THE KIDS ARE NOT ALRIGHT: ENDING THE UNCONSTITUTIONAL RELIANCE ON JUVENILE CONDUCT TO ENHANCE FEDERAL CRIMINAL SENTENCES

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Abstract: Under the U.S. Sentencing Guidelines’ recidivism provisions, prior judgments can be used to enhance a federal defendant’s advisory sentence and block relief from draconian mandatory minimums. This includes past offenses the defendant committed before age 18—whether the individual was prosecuted as an adult or as a juvenile. The use of pre-18 conduct to enhance later adult sentences is both constitutionally suspect and bad policy. First, the practice stands in tension with the U.S. Supreme Court’s juveniles-are-different line of cases that has recognized that “children are constitutionally different from adults in their level of culpability.” Second, the way in which the Guidelines draw a line between juvenile and adult priors generates unequal treatment between similarly situated defendants based on geography and race, a result at odds with the Guidelines’ “primary goal” of eliminating unwarranted sentencing disparities. Third, because juvenile systems in many states impose punitive sanctions while denying young people the right to a jury trial, the Guidelines enhance sentences based on convictions obtained in violation of the Sixth Amendment. Now that the U.S. Sentencing Commission is back in action following a three-and-a-half-year hiatus, this article recommends that the Commission amend the Guidelines to prohibit the use of offenses committed before age 18 to enhance advisory sentences. While those changes are pending, criminal defense attorneys and judges should implement training sessions to educate themselves about the flaws in the Guidelines so they can adjust their advocacy and sentencing decisions accordingly.
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INTRODUCTION

From a young age growing up in the Bronx, Charlie developed a penchant for joyriding in stolen cars.¹ Raised in a foster home and a survivor of childhood sexual abuse, Charlie’s crimes were influenced by the drugs and alcohol he consumed to cope with the trauma. He was first arrested as a young teen, and his crimes accelerated after his sixteenth birthday. In one 2016 incident, he and a friend drove off in a running, unlocked police car. In another, he was part of a group that threatened a cab driver and took his vehicle. Over the stretch of a few months, Charlie was charged in connection with four separate incidents. Because of his age, prosecutors offered Charlie a deal in which he could serve a single, concurrent sentence of incarceration to resolve all his open cases. In New York at the time, the jurisdiction of juvenile court ended at age 15, so Charlie could not be adjudicated as a juvenile. But he was young enough to avoid being charged as an adult. Accordingly, the plea deal made Charlie a “youthful offender.”

In New York, “youthful offender” status is available to people 18 or younger “[i]f in the opinion of the court the interest of justice would be served by relieving the eligible youth from the onus of a criminal record.”² A youthful offender adjudication “is not a judgment of conviction for a crime or any other offense,”³ nor does it disqualify the offender from such civil privileges as the ability to hold public employment or receive a professional license.⁴ The public cannot access records of such an adjudication,⁵ and it does not show up on a background check.

¹ The facts about Charlie throughout this article are taken from court filings shared with the author by Charlie’s defense attorney in his federal case, which concluded in 2021 in the Southern District of New York. Charlie’s name and other identifying details have altered to protect his identity.
² N.Y. CRIM. PROC. LAW § 720.20(1)(a) (McKinney 2023).
³ N.Y. CRIM. PROC. LAW § 720.35(1) (McKinney 2023).
⁴ Id.
⁵ Id.
Charlie was advised of these aspects of New York’s youthful offender law before he accepted his plea deal. He served his time and was released in February 2019.

Unfortunately, incarceration exacerbated Charlie’s substance abuse and mental health challenges, and he committed another crime soon after he returned home. Now 18, Charlie was drunk when he spontaneously robbed a cab driver and briefly took his car before abandoning it across town. This time, Charlie was charged in the federal system, for Hobbs Acts Robbery.6 Facing his first federal case, Charlie was shocked to learn that rather than saving him from a criminal record, his prior youthful offender adjudication now counted as “criminal history.” What is more, each of the four individual cases that were consolidated as part of his plea deal now counted as a discrete prior conviction.7

This criminal history stood to add years to Charlie’s federal sentence. Under the United States Sentencing Guidelines (the “Guidelines”), a 600-plus-page manual that helps federal judges calculate a recommended sentence for each defendant, all prior judgments—whether adult convictions or juvenile adjudications—can be used to enhance a sentence.8 If a state law conflicts with the Guidelines, as New York’s does in attempting to exclude youthful offenses from an individual’s criminal record, the Guidelines trump. Under the Supremacy Clause,9 federal law, not state law, controls application of the Guidelines.10 Although Charlie’s federal case resulted in his first felony conviction, he was treated for the purposes of sentencing as the most aggravated

7 U.S. SENT’G GUIDELINES MANUAL § 4A1.2(a)(2) (U.S. SENT’G COMM’N 2021) (“Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest.”).
8 See id. ch. 4.
9 U.S. CONST. art. VI, cl. 2.
10 See United States v. Elliot, 732 F.3d 1307, 1312 (11th Cir. 2013); United States v. Gray, 177 F.3d 86, 93 (1st Cir. 1999) (states “may not dictate how the federal government will vindicate its own interests in punishing those who commit federal crimes”).
repeat offender. Instead of a sentencing range of 63 to 78 months available to first-time offenders, the Guidelines recommended a sentence for Charlie of 120 to 150 months.

In the end, Charlie’s judge decided to “vary” downward and impose a lesser sentence than what the Guidelines called for. After noting Charlie’s difficult upbringing and prospects for rehabilitation, the judge sentenced Charlie to a prison term of 48 months followed by three years of supervised release. Had Charlie appeared before a judge who adhered more closely to the Guidelines, however, he could have faced 10 or more years behind bars.

Charlie’s story highlights what I argue are deep constitutional and policy-based flaws in how the Guidelines use offenses committed prior to age 18 to either enhance later federal sentences or block relief from draconian mandatory minimums.11 Thousands of federal defendants are affected each year. According to one 2017 study that examined defendants younger than 25 at the time of sentencing, one in four were assigned criminal history points on account of conduct they committed before age 18.12 The main problems with the Guidelines’ approach to youthful adjudications are threefold. First, as discussed in Part II, the weight given to such offenses flies in the face of a recent string of U.S. Supreme Court opinions that have held “that children are constitutionally different from adults for purposes of sentencing” in a way that makes them “less deserving of the most severe punishments.”13 Central to the Court’s reasoning have been advances in researchers’ understanding of adolescent cognitive, psychosocial, and neurobiological development, which help explain why teenagers as a group are more inclined to commit crime compared to older and younger cohorts. Second, the way in which the Guidelines

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draw a line between juvenile and adult priors generates unequal treatment between similarly situated defendants, a result at odds with the Guidelines’ “primary goal” of eliminating unwarranted sentencing disparities (Part III). Specifically, the Guidelines rely on divergent state practices to classify the prosecution of people under 18 and thereby allow sentences to vary based on arbitrary factors like geography and race. Third, because juvenile systems in many states impose punitive sanctions while denying young people the right to a jury trial, the Guidelines enhance sentences based on juvenile convictions obtained in violation of the Sixth Amendment. (Part IV). The Guidelines further err in assigning criminal history points based on the length of prior juvenile dispositions when, in fact, such dispositions can be imposed for reasons entirely unrelated to the seriousness of the underlying offense. In sum, the Guidelines’ treatment of offenses committed before 18 is an engine of incarceration at odds with modern constitutional doctrine, the prevailing science, and its own policy objectives. An update to the Guidelines is in order.

Fortunately, policymakers possess the authority to enact relatively straightforward policy changes to correct the worst of these flaws. In Part V, I consider a range of options available to policymakers, running from the most cautious to the most to the most far-reaching, before recommending that no offense committed before age 18 should any longer be considered under the Guidelines’ enhancement provisions. I argue this is the optimal choice for three reasons. First, it requires action not by Congress or the courts but by a single agency, the U.S. Sentencing Commission (the “Commission”), whose role is to “review and revise” the Guidelines on an

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15 U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”).

annual basis. Second, my recommendation is simple to implement from a technical standpoint, requiring minimal edits to the Guidelines as opposed to a significant overhaul of federal law. Third and most importantly, this option best accords with the insights of the Supreme Court, modern science, and policy considerations, all of which support the conclusion that adults should not receive sentence enhancements for offenses they committed as adolescents. Alternative proposals, for example, that the Guidelines should exclude juvenile adjudications but not convictions for pre-18 conduct obtained in adult courts, ignores the logic of those insights in a way that exposes defendants to unconstitutional, unfair, and racially disparate treatment. While amendments to the Guidelines are pending, I also recommend that criminal defense attorneys and judges implement training sessions to educate themselves about these flaws in the Guidelines so they can adjust their advocacy and sentencing decisions accordingly.

Before turning to my arguments and recommendations, I will describe in Part I how the Guidelines use conduct committed before age 18 to enhance federal sentences.

PART I: HOW THE GUIDELINES USE PRIOR OFFENSES COMMITTED BEFORE 18 TO ENHANCE SENTENCES

This Part provides a brief description of the history and design of the Guidelines sentencing system. Section I.A traces the system’s birth amid a “sentencing revolution” and its evolution from a binding to non-binding regime. Section I.B. explains how the Guidelines factor offenses committed before age 18 into calculations of an advisory sentencing range. Section I.C demonstrates that even when states classify crimes as “youthful offenses,” federal courts often

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17 After a three-and-a-half-year period under the Trump Administration when it lacked the quorum needed to conduct business, the Commission returned to action in August 2022. DAVE S. SIDHU, CONG. RSCH. SERV., LSB10890, BACK IN ACTION, THE U.S. SENTENCING COMMISSION TO RESOLVE CIRCUIT SPLITS ON CONTROLLED SUBSTANCES AND SENTENCING REDUCTIONS 1 (Dec. 30, 2022).
invoke the Guidelines to treat those crimes as adult convictions that expose defendants to the most punitive sentencing enhancements.

A. The Guidelines Regime from Inception to Modern Practice

The U.S. Sentencing Guidelines have been at the heart of federal sentencing practice since 1987, when they were first promulgated by the U.S. Sentencing Commission pursuant to the Sentencing Reform Act of 1984 (the “SRA”).\textsuperscript{18} The Guidelines were conceived amid a “sentencing revolution” spurred by a crisis of faith among leading judges, politicians, and scholars in the ability of incarceration to promote rehabilitation and by the belief that excessive judicial discretion had led to unfair disparities in sentencing.\textsuperscript{19} Particularly influential in shaping public discourse was Judge Marvin Frankel’s 1973 book \textit{Criminal Sentences: Law Without Order}, in which he described the sentencing power of federal judges as “almost wholly unchecked and sweeping” and which he found “terrifying and intolerable for a society that professes devotion to the rule of law.”\textsuperscript{20} In response, Congress in the SRA sought to impose a determinate sentencing regime that cabined judges’ decision-making and all but eliminated the role of parole in the federal system.\textsuperscript{21}

Tasked with implementing Congress’s desire for greater uniformity in sentencing, the Commission devised a scheme still used today that centers around a two-dimensional grid known as the “Sentencing Table.”\textsuperscript{22} The two axes correspond to a defendant’s “offense level” (1 to 43) and criminal history category (I to VI) that, once calculated, provide a range of months to which a judge should sentence a defendant in the typical case. To calculate those variables, a judge

\begin{footnotesize}
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\item[\textsuperscript{21}] Whitman, \textit{supra} note Error: Reference source not found, at 127-28.
\item[\textsuperscript{22}] U.S. SENT’G GUIDELINES MANUAL § 5A (U.S. SENT’G COMM’N 2021).
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applies hundreds of pages of “sentencing factors” set forth in chapters two through four of the Guidelines. Every federal offense has a base offense level that can be adjusted up or down based on various aspects of the offense, such as whether a weapon was used, or based on the defendant’s subsequent behavior, such as acceptance of responsibility. The criminal history category, in turn, is determined using an elaborate points system for past offenses.

The Guidelines as originally conceived were binding on judges, meaning that judges were required to sentence defendants to a period of incarceration within the range specified by the Sentencing Table. The main exception was if the judge determined that an upward or downward adjustment, known as a “departure,” was warranted. The availability of departures, however, was tightly constrained by “policy statements” within the Guidelines, which specified that considerations such as race or socioeconomic status were “not relevant” in granting departures, while other factors such as family ties, mental health, and addiction were “not ordinarily relevant.” Judges could also depart if an aggravating or mitigating circumstance was present “of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.” The Commission was clear that departures should occur only in the “atypical” or “unusual” case.

The most common basis for departure was defendants’ “substantial assistance in the investigation or prosecution of another person,” but that departure was available only upon

23 See, e.g., U.S.S.G. § 2A2.2 (2021) (“If [during an aggravated assault] (A) a firearm was discharged, increase by 5 levels; (B) a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by 3 levels.”)
30 U.S. SENT’G GUIDELINES MANUAL § 1A4(b) (U.S. SENT’G COMM’N 1987).
the prosecutor’s motion. Judges, therefore, had limited ability to maneuver around the dictates of the Sentencing Table.

Federal sentencing underwent another paradigm shift in 2005 when the Supreme Court declared in *U.S. v. Booker* that the sentencing ranges prescribed by the Guidelines were no longer binding on judges. In relegating the Guidelines to advisory status, the Court breathed new life into 18 U.S.C. § 3553(a), a code section that directs sentencing judges to consider each offender’s “history and characteristics” and “impose a sentence sufficient, but not greater than necessary” to comply with the statutory purposes of sentencing. In a series of decisions in the wake of *Booker*, the Supreme Court clarified the extent of judges’ discretion to deviate from the Guidelines. Most notably, district courts may not presume that a sentence with the recommended Guidelines range is reasonable and must address non-frivolous arguments for a sentence outside that range. Further, sentencing judges are free to deviate from the Guidelines based solely on policy considerations, such as disagreement with the Guidelines’ former 100-to-one ratio for crack cocaine versus powder cocaine sentences.

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32 That is not to say that all discretion was removed from federal sentencing. Prof. Michael O’Hear, for example, has pointed out that the departure mechanism allowed judges discretion in both whether to depart (e.g., what are the boundaries of “not ordinarily relevant”) and by how much. O’Hear, supra note Error: Reference source not found, at 798. And by constraining judges, the Guidelines transferred discretionary power to prosecutors in their charging decisions, plea bargains, and control over cooperation benefits. Id. at 807-08.
35 Rita v. United States, 551 U.S. 338, 351 (2007) (“the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply”). For their part, courts of appeal may—but are not required—to presume that a within-Guidelines sentence is reasonable. Id. at 353.
While re-empowering judges in *Booker* and its progeny, however, the Supreme Court has also mandated that the Guidelines continue to serve as “the starting point and the initial benchmark” of sentencing.\(^{37}\) Sentencing judges must now follow a three-step process set forth by *Gall v. United States*.\(^{38}\) First, judges must properly determine the advisory Guidelines range.\(^{39}\) Second, they must determine whether to apply a departure to adjust the Guidelines range.\(^{40}\) Finally, they must consider the factors in 18 U.S.C. § 3553(a) to determine whether a sentence outside the Guidelines range, known as a “variance,” is warranted.\(^{41}\)

This scheme has caused the advisory Guidelines to maintain considerable sway over the decisions of sentencing judges.\(^{42}\) In 2022, judges imposed sentences under the Guidelines Manual (i.e., either within the advisory Guidelines range or based on a departure) in 68% of cases while granting variances in the other 32%.\(^{43}\) While the influence of the Guidelines appears to have slipped over time—the year after *Booker* was decided, sentences under the Guidelines Manual were imposed in more than 85% of cases\(^{44}\)—it remains the case that, absent a


\(^{38}\) *Id.*; see also U.S. SENT’G GUIDELINES MANUAL § 1B1.1(a)-(c) (U.S. SENT’G COMM’N 2021) (application instructions). Judges receive key assistance in applying the Guidelines from the U.S. Probation Office, which must conduct a presentence investigation and submit a presentence report to the court prior to every sentencing, with limited exceptions. FED. R. CRIM. P. 32.


\(^{41}\) *Gall*, 552 U.S. at 49-50; U.S. SENT’G GUIDELINES MANUAL § 1B1.1(c) (U.S. SENT’G COMM’N 2021).

\(^{42}\) See, e.g., Peugh v. United States, 569 U.S. 530, 543-44 (2013) (“[Defendant] points to considerable empirical evidence indicating that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges.”).

\(^{43}\) U.S. SENT’G COMM’N, 2022 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 84 tbl. 29 (2023) [hereinafter U.S. SENT’G COMM’N, 2022 SOURCEBOOK].

\(^{44}\) U.S. SENT’G COMM’N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. N (2007) (figure combines cases sentenced within the Guidelines range with those where a departure was granted based on the provisions, policy statements, or commentary of the Guidelines Manual).
prosecutor’s motion, districts courts grant upward or downward variances in less than one-quarter of all cases.45

Even when judges do grant variances, it is very likely that the Guidelines are influencing what judges think is a reasonable length of imprisonment—a phenomenon known as the “anchoring effect.”46 The anchoring effect is a cognitive bias that describes the human tendency to adjust judgments higher or lower based on previously disclosed external information.47 Former U.S. District Court Judge Mark W. Bennett convincingly argues that the Guidelines are a “hulking anchor for most judges” that prevents them from meaningfully deviating from the advisory ranges even as they express widespread dissatisfaction with the Guidelines’ harshness.48 His assertion is supported by experiments in both the United States and Europe that have confirmed the anchoring effect in a variety of settings, including among physicians, real estate agents, lawyers, and judges.49 In one study of German judges, for example, participants in a mock sentencing scenario received an unexpected phone call from a reporter who asked: “Do you think that the sentence for the defendant in this case will be higher or lower than [1 or 3] year(s)?” Participants given the low anchor imposed an average sentence of 25 months, while

45 U.S. SENT’G COMM’N, 2022 SOURCEBOOK, supra note Error: Reference source not found, at 84 tbl. 29. Considerable variation exists between federal judicial districts in the rate at which they grant variances, ranging from a low of 10.8% in the District of Arizona to a high of 71.6% in the District of Rhode Island. Id. at 87-89 tbl. 30.
47 Id.
48 Id. at 523, 525-28 (“Given the widespread dissatisfaction among federal district judges with the Guidelines, judicial acceptance cannot possibly explain the extent of judges' tethering to the Guidelines.”). To counter the influence of the anchoring effect, Judge Bennett proposes requiring judges to consider the defendant’s personal history and other factors under 18 U.S.C. § 3553(a) and determine a preliminary sentencing range before the presentence report prepared by the U.S. Probation Office discloses the advisory Guidelines range. Id. at 529-30.
49 Id. at 495.
those exposed to the high anchor gave an average sentence of 33 months.\(^{50}\) The anchoring effect is observed “even when the anchors are incomplete, inaccurate, irrelevant, implausible, or random,” but it is even more robust with more plausible anchors.\(^{51}\) The Guidelines are an example of a plausible and thus powerful anchor, producing a recommendation that purports to take account of the difficult considerations that bear on sentencing.\(^{52}\)

The three-step sentencing procedure laid out in *Gall*, when combined with the cognitive anchoring effect, thus preserves the Guidelines’ status as the “lodestone of sentencing” even in the post-*Booker* era.\(^{53}\) I will now turn to the subject that will be my focus going forward: how the Guidelines specifically treat offenses committed before age 18. Although advisory, the policy espoused by the Guidelines routinely leads to longer periods of incarceration on account of defendants’ conduct as children or adolescents.

