This article examines some of the systemic problems the Supreme Court created when it held in McKeiver v. Pennsylvania in 1971 that children prosecuted as delinquents in juvenile court do not have a constitutional right to a jury trial. After showing that the Court's decision rested upon the premise that judges can be as fair as jurors in assessing guilt or innocence at a juvenile delinquency trial, the article shows that there are substantial reasons to question the accuracy of that premise. The article examines the nature of the factfinding process in bench trials and shows that several features of the bench model create the potential for biased or erroneous factfinding. The article concludes by proposing remedies for the most problematic aspects of the juvenile bench trial model. It presents remedies that legislators and judges can employ to engraft onto the bench trial model some of the safeguards of jury trials and also describes strategies and techniques that lawyers can use to compensate for the deficiencies of bench trials.

Introduction
In McKeiver v. Pennsylvania, the Supreme Court held that juveniles do not have a constitutional right, under either the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment, to a jury trial in juvenile delinquency proceedings. The 1971 decision marked the end of the Warren Court's "due process revolution," at least in the juvenile law context. Although the Court, now the Burger Court, nominally adhered to the Warren Court's landmark ruling in In re Gault, which held that juvenile court proceedings must measure up to an overarching due process requirement of "fundamental fairness," McKeiver ended the Warren Court's practice of construing the principle of "fundamental fairness" broadly to encompass the procedural protections that adult criminal defendants enjoyed. In McKeiver, the Court declared that whatever else "fundamental fairness" may mean, it does not mean that juveniles have a claim to the adult criminal process's bedrock guarantee of a jury trial.

In the two and a half decades since McKeiver, advocates for youths have tried to find a way around McKeiver so as to establish a constitutional right to a jury in juvenile court trials. These advocates have attempted to invoke federal constitutional protections other than those considered in McKeiver. They have argued that changes in the nature of the juvenile justice system undermine the validity of the McKeiver Court's analysis and require a re-examination of McKeiver's conclusions about the application of the Due Process Clause and the Sixth Amendment to juvenile court trials. [FN6] Advocates for youths have also urged state courts to interpret their state constitutions to reach a decision contrary to the federal constitutional ruling of McKeiver. [FN8] Finally, youth advocates have argued that particular statutory schemes are so punitive and non-rehabilitative as to render McKeiver's analysis inapplicable. [FN9]

Notwithstanding the creativity of these arguments, they have thus far proven almost uniformly unsuccessful. [FN10] Until
recently, the only courts that had recognized a constitutional right to a jury trial in juvenile delinquency proceedings were the Alaska and New Mexico Supreme Courts, both of which had established this right on state constitutional grounds prior to McKeiver. [FN11] A recent decision of the Louisiana Supreme Court [FN12] indicates that this constitutional landscape may be changing. Striking down a statute that authorized the state department of corrections to transfer adjudicated delinquents to adult penal facilities when the juvenile turns seventeen years old, the Louisiana Supreme Court explained that the state constitution's due process guarantee requires that juveniles subjected to adult criminal punishment be afforded the right to trial by jury. [FN13] In an analysis that may presage further movement towards the recognition of a juvenile court jury trial in Louisiana and other states, the Louisiana high court declared that the constantly increasing criminalization of juvenile court can reach a point at which the proceedings are so punitive and non-rehabilitative as to necessarily encompass a jury trial guarantee. [FN14]

This article will not wade into the debate over the validity and implications of the Supreme Court's constitutional analysis in McKeiver. Other authors have discussed these issues at great *556 length. [FN15] Although the recent Louisiana Supreme Court opinion represents an important change in the law, it rests upon constitutional arguments that have previously been explored in scholarly literature.

This article will focus instead on an aspect of McKeiver that has received relatively little attention: the Supreme Court's assumption (one might say, "finding of legislative fact") that a judge can be equally as fair as a jury in assessing guilt or innocence at a juvenile delinquency trial. [FN16] As Part I will show, this assumption was essential to the Court's analysis in McKeiver. Part II will demonstrate that the Court's conclusion in this regard was far from ineluctable. We will suggest that juries are generally more likely than judges to be fair and just triers of fact on the issue of guilt or innocence in a criminal or delinquency case.

It is not our purpose, however, to argue that juveniles have a right to jury trial. Rather, we intend to use the comparison of bench and jury trials to uncover and analyze certain idiosyncrasies of the adjudicatory process in juvenile court. On the assumption that the bench trial model will continue to be employed in juvenile courts in the vast majority of jurisdictions, Part III will offer some suggestions to enhance the fairness of this model and to remedy some of its most problematic features. Part III.A. will propose some measures that legislators and judges can institute to engraft onto the bench trial model some of the safeguards of the jury trial. Part III.B. will *557 offer advice to lawyers on how to adapt strategies and techniques to compensate for the problematic aspects of bench trials.

I. The Gault Legacy: The Touchstone of "Fundamental Fairness"

When the Supreme Court was asked to decide In re Gault, [FN17] it faced a task that was both challenging and fascinating. By 1967, the year the Court heard Gault, the process by which the Court decided constitutional criminal procedure cases was relatively straightforward. Generally, the cases that came before the Court involved a state court defendant's attempt to invoke a constitutional right expressly recognized in the Bill of Rights and already applied in federal prosecutions. [FN18] The issue in such cases was whether a particular guarantee of the Bill of Rights (which, by its terms, applied only to the federal government) should be extended to state court proceedings via the Due Process Clause of the Fourteenth Amendment. [FN19] By and large, the Court was merely administering a vision of constitutional criminal procedure developed by the Framers of the Bill of Rights and already well-defined in federal prosecutions.

For one member of the Court, Justice Black, Gault was not much different, and no more difficult, than the adult criminal cases that typically came before the Court. As his opinion reflects, Justice Black believed that there was no principled basis for distinguishing between adults and juveniles when applying the constitutional guarantees that constrain the power of the government in criminal prosecutions. [FN20] Under this view, the Court could easily have resolved *558 Gault by holding...
that Arizona had unconstitutionally denied Gerald Gault the panoply of rights enunciated in the Bill of Rights and available to adult criminal defendants in both federal and state criminal prosecutions. [FN21]

The majority of the Gault Court, however, was unwilling to agree that juvenile delinquency trials should precisely mirror their adult criminal counterparts. Instead, the majority wished to find a jurisprudential basis for affording the essential protections of the adult criminal process while preserving the rehabilitative goals, confidentiality, and other benevolent features of the juvenile court process. [FN22] To effect these results, the Gault majority decreed that juveniles would enjoy only those constitutional rights necessary to implement the Due Process Clause's guarantee of "fundamental fairness." [FN23]

*559 In doing so, the Gault Court cast itself loose of the Constitutional Framers' vision of a code of criminal procedure and assumed the task of identifying the core components of a fundamentally just system of criminal prosecutions of youth. In essence, the Court set about the task of re-imagining and re-crafting a system of justice. The Court addressed only four specific rights at issue in the case before it: the privilege against self-incrimination, the right to counsel, the right to fair notice of the charges, and the right to confront and cross-examine adverse witnesses. [FN24] The Court had little difficulty finding that these rights are so fundamental to a system of justice that they are required in juvenile delinquency prosecutions. [FN25] The Court left for another day, and other cases, the task of further fleshing out its vision of the essential elements of a fundamentally fair justice process. [FN26]

Three years later, in In re Winship, [FN27] the Court addressed the question of whether a juvenile may be convicted of a delinquency offense based only on a preponderance of evidence rather than the usual adult criminal standard of proof beyond a reasonable doubt. [FN28] The Court concluded that in juvenile delinquency cases, as in criminal cases, the Due Process Clause requires a standard of proof beyond a reasonable doubt. [FN29]

*560 The very next Term, however, the calculus of fundamental fairness produced a very different result in McKeiver v. Pennsylvania. [FN30] In arguing for a constitutional right to a jury trial, the juvenile appellants emphasized that the factfinding stage of a juvenile delinquency case, as reshaped by Gault and Winship, mirrored the adult criminal trial in virtually all respects except the right to a jury. [FN31] They urged the Court to view the grant of the jury trial right as the natural next step in this progression of reshaping the juvenile court, and they argued strenuously that there was no systemic or policy reason for declining to take this step. [FN32]

With hindsight, it is apparent that a central shortcoming of the McKeiver appellants' argument was that it did not sufficiently emphasize the Court's "fundamental fairness" analysis. The appellants did not make clear precisely why the jury trial model is indispensable to a "fundamentally fair" trial or in what manner this model significantly furthers the interests of accuracy and fairness. [FN33]

In rejecting appellants' arguments, Justice Blackmun's plurality opinion reaffirmed the Court's intention to preserve the traditional *561 juvenile court model to the greatest extent possible. Although admitting that the juvenile court system frequently "falls far short" of its "fond and idealistic hopes," [FN34] Justice Blackmun declared that the Court--or at least the plurality of four Justices [FN35]--was unwilling to give up on trying to achieve the juvenile court's "high promise." [FN36] In the plurality's view, the jury trial model had the distinct liability of "remak[ing] the juvenile proceeding into a fully adversary process" and "bring[ing] with it . . . the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial." [FN37] This step was not necessary for the sake of "fundamental fairness," the plurality declared, because "one cannot say that in our legal system the jury is a necessary component of accurate factfinding." [FN38] Proclaiming its confidence in the "fairness" of *562 juvenile court judges, [FN39] the plurality declared that there was no reason to doubt that judges would decide cases as fairly as juries. [FN40]
The plurality did not support or even elaborate upon its summary declaration of the inherent fairness of the judicial factfinder. At one point in the opinion, the plurality did allude to the systemic factors that threaten to bias a judicial factfinder in ways that generally are avoided in a jury trial. There may be "[c]oncern," the plurality acknowledged, "about the inapplicability of exclusionary and other rules of evidence, about the juvenile court judge's possible awareness of the juvenile's prior record and the contents of the social file; about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers." [FN41] Such factors, the plurality remarked, may be said to "create the likelihood of prejudgment." [FN42] But the plurality summarily dismissed this risk, declaring that such "[c]oncern . . . chooses to ignore . . . every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates." [FN43] If this passage is anything other than an inadvertent non sequitur, it would appear that the plurality was trying to say that it had confidence in judges' ability to put potentially biasing information out of their minds and to decide cases in an evenhanded and appropriate manner.

Thus, a critical premise of the Court's analysis in McKeiver was that judges can be as fair as juries in deciding cases. The next section will examine the validity of that premise.

II. A Comparison of the Quality of Factfinding in Bench and Jury Trials

It has long been known that judges and juries, when presented with identical facts, often return diametrically opposed verdicts. The classic social scientific study of juries, The American Jury by *563 Harry Kalven Jr. and Hans Zeisel, [FN44] found that judges are more likely than juries to vote in favor of conviction in a criminal case. [FN45] Of course, this finding merely shows that judges and juries react differently; it does not answer the normative question of which factfinder is more likely to reach the "correct" outcome. [FN46] Indeed, the very concept of a "correct" outcome is a problematic one. Comparative review of judge and jury factfinding requires that the reviewer know what an optimal decisionmaker "should" make of the evidence in a particular case. But assessments of guilt or innocence often turn upon credibility evaluations and subtle distinctions, upon which individuals of reasonable judgment can differ. Moreover, the cases in which judges and juries differ are most likely to be the "close" cases--the cases in which persons of reasonable judgment could easily go either way.

