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Recommended Citation
Deborah L. Mills, United States v. Johnson: Acknowledging the Shift in the Juvenile Court System from Rehabilitation to Punishment, 45 DePaul L. Rev. 903 (1996)
Available at: https://via.library.depaul.edu/law-review/vol45/iss3/9

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UNITED STATES V. JOHNSON: ACKNOWLEDGING THE SHIFT IN THE JUVENILE COURT SYSTEM FROM REHABILITATION TO PUNISHMENT

INTRODUCTION

The juvenile court system was originally designed to rehabilitate juvenile offenders.1 However, the number of juvenile offenders has increased and their crimes have become more violent.2 The United States Supreme Court responded to this situation accordingly. For example, as early as 1967, the Court dramatically altered the juvenile justice system in the landmark decision of In re Gault3 by granting juveniles many of the procedural protections given to adults.4 Gault was sentenced to a period of confinement and the Court emphatically stated that “the condition of being a boy does not justify a kangaroo court.”5 Many states also have adapted to the changing times by passing laws reflecting the notion that the juvenile court system should be

1. See Sanford J. Fox, Juvenile Justice Reform: An Historical Perspective, 22 STAN. L. REV. 1187, 1212 (1970) (stating that there was an “underlying rehabilitative aim” to all “juvenile penology”).

2. See Hon. Gordon A. Martin, Jr., The Delinquent and the Juvenile Court: Is there Still a Place for Rehabilitation?, 25 CONN. L. REV. 57, 64 n.32 (1992) (citing Glenn L. Pierce & James A. Fox, Recent Trends In Violent Crime: A Closer Look, NATIONAL CRIME ANALYSIS PROJECT, NORTHWESTERN UNIVERSITY, at 161.3 (Oct. 1992)) (stating that the arrest rate for criminal homicide for fifteen year-olds increased dramatically from 11.8 per 100,000 males in 1985 to 37.4, representing an increase of 217 percent); see also Avis LaVelle, Essence on the Issues: Should Children Be Tried As Adults?, ESSENCE, Sept. 1994, at 85 (stating that the “portrait of the American criminal is changing” insofar as it “[i]ncreasingly ... bears the face of a child,” as shown by the fact that the number of young people arrested for committing violent crimes increased from 66,296 in 1983 to 104,137 in 1992); David Zucchino, Violence: Down but Deadly, TIME, Sept. 19, 1994, at 60, 63 (exemplifying heinous juvenile violence by discussing the case of a fourteen-year-old who was found guilty of the gruesome killing of a preschooler).


4. Id. at 33-42 (holding that due process requires that a juvenile and his parents must be given constitutionally adequate notice before a hearing on the issues and must also be informed of their right to counsel). In addition, the juvenile is entitled to the constitutional privilege against self-incrimination and to the constitutional rights of confrontation and cross examination. Id. at 44-57.

5. Id. at 27-28.
used to punish juveniles, rather than to rehabilitate them. Also, support is dwindling for state efforts to rehabilitate juveniles who have committed serious crimes such as homicide because the crime of homicide evokes such strong emotions.

In 1984, Congress ordered the United States Sentencing Commission ("Commission") to establish sentencing guidelines. Pursuant to this order, the Commission established the United States Sentencing Guidelines ("Guidelines"). The Guidelines enhance an adult criminal's sentence based on both his prior adult sentences and prior juvenile sentences. Generally, the Guidelines treat prior juvenile and adult sentences of confinement for more than sixty days alike for the purpose of determining the appropriate sentence enhancement.

This principle was challenged in United States v. Johnson, where the defendant argued that due to the basic differences between the adult and juvenile court systems, the Commission abused its authority by treating his previous juvenile sentences of confinement the same as his previous adult sentence. The United States Court of Appeals for the District of Columbia held that the Commission acted within its delegated authority in establishing the Guidelines, and that its decision to give juvenile confinements the same weight as adult criminal

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6. See Barry C. Feld, The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes, 68 B.U.L. Rev. 821, 821-22 (1988) [hereinafter Feld, Principle of Offense] ("The trend of juvenile courts is to employ a 'justice model,' which prescribes the appropriate sentence on the basis of 'just deserts' rather than 'real needs,' reflects a movement away from a rehabilitation-treatment based model.")

7. See Martin, supra note 2, at 63 n.28 (discussing the example of thirteen-year-old Barry Massey of Washington State who was tried as an adult for the murder of a marina owner and sentenced to life in prison without parole); see also Laura Sessions Stepp, The Crackdown on Juvenile Crime: Do Stricter Laws Deter Youths?, Wash. Post, Oct. 15, 1994, at A1 (suggesting that society seems to support the idea of punishment for juveniles who commit crimes).

In several recent surveys on crime, many Americans appear to support strong measures. After American youth Michael Fay was sentenced to caning in Singapore for vandalism, for example, more than half of Americans surveyed in a Newsweek poll indicated that caning was appropriate punishment for spray-painting cars. And, in a Gallup poll released in August, 86 percent of adults favored increased penalties for student possession of weapons in school.

Id. at A12.


11. Id.


13. 28 F.3d 151 (D.C. Cir. 1994).

14. Id. at 153-55.
confinements was not unreasonable. The court's decision was soundly rooted in history and precedent.

This Note discusses the case of United States v. Johnson and its consistency with current laws dealing with juveniles and the Guidelines. Section I discusses the background of the juvenile court system, including its creation and development. This section then discusses the creation of the Guidelines and how courts have dealt with them. Section II provides a discussion of United States v. Johnson. Section III analyzes the Johnson case and concludes that it is consistent with the general trend in this country to punish repeat offenders. Section IV describes the positive impact the Johnson case has on our society. Finally, this Note concludes that the trend toward punishing recidivism results in a better society.

I. BACKGROUND

A. The Evolving Juvenile Court System

The first juvenile court was established during the Progressive Reform Movement in Chicago, Illinois in 1899. The motivating prin-

15. Id. at 155-56.
16. Many state and federal cases stand for the proposition that an adult's prior adjudications, both juvenile and adult, can be considered in determining his sentence as an adult. See Daniel E. Feld, Annotation, Consideration of Accused's Juvenile Court Record in Sentencing for Offense Committed as Adult, 64 A.L.R. 3d. 1291, 1294-95 (1975 & Supp. 1995) [hereinafter Feld, Consideration of Accused's Juvenile Court Record] (stating that most courts that have considered whether judges may consider the accused's juvenile court record in sentencing an accused for an adult offense have decided that the judge may consider this record) (citing, e.g., United States v. Gardner, 860 F.2d 1391 (7th Cir. 1988), cert. denied, 490 U.S. 1751 (1989); People v. Hubbell, 108 Cal. App. 3d. 253 (Cal. Ct. App. 1980); State v. Brown, 825 P.2d 482 (Idaho 1992); Commonwealth v. Phillips, 492 A.2d 55 (Pa. 1985)); see also 18 U.S.C. § 5038 (1994) (providing that throughout a juvenile delinquency proceeding, the juvenile records pertaining thereto must not be disclosed to unauthorized persons but may be released to the extent necessary to meet, inter alia, inquiries from an agency preparing a presentence report for another court).
17. See infra notes 22-163 and accompanying text (discussing the historical, philosophical and judicial creation and development of the juvenile court system).
18. See infra notes 164-211 (discussing the United States Sentencing Guidelines and their application by federal courts).
20. See infra notes 277-338 (analyzing the Johnson decision).
21. See infra notes 339-349 (discussing the impact of the Johnson decision).
22. This movement describes the period in American history, from the latter part of the nineteenth century to the early twentieth century, wherein the country experienced radical changes as the completion of the railroads modified "economic socialization," and the rise in immigration and urbanization led to an increase in the social construction of cities. Barry C. Feld, The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes, 78 J. CRIM. L. & CRIMINOLOGY 471, 473-74 (1987) [hereinafter Feld, Juvenile Waiver Statutes]; cf. Simonsen, supra note 2, at 7-8 (stating that during the Middle Ages, children convicted of "...
The principle behind the creation of this court system was to protect and reform juveniles who committed crimes. Therefore, the juvenile court was designed to deal with cases involving both juvenile delinquency and juvenile neglect.

Several suggestions have been made for what actually motivated the creation of the separate juvenile court system. Some commentators suggest that this system may have developed in response to the changes accompanying the shift of the United States from a rural, agrarian society to an urban, industrialized society. As this shift occurred, Americans began to experience the accompanying problems of modernization, urbanization, and immigration. The leaders of the reform movement, known as the Progressives, emerged to address...
these problems by offering solutions that incorporated the changing conceptions of childhood and social control strategy.28

This economic transformation was accompanied by changes in basic family structure and functions which, in turn, had an impact on society's conception of children.29 For the preceding two or three centuries, juveniles had been viewed as smaller versions of their parents, which meant that they also were treated much like their parents.30 However, at the end of the nineteenth century, society began to view juveniles as vulnerable beings in need of protection.31 This perception placed an increased burden of responsibility on parents to "supervise their children's moral and social development."32 As a result, the juvenile court reflected those Progressive reforms which centered around children.33

Commentators have suggested that another factor triggering the creation of a separate court system for juveniles may have been the ideological shift during the latter part of the nineteenth century concerning the causes of crime.34 Prior to this period, little scientific research had been done to determine the causes of crime and juvenile delinquency.35

The classical view reflected the notion that free willed individuals caused crime.36 According to this view, people were rational beings capable of making rational decisions.37 Criminals and law abiding citi-

28. Id. at 693-95 (explaining that "the Progressives believed that benevolent state action guided by experts could alleviate social ills . . . ."); see also Barry C. Feld, Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court, 69 MINN. L. REV. 141, 143 (1984) [hereinafter Feld, Criminalizing Juvenile Justice] (noting that problems such as "urban ghettos, poverty, congestion, disorder, crime, and inadequate social services accompanied the development of modern urban industrial life").

29. See Feld, Transformation of the Juvenile Court, supra note 21, at 693 ("Families became more private, women's roles more domestic, and a view of childhood and adolescence as distinct developmental stages emerged.").

30. Id. at 693-94; see also TROJANOWICZ & MORASH, supra note 23, at 12 (stating that during the early years of American history, juvenile delinquents were treated in the same manner as adult criminals, primarily with respect to punishment).

31. See Feld, Transformation of the Juvenile Court, supra note 26, at 694 (stating that "children increasingly were seen as vulnerable, innocent, passive and dependent beings who needed extended preparation for life.")

32. Id.

33. Id. In addition to creating the juvenile court, the Progressive programs resulted in laws that regulated child labor, child welfare and compulsory school attendance. Id.

34. Id. at 694-95.

35. TROJANOWICZ & MORASH, supra note 23, at 40.

36. See generally id. at 40-42 (discussing two schools of thought, the classical and the positive, which provide the basis for "past and contemporary criminological assumptions and principles of delinquency and criminality")

37. Id. at 40-41.
zens were believed to be similar in every respect, except that criminals "willed" crime. Accordingly, classicists held the belief that the proper punishment for a criminal was to give him a harsh sentence to "unwill" his propensity for crime. The classical criminal justice system was designed as a device to protect society and force the criminal to change his ways.

