

**JUVENILE ADJUDICATIONS AS ELEVATING FACTORS IN
SUBSEQUENT ADULT SENTENCING AND THE STRUCTURAL
ROLE OF THE JURY**

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INTRODUCTION

In *Apprendi v. New Jersey*, the U.S. Supreme Court held that the Sixth Amendment¹ requires that any fact used to increase a criminal sentence beyond its statutory maximum must be “submitted to a jury, and proved beyond a reasonable doubt.”² The Court carved out one narrow but significant exception to this rule: the fact of a prior conviction may be used as a sentence-elevating factor without being found by a jury.³ The central question addressed by this Comment is whether the elevation of an adult’s sentence on the basis of a prior juvenile adjudication is constitutionally permissible under *Apprendi*. My contention is that a satisfactory answer to this question must take into account the structural role of the jury. An analysis premised on an understanding of the jury guarantee as an individual right aimed at assuring accurate fact-finding is necessarily incomplete. Once the role of the jury guarantee as a fundamental reservation of power in our constitutional structure is fully appreciated,⁴ it becomes clear that sentence elevation based on prior juvenile non-jury adjudications

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1 The Sixth Amendment to the U.S. Constitution provides in relevant part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” U.S. CONST. amend. VI.

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

3 *Id.*

4 This understanding of the jury right is perhaps most commonly associated with Akhil Amar. See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION*, 81–118 (1998) (describing the Framers’ intent in passing the Sixth Amendment as providing a democratic check on the the judiciary). This idea has been more recently developed by Laura Appleman. See generally Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397 (2009) (providing extensive historical support for the notion that the jury right is a community right rather than an individual right). Appreciation of the jury’s structural role is not limited to the scholarly literature, but can also be seen throughout a number of U.S. Supreme Court opinions—in particular, the opinions and dissents of Justice Scalia. See *infra* Part III.A.

cannot be reconciled with the robust conception of the Sixth Amendment articulated in *Apprendi* and subsequent cases.

Despite the dubious constitutionality of treating non-jury juvenile adjudications as prior convictions for *Apprendi* purposes, state legislatures and the U.S. Congress have passed recidivism statutes that enable the use of juvenile adjudications as elevating factors in criminal sentencing.⁵ Most state and federal courts that have addressed the issue have held that the use of juvenile non-jury adjudications to elevate subsequent adult criminal sentences does not violate *Apprendi*'s command.⁶ Only Louisiana's Supreme Court and the Ninth Circuit have taken the opposite position.⁷ Oregon's high court has adopted

⁵ See, e.g., 18 U.S.C. § 924(e)(1), (2) (2006) (defining some juvenile adjudications as qualifying convictions for purposes of a provision mandating a minimum fifteen-year sentence for illegal possession of a firearm by a defendant with three previous qualifying convictions); CAL. PENAL CODE § 667(d)(3) (West 1999) (treating some juvenile adjudications as prior felony convictions for purpose of the state's three strikes law).

⁶ See, e.g., *Welch v. United States*, 604 F.3d 408, 429 (7th Cir. 2010) (“[B]ecause juvenile adjudications are reliable, they are not subject to the *Apprendi* rule.”); *United States v. Matthews*, 498 F.3d 25, 34–36 (1st Cir. 2007) (finding no distinction between juvenile adjudications and adult convictions, but not reaching the question of a right to trial by jury since defendant waived this right); *United States v. Crowell*, 493 F.3d 744, 749–51 (6th Cir. 2007) (holding that the use of prior juvenile adjudications to increase sentences does not violate due process); *United States v. Burge*, 407 F.3d 1183, 1187–91 (11th Cir. 2005) (upholding lower court's application of juvenile adjudication to increase sentence); *United States v. Jones*, 332 F.3d 688, 694–96 (3d Cir. 2003) (“A prior nonjury juvenile adjudication that was afforded all constitutionally-required procedural safeguards can properly be characterized as prior conviction for *Apprendi* purposes.”); *United States v. Smalley*, 294 F.3d 1030, 1031–33 (8th Cir. 2002) (concluding that “juvenile adjudications can rightly be characterized as ‘prior convictions’ for *Apprendi* purposes”); *People v. Nguyen*, 209 P.3d 946, 953–55 (Cal. 2009) (“[T]he *Apprendi* rule does not preclude use of nonjury juvenile adjudications to enhance later adult sentences.”); *State v. McFee*, 721 N.W.2d 607, 615–19 (Minn. 2006) (“We hold that, in calculating a defendant's criminal history score, a defendant does not have a Sixth Amendment right to a jury determination of the fact of a prior juvenile adjudication.”); *State v. Weber*, 149 P.3d 646, 649–53 (Wash. 2006) (finding that the inclusion of defendant's juvenile adjudications fell within *Apprendi*'s prior conviction exception); *People v. Mazzoni*, 165 P.3d 719, 722–23 (Colo. App. 2006) (finding “no error in the trial court's aggravating defendant's sentence on the basis of his prior juvenile adjudications”); *Ryle v. State*, 842 N.E.2d 320, 321–23 (Ind. 2005) (finding that juvenile adjudications can be factors in proper sentencing considerations for a trial judge and need not be submitted to a jury); *State v. Hitt*, 42 P.3d 732, 740 (Kan. 2002) (“Juvenile adjudications need not be . . . proven to a jury beyond a reasonable doubt before they can be used in calculating a defendant's criminal history score”); *Nichols v. State*, 910 So. 2d 863, 864–65 (Fla. Dist. Ct. App. 2005) (declining to hold that “prior juvenile dispositions are not valid prior convictions for the exception to sentencing enhancements in *Apprendi*”).

⁷ See *United States v. Tighe*, 266 F.3d 1187, 1194–95 (9th Cir. 2001) (“*Apprendi*'s narrow ‘prior conviction’ exception is limited to prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt. Thus, the ‘prior conviction’ exception does not include non-jury juvenile adjudications.”); *State v. Brown*, 879 So. 2d 1276, 1281–90 (La. 2004) (“Because a juvenile adju-

a middle position, holding that the absence of a jury right in the prior adjudication does not preclude its use as an elevating factor, but that a defendant has a right to a jury determination of the fact of the prior juvenile adjudication.⁸

This Comment argues that the majority position rests on a conception of the jury right that undervalues the structural role of the jury intended by the Framers of the Constitution. My goal is to examine the practice of enhancing criminal sentences on the basis of juvenile priors in light of a more complete and historically accurate understanding of the jury trial right. In the course of this examination, it will become clear that an underappreciated problem with the sentencing practice at issue is obscured by the majority position's implicit assumption that the jury trial right is exclusively an individual right aimed at promoting accuracy. By giving the jury's original structural purpose its proper place in the analysis, I will show that the Sixth Amendment prohibits sentence enhancements based on prior juvenile adjudications in which the accused had no right to a jury trial.