For these reasons, any of the usual ways of studying an issue of this sort are likely to prove of little avail in evaluating the comparative accuracy and fairness of judges and juries. Observations of trials, examination of transcripts, and interviews with participants may lead a reviewer to form an opinion about the accuracy and fairness of the factfinder's verdict, but, particularly in close cases, the *564 reviewer's opinion will be just as subject to question and dispute as that of the original factfinder.

A. Examination of Judicial Factfinding

While the very nature of the issue thus prevents an easy or clear-cut resolution, a review of appellate case law in bench trial cases raises troubling questions about the relative fairness and quality of judicial factfinding. The case law suggests that judges often convict on evidence so scant that only the most closed-minded or misguided juror could think the evidence satisfied the standard of proof beyond a reasonable doubt. For example, even if one examines merely the case law of the past year, one finds the following examples of cases in which a juvenile court judge convicted an alleged delinquent on evidence that an appellate court easily found to be insufficient:

* An Arkansas case in which the trial judge convicted a sixteen-year-old youth for stealing $40 from his mother's purse even though the youth's mother, "the State's lone witness . . . did not see [the youth] take the money from her purse and never talked to him about the money or asked him to return it when he came back home a week later." [FN47] Furthermore, the youth was never found to be in possession of any money. [FN48]
• A Florida case in which the trial judge convicted a youth of unlawfully entering a residence and stealing a gun from it based solely on evidence that the gun was missing and a neighbor observing the youth leave the garage area of the house. [FN49] This was the result despite the youth's explanation that he had been trying to see if his friend (a teenage boy who lived in the house) was home, and despite testimony showing that there were no signs of forced entry, there was no evidence placing the youth inside the residence, the youth's fingerprints were not found within the home, the gun was not recovered, no one saw the youth with the gun, and the teenage boy who lived in the home had had ample opportunity to take the gun himself. [FN50]

• A Louisiana case in which the trial judge convicted a youth of intentionally damaging property based on the youth's falling face-first into the wall of a store in the course of a struggle with a store manager who had caught the youth shoplifting a liquor bottle. [FN51]

• A Texas case in which the trial judge found that the police had probable cause to arrest a youth and therefore convicted him of evading a lawful arrest, even though the police officer was unable to point to any evidence of illegal activity that would justify his decision to make an arrest. [FN52]

• A Washington case in which the trial judge convicted a juvenile of aiding and abetting animal cruelty in the second degree based solely on evidence "that he was present and giggled while another boy threw a pigeon into a fountain." [FN53] The appellate court observed that "[l]aughing while another person injures an animal is not commendable behavior . . . [b]ut the giggling does not establish that Simon intended to encourage the other boy's actions." [FN54] These are only a few of the recent examples of juvenile convictions overturned due to insufficient evidence. [FN55]

*565 This is not to say, however, that the appellate courts frequently reverse bench trial convictions on insufficiency grounds. Such reversals appear to be relatively rare. [FN56] The apparent infrequency of such reversals, however, may be less a testimonial to the quality of judicial factfinding than a reflection of the exacting standard an accused must meet to secure a reversal on insufficiency grounds. Because the American judicial system is structured to leave the assessment of guilt or innocence to the finder of fact at trial, an appellate court generally must reject an insufficiency claim unless the case for acquittal is so overwhelming that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [FN57] If the applicable standard were, instead, whether "in the view of the appellate judges, the evidence at trial was sufficient to prove the accused guilty beyond a reasonable doubt," [FN58] appellate reversals of bench trial convictions surely would be far more frequent. Indeed, a review of the cases in which insufficiency claims failed readily reveals numerous instances in which the vast majority of "reasonable factfinders" would have acquitted. [FN59]

*566 An examination of judicial factfinding at other stages of the criminal and delinquency processes reveals what appear to be similar patterns of trial judges unduly leaning in the prosecution's favor when appraising the evidence. There are numerous instances in which the appellate courts have reversed trial court rulings denying motions to suppress evidence because the higher court concluded that the trial judge had credited police testimony that was so obviously false that the prosecution did not meet its minimal burden of producing a credible witness. [FN60] At the postconviction stage, *569 trial judges often deny defense motions to overturn a jury verdict of guilty, even when the evidence supporting the verdict is so scant that the conviction is eventually reversed on insufficiency grounds upon appellate or collateral review. [FN61] In capital cases in the few states that allow judges to override a jury's sentencing verdict, studies show that judges frequently override a jury's life recommendation so as to impose a death sentence but only rarely override a jury's death recommendation so as to impose life. [FN62]

Although the foregoing evidence of skewed judicial factfinding is far from definitive, it suggests that there are at least some
situations in which trial judges are prone—or at least more prone than jurors and appellate judges—to misconstrue facts in a manner that favors the prosecution. Some of these instances probably are attributable to the biases of individual trial judges. Some judges may tip the balance in the prosecution's favor to guard against acquiring a reputation for being "soft on crime," a reputation which can jeopardize a judge's prospects for re-election or reappointment to the *570 bench. [FN63] Judges who conduct bench trials in criminal or delinquency cases also may over-convict in close cases out of a misguided notion that the best way to protect the community from potentially dangerous offenders is to err on the side of conviction and then, upon receiving the pre-sentence report, rectify any error by granting probation to defendants or respondents who do not seem to be a danger to society. Finally, judges in the juvenile court setting may inappropriately lean in favor of conviction in order to ensure that youths in need of rehabilitative services will receive them as a condition of probation or placement. [FN64]

For purposes of this discussion, however, we will exclude these scenarios and postulate a judge who appreciates and honors her responsibility to evaluate a case as fairly as she can. It has been our experience that even fair-minded judges often convict alleged delinquents *571 on obviously insufficient evidence. If, as we believe, the biased judge is the exception rather than the rule, then the problem of flawed factfinding cannot be rectified by simply rooting out and removing the biased judges. Instead, improvement of the system requires that one uncover and correct whatever features of the current system are skewing the judgment of fair-minded jurists. This is the pursuit to which we will devote the rest of this article. The remainder of this section will identify various features of jury trials which are lacking in bench trials, and the omission of which may improperly skew the factfinding process in favor of conviction. Part III will examine various ways to correct what we believe to be problematic features of bench trials.

B. Distorting Influences in Bench Trials--Case Related Factors

The first and most significant distorting influence in the bench trial context is that trial judges are often exposed to inadmissible, extra-record evidence. Such evidence often suggests, and sometimes virtually proves incontrovertibly, that the accused committed the crime(s) charged. For example, by presiding at a pretrial suppression hearing that results in the suppression of evidence (a statement of the accused, tangible evidence, or identification testimony), the judge will be apprised of highly incriminating evidence that is inadmissible at trial and would be kept from a jury. [FN65] By presiding over the trial or a guilty plea of a co-respondent or adult co-perpetrator, the judge may hear another individual implicate the accused. [FN66] In the course of encouraging the parties to settle the case with a guilty plea, the judge may learn from defense counsel that the accused admits guilt. [FN67] Even in cases where the judge lacks such extra-record information about the accused's involvement in the charged crime, the judge may learn inadmissible information about the accused's prior record as a result of presiding over prior hearings in the case or while resolving evidentiary matters at trial. [FN68] *572

Finally, such information may reach the judge as a result of off-hand remarks by a clerk or bailiff in the judge's presence [FN69] or as a result of the judge's review of the court file. [FN70]

Appellate courts generally indulge in a fiction that a trial judge is capable of putting inadmissible information out of her mind and deciding a case solely on the basis of the evidence adduced at trial. [FN71] However, as the empirical evidence suggests, [FN72] and as some judges have forthrightly acknowledged, [FN73] such highly prejudicial information inevitably affects a judge, even if only at a subconscious level. Take, for example, a case in which a judge rules at a pretrial suppression hearing that the accused's confession must be suppressed *573 because the police violated some aspect of the rule of Miranda v. Arizona. [FN74] If that judge thereafter presides at the trial, how can she help but consider that the youth who is now presenting a reasonable-doubt defense made a detailed statement confessing to the crime? [FN75] As Justice Kennedy has observed in connection with improperly admitted evidence of a confession in a jury trial, it is difficult to overstate the indelible impact a full confession may have on the trier of fact . . . . If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other
evidence in the case. Apart, perhaps, from a videotape of the crime, one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence. [FN76] Although judges undoubtedly are better than juries at ignoring or not acting upon inadmissible evidence, it strains the imagination to believe that a judge would not be affected by knowledge of a confession, if only at an unconscious level. [FN77] Particularly in close cases, *574 such knowledge inevitably affects the judge's decision whether to come down on the conviction or on the acquittal side of the balance. Indeed, the Kalven-Zeisel study found that one of the central factors distinguishing the judge and jury verdicts they studied, as well as explaining why judges were more prone than juries to convict on identical trial testimony, was a judge's acquisition "during or prior to the trial, [of] an important [inadmissible] fact," such as a defendant's prior criminal record. [FN78] Referring to this aspect of the Kalven-Zeisel study, Justice White stated that the juries' performance in the study demonstrates the value of a jury trial system that ensures that the factfinder has not been exposed to prejudicial extra-record information. [FN79]

Another distorting influence, and the one that helps explain judges' tendency to credit police officers even when their accounts seem highly dubious, [FN80] is that judges who sit in a criminal or juvenile court for years come to know the police officers of the jurisdiction. If the judge knows that a particular officer is a "good cop" and particularly if the judge has found that the officer testified truthfully in previous cases, the natural tendency is to presume that the officer would not lie. As a result, the judge is less likely to subject the officer's testimony to the kind of critical evaluation that would expose untruths. In cases in which an officer's testimony is contradicted by previous statements or other officers' testimony, the judge is likely to presume that the inconsistency stems from a mistake or misunderstanding, rather than from fabrication. In addition to subtly biasing a judge in favor of the prosecution's witnesses, a judge's experience in presiding over criminal and juvenile cases may make the judge unduly skeptical of the testimony of the accused. Judges who sit for years in a criminal or juvenile court tend to hear the same stories over and over. For example, many of the defendants or juvenile respondents who are charged with possession of a gun claim that they found the firearm shortly before being arrested; many of those accused of drug possession claim that the police planted the drugs on them; and many of those accused of assault claim that the victim struck first and that they were merely acting in self-defense. A significant proportion of the defendants and juvenile respondents who present these defenses *575 probably are telling the truth, but many of them probably are not. A judge who has presided over numerous trials in which the accused invoked such a defense falsely (or, more precisely, in which the judge deemed the defense to be false) cannot help but be skeptical when yet another defendant or juvenile respondent comes forward with the same story. [FN81] Accordingly, unlike a jury which would assess the accused's credibility with an open mind, a judge may start from the cynic's position that the story is false until proven otherwise. [FN82]

