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NOTES

I'M FROM THE JUVENILE JUSTICE SYSTEM AND I'M HERE TO HELP: HOOSIER JUVENILES' RIGHT TO A JURY TRIAL

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INTRODUCTION

In all but one of the situations that follow, a defendant or responding party has the right to a jury trial under Indiana law—as presently constituted, the juvenile justice system in Indiana deprives juveniles of their fundamental right to a jury trial.

The first situation involves Johnny, a juvenile, and his family walking the family dog through a suburban neighborhood in Indianapolis. As the family nears the end of the cul-de-sac where they live, an Animal Control officer drives by and does not see an identification tag on the dog's collar. The officer issues a citation for a municipal code violation.[1]

In the second situation, Johnny's mom leaves home to run a few errands. As she pulls out of the neighborhood onto a main street, a police officer pulls her over because one of her taillights is out. Johnny's mom is cited for a traffic infraction.[2]

The third situation involves Johnny's father, who drives his car into the garage, but forgets the car has a manual transmission and neglects to either keep the car in gear or engage the emergency brake before getting out of the car. The car rolls backwards into the neighbor's yard, demolishing the neighbor's recently completed exotic flower garden. The neighbor sues Johnny's father in small claims court for the value of the damage.[3]

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1. *See, e.g.*, Gates v. Indianapolis, 991 N.E.2d 592 (Ind. Ct. App. 2013).
2. *See, e.g.*, Cunningham v. State, 835 N.E.2d 1075 (Ind. Ct. App. 2005).
3. *See* IND. CODE § 33-29-2-7 (2018).

In the fourth situation, Johnny's sister gets arrested for illegal possession of alcohol. Johnny's sister has already been through the juvenile system on two previous occasions: the first resulted in a true finding of criminal trespass, and the second in a true finding of glue sniffing. The prosecutor moves to have the juvenile court waive Johnny's sister to adult court.[4]

In the fifth situation, Johnny's college-aged brother is arrested after a bar fight and charged with misdemeanor battery.[5]

Finally, Johnny receives several nude pictures of other students in his school. School administrators find out about the photos, and the prosecutor files a petition against Johnny for possession of child pornography. The juvenile court ultimately finds him delinquent. Because of the true finding, Johnny now faces the possibility that he will be listed on the Sex Offender Registry.[6]

Had the child pornography petition been filed against Johnny in one of the sixteen states[7] that allow a jury trial in juvenile delinquency adjudications, his trial might have resulted in a very different outcome, and his life might have taken a vastly different trajectory. Unlike a juvenile court judge who sees alleged juvenile delinquents shuffle through the courtroom daily, a jury is empaneled for that particular case and may be better able to critically consider the evidence.[8] Studies have consistently shown that juries are more likely to find that the state failed in meeting its burden to prove each element of the alleged crime beyond a reasonable doubt.[9]

Most juveniles are foreclosed from the opportunity for a jury adjudication, as the U.S. Supreme Court has held that the Sixth Amendment's right to a jury trial is inapplicable in juvenile delinquency proceedings.[10] In its 1971 opinion, *McKeiver v. Pennsylvania*, the Court found that the underlying purposes of the juvenile justice system, and its significant differences from the adult criminal justice system, outweighed concerns over the condition of the juvenile justice system.[11] Most state supreme courts that have considered whether juveniles have a constitutional right to a jury trial in juvenile adjudications have reached the same conclusion as the U.S. Supreme Court.[12]

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4. *Id.* § 31-30-2-1.

5. IND. R. OF CRIM. P. 22.

6. IND. CODE § 11-8-8-4.5 (2018).

7. Some states condition the juvenile's right to a jury trial on the nature of the accusations, provide the right only in appeals, or permit it under "extended juvenile jurisdiction." NAT'L JUV. DEFENDER CTR., JUVENILE RIGHT TO JURY TRIAL CHART (2014), http://njdc.info/wp-content/uploads/2017/03/Right-to-Jury-Trial-Chart-7-18-14.pdf [https://perma.cc/7FGC-HZSW].

8. Cart Rixey, *The Ultimate Disillusionment: The Need for Jury Trials in Juvenile Adjudications*, 58 CATH. U. L. REV. 885, 909-910 (2009). For example, juries do not have access to the juvenile's previous records and were not exposed to the juvenile's prior court proceedings or earlier adjudications. *Id.* at 909 n.163.

9. *Id.* (noting a 2005 study that found juries tend to convict less often than judges).

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

11. *Id.* at 540-41.

12. *See, e.g.*, *In re* Jonathan C.B., 958 N.E.2d 227 (Ill. 2011); *In re* State, 27 So.3d 247 (La.

But in the years since *McKeiver*, two state supreme courts reached a different conclusion.[13] The Alaska Supreme Court, in its 1971 decision *RLR v. State*, reasoned that subjecting juveniles to incarceration, without the benefit of a jury to check government excess, violated the juveniles' state constitutional rights.[14] And in 2008, the Kansas Supreme Court, in *In re L.M.*, held that systemic changes to the Kansas juvenile code eroded the differences between it and the adult criminal justice system, and that denying the right to jury trial in juvenile adjudications violated both the Sixth Amendment's jury trial guarantee and the Fourteenth Amendment's Due Process Clause.[15]

Presently, Indiana does not afford juveniles the right to a jury trial in a juvenile delinquency adjudication.[16] In *Bible v. State*, decided the year before *McKeiver*, though largely using the same rationale, the Indiana Supreme Court rejected the argument that the jury trial right applied to juveniles within the context of the juvenile justice system.[17] Challenges to *Bible's* rejection of a jury trial right for juveniles, as in other states, have not met the same success as in *RLR* and *L.M.* In *A.S. v. State*, the Indiana Court of Appeals re-affirmed the *Bible* decision and held that the *civil* jury trial guarantee of the Indiana Constitution[18] did not apply to juvenile proceedings because juvenile adjudications would have been equitable causes of actions at common law.[19]

This Note argues that Hoosier juveniles are entitled to a jury trial when facing juvenile adjudications irrespective of what costs might inure—the Constitution is explicit. Part I of this Note traces the important role the jury has played from the Magna Carta to the present, ultimately contending that the paternalistic promise of the juvenile justice system no longer applies to today's juvenile system. As with the Alaska Supreme Court's decision in *RLR* and the Kansas Supreme Court's holding in *L.M.*, changes to the Indiana juvenile justice system have minimized the differences between the juvenile justice system and the adult criminal justice system.[20] Thus, continuing to deprive Hoosier juveniles of the right to trial by jury in juvenile adjudications violates the protections of the Sixth Amendment's right to jury trial and the Fourteenth Amendment's Due Process Clause. Nor do the practical considerations, such as increased costs, dissuade from this conclusion. The actual use and associated costs of permitting jury trials in juvenile adjudications is likely to be relatively insignificant.

Part II argues that article 1, section 20 of the Indiana Constitution enshrines a juvenile's right to a jury trial. Contrary to the court's ruling in *A.S.*, history shows the cause of action would have been legal, and not equitable, at common

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2009); State *in re* A.C., 43 A.3d 454 (N.J. 2012); State v. Lawley, 591 P.2d 772 (Wash. 1979).

13. RLR v. State, 487 P.2d 27 (Alaska 1971); *In re* L.M., 186 P.3d 164 (Kan. 2008).

14. *RLR*, 487 P.2d at 31.

15. *L.M.*, 186 P.3d at 169-70.

16. IND. CODE § 31-32-6-7 (2018); *see also* Bible v. State, 254 N.E.2d 319 (Ind. 1970).

17. *Bible*, 254 N.E.2d at 322.

18. IND. CONST. art. 1, § 20.

19. A.S. v. State, 929 N.E.2d 881, 892 (Ind. Ct. App. 2010).

20. RLR v. State, 487 P.2d 27 (Alaska 1971); *L.M.*, 186 P.3d 164.

law. As a result, juvenile adjudications are today quasi-criminal proceedings in which, as with traffic infractions, the civil jury trial right applies in full effect.

I. CHANGES TO INDIANA'S JUVENILE JUSTICE SYSTEM INFRINGE JUVENILES' JURY TRIAL AND DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION

A. Importance and Purpose of the Right to Trial by Jury

The jury-trial-right has long been considered the people's reservation of power in the judicial branch, equivalent to the power of the right to vote vis-à-vis the legislative and executive branches.[21] To be sure, the reverence for, and importance of, the right to trial by jury is rooted in its promise, stretching back hundreds of years, to serve as a bulwark against government oppression and arbitrariness.[22] Though the right to jury trial probably did not originate with the Magna Carta,[23] the right's historical credibility is nonetheless impressive.[24] By the time the thirteen colonies declared their independence from England, they listed the deprivation of the "benefits of Trial by Jury"[25] as one of the complaints against the British government. In Federalist 83, Alexander Hamilton confirmed the jury's role as a protection against tyranny, when he wrote, "[t]he friends and adversaries of the plan of the convention . . . concur at least in the value they set upon the trial by jury . . . the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."[26]

The U.S. Supreme Court has continually recognized the integral function the jury right plays in protecting individuals against potential arbitrary and capricious behavior by courts.[27] Writing for the Court in *Duncan v. Louisiana*, Justice Byron

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21. Blakely v. Washington, 542 U.S. 296, 306 (2004) (referencing Letter XV by the Federal Farmer, John Adams' diary, and a letter from Thomas Jefferson).

22. Duncan v. Louisiana, 391 U.S. 145, 154-56 (1968). "Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'" *Id.* at 154 (quoting Thompson v. Utah, 170 U.S. 343, 349-50 (1898)).

23. Thomas J. McSweeney, *Magna Carta and the Right to Trial by Jury*, *in* MAGNA CARTA: MUSE AND MENTOR 139 (Randy Holland ed. 2014), http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2761&context=facpubs [https://perma.cc/DGL7-KZJF].

24. *Duncan*, 391 U.S. at 151 ("Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution . . . .") (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 349-50 (Cooley ed. 1899)).

25. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

26. THE FEDERALIST NO. 83 (Alexander Hamilton).

27. Oregon v. Ice, 555 U.S. 160, 168 (2009) ("The rule's animating principle is the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense.").