Part I describes the exception that, in the view of most courts, allows the use of juvenile priors as sentence enhancements. This Part then traces the origin of the prior conviction exception in order to explain the central constitutional problem with this practice. Part II examines the arguments that courts have used to support the majority position and the usual responses to these arguments. Part III discusses the pervasive mischaracterization of the jury guarantee as a right designed only to ensure accuracy. This Part then lays out the support for a conception of the jury right that is not focused exclusively on accuracy, but also appreciates the role of the jury right as an institutional allocation of power. It is then suggested that the arguments supporting the majority position rely on an incomplete understanding of the jury right. By basing their analyses on an incomplete understanding of the Sixth Amendment, courts have obscured the extent to which allowing sentence elevations based upon prior juvenile adjudications erodes the jury right as envisioned by the Framers. Finally, Part IV discusses and evaluates possible steps the U.S. Supreme Court could take to resolve the asserted constitutional dilem-

lication is not established through a procedure guaranteeing a jury trial, it cannot be excepted from *Apprendi's* general rule . . .").

8 See *State v. Harris*, 118 P.3d 236, 238–46 (Or. 2005) ("It is of no moment—at least for Sixth Amendment purposes—if the legislature chooses to designate, *inter alia*, a prior nonjury juvenile adjudication as an element that . . . lengthens a criminal sentence, so long as the *existence* of that prior adjudication is proved to a jury . . .").

ma, with particular attention paid to consistency with the structural role of the jury.

I. THE CONSTITUTIONAL PROBLEM WITH SENTENCE ELEVATION ON THE BASIS OF PRIOR NON-JURY JUVENILE ADJUDICATIONS

Apprendi forbids the elevation of a criminal sentence beyond a statutorily prescribed maximum on the basis of facts not proved to a jury.⁹ Recidivism enhancements are permissible only because of the prior conviction exception to *Apprendi*'s rule.¹⁰ Under this exception, a prior conviction, unlike any other fact, may be used to elevate a criminal sentence beyond its statutorily prescribed maximum without first having been proved to a jury.¹¹ Whether or not the enhancement of adult sentences based upon juvenile priors is constitutionally permissible, therefore, turns on whether juvenile non-jury adjudications fall within the prior conviction exception to *Apprendi*'s general rule.¹²

The exception for prior convictions is premised on the idea that because the jury right would have attached (and been either exercised or waived) in the prior trial, there is no need to have another jury find that the prior offense had been committed.¹³ In the case of juvenile adjudications, however, a jury trial is not constitutionally mandated.¹⁴ Indeed, most states do not provide a jury right for defendants in juvenile court.¹⁵ The problem with lumping juvenile adjudications in with adult criminal convictions, then, is that juvenile adjudications lack the very feature that justifies the prior conviction exception. The exception cannot properly be interpreted to include juvenile adjudications lacking the essential procedural safeguard that distinguishes adult convictions from all other aggravating circumstances for *Apprendi* purposes.

⁹ *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

¹⁰ *See supra* notes 3, 5 and accompanying text.

¹¹ *Id.*

¹² If juvenile non-jury adjudications do not fall within the prior conviction exception, there can be no doubt that they are impermissible under *Apprendi* when they raise the defendant's sentence above the statutorily prescribed maximum.

¹³ *See Apprendi*, 530 U.S. at 488 (“[T]he certainty that procedural safeguards attached to any ‘fact’ of prior conviction . . . mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a ‘fact’ increasing punishment beyond the maximum of the statutory range.”).

¹⁴ *See McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

¹⁵ SAMUEL M. DAVIS, *RIGHTS OF JUVENILES* § 5:3 (2d ed. 2010).

Understanding the rationale for the prior conviction exception requires an examination of two significant pre-*Apprendi* cases: *Almendarez-Torres v. United States*¹⁶ and *Jones v. United States*.¹⁷ In *Almendarez-Torres*, the Supreme Court considered whether a recidivism provision constituted an offense element or a sentencing factor.¹⁸ Petitioner Hugo Almendarez-Torres had been convicted of returning to the United States after having been deported.¹⁹ This offense ordinarily authorizes a sentence of not more than two years,²⁰ but a related provision authorizes a sentence of up to twenty years if the initial deportation took place “subsequent to a commission of an aggravated felony.”²¹ The district court found a sentence range of seventy-seven to ninety-six months applicable.²²

At issue on appeal was the question of whether the recidivism provision defines a separate crime or simply authorizes an enhanced sentence.²³ The question arose not from a claim of violation of the defendant’s jury right, but rather from a claim that the sentence was not valid because the prior conviction had not been charged in the indictment, which would be required if it were an offense element rather than merely a sentencing provision. Placing great emphasis on the traditional status of recidivism as a sentencing factor,²⁴ the Court held that recidivism was not an element of the crime.²⁵ Consequently, the Court held, recidivism need not be stated in the indictment, nor must it be proven beyond a reasonable doubt to a jury.²⁶

Justice Scalia, joined by Justices Stevens, Souter, and Ginsberg, dissented, concluding that the statute must be read as defining two

16 523 U.S. 224 (1998).

17 526 U.S. 227 (1999).

18 *Almendarez-Torres*, 523 U.S. at 226.

19 *Id.* at 227.

20 *Id.* at 226; see also 8 U.S.C. § 1326 (2006).

21 *Almendarez-Torres*, 523 U.S. at 226 (quoting 8 U.S.C. § 1326(b)(2) (1994)) (internal quotation marks omitted).

22 *Id.* at 227.

23 *Id.* at 226. The question arose not from a claim of violation of the defendant’s jury right, but rather from a claim that the sentence was not valid because the prior conviction had not been charged in the indictment, which would be required if it were an offense element rather than merely a sentencing provision. *Id.* at 227–28.

24 *Id.* at 230 (“At the outset, we note that the relevant statutory subject matter is recidivism. That subject matter—prior commission of a serious crime—is as typical a sentencing factor as one might imagine.”).

25 *Id.* at 226–27.

26 See *id.* at 247 (rejecting defendant-petitioner’s claim that the Sixth Amendment requires that his recidivism be treated as an offense element and therefore proven to a jury beyond a reasonable doubt).

separate criminal offenses.²⁷ The Court is required to adopt a reasonable interpretation of a statute that avoids a “serious constitutional *doubt*” over an alternative interpretation under which such doubt arises.²⁸ The dissent found serious constitutional doubt regarding the “difficult question whether the Constitution requires a fact which substantially increases the maximum permissible punishment for a crime to be treated as an element of that crime—to be charged in the indictment, and found beyond a reasonable doubt by a jury.”²⁹

A year after deciding *Almendarez-Torres*, the Court handed down *Jones v. United States*.³⁰ At issue in *Jones* was whether the federal carjacking statute³¹ defines three distinct crimes or one crime that has three penalties depending on the presence of aggravating factors.³² In three separate subsections, the provision authorizes three different punishments depending on whether the crime resulted in serious bodily harm, death, or neither.³³ Jones had been convicted by a jury of carjacking, but neither the indictment nor the jury instruction on the offense elements had contained any reference to serious bodily injury.³⁴ Moreover, the magistrate judge told Jones that he faced a maximum sentence of fifteen years, the prescribed maximum for carjacking not resulting in serious bodily harm or death.³⁵ At sentencing, however, Jones was given a sentence of twenty-five years on the basis of the judge’s finding by a preponderance of the evidence that the carjacking of which he had been convicted led to serious bodily harm.³⁶ Neither the district court nor the circuit court was persuaded by Jones’s argument that serious bodily harm was an offense element.³⁷ At stake in the determination of whether the fact of serious bodily harm was an element of the offense or merely a sentencing factor was whether Jones was entitled to have that fact charged in his

27 See *id.* at 248–49 (Scalia, J., dissenting) (“Illegal reentry *simpliciter* (§ 1326(a)) and illegal reentry after conviction of an aggravated felony (§ 1326(b)(2)) are separate criminal offenses.”).