C. Distorting Influences in Bench Trials--Individual vs. Group Dynamics

Thus far, the discussion has focused on case-related factors that may subtly skew the perceptions or judgment of the individual decisionmaker. Still other distortions may stem from the very fact that the decisionmaker is an individual rather than a group. As the Supreme Court has recognized, a central virtue of the jury model is that it brings people "from different walks of life . . . into the jury box," thereby ensuring that "a variety of different experiences, feelings, *576 intuitions and habits" are brought to bear upon the assessment of facts and fact witnesses. [FN83] Social scientific studies have shown that an important part of the jury deliberation process is the jurors' applications of their respective backgrounds and perspectives to the evaluation of the conduct and motivation of the principal actors and witnesses. [FN84] By drawing upon a pool of twelve people's experiences and perspectives, rather than a single judge's, the jury model increases the likelihood that witnesses' credibility will be assessed accurately and facts correctly found. Thus, for example, a juror (or, for that matter, a judge) who has personally experienced or observed police harassment based on race may find it easier than a white judge
from a privileged background to accept the possibility that a police officer might lie under oath. [FN85]

*577 In this manner, the jury model helps to achieve the central purpose of the Sixth Amendment's jury trial guarantee. As the Supreme Court has observed, the "framers of the [federal and state] constitutions strove to create . . . an inestimable safeguard against . . . the compliant, biased, or eccentric judge." [FN86] While appellate review may suffice to uncover and correct a judge's most obvious biases, subtler biases such as predispositions based on life experiences or long held assumptions are unlikely to emerge from a paper record. Such biases are most likely to be uncovered--and corrected--by means of an interchange between individuals with conflicting perspectives, such as what typically occurs during a jury deliberation. Indeed, Justice Blackmun, the author of McKeiver, recognized as much when he favorably compared group decisionmaking with individual judgment in his later plurality opinion in Ballew v. Georgia, [FN87] a case concerning the constitutionally mandated minimum number of jurors on a jury panel. [FN88] Justice Blackmun wrote:

When individual and group decisionmaking were compared [in social scientific studies], it was seen that groups performed better because prejudices of individuals were frequently counterbalanced, and objectivity resulted. Groups . . . exhibited . . . self-criticism . . . Because juries frequently face complex problems laden with value choices, the[se] benefits are important . . . In particular, the counter-balancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case. [FN89] *578 In Ballew, Justice Blackmun used these social scientific studies merely to demonstrate the increasing inaccuracy of juries as they decrease in size. [FN90] Had the Ballew case reached the Court before McKeiver, however, Justice Blackmun might not have been so quick to assume that individual judges are necessarily as fair and accurate as juries when performing the task of factfinding.

The use of a jury also increases the likelihood that salient facts will not be overlooked or forgotten. As Justice Blackmun noted in Ballew, members of a group may remember testimony that other group members have forgotten. [FN91] While trial judges generally have an advantage over jurors in this regard, in that judges can take notes of the testimony whereas most jurisdictions prohibit jurors from doing so, [FN92] even the most assiduous note-taking judge may neglect to jot down an important response by a witness or argument of counsel because the judge failed to appreciate its significance at the time. Moreover, in her effort to take careful notes, the judge may fail to notice some meaningful aspect of a witness's demeanor or some highly salient gesture or meaningful glance by the witness while on the stand. [FN93] Indeed, judges suffer from a particular disadvantage in this regard because, unlike jurors, their attention is constantly diverted by the need to resolve pending evidentiary matters, to control the courtroom, and to attend to a series of clerks and lawyers filing in and out of the courtroom.

A final advantage of group decisionmaking, and perhaps the most important one, is that the give-and-take of a discussion format promotes accuracy and good judgment by ensuring that competing *579 viewpoints are aired and vetted. As social scientific studies of decisionmaking by juries and other groups have shown, group members commonly reconsider and change even the firmest of prejudgments as they come to appreciate the complexities of a subject and take heed of viewpoints which they initially did not recognize or sufficiently value. [FN94] Even without the benefit of social science research, anyone who has ever gone to a committee meeting with a strongly held opinion only to emerge with an equally strongly held, but directly antithetical, point of view can appreciate the virtues of this process.

Interestingly, the judicial process provides for the safeguards of group decisionmaking not only in jury factfinding at the trial court level but also in judicial review at the appellate level. [FN95] Nonetheless, the Supreme Court blithely assumed in McKeiver--and courts continue to indulge in the fiction--that juvenile respondents in delinquency trials do not suffer any diminution in the quality of their trials as a result of being denied the right to a jury. [FN96]

In addition to the differences in the ways in which juries and judges evaluate the evidence at the conclusion of a trial, there is
also a subtle but important difference in the ways these two types of factfinders evaluate the evidence during trial. At the beginning of a jury trial, the lawyers for both sides commonly use opening statements to present the jury with their respective theories of the case. As social scientific studies have shown, opening statements serve a vital function of exposing the jurors to perspectives they might not otherwise have considered, as well as ensuring that the jurors appreciate the significance of apparently unimportant facts. [FN97] In contrast, *580 it is an almost universal convention that opening statements are waived in bench trials. [FN98] Attorneys who insist upon "taking up the judge's time" by making an opening statement do so at the risk of irritating the factfinder. [FN99] While the reasons for this convention are unclear, it probably stems from a notion that judges are so experienced at evaluating cases they do not need the benefit of opening statements by the lawyers. Yet, as judges themselves readily acknowledge, legal training and years of experience on the bench confer no special expertise or insights in assessing witnesses' credibility and discerning the truth. [FN100] Indeed, years of experience on the bench may actually impede rather than enhance a judge's ability to evaluate the facts accurately. Moreover, as the Supreme Court recognized in holding that criminal defendants have a constitutional right to present closing arguments in a bench trial, a judge's position of neutrality may inhibit her perception or appreciation of important facts or considerations apparent to lawyers as a result of their partisan perspectives:

The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. . . . Some cases may [erroneously] appear to the trial judge to be simple--open and shut . . . . [In such cases, a lawyer's argument] may correct a [judge's] premature misjudgment and avoid an otherwise erroneous verdict. [FN101] By dispensing with opening statements, juvenile court judges deprive themselves of one of the few opportunities available in a bench *581 trial for escaping the limitations of their own perspectives and preconceptions.

The problems caused by the absence of opening statements are exacerbated by the tendency of many juvenile court judges to evaluate witnesses' testimony as they hear it rather than withholding judgment until the conclusion of the trial. In jury trials, it is commonplace for judges to instruct jurors to refrain from making any judgments about the facts until they have heard all of the evidence and the lawyers' closing arguments. [FN102] Yet, many juvenile court judges seem to assume that they are exempt from such a procedure when serving as finder of fact at a bench trial. Most lawyers who have practiced in juvenile court for an appreciable length of time have had the unsettling experience of delivering a closing argument to a judge who was neither taking notes nor even paying close attention and who immediately thereafter delivered the verdict by reading aloud from a piece of paper on which she had previously written her findings of fact and conclusions of law. Here again, judges' assumption of their innate ability to evaluate the facts deprives them of a critical opportunity to hear a perspective that they may have overlooked.

We do not suggest that the foregoing discussion definitively resolves the question of the comparative quality and fairness of judges and juries as factfinders. The discussion has, however, shown that jury trials have a variety of features that promote informed and accurate factfinding in ways that cannot be replicated in bench trials. It has also suggested that qualities unique to a judicial factfinder--special training in the law, awareness of policy issues, and sensitivity to the needs of youth--are often of little help, and may actually prove to be a hindrance, in deciding questions of guilt or innocence. [FN103]

Thus, the discussion strongly suggests that the Supreme Court erred in McKeiver and that juveniles should be accorded the same right to a jury trial that adult criminal defendants enjoy. As we indicated *582 at the beginning of this article, however, most courts are ill-disposed to reach this result. [FN104] Nor is it likely in the current political climate that state legislatures will be amenable to proposals to expand the rights of juvenile offenders so as to confer a jury trial right by statute in those jurisdictions that have not previously done so. [FN105] For at least the foreseeable future, therefore, the bench trial will continue to be the prevailing model in the juvenile courts of most jurisdictions. In recognition of that reality, the next section will consider ways to reform the bench trial model to eliminate some of its most obvious flaws and to replicate some of the
unique virtues of jury trials.

III. Improving the Adjudicatory Process in Juvenile Court Bench Trials

A. Changing the Nature of Judicial Decisionmaking: Proposals for Legislators and Judges

Generally, judges and lawyers only pay close attention to the quality of juvenile judges' factfinding in appeals involving claims that the judge was unable to decide the case fairly because she was exposed to some prejudicial inadmissible evidence. [FN106] As indicated earlier, the appellate courts resolve such claims handily, if perhaps disingenuously, by indulging in the fiction that judges possess the capacity (which other humans lack) to partition off those parts of their minds that contain any inflammatory or prejudicial extra-record information. [FN107]

*583 If, however, the issue arose in a less threatening context, judges might be more willing to concede the disingenuousness of this view of judges and judicial factfinding. This might occur, for example, if judges and policymakers set themselves to the task of designing a juvenile court factfinding process in which citizens could take pride, rather than one that can merely survive appellate challenge.

What might such a model of a juvenile court bench trial look like? First, it would provide a mechanism for the resolution of pretrial suppression issues and other potentially prejudicial matters by a judge other than the one who will preside over the trial. Second, it would provide some means for trial judges to reap the benefits of collective decisionmaking, including a process by which a judge could reveal any assumptions and preconceptions that adversely affect her ability to evaluate the evidence fairly. Finally, it would ensure that judges listen to lawyers' arguments and maintain an open mind about the factual issues until the conclusion of the trial.

The following subsections briefly discuss some ways to implement this vision. In keeping with our goal of providing concrete, realistic suggestions for reforming the system, the discussion will distinguish between reforms that can best be implemented by state legislatures and administrative judges, and those that can be effected by trial judges.

1. Reforms that should be implemented by legislators or administrative judges

In a number of jurisdictions, the state legislature or an administrative judge has taken steps to guard against a juvenile court judge's exposure to prejudicial information prior to conducting a bench trial. For example, in the District of Columbia, pursuant to statute, a juvenile court judge who presides over a pretrial detention hearing or transfer hearing (thereby learning of the respondent's prior record and possibly inadmissible information about the facts of the case) must recuse herself as the factfinder at trial if the defense so requests. [FN108] In that same jurisdiction, a juvenile court administrative procedure provides for pretrial suppression motions to be heard by a judge other than the one who will preside over the trial. [FN109]

*584 Procedures such as these should be adopted by state legislatures and/or administrative judges in all jurisdictions that deny juveniles the right to a jury trial. There should be a rule that all pretrial matters, including detention pending trial, transfer to adult court, and suppression of evidence, be heard by a judge other than the one who will preside over the trial. Moreover, to guard against the danger of litigants tainting a bench trial factfinder by reciting prejudicial evidence in the course of arguing its admissibility, the burden should be upon litigants to raise close questions of admissibility prior to trial in motions in limine—with appropriate sanctions when a party willfully violates this procedure. To provide for the rare situation in which an issue of this sort arises at trial without either of the litigants having anticipated it, there should be a procedure for certifying the case temporarily to another judge to resolve the evidentiary matter without exposing the judicial trier of fact to a needless risk of prejudice.