**B. The Guidelines’ Treatment of Offenses Committed Before Age 18**

The Guidelines are animated by the belief that “[a] defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment.”\(^{54}\) The Guidelines therefore contain a plethora of so-called “recidivist enhancements,” provisions that recommend harsher punishment for defendants with a criminal record. Of central concern to this article, the Guidelines authorize an accounting not only of a defendant’s criminal record as an adult, but also as a child or adolescent. This approach exposes thousands of defendants each year to enhanced sentences on account of their involvement with the criminal legal system before they turned 18. Between 2010 and 2015, for example, one in

\(^{50}\) Id. at 504.

\(^{51}\) Id. at 502-03.

\(^{52}\) Id. at 519.

\(^{53}\) *Peugh*, 569 U.S. at 544.

four defendants under 25 at the time of sentencing received an average of three criminal history points for prior offenses they committed before age 18.\textsuperscript{55} As described below, criminal history points are only one of several ways the Guidelines use past conduct committed before age 18 to raise a defendant’s advisory sentencing range. Additionally, the Guidelines can use that same conduct to deny defendants relief from mandatory minimum sentences.

The Guidelines can use pre-18 conduct to increase a defendant’s advisory sentencing range through three different mechanisms. First, such offenses can increase a defendant’s criminal history category, which ranges from I to VI on the x-axis of the Sentencing Table.\textsuperscript{56} Each criminal history category corresponds to a certain number of criminal history “points,” i.e., Category I is 0 or 1 point, Category II is 2 or 3 points, and so on, up to Category VI at 13 or more points.\textsuperscript{57} A higher criminal history category typically means a longer advisory sentence.\textsuperscript{58}

The Guidelines contain two similar but distinct schemes to assign criminal history points for prior adult offenses versus those committed before age 18. Under the scheme for adult offenses, the judge reviews a defendant’s rap sheet and adds three criminal history points for each prior sentence of imprisonment exceeding one year and one month, two points for each prior sentence exceeding 60 days, and one point for prior sentences not otherwise counted.\textsuperscript{59} Three-point offenses are counted provided the defendant was incarcerated on that sentence within the past 15 years; two- and one-point offenses time out after 10 years.\textsuperscript{60} The counting scheme for past offenses committed prior to age 18 differs slightly. A defendant will receive

\textsuperscript{55} YOUTHFUL OFFENDERS IN THE FEDERAL SYSTEM, supra note Error: Reference source not found, at 35-36.
\textsuperscript{56} U.S. SENT’G GUIDELINES MANUAL § 5A (U.S. SENT’G COMM’N 2021).
\textsuperscript{57} Id.
\textsuperscript{58} Id. For a crime with a base level offense of 14, for example, the advisory range is 15-21 months in Criminal History Category I but 37-46 months in Criminal History Category VI.
\textsuperscript{60} Id. § 4A1.2(e).
three points if “convicted as an adult” and sentenced to a term of imprisonment exceeding one year and one month, two points for each adult or juvenile sentence of at least 60 days, and one point for all other adult or juvenile sentences. Unlike prior adult offenses, offenses committed prior to age 18 are counted only if they resulted in imposition of an adult or juvenile sentence or release from confinement within five years of the instant offense. The counting scheme for offenses committed before age 18 is thus slightly more forgiving, but defendants—especially those in their early 20s—routinely face drastic sentencing enhancements on account of their past conduct as young teens or adolescents.

Charlie’s experience is a case in point. As described in this article’s opening anecdote, Charlie was placed in Criminal History Category VI largely on account of the four youthful offender adjudications that were consolidated under one plea deal when he was 16. We can now better understand why. Under controversial Second Circuit precedent that will be explored further in Part I.C, infra, his youthful offender adjudications were counted as “adult” convictions for purposes of the Guidelines. The court then determined that none of his offenses had timed out; Charlie had been released from confinement on them within five years of the instant offense. Finally, because each of his four “adult” offenses resulted in a sentence exceeding one year and one month (he served indeterminate, concurrent sentences of one to three years on two counts, 16 months to four years on the others), each added three points to his criminal history score, for a total of 12 points. Combined with one point stemming from a disciplinary matter while incarcerated, plus two points because he committed the instant offense while on parole, Charlie thus had more than the requisite 13 points to land him in Criminal

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61 Id. § 4A1.2(d).
62 Id.; id. § 4A1.2 cmt. n.7.
63 See United States v. Matthews, 205 F.3d 544 (2d Cir. 2000); United States v. Driskell, 277 F.3d 150 (2d Cir. 2002).
History Category VI. His advisory Guidelines range shot up to 120 to 150 months, compared to 63 to 78 months in Category I.  

The second way the Guidelines can enhance advisory sentencing ranges based on offenses committed prior to age 18 is by raising the “base offense level” for certain categories of crimes. Under the Guidelines, each type of crime is assigned a base offense level between 1 and 43, which corresponds to the y-axis of the Sentencing Table. A higher number typically increases the recommended sentence. The base offense level for each type of crime can then be adjusted upward or downward based on aggravating or mitigating factors. Section 2K2.1 of the Guidelines, for example, instructs on how to calculate the base offense level for the crime of unlawful receipt, possession, or transportation of firearms or ammunition. This section provides for a base offense level of 12 as the baseline but bumps that number up to 20 if the defendant has a certain type of prior felony conviction or to 24 if the defendant has two or more such felony convictions. “Felony conviction” is then defined to include judgments for offenses committed prior to age 18 if the judgment “is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.” Similar language appears in two other Guidelines sections concerning the crimes of unlawfully entering or remaining in the United States and unlawful receipt, possession, or transportation of explosive material. Although these sections represent a tiny fraction of all crimes described in the Guidelines, they are some of

65 At base offense level 26.
67 Id.
68 Id. § 2K2.1.
69 Id.
70 Id. cmt. n.1.
71 Id. § 2L1.2; id. § 2L1.2 cmt. n.1(B).
72 Id. § 2K1.3; id. § 2K1.3 cmt. n.2.
the most commonly charged, with firearms and immigration cases alone accounting for roughly 44% of all federal sentencings in 2021.\textsuperscript{73}

Third, offenses committed prior to age 18 can make a defendant a “career offender,” a designation that applies to a defendant who was at least 18 years old at the time of the instant offense and convicted of a third crime of violence or controlled substance offense.\textsuperscript{74} Crucially, an offense committed prior to age 18 can count as a qualifying predicate if it was classified as an adult conviction in the jurisdiction that adjudicated the case.\textsuperscript{75} Being deemed a career offender is one of the most consequential misfortunes that can befall a defendant. This designation automatically places the defendant in the highest criminal history category and simultaneously increases the base offense level to produce an advisory Guidelines range approximating the statutory maximum for the offense of conviction.\textsuperscript{76} To take a real-world example, a defendant we will call Samuel pleaded guilty in 2021 to federal charges of brandishing a firearm during a robbery of a New York City bodega.\textsuperscript{77} His plea agreement stipulated an advisory Guidelines range of 121-130 months based on a base offense level of 17, a criminal history category of IV, and a special enhancement for brandishing found at 18 U.S.C. § 924(c)(1)(A)(ii). In preparing a presentence report for the case, however, a probation officer uncovered a youthful offender adjudication from New York state that had been sealed and thus unknown to the prosecutor. Taking this adjudication into account, the probation officer classified Samuel as a career offender, more than doubling his advisory Guidelines range to 262-327 months.\textsuperscript{78}

\textsuperscript{73} U.S. Sent’g Comm’n, supra note \textsuperscript{Error: Reference source not found}, at 46 tbl. 4.
\textsuperscript{74} U.S. Sent’g Guidelines Manual § 4B1.1(a) (U.S. Sent’g Comm’n 2021).
\textsuperscript{75} Id. § 4B1.2 cmt. n.1 (using same language as in §§ 2K1.3, 2K2.1, and 2L1.2).
\textsuperscript{76} Id. § 4B1.1.
\textsuperscript{77} These facts, with identifying information removed, were taken from court submissions in the 2022 sentencing of a client represented by the Federal Defenders of New York, Southern District, and shared with the author.
\textsuperscript{78} In the end, Samuel got lucky. The prosecutor in his case abided by the terms of the plea agreement and asked the judge for a sentence of 130 months. The judge imposed a sentence of
In addition to enhancing an advisory Guidelines range, offenses committed prior to age 18 can also deny defendants relief from statutory mandatory minimum sentences for several controlled substance offenses. Congress has made hundreds of offenses punishable by a mandatory minimum term of imprisonment, although by far the most commonly charged are drug trafficking offenses, which in 2021 accounted for over three-quarters of the total. Concerned that mandatory minimums could result in equally severe penalties for unequally culpable offenders, Congress created the so-called “safety valve” in 1994 to allow certain defendants convicted of drug crimes to avoid the harshness of the statutory minimums. To qualify for the safety valve, a crime cannot have resulted in death or serious injury and the court must find that the defendant does not have more than a certain number of criminal history points; was not violent, armed, or a high-level participant; and provided the government with information regarding the offense and related conduct. Until 2018, anyone with more than one criminal history point under the Guidelines was ineligible for safety valve relief. The First Step Act, enacted in 2018, broadened that criterion so that defendants are ineligible only if they have a

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96 months. The public defender who represented Samuel said the case “could have gone terribly” before a different judge.

79 The most commonly prosecuted drug offenses carrying mandatory minimum sentences are found at 21 U.S.C. §§ 841, 960; see also U.S. SENT’G COMM’N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 11-12 (July 2017) [hereinafter U.S. SENT’G COMM’N, 2017 MANDATORY MINIMUM REPORT].

80 U.S. SENT’G COMM’N, QUICK FACTS: MANDATORY MINIMUM PENALTIES 1 (June 2022) (“Of all cases carrying a mandatory minimum penalty: 75.1% were drug trafficking....”).

81 CHARLES DOYLE, CONG. RSCH. SERV., R41326, FEDERAL MANDATORY MINIMUM SENTENCES: THE SAFETY VALVE AND SUBSTANTIAL ASSISTANCE EXCEPTIONS 2 (July 5, 2022).

82 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §80001, 108 Stat. 1796, 1985-86. The only other ways to get out from under statutory mandatory minimum sentences require a motion from the prosecutor based on the defendant’s substantial assistance to the government and without regard to the offense charged. 18 U.S.C. § 3553(e) (2023); FED. R. CRIM. P. 35(b); see also CHARLES DOYLE, supra note Error: Reference source not found, at 1.


prior two-point violent offense, a prior three-point offense, and more than four total criminal history points. As discussed, offenses committed before 18 are assigned criminal history points under the Guidelines. They therefore can—and do—render defendants ineligible for safety valve relief.

Besides the 2017 study quantifying the number of federal defendants who receive criminal history points on account of pre-18 conduct, it is difficult to find precise figures as to how many people face higher base offense levels, are designated career offenders, or denied safety valve relief due to offenses they committed before age 18. That said, anecdotal evidence from the Federal Defender Sentencing Guidelines Committee, a group of federal public defenders that advocates for amendments to the Guidelines, suggests that their clients face these dynamics “on a regular basis”:

We have represented a young woman who was charged as a courier in her first drug offense, but was denied safety valve relief from a mandatory minimum sentence because of a domestic dispute as an adolescent, while she was struggling with mental and emotional issues, that led to a juvenile adjudication. We have represented a man who was pushed across the sentencing grid to criminal history category V on the basis of an adjudication for assault when he was 10-years-old [sic], an adjudication for escape when he walked out of juvenile court at age 15, and a cocaine conviction when he was 18-years-old [sic]. And another young man who at age 20 fell in criminal history category V based entirely on juvenile adjudications, mostly for car theft. We routinely see our clients earn criminal history points for minor offenses committed when they were quite young, such as a 14-year-old lying to a police officer about his name and birthdate during a traffic stop.

85 Id.; see also United States v. Lopez, 998 F.3d 431, 437 (9th Cir. 2021) (“Thus, a defendant must meet the criteria in subsections (A) (more than four criminal-history points), (B) (a prior three-point offense), and (C) (a prior two-point violent offense) to be barred from safety-valve relief by § 3553(f)(1). This means one of (A), (B) or (C) is not enough. A defendant must have all three before § 3553(f)(1) bars him or her from safety-valve relief.”) (emphasis of the court).

86 YOUTHFUL OFFENDERS IN THE FEDERAL SYSTEM, supra note Error: Reference source not found, at 35-36.

I now turn to another problematic aspect of the Guidelines: the transformation of “youthful offender” adjudications under state law into adult convictions for federal sentencing purposes.

C. How the Guidelines Transform State “Youthful Offender” Adjudications into Adult Convictions for Sentencing Purposes

Judgments that are classified as “youthful offender” adjudications under state law can be counted as adult convictions under the Guidelines. This dynamic is problematic because the Guidelines’ treatment of these adjudications is often in direct conflict with language in state statutes labeling them as non-convictions and limiting their use in future proceedings. The mismatch between state and federal treatment of these adjudications stems from the fact that youthful offender statutes in many states create interstitial adjudicatory systems with procedures that mix those found in juvenile and adult courts, whereas the Guidelines recognize only two categories—juvenile and adult priors. The state statutes, for example, often authorize special procedures by which offenders who are ineligible for juvenile court but still under a certain age—often 18 but sometimes several years older—can receive dispositions that are more rehabilitative and less punitive than the penalties to which adults in criminal courts are exposed. In many states, as described in the case studies below, such adjudications do not count as adult convictions under state law and do not disqualify the individual from public employment, professional licenses, and other civil benefits. At first glance, therefore, these adjudications would appear to fit more naturally into the category of juvenile than adult priors for Guidelines purposes. Most federal appellate courts to consider the issue, however, have held that these adjudications can be counted as prior adult convictions for the purpose of calculating a federal

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defendant’s advisory sentence. The transformation is accomplished through language in the Guidelines that federal courts have generally held to override contrary state law.

The classification of youthful offender adjudications as adult convictions rather than juvenile adjudications is significant because, as mentioned in Part I.B, supra, the Guidelines treat prior adult convictions more harshly than prior juvenile adjudications. Adult convictions are assigned up to three criminal history points, can enhance the base offense level for certain categories of crimes, and most consequentially, can expose defendants to designation as a career offender. By contrast, juvenile adjudications can be assigned a maximum of two criminal history points, cannot be used to enhance the base level offense for those crimes, and cannot be counted as predicate convictions toward designation as a career offender.