The positivist school of thought, which emerged during the latter part of the nineteenth century, challenged the classical view. According to positivist theory, crime was caused by external forces rather than by an individual's deliberate choices. The positivist theory rejected the traditional view that criminals exercise reason and are capable of choice and free will. In addition, positivists rejected the classical notion that criminals were no different than law-abiding citizens. Rather, the positivists believed that a criminal's conduct was merely a reflection of the external forces controlling his life. These external forces included the offender's "biological, psychological, sociological, cultural and physical environments," although not all positivists agreed as to which factor determined or caused criminal behavior. The growing acceptance of positivistic criminology was probably a strong influence behind the creation of a separate juvenile court system.

38. Id. at 40.
39. Id. The idea was that criminals were viewed as rational people and that invocation of the "pleasure-and-pain principle" would quash their criminal desires. Id.
40. Id. at 41.
41. Feld, Juvenile Waiver Statutes, supra note 22, at 475. The positivist theory, founded by Cesare Lombrosco, is defined as "the identification of antecedent causal variables producing crime and deviance." Id.; see also TROJANOWICZ & MORASH, supra note 23, at 41.
42. See Feld, Juvenile Waiver Statutes, supra note 22, at 475. Feld explains that the classic view suggested that crime was something an individual deliberately chose to do, whereas the newer positivist theory viewed crime as an end product of external forces. Id. Thus, the positivist view decreased the actor's moral responsibility for the crime committed. Id.
43. TROJANOWICZ & MORASH, supra note 23, at 41.
44. Id.
45. Id.
46. See id. at 41-42 (explaining that the founder of positivism, Cesare Lombrosco, believed that biological factors caused criminal behavior, while later positivists believed that sociological factors were the primary cause).
47. Feld, Juvenile Waiver Statutes, supra note 22, at 474 (stating that criminology borrowed both methodology and vocabulary from the medical profession in its "quest for scientific legitimacy"). For an overview of various contemporary theories of criminality, see TROJANOWICZ & MORASH, supra note 23, at 42-80.
48. See Feld, Juvenile Waiver Statutes, supra note 22, at 474-75 (stating that among the criminal justice reforms introduced by the Progressives was the juvenile court, a development which reflected the "changing ideological assumptions about the causes and cures of crime and deviance").
In short, the movement toward urbanization, the changing conceptions of the causes of crime, or a combination of these factors may have led to the creation of an independent juvenile court system. Based upon the changing conceptions of children and new ideas about the causes of criminal behavior, the Progressives developed the juvenile court as a system separate from the adult criminal court. In doing so, the Progressives rejected the use of adult criminal prosecution procedures in juvenile court. Instead, Progressives described the new juvenile court system as an entity that is “benign, nonpunitive, and therapeutic.”

Thus, from the beginning of the juvenile court system, juveniles were treated quite differently than their adult counterparts. The juvenile hearings were informal and nonpublic, records were kept confidential, and juveniles were detained apart from adults. One reason the reformers treated the two systems differently was that they were “appalled” by the idea that children might be given harsh penalties or subjected to the brutal procedures of the adult court system. Therefore, the juvenile court system was not originally intended to decide whether a juvenile was guilty or innocent; rather, it was designed to save a child from a “downward career” of criminal activity.

49. See Feld, Transformation of the Juvenile Court, supra note 26, at 693-95 (explaining how the changing views of children and strategies of social control affected the Progressive criminal justice reforms).

50. Id. at 695; see also Feld, Juvenile Waiver Statutes, supra note 22, at 476 (“By separating children from adult offenders, the juvenile court also rejected the jurisprudence and procedures of criminal prosecutions.”) Feld also observed that courtroom procedures were modified to eliminate any implication of a criminal proceeding; a euphemistic vocabulary and a physically separate court building were introduced to avoid the stigma of adult prosecutions. Proceedings were initiated by a petition in the welfare of the child, rather than by a criminal complaint. Juries and lawyers were excluded, since the important issues in juvenile court proceedings were the child's background and welfare, rather than the details surrounding the commission of a specific crime. Judges dispensed with technical rules of evidence and formal procedures in order to obtain all available information.

51. Feld, Transformation of the Juvenile Court, supra note 26, at 694-95.

52. See, e.g., In re Gault, 387 U.S. 1, 14 (1967) (“It is frequent practice that rules governing the arrest and interrogation of adults by the police are not observed in the case of juveniles.”).


54. Gault, 387 U.S. at 15; cf. SIMONSEN, supra note 2, at 8 (stating that in 1682, an example of the severity of juvenile punishment for the crime of misbehavior was to put a child in the stocks and whip him). But see Fox, supra note 1, at 1222 (arguing that there was little use of oppressive criminal procedure in juvenile cases during the turn of the century that could possibly have appalled the reformers).

55. See Mack, supra note 23, at 119-20. Mack explains that the role of the judge is not to determine whether a “boy or girl committed a specific wrong,” but to ask, “[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career”. Id. Mack further stated that
Before the reform movement, the "law did not differentiate between the adult and the minor who had reached the age of criminal responsibility." At common law, children under the age of seven were considered incapable of committing crimes. However, once a child reached the age of criminal responsibility prescribed by the state's law, he or she was treated as an adult. Since the juvenile reform movement, the age of criminal responsibility has increased by several years. Currently, the age of criminal responsibility is eighteen in thirty-eight states and the District of Columbia. This increase in the age of criminal responsibility illustrates the concept that juvenile delinquents were intended to be treated differently than adult criminals. Indeed, as the above discussion implies, the juvenile court was originally designed as a separate mechanism aimed, at least in part, at rehabilitating juveniles.

The child who is brought into the court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. Id. at 120; see also TROJANOWICZ & MORASH, supra note 23, at 13 (stating that the prescribed goals of the juvenile court were "to investigate, diagnose, and prescribe treatment, not to adjudge guilt or fix blame").

See Mack, supra note 23, at 106. ("The majesty and the dignity of the state demanded vindications from both alike.").

In re Gault, 387 U.S. 1, 16 (1967); see also Mack, supra note 23, at 106 (explaining that the age of criminal responsibility was "seven at common law in some of our states, ten in others, with a chance of escape up to twelve, if lacking in mental and moral maturity").

Gault, 387 U.S. at 16; see also Mack, supra note 23, at 106 (explaining that the reason children were treated as adults at such an early age was because the basic thought in criminal jurisprudence at the time was not reformation, but punishment).

See Martin, supra note 2, at 60 n.9 (stating that currently most jurisdictions define a juvenile as "one who has not reached the age of eighteen"). As early as 1909, some state legislatures designated the age of criminal responsibility to be over the age of either fourteen or sixteen. Mack, supra note 23, at 109. An example quoted by Mack is the New York statute of May 25, 1909, which stated:

A child of more than seven and less than sixteen years of age, who shall commit any act or omission, which, if committed by an adult, would be a crime not punishable by death or life imprisonment, shall not be deemed guilty of any crime, but of juvenile delinquency only.

Id. at 108.

Martin, supra note 2, at 60 n.9 (stating that Wyoming is the only state that sets the age of criminal responsibility at nineteen, while Georgia, Illinois, Louisiana, Massachusetts, Michigan, Missouri, South Carolina, and Texas set the age of criminal responsibility at seventeen, and Connecticut, New York, and North Carolina dictate the age of criminal responsibility to be sixteen).

See supra notes 34-61 and accompanying text (discussing the influence of the concept of rehabilitation on the early development of the juvenile court system).
2. The Contemporary Juvenile Court System

Although the original purpose of the juvenile court system was to rehabilitate\textsuperscript{62} the juvenile and discourage recidivism, in the past decade, at least "ten state legislatures have redefined the purpose of their juvenile courts."\textsuperscript{63} According to Professor Barry Feld, a state's juvenile sentencing statute can serve as a guideline as to whether a juvenile court is actually serving the function of punishing or rehabilitating juveniles.\textsuperscript{64} Feld states that, "[a]lthough most juvenile sentencing statutes mirror their Progressive origins, even states that use indeterminate sentences emphasize the offense as a dispositional constraint."\textsuperscript{65} Approximately one-third of the states now use both the present offense and the prior record in determining an appropriate sentence for the juvenile.\textsuperscript{66} Furthermore, some states "have rejected the traditional offender-oriented juvenile court sentencing philosophy," and have chosen instead to emphasize the adult sentencing policies of retribution or incapacitation.\textsuperscript{67} For instance, several states even impose mandatory minimum sentences for certain felonies committed by juveniles.\textsuperscript{68}

63. Feld, Principle of Offense, supra note 6, at 842 n.84 (citing ARK. STAT. ANN. § 9-27-302 (1987); CAL. WELF. & INST. CODE § 202 (West 1984); FLA. STAT. ANN. § 39.001(2)(a) (West 1988); HAW. REV. STAT. § 571-1 (1985); IND. CODE ANN § 31-6-1-1 (BUTKS 1980); MINN. STAT. ANN. § 260.011(2) (West 1985); TEX. FAM. CODE ANN. § 51.01(2) (Vernon 1986); VA. CODE ANN. § 16.1-227 (1988); WASH. REV. CODE ANN. § 13.40.010(2) (West 1988); W. VA. CODE § 49-1-1(a) (1986)).
64. Feld, Transformation of the Juvenile Court, supra note 26, at 710.
65. Id. at 710-11.
66. Id. at 711. Feld points to Washington, which enacted "legislation that based presumptive sentences on a youth's age, present offense, and prior record." Id. (citing WASH. REV. CODE ANN. § 13.40.010(2) (West 1990)). New Jersey considers the offense, criminal history, and statutory aggravating and mitigating factors when sentencing juveniles, and enhances sentences for serious or repeat offenders. Id. (citing N.J. STAT. ANN. § 2A:4A-43(a) (West 1990)). In addition, Texas considers determinate sentences for juveniles charged with serious offenses. Id. (citing TEX. FAM. CODE ANN. § 54.04 (West 1991)).
67. Feld, Juvenile Waiver Statutes, supra note 22, at 511. But see SIMONSEN, supra note 2, at 49 (noting that in 1969, Dr. Jerome Miller, who was the youth commissioner for Massachusetts, took radical action and closed a juvenile institution, marking the end of the era of confining children in large correctional institutions). At the same time, a team of researchers at Harvard University released a study in which they spent eight years conducting an intensive examination of minors released from institutions and those released from community programs. Id. at 49. The study found that the "community based group did worse (in terms of recidivism) than the group released from the institutions." Id.
68. Feld, Transformation of the Juvenile Court, supra note 26, at 711 n.105 (citing OHIO REV. CODE ANN. § 2151.355 (Anderson 1990); N.Y. FAM. CT. ACT §§ 301.2(8)-(9), 352.2 and 353.5 (McKinney Supp. 1990)). Feld notes that certain mandatory minimum statutes give judges discretion in deciding whether or not to institutionalize a juvenile; nonetheless, if the judge does decide to institutionalize the offender, then the minimum term will apply. Id. at n.106 (citing
a. Types of Juvenile Offenses