28 *Id.* at 250.

29 *Id.* at 248.

30 526 U.S. 227 (1999) (holding that 18 U.S.C. § 2119 establishes three separate offenses by the specification of elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict).

31 18 U.S.C. § 2119 (2006).

32 *Jones*, 526 U.S. at 229.

33 *Id.* at 230.

34 *Id.* at 230–31.

35 *Id.*

36 *Id.* at 231.

37 *Id.* at 231–32.

indictment, submitted to a jury, and proven beyond a reasonable doubt.³⁸

The Supreme Court determined, based on a close examination of the statutory language and an analysis of congressional intent, that the relevant statute is best read to treat serious bodily harm as an element of a distinct offense rather than an enhancement.³⁹ Recognizing, however, that the alternative view was plausible,⁴⁰ the Court ultimately supported its construction by appealing to the venerable principle that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”⁴¹ Undertaking a thorough examination of the relevant precedent as well as the history and origin of the Sixth Amendment, the Court concluded that “there is reason to suppose that in the present circumstances . . . the relative diminution of the jury’s significance would merit Sixth Amendment concern.”⁴² The Court therefore resolved the question in exactly the same manner suggested by Justice Scalia’s dissent in *Almendarez-Torres*.

Having adopted the reasoning of the *Almendarez-Torres* dissent and based its opinion on the existence of significant constitutional doubt regarding a practice that the *Almendarez-Torres* majority had held constitutionally permissible, the *Jones* Court was in a bind. The Court could either overrule the year-old *Almendarez-Torres* precedent or explain why there was no constitutional doubt about classifying recidivism as a sentencing factor that need not be proven to a jury. The Court distinguished the fact of a prior conviction from other facts that increase criminal sentences in two ways. First, the Court observed that the holding of *Almendarez-Torres* rested heavily on “the tradition of regarding recidivism as a sentencing factor.”⁴³ Second, the Court explained the “constitutional distinctiveness” of recidivism as follows: “unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and *jury trial guarantees*.”⁴⁴ In other words, the reason that prior convictions escape the constitutional doubt that sur-

38 *Id.* at 232.

39 *Id.* at 232–39.

40 *Id.* at 239.

41 *Id.* (quoting *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)).

42 *Id.* at 248.

43 *Id.* at 249.

44 *Id.* (emphasis added).

rounds all other sentence-elevating facts is that the facts underpinning a prior conviction have already been charged in an indictment and, barring guilty pleas and waivers of the jury right, found to be true beyond a reasonable doubt by a jury.

Neither the *Almendarez-Torres* dissent nor the *Jones* majority had, of course, actually held unconstitutional the practice of circumventing juries by defining certain facts as sentencing factors rather than offense elements.⁴⁵ Neither opinion reached this question. Rather, both opinions merely suggested that there was *sufficient constitutional doubt* to compel the Court to answer questions of statutory construction so as to avoid the potential constitutional conflict. Separate concurrences by Justices Stevens and Scalia in *Jones* went further, expressing not mere constitutional doubt, but confidence that the Constitution forbids legislatures to diminish the role of the jury in this manner.⁴⁶ These concurring opinions laid the framework for the Court's decision in *Apprendi*, where it would confront the constitutional question directly.⁴⁷ It is important, therefore, to understand *Apprendi*'s holding and, in particular, the prior conviction exception, against the backdrop of *Jones* and *Almendarez-Torres*.

Indeed, in *Apprendi*, the Court explicitly adopted the formulation of the general rule as it was articulated in the *Jones* concurrences: "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."⁴⁸ Additionally, the Court adopted the *Jones* majority's position that *Almendarez-Torres* was limited to recidivism⁴⁹ and that opinion's explanation of why.⁵⁰ The Court

⁴⁵ See *Almendarez-Torres v. United States*, 523 U.S. 224, 250 (1998) (Scalia, J., dissenting) (noting that the principle he believed controlled the case "requires merely a determination of serious constitutional *doubt*, and not a determination of *unconstitutionality*").

⁴⁶ See *Jones*, 526 U.S. at 252–53 (Stevens, J., concurring) ("I am convinced that it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."); *id.* at 253 (Scalia, J., concurring) ("I set forth as my considered view, that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed.")

⁴⁷ See *Apprendi v. New Jersey*, 530 U.S. 466, 490 ("With [the exception of the fact of prior conviction], we endorse the statement of the rule set forth in the concurring opinions in [*Jones*]: '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" (alteration in original) (quoting *Jones*, 526 U.S. at 252–53 (Stevens, J., concurring))).

⁴⁸ *Id.* (quoting *Jones*, 526 U.S. at 252–53 (Stevens, J., concurring)).

⁴⁹ *Id.* at 488 (quoting language in *Jones* that states that both majority and dissent in *Almendarez-Torres* agreed that the case's holding was limited to recidivism).

reiterated the position that *Almendarez-Torres* was “at best an exceptional departure from the historic practice,”⁵¹ and then went on to explicitly treat the case as “a narrow exception to the general rule.”⁵² Given the background of the prior conviction exception, it is clear that this narrow exception can be reconciled with the rationale of *Apprendi* only because the facts necessary to prove the prior conviction in the first instance were presented to a jury which adjudged them true beyond a reasonable doubt.⁵³

This rationale produces an exception for prior convictions that can only be logically applied when the jury right has already attached at the prior trial. Because no such right ever attaches in the case of juvenile adjudications, the rule is improperly circumvented when such an adjudication is used to increase a criminal sentence. The result is that facts that have *never* been proved beyond a reasonable doubt to a jury increase a criminal sentence beyond the statutory maximum, bringing this practice squarely within the prohibition of *Apprendi*.

In other words, using prior juvenile adjudications to impose greater punishment stretches the *Almendarez-Torres* exception to the *Apprendi* rule in a way that distorts the precedent and cannot, despite assertions by many courts to the contrary, be constitutionally permissible.

50 *Compare id.* (“[T]he certainty that procedural safeguards attached to any ‘fact’ of prior conviction . . . mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a ‘fact’ increasing punishment . . .”) *with Jones*, 526 U.S. at 249 (“[U]nlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the . . . jury trial guarantee[.]. *Almendarez-Torres* cannot, then, be read to resolve the due process and Sixth Amendment questions implicated by reading [the sentence-enhancing provisions at issue as sentencing factors as opposed to offense elements] . . .”).

51 *Apprendi*, 530 U.S. at 487.

52 *Id.* at 490.

53 More precisely, it is the *opportunity* of the accused to insist that all elements of the offense be proven to a jury beyond a reasonable doubt that allows the prior conviction exception to be squared with *Apprendi*'s rationale. In reality, of course, offense elements are often admitted in a guilty plea or found true in a bench trial to which the accused has agreed. The Sixth Amendment does not, therefore, require that the right to a jury trial be exercised. It should be noted, however, that some of the most prominent scholarly criticism of *Apprendi* centers around the failure of that decision to recognize the prevalence of plea bargaining and the attendant diminution of the jury's role in today's criminal justice system. See Stephanos Bibas, *How Apprendi Affects Institutional Allocations of Power*, 87 IOWA L. REV. 465 (2002); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097 (2001).