White observed that "The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action . . . the jury trial provisions . . . reflect . . . a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."[28] And, Justice Antonin Scalia's majority opinion in *Blakely v. Washington* made clear that fairness and efficiency are not the goals of the criminal justice system.[29] Instead, "there is not one shred of doubt, however, about the Framers' paradigm for criminal justice . . . the common-law ideal of limited state power accomplished by strict division of authority between judge and jury."[30] The *Blakely* opinion likewise dispensed with the dissent's argument that "non-adversarial"[31] fact-finding by a judge is more effective: "Our Constitution and the common-law traditions it entrenches, however, do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury."[32]

B. The Creation, Foundation, and Development of the Indiana Juvenile Justice System

Indiana officially created its own version of the juvenile justice system in 1903,[33] just four years after the creation of the nation's first juvenile court system in Chicago.[34] Prior to the advent of this new justice system that focused solely on juveniles, juveniles charged with crimes were confined with adults while awaiting trial, and no systematic differences distinguished how courts heard or decided juvenile cases, or how guilty parties were sentenced.[35] Indeed, reformation was not the goal, but rather punishment and deterrence.[36] The sole exception was the then-judge of the Indianapolis police court, who was so distraught with the number of juveniles that came before him, that in 1902 he started using one day each week to try children under sixteen years old.[37]

A report conducted in 1902 by the Indiana Board of State Charities came to the same conclusion as the progressive reformers who successfully established the nation's first juvenile justice system in Chicago:[38] Indiana needed a juvenile

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28. *Duncan*, 391 U.S. at 157.

29. Blakely v. Washington, 542 U.S. 296, 313 (2004).

30. *Id.*

31. *Id.*

32. *Id.*

33. Frank Sullivan, Jr., *Indiana as a Forerunner in the Juvenile Court Movement*, 30 IND. L. REV. 279, 295 (1997).

34. *Id.* at 279.

35. *Id.*

36. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909).

37. Sullivan, *supra* note 33, at 285.

38. *Id.* at 288. The first judge of the Chicago juvenile court explained that the single focus of the new juvenile justice system was, "[t]o give children what all children need, parental care" as this new approach sought to provide "aid, encouragement, and guidance" in an effort to save the

justice system that reflected the goals of individualized treatment and rehabilitation[39] and would serve as the "guardian of all minor children."[40] A bill introduced in the 1903 Indiana General Assembly largely mirrored the act in Illinois that created the nation's first juvenile court system.[41] It sailed through the Indiana General Assembly, 35-0 in favor in the Senate, and 77-3 in the House of Representatives.[42]

But, then-Governor Winfield Durbin vetoed the bill on advice of the Indiana Attorney General—it failed to provide necessary legal protections for the juvenile, specifically the right to a speedy trial and the right to a jury trial.[43] After the General Assembly remedied these issues, Governor Durbin signed the bill into law, establishing a juvenile system, the central mission of which sought to approximate the parental role of "the care, custody and discipline of the child."[44] In 1945, however, the Indiana General Assembly eliminated the jury trial right for juveniles in juvenile adjudications.[45]

C. Laying the Groundwork: The Development of Federal Juvenile Procedural Protections

In the late 1960's, the U.S. Supreme Court began expanding the procedural rights of juveniles within the juvenile justice system.[46] In its 1966 opinion, *Kent v. U.S.*, the Court held that prior to a juvenile court waiving jurisdiction (and thus transferring the juvenile to the traditional adult court system for a determination of guilt), the juvenile had the right to a hearing, access by counsel to the records and reports considered by the court, and a statement of reasons for the waiver decision by the juvenile court.[47] In its reasoning, the Court expressed serious reservations about the efficacy of the juvenile system and its "immunity of the process from the reach of constitutional guaranties applicable to adults."[48]

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child from the stigmatization of future criminal conduct. *Id.* at 281-82 (quoting Richard S. Tuthill, *The Juvenile Court*, INDIANA BULLELTIN OF CHARITIES AND CORRECTION 48, 52 (1904)).

39. *Id.* at 279-80.

40. *Id.* at 288 (quoting IND. BD. OF ST. CHARITIES, ANNUAL REPORT 22-23 (1903)).

41. *Id.* at 292.

42. *Id.* at 293.

43. *Id.* at 293-94.

44. *Id.* at 296.

45. Bible v. State, 254 N.E.2d 319, 322 (Ind. 1970). The Court explained, "[T]he Indiana General Assembly enacted certain amendments in 1945, one of which contained a provision that expressly denied the [jury trial] right at juvenile hearings." *Id.*

46. Jessica Ann Garascia, *The Price we are Willing to Pay for Punitive Justice in the Juvenile Detention System: Mentally Ill Delinquents and Their Disproportionate Share of the Burden,* 80 IND. L. J. 489, 491 (2005). *See generally* THOMAS J. BERNARD, THE CYCLE OF JUVENILE JUSTICE 109-134 (1992) (discussing the jurisprudential development of juvenile constitutional protections).

47. Kent v. U.S., 383 U.S. 541 (1966).

48. *Id.* at 554-55. "The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct . . . But the admonition to

In 1967, the Court decided *In re Gault* and found that due process, as it pertained to juveniles, required adequate written notice, advice of counsel, the Sixth Amendment rights of confrontation and cross-examination, and the Fifth Amendment protection against self-incrimination.[49] Similar to the *Kent* opinion, the *Gault* Court discussed the putative purposes of the separate juvenile system and reached a similarly hostile conclusion, going so far as to state, "The constitutional and theoretical basis for this peculiar system is—to say the least—debatable . . . . Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[50] Given the actual nature of the juvenile system, the Court said, "it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court."[51]

The Court continued the trend of expanding juvenile procedural rights with its 1970 decision, *In re Winship*, reasoning that the "beyond a reasonable doubt" standard applied to juvenile delinquency adjudications.[52] Notably, the Court explicitly mentioned that its holding requiring the heightened standard of proof in juvenile adjudications would not materially affect the historical benefits of the juvenile justice system.[53]

The following year, 1971, the U.S. Supreme Court took up the issue of juveniles' right to a jury trial in juvenile adjudications. In *McKeiver v. Pennsylvania,* the Court held that the denial of a jury trial in juvenile adjudications passed constitutional muster.[54] In its decision, the Court rejected the juveniles' argument that their trial was "substantially similar to a criminal trial,"[55] and instead considered the *parens patriae*[56] purpose of the juvenile system.[57] In particular, the Court emphasized the individualized treatment and rehabilitation

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function in a 'parental' relationship is not an invitation to procedural arbitrariness." *Id.*

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

50. *Id.* at 17-18.

51. *Id.* at 27-28.

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

53. *Id.* at 366. "Use of the reasonable-doubt standard during the adjudicatory hearing will not disturb New York's policies that a finding that a child has violated a criminal law does not constitute a criminal conviction, that such a finding does not deprive the child of his civil rights, and that juvenile proceedings are confidential . . . And the opportunity during the post-adjudicatory or dispositional hearing for a wide-ranging review of the child's social history and for his individualized treatment will remain unimpaired." *Id.*

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

55. *Id.* at 541.

56. Black's Law Dictionary defines *parens patriae* as, "The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves." *Parens patriae*, BLACK'S LAW DICTIONARY (10th ed. 2014).

57. *McKeiver*, 403 U.S. at 546.

the juvenile system sought to provide,[58] concluding that a jury trial would prove detrimental to these core aims while failing to significantly improve the finding of facts in the adjudicatory process.[59]

In 1975, the U.S. Supreme Court, in *Breed v. Jones*, again found that "constitutional guarantees associated with traditional criminal prosecutions"[60] apply in full force to juvenile proceedings, this time deciding that an adult prosecution following a juvenile adjudication for the same offense violated the Fifth Amendment's protections against double jeopardy.[61] The Court reached its decision only after noting that distinct gaps existed between the juvenile system as originally intended and its realities.[62] Moreover, the Court reasoned, little distinguished the consequences between an adjudicatory hearing in juvenile court and a traditional criminal case.[63] Thus, the fact that juvenile adjudications had long been considered civil proceedings was not dispositive; instead, for purposes of "determining the applicability of constitutional rights,"[64] "the juvenile process . . . [must] be candidly appraised."[65]

D. States Fill the Due Process Void: RLR *and In re* L.M.

Unlike most of the state supreme courts that adopted *McKeiver's* reasoning and conclusion when addressing the issue of juvenile jury trial rights, the supreme courts of Alaska and Kansas reached the obverse result: In juvenile delinquency adjudications, juveniles have the right to a jury trial. Less than one month after the U.S. Supreme Court decided *McKeiver*, the Alaska Supreme Court held that juveniles were entitled to a jury trial because of the serious ramifications should a juvenile be adjudged delinquent.[66] The juvenile in *RLR v. State* was adjudicated delinquent for selling LSD,[67] and at the dispositional hearing, the court ordered the juvenile to the Division of Corrections for an indeterminate time, but not extending past his twenty-first birthday.[68] Though the court decided the case on

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58. *Id.* The Court also contemplated that a jury trial would undermine the juvenile system's objectives by remaking it into an adversarial process devoid of sympathy and "paternal attention." *Id.* at 550.

59. *Id.* at 547.

60. *Id.* at 528-29.

61. Breed v. Jones, 421 U.S. 519, 540 (1975).

62. *Id.* at 528.

63. *Id.* at 530 ("[T]here is little to distinguish an adjudicatory hearing . . . from a traditional criminal prosecution. For that reason, it engenders elements of anxiety and insecurity in a juvenile, and imposes a heavy personal strain. . . . [W]e can find no persuasive distinction in that regard [the risk of jeopardy] between the proceeding conducted in this case . . . and a criminal prosecution . . . .") (internal quotation marks omitted).

64. *Id.* at 529.

65. *Id.* (quoting *In re* Gault, 387 U.S. 1, 21 (1967)).