In sorting a defendant’s priors into either the juvenile or adult bucket, the Guidelines look to more than just the age at which the prior offense was committed. That is, the Guidelines do not classify all offenses committed prior to age 18 as juvenile offenses. Rather, the Guidelines further ask how defendants were prosecuted for that offense in the relevant jurisdiction—whether as a juvenile or as an adult. In its instructions for assigning criminal history points to offenses committed before age 18, for example, the Guidelines specify that an offense should receive three points “[i]f the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month.”89 Separately, in its instructions about whether an offense committed before age 18 can count as a predicate “prior felony conviction” toward designation as a career offender, the Guidelines advise:

“Prior felony conviction” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year. … A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted

(e.g., a federal conviction for an offense committed prior to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).\textsuperscript{90}

Sections 2K1.3 and 2K2.1, which contain instructions for calculating the base offense levels for crimes involving explosive materials and firearms, respectively, use the same language to define a prior “felony conviction.”\textsuperscript{91} Section 2L1.2, regarding the crime of unlawful entry, refers to a broader category of “felony offenses” than do Sections 2K1.3 and 2K2.1 but nonetheless defines such offenses to include those committed prior to age 18 using the same operative language.\textsuperscript{92}

This language in the Guidelines recognizes that all states have statutes specifying when the offense of a person under 18 may or must be considered the crime of an adult.\textsuperscript{93} Three different practices predominate: 1) statutory exclusion laws, which requires charges against juveniles be filed in adult court for certain offense; 2) prosecutorial discretion laws, which give prosecutors discretion to file charges directly in adult court; and 3) judicial waiver laws, which require a juvenile court judge to decide whether a minor can be charged as an adult.\textsuperscript{94} Some states specify a minimum age at which minors can be transferred to adult court, while others set no minimum age.\textsuperscript{95}

\textsuperscript{90} Id. § 4B1.2 cmt. n.1.
\textsuperscript{91} Id. §§ 2K1.3 cmt. n.2, 2K2.1 cmt. n.1.
\textsuperscript{92} Id. § 2L1.2 cmt. n.1(B) (“Subsections (b)(1), (b)(2), and (b)(3) do not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.”).
\textsuperscript{94} Id.; Ioana Tchoukleva, Children Are Different: Bridging the Gap Between Rhetoric and Reality Post Miller v. Alabama, 4 Cal. L. Rev. Circuit 92, 94 (2013).
\textsuperscript{95} Miller v. Alabama, 567 U.S. 460, 486 (2012) (“[I]ndeed, some of those States set no minimum age for who may be transferred to adult court in the first instance, thus applying life-without-parole mandates to children of any age—be it 17 or 14 or 10 or 6.”).
Read literally, the language in the Guidelines appears to give substantial deference to the prosecuting jurisdiction in determining whether an offense committed prior to age 18 should subsequently be treated by federal courts as a juvenile adjudication or adult conviction. In practice, however, the Guidelines have been interpreted by federal courts to permit most youthful offender adjudications to count as adult priors, regardless of the intention of the prosecuting jurisdiction. This dynamic raises a host of policy concerns over notice and fairness, which I discuss in Part IV, infra. In this section, I will merely describe how the Guidelines achieve this result. I will use the Second Circuit’s interpretation of New York state law as my primary case study and then briefly mention similar circuit court holdings regarding the laws of other states, including Michigan, South Carolina, Florida, Alabama, and Massachusetts. This is not an exhaustive list of all affected jurisdictions.

i. Second Circuit Treats New York Youthful Offender Adjudications as Adult Convictions

New York law explicitly states that “[a] youthful offender adjudication is not a judgment of conviction for a crime or any other offense,” and yet federal courts classify such adjudications as adult convictions and use them to enhance defendants’ advisory Guidelines ranges. This surprising metamorphosis is the product of the specific design of New York’s youthful offender procedure. Under New York law, 16-, 17-, and 18-year-olds are eligible to be found a youthful offender unless they commit certain serious felonies, have previously been adjudicated a youthful offender for a felony, or have previously been convicted and sentenced as an adult. Their cases proceed in adult court and if they plead guilty or are convicted at trial, their conviction after the fact is vacated and replaced with a youthful offender finding. The

96 N.Y. CRIM. PROC. LAW § 720.35(1) (McKinney 2023).
97 Id. § 720.10(2).
98 Id. §§ 720.20(1), (3). In some situations, the court “must” grant a youthful offender finding. In others, the court has discretion to do so if it believes finds that “the interest of justice would be served by relieving the eligible youth from the onus of a criminal record.” Id. § 720.20(1).
maximum sentence is an indeterminate term of imprisonment not exceeding four years. 99 All records of youthful offender adjudications nominally are sealed—they “are confidential and may not be made available to any person or public or private agency”—but the statute contains key exceptions that, in practice, allow federal courts to subsequently access the records. 100 Youthful offender adjudications do not disqualify individuals from public employment, voting, and other civic privileges, and individuals need not disclose such judgments if, say, future job or housing applications ask about past “convictions.” 101 New York courts cannot use the adjudications to enhance sentences in subsequent cases. 102

The Second Circuit has seized upon the fact that a New York youthful offender finding follows a conviction in adult court to assert that such findings constitute adult convictions for federal sentencing purposes. The first case to so hold was United States v. Driskell, in which the defendant argued that the district court had erred in assessing three criminal history points for a crime he committed at age 17 and for which he was adjudicated a youthful offender. 103 The Second Circuit admonished sentencing courts to “look to the substance of the past conviction rather than the statutory term affixed to it by a state court.” 104 In this case, the Second Circuit looked to Section 4A1.2(d) of the Guidelines, which assigns three criminal history points for each offense in which a defendant “was convicted as an adult and received a sentence of

99 Id.
100 Id. § 720.35(2).
101 Id.; Video interview with Donna Henken, Adolescent Intervention and Diversion Project Attorney, The Legal Aid Society (Mar. 6, 2023).
102 United States v. Matthews, 205 F.3d 544, 548 (2d Cir. 2000).
103 277 F.3d 150, 153-54 (2d Cir. 2002) (relying on Matthews, 205 F.3d 544, which held that a youthful offender adjudication does not operate as an expungement of a conviction).
104 Id. at 154.
imprisonment exceeding one year and one month.” The court held that New York’s youthful offender procedure satisfies that language.

Accordingly, a [federal sentencing] court may consider a defendant's eligible past conviction, even when that conviction has been vacated and deemed a youthful offender adjudication under New York law, in those situations where, as here, the defendant although under age eighteen was tried in an adult court, convicted as an adult, and received and served a sentence exceeding one year and one month in an adult prison.

The court also dismissed the argument that assigning criminal history points for the defendant’s youthful offender adjudications contravened the intent of the New York legislature. The youthful offender statute “emanate[s] from a legislative desire not to stigmatize youths between the ages of 16 and 19 with criminal records triggered by hasty or thoughtless acts.” It is not meant, however, to eliminate the offender’s culpability or shield the offender from all consequences if he recidivates, according to the court.

In subsequent cases, the Second Circuit built on its reasoning in Driskell to hold that youthful offender adjudications also count as adult convictions for purposes of calculating a federal defendant’s base offense level and designating that person a “career offender.” The

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106 Driskell, 277 F.3d at 154-55.
107 Id. at 154.
108 Id. at 156 (quoting People v. Drayton, 350 N.E.2d 377, 379 (1976)).
109 Id. at 155.
110 Id. at 156 (citing for support United States v. McDonald, 991 F.2d 866, 872 (D.C.Cir.1993) (“Setting aside a conviction may allow a youth who has slipped to regain his footing by relieving him of the social and economic disabilities associated with a criminal record. But if a juvenile offender turns into a recidivist, the case for conferring the benefit dissipates. Society's stronger interest is in punishing appropriately an unrepentant criminal.”)).
111 United States v. Reinoso, 350 F.3d 51, 55 (2d Cir. 2003) (“There is no principled reason to distinguish between convictions that are considered for the purpose of calculating a defendant's criminal history category, and those used to calculate the base offense level.”).
112 United States v. Jones, 415 F.3d 256, 258 (2d Cir. 2005) (“While it is true that Jones may only have pleaded guilty because the judge had indicated that he would adjudicate him a youthful offender, this does not change the fact that Jones was convicted before receiving youthful offender status.”); see also United States v. Parnell, 524 F.3d 166, 171 (2d Cir. 2008).
Second Circuit rejected, however, the argument that youthful offender adjudications could qualify as predicate convictions under the Armed Career Criminal Act ("ACCA"), which contains language more broad than that in the Guidelines to exclude any conviction that has been “set aside” under state law.\footnote{United States v. Sellers, 784 F.3d 876, 879 (2d Cir. 2015) (“We hold that a drug conviction under New York law that was replaced by a YO adjudication is not a qualifying predicate conviction under the ACCA because it has been ‘set aside’ within the meaning of 18 U.S.C. § 921(a)(20) and New York law.”).}

New York recently enacted legislation that will help some, but not all, defendants avoid the sting of Driskell and its progeny. Under its Raise the Age law that took full effect on Oct. 1, 2019, New York raised the age of criminal responsibility to 18.\footnote{N.Y. CRIM. PROC. LAW § 722 (McKinney 2023) (as added by L.2017, ch. 59, pt. WWW); see also Raise the Age, N.Y. COURTS (last updated Dec. 23, 2019), \url{https://nycourts.gov/courthelp/Criminal/RTA.shtml}.} Under prior law, New York automatically prosecuted 16- and 17-year-olds as adults, forcing those minors to rely exclusively on the youthful offender statute for relief from the full consequences of an adult conviction.\footnote{Making Raise the Age Work for New York City Youth, CMTY. JUST. COLLABORATIVE 3 (Oct. 8, 2020), \url{https://a860-gpp.nyc.gov/concern/nyc_government_publications/cf95jd59t?locale=en}.} Under current law, in contrast, all offenders below age 18 are eligible to have their cases adjudicated in juvenile court, known in New York as Family Court, which completely spares them from the prospect of an adult conviction.\footnote{Raise the Age, supra note Error: Reference source not found; Raise the Age Flowchart, N.Y. COURTS, \url{https://nycourts.gov/courthelp/pdfs/RTA_flowchart.pdf}.} Sixteen- and 17-year-olds who commit a criminal misdemeanor are automatically sent to juvenile court.\footnote{Raise the Age, supra note Error: Reference source not found; Raise the Age Flowchart, supra note Error: Reference source not found.} Those who commit non-violent felonies are presumptively sent to juvenile court, although prosecutors can try to keep those cases in adult court due to “extraordinary circumstances.”\footnote{Raise the Age, supra note Error: Reference source not found; Raise the Age Flowchart, supra note Error: Reference source not found; N.Y. CRIM. PROC. LAW § 722.23(1) (McKinney 2023).} Finally, those offenders who commit violent felonies start in adult court and face a more difficult path to getting their cases sent to
juvenile court. New York’s Raise the Age legislation thus protects more young people from adult convictions than the previous law, but it still does not shield many offenders who commit felonies. Furthermore, anyone who was adjudicated a youthful offender before Raise the Age took effect is permanently branded with having an adult conviction in any subsequent federal case.

ii. Sixth Circuit Counts Dismissals under Michigan’s Holmes Youthful Trainee Act (HYTA) Toward a Defendant’s Criminal History Score

Using logic similar to that of the Second Circuit, the Sixth Circuit has held that even when defendants have charges dismissed pursuant to Michigan's Holmes Youthful Trainee Act (“HYTA”), the underlying offense can still be used to enhance the person’s advisory Guidelines range. The HYTA addresses a slightly older cohort of offenders than New York’s youthful offender statute; defendants between ages 18 and 25 are eligible to be assigned the status of a youthful trainee. Nonetheless, the two programs have the same purpose, which is to shield defendants from the lifelong consequences of crimes they committed at a young age. Michigan law states that

assignment of an individual to the status of youthful trainee as provided in this chapter is not a conviction for a crime and … the individual assigned to the status of youthful trainee shall not suffer a civil disability or loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee.

Procedurally, to be assigned the statute of a youthful trainee, a defendant in Michigan must first plead guilty to a criminal offense. The judge, however, does not enter a judgment of conviction. If the individual successfully completes the trainee program, which can include

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119 Raise the Age, supra note Error: Reference source not found; Raise the Age Flowchart, supra note Error: Reference source not found; N.Y. CRIM. PROC. LAW § 722.23(2) (McKinney 2023).
120 MICH. COMP. LAWS § 762.11-.15 (2023).
121 Id. § 762.11(2).
122 Id. § 762.14(2).
123 Id. § 762.11(2).
124 Id.
incarceration, probation, training, fines, and community service, the original charges are dismissed.\textsuperscript{125}

Despite the fact of dismissal, the Sixth Circuit has held that because a guilty plea is a precondition of eligibility for the youthful training program, the underlying offense can be assigned criminal history points under the Guidelines.\textsuperscript{126} In \textit{United States v. Shor}, the defendant was denied sentencing relief after the district court assigned one criminal history point for a prior offense that led to a two-year probationary sentence under the HYTA.\textsuperscript{127} The Sixth Circuit affirmed by reference to Section 4A1.2(f) of the Guidelines, which instructs:

\begin{quote}
Diversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of nolo contendere, in a judicial proceeding is counted as a sentence under §4A1.1(c) even if a conviction is not formally entered, except that diversion from juvenile court is not counted.\textsuperscript{128}
\end{quote}

The Sixth Circuit has reaffirmed the \textit{Shor} holding in more recent cases, solidifying that a guilty plea under the HYTA constitutes a “prior sentence” despite the contrary language and apparent intent of Michigan law.\textsuperscript{129}

\textbf{iii. Eleventh Circuit Rejects Language in South Carolina, Florida, and Alabama Laws to Hold that Youthful Offender Adjudications are Convictions}

The Eleventh Circuit likewise considers youthful offender adjudications under South Carolina, Florida, and Alabama laws to be adult convictions for federal sentencing purposes despite those state’s contrary classifications. The first case in the circuit to touch on these issues was \textit{United States v. Pinion}, in which the defendant challenged the use of a South Carolina

\begin{itemize}
  \item \textsuperscript{125} \textit{Id.} § 762.14(1); \textit{see also} \textit{United States v. Hill}, 769 F. App’x 352, 354 (6th Cir. 2019) (“Under HYTA, certain defendants in Michigan are eligible to plead guilty and have their convictions dismissed if they complete the youthful trainee program.”).
  \item \textsuperscript{126} \textit{United States v. Shor}, 549 F.3d 1075, 1078 (6th Cir. 2008).
  \item \textsuperscript{127} \textit{Id.} at 1076-77.
  \item \textsuperscript{128} \textit{Id.} at 1077-78 (quoting U.S. SENT’G GUIDELINES MANUAL § 4A1.2(f) (U.S. SENT’G COMM’N 2006) (language still in effect as of 2021 Guidelines Manual)).
  \item \textsuperscript{129} \textit{See}, e.g., \textit{Hill}, 769 F. App’x at 354.
\end{itemize}
youthful offender adjudication to designate him a career offender.\textsuperscript{130} Inclusion of that judgment, which stemmed from an offense he committed when he was 17, resulted in a then-mandatory Guidelines range of 360 months to life in prison.\textsuperscript{131} Even though South Carolina had not prosecuted the defendant as an adult, the Eleventh Circuit stressed the need “to take the inquiry to a level above that of mere semantics” and “focus on the nature of the proceedings, the sentences received, and the actual time served.”\textsuperscript{132} Here, because the defendant was convicted in an adult court and served “adult sentences,” the Eleventh Circuit affirmed the use of his youthful offender adjudication to sentence him as a career offender.\textsuperscript{133}

In \textit{United States v. Wilks}, the Eleventh Circuit relied on its reasoning in \textit{Pinion} to hold that the defendant’s prior youthful offender adjudications in Florida could count as predicates toward both the career offender enhancement and the Armed Career Criminal Act’s mandatory 15-year minimum sentence.\textsuperscript{134} As in \textit{Pinion}, the defendant in \textit{Wilks} had been classified as a youthful offender but had been sentenced in an adult court to a term of imprisonment exceeding one year and one month.\textsuperscript{135} Interestingly, the defendant in \textit{Wilks} argued that the Eleventh Circuit’s failure to distinguish between youthful offender adjudications and adult convictions conflicted with the U.S. Supreme Court’s reasoning in \textit{Roper v. Simmons}, which held that the Eighth Amendment prohibits the execution of individuals for offenses they committed before age 18.\textsuperscript{136} I argue along related lines in Section II.A, infra. The Eleventh Circuit rejected that argument:

\textsuperscript{130} \textit{United States v. Pinion}, 4 F.3d 941, 943 (11th Cir. 1993).
\textsuperscript{131} \textit{Id.} at 942-43.
\textsuperscript{132} \textit{Id.} at 944.
\textsuperscript{133} \textit{Id.} at 944-45 (27 months’ confinement on three indefinite six-year maximum sentences constituted “adult sentences”).
\textsuperscript{134} \textit{United States v. Wilks}, 464 F.3d 1240, 1243 (11th Cir. 2006); \textit{Armed Career Criminal Act}, 18 U.S.C. § 924(e) (2023).
\textsuperscript{135} \textit{Wilks}, 464 F.3d at 1243.
\textsuperscript{136} \textit{Id.} (citing \textit{Roper v. Simmons}, 543 U.S. 551 (2005)).
It is one thing to prohibit capital punishment for those under the age of eighteen, but an entirely different thing to prohibit consideration of prior youthful offenses when sentencing criminals who continue their illegal activity into adulthood. *Roper* does not mandate that we wipe clean the records of every criminal on his or her eighteenth birthday.\(^{137}\)

Finally, in *United States v. Elliot*,\(^ {138}\) the Eleventh Circuit held that youthful offender adjudications under Alabama law could count as career offender predicates despite the fact that, under state law, such adjudications “shall not be deemed a conviction of crime.”\(^ {139}\) The court distinguished the case from *Pinion* and *Wilks* because, unlike in those earlier cases, the youthful offender adjudication at issue in this case resulted from an offense the defendant committed when he was over 18.\(^ {140}\) The question before the court, therefore, was “not whether Elliot sustained an adult conviction, but whether he sustained a conviction at all.”\(^ {141}\) The court concluded he had: a defendant over 18 who pleads guilty and is adjudicated must be considered to have sustained a conviction for the purposes of the Guidelines’ career offender enhancement, even if state law says otherwise.\(^ {142}\) In rejecting Alabama’s classification, the court made explicit a key premise of its approach throughout this line of cases: “Federal law, not state law, controls the application of the Sentencing Guidelines.”\(^ {143}\)

### iv. First Circuit Charts a Different Path, Upholding Massachusetts’ Distinction Between Youthful Offender Adjudications and Adult Convictions

Although the Second, Sixth, and Eleventh Circuits have reached similar conclusions as to the permissibility of counting youthful offender adjudications as adult convictions under the

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\(^ {137}\) *Id.*  
\(^ {138}\) 732 F.3d 1307 (11th Cir. 2013).  
\(^ {139}\) ALA. CODE § 15-19-7(a) (2023).  
\(^ {140}\) *Elliot*, 732 F.3d at 1311 (defendant was 20 years old when he committed the Alabama state offense).  
\(^ {141}\) *Id.*  
\(^ {142}\) *Id.* at 1312-13.  
\(^ {143}\) *Id.* at 1312 (quoting *United States v. Madera-Madera*, 333 F.3d 1228, 1231 n.2 (11th Cir. 2003)).
Guidelines, their approach does not reflect the only plausible interpretation of the Guidelines. Most notably, in *United States v. McGhee*, the First Circuit read the Guidelines’ career offender provisions to require greater deference to how state laws classify judgments. In *McGhee*, the defendant challenged the district court’s use of a youthful offender adjudication from when he was 15 toward a career offender determination. Under Massachusetts law, youthful offenders are treated like adults in some ways and as juveniles in others. Youthful offenders can be indicted, they can suffer punishment up to and including adult sentences, and their records are open to the public. However, jurisdiction of such cases remain in juvenile court and the proceedings “shall not be deemed criminal proceedings.” Faced with this inconclusive evidence, the court returned to the language in the Guidelines: for career offender purposes, a judgment for an offense committed before age 18 counts as a predicate only if “it is classified as an adult conviction under the laws of” that jurisdiction. That language, the court reasoned, “undermin[es] any presumption in favor of a federal standard that disregards state labels,” such as that articulated by the Second Circuit in *Jones* or the Eleventh Circuit in *Pinion*. The court thus concluded that the defendant’s youthful offender adjudication was not a career offender predicate. “This is a judgment call, but Massachusetts’ nomenclature clearly distinguishes between youthful offenders and adults, and to the extent that objective criteria apply, the treatment accorded under state law is significantly different than that given adult offenders.”