As stated above, the juvenile court was created on the premise that a juvenile could be rehabilitated. There are two different types of state laws that prohibit certain behavior by children. A violation of either type of these laws is considered delinquent behavior. The first type includes those laws that prohibit behavior which also is prohibited for adults. The second type includes state laws that prohibit status offenses, which are offenses that are only prohibited for juveniles, such as running away from home.

b. Waiver into Adult Court

From its creation, the juvenile court system has provided a mechanism whereby serious juvenile offenders can be treated as adults. Today, most legislatures have adopted some form of legislation whereby a juvenile can be transferred from the juvenile court into adult court. The most prevalent method to accomplish this transfer is through a judicial waiver. In performing this procedure, a judge will decide whether or not to waive a juvenile into adult court based

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69. See supra note 67 and accompanying text (concluding that rehabilitation was a major goal of the juvenile court system as originally created).
70. TROJANOWICZ & MORASH, supra note 23, at 5.
71. Id. at 4. The four key issues that are necessary to understand juvenile delinquency include: (1) who are the adolescents responsible for the most delinquent behavior; (2) which theories offer the best explanation of the causes of delinquency; (3) what programs and methods are effective in controlling delinquency; and (4) what do different groups in our society believe about delinquency. Id. at 5.
72. TROJANOWICZ & MORASH, supra note 23, at 5 (discussing examples such as murder, rape, fraud and robbery).
73. Id. The Guidelines provide that “juvenile offenses and truancy” are never counted toward a person’s criminal history score. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, supra note 10, § 4A1.2(c)(2).
74. Feld, Juvenile Waiver Statutes, supra note 22, at 478.

Under most of the juvenile-court laws a child under the designated age is to be proceeded against as a criminal only when in the judgment of the judge of the juvenile court, either as to any child, or in some states as to one over fourteen or over sixteen years of age, the interests of the state and of the child require that this be done.

75. Feld, Juvenile Waiver Statutes, supra note 22, at 498. For example, “[f]orty-nine states and the District of Columbia use, at least in part, the judicial waiver mechanism.” Id. at 504; cf. Lacayo, supra note 2, at 60 (noting that North Carolina passed a law in 1994 that allows youths as young as thirteen to be tried as adults). The first youthful offender to be tried under this law was thirteen-year-old Andre Green, who confessed to beating his female neighbor with a mop handle and then raping her after having become “infatuated with her.” Id.
76. Feld, Juvenile Waiver Statutes, supra note 23, at 488.
on factors such as the juvenile's threat to society and the likelihood that the juvenile will be rehabilitated. 77

Another mechanism used by states to waive juveniles into the adult court system is the legislative offense exclusion. 78 This is a process whereby the juvenile court automatically excludes juveniles who are charged with certain offenses. 79 Consequently, "[d]issatisfaction with the juvenile system has traditionally been defused and tempered by the existence of exclusion statutes or transfer procedures whereby juveniles can, either by legislative or judicial action, be removed from the juvenile system and placed in adult courts." 80

c. Procedure in Juvenile Courts

If a juvenile is not waived into adult court, then the general procedures for handling juvenile delinquents are as follows: arrest, intake, adjudication, disposition, and aftercare. 81 These procedures differ from those used in adult courts. For example, juvenile court proceedings have always been considered civil rather than criminal proceedings. 82 The reason juvenile proceedings are considered civil is because the purpose of the juvenile court proceeding is to determine the best interests of the child, rather than the child's criminal guilt or innocence. 83

d. Supreme Court Cases

The Supreme Court has played an important role in the development of the juvenile court. The Court has protected the constitutional rights of juveniles much as they have protected the constitutional rights of adult criminals. As early as 1948, in Haley v. Ohio, 84 the Court concluded that the Due Process Clause barred the use of a con-

77. Id.
78. Id.
80. Martin, supra note 2, at 61.
81. See Simonsen, supra note 2, at 29-30 (summarizing the guidelines outlined by the National Juvenile Clearinghouse).
82. See David Dormont, Note, For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences, 75 MINN. L. REV. 1769, 1776 n.43 (1991) (demonstrating the difference in terminology used in the juvenile courts). But see In re Gault, 387 U.S. 1, 23-24 (1967) (stating that the term "delinquent" has come to have only slightly less stigma than the word "criminal").
84. 332 U.S. 596 (1948).
fession taken illegally from a fifteen-year-old boy. Justice Douglas stated that “[n]either man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.”

The Court further extended rights typically enjoyed in the adult criminal system to juveniles in Kent v. United States. In Kent, a sixteen-year-old boy was charged with housebreaking, robbery, and rape. The juvenile court judge issued an order waiving jurisdiction over the boy and directed that his trial be held in the United States District Court for the District of Columbia. The judge recited that this decision had been made after a “full investigation.” However, the judge did not hold a hearing, made no findings, and gave no reason for issuing the waiver. Among other grounds, the petitioner “attacked” the juvenile court’s waiver because: (1) no findings were made by the juvenile court; (2) no reasons were given for the waiver; and (3) counsel was denied access to the social services file.

The Supreme Court held that the waiver was invalid and remanded the case. Writing for the majority, Justice Fortas first acknowledged that the District of Columbia statute that granted judges the power to waive jurisdiction over juveniles gave judges “considerable latitude” in allowing them to reach their decision. However, Fortas cautioned that this statute “does not confer upon the juvenile court a license for arbitrary procedure.” The Court did not reach the merits of the case, but stated that our legal system does not allow waiver to be reached “without a hearing, without effective assistance of counsel, [or] without a statement of reasons.”

The Court warned that a child may get the worst of both worlds by not getting the protection accorded to adults or the “solicitous care and regenerative treatment postulated for children.” The Court

85. Id. at 599-601.
86. Id. at 601.
88. Id.
89. Id.
90. Id.
91. Id. at 546. The petitioner had previously requested a hearing on the issues of waiver, hospitalization for psychiatric observation, examination of the social services file, and an offer of proof to show that the petitioner could be rehabilitated. Id.
92. Id. at 552.
93. Id.
96. Id. at 553.
97. Id. at 554.
98. Id. at 556.
stated that the "parens patriae" philosophy is not an "invitation to procedural arbitrariness." Moreover, the Court found that since the petitioner was sixteen at the time he was charged, he was entitled under the statute to certain benefits of, and the jurisdiction of, the juvenile court. The Court held that the waiver hearing is an extremely important proceeding and, accordingly, the juvenile must be given an opportunity for a hearing and reasons for granting a waiver order.

One year later, in 1967, the entire juvenile court system was dramatically changed by the landmark decision of In re Gault. In Gault, the police arrested the defendant, a fifteen-year-old boy named Gerald Gault, for making lewd remarks to a neighbor on the telephone. At the time of his arrest, Gault was still on probation for being in the company of a boy who was found with a stolen wallet. When the police arrested Gault, his parents were at work. No steps were taken to notify his parents that he had been arrested. His mother did not learn of Gault’s arrest until she sent his brother out to look for him.

A petition was filed with the juvenile court but it was not served upon Gault or his parents. The petition did not state any factual basis for the arrest, but merely stated that Gault was a delinquent minor in need of protection. At Gault’s first hearing, no transcript or recording was made of the proceeding and the complainant was not present. At his next hearing, the judge sentenced Gault to the State Industrial School until the age of twenty-one. Since Arizona did
not permit appeals in juvenile cases,¹¹² the Superior Court dismissed Gault's appeal.¹¹³ Thereafter, Gault sought review in the Arizona Supreme Court.¹¹⁴ The Supreme Court of Arizona affirmed dismissal of the writ.¹¹⁵ On his appeal to the United States Supreme Court, Gault urged the Court to hold the Juvenile Code of Arizona invalid on its face, or as applied in his case, as contrary to the Due Process Clause of the Fourteenth Amendment.¹¹⁶ In reversing the Arizona Supreme Court, Justice Fortas delivered the opinion for an eight-justice majority.¹¹⁷

Gault extended many of the constitutional procedural protections available in adult criminal proceedings to the juvenile courts.¹¹⁸ The Court refused to apply a lower standard to the juvenile hearing simply because it was considered "civil" rather than "criminal."¹¹⁹ The Court reasoned that even though juvenile court proceedings are labeled civil, a juvenile proceeding may subject the individual to incarceration just as in an adult criminal proceeding.¹²⁰

The Court first addressed the question of whether a juvenile hearing was subject to scrutiny under the Due Process Clause of the Fourteenth Amendment.¹²¹ The Court emphasized that it was not addressing the pre-judicial or post-adjudicative stages of the juvenile court process.¹²² Instead, the Court considered the issue as it was framed in the case, namely, whether Gault received sufficient due process when he was adjudicated delinquent and sentenced to a state institution.¹²³ In deciding whether the Due Process Clause applied, the Court discussed the historical development of the juvenile court and recognized that its purpose was to guide and protect children.¹²⁴ However, the Court also recognized that as a practical matter, the juvenile court system locked Gault in a facility called an "institution" or "industrial school" where he could be "restrained of his liberty for

¹¹². Id. at 8; see In re Gault, 407 P.2d 760 (Ariz. 1965) (providing that juveniles are not entitled to the statutory right of appeal available to adults) (citing Ginn v. Superior Court, 404 P.2d 721 (Ariz. Ct. App. 1965)).
¹¹⁴. Id. at 9.
¹¹⁵. Id.
¹¹⁶. Id. at 3.
¹¹⁷. Id.
¹¹⁸. See Dormont, supra note 82, at 1779 (stating that Gault provided the type of procedural regularity for juveniles compelled by the Fourteenth Amendment).
¹¹⁹. Gault, 387 U.S. at 50.
¹²⁰. Id.
¹²¹. Id. at 12-31.
¹²². Id. at 13.
¹²³. Id.
¹²⁴. Id. at 12-31.
Based upon this recognition of Gault's situation, the Court stated that "it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.'"\textsuperscript{126}

After deciding that a juvenile is entitled to some form of due process, the first specific issue addressed by the Court was whether the state had an obligation to notify Gault's parents of the hearing.\textsuperscript{127} The Court held that notice of the charge had to be given to them sufficiently in advance of a hearing to comply with the requirements of due process.\textsuperscript{128} Next, the Court considered the issue of whether the Due Process Clause required that the juvenile and his parents be advised of their right to representation by counsel.\textsuperscript{129} After discussing the importance of counsel in assisting the juvenile with legal matters,\textsuperscript{130} the Court concluded that the Due Process Clause required that a juvenile who may be institutionalized after being adjudicated delinquent, as well as his parents, must be informed of the juvenile's right to be represented by counsel.\textsuperscript{131}

The Court also granted juveniles several other procedural rights afforded to adults.\textsuperscript{132} The Court held that a juvenile is entitled to the constitutional privilege against self-incrimination\textsuperscript{133} and the rights to confrontation and cross-examination of witnesses.\textsuperscript{134} In addition, the Court criticized the State's practice of failing to provide juveniles the