II. THE ARGUMENTS IN FAVOR OF SENTENCE ELEVATIONS BASED ON JUVENILE NON-JURY ADJUDICATIONS

As noted above, the majority of courts of appeals and state courts have taken approaches counter to the one proposed in this Comment.⁵⁴ This Part canvasses the main arguments made in favor of the majority position and lays out the typical response to each. The following section examines each argument in light of the jury's role in our constitutional structure beyond that of a mere guarantor of reliability, a perspective that has largely been ignored by both sides of the debate.

A. *The Argument Based on the Satisfaction of All Applicable Due Process Requirements in the Juvenile Proceeding*

The most frequently adopted argument in support of sentence elevation based on juvenile non-jury adjudications is grounded in the fact that such adjudications are constitutionally valid despite the absence of a jury right.⁵⁵ Essentially, the argument is that because the juvenile proceeding comported with all applicable due process requirements, that decision falls within the prior conviction exception and is therefore a valid basis for a sentence enhancement.⁵⁶

This argument highlights the constitutional tension between *Apprendi* and the case in which the Supreme Court held that the right to trial by jury does not extend to juvenile proceedings, *McKeiver v. Pennsylvania*.⁵⁷ In *McKeiver*, the Court cited a long list of justifications for its decision.⁵⁸ At its core, the decision rested on the Court's ideal of a juvenile system that is not punitive and adversarial in nature,⁵⁹

⁵⁴ See *supra* notes 6–7 and accompanying text.

⁵⁵ See, e.g., *People v. Nguyen*, 209 P.3d 946, 949 (Cal. 2009) (“That authority [to increase a sentence on the basis of a defendant’s recidivism] may properly be exercised . . . when the recidivism is evidenced . . . by a *constitutionally valid* prior adjudication of criminal conduct.”).

⁵⁶ See *id.* at 953 (“[W]e agree with the majority view that the Fifth, Sixth, and Fourteenth Amendments, as construed in *Apprendi*, do not preclude the sentence-enhancing use, against an adult felon, of a prior valid, fair, and reliable adjudication that the defendant, while a minor, previously engaged in felony misconduct, where the juvenile proceeding included all the constitutional protections applicable to such matters, even though these protections do not include the right to jury trial.”).

⁵⁷ See *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (“[W]e conclude that trial by jury in the juvenile court’s adjudicative stage is not a constitutional requirement.”).

⁵⁸ See *id.* at 545–50 (enumerating thirteen justifications for the court’s decision).

⁵⁹ See *id.* at 545 (“[I]f required as a matter of constitutional precept, [the jury trial might] remake the juvenile proceeding into a fully adversary process and [might] put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.”).

but rather serves a rehabilitative goal and positions the government in a protective relationship vis-à-vis the youth.⁶⁰ In other words, the decision not to afford to juveniles the full procedural protection afforded to adults rests on a belief that juvenile proceedings are fundamentally different in their nature and purpose than criminal trials.⁶¹

When juvenile adjudications are used to elevate adult sentences, however, determinations made in a forum with weak due process protections are stripped from that context and used in a way that has serious implications for the liberty of the defendant. This practice raises serious due process concerns and provides additional support for the view that sentence elevation on the basis of prior non-jury juvenile adjudications is constitutionally problematic.⁶²

Writing in dissent in the most recent case to address the use of juvenile adjudications as sentence enhancements in subsequent adult proceedings, Judge Posner observed:

The constitutional protections to which juveniles have been held to be entitled have been designed with a different set of objectives in mind than just recidivist enhancement. So the mere fact that a juvenile had all the process he was entitled to doesn't make his juvenile conviction equivalent, for purposes of recidivist enhancements, to adult convictions.⁶³

60 See *id.* at 547 (“[W]e are particularly reluctant to say . . . that the system cannot accomplish its rehabilitative goals.”).

61 See generally Courtney P. Fain, Note, *What's in a Name? The Worrisome Interchange of Juvenile "Adjudications" with Criminal "Convictions,"* 49 B.C. L. REV. 495 (2008) (arguing that jury rights should not be extended to juvenile proceedings to legitimize their use in adult sentencing, but rather that they should not be used in adult sentencing because of further differences between juvenile and adult criminal systems).

62 For a more detailed exposition of this problem, see 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 (2003) (arguing that “[t]he absence of a jury right detracts from the factual accuracy of delinquency convictions, adversely affects the quality of justice and delivery of legal services in juvenile courts, and raises significant questions about the propriety of using delinquency adjudications to enhance adult criminal sentences under the *Apprendi* exception for prior convictions”). See also Fain, *supra* note 62; Cart Rixey, Note, *The Ultimate Disillusionment: The Need for Jury Trials in Juvenile Adjudications*, 58 CATH. U. L. REV. 885, 887 (2009) (suggesting “that the Kansas Supreme Court correctly held that the reasoning and public policy considerations of *McKeiver v. Pennsylvania* no longer apply because of the changing and increasingly punitive nature of juvenile codes”).

63 *Welch v. United States*, 604 F.3d 408, 431–32 (7th Cir. 2010) (Posner, J., dissenting). The constitutionality under *Apprendi* of using juvenile non-jury adjudications as aggravating factors in subsequent adult sentencing proceedings had not been addressed in the Seventh Circuit before *Welch v. United States*. *Id.* at 429. The question was presented indirectly through the defendant’s argument that his lawyer’s failure to raise the question at the sentencing proceeding constituted ineffective assistance of counsel. *Id.* at 411. The panel joined the majority of other circuits in holding that juvenile adjudications fall with-

In short, the juvenile proceedings comport with a less strict due process requirement because they have a different purpose from adult courts.⁶⁴ Fewer due process protections are required in juvenile courts because those courts do not sit to mete out punishment, but rather to find a way to rehabilitate young people. When this determination is stripped from its context and used for an essentially punitive purpose, however, the lower due process bar can no longer be justified by appeal to the *parens patriae* nature of the juvenile forum.

Moreover, this argument strains the justification for the prior conviction exception⁶⁵ by, in effect, substituting the predicate “constitutional validity of the prior adjudication” for “availability of a jury trial in the previous conviction.” It is easy to see that attachment of a jury right in a prior conviction might have some bearing on what the Sixth Amendment requires for use of that conviction as a sentence enhancement in a subsequent proceeding. There is no such logical connection that explains why the Sixth Amendment’s requirement should be satisfied in a case where no jury right ever attached.

B. The Argument Based on the Status of Recidivism as a “Highly Traditional” Basis for a Judge’s Decision to Enhance a Sentence

In its most basic form, the argument that recidivism is traditionally part of a judge’s discretion at sentencing and, therefore, need not be proven to a jury is simply not responsive to the underlying question. *Almendarez-Torres* makes perfectly clear that sentence elevation based on prior convictions falls within a judge’s traditional discretion,⁶⁶ but reiterating this fact does nothing to advance the inquiry into whether juvenile adjudications count as prior convictions for this purpose under *Apprendi*. The nature and purpose of the juvenile justice system support the contention that juvenile adjudications are not “convictions” at all, but something else entirely.⁶⁷

in the prior conviction exception to *Apprendi*. *Id.* at 426. In his dissent, Posner goes on to point out that keying *Apprendi*’s scope and that of the prior conviction exception to the due process afforded in the prior tribunal seems to lead to an untenable result: might not a conviction for a military crime by a military commission with very limited due process protections nonetheless be used to enhance a later ordinary criminal sentence? *Id.* at 432.