66. RLR v. State, 487 P.2d 27, 32 (Alaska 1971).

67. *Id.* at 29

68. *Id.*

state constitutional grounds, it drew considerably from federal constitutional jurisprudence.[69] Focusing on the U.S. Supreme Court's decision in *Duncan v. Louisiana*,[70] the *RLR* Court found that the jury's essential purpose of protecting "against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge"[71] applied just as fully in juvenile proceedings.[72] Thus, contrary to the *McKeiver* assertion that a jury was unnecessary in juvenile adjudications because it would not improve fact-finding,[73] the *RLR* court concluded that a juvenile had the right to a jury trial to "prevent oppression by the government"[74] because incarceration deprived a juvenile of his liberty.[75]

And in 2008, the Kansas Supreme Court decided in *In re L.M.* that denying the jury trial right in juvenile adjudications violated the Sixth and Fourteenth Amendments to the U.S. Constitution because changes in the Kansas juvenile code had "eroded the benevolent *parens patriae* character that distinguished it from the adult criminal system."[76] Instead, these changes to the juvenile system were "patterned after the adult criminal system" and as a result, the "Kansas juvenile justice system has become more akin to an adult criminal prosecution."[77] Among the statutory changes the Kansas Supreme Court considered were the shift in focus of the policy of the juvenile code to a greater emphasis on public safety and on holding juveniles accountable; the removal of differences between the sentencing of juveniles and adults, such as the introduction of determinate sentencing and use of prior juvenile adjudications; and the removal of confidentiality protections in court proceedings and juvenile records.[78]

In 1982, the Kansas Juvenile Offender Code focused on the juvenile justice system's traditional hopes and aims of "rehabilitation and the State's parental role in providing guidance, control, and discipline."[79] But by 2006, the Code's focus had shifted instead to protecting the public, juvenile accountability, and ensuring

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69. *Id.* at 29, 32 (citing DeBacker v. Brainard, 396 U.S. 28 (1969); Bloom v. Illinois, 391 U.S. 194 (1968); Duncan v. Louisiana, 391 U.S. 145 (1968); and *In re* Gault, 387 U.S. 1 (1967)).

70. *Duncan*, 391 U.S. 145 (incorporating the Sixth Amendment jury trial right against the states via the Fourteenth Amendment).

71. *RLR*, 487 P.2d at 32 (quoting *Duncan*, 391 U.S. at 155-56).

72. *Id.*

73. McKeiver v. Pennsylvania, 403 U.S. 528, 546 (1971) ("The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the fact-finding function . . . .").

74. *Duncan*, 391 U.S. at 155.

75. *RLR*, 487 P.2d at 31. The *RLR* court explicitly rejected showing "deference to [the] popular social theory" of *parens patriae*. *Id.* Instead, the court quoted Justice Louis Brandeis: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding." *Id.* n. 19 (quoting Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)).

76. *In re* L.M., 186 P.3d 164, 170 (Kan. 2008).

77. *Id.*

78. *Id.* at 168-70.

79. *Id.* at 168.

juveniles were responsible members of the public.[80] Specifically, the Court honed in on the purpose of the newly named "Kansas Juvenile Justice Code," which read, "[t]he primary goals of the juvenile justice code are to promote public safety, hold juvenile offenders accountable for their behavior and improve their ability to live more productively and responsibly in the community."[81]

The *L.M.* court also factored into its decision changes to the methodology and processes of sentencing juvenile offenders. The 2006 Code, for instance, included new additions such as a sentencing matrix scheme for juveniles that took into consideration the "level of the offense committed and, in some cases, the juvenile's history of juvenile adjudications."[82] Another addition to Kansas law that mimicked the adult criminal system included determinate sentencing, which allowed judges to sentence juveniles for minimum terms in juvenile correctional facilities based on the commission of certain acts.[83]

Finally, the court in *L.M.* likewise considered modifications to the confidentiality of Kansas' juvenile system, which had been "a key consideration in the *McKeiver* plurality decision."[84] Formerly, court documents and all police records for juveniles under the age of sixteen were unavailable to the public, and any hearing involving a juvenile under sixteen was confidential.[85] But with modifications to the Kansas Juvenile Justice Code, the official file is now open to the public unless a judge orders it closed for juveniles under fourteen; and for juveniles over fourteen, police and court records are subject to the same disclosure requirements as adults' records.[86]

E. Indiana Bridges the Gap Between Adult and Juvenile Justice Systems

The Indiana Supreme Court rebuffed a constitutional challenge to the absence of a jury trial right in juvenile delinquency proceedings when the Court concluded in its 1970 opinion, *Bible v. State*, that the right to a jury trial did not extend to juvenile adjudications.[87] The court reasoned that juvenile matters were civil;[88] that there was no civil jury trial right because there was no juvenile system at common law;[89] and that a jury would upend the core purposes of the juvenile system by eradicating the flexibility and informality of juvenile proceedings that allowed the judge to "establish a relationship that will permanently alter the behavior patterns of the child."[90]

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80. *Id.*
81. *Id.* (italics omitted).
82. *Id.* at 169.
83. *Id.*
84. *Id.* at 170.
85. *Id.*
86. *Id.*
87. Bible v. State, 254 N.E.2d 319 (Ind. 1970).
88. *Id.* at 322.
89. *Id.*
90. *Id.* at 327.

Since *Bible* and *McKeiver*, Indiana—like Kansas in *L.M.*—has altered significant components of its juvenile justice system, marking a shift from the original focus to "treat and rehabilitate—not punish—the child."[91] Instead, Indiana has chosen to provide greater congruency between the juvenile and adult justice systems.[92] Four particularly poignant examples illustrate this paradigmatic change from the juvenile justice system considered by the *Bible* and *McKeiver* Courts: Requiring a juvenile to register as a sex offender; the inclusion of determinate sentencing for juveniles; the diminished confidentiality of juvenile proceedings and records; and the use of juvenile adjudications for enhancing adult criminal sentences.[93]

First, juveniles can now be classified as a sexual offender and listed on the Indiana Sex and Violent Offender Registry.[94] A new section to the Indiana Code, added in 1994, provided that the term "sex or violent offender" includes "a child who has committed a delinquent act and who . . . is at least fourteen (14) years of age."[95] This law effectively treats juveniles the same as adults with the caveat that a separate hearing is used, whereby the state must prove by clear and convincing evidence that the juvenile will re-offend.[96] That process, though, is separate and apart from the adjudication in which the court decides if the child committed the offense.[97] The Indiana Court of Appeals rejected a constitutional challenge to this statutory provision on the grounds that it was inconsistent with the purposes of the juvenile system, instead deciding that the sex offender registry related to protecting the public,[98] a stated purpose of the juvenile code.[99]

The addition of determinate sentencing[100]—a practice used with regularity in

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91. Sullivan, *supra* note 33, at 282.

92. *In re* L.M., 186 P.3d 164, 169-70 (Kan. 2008). The *L.M.* court found that, "[T]he juvenile justice system is now patterned after the adult criminal justice system, we conclude that the changes have superseded the *McKeiver* . . . reasoning and those decisions are no longer precedent for us to follow." *Id.* at 170.

93. These examples represent how *Bible* and *McKeiver* could not have analyzed "the differences between treatment in juvenile court and punishment in criminal court, and [how] virtually every state has revised and greatly 'toughened' its juvenile codes in the decades since that decision." Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1156 (2003).

94. IND. CODE § 11-8-8-5(b)(2) (2018).

95. *Id.* § 11-8-8-5(b)(2); *see also* Alison G. Turoff, *Throwing Away the Key on Society's Youngest Sex Offenders*, J. CRIM. L. & CRIMINOLOGY, 1135 (2001) (arguing that juveniles subject to Illinois' Sex Offender Registration Act are entitled to a jury trial).

96. IND. CODE § 11-8-8-5(b)(2)(C).

97. *See* B.K.C. v. State, 781 N.E.2d 1157, 1167 (Ind. Ct. App. 2003).

98. N.L. v. State, 989 N.E.2d 773, 777 (Ind. 2013).

99. T.W. v. State, 953 N.E.2d 1120, 1123 (Ind. Ct. App. 2011); *see also* IND. CODE § 31-10-2-1(11) (2018) ("It is the policy of this state and the purpose of this title to . . . (11) promote public safety and individual accountability by the imposition of appropriate sanctions.").

100. Black's Law Dictionary defines a determinate sentence as "A jail term of a specified

adult court—in juvenile proceedings represents a second recent substantive change diminishing the gap between the historical purposes of the juvenile system and the adult criminal system. This statutory addition permits the juvenile court to order "wardship of a child found to have committed an act that, if committed by an adult, would be murder, kidnapping, rape, criminal deviate conduct, or aggravated robbery, to the DOC"[101] for a fixed period of time no longer than when the child turns eighteen.[102] Another new statute contains a similar provision that allows the court to sentence a juvenile for up to two years if the juvenile has prior convictions for acts that would be felonies.[103] As with challenges to the sex offender registry's inclusion of juveniles, the Indiana Court of Appeals held that determinate sentencing in confinement is consistent with the purposes and goals of the juvenile system.[104]

The diminished confidentiality of both juvenile proceedings and juvenile records is the third significant shift bridging the gap between the juvenile and adult criminal justice systems.[105] The 1903 act establishing the juvenile system in Indiana explicitly provided that, "The judge . . . is hereby empowered to exclude from the court room at such trials any and all persons that in his opinion are not necessary for the trial of the case."[106] But today, Indiana's statutory scheme varies drastically. It now permits open hearings "whenever a petition alleging that the child has committed an act that would be murder or a felony if committed by an adult."[107]

Similarly, the juvenile court historically closely guarded the confidentiality of Indiana juvenile court records. For instance, the 1979 Indiana Code permitted disclosure of juvenile records only to court personnel, those who were parties to the action, and those with legitimate research needs, provided that the researcher protect the identity of the juvenile.[108] Now, though, records are available to the public when a petition has been filed that alleges a juvenile committed what would be a felony, or a child over twelve years old allegedly committed what would be at least two unrelated acts that would be misdemeanors.[109] Formerly confidential information that can now be released includes the name of the child,

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duration." *Determinate sentence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

101. J.D. v. State, 853 N.E.2d 945, 948-49 (Ind. 2006).

102. IND. CODE § 31-37-19-9 (2018). This provision was added in 1997.

103. *Id.* § 31-37-19-10. This provision was added in 1997.