\textsuperscript{125} Id. at 27.
\textsuperscript{126} Id. at 27-28. The Court further stated: "Under our Constitution, the condition of being a boy does not justify a kangaroo court." Id. The Court noted the great disparity between the maximum sentence Gerald might have received had he been eighteen—a fine of $5 to $50 or imprisonment for not more than two months—and the sentence he actually received, which was confinement for a maximum of six years. Id. at 29.
\textsuperscript{127} See id. at 33 (stating that notice must be given sufficiently in advance so that the juvenile defendant will have a reasonable opportunity to prepare, and that notice must set forth the alleged misconduct with particularity).
\textsuperscript{128} See id. at 34-42.
\textsuperscript{129} Id. at 36.
\textsuperscript{130} Id. at 41. In its analysis of the issue, the Court cited the President's Crime Commission and noted that it had recently recommended that to assure "'procedural justice for the child,' it is necessary that 'Counsel . . . be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by child or parent.'" Id. at 38 (quoting Report by the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967)).
\textsuperscript{131} See infra text accompanying notes 139-41 (stating the specific procedural protections extended to juveniles).
\textsuperscript{132} Gault, 387 U.S. at 44-56. The Court stated that "[i]t would indeed be surprising if the privilege against self incrimination were available to hardened criminals but not to children. The language of the Fifth Amendment . . . is unequivocal and without exception." Id. at 47.
\textsuperscript{133} Id. at 57-58.
right to appeal or to record the proceedings. Although the Court granted juveniles all of these constitutional protections, it did not require the juvenile court to exactly mirror the adult court. The Gault court did not address the question of whether the Sixth Amendment right to a jury trial applies to juvenile court proceedings.

Although the Sixth Amendment guarantees the right to an impartial jury in all criminal prosecutions, the Court refused to extend this right to juveniles in a juvenile delinquency proceeding in the 1971 case of McKeiver v. Pennsylvania. In McKeiver, the Court applied the "fundamental fairness" standard of the Due Process Clause which applies to juvenile court proceedings. The Court concluded that the fundamental fairness standard required nothing more than accurate fact-finding, a process that could be satisfied by a judge as well as a jury. Writing for the Court, Justice Blackmun stated that if a jury trial were required in all juvenile proceedings as a matter of right, this requirement would bring with it "traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial."

135. See id. at 58 (reasoning that this practice imposes a "burden upon the machinery of habeas corpus").

136. See id. at 27 (stating that while due process requirements in the juvenile courts may introduce a degree of regularity, such requirements are not intended to displace the current system). In Gault, Justice Harlan concurred in part and dissented in part, joined by Justice Stewart. Id. at 65. Justice Stewart also wrote a separate dissenting opinion in which he stated: "[I]t certainly does not follow that notice of a juvenile hearing must be framed with all the technical niceties of a criminal indictment." Id. at 81 (Stewart, J., dissenting).

137. Id. at 1.

138. Duncan v. Louisiana, 391 U.S. 145, 149 (1968). In Duncan, the Court emphasized that the right to a trial by jury in criminal cases is fundamental to the American scheme of justice. Id.

139. 403 U.S. 528 (1971). This case involved three juveniles. McKeiver was a sixteen-year-old in Pennsylvania charged with robbery, larceny, and receiving stolen goods. Id. at 534. The court denied his request for a jury trial at his adjudication hearing. Id. at 535. Another juvenile, Edward Terry, a fifteen-year-old from Pennsylvania, was charged with assault and battery of a police officer together with conspiracy. Id. Terry's request for a jury trial was also denied. Id. In North Carolina, Barbara Burrus and approximately forty-five other black children ranging in age from eleven to fifteen were issued juvenile court summonses and charged with willfully impeding traffic. Id. at 536. These charges arose out of a series of incidents where black adults and children protested against the schools. Id. Burrus requested a jury trial and also was denied. Id.

140. Id. at 541. All of the parties agreed that the Due Process standard applicable to juvenile proceedings was "fundamental fairness," as developed in Gault and Winship, with an emphasis on factfinding procedures. Id. at 543; see also Feld, Criminalizing Juvenile Justice, supra note 28, at 159 (observing that the Court did not rely on the Sixth Amendment right to a jury trial which is applicable to the states through incorporation into the Fourteenth Amendment).

141. McKeiver, 403 U.S. at 545. "But one cannot say that in our legal system the jury is a necessary component of accurate factfinding." Id. at 543.

142. Id. at 550.
The Court concluded that the right to a jury was not fundamental and was therefore not required in juvenile proceedings.143

Even though McKeiver limited the protections available to juveniles, many other procedural protections have attached to juvenile court proceedings since Gault.144 For example, in In re Winship145 the Court held that the Due Process Clause required proof beyond a reasonable doubt in juvenile proceedings, rather than lower civil standards.146 The Court first explained that the reasonable doubt standard is a device that is utilized to ensure that innocent people are not condemned.147 In arriving at its conclusion, the Court emphasized the following interests which are protected by the higher standard: (1) the youth’s strong interest in preventing the loss of his liberty; (2) society’s concern for not convicting an accused where reasonable doubt exists; and 3) the need to ensure the community of the fairness of the criminal law.148

However, juveniles are treated somewhat differently in pre-trial detention matters. In the 1984 case of Schall v. Martin,149 the Supreme Court upheld preventive detention of juveniles, reasoning that the prevention of pre-trial crime is a compelling social goal.150 In Schall, a fourteen-year-old named Martin was charged with first-degree robbery, second-degree assault, and criminal possession of a weapon.151 These charges were based upon an incident wherein Martin hit another youth on the head with a loaded gun and stole his jacket and

143. Id. Contra Duncan v. Louisiana, 39 U.S. 145 (1968) (holding that the Sixth Amendment right to a jury is applicable to the states because it is deemed fundamental).
144. See supra note 4 (discussing the constitutional protections afforded to juveniles in Gault).
145. 397 U.S. 358 (1970). In this case, a twelve-year-old boy was found guilty, by a preponderance of evidence, of violating section 744(b) of the New York Family Court Act, the equivalent of the crime of larceny if committed by an adult. Id. at 360 (citing N.Y. FAM. CR. ACR § 744(b) (McKinney 1962), which sets forth the evidentiary requirements for juvenile court hearings).
146. Id. at 368. The Supreme Court did not find the reasoning of the New York Court of Appeals convincing. Id. at 365. The appellate court reasoned that a juvenile finding of delinquency is not a conviction, that it does not affect any right or privilege, that it results from confidential proceedings, and that such proceedings are not intended to punish the juvenile. Id. Nonetheless, the Supreme Court emphasized that Gault explicitly held that Due Process cannot be “obviated” where a juvenile can be found delinquent and lose his liberty for years. Id. at 366. The Court also rejected the appellate court's conclusion that there is only a "tenuous difference" between the standards of reasonable doubt and preponderance of the evidence. Id.
147. Id. at 364.
148. Id. In Breed v. Jones, 421 U.S. 519 (1975), the Court held that the Fifth Amendment ban on double jeopardy applies to delinquency proceedings in the same manner as it applies to adult criminal proceedings. Id. at 529. This case involved the prosecution of a seventeen-year-old boy in a criminal court after adjudicatory proceedings had been held in juvenile court. Id. at 519.
150. Id. at 264 (citing DeVeau v. Braisted, 363 U.S. 144, 155 (1960)).
151. Id.
sneakers. The state charged another fourteen-year-old, Rosario, with attempted first-degree robbery and second-degree assault where he and four others tried to rob two men, putting a gun to the head of one and beating the other with a stick. A third fourteen-year-old, Morgan, was charged with attempted robbery and attempted grand larceny based upon an incident where he and another boy tried to steal money from a fourteen-year-old girl and her brother by threatening to blow their heads off. At issue on appeal was the constitutionality of a provision of the New York Family Court Act that authorized pretrial detention of an accused juvenile delinquent based upon a finding of serious risk that the juvenile would commit a crime before returning to court. The juveniles who had been detained argued that this provision violated the Due Process Clause of the Fourteenth Amendment.

Justice Rehnquist, writing for the Court, first noted that juvenile proceedings must comport with the "fundamental fairness" standard required by the Due Process Clause. Rehnquist reasoned that the states must sometimes keep juveniles in custody in accordance with its role as parens patriae to preserve and protect the welfare of the child. A child's interest in freedom from institutional restraints is more limited than adults because, unlike adults, children are considered incapable of caring for themselves and are always subject to some form of custody, whether parental or state custody. The Court also concluded that the state had a "legitimate and compelling state interest in protecting the community from crime." Rehnquist then noted that juveniles are already given notice, a hearing, a statement of facts, reasons as to why they are being detained, and a formal probable cause hearing. In holding that juveniles could constit-
tionally be detained, the majority indicated that juveniles received enough protections to ensure that they are not erroneously deprived of their liberty.163

B. The United States Sentencing Commission

In 1984, Congress established the United States Sentencing Commission164 to promulgate guidelines for federal judges to follow when sentencing criminals.165 Congress expressly granted this authority to the Commission as an independent agency.166 The Commission was authorized to consider whether, and to what extent, a defendant’s prior criminal history is relevant in establishing guidelines as a sentencing structure.167

Since the Commission is an administrative agency, it is important to note some basic principles of administrative law. First, when Congress has “spoken unambiguously on a matter, the agency must give effect to the intent of Congress.”168 However, where the intent of Congress is not clear, the court must defer to the agency interpretation unless the agency interpretation is clearly in conflict with congressional intent.169

Congress authorized the Commission to establish these sentencing guidelines, in part, to eliminate the discretionary sentencing system which was previously in place.170 This system was considered to be

163. Id. at 274-81.
164. See 28 U.S.C § 991(a) (1994) (establishing and setting forth the purposes of the Commission). The Commission was established as an independent commission in the judicial branch of the United States with seven voting members. Id. At least three of the members must be federal judges and no more than four can be members of the same political party. Id.
166. 28 U.S.C. § 994 (d) states:
   The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences . . . shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent and place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent they do have relevance—
   (10) criminal history; and
   (11) degree of dependence upon criminal activity for a livelihood . . . .
   Id.; see generally Jeffrey Standen, Plea Bargaining in the Shadow of the Guidelines, 81 CALIF. L. REV. 1471 (1993) (arguing that the Guidelines place too much power in the hands of the prosecutor and take too much discretion away from federal judges).
167. See United States v. Doe, 934 F.2d 353, 359 (D.C. Cir. 1990), cert denied, 502 U.S. 896 (1991) (holding that a district court does not have the authority to arbitrarily issue a sentence below the statutory guidelines).
169. Id.
permeated by judicial bias and abuse of judicial power.\textsuperscript{171} Congress wanted to ensure that similarly situated criminal defendants received equal sentencing treatment in the courts.\textsuperscript{172} The Guidelines attempted to achieve three goals: 1) general deterrence; 2) punishment; and 3) incapacitation.\textsuperscript{173} In establishing the Guidelines, Congress was particularly concerned with punishing recidivism.\textsuperscript{174}