⁶⁴ See Fain, *supra* note 62, at 518 (stating that rehabilitation is the goal of juvenile courts).

⁶⁵ See *supra* Part I.

⁶⁶ See *Almendarez-Torres v. United States*, 523 U.S. 224, 243 (1998) (noting that recidivism is the most traditional basis on which a court may increase a criminal sentence).

⁶⁷ See Fain, *supra* note 62, at 519 (“[J]uvenile court proceedings are considered non-criminal in nature . . .”).

Moreover, it is something of a sleight of hand when the traditional “recidivism” factor is substituted for the fact of a prior juvenile adjudication. The traditional rationales that justify allowing a judge to enhance a sentence on the basis of recidivism do not apply to juvenile adjudications. Whether recidivism enhancements serve a crime prevention purpose or a retributive purpose is open for debate.⁶⁸ A definition of “recidivism” that includes juvenile adjudications seems at odds with either rationale. With respect to the crime control rationale, it is not at all clear that juvenile crime has the predictive value of adult crime when it comes to future offenses.⁶⁹ With respect to the retributivist rationale, criminal actions committed by children might not constitute the same reflection on moral character as crimes committed by adults.⁷⁰ Moreover, research on community views suggest that although people do consider a repeat offense somewhat more blameworthy than a first offense, the dramatic enhancement of sentences under most three-strikes or habitual offender statutes diverges sharply from shared intuitions of justice.⁷¹

A more subtle form of this argument relies on *Oregon v. Ice*, which held that a state may constitutionally assign to a judge—rather than a jury—responsibility for finding facts necessary to support imposing sentences consecutively rather than concurrently.⁷² The Court held that this was the case because “[t]here is no encroachment here by the judge upon facts historically found by the jury.”⁷³ The argument, as it applies here, is that because juvenile trials have traditionally been held in the absence of juries, there is no encroachment on the

68 Such provisions are most often justified on incapacitation grounds. Proponents argue that a history of recidivism shows that the defendant cannot be deterred and therefore must be incarcerated to prevent the commission of future crimes. See Paul H. Robinson et al., *The Disutility of Injustice* 8 (Public Law and Legal Theory Research Paper Series, Research Paper No. 09-24, 2009), available at <http://ssrn.com/abstract=1470905> (describing the justifications commonly offered for habitual offender statutes).

69 See Elizabeth S. Scott & Laurence Steinberg, Essay, *Blaming Youth*, 81 TEX. L. REV. 799, 820–21 (2003) (relying on the work of several psychiatric studies to conclude that much crime committed by youths is better understood as “experimentation in risky behavior . . . [as] part of identity development” that, more often than not, “desists naturally as individuals develop a stable sense of self and maturity of judgment”).

70 See *id.* (arguing that “[t]he criminal choices of typical young offenders differ from those of adults . . . because the adolescent’s criminal act does not express the actor’s bad character,” whereas most adults who commit crimes “act upon subjectively defined preferences and values”).

71 See Robinson et al., *supra* note 68, at 27, 29 (describing empirical research showing that “the crime-control doctrines most divergent from community views include . . . three-strikes (habitual offender) doctrines”).

72 See *Oregon v. Ice*, 129 S. Ct. 711, 714–15 (2009).

73 *Id.* at 718.

historic role of the jury when a juvenile is adjudicated delinquent without a jury right and that adjudication is subsequently used to enhance an adult criminal sentence. This version of the argument asserts that, like the fact of a prior conviction, juvenile delinquency is traditionally a determination for the judge, not the jury. This argument fails because juveniles have received a wide range of treatment by courts throughout history.⁷⁴ *Ice's* historical inquiry is therefore simply not probative. The varying treatment through time and among states makes it impossible to say what questions tradition reserves for judges as opposed to juries.

C. *The Technical Compliance Argument*

Some courts have embraced the view that, as long as the jury in the subsequent adult trial makes a determination as to the fact of the prior conviction, *Apprendi* is technically satisfied. According to this argument, *Apprendi* requires only that the jury in the current case find beyond a reasonable doubt that there was a prior adjudication of guilt, and that it is not necessary that the actual facts supporting a guilty verdict ever be found by a jury.⁷⁵ This is the intermediate approach adopted by the state of Oregon.⁷⁶

At best, this approach is formalistic. At worst, it is an insulting circumvention of the Supreme Court's interpretation of the right to a jury trial. Either way, the argument does not withstand scrutiny; it pays lip service to the Sixth Amendment and cannot be reconciled with *Apprendi's* robust jury right. As California Supreme Court Justice Kennard pointed out, such an argument "opens the door to wholesale evasion or trivialization of the holding in *Apprendi*."⁷⁷

III. THE COMMON MISTAKE OF THE ARGUMENTS IN SUPPORT OF THE MAJORITY POSITION: OVERLOOKING THE INSTITUTIONAL ROLE OF THE JURY

The previous Parts have surveyed the arguments in support of the majority position and the most common responses to them. This

⁷⁴ See *State v. Rudy B.*, 216 P.3d 810, 818 (N.M. App. 2009) (summarizing the widely varied treatment of juveniles by courts).

⁷⁵ See *State v. Harris*, 118 P.3d 236, 246 (Or. 2005) (holding that "the use of prior juvenile adjudications as sentencing factors in Oregon does not violate the jury trial right guaranteed by the Sixth Amendment . . . [but] when such an adjudication is offered as an enhancement . . . its existence must . . . be proved to a trier of fact").

⁷⁶ *Id.*

⁷⁷ *People v. Nguyen*, 209 P.3d 946, 962 (Cal. 2009) (Kennard, J., dissenting).

Part suggests that a critical mischaracterization—or at least a mistaken emphasis—is common to all of the majority-position arguments. This mischaracterization obscures the way in which the majority position erodes the jury right by undermining an important function of the jury within our constitutional structure. That function, this Comment argues, is not merely to guarantee the accuracy of judicial proceedings but also to serve as a “bulwark between the State and the accused at the trial for an alleged offense.”⁷⁸ The courts that have adopted the majority position err in their treatment of the right to a jury trial as only a check on accuracy, and not also a “fundamental reservation of power in our constitutional structure”⁷⁹ as was intended by the Framers and is commanded by *Apprendi*.⁸⁰

A. *The Right to a Jury Trial Was Designed to Reserve to the People Power over the Judiciary and to Protect Them from Tyranny of the Government*

Professor Akhil Amar proposes that “it is anachronistic to see jury trial as an issue of individual right rather than (also, and more fundamentally) a question of government structure.”⁸¹ Strong historical evidence supports the proposition that the Framers’ intent in passing the Sixth Amendment was to reserve to the people a democratic check on the power of the Judicial Branch.⁸² Indeed, Thomas Jefferson, emphasizing the importance of the jury’s role as a check on the judiciary, indicated that it would be better that the people be left without a role in the Legislative Branch than that they be excluded from oversight of the judiciary.⁸³

Jefferson’s observation was not the only recognition of the jury’s role in a government by the people—it is only the most famous. Professor Laura Appleman has canvassed seventeenth- and eighteenth-century sources and determined unequivocally that an Founding-era audience would have “understood the right to a jury trial to be a collective right.”⁸⁴ This historical observation contrasts sharply with to-

78 See *Ice*, 129 S. Ct. at 717 (describing the animating principle of *Apprendi*).

79 *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

80 See *id.* (referring to the jury right as a “fundamental reservation of power in our constitutional structure” and asserting that “*Apprendi* carries out this design by ensuring that the judge’s authority to sentence derives wholly from the jury’s verdict”).