104. B.K.C. v. State, 781 N.E.2d 1157, 1171 (Ind. Ct. App. 2003).

105. Jennifer M. Segadelli, *Minding the Gap: Extending Adult Jury Trial Rights To Adolescents While Maintaining a Childhood Commitment to Rehabilitation*, 8 SEATTLE J. FOR SOC. JUST. 683, 689 (2010).

106. IND. CODE § 31-6-7-10 (1903). The 1945 version of the statute contained nearly identical language.

107. *Id.* § 31-32-6-3 (2018). This provision is subject to limited exceptions, such as upon a motion to the Court when a child witness or child victim, health care worker, or social worker is testifying. *Id.* § 31-32-6-4.

108. *Id.* § 31-6-8-1 (repealed 1979).

109. *Id.* § 31-39-2-8 (2018).

the nature of the offense, petitions, case summaries, and if the child is adjudicated delinquent, the child's photograph.[110]

And further, the use of juvenile adjudications for enhancing adult criminal sentences illustrates another collapse of the distinctions between the juvenile and adult justice systems. In *Apprendi v. New Jersey*, the U.S. Supreme Court held that "all facts used to enhance a sentence over the statutory maximum must be found by a jury beyond a reasonable doubt."[111] The Court did recognize an exception for prior convictions in a proceeding in which "the defendant had the right to a jury trial and the right to require the prosecutor to prove beyond a reasonable doubt."[112] Whether a prior juvenile adjudication falls within the "prior conviction" exception of *Apprendi* for the purposes of enhancing adult criminal sentences remains unresolved at the federal level.[113]

But the Indiana Supreme Court in *Ryle v. State* found that juvenile adjudications may be used to enhance adult criminal sentences.[114] The court in *Ryle* reached its decision based on the notion that recidivism is the most common basis for sentencing enhancements, and a juvenile record was merely evidence of prior misbehavior.[115]

Distinct from the advisability and constitutionality of this practice, the *Ryle* decision nonetheless confirms that changes to the juvenile system have bridged the gap between the juvenile justice system and adult criminal justice system: A true finding in a juvenile adjudication and an adult conviction serve the same function, as both can be used to enhance the sentence of an adult defendant found guilty,[116] notwithstanding the putative purposes of the juvenile system of rehabilitation and reformation, nor the fact that a juvenile adjudication is

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110. *Id.*

111. Ryle v. State, 842 N.E.2d 320, 321 (Ind. 2005) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

112. *Apprendi*, 530 U.S. at 496.

113. State v. Hand, 73 N.E.3d 448, 456 (Ohio 2016), *cert. denied*, 137 S. Ct. 1074 (2017) (The Third, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits have found that juvenile adjudications without a jury may be used to enhance an adult sentence. The Ninth Circuit held that nonjury juvenile adjudications fall outside the exception in *Apprendi*.).

114. *Ryle*, 842 N.E.2d at 322-23.

115. *Id.* at 323. Though a somewhat ancillary issue, it merits noting that the *Ryle* Court relied heavily on the U.S. Supreme Court's decision in *Almendarez-Torres v. United States*, decided two years prior to *Apprendi*. There, the Court held that recidivism was only a sentencing factor, and not an element of the alleged crime that the government had to prove beyond a reasonable doubt. Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Tellingly, the *Apprendi* Court cast the *Almendarez* decision as a "narrow exception," stating, "[I]t is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested . . . ." *Apprendi*, 530 U.S. at 488-89.

116. *See* Mitchell v. State, 844 N.E.2d 88, 92 (Ind. 2006) (citing true findings as a juvenile for resisting law enforcement, criminal trespass, theft, and three counts of robbery, along with defendant's adult convictions for criminal trespass, auto theft, and carjacking as support for enhanced sentences).

specifically not considered a criminal conviction.[117]

Indiana, like Kansas in *L.M.*, has altered its juvenile code in such a significant manner that the Indiana juvenile justice system's original purposes have long since been precluded by changes that instead *de facto* treat juveniles in a manner similar to adult criminal defendants.[118] The Indiana Court of Appeals' holding—that requiring juveniles to register as sex offenders and the use of determinate sentencing are consistent with the purposes of the juvenile justice system—shows how far the system's current purposes have strayed from the original foci of rehabilitation and individualized treatment.[119]

The constitutional requirement of a juvenile's right to a jury trial in delinquency proceedings becomes even more apparent when the above additions and changes to Indiana's juvenile statutory scheme are considered within the context of the *RLR* reasoning.[120] Extending the jury trial right to juvenile proceedings would not, as some proponents of the traditional juvenile system contend, remake the juvenile system into an adversarial proceeding.[121] Instead, it is because the juvenile system has become an adversarial proceeding with severe consequences that the Constitution requires juveniles should have the right to a jury trial.[122]

In Indiana, the ability of juvenile courts to send juveniles adjudged delinquent to the Department of Corrections[123] has frequently been recognized as consistent with the purposes of the juvenile justice system.[124] But, when the ability of a court to order imprisonment is coupled with the fact that the Indiana juvenile justice system now closely resembles the adult criminal justice system, due process mandates extending the "jury's historic role as a bulwark between the State and the accused"[125] to juveniles.[126] Continuing with the *status quo* subjects juveniles to an unjust and unfair violation of their rights under the Sixth and Fourteenth

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117. IND. CODE § 31-32-2-6 (2018) ("A child may not be considered a criminal as the result of an adjudication in a juvenile court, nor may an adjudication in juvenile court be considered a conviction of a crime.").

118. For a similar discussion regarding Ohio, see Emily L. Barth, *Blurring the Lines: When the "Best Interests of the Child" Fall to the Wayside. An Analysis of Ohio's Serious Youthful Offender Statute*, 79 U. CIN. L. REV. 323 (2010).

119. Sullivan, *supra* note 33, at 282.

120. RLR v. State, 487 P.2d 27, 31 (Alaska 1971).

121. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) ("[T]he jury trial . . . will remake the juvenile proceeding into a fully adversary process . . . .").

122. Martin R. Gardner, *Punitive Juvenile Justice and Public Trial by Jury: Sixth Amendment Applications in a Post-McKeiver World*, 91 NEB. L. REV. 1, 66 (2012).

123. *See* IND. CODE § 31-37-18-6 (2018) (permitting a juvenile court wide discretion when entering a disposition); *see also* K.A. v. State, 775 N.E.2d 382 (Ind. Ct. App. 2002) (holding that commitment to DOC was proper).

124. *See, e.g.*, R.H. v. State, 937 N.E.2d 386 (Ind. Ct. App. 2010); L.L. v. State, 774 N.E.2d 554 (Ind. Ct. App. 2002); E.H. v. State, 764 N.E.2d 681 (Ind. Ct. App. 2002).

125. Oregon v. Ice, 555 U.S. 160, 168 (2009).

126. RLR v. State, 487 P.2d 27, 32 (Alaska 1971).

Amendments and requires, consistent with the *RLR* court's reasoning,[127] that a jury necessarily serves its long-established role as a "valuable safeguard to liberty."[128] As Justice Ruth Bader Ginsburg's opinion articulated in *Ring v. Arizona*, where the U.S. Supreme Court invalidated an Arizona statute that permitted a judge—alone—to find an aggravating circumstance required for imposing the death penalty:[129]

> The Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders. Entrusting to a judge the finding of facts . . . might be "an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State . . . The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it was always been free."[130]

F. Effects on Judge's Flexibility and the Costs of a Juvenile Jury Trial

Just as the *Winship* court acknowledged, changes to the adjudicative phase of juvenile proceedings—such as a jury trial—would minimally affect "the opportunity during the post-adjudicatory or dispositional hearing for a wide-ranging review of the child's social history and for his individualized treatment."[131] If a jury was to find a juvenile delinquent, the Indiana juvenile court judge's ability to explore all alternatives[132] in creatively fashioning a dispositional decree would remain unimpeded to treat the juvenile as a person "in need of care, protection, treatment and rehabilitation." [133] The judge could still issue a dispositional decree that is "in the least restrictive . . . and most appropriate setting available; and . . . close to the parents' home . . . least interferes with family autonomy . . . [and] imposes the least restraint on the freedom of the child and the child's parent, guardian, or custodian."[134] In short,

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127. *Id.* at 31-32.

128. THE FEDERALIST NO. 83 (Alexander Hamilton).

129. Ring v. Arizona, 536 U.S. 584, 609 (2002).

130. *Id.* at 607 (quoting Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring)). As critics of the *McKeiver* opinion have observed, "there is no way to know the 'correct' outcome" of a delinquency adjudication or criminal trial, and *McKeiver's* rationale "undermines factual accuracy and creates the strong probability that outcomes will differ in delinquency and criminal trials." Feld, *supra* note 93, at 1162.

131. *In re* Winship, 397 U.S. 358, 366 (1970).

132. IND. CODE § 31-37-18-1 (2018).

133. *Id.* § 31-10-2-1 (2018). *But see* McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971) (arguing that the need for a jury trial in juvenile proceedings ignores "*every* aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.") (emphasis added).

134. IND. CODE § 31-37-18-6.

then, the juvenile court would retain every single post-adjudicatory option presently at its disposal to "supervise, enlighten, and cure—not to punish."[135] Of course, if a juvenile did not commit the offense, then there is no need for the court's "solicitous care and regenerative treatment."[136]

Additionally, opponents of juveniles' right to a jury trial have long argued that mandating juveniles have the same jury trial right as adults will lead to increased workloads and costs for courts, prosecutors, public defenders, and children's social service agencies.[137] In his dissenting opinion in *McKeiver*, Justice Douglas addressed this concern, stating, "[T]here is no meaningful evidence that . . . jury trials will impair the function of the court. Some states permit jury trial in all juvenile court cases; few juries have been demanded, and there is no suggestion . . . that jury trials have impeded the system of juvenile justice."[138]

Statistics on Indiana trials confirm Justice Douglas' assertion; were jury trials held in juvenile cases at the same rate as in felony trials, there would have been approximately 180 juvenile jury trials held in Indiana in 2015.[139] If juveniles requested a jury trial proportionally to adult defendants in misdemeanor cases,[140] juries would have decided fourteen juvenile jury trials in Indiana in 2015.[141] Fundamentally, the *McKeiver* plurality's concerns over costs, echoed over the last fifty years by critics of juveniles' right to a jury trial,[142] are only relevant if the

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135. DeBacker v. Brainard, 396 U.S. 28, 35 (1969).