1. \textit{The Guidelines}

"The adoption in 1987 by Congress of the United States Sentencing Guidelines . . . and its supporting jurisprudence are indicative of society's embrace of the punitive mode of criminal justice."\textsuperscript{175} The indeterminate sentencing previously in place occurred largely because of the notion held by courts that a criminal offender could be rehabilitated.\textsuperscript{176} However, the Senate Report on the 1984 legislation\textsuperscript{177} made reference to the "outmoded rehabilitation model."\textsuperscript{178} "The modern case against the rehabilitative ideal has been in the making at least since the years immediately preceding [World War] II."\textsuperscript{179} At least

\begin{itemize}
  \item \textsuperscript{171} See S. Rep. No. 225, 98th Cong., 1st Sess. 52 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3235 (stating that the goal of sentencing reform was to eliminate the unjustifiable sentencing disparity which existed in the courts).
  \item \textsuperscript{172} See S. Rep. No. 225, supra note 166, at 51, reprinted in 1984 U.S.C.C.A.N. 3182, 3235 (stating that the guidelines are intended to make each sentence fair when compared to all other sentences for the same crime); see also 28 U.S.C. § 991(b)(1)(B) (1994), which states that one of the purposes of the United States Sentencing Commission is to establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.
  \item \textsuperscript{173} United States v. Scroggins, 880 F.2d 1204, 1208 (11th Cir. 1989), cert denied, 494 U.S. 1083 (1990); see also Martin, supra note 2, at 58-59 (stating that after the Guidelines were established, rehabilitation was no longer a factor in sentencing).
  \item \textsuperscript{174} See United States Sentencing Commission, Guidelines Manual, supra note 10, § 4A1.1 (delegating under the title "Criminal History Category," a certain number of points to be added to a person's criminal history score based upon prior incarcerations). A recidivist is generally defined as "a habitual criminal" and "a criminal repeater often subject to extended terms of imprisonment under habitual offender statutes." Black's Law Dictionary 1269 (6th ed. 1990); cf. Rene Lynch, Public Defender Tests 3-Strikes Law, L.A. Times, Apr. 9, 1994, at B3 (commenting that "[s]upporters hail the 'three strikes' law as a way to crack down on repeat offenders").
  \item \textsuperscript{175} Martin, supra note 2, at 58 (emphasis added).
  \item \textsuperscript{176} Mistretta v. United States, 488 U.S. 361, 363 (1989).
  \item \textsuperscript{178} Id. (citing Mistretta), 488 U.S. at 366).
  \item \textsuperscript{179} Francis A. Allen, The Decline of the Rehabilitative Ideal 31 (1981). Allen states that the modern rehabilitative ideal rests on three "principal propositions": (1) the ideal is
one commentator has argued that under the Guidelines, rehabilitation is no longer a factor to be considered in determining an appropriate sentence. 180

Section 994(a) of the Sentencing Reform Act delegates broad authority to the Sentencing Commission. 181 However, "[i]f Congress disagrees with the [G]uidelines or policy statements promulgated by the [C]ommission, it can revoke them at any time." 182 Based on its delegated authority, the Sentencing Commission concluded that a defendant's criminal history, including his previous juvenile adjudications, is relevant in determining an appropriate sentence. 183 Juvenile adjudications have long been considered part of an adult defendant's criminal history under both state and federal laws. 184 One example is the Federal Youth Corrections Act, 185 which authorizes prior juvenile adjudications to be considered in sentencing. 186

The Guidelines classify offenses into forty-three different categories of severity 187 and six different criminal history categories. 188 After the category of severity is determined, the sentencing judge allocates a certain number of points depending upon which criminal history category the defendant falls within. 189 Under the Guidelines, a juvenile sentence of at least sixty days warrants the same number of points to be added to a defendant's criminal history score as an adult sentence

a threat to political values of free societies; (2) the ideal is "peculiarly vulnerable to debasement and the serving of unintended and unexpressed social ends; and (3) the ideal is "lacking" for some unknown reason. Id. at 33-34.

180. Id.
182. Id. (citing Mistretta, 488 U.S. at 393-94).
183. The Guidelines provide, in relevant part:

If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add three points under § 4A1.1(b) for each such sentence . . . . In any other case . . . . [a]dd 2 points under § 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from confinement within five years of his commencement of the instant offense; . . . add 1 point under § 4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A).

UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, supra note 10, § 4A1.2(d).

184. See supra note 16 (citing state and federal cases where courts have applied statutes that allow them to consider juvenile adjudications in determining sentences of adult criminal defendants).
186. Id.
188. Id.
189. Id.
of at least sixty days.\(^{190}\) The only exception is that a sentence of juvenile confinement of more than sixty days issued more than five years prior to the current sentencing is not counted,\(^{191}\) while an adult sentence issued more than ten years prior to the current sentencing is not counted.\(^{192}\) However, the Guidelines still give the trial judge some sentencing discretion by allowing him to depart downward on the chart when he believes that the defendant's criminal history score over-represents his criminal propensities.\(^{193}\) The Guidelines do not establish a ceiling on the amount of points an adult may acquire from a previous juvenile record.\(^{194}\) In establishing the Guidelines, Congress looked to the Minnesota Sentencing Guidelines as a model.\(^{195}\) However, the Minnesota guidelines specifically cap the amount of points that an adult may accumulate based on his prior criminal history.\(^{196}\)

### 2. Case Law Interpreting the Guidelines

In 1989, the Supreme Court had an opportunity to rule on the constitutionality of the Guidelines.\(^{197}\) In *United States v. Mistretta*,\(^{198}\) the defendant argued that the Guidelines were unconstitutional because they were contrary to the separation of powers doctrine.\(^{199}\) Therefore, the Court began its analysis by acknowledging the general principle that Congress cannot delegate its legislative power to another branch of government,\(^{200}\) but may obtain assistance from the other branches.\(^{201}\) Justice Blackmun, writing for the majority, concluded that the delegation of authority to the Commission was "sufficiently

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190. *Id.* § 4A1.2(d).
191. *Id.* § 4A1.2(d)(2).
192. *Id.* § 4A1.1(b).
193. Section 4A1.3 of the Sentencing Guidelines states as follows:

§ 4A1.3 Adequacy of Criminal History Category (Policy Statement) If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range.

196. MINN. STAT. ANN. app. § 244(II)(B)(4) (West 1992).
198. *Id.*
199. *Id.* at 370.
200. *Id.* at 371-72 (citing Field v. Clark, 143 U.S. 649, 692 (1892)).
201. *Id.* at 372.
specific and detailed” so as not to render it unconstitutional.\textsuperscript{202} The Court held that Congress did not violate separation of powers in delegating the authority to the Commission to establish the Guidelines.\textsuperscript{203}

In United States v. Williams,\textsuperscript{204} the Ninth Circuit held that a sentencing court may enhance a sentence under the Guidelines even if a juvenile sentence was imposed without a jury trial.\textsuperscript{205} Williams argued that even though a bench trial was valid for use in a juvenile adjudication of delinquency, it should not be valid to enhance his sentence as an adult.\textsuperscript{206} The court noted that at the time of his juvenile adjudications, Williams had procedural safeguards such as the right to counsel and cross-examination and, therefore, the enhancement of his sentence based upon his prior juvenile adjudications did not violate his due process rights.\textsuperscript{207}

Williams also argued that the court erroneously categorized his juvenile sentence as one of imprisonment under the Guidelines because he was only sentenced to a juvenile hall.\textsuperscript{208} The court noted that although the general purpose of juvenile sentencing is to rehabilitate a juvenile, Williams was nonetheless deprived of his liberty through his placement in the juvenile hall.\textsuperscript{209} The court stated that the judge was not required to look at the purpose behind the sentencing, only to the act of confinement itself.\textsuperscript{210} The court concluded that the sentencing judge had properly looked to the prior instances of juvenile confinement and upheld Williams’ sentence.\textsuperscript{211}

\textsuperscript{202} Id. at 374. The Court gave the following reasons to support its conclusion that Congress delegated sufficiently specific authority to the Commission: (1) Congress charged the Commission with three specific goals; (2) Congress specified the purposes which the Commission was to follow; (3) Congress “prescribed the specific tool — the guidelines system — for the commission to use in regulating sentencing;” (4) Congress directed the commission to consider seven factors regarding offense categories; and (5) Congress provided detailed guidance to the Commission about offenders and their characteristics. Id. at 374-76.

\textsuperscript{203} Id. at 374.

\textsuperscript{204} 891 F.2d 212 (9th Cir. 1989). In Williams, the defendant pled guilty to bank robbery. Id. at 213. Williams was assigned an offense level of seventeen and a criminal history category level of ten. Id. Four of Williams’ criminal history points were the result of two prior juvenile adjudications, both of which were for the crime of bank robbery. Id.

\textsuperscript{205} Id. at 215.

\textsuperscript{206} Id. at 214.

\textsuperscript{207} Id. at 215.

\textsuperscript{208} Id. at 215-16.

\textsuperscript{209} Id. at 216.

\textsuperscript{210} Id.

\textsuperscript{211} Id.
II. SUBJECT OPINION: UNITED STATES v. JOHNSON

A. Facts

In the District of Columbia on January 15, 1993, Reco Vondell Johnson pled guilty to possession of fifty grams or more of cocaine base with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(iii). The statutory penalty for this crime is imprisonment for 120 months to life. In return for his guilty plea, the government dismissed the remaining two counts against Johnson. The remaining two counts were the distribution of cocaine base in violation of 21 U.S.C. § 841 and possession with intent to distribute drugs within 1000 feet of a school in violation of 21 U.S.C. § 860(a).

At the time Johnson committed these crimes and became subject to sentencing, he was nineteen years old.

Under the Guidelines, Johnson was assigned an offense level of twenty-nine and fell into criminal history category number five, such that the lines of the sentencing table intersected at a sentence of imprisonment between 140 and 175 months. Johnson received seven points for prior juvenile adjudications and one point for a prior adult conviction. Johnson also received an additional two points because he committed the current offense less than two years after his release from custody for his most recent juvenile adjudication. One of Johnson’s juvenile adjudications took place when he was fourteen and arose out of his involvement in a fight at school.