It may seem impracticable to implement this proposal in jurisdictions that have only one juvenile court judge. Even in these

jurisdictions, however, there is at least one other judge who is fully qualified to decide pretrial motions to suppress evidence or pretrial or mid-trial motions on evidentiary matters: the criminal court judge. The criminal court judge could hear motions, including evidentiary hearings on motions to suppress, and then remit the matter to the juvenile court judge for trial. Or, if the criminal court judge is unavailable for some reason, a civil court judge could substitute. Although the civil court judge may be unfamiliar with the applicable criminal and juvenile law and procedure, she can rely on the parties to inform her of the relevant authorities and procedures. Unlike the process of putting facts out of one's mind, the process of learning new law and legal procedures is one quite familiar to, and easily accomplished by, any reasonably competent judge.

2. Reforms that should be effected by trial judges themselves

Even in the absence of formal mechanisms for safeguarding trial court judges from exposure to prejudicial information, judges can accomplish the same goal themselves. Regardless of the standard a litigant must meet to require a judge to recuse herself, a judge may always grant a recusal motion or disqualify herself sua sponte if she is exposed to prejudicial information. [FN110] Juvenile court judges should take such options seriously, keeping in mind the importance of avoiding any "appearance of impropriety." [FN111] Judges *585 also can, and should, structure pretrial hearings and trials so as to guard against exposure to prejudicial information. For example, confession suppression hearings can be conducted without the judge ever hearing the substance of the accused's statement. Similarly, evidentiary issues often can be resolved by the judge applying the law without hearing a proffer of the challenged evidence.

Trial judges also have the ability to modify the bench trial model to secure some of the virtues of careful, thorough deliberation. Judges should take great pains to refrain from making up their minds until they have heard all of the evidence and the lawyers' closing arguments. [FN112] They should encourage counsel to clearly state their respective theories of the case and to explain how particular pieces of evidence fit with their theories. Finally, judges can try to find collaborators to help them decide cases. In McKeiver v. Pennsylvania, the Supreme Court stated that judges are free to empanel advisory juries to assist them in decisionmaking in appropriate cases. [FN113] A judge can achieve a similar effect, with far less formality and inconvenience, by adopting a routine practice of discussing cases with one or more other judges to get a second or third opinion before rendering a verdict. Such a process is likely to improve the quality of the judge's decisionmaking, not only in an individual case but also on a long-term basis. Each of the judges participating in the deliberation is likely to take from the experience*586 a heightened sensitivity to her own biases and an enhanced ability to view a case from a variety of perspectives.

B. Litigating Within Existing Constraints

Given the inevitability of bureaucratic resistance to change, we are not so naive as to assume that legislators and judges will rush to embrace the proposals we have advanced in the preceding subsections. Thus, it behooves anyone concerned with improving the quality of juvenile court decisionmaking to offer suggestions to lawyers on how best to navigate within the current constraints of bench trials. In this section, we will endeavor to present some suggestions of this sort. In doing so, we will focus on techniques that can be used by defense lawyers for alleged juvenile delinquents. As Part II suggested, the impediments to fair factfinding in bench trials tend to be factors that skew the process in favor of the prosecution. Thus, to the extent that counteracting influences are needed, they are ones that would be employed by the defense. [FN114] However, at least some of the following litigative techniques are ones that prosecutors also could employ to enhance the efficacy of their advocacy in bench trials.

There has been remarkably little attention paid to the subject of lawyering in the context of bench trials. Treatises and articles on trial techniques and litigation skills tend to focus on the jury trial context. [FN115] The discussions of "case theory," witness examinations, *587 and opening and closing arguments that appear in such sources usually concentrate on techniques
lawyers can use to pitch a case effectively to a jury. [FN116] To the extent that such treatises or articles refer to bench trials at all, they usually just alert readers that the techniques described by the author(s) may need to be modified when used in a bench trial. [FN117]

It may or may not be the case that the litigation techniques that prove effective in a jury trial are equally relevant to the bench trial context. There has been considerable attention paid, especially in recent years, to jurors' decisionmaking processes and to the kinds of presentations and techniques that are likely to persuade a jury. [FN118] Such studies, which tend to emphasize the critical role of narrative in shaping jurors' understanding and evaluation of evidence, [FN119] have laid the foundation for scholars' analyses of litigative techniques for using narrative effectively in presenting a case to a jury. [FN120] Although *588 it seems reasonable to assume that narrative theory plays an equally important role in bench trials (especially if cognitive psychologists are correct in maintaining that narrative is at the core of cognition [FN121]), there is no empirical (or even anecdotal) basis for assessing the kinds of narrative approaches that are likely to prevail in a bench trial. [FN122]

The suggestions we offer here are based on our experiences as lawyers who have handled several bench trials of our own, supervised a large number of student attorneys in bench trials, and observed countless bench trials over the course of two decades. We certainly do not presume that our observations are necessarily valid. We offer them merely as possible approaches for lawyers to try and, on a broader level, as a means to stimulate further discussion*589 and study of the techniques that are likely to prove successful in a bench trial.

As narrative theory teaches, the choice of narrative is a critical one, for different types of narratives will appeal to different audiences. [FN123] Given what Part II suggests about judges' resistance to defense-prone narratives framed in purely factual terms (for example, that "the eyewitness picked the wrong person in the show-up or lineup"; or that "the alibi witness is telling the truth"; or that "the police officer is lying when he claims to have found the gun or drugs on the accused rather than on the ground nearby"), defense lawyers might choose to concentrate their efforts in a bench trial on purely legal arguments. While the lawyer certainly should not forego factual arguments, she might devote primary attention at the prima facie stage and at the close of trial to arguments that the prosecution's proof failed to satisfy the legal elements of the crime (for example, the definition of "physical injury" in an assault case; the requirement of "force" in a robbery case; the mens rea element of a specific intent crime). These might be viewed as, essentially, "legal narratives," in which the underlying "story" the lawyer tells is that "the judge should follow the law by dismissing the case (or particular counts of the charging paper) because the prosecution has not satisfied the applicable legal standard." [FN124]

The concept of a "legal narrative" also offers opportunities for presenting factual narratives in a manner that may prove more appealing to a judge. Often, lawyers can use legal principles to embed a factual narrative in a legal framework. For example, a misidentification defense in a one-witness-identification case can be reframed in terms of appellate caselaw recognizing the inherent unreliability of identification testimony [FN125] and the particular hazards of basing a conviction on a single eyewitness's identification. [FN126] If *590 presented with appropriate citations from the appellate caselaw, such a narrative may induce an otherwise reluctant judge to apply the "reasonable doubt" requirement stringently. This strategy essentially shifts the focus of the narrative from what happened during the trial or what happened during the identification procedure to what should happen when the judge sifts and evaluates the evidence. As analyses of jury trial arguments have shown, it is often effective to switch the narrative in this manner to one in which the factfinder is the protagonist. [FN127] The alternative"legal narrative" has the additional benefit of a highly useful subtext about the risk of appellate reversal if the judge convict on evidence the appellate court is likely to regard as insufficient. [FN128]

Similar sorts of embedding of factual narratives in a legal framework are possible in a wide variety of cases. For example, appellate courts' skepticism about the "dropsy" scenario (in which the police claim that the accused threw a weapon or drugs
to the ground upon the officers’ arrival) [FN129] might be used to shore up a closing argument that the judge should not credit a police officer's testimony of this sort. If counsel can find cases in which appellate courts reversed a conviction on legal insufficiency grounds on facts similar to the one counsel is litigating, she should bring such appellate opinions to the judge's attention to support the argument that, as a matter of law, the prosecution's evidence does not satisfy the reasonable doubt standard. Even if there are no cases directly on point, counsel may find that a factual narrative assumes greater force in a bench trial if seen through the lens of the legal requirement of proof beyond a reasonable doubt. [FN130]

In addition to considering whether to tell a different type of narrative to a judge than to a jury, a lawyer should think carefully about whether she should tell it in a different way. For example, the common jury trial strategy of eliciting apparently insignificant concessions upon cross-examination and weaving them together in closing argument [FN131] may be counterproductive in a bench trial. Because, as we suggested earlier, [FN132] many judges make up their minds about the verdict before hearing closing argument, they may decide to convict simply because they failed to appreciate the actual significance of a cross-examination. Thus, a defense lawyer handling a bench trial may be well-advised to surface the implications of obscure lines of cross-examination, assuming of course that the revelation does not afford the witness or the prosecutor an opportunity to repair the damage to the State's case.

In cross-examinations of prosecution witnesses as well as direct examinations of defense witnesses, defense counsel should watch for opportunities to capitalize upon a judge's familiarity with typical fact patterns and thereby turn what is usually a disadvantage into an advantage. For example, if the evidence shows that the police officers diverged from usual police procedure in a significant respect (for example, they failed to record a confession in their memo books and police reports; they failed to file a certain form that is invariably filed in particular types of cases; or they conducted a show-up under circumstances in which lineups are ordinarily used), defense counsel might use cross-examination and closing argument to emphasize the unusual nature of the officers' actions and thereby encourage the judge to view the prosecution's evidence as less reliable than she might otherwise be inclined to regard it. [FN133] In a mirror image of this approach, counsel should consider whether there are typically holes in the kind of story that the accused tells which can be filled in this particular case. For example, in a case in which the accused claims that he was forced to commit the crime because of duress by another person, did the accused, unlike most respondents and adult defendants, make a prompt complaint to a police officer, teacher, parent, or other adult relative? Or, in a case in which a youth accused of gun possession tells the oft-told tale that he found the gun and was planning to turn it in to the police, did the accused, unlike most young people in that situation, enlist the aid of his parent or another adult relative? By bringing out facts of this sort, defense counsel can shake up the judge's expectations and encourage her to take the case more seriously precisely because it does not fit the mold.

Thus far, we have looked at ways in which the techniques for handling a bench trial might differ from those a lawyer would ordinarily employ in a jury trial. There is, however, one respect in which lawyers should start treating bench trials more like jury trials. As explained earlier, it is commonplace for lawyers to waive opening statements in juvenile court bench trials. [FN134] The previous discussion suggested that this practice may skew the trial in favor of the prosecution because the judge will hear the prosecution's evidence without appreciating a certain perspective on the events. [FN135] Cognitive psychology literature underscores the point that an individual's perception of events or people may vary dramatically as a result of information that has "primed" the individual to perceive things in a particular way. [FN136] Accordingly, defense lawyers should give careful consideration to using opening statements to attune the judge to considerations or perspectives she might otherwise overlook. [FN137] especially in cases in which critical facts will not emerge until the accused's case-in-chief. Although judges may be resistant at first to requests to deliver an opening statement, repeated requests of this sort may eventually change the prevailing practice.