136. Kent v. U.S., 383 U.S. 541, 556 (1966).

137. *See generally* Gardner, *supra* note 122, at 42; Korine L. Larson, *With Liberty and Juvenile Justice for All: Extending the Right to a Jury Trial to the Juvenile Courts*, 20 WM. MITCHELL L. REV. 835, 866 (1994).

138. *McKeiver*, 403 U.S. at 564. Justice Douglas cited extensively to a Providence, Rhode Island Family Court decision, wherein the presiding judge explained, "In fact the very argument of expediency, suggesting 'supermarket' or 'assembly line' justice is one of the most forceful arguments in favor of granting jury trials." *Id.* at 565.

139. Of the 63,371 murder and felony cases decided in Indiana in 2015, juries disposed of 760. That same year, there were 15,023 juvenile delinquency proceedings. SUPREME COURT OF IND., INDIANA JUDICIAL SERVICE REPORT, VOL. II CASELOAD STATISTICS 176, 304 (2015) http://www.in.gov/judiciary/admin/files/rpts-ijs-2015-judicial-v2-statistics.pdf [https://perma.cc/KPZ5-5VGJ].

140. This may well be a more accurate juxtaposition, since a defendant must, as with states that recognize juveniles' right to a jury trial, request a jury trial in misdemeanor cases. IND. R. CRIM. P. 22.

141. Courts disposed of 131,812 misdemeanor cases in Indiana in 2015. Of those, juries decided only 119. SUPREME COURT. OF IND., *supra* note 139, at 176, 304. Consider that in Texas, juries disposed of twenty-one cases in juvenile proceedings out of 8,220 overall adjudications. OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY, 104 (2016), http://www.txcourts.gov/media/1436989/annual-statistical-report-for-the-texas-judiciary-fy-2016.pdf [https://perma.cc/5UDL-2VKD].

142. *See, e.g.*, Susan E. Brooks, *Juvenile Injustice: The Ban on Jury Trials for Juveniles in the District of Columbia*, 33 U. LOUISVILLE J. FAM. L. 875, 895 (1995) (citing *McKeiver's* concerns

juvenile justice system has *not* departed from its rehabilitative roots.[143] Otherwise, it is akin to arguing that one defendant accused of a jury-right-eligible crime has the right to a jury, while another defendant accused of a different jury-right-eligible crime has no right to a jury.

Of course, the costs of ensuring compliance with constitutional rights[144] are, to a significant degree, irrelevant;[145] the Constitution commands compliance regardless of cost.[146] As Chief Justice John Marshall long ago stated, "It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned."[147] Concurring in the *Winship* decision, Justice John Harlan II recognized that requiring the state to prove each element of the alleged crime beyond a reasonable doubt carries with it the distinct possibility that when the state cannot meet its burden, "a guilty man [may] go free."[148] Instead, this high burden on the state is premised on the "fundamental value"[149] that "it is far worse to convict an innocent man."[150]

In the criminal procedure context, the right to counsel recognized in *Gideon v. Wainwright*, and subsequently extended to juveniles in *In re Gault*, has indeed proven financially costly: The 2017-2019 biennial Indiana budget alone appropriated nearly $37 million to the Public Defender Commission to reimburse counties for indigent defense services,[151] almost $13 million to the State Public Defender,[152] and approximately $2 million to the Public Defender Council.[153] Yet,

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over lack of resources).

143. Gardner, *supra* note 122, at 42 ("[I]t is important to keep in mind that the jury trial costs of delay and formality cited by the *McKeiver* plurality are of concern only within a rehabilitative model of juvenile justice. If the system has become punitive, thus necessitating jury trials, the benefits of jury determinations replace whatever costs such trials might have imposed on a rehabilitative model.").

144. In another constitutional context, Justice Samuel Alito compared the potential public safety implications from the Second Amendment's right to bear arms with constitutional restrictions on law enforcement's actions during arrests and procedural hurdles for the State in prosecuting crimes. McDonald v. City of Chicago, 561 U.S. 742, 783 (2010). Specifically, Justice Alito cited the significant "social costs" of the exclusionary rule, and that *Miranda's* protections might "return a killer, a rapist or other criminal to the streets." *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 542 (1966) (White, J., dissenting) and Mapp v. Ohio, 367 U.S. 643, 659 (1961)).

145. DeBacker v. Brainard, 396 U.S. 28, 38 (1969) (Douglas, J., dissenting) ("Whether a jury trial is in conflict with the juvenile court's underlying philosophy is irrelevant, for the Constitution is the Supreme Law of the land.").

146. U.S. CONST. art. VI. ("This Constitution . . . shall be the supreme Law of the Land.").

147. Marbury v. Madison, 5 U.S. 137, 180 (1803).

148. *In re* Winship, 397 U.S. 358, 373 (1970) (Harlan, J., concurring).

149. *Id.* at 372.

150. *Id.*

151. H. Enrolled Act No. 1001, 2017 Leg. Sess. 12 (Ind. 2017) https://www.in.gov/sba/files/AP_2017_0_0_0_0_HEA_1001_-_The_Budget_Bill.pdf [https://perma.cc/3CD4-68R5].

152. *Id.* at 13.

153. *Id.*

this expenditure represents only a fraction of the actual costs of complying with *Gideon*. Thirty-seven of Indiana's ninety-two counties do not participate in the Public Defender Commission reimbursement program,[154] and those that do only receive reimbursement for forty percent of the cost in non-capital, non-misdemeanor cases.[155] One estimate put the amount that Indiana counties spend for indigent defense services at more than $75 million annually.[156]

It is no answer, then, to submit that the constitutional right to trial by jury should fail to apply to juveniles because of the possibility of additional resources needed to facilitate protection of that right.[157] Indeed, based on the notion that government expenditures reflect its priorities, the exact opposite should be the case: *Whatever* the cost to uphold the constitutional right to trial by jury for juveniles is the price that need be paid to comply with the Constitution.

II. JURY TRIAL RIGHT UNDER ARTICLE 1, SECTION 20 OF THE INDIANA CONSTITUTION

A. Indiana's Heritage of Protecting Procedural Rights

Indiana has long offered greater protections under its constitution than those provided for in the United States Constitution.[158] Similarly, the Indiana Supreme Court has proven more willing than its federal counterpart in adopting various procedural constitutional safeguards.[159] Nearly 110 years before the U.S. Supreme Court recognized the right to counsel in *Gideon v. Wainwright*,[160] the Indiana Supreme Court decided that no person "put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid."[161] Other Indiana Supreme Court decisions interpreting the Indiana Constitution likewise put Indiana at the vanguard of protecting a defendant's procedural rights within the context of double jeopardy[162] and the exclusionary rule.[163]

Indiana's commitment to providing procedural protections much earlier

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154. SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN INDIANA: EVALUATION OF TRIAL LEVEL INDIGENT DEFENSE SERVICES 33 (2016), http://sixthamendment.org/6ac/6AC_indianareport.pdf [https://perma.cc/6VCH-85DY].

155. *Id.* at 15, 28.

156. *Id.* at 30.

157. *See generally*, D.C. v. Heller, 554 U.S. 570, 634 (2008) ("The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.").

158. Randall T. Shepherd, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 576 (1989).

159. *Id.*

160. *Id.*

161. *Id.* at 578 (quoting Webb v. Baird, 6 Ind. 13, 18 (1854)).

162. *Id.* (citing Miller v. State, 8 Ind. 325 (1856), *abrogated by* State v. Walker, 26 Ind. 346, 352 (1866)).

163. *Id.* (citing Wilkins v. Malone, 14 Ind. 153 (1860)).

than—and in some cases, to a greater degree than—the Federal Constitution also extended to the right to trial by jury.[164] An 1825 decision by the Indiana Supreme Court found a statute that allowed appraiser assessments of damages in condemnation cases to unconstitutionally violate the right to trial by jury.[165] Additionally, the Indiana Supreme Court concluded that citizens have a right to trial by jury in misdemeanor cases, a right not provided under the Sixth Amendment.[166] Indiana's Constitution is also only one of three[167] that mandates the jury find both "the law and the facts"[168] in criminal trials. In short, reading article 1, section 20 of the Indiana Constitution to encompass a juvenile's right to a jury trial finds strong precedence in Indiana's heritage as a pioneer in safeguarding the procedural rights of Hoosiers.

B. A Step Back in Time

Juvenile adjudications in Indiana have long been considered civil—not criminal—proceedings.[169] Article 1, section 20 of the Indiana Constitution, then, controls as it addresses the civil jury trial right: "In *all* civil cases, the right of trial by jury shall remain inviolate."[170] This civil jury trial right is limited in that it preserves the right as it existed at the time the current Indiana Constitution was ratified.[171] Indiana Trial Rule 38 provides additional guidance:

> Issues of law and issues of fact in causes that prior to the eighteenth day of June, 1852, were of exclusive equitable jurisdiction shall be tried by the court; issues of fact in all other causes shall be triable as the same are now triable . . . as actions at law and triable by jury.[172]

One interpretation and application of the civil jury right in the juvenile delinquency context is found in the Indiana Supreme Court's decision *Bible v. State*, in which the court explained that a juvenile was not entitled to a civil jury trial right because no juvenile system existed at common law.[173] This narrow interpretation of the section 20 jury trial right finds some support in other case

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164. *Id.* at 577, 579.

165. *Id.* at 577.

166. *Id.* at 579 (citing State *ex rel.* Rose v. Hoffman, 85 N.E.2d 486 (Ind. 1949)).

167. *Id.* at 582.