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144 United States v. McGhee, 651 F.3d 153, 158 (1st Cir. 2011).
145 *Id.* at 156.
146 *Id.* at 157.
147 *Id.* at 157-58.
148 *Id.* at 155 (quoting U.S. SENT’G GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENT’G COMM’N 2006)).
149 Jones, 415 F.3d 256 (2005).
150 Pinion, 4 F.3d 941 (1993).
151 *McGhee*, 651 F.3d at 158.
152 *Id.*
v.  *Summary*

These case studies demonstrate how youthful offender adjudications in many states can be counted as adult convictions for Guidelines purposes in subsequent federal cases. This classification can have huge stakes to the extent that adult priors are treated far more harshly than juvenile priors under the Guidelines’ recidivism provisions. Indeed, this article’s opening anecdote described how Charlie was placed in the most aggravated criminal history category largely because each of his four youthful offender adjudications in New York was counted as a separate adult prior, significantly raising his advisory Guidelines range. Most federal appellate courts to consider the issue have held that the classification of youthful offender adjudications as either adult or juvenile priors should be controlled by the “substance” of the proceeding rather than the label affixed to it by the state. The First Circuit, however, has rejected this trend where a sentencing judge sought to count a Massachusetts youthful offender adjudication as a career offender predicate, reasoning that the non-adult label affixed to the prior proceeding under state law should control.

**PART II: THE GUIDELINES CLASH WITH THE SUPREME COURT’S JUVENILES-ARE-DIFFERENT JURISPRUDENCE AND THE UNDERLYING SCIENCE**

This Part argues that the Guidelines’ use of past offenses committed before age 18 to enhance the sentences of federal defendants stands in tension with the U.S. Supreme Court’s juveniles-are-different jurisprudence. Section II.A describes the recent opinions in which the Court has held “that children are constitutionally different from adults for purposes of sentencing” in a way that makes them “less deserving of the most severe punishments.”153 Section II.B elaborates on the scientific research that underpins the Court’s reasoning and that

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continues to point in the direction of less culpability for juveniles who commit crimes. Section III.C argues that, in light of these considerations, offenses committed before age 18 should never be treated like adult convictions under the Guidelines’ recidivist enhancements.

A. The U.S. Supreme Court Recognizes that Young Offenders are Less Culpable than Adults

The U.S. Supreme Court has recognized that offenders under 18 are different from adults in ways that make them less culpable for their crimes and less deserving of the harshest punishment. The Court set off a “juvenile sentencing revolution” in 2005 with its landmark decision in *Roper v. Simmons*, which held that the Eighth Amendment forbids imposition of the death penalty on offenders who were under 18 when they committed their crimes. *Roper* was significant as much for its holding as for its reasoning, which concluded that juveniles have “diminished culpability” compared to adults based on three broad observations about the nature of youth.

First, young people exhibit “a lack of maturity and an underdeveloped sense of responsibility.” Second, juveniles are more susceptible to negative influences and peer pressure, in part because they often “have less control, or less experience with control, over their own environment.” Third, “the character of a juvenile is not as well formed as that of an adult.” Notably, the Court supported its observations with four citations to an influential 2003 article by psychology professors Laurence Steinberg and Elizabeth Scott, who used emerging evidence from behavioral studies and neuroscience to argue that youth should not be held to the

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155 543 U.S. 551, 578.

156 *Roper*, 543 U.S. at 571.

157 *Id.* at 569.

158 *Id.*

159 *Id.* at 570.
adult standard of criminal liability. Because of the differences between juveniles and adults, the Court concluded, “the penological justifications for the death penalty apply to them with lesser force than to adults.”

The Court subsequently extended the reach of *Roper* to other areas of juvenile sentencing. In *Graham v. Florida*, the Court forbid the imposition of a life-in-prison-without-parole (“LWOP”) sentence on juvenile offenders who did not commit homicide. In *Miller v. Alabama*, the Court outlawed any sentencing scheme that mandates LWOP for juveniles who commit homicide. And in *Montgomery v. Louisiana*, the Court held that *Miller* announced a new substantive rule of constitutional law that applies retroactively to cases on state collateral review. In both *Graham* and *Miller*, the Court emphasized that the behavioral and neuroscience research underpinning its reasoning in *Roper* had grown only more extensive in the intervening years.

Although the Court’s juveniles-are-different quartet addresses only death penalty and LWOP cases, numerous commentators have argued that there is no principled way to wall off the Court’s key insight—that “children are constitutionally different from adults in their level of culpability”—from juveniles who commit less serious crimes. It seems self-evident that the

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161 *Roper*, 543 U.S. at 571.


163 *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (“a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles”).


165 *Graham*, 560 U.S. at 68 (“developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”); *Miller*, 567 U.S. at 472 n.5 (“The evidence presented to us in these cases indicates that the science and social science supporting *Roper*’s and *Graham*’s conclusions have become even stronger.”).

166 *Montgomery*, 577 U.S. at 213.

same immaturity and susceptibility to outside influence that makes a young person less culpable for murder also makes them less culpable for a lesser crime of robbery or drug possession. Likewise, juveniles who commit less serious offenses are at least as capable of change and as deserving of grace in sentencing as those who commit the most heinous acts. Indeed, a central lesson of modern science, which I turn to presently, is that the justifications for punishment are weaker when applied to juveniles as a class. This suggests that the logic of Roper, Graham, and Miller should apply categorically to adolescent defendants, not to a tiny subset distinguished by the nature of their crime.

B. Behavioral Evidence, Supported by Neuroscience, Points to Legally Relevant Differences Between Adolescents and Adults

The Supreme Court’s recognition is warranted: behavioral studies and neuroscience provide robust support for the proposition that adolescents differ from adults such that the former should not be held to adult standards of criminal responsibility. Specifically, researchers have determined that while humans’ capacity to reason and deliberate systematically matures by around age 16, our ability to exercise self-regulation, especially in socially and emotionally arousing contexts, does not mature for roughly another five years. Adolescents, in other words, are at a developmental disadvantage compared to adults in resisting impulses and urges to engage in criminal behavior. The Court, therefore, has rightly treated immature psychological functioning in younger people as a mitigating factor in meting out criminal punishment.

reason why the reduction in culpability associated with adolescence should vary according to the severity of the offense”); Mending the Federal Sentencing Guidelines, supra note Error: Reference source not found, at 1006 (“there may be reason to believe that the Court's observations about the nature of adolescence apply just as vigorously to at least some noncapital and non-LWOP crimes”).

168 Laurence Steinberg & Grace Icenogle, Using Developmental Science to Distinguish Adolescents and Adults Under the Law, 1 ANN. REV. OF DEVELOPMENTAL PSYCH. 21, 34 (2019).

169 Id.
The literature on adolescent development can be divided into three broad categories—cognitive, psychosocial, and neurobiological—each of which describes systematic patterns of maturation through the teenage years and, in some cases, beyond.\textsuperscript{170} Cognitive research focuses on the basic cognitive faculties that support logical reasoning and thoughtful, informed decision making. Along these measures of intellectual abilities, adolescents do not differ meaningfully from adults.\textsuperscript{171} Scholars have found that the cognitive capacities that facilitate logical reasoning, planning, and analytical thought plateau in early- to mid-adolescence.\textsuperscript{172} Thus, by the time they are 15 to 17 years old, adolescents perform at adult levels on various tasks that test their ability to plan ahead or weigh the costs and benefits of risky behavior, such as riding with a drunk driver.\textsuperscript{173} Likewise, that age cohort exhibits adult-like ability to make informed decisions in legal, medical, and research contexts.\textsuperscript{174}

Psychosocial research approaches, however, tell another crucial part of the story, which is that despite their intellectual abilities, adolescents in emotionally arousing situations tend not to evince adult levels of self-control until well beyond their eighteenth birthday.\textsuperscript{175} Whereas mental processes employed in emotionally neutral contexts are often called “cold” cognition, this area of research focuses on “hot” cognition—how adolescents in situations that hinder deliberate decision making are able to control their impulses, assess risks, resist coercive influences, and consider the future consequences of their decisions.\textsuperscript{176} Both self-reporting and experimental

\begin{footnotesize}
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\item \textsuperscript{170} Id. at 27.
\item \textsuperscript{171} Id. at 28.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Id.
\item \textsuperscript{174} Id.
\item \textsuperscript{175} Id. at 29; see also Grace Icenogle et al., Adolescents’ Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a “Maturity Gap” in a Multinational, Cross-Sectional Sample, 43 LAW & HUM. BEHAV. 69, 69-70 (2019) (documenting a “maturity gap” between the timetables of intellectual and emotional development in both U.S. and international samples).
\item \textsuperscript{176} Icenogle et al., supra note Error: Reference source not found, at 71.
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research indicates that, compared to adults, adolescents into their twenties have lower impulse control, a greater tendency toward sensation seeking, a greater sensitivity to rewards, and a weaker ability to delay gratification.\textsuperscript{177} Furthermore, “[t]here is extensive empirical support for the observation that youth act differently when they are among peers and friends than they do when they are alone,”\textsuperscript{178} an important observation given that, unlike adults, most criminal offenses among teens occur in groups.\textsuperscript{179} Experiments assessing risk-taking by adolescents, for example, find that participants who are observed by peers take more risks than those who are unobserved, even when their peers are in a different room and prohibited from speaking to the target subject.\textsuperscript{180}

Neurobiological research approaches, which utilize functional magnetic resonance imaging to measure brain activity, reach results consistent with the findings from behavioral studies and provide a biological explanation for the developmental differences between adolescents and adults. Many scientists attribute the psychological immaturity observed during adolescence to the differing timetables along which two important brain systems change—a model referred to as “maturational imbalance.”\textsuperscript{181} In short, the brain system responsible for risk-taking and reward-seeking undergoes dramatic changes in early adolescence, but the system responsible for regulating impulses and thinking ahead is still undergoing maturation into the mid-twenties.\textsuperscript{182} As a result, faced with peer pressure, potential rewards, or other stressors, the

\begin{thebibliography}{9}
\bibitem{178} Steinberg & Icenogle, \textit{supra} note Error: Reference source not found, at 29.
\bibitem{180} Steinberg & Icenogle, \textit{supra} note Error: Reference source not found, at 29-30.
\bibitem{181} \textit{Id.} at 30.
emotional centers of the brain can “hijack” the less mature self-control system.\textsuperscript{183} Two recent experiments dramatically illustrate this point.\textsuperscript{184} In the studies, participants’ impulse control and brain activity were assessed while their emotional states were experimentally manipulated. Under conditions in which participants were not emotionally aroused, individuals between ages 18 and 21 showed impulse control and patterns of brain activity comparable to those in their mid-twenties. When subjected to emotional conditions, however, those same participants demonstrated levels of impulse control and patterns of brain activity comparable to those in their mid-teens. As one research team summarized, “in many respects and under certain circumstances, individuals between ages 18 and 21 are more neurobiologically similar to younger teenagers than had previously been thought.”\textsuperscript{185}

Behavioral research and neuroscience are therefore in agreement that while the cognitive capacities of adolescents resemble those of adults, adolescents on average tend to be impaired in their ability to regulate their behavior in emotionally arousing situations. In light of these observations, psychologists have argued that policymakers should set different age boundaries for different legal purposes: a lower age for matters in which cognitive capacities predominate (such as voting) and a higher age for matters in which psychosocial maturity plays a substantial role (like gambling).\textsuperscript{186} As recognized by these same psychologists, the decision to commit crime clearly falls into the latter category, as adolescents who engage in criminal behavior often do so

\textsuperscript{183} Cohen & Casey, \textit{supra} note Error: Reference source not found, at 65.
\textsuperscript{185} Steinberg & Icenogle, \textit{supra} note Error: Reference source not found, at 32.
\textsuperscript{186} See, \textit{e.g.}, \textit{id}. at 34; Icenogle et al., \textit{supra} note Error: Reference source not found, at 82-83.
under considerable stress, facing time pressures, and surrounded by peers. Immaturity does not exonerate adolescents from guilt, but it does provide a compelling reason why adolescents have “diminished culpability” and why they should be held to a more forgiving standard of criminal responsibility compared to adults. I argue in the next section that criminal conduct committed before age 18 should not be allowed to enhance adult sentences to the same extent as prior adult convictions.

C. Offenses Committed Before Age 18 Should Never Be Equated with Prior Adult Convictions

Under the Guidelines’ Recidivist Enhancements

Because developmental realities render adolescents less culpable for their criminal behavior than adults, offenses committed before age 18 should never be weighted the same as adult convictions in applying recidivist enhancements under the Guidelines. This, however, is precisely what the Guidelines do in several respects. Recall that the Guidelines count offenses committed prior to age 18 as adult convictions under two scenarios: if they are so classified by the prosecuting jurisdiction, or if a federal circuit court determines they have the indicia of an adult conviction despite state law that says otherwise. In calculating a Guidelines sentencing range, adult priors can then increase a defendant’s criminal history score, raise his base offense level, brand him a career offender, or block safety valve relief. The effect of these provisions is to expose defendants to longer prison sentences—in some cases by a decade or more—on account of conduct they committed before they turned 18. This treatment is in clear tension with

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187 Steinberg & Icenogle, supra note Error: Reference source not found, at 34; Icenogle et al., supra note Error: Reference source not found, at 71.
188 Roper, 543 U.S. at 571.
189 See supra Section I.C.
190 See supra Section I.B.
the Supreme Court’s observation that adolescents are “less deserving of the most severe punishments” and the developmental science undergirding that insight.

Defenders of the Guidelines in their current form often argue that while juvenile and youthful offender laws rightfully relieve young people of the disabilities associated with a criminal record, the case for conferring those benefits dissipate if the individual reoffends. At that point, according to a case cited favorably by the Second Circuit, “[s]ociety’s stronger interest is in punishing appropriately an unrepentant criminal.” In the words of the Eleventh Circuit, “[i]t is one thing to prohibit capital punishment for those under the age of eighteen, but an entirely different thing to prohibit consideration of prior youthful offenses when sentencing criminals who continue their illegal activity into adulthood.” The Guidelines themselves in an application note announce a policy that “defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency.”

191 Miller, 567 U.S. at 471.
192 “The Guidelines clash with Supreme Court precedent and the underlying science in other ways as well. The Guidelines discourage considerations of how youthfulness may have contributed to the commission of the instant offense. Section 5H1.12 states that “[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted.” U.S. Sent’g Guidelines Manual § 5H1.12 (U.S. Sent’g Comm’n 2021); but cf. United States v. Rivera, 192 F.3d 81, 84-85 (2d Cir. 1999) (“[T]he Guidelines foreclose any downward departure for lack of youthful guidance ... [but] a downward departure may be appropriate in cases of extreme childhood abuse.”). Section 5H1.1 adds that “[a]ge (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.” U.S. Sent’g Guidelines Manual § 5H1.1 (U.S. Sent’g Comm’n 2021). Lest there be confusion about the Guidelines’ general policy, the Sentencing Commission has clarified that age is a “discouraged ground for departure.” Office of Gen. Counsel, U.S. Sent’g Comm’n, Primer: Departures and Variances 16 (Sept. 2022), https://www.ussc.gov/sites/default/files/pdf/training/primers/2022_Primer_Departure_Variance.pdf.
193 United States v. McDonald, 991 F.2d 866, 872 (D.C.Cir.1993) (quoted in Driskell, 277 F.3d at 156).
194 Wilks, 464 F.3d at 1243.
195 U.S. Sent’g Guidelines Manual § 4A1.2 cmt. n.9 (U.S. Sent’g Comm’n 2021). This application note purports to apply only to adult diversionary dispositions, but we have seen how
Even accepting the general argument that repeat offenders are less deserving of leniency, it does not follow that an offense committed before age 18 should ever be treated like an adult conviction. Consider an adult with a prior adjudication as a youthful offender for conduct he committed at age 16. Defenders of the current Guidelines approach argue, in effect, that so long as that individual stays on the straight and narrow, he should enjoy the benefits of that adjudication. The moment he reoffends, however, that adjudication should retroactively be transformed into the most severe type of prior under the Guidelines, an adult conviction. This is faulty logic for at least two reasons. First, commission of the instant offense does not change the reality that the earlier offense was committed when the defendant was 16. Second, the instant offense does not somehow elevate the severity of the earlier offense. The earlier offense is and forever shall be a crime committed by an adolescent, making it less blameworthy than a crime committed by an adult and thus entitled to differential treatment in sentencing.

A more logically sound position—one accommodating both the Supreme Court’s juveniles-are-different jurisprudence and the sentiment that sentencing courts should not be required to “wipe clean the records of every criminal on his or her eighteenth birthday”—is that offenses committed before 18 should be treated exclusively as “juvenile adjudications” under the Guidelines. Each such adjudication could then count as one or two criminal history points but never as an “adult conviction” that could raise a defendant’s base level offense or qualify as a career offender predicate. This revision would better align the Guidelines with the insight of _Roper_ and its progeny while heeding the Guidelines’ current policy that repeat

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196 This is a contestable argument. Some scholars contend that a defendant’s status as a recidivist should not affect a measure of the seriousness of the instant offense or of the appropriate punishment, and they further maintain that there is little evidence that longer sentences deter future crime. See, e.g., Sarah French Russell, _Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing_, 43 U.C. Davis L. Rev. 1135, 1151-53 (2010).

197 Wilks, 464 F.3d at 1243.
offenders should receive harsher sentences.\textsuperscript{198} For reasons explored in Part IV, this proposal has shortcomings of its own, and I ultimately reject it in favor of barring the use of pre-18 conduct to enhance federal sentences at all. Implementation of this proposal, however, would still be a step in the right direction compared to the Guidelines’ current approach.

It should be acknowledged that the developmental science supports setting the legal age boundary between juvenile and adult conduct at some point higher than 18 given that young people continue to mature into their early- to mid-twenties.\textsuperscript{199} In line with the science, the Supreme Court in \textit{Roper} recognized that “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18.”\textsuperscript{200} Accordingly, one commentator has argued against drawing a bright line at 18 for mitigating society’s harshest penalties, advocating instead for a scheme in which defendants up to age 25 would have the opportunity to show the sentencing court that their youthfulness entitled them to reduced punishment under the Eighth Amendment.\textsuperscript{201} One could use analogous logic to advocate for a higher age boundary in the Guidelines, such as 21, between juvenile and adult conduct. I ultimately do not endorse this proposal—not because it lacks persuasive force, but because it would upend the age boundary that has existed in the Guidelines since their inception.\textsuperscript{202} I believe, therefore, that such a change would prove too drastic to garner the support of federal judges and the U.S. Sentencing Commission.