81 AMAR, *supra* note 4, at 104.

82 See Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767, 780 (2005) (discussing the Founders’ “recogni[tion of] the importance of the division of power between the judiciary and the jury”).

83 *Id.* (citing 3 THE WRITINGS OF THOMAS JEFFERSON 82 (H.A. Washington ed., J.B. Lippincott & Co. 1864)).

84 See Appleman, *supra* note 4, at 399.

day's prevalent understanding of the jury as an individual right possessed by defendants and aimed at ensuring accuracy. In the early nineteenth century, Tocqueville's observations led him to place the jury right on par with the right to vote as an instrument of democratic rule: "[t]he system of the jury, as it is understood in America, appears to me as direct and extreme a consequence of the dogma of the sovereignty of the people as universal suffrage. These are two equally powerful means of making the majority reign."⁸⁵ He understood the jury as, first and foremost, a "political institution."⁸⁶

In the Supreme Court's jurisprudence, the institutional understanding of the jury right is perhaps most clearly articulated in the opinions of Justice Scalia through the *Apprendi* line. Beginning with *Apprendi* itself, Scalia lays out his view in response to Justice Breyer's assertion that, in modern times, the jury cannot provide fairness.⁸⁷ Scalia chides Breyer, noting that his opinion "sketches an admirably fair and efficient scheme of criminal justice designed . . . to leave criminal justice to the State."⁸⁸ He goes on to note that "[t]he [F]ounders 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."⁸⁹ These quotations suggest that, in Scalia's view, the jury right was the Founders' way of checking the judicial power of the state.

Scalia is even clearer in subsequent opinions. Most importantly, in *Blakely v. Washington*, Scalia, this time writing for the majority, characterizes the jury right as "no mere procedural formality, but a fundamental reservation of power in our constitutional structure."⁹⁰ He goes on to argue, citing founding era documents including the diary of John Adams, that "[j]ust as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."⁹¹ In *Ring v. Arizona*, Justice Scalia explicitly rejects characterization of the jury right as merely a guarantee of accuracy, noting that "[t]he Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders."⁹²

85 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 261 (Harvey C. Mansfield & Delba Winthrop eds., trans., 2000) (1835).

86 *Id.* at 260 ("The jury is . . . before everything a political institution.").

87 *See Apprendi v. New Jersey*, 530 U.S. 466, 555 (Breyer, J., dissenting).

88 *Id.* at 498 (Scalia, J., concurring).

89 *Id.*

90 *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

91 *Id.*

92 *Ring v. Arizona*, 536 U.S. 584, 607 (2002).

A view of the jury as more than a guarantor of accuracy is reflected beyond Scalia's opinions in the *Apprendi* line. The *Apprendi* majority, quoting an early constitutional authority, recognizes that the historical function of the jury is "[t]o guard against a spirit of oppression and tyranny on the part of rulers" and to serve "as the great bulwark of [our] civil and political liberties."⁹³ *Jones*, the clear forerunner of the *Apprendi* line, also undertakes an extensive examination of the history of the Sixth Amendment and reaches the same conclusion.⁹⁴

Additionally, the Court's holding that *Ring v. Arizona* does not apply retroactively provides further support for the notion that the Sixth Amendment as interpreted by *Apprendi* is not concerned primarily with accuracy.⁹⁵ The retroactivity inquiry centers on the risk of inaccurately convicting a person for conduct the law does not prohibit, or, in death penalty cases, erroneously reaching the conclusion that the law allows the sentence of death.⁹⁶ The majority opinion, written by Justice Scalia, dismisses the assertion that judicial fact-finding seriously diminishes accuracy,⁹⁷ suggesting that accurate fact-finding is not what underpins *Ring* and the rest of the *Apprendi* line. The four Justices in dissent argue that accuracy concerns do warrant retroactive application of *Ring*'s rule. Yet the accuracy they have in mind is not accurate fact-finding, but rather accurate reflection of community values.⁹⁸

B. When Viewed Through the Lens of the Jury's Institutional Role, the Arguments in Support of the Majority Position Fail

Having explained the importance of understanding the Sixth Amendment not only as a protection of the rights of an individual defendant but also as an institutional check on government power, I

⁹³ *Apprendi*, 530 U.S. at 477 (alteration in original) (quoting J. STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)) (internal quotation marks omitted).

⁹⁴ See *Jones v. United States*, 526 U.S. 227, 245–49 (1999) (citing early authorities such as WILLIAM BLACKSTONE, COMMENTARIES (1769) in support of the proposition that the jury right was perceived at the time of the founding as a check on the power of the state).

⁹⁵ See *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (rejecting respondent's argument that *Ring* articulated a watershed rule that must be applied retroactively).

⁹⁶ See *id.* at 355; *id.* at 359 (Breyer, J., dissenting).

⁹⁷ *Id.* at 356 (majority opinion) ("When so many presumably reasonable minds continue to disagree over whether juries are better factfinders *at all*, we cannot confidently say that judicial factfinding *seriously* diminishes accuracy.")

⁹⁸ *Id.* at 361 (Breyer, J., dissenting).

now turn to an application of this perspective to the arguments in favor of the majority position.⁹⁹

The argument based on the satisfaction of all constitutionally mandated due process requirements in the juvenile proceeding¹⁰⁰ perhaps most clearly reflects a mistaken emphasis on reliability. The pivotal role that reliability plays in this argument is evident, for example, in *United States v. Matthews*, in which the First Circuit adopted the majority rule:

Thus, while their outcomes differed, all of the courts to consider the issue have agreed that “the question of whether juvenile adjudications should be exempt from *Apprendi*’s general rule should [] turn on . . . an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption.”¹⁰¹

If the only purpose of the jury right were to protect the defendant by ensuring reliability, then the fact that juvenile non-jury adjudications satisfy all applicable due process requirements might justify treating them like adult convictions for *Apprendi* purposes. After all, the argument goes, the Supreme Court’s holding that juries are not required in juvenile courts suggests that juvenile adjudications are at least accurate *enough*. But once it is recognized that the “jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders”¹⁰² but instead on a fundamental reservation to the people of control over the judiciary, an additional weakness in this argument is revealed.

The untenability of the Oregon approach¹⁰³ is also exposed once the jury right is understood as a fundamental reservation of power to the people over the judiciary. Viewed through this lens, the practice of allowing sentences to be elevated on the basis of non-jury adjudications of guilt can be seen for what it is: an illicit transfer of power from jury to judge and an erosion of the jury right. Allowing a judge to take notice of a prior conviction tried before a jury, as does the prior conviction exception, does not transfer power from jury to

⁹⁹ See *supra* Part II.