168. IND. CONST. art. 1, § 19.

169. IND. CODE § 31-32-2-6 (2018); *see also* State *ex rel.* McClintock v. Hamilton Circuit Court, 232 N.E.2d 356 (Ind. 1968).

170. IND. CONST. art. 1, § 20 (emphasis added).

171. Carmichael v. Adams, 91 Ind. 526 (1883) ("The provision of the constitution which declares that 'the right of trial by jury shall remain inviolate' does not enlarge the right, but simply ordains that it shall remain as it was when the Constitution was adopted.") (quoting IND. CONST. art. 1, § 20); *see also* Midwest Sec. Life Ins. Co. v. Stroup, 730 N.E.2d 163, 169 (Ind. 2000) (Boehm, J., concurring).

172. IND. TRIAL R. 38(A).

173. Bible v. State, 254 N.E.2d 319, 322 (Ind. 1970).

law.[174] Under this approach, if the action was not triable by a jury prior to 1852, then there is no present civil jury right.[175] Illinois created the inaugural juvenile justice system in 1899,[176] and Indiana followed shortly thereafter in 1903.[177] Based on the *Bible* analysis,[178] there could not have been jury trials in the juvenile system at common law because the juvenile system in Indiana developed well after 1852.[179] The juvenile system simply did not exist at common law, and so "juvenile matters obviously were not triable by jury."[180]

Justice Theodore Boehm sketched a different interpretation of the section 20 jury right in his concurring opinion in *Midwest Sec. Life Insurance Co. v. Stroup*.[181] Instead of simply considering "whether a cause of action existed at common law"[182] as the *Bible* Court did,[183] Boehm's inquiry turned on "whether the cause of action is essentially legal or equitable, as those terms were used in 1852."[184] As Justice Boehm explained, if the action at common law was "essentially legal," then a civil jury trial right exists;[185] but, an equitable cause of action at common law "may be tried to the court."[186] In *Songer v. Civitas Bank*, two years after the *Stroup* decision, the Indiana Supreme Court adopted Justice Boehm's method for interpreting and applying the section 20 right to jury trial in civil matters.[187]

This historical method is consistent with the method used in other areas of Indiana constitutional jurisprudence.[188] In the context of some article 1 protections, the applicable approach in interpreting the Indiana Constitution is to "examine the language of the text in the context of the history surrounding its drafting and ratification."[189] The ultimate mission is to "ascertain the old law"[190]

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174. E.P. v. Marion Cty. Office of Family and Children, 653 N.E.2d 1026, 1030 (Ind. Ct. App. 1995); *see also* Gray v. Monroe Cty. DPW, 529 N.E.2d 860 (Ind. Ct. App. 1988).

175. *E.P.*, 653 N.E.2d at 1030 (citing *Gray*, 529 N.E.2d 860).

176. Sullivan, *supra* note 33, at 279.

177. *Id.*

178. *Bible*, 254 N.E.2d at 322.

179. Sullivan, *supra* note 33, at 279.

180. *E.P.*, 653 N.E.2d at 1030; *see also Bible*, 254 N.E.2d at 322.

181. Midwest Sec. Life Ins. Co. v. Stroup, 730 N.E.2d 163, 169 (Ind. 2000) (Boehm, J. concurring).

182. *Id.*; *see also* IND. TRIAL R. 38(A).

183. *Bible*, 254 N.E.2d at 322.

184. *Midwest*, 730 N.E.2d at 169 (Boehm, J., concurring); *see also* IND. TRIAL R. 38.

185. *Midwest*, 730 N.E.2d at 169 (Boehm, J., concurring); *see also* Songer v. Civitas Bank, 771 N.E.2d 61, 63 (Ind. 2002).

186. *Midwest*, 730 N.E.2d at 169 (Boehm, J., concurring); *see also Songer*, 771 N.E.2d at 63.

187. *Songer*, 771 N.E.2d at 63.

188. City Chapel Evangelical Free Church v. City of South Bend, 744 N.E.2d 443, 447 (Ind. 2001); *see also* Embry v. O'Bannon, 798 N.E.2d 157, 160 (Ind. 2003).

189. *City Chapel*, 744 N.E.2d at 447 (quoting McIntosh v. Melroe Co., 729 N.E.2d 972, 986 (Ind. 2000) (Dickson, J., dissenting)); *see also Embry*, 798 N.E.2d at 160.

190. *City Chapel*, 744 N.E.2d at 447 (quoting *McIntosh*, 729 N.E.2d at 986 (Dickson, J.,

by "look[ing] to the history of the times, and examin[ing] the state of things existing when the constitution or any part thereof was framed and adopted."[191]

History decides the issue if the cause of action existed on June 18, 1852. But if the cause of action did not exist at that time, "it is necessary to determine whether it is closer to a claim at law or one in equity."[192] Unlike the narrow approach adopted in *Bible* and *E.P.*, the more historically accurate method[193] of determining whether the Indiana Constitution requires a civil jury right does not turn solely on whether the cause of action existed at common law.[194] Under that narrow reasoning, a party that filed suit under a statutory scheme that did not exist at common law would be precluded from a jury trial. As Justice Boehm noted, "no case seems to suggest that result, and for good reason."[195]

C. Juvenile Adjudications Were Legal Proceedings Prior to 1852

In its 2010 decision, *A.S. v. State*, the Indiana Court of Appeals decided that the section 20 civil jury trial right did not apply to juveniles.[196] Even though the court used Justice Boehm's method of analysis from *Midwest Security Life Insurance Co. v. Stroup*, it found that juvenile adjudication decisions would have been equitable proceedings prior to 1852.[197] Central to the court's reasoning was the concept of *parens patriae*. At common law, the King of England had charge over those who "could not care for themselves or protect their estates."[198] These same reasons compelled the *A.S.* court to reject the argument that juvenile proceedings were quasi-criminal.[199]

But the *A.S.* court reached an incorrect conclusion because of its misguided

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dissenting)); *see also Embry*, 798 N.E.2d at 160.

191. *City Chapel*, 744 N.E.2d at 447 (quoting *McIntosh*, 729 N.E.2d at 986 (Dickson, J., dissenting)); *see also Embry*, 798 N.E.2d at 160.

192. Midwest Sec. Life Ins. Co. v. Stroup, 730 N.E.2d 163, 170 (Ind. 2000) (Boehm, J., concurring).

193. *Id.*; *see also* Caroline Selig, *Incorporating the Analyses of The Kansas Supreme Court Under In re* L.M. *to Create A More Broadly Applicable Juvenile Justice Holding*, 44 NEW ENG. L. REV. 469, 490-91 (2010) ("[A]pplication of such a time-honored analytical technique . . . is solidly based in analytical precedent by the United States' highest court.").

194. *Midwest*, 730 N.E.2d at 170 (Boehm, J., concurring).

195. *Id.*

196. A.S. v. State, 929 N.E.2d 881 (Ind. Ct. App. 2010).

197. *Id.* at 892.

198. *Id.* "The power the State has conferred on our current juvenile courts 'is of the same character as the jurisdiction exercised by courts of chancery over the person and property of infants, and flows from the general power and duty of the state *parens patriae* to protect those who have no other lawful protector.'" *Id.* (quoting State *ex rel*. Johnson v. White Circuit Court, 77 N.E.2d 298, 301 (Ind. 1948)).

199. *Id. But cf.* Cunningham v. State, 835 N.E.2d 1075, 1077 (Ind. Ct. App. 2005) (finding a traffic infraction would have been a legal claim at the time Indiana's Constitution was adopted).

section 20 analysis. Though the court correctly recognized Justice Boehm's methodology as the appropriate standard in section 20 issues, it failed to properly examine the historical basis of the cause of action to decide if it was one at law or one in equity.[200] Instead, it put outweighed emphasis on the *Bible* decision, which devoted a single clause to the legal-equitable distinction, stating, "Section 20 of the Indiana Constitution applies only to civil actions triable by jury under the common law . . . ."[201] As noted above, the Indiana Supreme Court decided *Bible* well before *Songer*, and so did not have the benefit of Justice Boehm's discussion in *Midwest* of the depths of the Section 20 analysis.[202] In effect, the *A.S.* court tried to have it both ways, concluding that "[t]he power the State has conferred on our current juvenile courts 'is of the same character as the jurisdiction exercised by a court of chancery over the person and property of infants . . . .'"[203] The A.S. court hung its hat on *parens patriae*, ultimately failing to discern if juvenile adjudications were legal or equitable in 1852.[204]

Moreover, the *A.S.* opinion, written by a panel of the Court of Appeals, is not the final word on this issue; Indiana does not recognize horizontal stare decisis.[205] Instead, "each panel of this Court has coequal authority on an issue and considers any previous decisions by other panels but is not *bound* by those decisions."[206] In fact, the Indiana Rules of Appellate Procedure foresee such a situation when the Supreme Court considers a petition to transfer, as the very first consideration listed in Rule 57(H)(1) states, "[t]he Court of Appeals has entered a decision in conflict with another decision of the Court of Appeals on the same important issue."[207] Additionally, the Indiana Supreme Court has not spoken on whether a juvenile is entitled to a *civil* jury trial right by deciding if the cause of action was one of law or equity.[208] Thus, it remains an open question.[209]

Whether a cause of action is "closer to a claim at law or one in equity"[210] is necessarily a historical inquiry.[211] To be sure, as a concurrence to the *L.M.*

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200. *In re* L.M., 186 P.3d 164, 476 (Kan. 2008); *see also Midwest*, 730 N.E.2d at 169-70 (Boehm, J., concurring).

201. Bible v. State, 254 N.E.2d 319, 322 (Ind. 1970).

202. *Bible v. State* was decided in 1970, *Midwest Sec. Life Ins. Co. v. Stroup* was decided in 2000, and *Songer v. Civitas* was decided in 2002.

203. *A.S.*, 929 N.E.2d at 892.

204. *Id.*

205. Smith v. State, 21 N.E.3d 121, 126 (Ind. Ct. App. 2014).

206. *Id.*

207. IND. R. APP. P. 57.

208. As noted above, the *Bible* court conducted only a surface-level analysis of the section 20 jury trial right; *see also* Gideon v. Wainwright, 372 U.S. 335, 346 (1963) ("Yet, happily, all constitutional questions are always open.") (Douglas, J., concurring).