\textsuperscript{198} U.S. \textsc{Sent’g Guidelines Manual} ch. 4, pt. A, introductory cmt. (U.S. \textsc{Sent’g Comm’n} 2021).
\textsuperscript{199} See \textit{supra} Section II.B.
\textsuperscript{200} \textit{Roper}, 543 U.S. at 574.
\textsuperscript{201} Kelsey B. Shust, Comment, \textit{Extending Sentencing Mitigation for Deserving Young Adults}, 104 \textit{J. Crim. L. \& Criminology} 667, 696-99 (2014).
\textsuperscript{202} U.S. \textsc{Sent’g Guidelines Manual} § 4A1.2(d) (U.S. \textsc{Sent’g Comm’n} 1987).
PART III: THE GUIDELINES’ TREATMENT OF UNDER-18 CONDUCT UNDERMINES CONGRESS’S GOAL TO PROMOTE UNIFORMITY IN SENTENCING

This Part argues that the way the Guidelines draw a line between juvenile and adult priors generates unequal treatment of similarly situated defendants, a result at odds with the “sentencing uniformity” policy at the heart of the Guidelines. Section III.A briefly revisits how sentencing uniformity came to be—and remains today—a preeminent goal of federal sentencing. Section III.B describes how the Guidelines’ reliance on highly variable state practices to classify the prosecution of people under 18 injects arbitrariness and racial disparities into federal sentencing outcomes. Section III.C argues that sentencing uniformity would best be achieved by excluding all pre-18 offenses from the Guidelines calculations.

A. A Central Goal of the Guidelines Is to Reduce “Unwarranted Sentencing Disparities”

“[T]hirty years after the sentencing revolution commenced, and despite the travails of the Federal Guidelines, the campaign for equality in punishment has attained something like the status of political orthodoxy in the United States today.”203 That statement, made by Prof. James Whitman in 2009, remains true into the present, and it reflects decades of agreement between Congress and the U.S. Sentencing Commission that federal sentencing should pursue the goal of uniformity—the notion that defendants with similar records found guilty of similar conduct should receive similar sentences.204

Reduction of “unwarranted sentencing disparities” was a primary goal—perhaps the primary goal—of the Sentencing Reform Act of 1984.205 As briefly mentioned above,206 the SRA was drafted amid widespread concern that judicial discretion had run amok, disfiguring the

206 See supra Section I.A.
federal sentencing regime into a system that victimized defendants through arbitrary and
malicious exercises of power and contributed to the public perception that justice in America was
a game of chance.\textsuperscript{207} As the Department of Justice explained in 1987, “Simply stated,
unwarranted sentencing disparity caused by broad judicial discretion is the ill that the Sentencing
Reform Act seeks to cure.”\textsuperscript{208} Members of Congress voiced similar concerns in the debates
leading up to the Act’s passage,\textsuperscript{209} in the Senate report accompanying it,\textsuperscript{210} and in the text of the
bill itself.\textsuperscript{211} That text is still in effect today. Under 18 U.S.C. § 3553(a), sentencing judges are
required to consider “the need to avoid unwarranted sentence disparities among defendants with
similar records who have been found guilty of similar conduct.”\textsuperscript{212} Under 28 U.S.C. § 991(b), the
Sentencing Commission is likewise directed to establish policies that “avoid[] 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.”\textsuperscript{213}

\textsuperscript{207} Michael M. O’Hear, \textit{The Original Intent of Uniformity in Federal Sentencing}, 74 U. Cin. L.
Rev. 749, 760, 769-70 (2006) (tracing the policy debates leading up to the SRA).
\textsuperscript{208} Letter from Stephen S. Trott, Associate Attorney General, on behalf of the U.S. Dep’t of Just.,
to Hon. William W. Wilkins, Jr., Chairman, U.S. Sen’g Comm’n (Apr. 7, 1987). Seven years
later, now a judge on the Ninth Circuit Court of Appeals, Trott called for undoing the Guidelines,
observing that “[i]n the pursuit of treating people equally, we have overdone it to the point
where the cure is worse that the disease.” Letter from Hon. Stephen S. Trott to Hon. Richard
Conaboy, Chairman, U.S. Sen’g Comm’n (Nov. 9, 1994). The letters are reprinted in 8 FED.
\textsuperscript{209} See, e.g., Kate Stith Steve Y. Koh, \textit{The Politics of Sentencing Reform: The Legislative History
\textsuperscript{210} Senate Report, \textit{supra} note Error: Reference source not found, at 52 (“A primary goal of
sentencing reform is the elimination of unwarranted sentencing disparity.”).
shall promote the purposes set forth in section 991(b)(1), with particular attention to the
requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and
reducing unwarranted sentence disparities.”).
The goal of sentencing uniformity has been applauded as a general concept but savagely criticized for the way it has been implemented. On the one hand, “[f]airness is essential to any principled sentencing scheme, and one aspect of fairness is that the primary determinant in a sentence should not be which judge is drawn” or where the case is heard.\(^{214}\) That one person should be punished more harshly than another person who committed the same crime under similar circumstances offends common-sense notions of fairness. One the other hand, as scholars have pointed out, “uniformity” is not a self-defining principle, and standing alone it is devoid of content:

Surely two crimes need not be treated alike because they both happened on Thursdays. Nor must they differ just because their perpetrators had different hair colors or skin colors. Focusing on equalizing outcomes per se functions to bypass prior questions of morality, social psychology, and other factors that inform punishment determinations. But without a foundation to ground it, equality of outcomes has no freestanding normative purchase.\(^{215}\)

The Commission itself in its introduction to the Guidelines admits that it sidestepped the problem of “reconcil[ing] the differing perceptions of the purposes of criminal punishment … by taking an empirical approach” that used data from pre-guidelines sentencing practice to decide what factors should be considered at sentencing.\(^{216}\) This “lack of a moral compass” has rendered the Guidelines “pointless,” resulting in numerous shortcomings in the eyes of scholars.\(^{217}\) A sampling of those criticisms is as follows. In striving for uniformity, Congress has made the Guidelines uniformly harsh, and yet it remains unclear whether the severity of the Guidelines has


\(^{216}\) U.S. SENT’G GUIDELINES MANUAL § 1A1.3 (U.S. SENT’G COMM’N 2021).

accomplished any sentencing purpose.\textsuperscript{218} The Guidelines fixate on the social harm caused by an offense while disregarding other difficult-to-describe sentencing considerations, such as the offender’s motivations, partial justifications, and background, which may be just as relevant to determining an appropriate sentence.\textsuperscript{219} In obsessing about minimizing judicial discretion at the post-conviction phase of the criminal justice process, the Guidelines has simply shifted discretion—and the attendant concerns about disparate treatment—to those officials who investigate, arrest, and prosecute defendants at the pre-conviction phase.\textsuperscript{220} Finally, the Guidelines have lost sight of one of the original justifications for the push for uniformity in the 1970s and 1980s: to humanize sentencing in a way that takes note of the dignity of defendants.\textsuperscript{221} “Instead, uniformity has come to be viewed almost wholly as a matter of crime control and respect for public views of just punishment.”\textsuperscript{222}

Notwithstanding these critiques, it seems uncontroversial that a sentencing regime should strive for uniformity at least to the extent that is does not offend basic ideas of fairness. To paraphrase the earlier examples, a defendant’s sentence should not hinge on arbitrary factors such as the day of the week, his hair color, his race, or where in the country his case is heard. However, the Guidelines’ manner of distinguishing between juvenile and adult priors results in an equally absurd outcome: it introduces disparities into sentencing based on both the state in which a defendant committed his past offenses and, as we will see, his race. This violates

\textsuperscript{218} Id. (“if there is one message conveyed to the public under the contemporary scheme, it is one of simple retribution for any type of crime”).
\textsuperscript{220} Whitman, supra note Error: Reference source not found, at 129-31 (“Americans allow prosecutors degrees of discretion that are unparalleled in the advanced democratic world.”).
\textsuperscript{221} O'Hear, supra note Error: Reference source not found, at 760-61.
\textsuperscript{222} Id. at 804.
common-sense notions of fairness and undermines Congress’s clear directive—even if deeply flawed—to reduce unwarranted disparities in sentencing.

B. The Guidelines Generate Arbitrary and Racial Disparities by Relying on Divergent State Practices to Classify the Prosecution of People Under 18

In relying on state practices to classify as juvenile or adult the prosecution of people under 18, the Guidelines expose defendants to arbitrarily harsh or lenient treatment based on such factors as geography and race. Taking geography first, the absurdity of the Guidelines approach is encapsulated in an anecdote related by a group of federal public defenders to the Sentencing Commission in 2017:

[I]n one Defender case, a defendant who committed a note job bank robbery [using a note to demand money as opposed to a weapon] at the age of 19 was sentenced as a career offender based on two prior convictions for struggles with police that occurred when he was 17. The priors counted as career offender predicates because at that time, all 17-year-olds were treated as adults in Massachusetts. If the offenses had occurred in neighboring Rhode Island, where the juvenile court has original jurisdiction over all young people under the age of 18, the defendant likely would not have qualified as a career offender. Indeed, if it simply had happened a few years later, after Massachusetts increased the jurisdiction of its juvenile courts to all young people under the age of 18, it is likely he would not have been deemed a career offender.  

Recall from Part I.C., supra, the various ways in which the Guidelines incorporate state law in drawing distinctions between prior juvenile and adult offenses. In calculating criminal history points for pre-18 conduct, they ask whether the defendant was previously convicted “as an adult.” An offense committed before 18 can count as a predicate “prior felony conviction” toward career offender status “if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.” Offenses committed before 18 can also increase the base offense level of certain crimes if they quality as a prior “felony conviction” or

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224 U.S. Sent’g Guidelines Manual § 4A1.2(d) (U.S. Sent’g Comm’n 2021).

225 Id. § 4B1.2 cmt. n.1.
“felony offense,” defined using nearly identical language.\textsuperscript{226} Adding more confusion to the system, some federal courts have selectively \textit{rejected} the categorization of pre-18 conduct advanced under state “youthful offender” statutes.\textsuperscript{227} Thus, youthful offender adjudications for pre-18 conduct counts as “adult” convictions in New York, Michigan, South Carolina, Florida, and Alabama—but not in Massachusetts, where the First Circuit has deferred to the state’s preferred classification.\textsuperscript{228}

State practices regarding the classification of young offenders as juveniles or adults vary tremendously and shift regularly, rendering irrational the Guidelines’ reliance on those practices to craft a nationally uniform sentencing regime. To begin, states differ on the age at which they set the upper boundary of juvenile court. The vast majority—46 states in all—set the maximum age of juvenile court jurisdiction at 17.\textsuperscript{229} That means adolescents up to 17 years old are eligible to have their cases heard in juvenile court, with the resulting adjudication likely to count under the Guidelines’ taxonomy as a juvenile prior. Georgia, Texas, and Wisconsin draw the juvenile/adult line at 16.\textsuperscript{230} And in 2020, Vermont became the first state in the nation to expand juvenile court jurisdiction to 18-year-olds.\textsuperscript{231} Illustrating how quickly these laws can change, just

\begin{itemize}
\item \textsuperscript{226} Id. §§ 2K1.3 cmt. n.2, 2K2.1 cmt. n.1, 2L1.2 cmt. n.1(B).
\item \textsuperscript{227} See discussion supra Section I.C.
\item \textsuperscript{228} Id.
\item \textsuperscript{230} Id.
\item \textsuperscript{231} Peter Hirschfeld, Scott Administration Wants to “Pause” Plan to Send 19-Year-Olds Through the Juvenile Court System, VERMONT PUB. (Oct. 6, 2021), https://www.vermontpublic.org/vpr-news/2021-10-06/scott-administration-wants-to-pause-plan-to-send-19-year-olds-through-the-juvenile-court-system. Vermont policymakers have since scuttled plans to raise the age of juvenile court jurisdiction even higher, to 22. Calvin Cutler, Scott Asks Lawmakers to Delay “Raise the Age” Juvenile Offender Law, WCAX (Jan. 18, 2023), https://www.wcax.com/2023/01/18/scott-asks-lawmakers-delay-raise-age-juvenile-offender-law/.
\end{itemize}
a decade ago, nine states capped juvenile court jurisdiction at 16, while two states—New York and North Carolina—capped it at 15.\textsuperscript{232}

But the upper boundary of juvenile court tells only part of the story because “[a]ll states have statutes that make exceptions … by specifying when the offense of a juvenile may or must be considered the crime of an adult.”\textsuperscript{233} A judgment reached in adult court typically will then count as an adult prior under the Guidelines. Which young people are excepted from juvenile jurisdiction and how that decision is made vary dramatically state to state.\textsuperscript{234} Many states give juvenile court judges the authority to transfer a young person to adult court, although laws vary as to whether the judge retains discretion or must transfer the person if certain conditions are met. Other states have “statutory exclusion” laws that require transfer to adult court based on the nature of the offense or if the person had ever been in adult court previously (known as “once an adult, always an adult” provisions). Still other states allow prosecutors to decide where to prosecute people under 18. Each jurisdiction implements one or more of these common practices with its own idiosyncratic variations. For example, some states allow “reverse waiver,” in which young people start in adult court but can argue for transfer to juvenile court. Others provide for “criminal blended sentences” in which adult courts retain jurisdiction over young people while imposing a juvenile-only disposition or a combination of juvenile and adult sanctions. This is the category to which most “youthful offender” statutes belong.

This brief survey of state practices suffices to show why the Guidelines’ method of drawing a line between juvenile and adult priors generates unfair sentencing outcomes. Federal

\textsuperscript{232} Jurisdictional Boundaries, supra note Error: Reference source not found (using “delinquency age boundaries” data from 2013).

\textsuperscript{233} Id. (in subsection “transfer discretion”).

\textsuperscript{234} See generally id. (in subsections “transfer provisions” and “compare transfer provision”); see also Transfer Provision Detail, JUV. JUST. GEOGRAPHY, POL’Y, PRAC. & STAT., http://www.jigps.org/about/jurisdictional-boundaries (last visited Mar. 20, 2023) [hereinafter Transfer Provision Detail]. All assertions in this paragraph are supported by these sources.
defendants who committed identical prior offenses as adolescents can have radically different
criminal records based on the quirks of geography, timing, and luck. As in the anecdote from the
federal public defenders, a 17-year-old treated as a juvenile in one state could be excluded from
juvenile court jurisdiction in a neighboring state. Or, if a state passes Raise the Age legislation, a
17-year-old facing adult charges one year can be treated as a juvenile the next. Or, two juveniles
facing the same charges in the same place at the same time may have divergent success in
avoiding transfer to adult court, if one has a favorable judge, a lenient prosecutor, or a good
attorney, and the other does not. These variations in outcomes are driven by little more than
randomness, not by any factor that is rightfully relevant to sentencing.

Layered on top of this arbitrariness are persistent racial disparities regarding which young
people states choose to prosecute in adult court. The available empirical evidence, from 2013,
has revealed that under state judicial wavier provisions, “[B]lack and American-Indian youth
were … more likely to be waived to criminal [adult] court for trial than white youth.”\(^{235}\)
Although no national data set exists as to the number of juveniles transferred to adult court
through other waiver mechanisms, the available evidence demonstrates that “disproportionality
clearly remains a hallmark of nonjudicial waiver” as well.\(^{236}\) A 2014 study in Florida, for
example, found that Black adolescents comprised only about 27% of arrested youth but
accounted for 51% of all transfers to the adult system.\(^{237}\) Similarly, in California, Black youth in
2014 comprised only 5% of the state’s population of 14- to 17-year-olds but were the subject of
27% of the cases that prosecutors filed directly in adult court.\(^{238}\) Hispanic youth were 50% of the

\(^{235}\) Katherine Hunt Federle, The Right to Redemption: Juvenile Dispositions and Sentences, 77


\(^{236}\) Id. at 57.

\(^{237}\) Alba Morales, Branded for Life: Florida’s Prosecution of Children as Adults Under its

files/reports/us0414_ForUpload%202.pdf.

\(^{238}\) Federle, supra note Error: Reference source not found, at 59.
population but accounted for 58% of all transfers.\textsuperscript{239} White youth, meanwhile, accounted for 30% of the population but only 10% of the transfers.\textsuperscript{240} Similar trends have been observed in Michigan and Arizona.\textsuperscript{241}

The discretion of state judges and prosecutors holds disproportionate sway over federal judges’ sentencing determinations in later cases. Under the Guidelines, past prosecution as an adult rather than a juvenile can generate a higher criminal history score, a higher base offense level, career offender status, and a denial of safety valve relief. It is therefore no surprise that in 2021, Black individuals comprised 23% of all federal defendants\textsuperscript{242} but 37% of those in the top three criminal history categories\textsuperscript{243} and 58% of those designated career offenders.\textsuperscript{244} Black defendants also qualify for safety valve relief less often than any other group, primarily because of criminal history.\textsuperscript{245} Federal judges’ sentencing decisions, therefore, are constrained and colored by the often racially disparate decisions made earlier by state judges and prosecutors.

In sum, the Guidelines’ reliance on state practices to distinguish between juvenile and adult priors generates sentencing disparities based both on arbitrary factors, such as geography, and on pernicious factors, such as race.

C. To Promote Uniformity and Ameliorate Disproportionate Racial Impacts, the Guidelines Should Exclude from Consideration All Prior Offenses Committed Before 18

\textsuperscript{239} Id.
\textsuperscript{240} Id.
\textsuperscript{241} Id. at 58-59.
\textsuperscript{244} U.S. SENT’G COMM’N, QUICK FACTS: CAREER OFFENDERS 1 (June 2022).
\textsuperscript{245} U.S. SENT’G COMM’N, 2017 MANDATORY MINIMUM REPORT, supra note Error: Reference source not found, at 40 (“Much of this difference can be attributable to the fact that Black offenders who commit drug offenses often do not qualify for the safety valve because of their criminal history.”).
To bring the Guidelines into line with Congress’ uniformity goal and to mitigate their disproportionate impact on people of color, all prior offenses committed before age 18 should be excluded from consideration at sentencing. This is the only solution that ensures equal treatment of defendants based on their pre-18 conduct without clashing with other important principles.