Naturally, these techniques are not ones that are suited to every delinquency case. The particular strategy must be fine-tuned
to the facts and circumstances of the individual case, the lawyers who are handling the case, and, most of all, the judge who is presiding over the trial. However, as this discussion has illustrated, there are some general techniques that defense lawyers can use to compensate, at least in part, for the distortions that often afflict bench trials in delinquency cases. If, as we hope, lawyers and scholars devote more attention to discussing bench trials, there will be a greater basis for assessing precisely what works in such trials and refining lawyers' techniques accordingly.

Conclusion

In a well-known and oft-quoted passage, the Supreme Court in Kent v. United StatesFN138 and In re GaultFN139 expressed its "concern that . . . [youth prosecuted in juvenile court] receive[ ] the worst of both worlds: . . . get[ ting] neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."FN140 If there is any one feature of juvenile court that most clearly gives rise to this spectre of inequality and irrationality, it is the denial of a jury trial. The Supreme Court in McKeiver v. PennsylvaniaFN141 denied juveniles the right to trial by jury on the assumption that judges can be every bit as fair in factfinding as juries. But, as the discussion has shown, there is real reason to question the accuracy of the Court's assumptions about the comparative fairness of judicial and jury factfinding. The indications of skewed and unfair decisionmaking demand further study. If, as we believe, they reflect flaws endemic in the bench trial model, the courts should revisit the conclusion the Supreme Court reached in McKeiver. At the very least, however, legislators, judges and lawyers should be alert to the possibilities for correcting some of the most overt distortions in bench trials by adopting the kinds of approaches we have proposed. Only in this manner can society offer young people prosecuted in juvenile court something better than the "worst of [all] . . . worlds."

[FNa1]. Professor of Clinical Law, New York University School of Law.

[FNa1]. Professor of Clinical Law, New York University School of Law.

The authors are grateful to Masiel Rodriguez-Vars, Neal Takiff and Kelly Warner-King for their research assistance and feedback, and to the Filomen D'Agostino and Max E. Greenberg Research Fund at New York University School of Law for financial support.


[FN2]. Id. at 545.


[FN4]. McKeiver, 403 U.S. at 543 ("All the litigants here agree that the applicable due process standard in juvenile proceedings, as developed by Gault . . . is fundamental fairness."). For a discussion of the "fundamental fairness" standard, see infra note 23 and accompanying text.

[FN5]. Id. at 543-51. For further discussion of the holding and reasoning of McKeiver, see infra notes 30-43 and accompanying text.

[FN6]. See, e.g., In re T.M., 742 P.2d 905, 911-12 (Colo. 1987) (rejecting the argument that equal protection clauses of federal and state constitutions require that juveniles be afforded the same right to jury trial as adult criminal defendants); State v. Schaff, 743 P.2d 240, 248-50 (Wash. 1987) (rejecting an argument that the strict scrutiny test applies to juvenile proceedings because juveniles are not a suspect class and because the right to a jury is not a fundamental right). See also In re K.A.A., 410 N.W.2d 836, 837 (Minn. 1987) (rejecting argument that juvenile, who was charged with driving under influence

and operating uninsured motor vehicle, had equal protection right to waive juvenile court jurisdiction for purpose of obtaining jury trial in criminal court); State v. Little, 423 N.W.2d 722, 725 (Minn. Ct. App. 1988) (rejecting argument that equal protection guarantees prohibit use of juvenile court adjudications as aggravating factors in adult court sentencing because such adjudications result from process that lacks essential safeguard of jury trial right); State v. Lord, 822 P.2d 177, 215-16 (Wash. 1992) (rejecting argument that admission of prior juvenile adjudications as aggravating factors at capital sentencing hearing violates equal protection because juvenile court judges employ what amounts to "a lesser standard of proof" when deciding whether to convict).


[FN11]. See RLR v. State, 487 P.2d 27, 32 (Alaska 1971); Peyton v. Nord, 437 P.2d 716, 722-26 (N.M. 1968) (holding that juveniles have a constitutional right to a jury trial in cases that would be felonies if committed by adults). But see State v. Benjamin C., 781 P.2d 795, 797-99 (N.M. Ct. App. 1989) (holding that a juveniles' state constitutional right to a jury trial does not extend to offenses that would be misdemeanors if committed by adults). There have been some cases in which a trial court or an intermediate state court of appeals established a jury trial right for juveniles but a higher state court subsequently overturned the decision. See, e.g., In re George S., 355 N.Y.S.2d 143, 144 (App. Div. 1974) (reversing trial court's ruling granting a jury trial).


[FN13]. See id. at 392-400.

[FN14]. See id. at 400 ("We therefore hold that the statute through its corresponding regulation has sufficiently tilted the scales away from a 'civil' proceeding, with its focus on rehabilitation, to one purely criminal.").


[FN16] See infra notes 38-43 and accompanying text.


[FN18] See, e.g., Klopfer v. North Carolina, 386 U.S. 213 (1967) (Sixth Amendment right to a speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (Sixth Amendment right to confront adverse witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (Fifth Amendment privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (Sixth Amendment right to counsel).


[FN20] In re Gault, 387 U.S. 1, 61 (1967). In his concurrence, Justice Black stated:
Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment. Undoubtedly this would be true of an adult defendant, and it would be a plain denial of equal protection of the laws--an invidious discrimination--to hold that others subject to heavier punishments could, because they are children, be denied these same constitutional safeguards.
Id. (Black, J., concurring).

[FN21] See id. (Black, J., concurring). Justice Black underscored this notion when he stated:
I ... agree with the Court that the Arizona law as applied here denied to the parents and their son the right of notice, right to counsel, right against self-incrimination, and right to confront the witnesses against young Gault. Appellants are entitled to these rights, not because "fairness, impartiality and orderliness--in short, the essentials of due process"--require them and not because they are "the procedural rules which have been fashioned from the generality of due process," but because they are specifically and unequivocally granted by provisions of the Fifth and Sixth Amendments which the Fourteenth Amendment makes applicable to the States.
Id. (Black, J., concurring).

[FN22] See id. at 27-28 (majority opinion) (noting that given the deprivation of liberty at stake in a juvenile delinquency trial, "our Constitution ... require[s] the procedural regularity and the exercise of care implied in the phrase 'due process,'" but such injection of "due process requirements ... [to] introduce a degree of order and regularity to Juvenile Court proceedings ... [[and] some elements of the adversary system ... [does not] require that the conception of the kindly juvenile judge be replaced by its opposite"); see also id. at 21 ("The observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process."); id. at 25 ("There is no reason why, consistently with due process, a State cannot continue if it deems it appropriate, to provide
and to improve provision for the confidentiality of records of police contacts and court action relating to juveniles.

[FN23] See id. at 30-31 & n.48 (holding that "the procedural requirements at the adjudicatory stage" of a juvenile court delinquency case "must measure up to the essentials of due process and fair treatment," but simultaneously cautioning that this holding does not "indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing" (quoting Kent v. United States, 383 U.S. 541, 562 (1966))). Although the Gault majority did not actually use the phrase "fundamental fairness," the Court has subsequently characterized the Gault standard in that manner. See, e.g., Schall v. Martin, 467 U.S. 253, 263 (1984); Breed v. Jones, 421 U.S. 519, 531 (1975); McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971) (plurality opinion). Individual Justices who issued separate opinions in Gault also referred to the majority's standard in that manner. See Gault, 387 U.S. at 61-62 (Black, J., concurring); id. at 72 (Harlan, J., concurring in part and dissenting in part). For discussion of the historical lineage of the term "fundamental fairness" and the role this concept has played in defining the procedural rights of adult criminal defendants, see LaFave & Israel, supra note 19, §§ 2.4-2.6, at 52-72.

[FN24] Gault, 387 U.S. at 31-34 (notice of charges); id. at 34-42 (right to counsel); id. at 42-55 (privilege against self-incrimination); id. at 56-57 (right to confront and cross-examine adverse witnesses).

[FN25] See id. at 33-34 (notice); id. at 36, 41 (counsel); id. at 49-51, 55 (self-incrimination); id. at 56-57 (confrontation and cross-examination).

[FN26] See id. at 13, 30, 31 n.48 (making clear that the Court's holding and discussion were limited to "the adjudicatory stage" of a juvenile delinquency case and therefore were not "necessarily applicable to other steps of the juvenile process" such as "the pre-judicial stage[ ]" and the "post-adjudicative" and "dispositional process(es]"); see also id. at 58 (declining to reach question of whether due process requires that states afford processes for appellate review of delinquency adjudications).


[FN28] See id. at 359.

[FN29] Prior to Winship, the Court had never expressly held that the Due Process Clause requires a standard of proof beyond a reasonable doubt even in adult criminal cases. Thus, the Winship Court began by considering the standard applicable to the adult criminal context. The Court readily concluded that the reasonable-doubt standard is not merely a matter of historical tradition and sound policy but also is firmly embodied in the Due Process Clause. Id. at 361-64. Thereafter, the Court turned to the juvenile context and inquired whether "afford[ing] juveniles the protection of proof beyond a reasonable doubt would risk destruction of beneficial aspects of the juvenile process." Id. at 366. Concluding that it would not, the Court held that "the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in Gault." Id. at 368.


[FN31] "The Pennsylvania juveniles' basic argument is that they were tried in proceedings 'substantially similar to a criminal trial.'"; see also id. at 542 (describing the many ways in which a Pennsylvania juvenile delinquency proceeding resembles its adult criminal counterpart); id. at 550 ("The arguments advanced by the juveniles here ... necessarily equate the juvenile proceeding--or at least the adjudicative phase of it--with the criminal trial."). Other than the jury trial right, the primary differences between juvenile delinquency and adult criminal procedure concern the pretrial and post-trial stages of a
case: juveniles generally lack the right to bail pending trial and are subject to shorter sentences upon conviction than adult criminal defendants. See generally Randy Hertz et al., Trial Manual for Defense Attorneys in Juvenile Court § 4.15, at 86-88 (1991) (bail); id. § 38.03, at 870-74 (disposition).

[FN32] See McKeiver, 403 U.S. at 542-43 ("The North Carolina juveniles particularly urge that the requirement of a jury trial would not operate to deny the supposed benefits of the juvenile court system ... [and] that no reason exists why protection traditionally accorded in criminal proceedings should be denied young people subject to involuntary incarceration for lengthy periods ....").

[FN33] See id. at 541-43, 550 (describing appellants' arguments). The appellants' briefs did make some effort to delineate the inherent flaws of the bench trial model. See id. at 550 (alluding to appellants' arguments that "the inapplicability of exclusionary and other rules of evidence, ... the juvenile court judge's possible awareness of the juvenile's prior record and of the contents of the social file ... [and the] repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers" tend to "create the likelihood of prejudgment"); see also McKeiver v. Pennsylvania, 29 L. Ed.2d 1081, 1081-82 (summarizing the briefs of Pennsylvania appellants and North Carolina appellants in McKeiver). The appellants presumably decided, for strategic reasons, to refrain from mounting a more direct challenge upon the capacity of judges to serve as fair factfinders. As the appellants certainly recognized, and as the resulting plurality opinion in McKeiver graphically demonstrates, the Burger Court was not a receptive forum for arguments of this sort. See e.g., McKeiver, 403 U.S. at 550 (dismissing the possibility that judges are affected by the various biasing factors identified by appellants).