209. Neither party sought transfer in *A.S. v. State*.

210. Midwest Sec. Life Ins. Co. v. Stroup, 730 N.E.2d 163, 170 (Ind. 2000) (Boehm, J., concurring).

211. *Id.* ("If, however, the cause of action is one that was not in existence in 1852, it is necessary to determine whether it is closer to a claim at law or one in equity.").

opinion highlighted,[212] "[t]his historical analysis has not been undertaken by many courts considering a juvenile's right to a jury trial even though many state constitutions contain similar provisions."[213] But, as that concurring opinion recognized, a 1984 decision by the California Court of Appeals engaged in extensive research and discussion regarding the English common law as it pertained to the prosecution of juveniles.[214] In *In re Javier A.*, the California Court of Appeals found that "California juveniles are entitled to trial by jury in delinquency proceedings because in 1850 England juveniles could not be declared wards of the court on the basis of their commission of felonies without a trial by jury."[215]

The *Javier* opinion is particularly informative because, California, like Indiana, does not categorize juvenile delinquency proceedings as criminal, but rather equitable, "pursuant to equity's *parens patriae* jurisdiction."[216] In addition, *Javier's* analysis of juvenile proceedings as of 1850 closely aligns with the operative year for the adoption of the Indiana Constitution under Trial Rule 38(A). And, Indiana's section 20 civil jury trial guarantee tracks closely with California's jury right at issue in *In re Javier A*: "Trial by jury is an inviolate right and shall be secured to all . . . ."[217]

Unlike the *A.S.* court's meager historical scholarship, the *Javier* decision amply illustrates that at the time Indiana's Constitution was adopted, juveniles had the right to a jury trial because those proceedings were legal, and not equitable.[218] As the *Javier* court explained, England repeatedly rejected attempts to eliminate the jury trial right for juveniles as part of instituting a separate court system similar to today's juvenile courts.[219] Though the *Javier* analysis focused on the year 1850, the opinion nonetheless explained that it was not until 1854—two years after the operative year of 1852—that Parliament began to strip

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212. *In re* L.M., 186 P.3d 164, 173-74 (Kan. 2008) (Luckert, J., concurring).

213. *Id.* at 173. Notably, the Kansas Constitution's jury right guarantee reads very similarly to Indiana's: "The right of trial by jury shall be inviolate." KAN. CONST. BILL OF RIGHTS § 5; s*ee also* Selig, supra note 193 at 491 (This historical analysis is a "time-honored analytical technique" and is "solidly based in analytical precedent by the United States' highest court.").

214. *L.M.*, 186 P.3d at 174 (Luckert, J., concurring).

215. *In re* Javier A., 159 Cal. App. 3d 913, 929 (1984) (italics omitted). This analysis mirrors the legal—equitable delineation outlined by Justice Boehm in his concurring opinion in *Midwest*. The *Javier* court ultimately affirmed the juvenile appellant's denial of a jury trial because of binding California Supreme Court precedent, but the detailed historical examination is no less critical. *Javier*, 159 Cal. App. 3d at 919.

216. *Javier*, 159 Cal. App. 3d at 929; *see also* People v. Nguyen, 46 Cal. 4th 1007 (2009).

217. CAL. CONST. art. I, § 16.

218. *See Midwest*, 730 N.E.2d at 170 ("To determine whether or not a party is entitled to a trial by jury, we look beyond the label given a particular action and evaluate the nature of the underlying substantive claim.") (quoting Hacienda Mexican Restaurant v. Hacienda Franchise Group, Inc. 641 N.E.2d 1036, 1041 (Ind. Ct. App. 1994)).

219. *Javier*, 159 Cal. App. 3d at 933; *see also* WILEY SANDERS, JUVENILE OFFENDERS FOR A THOUSAND YEARS 234-39, 284-86 (1970).

away juveniles' right to a jury trial.[220]

For instance, in 1815, Parliament's Select Committee on the State of the Police of the Metropolis heard testimony from a magistrate who proposed entrusting magistrates with "the sort of parental authority" to discipline wayward youth.[221] That proposal, and a similar plea in 1827, apparently went nowhere, because a Royal Commission appointed in 1836 to contemplate the advisability of distinguishing the "mode of trial between adult and juvenile offenders" and whether any proceedings could be more efficient than that of a jury trial, concluded that "a distinction in the mode of trial [between adult and juveniles] would not be advisable."[222]

For proponents of a more *parens patriae*-type approach, 1840 proved to be a watershed year as those reformers managed to achieve several legislative objectives. The House of Commons passed a bill eliminating juveniles' right to trial by jury and instead authorizing magistrates treat the juvenile as a "father over his son—a moral authority, which could enable them to bring juvenile offenders under a course of moral training" so that the magistrates could "save them [the juveniles] from being sent to gaols to be contaminated and ruined."[223] But, the House of Lords defeated the bill because it denied the right of a jury trial to children.[224]

A second bill passed into law in 1840, the Infant Felons Act of 1840, allowed courts of equity (also known as Chancery Courts) to transfer custody of children who committed felonies to the care of a "benevolent society."[225] Though notably, the Chancery Court's jurisdiction commenced only *after* a juvenile had been convicted in a court of law, where the juveniles still retained the right to a jury trial.[226] As the *Javier* court observed, "The equity court itself was not empowered to assume jurisdiction over a minor *accused* of an offense or to decide without a jury whether the minor had committed the crime. That jurisdiction remained exclusively with the law courts."[227]

And in 1847, a bill became law that permitted non-jury juvenile trials, but only for "trivial crimes" such as "[s]imple [l]arceny."[228] Moreover, the maximum amount of imprisonment could last only three months, and importantly, a juvenile

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220. *Javier*, 159 Cal. App. 3d at 940 n.18. And even the 1854 Youthful Offenders Act only applied to minor crimes, "primarily in the nature of petty theft," and did not remove the jury trial right in felony cases. *Id.*

221. *Id.* at 933-34.

222. *Id.* at 934 (quoting 1927 DEPARTMENTAL COMMITTEE ON THE TREATMENT OF YOUNG OFFENDERS, REPORT, 1938, at 11 (UK) (quotation marks omitted)).

223. *Id.* at 934-35 (quoting 52 Parl Deb HC (3d ser.) (1840) col. 653 (UK)). Note the similarity in this language to present-day *parens patriae* justifications such as those found in *A.S. v. State*.

224. *Id.* at 935-36.

225. *Id.* at 943.

226. *Id.* at 943-44.

227. *Id.* at 944 (emphasis in original).

228. *Javier*, 159 Cal. App. 3d at 936.

could still demand a jury throughout the adjudication process.[229] This latter provision apparently proved essential to securing passage of the 1847 legislation. As one member of the House of Commons stated, he "could not support the bill in its future stages, unless it should convey in its enactments a direct and specific option to the party accused of an appeal to a jury if he desired it."[230] In 1850, reform proponents proposed another bill sanctioning the trial of juveniles without a jury and the creation of "schools of reform," but members of Parliament similarly rejected this proposal, in part because "trial by jury was one of the dearest rights of Englishmen[.]"[231]

The *Javier* court also examined pre-1850 English cases cited by American courts to support the *parens patriae* jurisdiction of English courts of equity to declare wardship of a juvenile based on wrongful conduct.[232] The *Javier* majority, with the assistance of the parties, could only discover five cases even remotely related, and in all five instances the chancery court's jurisdiction stemmed not from the juvenile's misbehavior, but rather the "worthiness . . . of the parent or potential nonparent guardian of the child."[233] In fact, it was not until 1908—after even the juvenile system originated in Indiana, and some fifty-six years after the enactment of the Indiana Constitution—that England created a special jurisdictional system for juveniles that denied them the right to trial by jury.[234]

Finally, the *Javier* court scrutinized the historical justifications of the *parens patriae* concept in American juvenile jurisprudence.[235] And its results prove calamitous for the *A.S.* court's rationale. The court unearthed English scholarship that asserted the jurisdiction of American juvenile courts and English Chancery Courts were quite distinct.[236] In fact, such English courts never involved themselves with criminal matters, like juvenile delinquency, and instead were only available to those who had or claimed to have a familial or otherwise legal relationship with the subject child.[237] American scholars have offered similar critiques of this foundational rationale, instead asserting that, "[t]he juvenile court

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229. *Id.* at 937.

230. *Id.* at 937 n.16.

231. *Id.* at 939. Ironically, the "chief spokesman" of the 1847 legislation that became law was a vocal critic of the 1850 proposal, declaring to Parliament that, "he was no party to this Bill, and that as the measure now stood he could not give it his support." *Id.* at 940 (quoting 110 Parl Deb HC (3d ser.) (1850) col. 782 (UK)).

232. *Id.* at 941.

233. *Id.*

234. *Id.* at 945. Tellingly, this newly formed jurisdictional responsibility did *not* fall within the purview of the equitable Chancery courts. *Id.*

235. *Id.* at 945-46.

236. *Id.* at 946 (citing PHYLLIDA PARSLOE, JUVENILE JUSTICE IN BRITAIN AND THE UNITED STATES 60-63 (1979)).

237. *Id.* at 946 (citing PARSLOE, *supra* note 236, at 60-63). In pejorative language, the *Javier* majority quoted one scholar, "On the whole it seems likely that early [American] writers like Judge Lindsay, were more concerned with acquiring legal prestige for their juvenile courts than with historical accuracy." *Id.* (quoting PARSLOE, *supra* note 236, at 60-63).

emerged from what was a legal misinterpretation of the *parens patriae* concept. This concept was developed for quite different purposes—property and wardship—and had nothing to do with what juvenile courts do now."[238]

Tellingly, the *Gault* Court made many of these same observations about *parens patriae*.[239] Writing for the majority, Justice Abe Fortas stated, "[t]he Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance."[240]

As the *Javier* court's historical study of English common law shows, juvenile proceedings were legal, and not equitable, until at least 1854.[241] And even then, juveniles only forfeited the right to a jury trial for minor crimes like petty theft.[242] Therefore, based on Justice Boehm's analysis in *Midwest Sec. Life Ins. Co.*, juveniles in Indiana juvenile delinquency adjudications retain the right to a jury trial in proceedings in which the court decides whether the juvenile committed the act for which he or she is accused.[243]

D. Juvenile Adjudications As Quasi-Criminal Proceedings

The *A.S.* court also considered, and ultimately rejected, the argument that juvenile proceedings are quasi-criminal,[244] akin to prosecutions for speeding, which are governed by the Indiana Rules of Trial Procedure.[245] The basis for that argument came from an Indiana Court of Appeals decision, *Cunningham v. State*.[246] In *Cunningham*, the court held that article 1, section 20 of the Indiana Constitution protected the right to jury trial in quasi-criminal proceedings like traffic infractions.[247] The *Cunningham* court found, using Justice Boehm's

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238. *Id.* at 947 (quoting NORVAL MORRIS & GORDON HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 157 (1970)).