Consider the alternatives. The Guidelines could, for example, treat all offenses committed before age 18 (or, say, between the ages of 16 and 18) as adult convictions. As explained in Part II, supra, however, that approach is at odds with the Supreme Court’s juveniles-are-different jurisprudence and the developmental science on which the Court’s insights are based. Instead, the Guidelines could treat offenses committed before age 18 uniformly as juvenile adjudications. This approach would surely fix some of the problems identified in this Part, such as the obvious unfairness caused by inconsistencies between states’ reach of juvenile court jurisdiction. This approach, too, however, is seriously flawed, as the use of juvenile adjudications to enhance later adult sentences is unconstitutional for reasons I turn to presently in Part IV. Therefore, as discussed at greater length in Part V, infra, the best solution is to no longer permit any offense committed before age 18 to enhance a Guidelines sentence.

PART IV: THE USE OF JUVENILE ADJUDICATIONS TO ENHANCE SENTENCES IS BOTH UNCONSTITUTIONAL AND BAD POLICY

This Part argues that the use of juvenile adjudications to enhance subsequent adult sentences under the Guidelines is both constitutionally suspect and bad policy. Section IV.A describes how juvenile adjudications are unconstitutional under the Sixth Amendment to the extent they impose punishments of incarceration for non-petty offenses without providing young people the right to a jury trial. When those conditions are met, federal courts may not constitutionally use a sentence stemming from a juvenile adjudication to enhance a later adult
sentence. Section IV.B discusses why the length of a juvenile disposition is not comparable to
the length of a sentence imposed for an adult conviction and thus should not be the metric used
to assign criminal history points under the Guidelines. Section IV.C describes how young people
often are not informed that federal courts may use prior juvenile or youthful offender
adjudications for enhancement purposes under the Guidelines, raising policy concerns about
notice. Finally, Section IV.D argues that the Guidelines’ use of juvenile adjudications should be
discontinued because it has a disparate impact on people of color.

Although the U.S. Supreme Court’s recognition that “children are constitutionally
different from adults in their level of culpability”\(^\text{246}\) will not be discussed further in this Part, that
insight remains relevant to entire discussion that follows. As examined in Part II, \textit{supra}, the
immaturity of youth differentiates adolescents from adults for sentencing purposes. On that basis
alone, juvenile priors should not be used to enhance sentences in adult proceedings.

\textbf{A. Many Juvenile Adjudications Are Unconstitutional Under the Sixth Amendment and Cannot
Constitutionally Be Used to Enhance a Later Adult Sentence}

When juvenile court judges, without a jury, impose punitive terms of incarceration for
non-petty offenses, the juvenile proceedings violate the young person’s Sixth Amendment right
to a public jury trial in “criminal prosecutions.”\(^\text{247}\) These conditions frequently materialize in
juvenile courtrooms across America because modern juvenile justice practice has far outpaced
the U.S. Supreme Court’s jurisprudence on the subject, most notably the Court’s 1971 holding
denying the right to a jury trial in state delinquency proceedings.\(^\text{248}\) The basic problem is that
while young people have become subject to increasingly punitive juvenile sentences, they still
enjoy fewer procedural protections than adult defendants on the assumption that juvenile courts

\(^{246}\) \textit{Montgomery}, 577 U.S. at 213.
\(^{247}\) \textit{U.S. CONST. amend. VI.}
are primarily agents of therapy and rehabilitation. As a result, many juvenile adjudications today are constitutionally suspect. The Guidelines’ use of juvenile proceedings to enhance later sentences imposed in adult proceedings is therefore constitutionally infirm as well. It is well-settled law that when a defendant in a criminal proceeding is denied constitutional rights, a conviction resulting from that proceeding is invalid and cannot be used later against the defendant.\textsuperscript{249} The same logic should apply to certain juvenile convictions obtained without a jury trial.

Understanding this argument requires a brief recounting of the origins of the American juvenile justice system. The modern system traces its origins to the Progressive reform movement at the turn of the 19\textsuperscript{th} century.\textsuperscript{250} Policymakers were appalled by both the harshness of the adult system and the fact that children could be sentenced to long stints in prison with hardened criminals.\textsuperscript{251} Under the common law, children under seven were deemed incapable of committing crimes, while those between seven and 14 were rebuttably presumed to be incapable of committing criminal acts.\textsuperscript{252} Outside of those protections, however, juveniles accused of crimes were treated as adults.\textsuperscript{253}

The reformers removed young people from adult courts and, at least for white youths,\textsuperscript{254} created a separate system whose primary purpose was not to punish offenders, but rather to cure


\textsuperscript{250} Id. at 1776 n.43.

\textsuperscript{251} In re Gault, 387 U.S. 1, 15 (1967).


\textsuperscript{253} Id.

\textsuperscript{254} See Robin Walker Sterling, Fundamental Unfairness: In Re Gault and the Road Not Taken, 72 MD. L. REV. 607, 627 (2013) (discussing how the juvenile court movement “grew up under the watchful gaze of Jim Crow,” causing Black children to be overrepresented in juvenile court proceedings and underrepresented in rehabilitative services from the movement’s inception).
them of the “disease of delinquency.” In this new system, the proceedings were conceived as non-adversarial. The offender, reformers believed, should be made to feel cared for, not facing arrest or trial. Under this scheme, in which proceedings focused on the offender’s background rather than the specifics of the crime, traditional notions of adult criminal due process were thought unnecessary, if not detrimental. Juvenile proceedings excluded lawyers, juries, and rules of evidence. Judges conducted confidential hearings, limited public access to court records, and adopted a euphemistic vocabulary to reduce the stigma of proceedings. Juvenile proceedings ceased being “criminal” and became “civil,” “trials” became “hearings,” “imprisonment” became “commitment,” and offenders were not “criminals” but “juvenile delinquents.” Sentences were for an indefinite rather than finite period—as long as needed to “treat” the offender. Courts held that juveniles were not entitled to bail or indictment by grand jury, and it was “frequent practice” that the rules governing the arrest and interrogation of adults by police were not observed in the case of juveniles.

Over time, however, the inability of the juvenile justice system to live up to its lofty goals became increasingly apparent, and the Supreme Court in a landmark 1967 decision insisted that some—but not all—of the procedural protections available to adults be observed in juvenile court. In In re Gault, the Court acknowledged that modern juvenile justice resembled a

256 In re Gault, 387 U.S. at 16.
257 Id. at 15.
258 Dormont, supra note Error: Reference source not found, at 1777.
260 Id. at 1138-39; see also Dormont, supra note Error: Reference source not found, at 1776 n.43.
261 Dormont, supra note Error: Reference source not found, at 1776 n.43.
262 Id. at 1777-78 & n.48.
263 In re Gault, 387 U.S. at 15.
“kangaroo court” that raised the “concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”264 Accordingly, the Court held that young people in juvenile proceedings have a constitutional right to counsel, right to notice of charges, privilege against self-incrimination, right to compulsory process, and right to confront and examine adverse witnesses.265 Crucially, however, rather than introducing into juvenile proceedings the fundamental protections enumerated in the Bill of Rights, as it had done in adult criminal proceedings, the Court installed a Fourteenth Amendment “fundamental fairness” balancing test as the touchstone for analyzing what minimum due process protections were required in juvenile proceedings.266 The difference between these approaches would prove to be profound. The former strategy involved incorporating specific Bill of Rights protections for criminal defendants against the states via the Due Process Clause of the Fourteenth Amendment. By contrast, the guiding principle of the Court's due process balancing test established in Gault “consisted of weighing the protection afforded by a particular due process protection against its potential for jeopardizing the informality, flexibility, and efficiency of juvenile court hearings.”267 While the Gault Court extended to juvenile defendants many of the same protections enumerated in the Bill of Rights, the Court simultaneously rejected the idea that juvenile proceedings were equivalent to adult criminal prosecutions for constitutional purposes.268 Instead, the Court stressed that juvenile courts could retain some of their distinctive characteristics, such as the ability to treat delinquents

264 Id. at 17-18 n.23 (quoting Kent v. United States, 383 U.S. 541, 556 (1966); id. at 28.  
265 Id. at 33, 36, 55, 56. A few years later, the Supreme Court also held that charges against juveniles must be proven “beyond a reasonable doubt.” In re Winship, 397 U.S. 358, 368 (1970).  
266 Walker Sterling, supra note Error: Reference source not found, at 635-37.  
267 Id. at 641.  
268 Id. at 641-47.
separately from adults.\textsuperscript{269} The precise extent to which juvenile adjudications could stand apart from adult criminal proceedings remained an open question.

The significance of the Court’s “fundamental fairness” approach became clear four years later in \textit{McKeiver v. Pennsylvania}, in which the Court refused to extend the due process rights recognized in \textit{Gault} to include the right to a jury trial in state delinquency proceedings.\textsuperscript{270} The Court first noted that “the juvenile court proceeding has not yet been held to be a ‘criminal prosecution,’ within the meaning and reach of the Sixth Amendment, and also has not yet been regarded as devoid of criminal aspects merely because it usually has been given the civil label.”\textsuperscript{271} The Court then applied the due process balancing test and, after observing that juries are not required in several other kinds of cases, such as worker’s compensation, probate, and deportation, concluded that fundamental fairness required only accurate fact-finding, which could be accomplished by juvenile court judges alone without the help of juries.\textsuperscript{272} In his

\textsuperscript{269} \textit{In re Gault}, 387 U.S. at 22.

\textsuperscript{270} \textit{McKeiver v. Pennsylvania}, 403 U.S. 528, 545 (1971).

\textsuperscript{271} \textit{Id.} at 541.

\textsuperscript{272} \textit{McKeiver}, 403 U.S. at 543; \textit{see also} Feld, \textit{supra} note Error: Reference source not found, at 1143-44 (“\textit{McKeiver} invoked the mythology of the sympathetic, paternalistic juvenile court judge, denied that delinquents required protection against government oppression, and rejected concerns that the informal juvenile system could compromise the accuracy of fact-finding.”) (internal citations omitted). Despite the Court’s assertion, research has shown that the absence of juries “undermines factual accuracy and creates the strong probability that outcomes will differ in delinquency and criminal trials.” \textit{Id.} at 1162. In general, juries are more protective of defendants than are judges. Studies have found that judges and juries agree about the defendant’s guilt or innocence in about four-fifths of cases, but when they differ, “juries are far more likely to acquit defendants than are judges given the same types of evidence.” \textit{Id.} & n.164 (citing studies); \textit{see also} Richard E. Redding, \textit{Using Juvenile Adjudications for Sentence Enhancement Under the Federal Sentencing Guidelines: Is It Sound Policy?}, 10 VA. J. SOC. POL’Y & L. 231, 241-42 (2002). Other evidence suggests that it is easier to convict an offender in juvenile court than in criminal court. Feld, \textit{supra} note Error: Reference source not found, at 1166-67. The potential reasons are manifold. A juvenile judge, who hears hundreds of cases a year, might be less sympathetic toward the offender’s youthfulness than a jury sitting in judgment of a young person in an adult proceeding. \textit{Id.} at 1166. Juvenile judges preside at pre-trial detention hearings and receive prejudicial information about a youth’s offense, criminal history, and background before trial, increasing the risk of erroneous conviction. \textit{Id.} at 1166. And juvenile judges may be more inclined to convict in order to “help” an errant youth, in line with a purported mission of

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plurality opinion, Justice Blackmun acknowledged that “the fond and idealistic hopes of the juvenile court proponents … have not been realized,” citing a scarcity of professional help, an inadequacy of dispositional alternatives, and a general lack of concern for young people as contributing to the system’s failures.\footnote{McKeiver, 403 U.S. at 543-44.} Despite “disappointments of grave dimensions,” however, the Court clung to the hope that the juvenile justice system could still accomplish its “rehabilitative goals” through “an intimate, informal protective proceeding.”\footnote{Id. at 545, 547.} Transforming juvenile adjudications into a “fully adversary process” would be “regressive” and strip the system of those elements that have proven beneficial for young people.\footnote{Id. at 539-40 (quoting In re Terry, 438 Pa. 339, 349 (1970) (Roberts, J., for the majority), the decision of the Pennsylvania Supreme Court under review) (internal quotation marks omitted); see also Barry C. Feld, Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court, 69 MINN. L. REV. 141, 248 n.415 (1984) (“The fundamental justification in juvenile jurisprudence for denying jury trials and, more basically, for maintaining a juvenile justice system separate from the adult one is based on the difference between punishment and treatment.”).} Among the elements listed by the court were rehabilitative services “that are far superior to those available in the regular criminal process” and dispositions that are “significantly different from and less onerous than a finding of criminal guilt.”\footnote{Juvenile Right to Jury Trial Chart, NAT’L JUV. DEF. CTR., \url{https://njdc.info/wp-content/uploads/2017/03/Right-to-Jury-Trial-Chart-7-18-14.pdf} [https://perma.cc/8KJK-C6QP] (last updated July 17, 2014) (organization now known as The Gault Center).} Consistent with \textit{McKeiver}, the vast majority of states today do not provide jury trials for juveniles.\footnote{Id. at 1166.} 

The \textit{McKeiver} Court did not anticipate, however, the extent to which states would move to much more punitive models of juvenile justice in the ensuing decades. I have already described how the rejection of rehabilitation as a penal goal in the 1960s and 1970s spurred the
“sentencing revolution” and enactment of the Sentencing Reform Act of 1984. Coincident with these developments was a “renaissance of retribution” in which theorists across the political spectrum increasingly defended punishment as the best way to deter crime and give offenders their just desserts. At the same time, race and crime policy issues became increasingly politicized amid calls by public officials for “law and order” and a “war on drugs.” By the 1990s, the new retributive orientation had spilled over into juvenile justice in response to perceptions of rapidly increasingly juvenile crime rates:

Daily media depictions of gang violence and drive-by shootings shaped public perceptions that urban black males committed all the violent crime. Conservative politicians warned of a coming generation of “super-predators,” encouraged and exploited public fears of a juvenile-crime “blood-bath,” and reinforced punitive attitudes with pledges to “get tough,” which everyone understood as a “code word” applying to black males.

By the mid-1990s, nearly every state had adopted laws to transfer more and younger offenders to criminal courts for prosecution as adults. Some states even lowered the maximum age of juvenile court jurisdiction from 18 to 17 in order to transform youths into adults on a wholesale basis. Within juvenile systems, at least 17 states amended the purpose clause of their juvenile codes to incorporate goals of punishment, accountability, and public safety—goals traditionally

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278 See supra Section I.A.
280 Feld, supra note Error: Reference source not found, at 25-27.
282 Feld, supra note Error: Reference source not found, at 34.
283 Id.
reserved for the criminal justice system.  

Washington, for example, enacted amendments in 1977 aimed at providing “punishment commensurate with the age, crime, and criminal history of the juvenile offender” in order to, among other things, “[m]ake the juvenile offender accountable for his or her criminal behavior.”  

Meanwhile, states expanded the consequences of a juvenile adjudication to include a whole new set of “procrustean punishments,” including lifetime sex offender registration, potential enhancement of future criminal sentences, ineligibility for student loans, disqualification from public benefits, and ineligibility to enlist in the military.  

While many states still retain language indicating that rehabilitation is a goal of juvenile justice, only a tiny number continue to emphasize the best interests of the child as the primary purpose of juvenile court.  

The more punitive a juvenile justice system becomes, the more shaky becomes a key premise in the McKeiver Court’s justification for denying juveniles the right to a jury trial, namely, that a juvenile proceeding is not a “criminal prosecution” within the meaning of the Sixth Amendment.  

Various procedural and substantive provisions in the Bill of Rights are applicable to “criminal” cases and “prosecutions.” The Sixth Amendment right to a jury trial, for example, applies to “all criminal prosecutions” for non-petty offenses, generally defined as those offenses where imprisonment for more than six months is authorized.  

Crucially, the

287 *Id.* at 675.
288 *McKeiver*, 403 U.S. at 541.
289 U.S. CONST. amend. V (requiring grand jury indictments in charging “infamous crime[s]” and forbidding compelled testimony against oneself in “any criminal case”; *id.* amend. VI (requiring in “all criminal prosecutions” the right to a speedy and public trial by an impartial jury and the right to counsel, among other guarantees).
290 Baldwin v. New York, 399 U.S. 66, 69, 73-74 (1970) (“no offense can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for more than six months is
infliction of punishment is sufficient to render a legal process criminal in nature and thereby
trigger the full slate of protections under the Bill of Rights.\textsuperscript{291} Should a state’s juvenile system be
determined to mete out punishment, therefore, the young people who appear there are entitled to
a jury trial.\textsuperscript{292} On the other hand, Bill of Rights protections do not necessarily apply to
proceedings dispensing nonpunitive sanctions, such as coerced rehabilitation.\textsuperscript{293} Distinguishing
between punitive and rehabilitative proceedings is thus crucial to determine the applicability of
constitutional protections. “[I]f a juvenile justice system were in fact ‘punitive,’ even if
nominally ‘rehabilitative,’ it would become a ‘criminal’ legal system subject to those
requirements unique to state dispensations of punishment.”\textsuperscript{294}

The Supreme Court has articulated a two-part inquiry to help courts determine whether a
sanction is civil or punitive.\textsuperscript{295} First, a court should look to the stated intent of the legislature.\textsuperscript{296} If
the intention of the legislature is to impose punishment, the sanction is punitive and that ends the
inquiry.\textsuperscript{297} If, however, the legislative intent or label indicates the sanction is civil, it will be
presumed to be so unless it can be shown by “the clearest proof” to be punitive.\textsuperscript{298} Some “tests”

\begin{footnotesize}
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\item \textsuperscript{291} \textsc{George p. fletcher, rethinking criminal law} 408-09 (2000) (“The best candidate for a
conceptual proposition about the criminal law is that the infliction of ‘punishment’ is sufficient
to render a legal process criminal in nature.”); \textit{see also} Gardner, \textit{supra} note \textsuperscript{291}.
\item \textsuperscript{292} Gardner, \textit{supra} note \textsuperscript{292}.
\item \textsuperscript{293} \textsc{smith v. doe}, 538 U.S. 84, 92 (2003).
\item \textsuperscript{294} Gardner, \textit{supra} note \textsuperscript{294}.
\item \textsuperscript{295} \textit{Id.}
\item \textsuperscript{296} \textit{Id.}
\item \textsuperscript{297} \textit{Id.}
\item \textsuperscript{298} \textit{Id.}
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developed by the court to help determine if a sanction is punitive include whether the sanction involves “an affirmative disability or restraint”; whether it has historically been regarded as punishment; whether it is typically imposed upon those deemed to be blameworthy; whether it promotes retribution and deterrence, whether the behavior to which it applies is already a crime; and whether it seems excessive compared to the alternative purpose assigned. Prof. Martin R. Gardner, after surveying the philosophical literature, argues that an additional factor central to the concept of punishment is the extent to which a sanction is “determinate,” in the sense that “its intensity and duration is determined by the seriousness of the action to which it responds.” For example, punitive sanctions are typically fixed at the time of imposition, while rehabilitative sanctions are more likely to be indeterminate because, at the time of their imposition, it is impossible to know how long it will take to rehabilitate the offender.