¹⁰⁰ That is, the use of a juvenile non-jury adjudication to elevate a subsequent adult sentence does not violate *Apprendi* so long as the adjudication comported with all constitutionally mandated due process requirements. See discussion *supra* Part II.A.

¹⁰¹ *United States v. Matthews*, 498 F.3d 25, 35 (1st Cir. 2007) (alteration in original) (quoting *United States v. Smalley*, 294 F.3d 1030, 1032–33 (8th Cir. 2002)).

¹⁰² *Ring v. Arizona*, 536 U.S. 536, 607 (2002).

¹⁰³ Oregon has adopted the position that *Apprendi*’s requirement is satisfied if a jury in the adult case finds that there was a previous conviction, even if that previous “conviction” was a juvenile adjudication at which no jury right attached. See *State v. Harris*, 118 P.3d 236, 238–46 (Or. 2005); see also discussion *supra* Part II.C.

judge; rather, it transfers power from one jury to another: from the jury in the present trial to the jury in the original trial. When, on the other hand, jury determination of the fact of a prior conviction is allowed to stand in for jury determination of the facts that support the prior conviction, power is transferred to the judge in the juvenile proceeding, and the jury right is rendered meaningless. Because in such a scenario “the length of a sentence is made to depend upon facts removed from [the jury’s] determination,”¹⁰⁴ the jury’s role is impermissibly diminished in a way that is contrary to “the system envisioned by a Constitution that guarantees trial by jury.”¹⁰⁵

The argument that non-jury juvenile adjudications are convictions for *Apprendi* purposes because recidivism is a highly traditional basis on which a judge may increase a sentence¹⁰⁶ reflects the same one-sided understanding of the jury right. When approached with the jury’s role as a mechanism of popular sovereignty in mind, this tradition-based argument is persuasive only when the assigning the determination in question to a judge does not allow the judiciary to misappropriate power that traditionally belongs to the people. Otherwise, the role of the jury is unacceptably diminished. When a judge bases a recidivism enhancement on a juvenile adjudication, however, she unquestionably takes from the jury the right to determine questions traditionally within their province—the facts supporting an adjudication of guilt.

IV. POSSIBLE SOLUTIONS TO THE CONSTITUTIONAL PROBLEM WITH USING PRIOR JUVENILE NON-JURY ADJUDICATIONS AS SENTENCE ENHANCEMENTS FOR CRIMES COMMITTED AS AN ADULT

If the use of prior juvenile non-jury adjudications to enhance adult sentences is a violation of the constitutional right to a jury trial, as this Comment has argued, this problem could be resolved by the Supreme Court in one of three ways.¹⁰⁷ One option would be for the

¹⁰⁴ *Oregon v. Ice*, 129 S. Ct. 711, 721 (Scalia, J., dissenting).

¹⁰⁵ *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

¹⁰⁶ See discussion *supra* Part II.B.

¹⁰⁷ The Court has rejected numerous petitions for certiorari in cases that squarely presented this issue; among those cases are decisions that have reached opposite results. See, e.g., *United States v. Matthews*, 498 F.3d 25, 35 (1st Cir. 2007), *cert. denied*, 552 U.S. 1238 (2008); *United States v. Crowell*, 493 F.3d 744, 750 (6th Cir. 2007) (holding that the use of procedurally sound juvenile adjudications to enhance adult sentences does not violate due process), *cert. denied*, 552 U.S. 1105 (2008); *United States v. Burge*, 407 F.3d 1183

Supreme Court to overrule *Almendarez-Torres* and hold that prior convictions are not exempted from the general principle laid out in *Apprendi*. A second possibility would be to hold that juveniles have a constitutional right to a trial by jury, overruling *McKeiver*. Juvenile adjudications going forward would therefore include a jury right and would fall within the *Almendarez-Torres* prior conviction exception. Finally, the Court could simply hold that a non-jury juvenile conviction does not fall within the prior conviction exception to *Apprendi*. Each of these possibilities will be addressed in turn.

A. Overruling *Almendarez-Torres*

Because the continued viability of *Almendarez-Torres* has been in question almost since it was handed down,¹⁰⁸ perhaps the most obvious solution would be to overrule that case, which is limited to the fact of recidivism alone,¹⁰⁹ and update the *Apprendi* rule to reflect the lack of a prior conviction exception. The characterization of *Almendarez-Torres* as “an exceptional departure from . . . historic practice”¹¹⁰ that was “arguabl[y] . . . incorrectly decided,”¹¹¹ coupled with the fact that it was a five-four decision about which a fifth justice has subse-

(11th Cir. 2005), *cert. denied*, 546 U.S. 981 (2005); *United States v. Jones*, 332 F.3d 688 (3d Cir. 2003), *cert. denied*, 540 U.S. 1150 (2004); *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003); *People v. Nguyen*, 209 P.3d 946 (Cal. 2009), *cert. denied*, 130 S. Ct. 2091 (2010); *Ryle v. State*, 842 N.E.2d 320 (Ind. 2005), *cert. denied*, 549 U.S. 836 (2006); *State v. Hitt*, 42 P.3d 732 (Kan. 2002), *cert. denied*, 537 U.S. 1104 (2003); *State v. Brown*, 879 So. 2d 1276, 1290 (La. 2004) (finding the use of juvenile adjudications to increase a defendant’s penalty as unconstitutional), *cert. denied*, 543 U.S. 1177 (2005); *State v. Weber*, 149 P.3d 646 (Wash. 2006), *cert. denied*, 551 U.S. 1137 (2007). Nevertheless, the Court is certain to continue to receive petitions presenting this issue. Indeed, at least one petition raising this issue was pending when this Comment went to print. *See Welch v. United States*, 604 F.3d 408 (7th Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3129 (U.S. Sept. 1, 2010) (10-314). In *Welch*, the Seventh Circuit addressed for the first time the question of whether juvenile adjudications could be used to elevate adult sentences and concluded that “because juvenile adjudications are reliable, they are not subject to the *Apprendi* rule.” *Id.* at 429. Judge Posner dissented, interpreting *Apprendi* to require that a prior conviction used as a sentence elevating factor “must be the outcome of a proceeding in which the defendant had a right to have a jury determine his guilt.” *Id.* at 431 (Posner, J., dissenting).

108 *See* James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 554 (2009) (observing that in addition to the four dissenting justices in *Almendarez-Torres*, Justice Thomas, who sided with the majority, has also expressed the view that the case might have been wrongly decided).

109 *See Apprendi*, 530 U.S. at 488 (noting the general agreement that the holding of *Almendarez-Torres* was limited to recidivism).

110 *Id.* at 487.

111 *Id.* at 489.

quently expressed reservations,¹¹² suggest that this is a plausible scenario. However, the recent decision in *Ice*, which enshrined into the *Apprendi* jurisprudence the importance of the traditional classification of a fact as a sentencing factor,¹¹³ might have changed this calculus somewhat because of its implicit endorsement of the logic underpinning *Almendarez-Torres*.

Perhaps more importantly, overruling *Almendarez-Torres* would close the prior conviction exception not only to juvenile non-jury adjudications, but also to prior adult convictions that were decided by juries. It is therefore an overbroad solution to the problem discussed in this Comment. It seems unlikely that the Supreme Court would resolve the constitutional problem associated with sentence enhancement based on juvenile priors by overruling a precedent that, as it applies to adult convictions, does not raise any constitutional concerns.