Under the Guidelines, the court was authorized to consider Johnson’s juvenile history and, therefore, nine out of Johnson’s ten points were for juvenile offenses. Johnson challenged the Commission’s

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212. 28 F.3d 151 (D.C. Cir. 1994).
213. The provision states, in relevant part: “[I]t shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance . . . . 21 U.S.C. § 841(a)(1) (1994).
214. Under this section, “any person violating subsection (a) which involves [fifty] grams or more of a mixture or substance described in clause (ii) which contains cocaine base . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . . “ 21 U.S.C. § 841(b)(1)(A)(iii) (1994).
216. Johnson, 28 F.3d at 153 n.1.
217. Id.
218. This statute relates to the offense and punishment for distribution of cocaine within 1,000 feet of a school. 21 U.S.C. § 860 (1994).
220. Id.
221. Id.
222. Id.
223. Id. at 157.
224. Id. at 153.
authority to use his juvenile records to determine his criminal history category, noting that a juvenile sixty-day sentence of confinement gave him the same number of points as an adult sentence of the same duration.\textsuperscript{225}

\textbf{B. Procedural History}

Johnson pled guilty to possession of cocaine base with intent to deliver on January 15, 1993.\textsuperscript{226} On May 6, 1993, the appellant filed a thirteen-page sentencing memorandum urging the district court to disregard his juvenile adjudications in determining the appropriate sentence.\textsuperscript{227} On July 13, 1993, the district court issued its memorandum which sentenced Johnson to 140 months imprisonment,\textsuperscript{228} which is twenty months more than the statutory minimum.\textsuperscript{229} Johnson filed an appeal challenging the Commission's authority to use his juvenile records in determining his sentence.\textsuperscript{230} Johnson also argued that the Guidelines reflected a "lack of neutrality with respect to socio-economic status and race."\textsuperscript{231}

\textbf{C. Majority Opinion}

The appellate court began its analysis by recognizing that the Sentencing Reform Act gives the Sentencing Commission broad authority to establish criteria for sentencing.\textsuperscript{232} After noting the broad authority of the Sentencing Commission,\textsuperscript{233} the court addressed Johnson's first argument that the Commission exceeded its authority by requiring that his prior juvenile adjudications be considered to enhance his

\begin{itemize}
\item \textsuperscript{225} \textit{Id.}
\item \textsuperscript{226} Appellee's Brief at 1.
\item \textsuperscript{227} \textit{Id.} at 2.
\item \textsuperscript{228} \textit{Id.} at 3-5.
\item \textsuperscript{229} \textit{Johnson,} 28 F.3d at 153.
\item \textsuperscript{230} \textit{Id.}
\item \textsuperscript{231} \textit{Id.}
\item \textsuperscript{232} \textit{Id.} at 153-54 (citing 28 U.S.C. §§ 991, 994(a) (1994); Mistretta v. United States, 488 U.S. 361, 377 (1989)). Johnson, relying upon the case of \textit{Baldasar v. Illinois,} 446 U.S. 222 (1980) (per curiam), also argued that counting juvenile adjudications rendered without a jury is unconstitutional. \textit{Id.} at 153 n.3. However, \textit{Baldasar} was overruled by \textit{Nichols v. United States,} 114 S.Ct. 1921 (1994), before \textit{United States v. Johnson} was decided. \textit{Id.} The \textit{Nichols} Court held that an "uncounseled conviction may be used to enhance a sentence." \textit{Id.} Accordingly, the Court found no reason to conclude that non-jury juvenile adjudications could not be treated as uncounseled convictions used to enhance sentences. \textit{Id.}
\item \textsuperscript{233} Although the Commission did not identify the statutory basis for counting juvenile history, the court reasoned that this omission was not fatal because the Commission made a reasonable interpretation of the Sentencing Reform Act under its broad authority. \textit{Id.} at 153-54.
\end{itemize}
sentence as an adult because under the District of Columbia Code, \textsuperscript{234} a juvenile adjudication is not a criminal conviction. \textsuperscript{235}

The court pointed out that under the statute, \textsuperscript{236} "a court may take into account the defendant's juvenile record in determining his sentence for crimes he committed as an adult." \textsuperscript{237} The majority stated that, in theory, the juvenile justice system focuses on "treatment and rehabilitation." \textsuperscript{238} The majority acknowledged that a juvenile who commits a crime will often have his record set aside after he becomes an adult. \textsuperscript{239} At that time, therefore, the juvenile would be relieved of the "social and economic disabilities associated with a criminal record." \textsuperscript{240} However, the court noted that this aspect of the juvenile court system is designed for individuals who cease criminal activity after they become adults. \textsuperscript{241} The court reasoned that this type of juvenile is rewarded for not becoming a recidivist. \textsuperscript{242} The court also noted that society has accepted the idea of considering prior juvenile adjudications as exemplified by the enactment of the Federal Youth Corrections Act. \textsuperscript{243} Furthermore, the Guidelines expressly exclude juvenile status offenses and truancy from consideration in a defendant's criminal history score. \textsuperscript{244}

Next, the court noted that both Congress and the Commission have concluded that recidivism warrants an increased punishment. \textsuperscript{245} The Commission's original mandate was to establish categories of factors bearing upon a convicted criminal's punishment. \textsuperscript{246} Therefore, the court recognized an inconsistency in hypothetically ignoring the defendant's previous history of juvenile delinquency. \textsuperscript{247} Given the broad authority granted to the Commission by Congress, the court concluded that the Commission had not exceeded its authority by taking juvenile sentences into account. \textsuperscript{248}

\textsuperscript{235} Id.
\textsuperscript{236} Id. § 16-2331(b)(4) (1989).
\textsuperscript{237} Johnson, 28 F.3d at 154.
\textsuperscript{238} Id.
\textsuperscript{239} Id.
\textsuperscript{240} Id. (quoting United States v. McDonald, 991 F.2d 866, 872 (D.C. Cir. 1993)).
\textsuperscript{241} Id.
\textsuperscript{242} Id.
\textsuperscript{243} Id.
\textsuperscript{244} United States Sentencing Commission, Guidelines Manual, supra note 10, § 4A1.2(c)(2).
\textsuperscript{245} Johnson, 28 F.3d at 155.
\textsuperscript{247} Johnson, 28 F.3d at 154.
\textsuperscript{248} Id. at 155.
The court then addressed Johnson's argument challenging section 4A1.2(d) of the Guidelines as unreasonable in that it failed to differentiate between juvenile adjudications and adult criminal convictions.\textsuperscript{249} The court stated that as long as the Guidelines established by the Commission are not unreasonable, they will be upheld.\textsuperscript{250} First, the court acknowledged that society responds differently to an adult offender than to a juvenile offender.\textsuperscript{251} However, the court reasoned that since this different response is not attributable to the nature of the criminal acts performed, the social justifications for treating a juvenile differently from an adult disappear when the juvenile becomes an adult offender.\textsuperscript{252} Consequently, the court concluded that the Commission's decision to give juvenile confinements or sentences the same weight as those of adults was not unreasonable.\textsuperscript{253} Moreover, the court interpreted the Commission's decision to treat the two sentences alike as a "method . . . of measuring relative culpability among offenders and the likelihood of their engaging in future criminal behavior."\textsuperscript{254} The court did acknowledge that there are differences between adult and juvenile court proceedings and that judges have discretion in imposing a wide variety of sentences on delinquent juveniles.\textsuperscript{255} However, the court declined to decide the issue of the nature of Johnson's prior juvenile confinement and how it might impact his sentence because he had been sentenced to a secured commitment center which the court analogized to a prison-like facility.\textsuperscript{256} Therefore, as applied to Johnson, the court held that the sentencing calculations were reasonable, but left open the question whether the result would have been the same if Johnson had been sentenced to a non-secured facility.\textsuperscript{257}

The court then discussed section 4A1.3 of the Guidelines.\textsuperscript{258} This section allows the trial court judge to depart from the sentence statutorily imposed by the Guidelines when it appears that this sentence

\begin{itemize}
\item \textsuperscript{249} Id.
\item \textsuperscript{250} Id.
\item \textsuperscript{251} Id.
\item \textsuperscript{252} Id.
\item \textsuperscript{253} Id. The court noted that this is a rough method of determining likelihood of future criminal behavior. Id.
\item \textsuperscript{254} Id.
\item \textsuperscript{255} Id. For example, when a juvenile is adjudicated as delinquent, he or she may be placed in "foster care," "group homes," "residence treatment centers," or "secure prison-like facilities." Id.
\item \textsuperscript{256} Id.
\item \textsuperscript{257} Id. at 156.
\item \textsuperscript{258} United States Sentencing Commission, Guidelines Manual, supra note 10, \S 4A1.3.
\end{itemize}
does not adequately reflect the defendant's past criminal conduct or likelihood of committing future crimes. The Guidelines state that, if necessary, this provision may be used to cure any significant distinctions between adult and juvenile sentences. The court found that the sentencing court did not commit error in finding this provision inapplicable to Johnson because he had an extensive criminal history and nothing in his record overrepresented his likelihood to commit further crimes.

The final argument addressed by the court was whether the Guidelines lacked neutrality with respect to race and socio-economic status. The court noted that Congress explicitly directed the Commission to make certain that the Guidelines were neutral with respect to the "race, sex, national origin, creed, and socio-economic status of offenders." The court observed that Johnson did not "profess innocence" to any of his offenses or claim that his juvenile sentences were discriminatory. Therefore, the court concluded that section 4A1.2(d) is neutral on its face with respect to the above mentioned factors.

D. Dissent

The dissent concluded that Guidelines section 4A1.2(d) is irrational and that the Commission impermissibly abused its delegated discretion in promulgating the section. The dissent initially acknowledged that Congress clearly did not foreclose the use of juvenile dispositions in sentencing because it had delegated to the Commission the authority to consider a wide range of factors in formulating the Guidelines.

However, the dissent argued that the Commission used its delegated authority irrationally by treating juvenile and adult sentences

259. Id.; see also United States v. Thomas, 930 F.2d 526 (7th Cir. 1990), cert denied, 112 S. Ct. 171 (1991) (allowing a downward departure for a defendant's substantial help to the government but not for factors such as a poor upbringing or other family considerations).
260. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, supra note 10, § 4A1.3.
261. Johnson, 28 F.3d at 156.
262. Id.
263. Id.; see also 28 U.S.C. § 994(d) (noting neutrality goals and factors that are to be considered in determining sentences).
265. Id.
266. Id. (Wald, J., dissenting).
267. Id. The dissent argued that Johnson's argument failed the first part of the Chevron test, but survived the second inquiry which is used where the intent of Congress in delegating its legislative authority is unclear. Id.
alike for the purpose of sentence enhancement. The dissent reasoned that "[u]nlike criminal punishment, which might be imposed in pursuit of retributive as well as rehabilitative objectives, the focus of juvenile confinement traditionally has been primarily, or even exclusively, on reforming and treating the offender." The dissent conceded that theory has been separated from reality in the juvenile justice system. Furthermore, according to the dissent, the "procedural landscapes" of juvenile and adult proceedings differ. The dissent argued that because the Supreme Court explicitly declined to require the full protections that are applicable to adult criminal trials, the two proceedings are essentially different.

The dissent noted that a judge sentencing a juvenile may take into account a wide variety of juvenile sentences unrelated to actual criminal culpability. The dissent further noted that a specific number of points are given for all juvenile sentences without consideration of the juvenile's age or the circumstances behind the sentencing. The dissent contended that the provision which allows the judge to depart downward where a defendant's criminal history category significantly overrepresents his or her actual criminal history does not provide an "adequate safety valve" for the problems inherent in treating adult and juvenile confinements alike. The dissent concluded that the Commission's regulations gave undue weight to prior juvenile sentences and did not reflect "the design of Congress."