[FN34] Id. at 543-44; see also id. at 534 ("There has been praise for the system and its purposes, and there has been alarm over its defects."); id. at 545-46 (observing that the Task Force Report of the President's Commission on Law Enforcement and Administration of Justice provides a "vivid description of the system's deficiencies and disappointments").

[FN35] Justice Blackmun's plurality opinion was joined by Chief Justice Burger and Justices Stewart and White. See id. at 528. Justice Harlan concurred in the judgment, providing a fifth vote for the plurality's ultimate ruling, on a ground that was both narrower in its implications for juvenile law and much broader in its implications for criminal procedure. See id. at 529. Although accepting that "juvenile delinquency proceedings have in practice actually become in many, if not all, respects criminal trials" and that juveniles therefore should be entitled to jury trials if adult criminal defendants are, Justice Harlan believed that the Court should overrule Duncan v. Louisiana, 391 U.S. 145 (1968), and hold that "jury trials are not constitutionally required of the States" in either adult or juvenile trials. See id. at 557 (Harlan, J., concurring). Justice Brennan, who concurred and dissented (thereby providing a sixth vote for the plurality's judgment in one of the two cases before the Court), took the intermediate position that juveniles may be entitled to a jury trial, depending upon the nature of juvenile court practice within a particular jurisdiction and, in particular, the availability of other procedures that would afford protections equivalent to the jury trial right. See id. at 553-57. The remaining three Justices-- Douglas, Black, and Marshall--dissented. See id. at 557.

[FN36] Id. at 547 ("The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise, and we are particularly reluctant to say, as do the Pennsylvania appellants here, that the system cannot accomplish its rehabilitative goals."); see also id. at 551 ("If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.").

[FN37] Id. at 550; see also id. at 545 ("There is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to
what has been the idealistic prospect of an intimate, informal protective proceeding.

[FN38] Id. at 543.

[FN39] See id. at 550; see also id. at 547-48 ("Of course there have been abuses ... [but] [t]hey relate to the lack of resources and of dedication rather than to inherent unfairness.").

[FN40] See id. at 543 (stating:
In Duncan v. Louisiana, 391 U.S. 145, 158 (1968) the Court stated, 'We would not assert, however, that every criminal trial--or any particular trial--held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.' In DeStefano v. Woods, 392 U.S. 631 (1968), for this reason and others, the Court refrained from retrospective application of Duncan, an action it surely would not have taken had it felt that the integrity of the result was seriously at issue.);
see also id. at 547 ("[T]he imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function ....").

[FN41] Id. at 550.

[FN42] Id.

[FN43] Id.


[FN45] Kalven and Zeisel compared the voting patterns of judges and juries by selecting 3,576 jury trials in criminal cases and arranging for the judges in these cases to answer questionnaires, "telling how [the judge] would have disposed of the case had it been tried before him without a jury." Id. at 10. They found that the jury verdicts were "less lenient than the judge in 3 per cent of the cases and more lenient than the judge in 19 per cent of the cases." Id. at 59. In other words, a criminal defendant "fares better 16 per cent of the time in a jury trial than he would have in a bench trial." Id. Although a subsequent study found the opposite, see James P. Levine, Jury Toughness: The Impact of Conservatism on Criminal Court Verdicts, 29 Crime & Delinq. 71, 85 (1983), the latter study suffered from methodological flaws not present in Kalven and Zeisel's study, see Michael J. Saks, What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?, 6 S. Cal. Interdisciplinary L.J. 1, 4-45 (1997) (comparing the studies).

[FN46] For example, it has been suggested that the disparity in judge-jury verdicts in criminal cases may be caused, at least to some extent, by jurors inappropriately acting on the basis of sympathy for the defendant. See Neal R. Feigenson, Sympathy and Legal Judgment: A Psychological Analysis 1, 20 & nn.72-73 (1997) (reviewing literature). However, the Kalven-Zeisel study described supra note 45 found that jury sympathy accounted for only a small proportion of the cases in which jurors’ verdicts were more favorable to the defendant than judges’ verdicts. See id. at 22 & n.78 (discussing Kalven-Zeisel study). The case law which we discuss infra notes 47-55, 60-62 and accompanying text-- in which panels of appellate judges concluded that trial judges had made findings of fact that were clearly inconsistent with the evidence at a trial or a pretrial or posttrial hearing--suggests that skewed judicial factfinding may account for at least some of the cases in which judges rule in favor of the prosecution. The discussion infra notes 65-103 and accompanying text suggests various factors that may improperly slant judges' factfindings in favor of the prosecution.

The sum total of the evidence underlying the officer's decision to arrest the youth was that he was "in a high drug trafficking area, talking to persons in a vehicle near a housing complex, huddling in a group, and [that he] walked away from unidentified police officers." Id. As the appellate court concluded, "even taking the facts in the light most favorable to the trial court's ruling," the record failed to reveal any evidence suggesting any illegal activity occurred. Id.

[FN51] See also D.W. v. State, 702 So. 2d 288, 288 (Fla. Dist. Ct. App. 1997) (reversing bench trial conviction of theft which was based solely on youth's having made errors in ringing up twelve of the more than 1,000 transactions that she handled while working as sales clerk at store); D.D. v. State, 698 So. 2d 1379, 1380 (Fla. Dist. Ct. App. 1997) (reversing bench trial conviction of accessory after the fact to burglary of a dwelling which was based solely on youth's giving statement implicating two other youths); In re C.W., 485 S.E.2d 561, 563 (Ga. Ct. App. 1997) (reversing bench trial conviction of criminal possession of stolen car because officer's testimony merely established that youth was inside stolen van with other youths, not that he was driving or aided or abetted driver); In re P.A.W., 480 S.E.2d 347 (Ga. Ct. App. 1997) (reversing bench trial conviction of burglary which was based on insufficiently corroborated confession of another individual who implicated accused as accomplice); In re K.A., 682 N.E.2d 1233, 1239-40 (Ill. App. Ct. 1997) (reversing bench trial conviction of constructive possession of drugs which was based solely on youth having been with adult inside apartment in which police found drugs and youth having attempted to flee when police battered down door of apartment); In re R.Y., No. C8-96-1735, 1997 WL 228981, at *1 (Minn. Ct. App. May 6, 1997) (reversing bench trial conviction of possession of theft tools because youth's possession of "two barrel-shaped keys of the type commonly used to access soft drink machines," which youth claimed that he had found, did not adequately prove intent to use tools for burglary); State v. Mariano R., 934 P.2d 315 (N.M. Ct. App. 1997) (discussed infra note 82); In re Paul N., 664 N.Y.S.2d 341, 342 (App. Div. 1997) (reversing bench trial conviction of criminal trespass because prosecution failed to present any evidence that youth, who fled from police into open door of house, lacked license or privilege to be on premises); State v. Echeverria, 934 P.2d 1214, 1217 (Wash. Ct. App. 1997) (reversing bench trial conviction of possession of martial arts throwing star which was based on 15-year-old youth riding in automobile in which throwing star was found under seat); In re Thomas B., No. 97-1345, 1997 WL 615614 (Wis. Ct. App. Oct. 8, 1997) (discussed infra note 77); In re Jonathon R., No. 97-1492-FT, 1997 WL 537274, at *2 (Wis. Ct. App. 1997) (reversing bench trial conviction of negligent handling of burning material because prosecution failed to present any evidence that youth's use of homemade flame-thrower in deserted area created "substantial and unreasonable risk of harm to another"; appellate court commented that "performing moronic acts that could harm oneself is not a crime"). For some examples of cases from prior years, see infra note 59.

[FN56] We base this statement on our survey of the appellate case law. However, any such sampling necessarily underestimates the number of reversals. Frequently, the appellate courts withhold publication of opinions reversing bench trial convictions, perhaps to spare embarrassment to the trial judge. For example, the appellate decisions described in the text
accompanying notes 47, 52 and 53 supra have all been withheld for publication and are available only because they were placed into the Westlaw data base. See P.V. v. State, No. CA96-1139, 1997 WL 346806 (Ark. Ct. App., June 18, 1997); In re C.R., No. 03-96-00429-CV, 1997 WL 348532 (Tex. Ct. App., June 26, 1997); State v. Simon, No. 385502-0-I, 1997 WL 292344 (Wash. Ct. App., June 2, 1997). It is impossible to know how many more such decisions are neither in the computerized data bases nor the printed case reporters.

[FN57]. Jackson v. Virginia, 443 U.S. 307, 319 (1979). See generally Hertz et al., supra note 31, § 32.01, at 773-74, § 35.01, at 825-27. In some jurisdictions, the state appellate courts employ a somewhat more rigorous standard for reviewing the sufficiency of the evidence in criminal and juvenile delinquency cases. See, e.g., People v. Bleakley, 508 N.E.2d 672, 673-74 (N.Y., 1987) (explaining "weight-of-the-evidence" standard of appellate review authorized by state statute and comparing it with "sufficiency-of-the-evidence" standard adopted in Jackson v. Virginia). Even in these jurisdictions, however, the appellate courts generally give heavy deference to the trial-level factfinder's verdict, see id. at 674, particularly when the factfinder was a judge in a bench trial rather than a jury. See, e.g., In re Chaka A., 589 N.Y.S.2d 569, 569-70 (App. Div. 1992) (stating that because "this case was tried before a court without a jury, the greatest respect must be accorded the determination of the hearing court in assessing the credibility of witnesses and resolving disputed questions of fact").

[FN58]. Cf. Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) (stating that due process standard for reviewing sufficiency of evidence upon appeal or in federal habeas corpus proceedings "does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.'... Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (emphasis added))).