239. *In re* Gault, 387 U.S. 1, 16 (1967).

240. *Id.*

241. *Javier*, 159 Cal. App. 3d at 940 n.18.

242. *Id.*

243. The *Javier* court explicitly stated that, "The lesson, of course, is not that American legislatures somehow lack constitutional authority to shift juvenile delinquency proceedings to the equitable jurisdiction of the court . . . . However, the constitutionality of doing so without affording a jury trial during the determination of delinquency is a very different question . . . ." *Id.* at 947. That observation is reiterated here. As noted above, even were a jury to find a juvenile delinquent at the adjudication phase, the juvenile court judge would still retain all present authority and flexibility to craft an appropriate disposition.

244. "Obviously, though, such a [juvenile] proceeding is more akin to a criminal proceeding than to a conventional civil proceeding when the minor's liberty is at stake. It is best described as 'quasi-criminal.'" Welch v. United States, 604 F.3d 408, 430 (7th Cir. 2010) (Posner, J., dissenting) (quoting *In re* B.L.D., 113 S.W.3d 340, 351 (Tex. 2003)).

245. A.S. v. State, 929 N.E.2d 881, 891 (Ind. Ct. App. 2010).

246. Cunningham v. State, 835 N.E.2d 1075 (Ind. Ct. App. 2005).

247. *Id.* at 1079.

analysis in *Midwest Security Life Insurance Co.*, that traffic infractions would have been a criminal, and not equitable, action in 1852.[248] In reaching this conclusion, the court noted that prior to the General Assembly enacting the Indiana Rules of Trial Procedure in 1981, traffic infractions were crimes and trial courts were "required to inform defendants in traffic cases of their criminal rights, including the right to a jury trial."[249]

Further, the court opined, speeding infractions remained quasi-criminal because "they are enforced by the police; complaints are initiated and litigated by a prosecuting attorney on behalf of the State; and violators are fined by the government."[250] As the court in *Cunningham* made clear, by labeling speeding infractions as quasi-criminal the court was only "saying that the procedures through which these actions are adjudicated bear a likeness to those procedures employed in adjudicating criminal offenses."[251]

The *Cunningham* court's reasoning drew on a previously decided Indiana Supreme Court case, *State v. Hurst*.[252] In *Hurst,* the court considered whether a fine for failing to yield the right-of-way constituted "jeopardy" under the Double Jeopardy Clauses of the Indiana and U.S. Constitutions.[253] The court ultimately concluded that there was no double jeopardy violation; but it did recognize that a sanction labeled as civil might nonetheless be effectively criminal if the sanction served "the purpose of punishment."[254]

The *A.S.* court rejected this quasi-crime argument,[255] instead concluding that juvenile adjudications would have been equitable in 1852.[256] Yet, as discussed, history proves otherwise; England did not eliminate the jury trial right for juveniles until some years after 1852.[257] Juvenile trials were criminal, and thus legal, proceedings at the time Indiana's Constitution was adopted and ratified.[258] Lacking that post on which to lean, the *Cunningham* analysis should control: Just

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248. *Id.* at 1078-79.

249. *Id.* at 1078.

250. *Id.* at 1079.

251. *Id.* at 1079 n.4.

252. State v. Hurst, 688 N.E.2d 402 (Ind. 1997).

253. *Id.* at 403.

254. *Id.* at 404.

255. "We decline to disregard our Supreme Court's explicit holding . . . ." A.S. v. State, 929 N.E.2d 881, 891 (Ind. Ct. App. 2010). *But cf.* Fry v. State, 990 N.E.2d 429, 444 (Ind. 2013) ("We recognize that stare decisis 'is a maxim of judicial restraint . . . that we should be "reluctant to disturb long-standing precedent," and "a rule which has been deliberately declared should not be disturbed by the same court absent *urgent reasons* and a *clear manifestation of error*."'") (quoting Marsillett v. State, 495 N.E.2d 699, 704-05 (Ind. 1986)) (emphasis added).

256. *A.S.*, 929 N.E.2d at 892. The court predicated its decision on the idea that, "The power the State has conferred on our current juvenile courts 'is of the same character as the jurisdiction exercised by courts of chancery over the person and property of infants, and flows from the general power and duty of the state *parens patriae* . . . .'" *Id.*

257. *In re* Javier A., 159 Cal. App. 3d 913, 940 n.18 (1984).

258. *See generally id.* at 947.

as a traffic infraction, like speeding, would have been criminal in 1852, so too would have juvenile delinquency proceedings.[259] Similarly, as with speeding and other traffic infractions, juvenile adjudicatory proceedings are enforced by police, the prosecutor initiates proceedings, and juveniles face sanctions that increasingly correspond to adult criminal penalties.[260]

In sum, based on the standard outlined in *Cunningham*, juvenile adjudications are quasi-criminal actions and historically non-equitable, so the civil jury right guaranteed under article 1, section 20 of the Indiana Constitution fully applies to juveniles in delinquency adjudications.

CONCLUSION

Since the end of World War II, Hoosier juveniles have been deprived of the right to trial by jury in juvenile adjudications.[261] Courts, including the U.S. Supreme Court and the Indiana Supreme Court, have reasoned that adopting jury trials would undermine the equitable nature of the juvenile justice system while failing to confer any additional benefits upon the juvenile adjudicatory process.[262] This Note argued that Indiana's juvenile statutory scheme has shifted to such a degree—now sharing many commonalities with the adult criminal justice system—that continuing to deprive juveniles of their jury trial right impinges on the rights guaranteed by the Sixth and Fourteenth Amendments, past the point of simple inconsistency;[263] and indeed invading the province of the disingenuous.[264] Contrary to what the opponents of this position argue, it is not the inclusion of jury trials that would remove the last vestiges of the juvenile system which once held high hope.[265] Rather, it is *because of* changes such as the addition of determinate sentencing,[266] requiring juveniles to register as sex offenders,[267] diminished confidentiality protections,[268] and the use of juvenile adjudications as

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259. *See* Midwest Sec. Life Ins. Co. v. Stroup, 730 N.E.2d 163, 170 (Ind. 2000) (Boehm, J., concurring); *Javier*, 159 Cal. App. 3d at 940 n.18.

260. *See* Cunningham v. State, 835 N.E.2d 1075, 1079 (Ind. Ct. App. 2005).

261. Bible v. State, 254 N.E.2d 319, 322 (Ind. 1970).

262. McKeiver v. Pennsylvania, 403 U.S. 528 (1971); *Bible*, 254 N.E.2d 319.

263. *In re* L.M., 186 P.3d 164, 170 (Kan. 2008); *see also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . . and to establish them as legal principles to be applied by the courts.").

264. *See* Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 311 (2014) ("The freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power.").

265. As argued, juvenile court judges would still retain all current flexibility to craft appropriate dispositions should the juvenile be found delinquent.

266. IND. CODE § 31-37-19-9 to -10 (2018).

267. *Id.* § 11-8-8-5(b)(2).

268. *Id.* § 31-32-6-3.

sentence enhancers[269] that compel juveniles be afforded the same jury trial right as adults.[270] This necessity is amplified[271] when considered in conjunction with the fact that Hoosier juveniles may be placed in the Department of Corrections[272] without the "adversarial testing before a jury."[273]

Further, juveniles in Indiana are entitled to a jury trial under article 1, section 20 of the Indiana Constitution. The juvenile system did not exist in England at the time Indiana adopted the common law;[274] but as Justice Boehm instructed,[275] that does not end the analysis. Before Chancery Courts (or "courts of equity") could intervene on a juvenile's behalf, courts of law—where a juvenile had the right to a jury trial[276]—had to first decide whether the juvenile had committed the crime for which he or she was accused.[277] Crucially, England did not amend this practice until after 1852.[278] And, serious questions persist as to whether the long-vaunted *parens patriae* foundation of the modern juvenile justice is historically justified.[279] Entrusting the power to strip away an individual's liberty to "a single employee of the State"[280] is the *very* situation the "founders of the American Republic"[281] sought to avoid. The time has come to include Hoosier juveniles facing a delinquency adjudication within the protection of a right "fundamental to the American scheme of justice."[282]

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269. Ryle v. State, 842 N.E.2d 320, 322-23 (Ind. 2005).

270. *In re* L.M., 186 P.3d 164 (Kan. 2008); RLR v. State, 487 P.2d 27 (Alaska 1971).

271. *RLR*, 487 P.2d at 31-32.

272. *See* E.H. v. State, 764 N.E.2d 681 (Ind. Ct. App. 2002); R.H. v. State, 937 N.E.2d 386 (Ind. Ct. App. 2010).

273. Blakely v. Washington, 542 U.S. 296, 313 (2004).

274. *In re* Javier A., 159 Cal. App. 3d 913, 940 n.18 (1984).

275. Midwest Sec. Life Ins. Co. v. Stroup, 730 N.E.2d 163, 170 (Ind. 2000) (Boehm, J., concurring).

276. *Javier*, 159 Cal. App. 3d at 943.

277. *Id.*

278. *Id.* at 940 n.18.

279. *Id.* at 947 (citing MORRIS & HAWKINS, *supra* note 238, at 157; *In re* Gault, 387 U.S. 1, 16 (1967)).

280. Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

281. *Id.*

282. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).