III. Analysis

A. Rising Juvenile Crime

Based upon a study conducted in 1992, the arrest rate for criminal homicides committed by juveniles ages fifteen to seventeen rose 217

268. Id. at 158 (Wald, J. dissenting).
269. Id. at 159.
270. Id.; see also Feld, Transformation of the Juvenile Court, supra note 21, at 695 (arguing that the practical operations of the juvenile courts differ considerably from the theoretical purposes for which they were created).
271. Johnson, 28 F.3d at 159. Specifically, the dissent argued that most juvenile courts still use an indeterminate method of sentencing which allows for greater judicial discretion than exists in most adult proceedings. Id.
272. Id. at 160 (noting that the Supreme Court has held that juvenile delinquency proceedings do not require a jury).
273. Id. The dissent stated that "[j]uvenile confinement, unlike adult incarceration, is still largely imposed on the basis of characteristics of the offender, rather than characteristics of the offense." Id.
274. Id. at 162.
275. Id. at 161-62.
276. Id.
percent during the period from 1985 to 1991.\textsuperscript{277} Moreover, recent statistics indicate that juveniles today are not only committing more crimes, but the crimes they are committing are more violent than ever before.\textsuperscript{278} Today, people are afraid of many juvenile offenders,\textsuperscript{279} a sad truth exemplified by the fact that many people wish to see juveniles punished for their delinquent behavior.\textsuperscript{280} For example, studies were conducted after Michael Fay, an American juvenile, was caned in Singapore for vandalizing property in that country.\textsuperscript{281} Not surprisingly, these studies revealed that many Americans embrace the punitive mode of sentencing.\textsuperscript{282} Although the juvenile court system was originally designed to rehabilitate juveniles, the results of such studies are indicative of changing attitudes about how juvenile delinquents should be punished. These changes are also manifested by the fact that some states are now designing their juvenile laws to punish offenders in order to deter future criminal behavior rather than to rehabilitate the offenders themselves.\textsuperscript{283}

B. The Sentencing Commission's Authority

Johnson first argued that the Sentencing Commission exceeded its authority by mandating that his prior juvenile adjudications be considered to establish his present sentence as an adult.\textsuperscript{284} The court correctly concluded that the Commission did not exceed its authority. Johnson's argument was correctly rejected for several reasons. First, even before the Guidelines were created, courts faced the question of whether juvenile adjudications could be considered in assessing an adult defendant's criminal history. Under both state and federal law, this practice had long been allowed.\textsuperscript{285} For example, in enacting the Federal Youth Corrections Act,\textsuperscript{286} Congress explicitly allowed previ-
ous juvenile sentences to be considered in subsequent adult sentencing decisions. Therefore, the Commission's decision was soundly rooted in legislative precedent.

Secondly, Congress explicitly delegated broad authority to the Commission to establish the Guidelines. As an administrative agency, the Commission would have to act contrary to either the express language or the expressed intent of Congress for a court to declare the Commission's actions unreasonable. Furthermore, the Supreme Court recently upheld the Guidelines as constitutional and rejected the argument that Congress' delegation of power to the Commission violated the separation of powers doctrine. In establishing the Guidelines, the Commission acted in accordance with the express language and intent of Congress. Accordingly, given the statutory bases for considering a juvenile's previous criminal history in sentencing and the well established constitutionality of the Guidelines, the Johnson court properly held that the Commission did not abuse its authority.

C. The Differences Between the Juvenile and Adult Courts

The majority in Johnson emphasized that, theoretically, the juvenile justice system was designed to focus on "treatment and rehabilitation." Certainly, the juvenile court system in America has undergone significant procedural changes since its origins in Chicago, Illinois in 1899. However, the dissent placed undue emphasis on this theoretical notion in reaching its conclusion. It is true that the

287. Id.
289. See Chevron U.S.A. v. NRDC, 467 U.S. 837 (1984) (upholding regulations promulgated by the Environmental Protection Agency on the ground that they did not contradict Congress' intended definition of language contained in the agency's enabling statute).
291. Id. at 374-75.
292. 28 F.3d 151, 154 (D.C. Cir. 1994).
293. See Schall v. Martin, 467 U.S. 253 (1984) (allowing pretrial detention of juveniles only after a showing that the preventive detention statute serves a "legitimate purpose" and post detention procedures are sufficient to correct erroneous detentions); Breed v. Jones, 421 U.S. 519, 541 (1975) (holding that juveniles are entitled to the protection of the double jeopardy clause of the Fifth Amendment); In re Winship, 397 U.S. 358, 361-68 (1970) (holding that a juvenile must be found guilty by proof beyond a reasonable doubt rather than merely by a preponderance of the evidence); In re Gault, 387 U.S. 1, 31-56 (1969) (extending due process rights to defendants in juvenile proceedings, including adequate written notice to the juvenile's parent or guardian, the right to representation, and the privilege against self-incrimination); United States v. Kent, 383 U.S. 541, 562 (1966) (holding that a juvenile is entitled to counsel and other "due process rights" before jurisdiction by the juvenile court can be waived); Feld, Principle of Offense, supra note 6, at 821 (stating the ways in which the juvenile court has changed from how its creator envisioned it).
early Progressive reformers created a juvenile court separate from that of the adult court for the purpose of treating juveniles differently than their adult counterparts.\textsuperscript{294} The Progressives did not want a juvenile court proceeding to be considered criminal.\textsuperscript{295} This is exemplified by the efforts of the courts and state legislatures to identify juvenile proceedings as non-criminal.\textsuperscript{296} The following are examples of the non-punitive words used in juvenile proceedings versus those used in criminal proceedings, respectively: petition versus complaint, summons versus warrant, initial hearing versus arraignment, finding of involvement versus conviction, and disposition versus sentence.\textsuperscript{297} As these examples illustrate, the basic idea behind the juvenile court system was to rehabilitate the juvenile offender.

Nonetheless, while the words remain different, since the landmark decision of In re Gault,\textsuperscript{298} the juvenile court has come dramatically closer in appearance to the adult criminal court.\textsuperscript{299} The juvenile is now provided many of the constitutional protections currently available to adults in criminal proceedings.\textsuperscript{300} For example, in In re Gault, the Court required that the following protections be given to juveniles subject to juvenile court proceedings: the due process right to notification of charges, the right to counsel, the Fifth Amendment privilege against self-incrimination, and the rights to confrontation and cross-examination.\textsuperscript{301}

Even after Gault, the Supreme Court continued to give juveniles the protections afforded to their adult counterparts in In re Winship and Breed v. Jones. The juvenile must now be proven delinquent by the criminal standard of beyond a reasonable doubt.\textsuperscript{302} This is significant because the standard of beyond a reasonable doubt is used in

\begin{itemize}
\item \textsuperscript{294} See Mack, supra note 23, at 107 (noting that the goal of the juvenile courts was to improve rather than punish juvenile offenders); see also Fox supra note 1, at 1212 (noting that traditionally, the system intended to protect, not punish, juveniles).
\item \textsuperscript{295} See Mack, supra note 23, at 119-120 (explaining how the Progressives notably eliminated the court-like atmosphere and surroundings from the juvenile court system).
\item \textsuperscript{296} See Dormont, supra note 82, at 1778 n.43 (noting the non-criminal terminology used in juvenile proceedings).
\item \textsuperscript{297} Id.
\item \textsuperscript{298} 387 U.S. 1 (1969).
\item \textsuperscript{299} See Feld, Principle of Offense, supra note 6, at 821 (explaining that juvenile courts have increasingly moved to the punitive mode of sentencing).
\item \textsuperscript{300} See Gault, 387 U.S. at 31-87 (awarding due process rights to juveniles); see also Kent, 383 U.S. 541, 562 (1966) (allowing a juvenile offender to waive jurisdiction only if the requirements applicable to adult criminal proceedings are met).
\item \textsuperscript{301} 387 U.S. at 31-87.
\item \textsuperscript{302} In re Winship, 397 U.S. 358 (1970).
\end{itemize}
adult criminal cases, while lower standards of proof are generally used in civil proceedings.\textsuperscript{303}

As the procedures afforded to juveniles and adults become more similar, juvenile proceedings take on the appearance of adult criminal proceedings.\textsuperscript{304} In fact, since \textit{Gault} was decided, the only constitutional protection the Court has not extended to juveniles is the right to a jury trial.\textsuperscript{305} Based on this analysis, as a juvenile, Johnson was entitled to almost every constitutional protection afforded to adult criminals except that of a trial by jury.\textsuperscript{306} Thus, it appears that the Supreme Court has attempted to close the gap between adult criminal proceedings and juvenile proceedings.

The dissent in \textit{Johnson} argued that because the procedures between adult and juvenile courts differ, they cannot be treated alike.\textsuperscript{307} The dissent argued that because the Supreme Court has not yet required juvenile proceedings to be given the full procedural protections available in adult proceedings, the two proceedings are essentially different.\textsuperscript{308} However, the fact that juveniles are not constitutionally entitled to a jury trial does not make juvenile proceedings "essentially different" from criminal proceedings. As the Court held in \textit{McKeiver}, a jury trial is not essential to factfinding because it can also be accomplished through a judge.\textsuperscript{309}

The adult criminal courts and juvenile courts also appear to be moving closer to one another in that juvenile courts, in actuality, now tend to punish juveniles for crimes rather than attempting to rehabilitate them.\textsuperscript{310} This has been accomplished through legislative offense exclusion, waiver of the juvenile into adult court, and other state statutes.\textsuperscript{311} As previously mentioned, these developments have occurred in response to the serious problem of escalating juvenile crime.\textsuperscript{312}

\textsuperscript{303} \textit{Id.} at 365.

\textsuperscript{304} \textit{See} Feld, \textit{Transformation of the Juvenile Court}, supra note 26, at 691-92 (noting that juvenile and adult courts now converge procedurally and substantively in most respects).

\textsuperscript{305} \textit{See} \textit{McKeiver v. Pennsylvania}, 403 U.S. 528 (1971) (holding that a trial by jury is not constitutionally required in juvenile delinquency proceedings).

\textsuperscript{306} \textit{Johnson}, 28 F.3d 151 (D.C. Cir. 1994).

\textsuperscript{307} \textit{Id.} at 159 (Wald, J., dissenting).

\textsuperscript{308} \textit{Id.} at 159-60 (Wald, J., dissenting).

\textsuperscript{309} \textit{McKeiver}, 403 U.S. at 543.

\textsuperscript{310} \textit{See} Feld, \textit{Principle of Offense}, supra note 6, at 821-22 (characterizing the experience of juvenile confinement as hard and prison-like).

\textsuperscript{311} \textit{See} Feld, \textit{Juvenile Waiver Statutes}, supra note 22 (discussing changes in state legislation which have the effect of treating juvenile offenders more like adults).