B. Overruling *McKeiver*

The Supreme Court could remedy the constitutional obstacle to use of juvenile priors by doing away with non-jury juvenile adjudications altogether. This could, of course, be accomplished by state legislatures. Indeed, some states have provided such a right in limited circumstances, but even in those states the vast majority of juvenile adjudications are not decided by juries.¹¹⁴ At least one state supreme court has held that juveniles do have a state constitutional right to a jury trial.¹¹⁵

Eliminating the problem nationally, however, would require the U.S. Supreme Court to explicitly overrule *McKeiver*. Some critics of the juvenile justice system have argued that the Court should do just that.¹¹⁶ The argument for doing so is essentially that the rationale

¹¹² See *id.* at 499–523 (Thomas, J., concurring).

¹¹³ See *Oregon v. Ice*, 129 S. Ct. 711, 717 (2009) (finding historical practice adequate to justify leaving consideration of facts relevant to the decision to impose multiple sentences consecutively or concurrently to the judge rather than the jury).

¹¹⁴ See Sandra M. Ko, Comment, *Why Do They Continue to Get the Worst of Both Worlds? The Case for Providing Louisiana's Juveniles with the Right to a Jury in Delinquency Adjudications*, 12 AM. U. J. GENDER SOC. POL'Y & L. 161, 177–78 n.118 (2004) (stating that between 1% and 3% of juvenile adjudications are decided by juries in states where juveniles have the right to a jury trial).

¹¹⁵ See *In re L.M.*, 186 P.3d 164, 171–72 (Kan. 2008) (holding that juveniles have a right to a jury trial under the Kansas Constitution).

¹¹⁶ See Feld, *supra* note 63, at 1111 (arguing that *McKeiver* should be overruled); see also Rixey, *supra* note 63, at 887 (arguing that the reasoning of *McKeiver* has been undermined by changes in the juvenile system).

underpinning the *McKeiver* decision is no longer applicable.¹¹⁷ In other words, because juvenile codes have become increasingly punitive and less rehabilitative, the absence of a jury guarantee can no longer be justified, as it was in *McKeiver*, by appealing to the *parens patriae* role of the state in juvenile proceedings.¹¹⁸ One scholar has even gone so far as to argue that *Apprendi* should provide additional motivation to the Court to overrule *McKeiver* so that juvenile adjudications could be used to enhance adult sentences without raising constitutional doubts.¹¹⁹

Essentially, then, the decision between this solution and the overruling of *Almendarez-Torres* boils down to the question of whether it is more desirable to overhaul the juvenile justice system by providing a constitutional jury right to avoid the tension with *Apprendi*, or to close the prior conviction exception in *Apprendi* to bring that case's rule in line with the reality of the juvenile justice system. The policy considerations in favor of the former are compelling,¹²⁰ but the constitutional argument does not appear to have gained much traction within the court. Moreover, this possibility seems less likely than the latter, as the Court has not expressed the same doubts about *McKeiver* as it has about the continued viability of the *Almendarez-Torres* precedent.¹²¹

At any rate, speculation regarding the relative likelihood that the Court will overrule one of the two aforementioned precedents ultimately does not provide guidance as to what the Court *should* do. As a solution to the constitutional problem with which this Comment is concerned, this solution, like the possibility of overruling *Almendarez-Torres*, is overbroad. Overruling *McKeiver* would provide a new jury right to juveniles even where the constitutional problem with which this Comment is concerned does not arise, depriving states of the flexibility that the Court has deemed necessary to a distinct informal

117 See Rixey, *supra* note 63, at 887.

118 See *id.* (“[T]he reasoning and public policy considerations of *McKeiver v. Pennsylvania* no longer apply because of the changing and increasingly punitive nature of juvenile codes.”).

119 See Feld, *supra* note 63, at 1111–12 (“*McKeiver* long has been ripe for overruling on its own merits, and *Apprendi* provides additional impetus for the Supreme Court and states to grant juveniles a constitutional or statutory right to a jury trial so that criminal courts properly may use delinquency adjudications as a legitimate ‘fact of a prior conviction.’”).

120 See generally Feld, *supra* note 63 (arguing that the constitutional tension between *Apprendi* and *McKeiver* should be resolved by overruling *McKeiver* and requiring jury trials in juvenile courts); Rixey, *supra* note 63 (advocating the overruling of *McKeiver* because the policy considerations underpinning it are no longer applicable).

121 See discussion *supra* Part I.A.

and rehabilitation-oriented juvenile justice system.¹²² While there is good reason to believe this would be a change for the better, such a broad solution is not called for by the narrow constitutional problem in question.

C. *A Juvenile Adjudication Is Not a Conviction Within the Meaning of the Almendarez-Torres Exception to Apprendi*

The solution most compatible with Supreme Court precedent would be to hold that a non-jury juvenile adjudication is not a prior conviction for *Apprendi* purposes. In other words, rather than changing the *Apprendi* rule or upending the juvenile justice system, the Court could simply answer in the negative the central question addressed in this Comment, which currently divides the circuits and state courts. The Court could simply hold that a non-jury adjudication is not a prior conviction for purposes of the exception to *Apprendi*.

Allowing judges alone to elevate sentences substantially erodes the jury right and undermines the reservation of power to the people that the framers sought to effectuate by guaranteeing the right to a jury trial. It does so in a way that *Almendarez-Torres* does not because, unlike in the case of a previous adult conviction, no jury has *ever* found the ultimate facts necessary to find the defendant guilty. Significantly, this position is also consistent with the *McKeiver* rationale regarding the differences between adult and juvenile criminal proceedings. Because this solution does not require overruling any past precedents, it seems the most plausible. Moreover, it resolves the narrow constitutional problem with elevating sentences based on prior juvenile adjudications with no collateral effects for other parties. Finally, it effectively reconciles the *Apprendi* rule with the concern that truly underpins the Sixth Amendment Jury Guarantee. For these reasons, the Supreme Court should grant certiorari in an appropriate case¹²³ and hold explicitly, as have the Ninth Circuit and the Louisiana Supreme Court, that prior juvenile non-jury adjudications are not prior convictions within the meaning of *Apprendi* and therefore may not constitutionally be used to enhance sentences in later adult criminal proceedings.

122 See *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971) (“If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.”).

123 The Court receives petitions for certiorari in such cases regularly. See *supra* note 108.

V. CONCLUSION

This Comment has sought to address the constitutional problem under *Apprendi* and its progeny that arises when a prior non-jury juvenile adjudication is used to enhance an adult defendant's sentence for a subsequent crime. My aim was to examine this question in light of an understanding of the Sixth Amendment jury guarantee as not only an individual right aimed at assuring accuracy, but also a community right designed to limit the power of the state.

To be clear, my intent has not been to diminish the importance of the jury right's role in ensuring accurate fact-finding and protecting individual defendants. Rather, I have sought to draw attention to the other important aspect of the right to a jury trial, and to examine what a more complete understanding of the Sixth Amendment's jury guarantee suggests about the unresolved question of juvenile adjudications as elevating factors in subsequent adult sentencing. An examination of the arguments favoring the majority position reveals that they fail to account for the jury's structural role. In light of this determination, this Comment proposes that the Supreme Court hold explicitly that juvenile non-jury adjudications may not later be used to increase the sentence of an adult defendant.