[FN59]. Although one can find numerous decisions of this sort throughout the country, the patterns described in the text become particularly apparent when one focuses on an individual state's case law and compares the cases in which an appellate court reversed a bench trial conviction on insufficiency grounds with those in which an appellate court rejected an insufficiency challenge. If one looks at New York State case law, for example, one finds that the appellate courts reversed bench trial convictions only when the trial judge grossly diverged from a reasonable interpretation of the facts. See, e.g., In re Paul N., 664 N.Y.S.2d 341 (App. Div. 1997) (described supra note 55); In re Paris M., 630 N.Y.S.2d 732 (App. Div. 1995) (reversing conviction of aiding and abetting because there was no evidence that accused shared mental culpability of another youth who threw glass bottle); In re Gregory J., 611 N.Y.S.2d 515 (App. Div. 1994) (reversing conviction of robbery because complainant had very limited opportunity to observe assailant during crime, show-up that produced complainant's identification of accused was highly suggestive, and complainant changed original description to match appearance of person presented in show-up); People v. Van Akin, 602 N.Y.S.2d 450, 450-51 (App. Div. 1993) (reversing adult court bench trial conviction of rape because victim had "maintained for approximately six months" that she was raped by solely one man, victim "candidly admitted that she implicated defendant [as second rapist] solely because she was tired of all the questions and she knew that pointing the finger at defendant was the only way to stop them," and actual rapist testified that he acted alone). Absent such gross deviations from the norm, the appellate courts rejected insufficiency challenges even though the facts were such that a jury likely would have acquitted. See, e.g., In re Hiram D., 592 N.Y.S.2d 739, 741 (App. Div. 1993) (affirming delinquency adjudication of attempted robbery which rested solely upon identification of respondent by complainant, who had limited opportunity to observe perpetrators during robbery and who mistook accused for another youth whom he had identified as also involved in the robbery; appellate court treats complainant's error as having little significance because the Family Court judge "found that there was 'absolutely no doubt' that respondent was one of the attackers"); In re Nikkia C., 590 N.Y.S.2d 129 (App. Div. 1992) (affirming delinquency adjudication of grand larceny even though complainant, who was prosecution's sole witness, changed account of theft and "had previously falsely accused the appellant of a larceny"); the appellate court commented that: "[W]e are satisfied that the Family Court's factual findings were not
contrary to the weight of the evidence” because “the hearing court was in the best position to assess the complainant's credibility ... [and] was aware of the discrepancy in the complainant’s testimony and was further aware that the complainant had previously falsely accused the appellant of a larceny”); In re Juan L., 580 N.Y.S.2d 243, 243-46 (App. Div. 1992) (affirming trial court’s finding that youth who participated in group assault also aided and abetted another youth's taking of victim's wallet during assault even though, as dissenting judge points out, the evidence before the Family Court did not prove anything other than a spontaneous decision by one of the members of the group to steal [victim’s] wallet while the beating was taking place[,] ... [t]here was no testimony or evidence that respondent shared the intent of the person who took [victim's] wallet[,] ... [and] there is no evidence that respondent was even aware that [ ] [victim] was robbed of his wallet”); In re Ryan W., 532 N.Y.S.2d 575, 577-78 (App. Div. 1988) (affirming delinquency adjudication of criminal possession of controlled substance and weapon even though, as dissenting justice points out, the arresting officer [who] identified the appellant as the person who deposited the contraband in the vacant lot ... admitted on cross-examination that he had not seen the face of the perpetrator, that the lighting conditions were “fairly dark”, ...and that his observations were made from a distance of approximately 60 feet[,] ... [and] [t]here were no unique characteristics noted by the officer).

[FN60]. Here again, focusing on an individual state makes it possible to convey the overall patterns in the case law. Again using New York State as the data base, one finds:

• Cases in which the trial judge readily accepted a police officer's claims about his or her own actions or those of the accused even though, as the appellate panel concluded, the officer's version of the facts was self-evidently absurd. See, e.g., People v. Lewis, 600 N.Y.S.2d 272, 273 (App. Div. 1993) (“It is unbelievable that the officer was able to observe, in the middle of the night as the vehicles passed in an intersection, that the defendant appeared to be under the legal driving age.... Even assuming, arguendo, that the officer was capable of making such an observation, it makes no sense that he would follow the defendant for about 20 blocks before stopping his vehicle.”); People v. Lastorino, 586 N.Y.S.2d 26, 27 (App. Div. 1992) (rejecting, as incredible, police officer's testimony “that the defendant, who was aware he was under surveillance for at least several minutes, exited his vehicle and left the driver's door open and a loaded gun visible on the front seat, virtually inviting the police to discover the gun”); People v. Void, 567 N.Y.S.2d 216, 217 (App. Div. 1991) (rejecting, as incredible, police officer's testimony “that the defendant consented to a police search of the apartment, where a substantial amount of cocaine was stored in plain view in the kitchen sink--a location where the drugs could be readily discovered”); People v. Addison, 496 N.Y.S.2d 742, 744 (App. Div. 1986) (rejecting, as incredible, police testimony that the defendant, although surrounded by police officers, reached for a gun in his waistband and thereby provided a basis for a Terry frisk); People v. Quinones, 402 N.Y.S.2d 196, 197 (App. Div. 1978) (holding that police officer's testimony that "he did not have his weapon drawn when he approached the building nor ... did the other officers" was inherently incredible in light of testimony that the police had received a radio call reporting armed suspects).

• Cases in which the trial judge credited the police officer's testimony even though it was contradicted by the officer's prior statements in police reports or previous testimony, or by the accounts of other police officers, or by physical evidence. See, e.g., In re Bernice J., 670 N.Y.S.2d 207, 208 (App. Div. 1998) (noting that "detective's testimony ... was contradicted by the remainder of the record, including other police testimony and documents”); People v. Lebron, 585 N.Y.S.2d 498, 500-02 (App. Div. 1992) (noting that officer's testimony was contradicted by statements and significant omissions in prior police reports); People v. Nunez, 510 N.Y.S.2d 694, 695 (App. Div. 1987) (observing that officer's account of "radio run reporting a past robbery upon which he stopped the defendant and his companion was contradicted, in substantial part, by [computer printout of the radio run]"); People v. Addison, 496 N.Y.S.2d 742, 743 (App. Div. 1986) (stating that officer's testimony regarding description provided by civilian was undermined by fact that "[t]he arresting officer had made no notation, either in his memo book or any police report, of any conversation with civilians or of having received a description from them," and
had also omitted any mention of civilians in his grand jury testimony); People v. Bezraes, 478 N.Y.S.2d 16, 17 (App. Div. 1984) ("[T]he testimony of the arresting officer was, at a minimum, not supported by the testimony of his fellow police officer who was with him throughout, and indeed to some extent, was contradicted by that testimony.").

[FN61] For examples of cases in which the conviction was reversed upon federal habeas corpus review, see 1 James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 11.2c(10) (2d ed. 1994 & Supp. 1997).


[FN63] For extensive discussion of the impact of such political considerations on judges' rulings in criminal cases, see Stephen B. Bright, Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?, 72 N.Y.U. L. Rev. 308, 312-26 (1997) and Bright & Keenan, supra note 62, observing that, [t]he "higher authority" to whom present-day capital judges may be "too responsive" is a political climate in which judges who covet higher office-- or who merely wish to remain judges--must constantly profess their fealty to the death penalty.... The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III);
see also John Paul Stevens, Address at the American Bar Association Annual Meeting (Aug. 3, 1996), in 12 St. John's J. Legal Comment 21, 31 (1996) ("[M]aking the retention of judicial office dependent on the popularity of the judge inevitably affects the decisional process in high visibility cases, no matter how competent and how conscientious the judge may be.").

[FN64] There are various ways in which a judge could learn information suggesting that a child accused of an offense needs rehabilitative services. The prosecution's proof of the crime may appear to suggest such a need, either because of the nature of the crime or its surrounding circumstances. See, e.g., P.V. v. Arkansas, No. CA96-1139, 1997 WL 346806, at *1 (Ark. Ct. App. June 18, 1997) (involving a youth jointly tried for delinquency offense and for being a member of a family in need of services; evidence at trial established that 16-year-old accused had "a pattern of running away from home in order to be with his girlfriend" and that he left home on night of alleged theft and did not return for a week); State v. Echeverria, 934 P.2d 1214, 1215 (Wash. Ct. App. 1997) (noting that a police officer testified at trial that she stopped automobile in which accused was riding because it was "way after curfew" and she subsequently recognized accused as youth whom she knew to be on probation). The judge may know about the youth's background and family circumstances as a result of having presided over the initial hearing in the case (at which a judge makes a determination about pretrial release based upon social factors, see generally Hertz et al., supra note 31, §§ 4.17, 4.19, at 89-92, 94-95) or having presided over a prior delinquency or child neglect case involving the youth. The judge also may learn such information as a result of reading the court file or overhearing a chance remark between the lawyers or among courthouse staff, see infra notes 69-70.

[FN65] See, e.g., Commonwealth v. Paquette, 301 A.2d 837, 841 (Pa. 1973) ("[T]he trial judge also presided during the Suppression Hearing" and therefore, "although the confession had been ordered to be suppressed, the trial judge who sat as the finder of fact, was aware of its contents."). For further discussion of cases of this sort, see infra notes 74-79, 108-09 and accompanying text.
See, e.g., In re George G., 494 A.2d 247, 252-53 (Md. Ct. Spec. App. 1985) (concluding that trial judge should have recused himself because he had previously presided over bench trials of three co-perpetrators and rejected very same defense respondent intended to offer); Brent v. State, 492 A.2d 637 (Md. Ct. Spec. App. 1985) (holding that judge should have recused himself because he previously presided over guilty pleas of co-defendants, at which statements implicating defendant were made); People v. Zappacosta, 431 N.Y.S.2d 96 (App. Div., 1980) (holding that judge should have recused himself because he presided over guilty plea of defendant’s wife, at which time judge heard statements incriminating defendant).

See, e.g., Brent, 492 A.2d at 640-43.

See, e.g., Commonwealth v. Goodman, 311 A.2d 652, 654 & n.4 (Pa. 1973) (concluding that judge who presided over suppression hearing should have recused himself from bench trial in marijuana possession case because hearsay testimony at suppression hearing gave “[a]n impression... that [accused was]... trafficking in narcotics”).

See, e.g., In re James H., 341 N.Y.S.2d 92, 93 (App. Div. 1973) (concluding that judge should have granted defense motion for disqualification when probation officer stated during delinquency trial that case was “a ‘Training School’ case”).

See, e.g., In re Gladys R., 464 P.2d 132, 132 (Cal. 1970) (holding that judge committed reversible error by reviewing social study with "negative indications about [the child's] ...home environment” during course of delinquency trial).

See, e.g., Harris v. Rivera, 454 U.S. 339, 346 (1981) (per curiam); In re Kean, 520 A.2d 1271, 1277 (R.I. 1987). Even if a judge were capable of wholly ignoring such inadmissible information, there would still be the discrete question of whether recusal is required to avoid an appearance of impropriety. See infra note 111 and accompanying text.

See Saks, supra note 45, at 27 & n.86 (explaining that empirical studies on judges' ability to "disregard[ ] inadmissible information" suggest that judges may be no better than juries at "bas[ing] their decisions squarely on legally admissible information") (citing Stephan Landsman & Richard Rakos, A Preliminary Inquiry into the Effect of Potentially Biassing Information on Judges and Jurors in Civil Litigation, 12 Behavioral Sci. & L. 113 (1991), and Gary L. Wells, Naked Statistical Evidence of Liability: Is Subjective Probability Enough?, 62 J. Personality & Soc. Psychol. 739 (1992)).

See, e.g., United States v. Walker, 473 F.2d 136, 138 (D.C. Cir. 1972) (stating that although a "[j]udge is presumed to have a trained and disciplined judicial intellect,...even the most austere intellect has a subconscious"); People v. Zappacosta, 431 N.Y.S.2d 96, 99 (App. Div. 1980) ("Even the most learned [j]udge would have difficulty in excluding such information from his subconscious deliberations."); In re George G., 494 A.2d 247, 252 (Md. Ct. Spec. App. 1985) (commenting that although "the sincerity [and] the integrity of the learned trial judge" could not be disputed, "[s]ubconsciously, ... [the impermissible information] apparently lingered on in the deep recesses of his mind"); State v. Rochelt, 477 N.W.2d 659, 662 n.4 (Wis. Ct. App. 1991) ("Much is left in every trial to the discretion of the judge. Discretionary rulings ... may have been motivated by conscious or unconscious bias."); see also Donald C. Nugent, Judicial Bias, 42 Clev. St. L. Rev. 1, 5 (1994) (Nugent, an Ohio appellate judge and former trial court judge, observes that judges generally "fail to take into account the unavoidable influences we all experience as human beings and disregard the limits of human nature and the difficulty of bringing to the conscious level subjective motivations, beliefs and predilections.").