Under this framework, many modern juvenile systems impose punitive sanctions that entitle defendants to a jury trial. In states that have changed the purpose clauses of their juvenile systems to incorporate goals of punishment, juvenile sentences can be presumed to be punitive under the Supreme Court framework. But even in states where the purpose clause might be more ambiguous, propounding both rehabilitative and punitive goals, many juvenile defendants can show by the “clearest proof” that they have been subject to punishment. In his article, Prof. Gardner cites cases from Delaware, Washington, and New York in which sentences of prolonged confinement, imposed because of an offense, advancing retributive and deterrent goals, and set for a fix period clearly meet the standard for a punitive sanction. In the Delaware

300 Gardner, supra note Error: Reference source not found, at 15.
301 Id. at 15, 17.
305 Gardner, supra note Error: Reference source not found, at 53, 56, 61-62.
and Washington cases, however, the state courts did not recognize the juvenile’s right to a jury trial. More generally, courts have historically been inattentive to the need to distinguish between punitive dispositions, which trigger Sixth Amendment applicability, and rehabilitative ones, which do not.306 It is difficult to estimate precisely how many young people across the country are facing Sixth Amendment deprivations today. But with the continuing vitality of “tough on crime” policies, combined with the general unavailability of juvenile jury trials in most states, the likelihood is high that a significant portion of juvenile defendants face punitive sanctions without the protection of a jury.

To the extent this is occurring, the Guidelines authorize punitive sentences that were imposed on juvenile defendants in violation of the Sixth Amendment to enhance later adult sentences. This is plainly unlawful. Recall that in their current form, the Guidelines use juvenile priors to enhance sentences through Section 4A1.2(d), which assigns two criminal history points “for each adult or juvenile sentence to confinement of at least sixty days” and one point for all other juvenile sentences. However, it is well-settled law that when a defendant in a criminal proceeding is denied constitutional rights, a conviction resulting from that proceeding is invalid and cannot be used later against the defendant.307 This prohibition extends to the use of an unconstitutional conviction to enhance a later sentence. In Burgett v. Texas, for example, the Supreme Court held that an uncounseled and therefore constitutionally infirm criminal conviction could not be considered by a later court under a Texas recidivism statute.308 The Court qualified this principle somewhat in Nichols v. United States, which held that an uncounseled misdemeanor conviction, valid under Supreme Court precedent because no prison term was

306 Id. at 50-51.
307 See supra note Error: Reference source not found.
308 389 U.S. 109, 115 (1967) (“To permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of that case.”) (internal citations omitted).
imposed, can be relied on to enhance the sentence for a subsequent offense, even if it involves imprisonment. Nonetheless, the central contention of Burgett is still good law. The Guidelines themselves acknowledge that “[s]entences resulting from convictions that … have been ruled constitutionally invalid in a prior case are not to be counted” in a defendant’s criminal history.

Not every juvenile adjudication may trigger Bill of Rights protections, but those that do should not be used to enhance a later adult sentence if those protections were lacking. The Guidelines do not distinguish between constitutionally sound and unsound juvenile adjudications, instead assuming all such prior are legitimate fodder for consideration. This situation creates a substantial risk that federal defendants will be punished a second time for an unconstitutionally obtained conviction at the juvenile level.

B. The Length of a Juvenile Sentence Should Not Be Used to Measure its Seriousness

The Guidelines err further in assigning criminal history points to prior juvenile adjudications based on the length of juvenile dispositions. This policy is misguided because the length of a juvenile disposition is a poor proxy for the seriousness of the underlying offense and not comparable to the length of sentences imposed for adult convictions. Again, Section 4A1.2(d) assigns two criminal history points “for each adult or juvenile sentence to confinement of at least sixty days” and one point for all other juvenile sentences. Besides the fact that juvenile adjudications are no longer counted after five years, whereas the adult convictions decay after 10 years, the juvenile priors are treated the same as adult priors for the same sentence imposed.

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310 U.S. Sent’g Guidelines Manual § 4A1.6 (U.S. Sent’g Comm’n 2021).
311 U.S. Sent’g Guidelines Manual § 4A1.2(d) (U.S. Sent’g Comm’n 2021).
312 Id.; see also id. § 4A1.2(d) n.7.
313 Id. § 4A1.2(e)(2).
Juvenile dispositions, however, can be imposed for reasons entirely unrelated to the seriousness of the underlying offense. Even in states that have incorporated punitive goals into their juvenile systems, treatment and rehabilitation can remain an aim of the system as well. In practice, the length of juvenile dispositions is often set in line with a treatment plan to address the offender’s behavioral and other needs.\textsuperscript{314} Or, in the alternative, a juvenile judge may confine a young person as a “warning”\textsuperscript{315} or because the young person “lacked an adequate home or that the community lacked adequate services.”\textsuperscript{316} As a result, the “imposition and duration of juvenile confinement may be set irrespective of proportionality; irrespective of the sentence ranges for adult offenders.”\textsuperscript{317} The meaning of a juvenile adjudication can vary across jurisdictions and “there is no necessary relationship between the adjudicated offense and sentence imposed by the court.”\textsuperscript{318}

The Guidelines, therefore, unfairly use the length of a juvenile sentence of confinement as a proxy for the seriousness of a prior offense. Juvenile sentences of confinement, which may have been imposed for treatment purposes following a minor infraction, are not comparable to the length of adult sentences. Juvenile adjudications should not be assigned criminal history points on this basis.

C. The Use of Juvenile Adjudications to Enhance Adult Sentences Raises Policy Concerns About Notice

To the extent that young people are not informed that their juvenile adjudications can enhance a subsequent federal sentence, the Guidelines raise policy concerns about fair notice. More specifically, several state laws explicitly assert that the records of juvenile adjudications—

\textsuperscript{314} Dormont, \textit{supra} note Error: Reference source not found, at 1803.
\textsuperscript{315} \textit{Id.}
\textsuperscript{316} United States v. Johnson, 28 F.3d 151, 160 (D.C. Cir. 1994) (Wald, J., dissenting).
\textsuperscript{317} \textit{Id.}
\textsuperscript{318} Redding, \textit{supra} note Error: Reference source not found, at 245 (internal quotation marks omitted).
and many youthful offender adjudications as well—are off-limits for future proceedings.

Accordingly, available evidence suggests that neither judges nor defense counsel advise youth
about the potential federal consequences of their state juvenile or youthful offender
adjudications. This problem is compounded by the fact that so many juvenile offenders lack
counsel to begin with, making it highly unlikely that juveniles fully understand the potential
federal consequences of their legal decisions.\footnote{Despite Gault’s recognition of a right to counsel in juvenile proceedings, “[i]t is an open
secret in America’s justice system that countless children accused of crimes are prosecuted and
convicted every year without ever seeing a lawyer.” Defend Children: A Blueprint for Effective
Juvenile Defender Services, NAT’L JUV. DEF. CTR. 10 (Nov. 2016), https://njdc.info/wp-content/
This occurs because, in many jurisdictions, children are routinely permitted—even encouraged—
to waive their right to counsel without first consulting with an attorney. Id.; see also Karol
Mason & Lisa Foster, Guest Post: Some Juvenile Defendants Still Denied Justice Through Lack
of Counsel, WASH. POST. (Dec. 20, 2016) (“Many young people in detention facilities never had
a lawyer appointed to represent them, and too often children are encouraged to waive their right
to counsel even when doing so can hurt their chances of a fair hearing and a fair result.”); Feld,
supra note Error: Reference source not found, at 1170 (“Studies in many states consistently
report that juvenile courts adjudicate youths delinquent without the appointment of counsel.”).
Even when juvenile defenders are appointed, they are often overworked, underpaid, and
inadequately trained.

In addition to the frequent absence of quality counsel, juvenile proceedings also suffer
from other procedural weaknesses. Juvenile courts often follow evidentiary and procedural rules
less rigorously than adult courts. Redding, supra note Error: Reference source not found, at 243.
And juvenile adjudications are appealed at a far lower rate than adult convictions. One study
using data from 2009 to 2013 found that only 1 in every 2,707 juvenile cases was appealed.
Increasing Juvenile Appeals: An Underused Critical Check on the Juvenile Delinquency System,
Juvenile-Appeals.pdf. By comparison, one comprehensive study found that 16% of federal
convictions were appealed. Megan Annitto, Juvenile Justice on Appeal, 66 U. MIAMI L. REV. 671, 680 (2012). At the state level, little data is available, but estimates of the rate of appeal of
adult convictions are even higher. Id.}
unconstitutional ex post facto law because it considered juvenile adjudications that, at the time of those adjudications, the defendant believed could not under state law be used against him at future proceedings.\footnote{320} In a Fourth Circuit case, the defendant argued that the use of his juvenile adjudications violated due process “because he was not aware that confidential juvenile proceedings could be used to enhance future sentences.”\footnote{321} And in a First Circuit case, a defendant contested the consideration of a juvenile prior that state law specifically said could not be considered in subsequent proceedings.\footnote{322}

Recent interviews with public defenders at three different New York City offices suggests that the problem of notice extends to young people in youthful offender proceedings. Attorneys who represent youth at The Legal Aid Society,\footnote{323} the Neighborhood Defender Service of Harlem,\footnote{324} and The Bronx Defenders\footnote{325} were aware of many of the collateral consequences of a youth offender adjudication,\footnote{326} but not that New York youthful offender adjudications are routinely used to enhance federal sentences under the Guidelines.\footnote{327} These attorneys unanimously reported that they did not advise clients about the federal ramifications of taking a youthful offender plea deal, nor did New York judges advise their clients about this aspect of

\footnote{321} United States v. Daniels, 929 F.2d 128, 129 (4th Cir. 1991).
\footnote{322} United States v. Gray, 177 F.3d 86, 92 (1st Cir. 1999).
\footnote{323} Video interview with Donna Henken, Adolescent Intervention and Diversion Project Attorney, The Legal Aid Society (Mar. 6, 2023).
\footnote{325} Video interview with Elizabeth Fischer et al., Managing Attorney, Criminal Defense Practice, Neighborhood Defender Service of Harlem (Mar. 15, 2023).
\footnote{326} See, e.g., United States v. Cuello, 357 F.3d 162, 166 (2d Cir. 2004) (YO adjudication can be considered by New York criminal courts in setting bail or granting parole); People v. Francis, 94 N.E.3d 882, 884 (2018) (when assessing an offender’s risk level under New York’s Sex Offender Registration Act); People v. Saqline K., 84 N.Y.S.3d 187, 188-89 (2018) (to deny immigration bond). In addition, the public defenders interviewed indicated that prosecutors consider prior YO adjudications in deciding what plea deals to offer.
\footnote{327} See supra Section I.C.
their plea. One attorney who works predominantly on immigration matters pointed out the anomaly of the Guidelines policy in light of federal Board of Immigration Appeals precedent that New York youthful offender adjudications do not count as criminal convictions for immigration purposes.\textsuperscript{328}

Federal courts have not been receptive to challenges on due process grounds to Section 4A1.2(d) of the Guidelines, although the courts have failed to engage with the reality that, in practice, juveniles are rarely advised of their cases’ federal consequences. In the three appellate cases mentioned above, the courts dismissed the defendants’ arguments on narrow technical grounds. In the Third Circuit case, the court construed language in the Pennsylvania law at issue—that a juvenile adjudication can be used “in dispositional proceedings after conviction of a felony for the purposes of a presentence investigation and report”—to provide constitutionally adequate notice.\textsuperscript{329} In the Fourth Circuit case, the court argued in dicta that because the Guidelines were enacted before the defendant’s juvenile adjudication, he “was charged with notice that those juvenile adjudications could later be used for sentencing under federal law.”\textsuperscript{330} And in the First Circuit case, the court stated that even assuming the Maine law at issue prohibited the consideration of a juvenile adjudication in future proceedings, “that reading of the law would fall under the force of the Supremacy Clause.”\textsuperscript{331} The court continued:

Whether a particular offense falls within the federal guidelines’ criminal history framework is a question of federal law, not state law. States enjoy a broad range of flexibility in choosing how they will treat those who offend their laws. But they may not dictate how the federal government will vindicate its own interests in punishing those who commit federal crimes.\textsuperscript{332}

\textsuperscript{328} Matter of Devison, 22 I. & N. Dec. 1362 (BIA 2000).
\textsuperscript{329} Bucaro, 898 F.2d at 372-73.
\textsuperscript{330} Daniels, 929 F.2d at 130.
\textsuperscript{331} Gray, 177 F.3d at 93.
\textsuperscript{332} Id. (internal quotation marks and citations omitted).
In sum, these courts reasoned that, despite state laws, attorneys, or courts who were silent on the matter or even directed otherwise, the federal defendants had received adequate notice about the future use of their juvenile adjudications though prior enactment of the Guidelines.

This logic, however, does not grasp just how unlikely is the notion that juveniles receive notice of the potential consequences of their adjudications. In fact, juvenile offenders as a general rule are wholly unaware of this aspect of the Guidelines—either because their counsel is also unaware, they do not have counsel to begin with, juvenile judges do not provide notice, state laws suggest juvenile adjudications cannot be used against them down the line, or a combination of these reasons. If well-represented juvenile offenders were aware of Section 4A1.2(d) of the Guidelines, they could adjust their legal advocacy and urge dispositions that may reduce or eliminate the juvenile’s future federal criminal history score. For example, a juvenile defendant might fight a rehabilitative term of incarceration exceeding 60 days, asking instead for a shorter commitment or noncarceral adjudication, to avoid the prospect of two criminal history points in a later federal case. Given that many young people do not receive notice of the ways in which their juvenile adjudications can enhance a future sentence, it is deeply unfair to allow those adjudication to enhance subsequent federal sentences.

D. The Guidelines’ Consideration of Juvenile Adjudications Exacerbates Existing Racial Disparities in the Criminal Legal System

The U.S. Sentencing Commission should end the use of juvenile priors to enhance federal sentences because that practice disproportionately impacts nonwhite defendants. It has long been the case that nonwhite youth—and Black youth in particular—experience a harsher juvenile justice system than their white peers.333 “[Y]outh from racial and ethnic minority groups are (and

have been) more likely to be arrested, detained, and ordered to residential placement than White youth.”

This racially disparate treatment is reflected in the available data. In 2019, for example, Black youth comprised 15% of America’s youth population but accounted for 35% of all delinquency cases handled by juvenile courts. Black youths were nearly three times as likely as white youth to be referred to juvenile court in the first place. And cases involving racial and ethnic minority youth were more likely to result in detention than those involving white youth. These figures are in line with the results of studies from earlier years.

The use of juvenile priors to enhance sentences under the Guidelines, then, only compounds the problems of racial disparity endemic to juvenile justice systems. Because people of color are overrepresented in juvenile courts, they are more likely as adult defendants to have juvenile priors. In turn, they are more likely to receive criminal history points on account of those juvenile priors and thus face higher recommended sentences and disqualification from safety valve relief. Akin to the disproportionate rate at which Black youth are tried as adults, leading to higher criminal history scores and other repercussions, this dynamic is patently unfair and deserves reexamination by the U.S. Sentencing Commission.

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334 Id. Black youth are also more likely to be tried as adults. Id.; see also supra Section III.B.
335 Id. at 145.
336 Id. at 164.
337 Id.
338 See, e.g., Federle, supra note Error: Reference source not found, at 51-52.
339 See supra Section III.B.
340 This conclusion accords with the policy recommendations of scholars at the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota, who in 2015 undertook a comprehensive review of criminal history enhancements in jurisdictions across the United States. Richard S. Frase et al., Criminal History Enhancements Sourcebook, ROBINA INST. OF CRIM. LAW AND CRIM. JUST. 107 (2015), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-02/criminal_history_enhancement_web2.pdf. The scholars suggested that steps “to reduce or eliminate criminal history rules that have a disparate impact on nonwhite offenders” is “the fastest and least expensive way” to reduce disproportionality in prison populations, reduce “perceived unfairness,” and potentially reduce crime. Id.
PART V: RECOMMENDATIONS

This Part argues that the U.S. Sentencing Commission should end the use of offenses committed prior to age 18 to enhance federal sentences. This Part also suggests steps that other legal actors can take now regardless of action by the Commission. Section V.A explains that the Commission has the legal authority to amend the Guidelines to end the use of pre-18 offenses to enhance sentences. Section V.B discusses the policy options available to the Commission regarding how it could revise the Guidelines’ treatment of offenses committed prior to age 18. Section V.C argues that the Commission’s optimal policy is to categorically end consideration of pre-18 conduct. Section V.D addresses steps that can be taken by other legal actors. I urge the U.S. Department of Justice, the Commission, or another federal agency to conduct a study to get a better sense of which and how many federal defendants face enhanced sentences on account of pre-18 conduct; public defenders and judges to implement trainings to educate themselves about the issues discussed in this article; and federal judges to take account of these issues when exercising their considerable discretion under Booker and 18 U.S.C. § 3553(a) to impose sentences.