\textsuperscript{312} \textit{See} supra note 2 (discussing statistics and trends indicating an escalation in juvenile crime and violence in the United States).
Although there are still some procedural differences between adult and juvenile proceedings, the end result for sentencing purposes is that both types of offenders committed prior crimes for which they paid with a denial of their liberty in a jail or some other facility.\textsuperscript{313} The victims of these crimes and society in general do not see these procedural differences as relevant.\textsuperscript{314} Furthermore, juveniles and adults are certainly capable of committing the same types of offenses.\textsuperscript{315} A juvenile can commit first degree murder just as an adult can. For these reasons, the Guidelines do differentiate, to the extent necessary, between juvenile and adult sentences by tying the juvenile sentence closer in time to the present sentence.\textsuperscript{316} In treating the juvenile sentence slightly differently than the adult sentence, the Guidelines balance the recognition that some procedural differences exist between the adult and juvenile courts with the need to protect society from recidivists.

\textbf{D. Recidivism}

One major concern in today’s society is the criminal who, after being released from custody, continues to commit crime (the recidivist). In establishing the Guidelines, Congress was clearly concerned about the problem of recidivism.\textsuperscript{317} To address this concern, the Guidelines attempt to achieve the following three goals: general deterrence, punishment, and incapacitation.\textsuperscript{318} Thus, the Guidelines expressly embrace the punitive mode of criminal justice.\textsuperscript{319}

In \textit{Johnson}, the court recognized that a juvenile who commits a crime may later escape punishment as a recidivist upon entering the adult stages of life simply by not committing any further crimes.\textsuperscript{320} This person is rewarded for “going straight.”\textsuperscript{321} However, the juvenile who continues to commit crimes as an adult is not entitled to this re-

\textsuperscript{313} See United States v. Williams, 891 F.2d 212, 214 (9th Cir. 1989) (characterizing juvenile detention as similar to a “sentence of imprisonment”).

\textsuperscript{314} Id. In California, only those juveniles who commit an offense that would otherwise be considered a crime if committed by an adult can be sentenced to detention. \textit{Id.}

\textsuperscript{315} See \textit{UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, supra note 10, § 4A1.2(c)(2) (noting that juvenile status offenses are excluded from the Guidelines).}

\textsuperscript{316} \textit{Id.} § 4A1.2(d).

\textsuperscript{317} See \textit{id.} § 4A1.1 (describing criminal history as a relevant factor in determining sentence); \textit{see also} 18 U.S.C. § 3553(c)(2) (1984) (noting desire to prevent recidivism as one of the purposes for sentencing).

\textsuperscript{318} Martin, \textit{supra} note 2, at 58 n.3 (explaining the goals of the guidelines).

\textsuperscript{319} \textit{Id.}

\textsuperscript{320} United States v. Johnson, 28 F.3d 151, 154 (D.C. Cir. 1994).

\textsuperscript{321} \textit{Id.}
ward. Thus, a person is rewarded for "going straight" upon becoming an adult, and punished accordingly if he continues to violate criminal laws. Johnson is an example of a recidivist. He was a juvenile delinquent who became an adult criminal. This is precisely the type of individual Congress intended to protect society from when it authorized the Commission to promulgate sentencing guidelines.

E. Can Juvenile and Adult Sentences be Equated?

Johnson's next contention was that the Guidelines unreasonably failed to differentiate between his convictions as an adult and his juvenile sentences. The court analogized the institution in which Johnson served time as a juvenile to a prison-like facility. Johnson was sent to a juvenile hall and was denied his personal liberty in the same manner as the defendant in United States v. Williams. As the Williams court stated, the relevant consideration under the Guidelines is the fact of confinement. Without question, Johnson was sentenced to confinement as a juvenile. Furthermore, Johnson was entitled to many of the constitutional protections given to adult criminals when he was adjudicated delinquent. For these reasons, as in Williams, the Johnson court found that it was not unreasonable for the Commission to treat Johnson's juvenile and adult adjudications similarly for sentencing purposes.

However, the court did not answer the question whether Johnson's sentence as a juvenile would have been different had it been served in a less secured facility. It should be emphasized that the court could have used the downward departure provision of the Guidelines here because, in situations where a juvenile does not serve his sentence in a

322. Id.
323. Id. at 154-55 ("Recidivism, so the Congress and the Commission concluded, generally warrants increased punishment.").
324. See supra notes 226-30 and accompanying text (describing Johnson's criminal history, including juvenile adjudications, in the context of his sentence determination under the Guidelines).
325. See supra notes 319-22 and accompanying text (discussing the curbing of recidivism as one of the purposes of the sentencing guidelines).
327. Id.
328. See United States v. Williams, 891 F.2d 212, 215-16 (9th Cir. 1989) (holding that detention in a juvenile hall can be used to infer a sentence of imprisonment).
329. Id. at 216.
330. See text accompanying note 263 (noting that the Johnson majority emphasized that Johnson's juvenile sentence consisted of secure confinement in a prison-like facility).
332. Id. at 156. The Court declined to address this issue because Johnson did not raise it on his appeal. Id.
secured facility, the Guidelines may overrepresent his criminal history and the judge may take such overrepresentation into account for sentencing purposes. Moreover, the Guidelines explicitly exclude juvenile status offenses from consideration in a defendant’s criminal history score. Johnson was not sentenced to an unsecured facility and his history does not include status offenses. This means that the crimes considered in the compilation of Johnson’s criminal history score were not unique to juveniles, but instead were crimes that could be committed by adults. Therefore, the crimes he committed as a juvenile were correctly equated with the crimes he committed as an adult.

F. Judicial Discretion

Johnson’s third argument was that the judge should have used his discretion to depart downward from the Guidelines in his situation. This argument is simply without merit. Johnson did not claim he was innocent of any of his adjudicated offenses. He argued only that the judge should have departed from the Guidelines in fixing his sentence. As the record indicates, Johnson had a “long and varied experience in the criminal justice system” since he was fourteen years old. Therefore, it is highly unlikely that the Guidelines overrepresented his criminal propensities, and the judge’s decision not to exercise his discretion by departing from them was not unreasonable.

IV. Impact

If the court in United States v. Johnson had held the Guidelines unconstitutional by concluding that juvenile sentences could not be treated the same as adult sentences, the court would have allowed people who committed prior crimes to go unpunished for their recidi-vistic ways. This group could not be distinguished based on the types or severity of crimes committed. Rather, the only factor distinguishing this group from others would be their status as juveniles at the time they committed the crimes.

333. See supra notes 175-244 and accompanying text (discussing the circumstances under which the trial judge may exercise his or her discretion in departing from the sentence imposed by the Guidelines).
334. See supra note 317 (noting that juvenile status offenses are excluded under the Guidelines).
335. Johnson, 28 F.3d at 156.
336. Id. at 157.
337. Id. However, a trial court’s discretionary decision to depart from the guidelines in sentenc- ing is not a reviewable decision. Id.
338. Id.
Fortunately, the court did not follow this course of reasoning in *Johnson*. Rather than protecting this group of recidivists, the court strengthened the power of the Guidelines to attack recidivism. The Supreme Court in *United States v. Mistretta* had already upheld the constitutionality of the Guidelines. The *Johnson* court went one step further and upheld the specific principle under the Guidelines that juvenile sentences may be used to enhance an adult criminal’s sentence. The Guidelines are strengthened by this decision because, under *Johnson*, they can be used to keep more recidivists off the streets. By allowing the sentence enhancement for all adult criminals, *Johnson* ensures that adults who have committed previous crimes, whether those crimes were committed as an adult or juvenile, will be subject to longer sentences.

The *Johnson* court sent a clear message that courts will no longer “forget” the crimes that adult criminals committed as juveniles. The juvenile cannot continue to take advantage of the separate juvenile system when he becomes an adult. The Guidelines do not prevent the juveniles from enjoying any benefits the juvenile system has to offer when they are properly under its jurisdiction. If the juvenile does not commit any further crimes once he becomes an adult, the juvenile will have benefited from the separate juvenile system. However, if that same juvenile commits crimes as an adult, he or she should not continue to benefit from the separate juvenile system as an adult. This person would effectively receive a double benefit from the juvenile system.

This case also represents a positive step forward for the Supreme Court, Congress and state legislatures in treating juvenile offenders more like criminals. As the Court in *Gault* recognized, a juvenile’s confinement results in a loss of his liberty. The juvenile is, despite philosophical differences between the two systems, treated like an adult criminal when it comes to confinement. The Guidelines acknowledge this similarity, and accordingly treat juvenile sentences vir-

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340. See supra notes 232-65 and accompanying text (discussing the *Johnson* majority’s holding and supporting arguments concerning the use of juvenile adjudications in determining sentences under the federal sentencing guidelines).
341. See supra notes 319-28 (discussing recidivism and the manner in which the Guidelines justly punish the habitual criminal).
343. Id.
344. 387 U.S. 1, 27 (1967).
345. Id.
It should be emphasized that the primary impact of the *Johnson* decision will be on adult criminals. Although juveniles today commit more violent crimes, and in turn, are often treated more as adult criminals, the court’s opinion in *Johnson* has only a minor impact on juveniles themselves. Juvenile delinquents continue to benefit from the juvenile system while they are minors.\(^{346}\) The fact remains that today the juvenile system is still not the exact equivalent of the adult criminal system.\(^{347}\) The juvenile still has the opportunity to benefit from the rehabilitation-oriented philosophy underlying the juvenile courts.\(^{348}\) However, once that juvenile becomes an adult, he should no longer derive the benefits of the juvenile courts. As discussed above, society cannot afford to sweep under the rug offenses a person commits as a juvenile when determining that person’s criminal sentence as an adult.\(^{349}\)

**Conclusion**

As the juvenile court in Chicago approaches its 100th anniversary,\(^{350}\) it may be time to rethink the purposes served by the juvenile courts. The original philosophy behind the juvenile court was to rehabilitate the juvenile.\(^{351}\) The juvenile proceeding was to be considered civil in nature and geared towards rehabilitating juveniles. However, the actual juvenile system has unfolded quite differently, more closely resembling the adult criminal system with each passing year. Indeed, the Supreme Court has given juveniles almost all of the constitutional protections given to adult criminals.

The Guidelines reinforce the important goal of punishing recidivism. By including juvenile crimes in calculating a defendant’s sentence, the Guidelines effectively address the nature and increased amount of juvenile crime. To deny courts the force of this provision of

\(^{346}\) See *supra* notes 74-169 and accompanying text (demonstrating that if juvenile offenders commit no further crimes, they enjoy the benefit of having their juvenile records sealed).

\(^{347}\) See *supra* notes 292-317 and accompanying text (discussing the differences between juvenile and adult criminal courts).

\(^{348}\) See *supra* notes 28-31 (explaining that the original intent of the juvenile court system was to rehabilitate, rather than punish, young offenders).

\(^{349}\) See *supra* notes 320-22 and accompanying text (discussing the growing concern over recidivism).

\(^{350}\) See *supra* note 23 and accompanying text (noting that the juvenile system was created in Chicago in 1899).

\(^{351}\) See *supra* notes 22-60 and accompanying text (discussing the early years of the juvenile court system and the rehabilitative ideal underlying its creation).
the Guidelines would be to accept the result that adults who have committed crimes as juveniles may avoid the consequences of their repetitive criminal behavior.

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