A. The U.S. Sentencing Commission Has the Authority to Amend the Guidelines’ Treatment of Offenses Committed Before Age 18

The U.S. Sentencing Commission has the statutory authority to revise the manner in which the Guidelines consider offenses committed before age 18 in sentencing. Pursuant to 28 U.S.C. § 994, the Commission is empowered to promulgate sentencing guidelines and policy statements for federal sentencing courts;\textsuperscript{341} to periodically “review and revise” those

guidelines, and to submit proposed amendments to Congress no later than May 1 each year. Absent action of Congress to the contrary, the proposed amendments become effective on the date specified by the Commission—usually November 1 of the same year. Between 2019 and July 2022, the Commission lacked the necessary quorum to promulgate amendments to the Guidelines, but the U.S. Senate confirmed a full slate of seven new commissioners in August 2022 and the Commission has once again been able to initiate its amendment process.

The Commission’s discretion to amend the Guidelines is limited by specific congressional directives, but no such directive exists with regards to the treatment of offenses committed prior to age 18. The Commission may not override statutes enacted by Congress, such as those that trigger mandatory minimum sentences for certain drug trafficking offenses or possession of a firearm in connection with other crimes. That no such directive exists regarding the Guidelines’ treatment of pre-18 conduct is evident from the fact that the Commission has proposed amending it in the past. In 2016, the Commission solicited public comment on its proposal to amend Section 4A1.2(d) of the Guidelines to exclude juvenile adjudication from being considered in the calculation of defendants’ criminal history scores. In questions appended to the proposed amendment, the Commission further asked whether it should “provide instead that sentences for offenses committed prior to age eighteen are not to be counted in the criminal history score, regardless of whether the sentence was classified as a

342 Id. § 994(o).
343 Id. § 994(p).
344 SIDHU, supra note 1.
345 Id. The Commission’s policy priorities for the amendment cycle ending May 1, 2023, do not include any proposal to change the treatment of offenses committed prior to age 18. Final Priorities for Amendment Cycle, 87 Fed. Reg. 67756 (Nov. 9, 2022).
‘juvenile’ or ‘adult’ sentence.” Although neither of these proposals was ultimately submitted to Congress, their consideration shows that the Commission has the authority to do what I recommend in Section V.C, infra.

B. The Commission Has Several Policy Options

A range of policy options are open to the Commission as to how it should instruct sentencing courts to consider prior offenses committed before age 18. In this Section, I attempt to list, from the most cautious to the most far-reaching, the available alternatives.

Option 1: Do Nothing

The Commission could conclude that no amendments to the Guidelines are necessary. After all, the Guidelines are just advisory, and if a sentencing judge feels that consideration of offenses committed before age 18 results in an inappropriately harsh advisory range, she can vary the sentence downward. In Section V.D, infra, I urge judges to do this while amendments to the Guidelines are pending.

Option 2: Encourage Downward Departures Where Consideration of Pre-18 Conduct Results in an Enhanced Guidelines Range

This proposal would not change how pre-18 conduct is used to calculate an advisory Guidelines range. Instead, it would encourage—but not require—the sentencing judge to take a closer look at how that range was calculated and to depart downward if the inclusion of offenses committed before 18 resulted in a higher advisory Guidelines range. The judge would retain discretion to depart downward if she found, due to the mitigating circumstances surrounding crimes committed by adolescents or other factors, that inclusion of those offenses “substantially overrepresents the seriousness of the defendant’s criminal history.”

349 Id. at 92011.
350 Again, judges can do this regardless of action by the Commission. See infra Section V.D.
351 This language is borrowed from an application note in Section 4B1.1 of the Guidelines. U.S. SENT’G GUIDELINES MANUAL § 4B1.1 n.4 (U.S. SENT’G COMM’N 2021) (explaining that a
The Commission solicited public comment on a variation of this proposal in 2016, but the change was never implemented. The language proposed at the time assumed that the Commission would also end the consideration of juvenile adjudications in the calculation of defendants’ criminal history scores. That said, with minor edits, the language could stand on its own. The Commission suggested amending application note 3 in Section 4A1.3 to read:

A downward departure from the defendant’s criminal history category may be warranted if the defendant had an adult conviction for an offense committed prior to age eighteen counted in the criminal history score that would have been classified as a juvenile adjudication (and therefore not counted) if the laws of the jurisdiction in which the defendant was convicted did not categorically consider offenders below the age of eighteen years as “adults.”

This proposal was criticized as overly technical and inviting litigation, but it gets at the notion that the Commission could encourage downward departures—either through policy statements or application notes—to draw some of the sting out of the Guidelines’ treatment of offenses committed before age 18.

Option 3: Exclude All Juvenile Adjudications from Guidelines Consideration

Juvenile adjudications would not be assigned criminal history points under Section 4A1.2 of the Guidelines. However, offenses committed before age 18 that are classified as “adult” convictions could still increase a defendant’s criminal history score, increase the base offense level for certain crimes, serve as career offender predicates, and block safety valve relief. As mentioned, the Commission considered but did not implement this proposal in 2016.
Option 4: Exclude All Offenses Committed Before 18—Whether Classified as Adult or Juvenile—from Guidelines Consideration

No offense of any kind committed before age 18 could be considered under the Guidelines’ enhancement provisions.

Option 5: Raise the Guidelines’ Legal Age Boundary Between Juvenile and Adult Priors Above 18

The Commission could increase above 18 the age at which a defendant’s prior offenses are given the full weight of “adult” criminal history. This proposal responds to those scholars who point out that the immaturity that makes young people less culpable for their crimes does not end on their eighteenth birthday. Rather, the ability of young people to regulate their emotions and control their impulses—developing amid dramatic changes to the brain—is not fully mature until the early- to mid-20s.357

How to implement this proposal would require further analysis, although academic commentators have already suggested models in a slightly different context: how to mitigate sentences for defendants whose youthfulness may have contributed to the instant offense. Prominent juvenile justice scholar Barry C. Feld, for example, has long advocated that jurisdictions adopt a “youth discount” at sentencing to account for young people’s diminished culpability.358 Under Prof. Feld’s scheme, judges would be required to give defendants under a certain age—25, as one possibility—a reduction off the sentence that they would impose on an adult convicted of the same crime.359 Just how much a reduction would depend on the age of the defendant, with younger defendants receiving a steeper reduction.360 Another commentator has argued in favor of a scheme that would extend to defendants up to age 25 a rebuttable

357 See supra Section II.B.
359 Id.
360 Id.
presumption that they should be excused from society’s harshest punishments—the death penalty, life imprisonment for nonhomicide offenses, and mandatory life without parole—on account of their youthfulness.\textsuperscript{361}

Elements of these models could be imported into the Guideline’s provisions on criminal history. For example, the Commission could exclude consideration of all prior offenses committed before 18 to enhance a defendant’s sentence, and then layer on top of that a more forgiving points system for prior offenses committed between ages 18 and 25. For instance, instead of assigning such priors three criminal history points if they resulted in a sentence exceeding 13 months, such priors could be “discounted” and assigned only one or two points. Alternatively, a policy statement or application note could be added to the Guidelines to encourage judges to depart downward if a significant portion of the defendant’s criminal history score derived from priors committed between the ages of 18 and 25. Barring congressional action, however, such changes could not override the definitions of qualifying predicate offenses that currently exist under various mandatory minimum statutes, such as the Armed Career Criminal Act.\textsuperscript{362} These predicate offenses currently include crimes committed by defendants when they were 18 or older.

C. The Commission Should Categorically End the Use of Offenses Committed Before 18 to Enhance Federal Sentences

I recommend that the U.S. Sentencing Commission amend the Guidelines to categorically end the use of prior offenses committed before age 18 to enhance advisory sentences. This is the optimal choice for several reasons. First and most importantly, this proposal brings the Guidelines into harmony with modern constitutional doctrine on adolescent development, promotes uniformity in sentencing, and ends the unconstitutional use of jury-less juvenile

\textsuperscript{361} Shust, \textit{supra} note Error: Reference source not found, at 698-99.
convictions to enhance punishment. This stands in stark contrast to the first three policy options identified above. The first option—do nothing—is legally, logically, and morally untenable in light of the arguments advanced in this article. The second option—encourage judges to depart downward where pre-18 offenses result in an enhanced Guidelines range—is inferior to a categorical rule. For one thing, this option does little to counter the psychological anchoring effect that the Guidelines have on judges. Judges would still be presented with a high advisory sentencing range that anchors their perception of what is reasonable before considering a departure. For another thing, because youths of color are disproportionately prosecuted in both juvenile and adult courts, they are more likely than white defendants to have longer pre-18 criminal histories as adults. Therefore, judges with discretion to depart downward may unintentionally but systematically extend them less grace at sentencing, perpetuating the racial disparities found elsewhere in the criminal legal system. Furthermore, this option errs in permitting an individualized assessment of defendants’ pre-18 criminal histories, whereas the developmental science stresses that young people as a group tend to be less culpable for the crimes they commit. This option thus runs the risk that many defendants whose past crimes were the product of immaturity might erroneously be judged after the fact to have been fully culpable for them. The third option—end consideration only of prior juvenile adjudications—would undoubtedly be a step in the right direction, but it does little to correct the unwarranted sentencing disparities created by the current regime and likewise gives insufficient weight to the

363 See supra Section I.A.
364 See supra Sections III.C, IV.C.
365 Cf. Scott & Steinberg, supra note Error: Reference source not found, at 782 (“There is a high risk of a particular kind of harmful error if assessment of immaturity is conducted on an individualized basis.”); see also Roper, 543 U.S. at 572-74 (discussing reasons in favor of a categorical rule barring imposition of the death penalty on any offender under 18 years old).
argument that young people *as a group* tend to be less culpable for the crimes they commit, regardless of whether they were charged as juveniles or adults.

My proposal is superior to the fifth option because it is far more administrable and would not require action by Congress. A virtue of the proposal I recommend is its simplicity. From a technical standpoint, it would require just a few edits to the Guidelines. First, it would amend Section 4A1.2(d) to read that offenses committed prior to age 18 should not be assigned criminal history points. Second, it would amend the definition of “prior felony conviction” in the career offender provision to exclude offenses committed before 18. Finally, it would amend the definitions of prior “felony conviction” or “felony offense” that appear in Sections 2K1.2, 2K2.1, and 2L1.2 to similarly exclude offenses committed before 18. By assigning fewer criminal history points, these changes would also make more defendants eligible for safety valve relief without requiring changes to the underlying statute. All of this could be accomplished through the Commission’s normal amendment cycle; it would not require action from Congress other than to abstain from affirmatively blocking the amendments. By contrast, the fifth option—to raise above 18 the Guidelines’ existing age boundary between juvenile and adult priors—would likely run into legal, political, and cultural roadblocks. Amending the Guidelines, for example, to “discount” the criminal history points assessed for prior offenses committed between ages 18 and 25 might be simple enough from a technical standpoint. Any edits more ambitious than that, however, would clash with federal criminal law’s treatment of people 18 or older as “adults.”

As a result, the Commission, via the Guidelines, could not override statutes that enhance sentences based on adult priors, defined to include offenses committed by those 18 or older.

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368 18 U.S.C. § 5031 (2023) (“a ‘juvenile’ is a person who has not attained his eighteenth birthday”).
Perhaps more consequentially, such a move by the Commission could face cultural and political backlash from other policymakers and the public at large who are familiar with 18 as “the point where society draws the line for many purposes between childhood and adulthood,”369 including, in most states and the federal system, criminal responsibility. These folks will likely argue, rightly in my opinion, that it should be the role of Congress, not a relatively obscure and unelected judicial agency, to alter a legal boundary so fundamental to American legal and cultural life.

D. Other Legal Actors Can Take Steps Now to Mitigate the Guidelines’ Shortcomings

Whether or not the Commission amends the Guidelines, other legal actors can take immediate steps to address the constitutional and policy-based problems with the Guidelines’ treatment of offenses committed before age 18. First, I urge the Department of Justice, the Sentencing Commission, or another federal agency to perform a study to better understand which and how many federal defendants face sentence enhancements and the denial of safety valve relief on account of conduct committed before age 18. As discussed, a study the Commission published in 2017 found that one in four federal defendants under age 25 at sentencing was assigned criminal history points for conduct they committed before age 18.370 The study did not, however, track the extent to which pre-18 conduct raised defendants’ base offense levels, counted as career offender predicates, or contributed to the denial of safety valve relief. This information is not otherwise available to the public.371 A full accounting of the Guidelines’ treatment of offenses committed before age 18 must consider all these consequences. This is a

369 Roper, 543 U.S. at 574.
370 YOUTHFUL OFFENDERS IN THE FEDERAL SYSTEM, supra note Error: Reference source not found, at 35-36.
371 The annual data published by the Commission does not allow researchers to determine the extent to which relevant Guidelines outcomes were caused by pre-18 conduct versus other priors. See, e.g., U.S. SENT’G COMM’N, INDIVIDUAL OFFENDER DATAFILES, FISCAL YEAR 2021, https://www.ussc.gov/research/datafiles/commission-datafiles (last visited Apr. 26, 2023).
feasible undertaking. The data necessary to execute this study is already included as a matter of course in defendants’ presentence reports prepared by the U.S. Probation Office, including a full list of the defendants’ juvenile and adult priors, the criminal history and base offense level points assigned to those offenses, whether the career offender provision has been triggered, and whether the defendant is eligible for safety valve relief. Based on the remarkable number of defendants who receive criminal history points for pre-18 conduct, I anticipate that such a study would reveal a similarly broad but heretofore overlooked population of defendants who experience other negative sentencing consequences on account of their pre-18 priors. I also anticipate the study would reveal that Black and other non-white defendants tend to face more frequent and more severe sentencing impacts for pre-18 conduct than white defendants. These findings should compel the Commission to act with heightened urgency in considering amendments to the Guidelines.

Second, I recommend that both criminal defense attorneys and judges start implementing trainings on the Guidelines’ treatment of under-18 conduct so they can address these issues through their advocacy and sentencing decisions. Defense attorneys at both the state and federal levels would benefit from such trainings. Attorneys representing individuals under 18 at the state level, for example, should be aware of dispositions that will be particularly harmful should their clients one day pick up a federal case, and they should advocate for an alternative disposition if possible. Federal defense attorneys, meanwhile, can use the arguments presented in this article to educate judges as to why the Guidelines may overstate the severity of their clients’ criminal history. Likewise, judges at both the state and federal levels should understand how pre-18 priors are counted against defendants under the Guidelines. This knowledge could encourage state

372 See supra Sections III.B, IV.D for a discussion of the persistent racial disparities in the rates at which Black youth are referred for juvenile court proceedings and transferred to adult court.
juvenile judges, for example, to limit dispositions of confinement so as not to trigger Section 4A1.2(d)’s two-point enhancement in a subsequent federal case. It may also prompt some state judges, whether juvenile or adult, to advise young defendants that while certain adjudications cannot later be used against them under state law, federal law likely is less forgiving. Trainings for federal judges, meanwhile, would encourage them to examine critically the Guidelines’ recidivist enhancements and adjust sentences accordingly if they discover a defendant’s advisory Guidelines range has been unjustifiably inflated by pre-18 conduct.

Third, and relatedly, I encourage federal judges to use their considerable sentencing discretion under Booker and 18 U.S.C. § 3553(a) to address the problems identified in this article, even if the Guidelines still require an accounting of pre-18 conduct for the time being. Booker made the Guidelines advisory, while 18 U.S.C. § 3553(a) grants judges broad freedom to deviate from the Guidelines based on considerations of the defendant’s history and background, among other factors. Judges need not—and should not—adhere to the Guidelines if doing so perpetuates constitutionally suspect outcomes that defy the Guidelines’ own stated policy objectives. Regardless of action by the Commission, federal judges should make it a practice to sentence individuals without considering offenses they committed as an adolescent.

CONCLUSION

Thousands of federal defendants each year face enhancements to their advisory sentencing ranges or are denied relief from draconian mandatory minimums because of the Guidelines’ recidivism provisions, which penalize defendants for past offenses committed prior to age 18. Given that the Guidelines continue to hold considerable sway over the decisions of sentencing judges, this approach adds years to offenders’ prison terms for actions taken when
they were in high school or even younger. This practice is not only shocking on its face, but it is also unconstitutional and bad policy. First, the use pre-18 conduct to enhance subsequent adult sentences flies in the face of the Supreme Court’s juveniles-are-different jurisprudence, which is animated by the insight that adolescents are less culpable for their crimes on account of their immaturity. Second, the Guidelines’ reliance on highly variable state practices to distinguish between juvenile and adult priors injects arbitrariness based on geography and race into the sentencing process, an outcome that undermines the Guidelines’ primary goal of achieving uniformity in sentencing. Third, as states have moved to more punitive models of juvenile justice without providing young people access to jury trials, many juvenile convictions are obtained in violation of young people’s Sixth Amendment rights. This situation renders unlawful the Guidelines’ use of these priors to enhance sentences.

While public defenders and judges can take steps now to remediate these failures of the Guidelines, my recommendations focus primarily on changes to the Guidelines that should be implemented by the U.S. Sentencing Commission. The Guidelines are the authoritative statement of federal sentencing policy, and I believe that changes made to that document will be most impactful on a nationwide basis in addressing the issues raised in this article. I acknowledge that my foremost recommendation—to exclude all offenses committed before age 18 from Guidelines consideration—may run into resistance from federal judges, but that is not a sufficient reason for inaction. In 2010, the Commission undertook its first and, to date, only survey of all federal district judges concerning their views on sentencing practices. One series of questions asked about hypothetical amendments to the Guidelines’ method of calculating

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373 See supra Section I.A for a discussion of the enduring influence of the Guidelines even after Booker.
criminal history. The statement that elicited the most negative reaction—with 39% of judges indicating they “somewhat disagree” and 21% indicating they “strongly disagree”—was that “[o]ffenses committed prior to age 18 should always be excluded from criminal history computations.”375 If these views still prevail today, many federal judges may oppose my proposal.

To that possibility I have two responses. First, even if the Commission implements my recommendation, the Guidelines remain advisory, and judges would retain broad discretion to impose a sentence they believe appropriate in light of the defendant’s history, background, and other sentencing factors listed in 18 U.S.C. § 3553(a). Second, Congress assigned to the Commission, not individual judges, the duty to establish federal sentencing policies that “provide certainty and fairness,” “avoid[] unwarranted sentencing disparities,” and “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.”376 Now that the Commission is back in action following a three-and-a-half-year hiatus, it should update the Guidelines to embrace modern constitutional doctrine, the prevailing science, Sixth Amendment guarantees, and its own stated policy objectives.

375 Id. tbl. 10.