The problem described in the text would arise not only in cases in which the respondent presents a "pure" reasonable doubt defense (refraining from presenting any defense witnesses and simply arguing that the prosecution has not proven its case beyond a reasonable doubt) but also in cases in which the respondent presents defense witnesses without taking the...
witness stand himself or herself. Although statements suppressed on Miranda grounds may be admissible at trial to impeach the accused, see Harris v. New York, 401 U.S. 222, 226 (1971); see generally Hertz et al., supra note 31, § 24.22, at 666-67, they may not be used to impeach other defense witnesses see James v. Illinois, 493 U.S. 307, 319 (1990). The problem would also arise, and indeed, would be particularly acute, in cases in which a statement is suppressed on due process involuntariness grounds, thereby precluding its use for impeachment of the accused at trial (see Mincey v. Arizona, 437 U.S. 385, 397-98, 402 (1978); see generally Hertz et al., supra note 31, § 24.22, at 666-67), and the respondent thereafter takes the witness stand at trial and testifies in a manner that is inconsistent with the suppressed statement.


[FN77]. For an example of this phenomenon, see In re Thomas B., No. 97-1345, 1997 WL 615614 (Wis. Ct. App. Oct. 8, 1997). The appellant, Thomas B., was charged with one count of carrying a concealed weapon (to wit, two razor blades), a crime which state law defines as encompassing an element that the accused used or intended to use the weapon in a threatening manner. Prior to trial, the judge suppressed Thomas B.'s confession that he had been carrying the razor blades in his back pocket "because people were out to get him and he was afraid." Id. at *1. With that statement suppressed, the prosecution could only prove that Thomas B. had the razor blades; "there was no evidence that the manner in which Thomas 'used or intended to use' the razor blades was calculated or likely to produce death or great bodily harm." Id. at *2. Nonetheless, the trial judge convicted. Id. at *1. The appellate court had no difficulty in reversing, since there was no evidence--apart from the suppressed confession--supporting the conviction. Id. at *2.

[FN78]. Kalven & Zeisel, supra note 44, at 107; see also id. at 121-33 (examining the many sources of information available to a judge which could lead to prejudice).

[FN79]. See Duncan v. Louisiana, 391 U.S. 145, 157 n.26 (1968) (citing Kalven & Zeisel, supra note 44, at 4 n.2). Justice White commented that the Kalven-Zeisel study shows that "when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed." Id.

[FN80]. For examples of this phenomenon in the suppression hearing context, see supra note 60.

[FN81]. Cognitive psychologists have explained that an individual's prior experiences and the stereotypic assumptions she forms as a result of those experiences inevitably shape the way in which that individual perceives and processes new experiences. See, e.g., Susan T. Fiske & Shelley E. Taylor, Social Cognition 96-141 (2d ed. 1991). As some commentators have observed, this social science data suggests that judges and other decisionmakers in the legal system unavoidably apply a host of stereotypic assumptions formed on the basis of their experiences in prior cases. See Ronald A. Farrell & Malcolm D. Hunter, The Social and Cognitive Structure of Legal Decision-Making, 32 Soc. Q. 529, 532, 536 (1991) ("[c]ourt actors internalize crime stereotypes as cognitive schemata that provide a shorthand for information-processing in a system characterized by time and resource constraints"; these schemata are "reaffirmed continuously through the everyday interaction of court actors as they deal with alleged offenders"); Nugent, supra note 73, at 19-20 (stating the literature ...simply supports ...that judges' early lives, their experiences both on and off the bench, and their professional careers instill in them certain ideas, beliefs and attitudes about issues and people (including oneself), all of which facilitate the organization of information by telling judges how to define situations and encouraging them to take actions consistent with their ideas, beliefs or attitudes. And, while this dynamic often results in reasonable judgments, it also leads to many distorted and systematically biased decisions.);

see also Robert Rubinson, The Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse, 101 Dick. L. Rev.
(describing the theory of cognitive conservatism).

[FN82]. See, e.g., State v. Mariano R., 934 P.2d 315, 317 (N.M. Ct. App. 1997) (reversing bench trial conviction of juvenile for conspiracy to shoot firearm from a motor vehicle; appellate court observes that testimony at trial may have supported "cynical speculation" that juvenile knew that his companions "planned to fire a shot from the vehicle," but there was no actual evidence to that effect and therefore trial judge should have applied presumption of innocence and acquitted).

[FN83]. United States ex rel. Toth v. Quarles, 350 U.S. 11, 18 (1955); see also, e.g., Gallagher v. Delaney, 39 F.3d 338, 342 (2d Cir. 1998) (concluding that judges are in a poor position to evaluate sexual dynamics in the modern workplace); Free v. Peters, 12 F.3d 700, 707 (7th Cir. 1993) (Bauer, J., concurring) (suggesting that a jury's collective diversity, as compared to any single judge, is the best means to ensure fairness).

[FN84]. See, e.g., Phoebe C. Ellsworth, Some Steps Between Attitudes and Verdicts, in Inside the Juror: The Psychology of Juror Decision Making 42, 47, 61 (Reid Hastie ed., 1993) (explaining that individual jurors' attitudes and their views of "how the world works" shape their "interpretation[s] of [the] body of evidence," including their evaluations of witnesses' "demeanor, character, and motivations as well as judgments of the plausibility of statements made by witnesses"); Rita M. James, Status and Competence of Jurors, 64 Am. J. Soc. 563 (1959) (reporting results of jury study that found, inter alia, that jury deliberations benefited from jurors' descriptions and applications of relevant experiences from their daily lives).

[FN85]. See Kim Taylor-Thompson, The Politics of Common Ground, 111 Harv. L. Rev. 1306, 1313 & nn.11-15 (1998) (reviewing Randall Kennedy, Race, Crime and the Law (1997)). Professor Taylor-Thompson explains that "studies and polls reveal that attitudes about police officers often diverge along racial lines. Despite jury instructions that admonish jurors to treat police officers like any other witnesses, white jurors generally tend to credit police officers' testimony, while jurors of color are more likely to approach their testimony with skepticism or even mistrust." Id. at 1313 (footnotes omitted). The available data on state trial judges' behavior suggests that white judges may undervalue the credibility of African American witnesses. See Sherrilyn A. Ifill, Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts, 39 B.C. L. Rev. 95, 103 & n.42 (1997) (explaining that the 1993 Minnesota Supreme Court Task Force on Racial Bias in the Judicial System found that state trial judges "credit[ ] the testimony of white witnesses while failing to credit the testimony of comparable African American witnesses," and inferring that "[t]he absence of significant numbers of African Americans on state court benches makes it unlikely that African American judges are responsible for these disparities"); id. at 95 & nn.2-3 ("Only 3.8 % of all state court judges are African American. Among state trial court judges, only 4.1 % are African American." (footnotes omitted)); see also Nugent, supra note 73, at 48 (stating that statistical evidence on gender and racial bias should alert judges to "the absolute necessity ... to recognize the possibility that gender, race, or ethnicity may influence their judicial decision-making"). For an illustration of the ways in which a white decisionmaker's background and experiences may impede his or her ability to perceive and understand the actual nature of interactions between white police officers and African American civilians, see Clark D. Cunningham, The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse, 77 Cornell L. Rev. 1298, 1368-87 (1992) (relating that a white law professor and a group of white law students failed to appreciate the actual dynamics of an encounter between an African American client and a white police officer--which resulted in the officer lodging a charge of disorderly conduct--until an African American law professor explained critical aspects of such situations to them).

[FN86]. Duncan v. Louisiana, 391 U.S. 145, 156 (1968). The Supreme Court also recognized that "[t]hose who wrote our constitutions knew from history and experience that it was necessary to protect against ...judges too responsive to the voice of higher authority." Id.

[FN88]. Id. at 224.


[FN91]. Ballew, 435 U.S. at 233. See Ellsworth, supra note 84, at 42 ("Different jurors will be especially attentive or especially inattentive to different bits of the testimony, and thus their final impressions of what was said will differ."); Saks, supra note 45, at 42-43; David A. Vollrath et al., Memory Performance by Decision-Making Groups and Individuals, 43 Organizational Behav. & Hum. Decision Processes 289, 299 (1989) ("[G]roups generally perform memory tasks better than individuals.").

[FN92]. See Ballew, 435 U.S. at 233 (observing that "most juries are not permitted to take notes" (citing Robert F. Forston, Sense and Non-Sense: Jury Trial Communication, 1975 BYU L. Rev. 601, 631-33)); see also Saul M. Kassin & Lawrence S. Wrightsman, The American Jury on Trial: Psychological Perspectives 128 (1988) (discussing the debate over juror note taking).

[FN93]. For discussion of the types of nonverbal cues that may bear upon an assessment of a witness's credibility and that may be missed by an inattentive observer, see, for example, Paul Ekman & Wallace V. Friesen, Detecting Deception from the Body or Face, 29 J. Personality & Soc. Psychol. 288 (1974), and Charles C. Mc Clintock & Raymond G. Hunt, Nonverbal Indicators of Affect and Deception in an Interview Setting, 5 J. Applied Soc. Psychol. 54 (1975).

[FN94]. See, e.g., Reid Hastie et al., Inside the Jury 173-74 (1983) (describing the nature of jury deliberations based upon study in which 800 subjects participated in mock juries and deliberated to verdict); Kalven & Zeisel, supra note 44, at 489 (observing, on basis of empirical and anecdotal evidence, that jury deliberation process "is an interesting combination of rational persuasion, sheer social pressure, and the psychological mechanism by which individual perceptions undergo change when exposed to group discussion").

[FN95]. Although the appellate model ensures that juveniles who are adjudicated delinquent eventually receive the benefit of a group deliberation, appellate review cannot substitute for an adequate assessment of the evidence at trial. As explained earlier, the standards for appellate review of the sufficiency of the evidence severely constrain an appellate court's review of the facts and generally require great deference to the trier of fact. See supra notes 57-59 and accompanying text. Moreover, by the time a case is heard and decided by an appellate court, a youth who has been adjudicated delinquent usually will already have served most or all of his or her sentence. See Hertz et al., supra note 31, § 14.04(e), at 353.

For an overview of the social scientific literature on opening statements, see Janice Schuetz & Kathryn Holmes Snedaker, Communication and Litigation: Case Studies of Famous Trials 42-46 (1988), and Ronald J. Matlon, Opening Statements and Closing Arguments: A Research Review, Presentation to the American Society of Trial Consultants Convention (Oct. 10-13, 1991) (document on file with the authors).

See Hertz et al., supra note 31, § 29.03(a), at 727.

See id.

See, e.g., Jon O. Newman, Beyond "Reasonable Doubt", 68 N.Y.U. L. Rev. 979, 998 (1993) ("Deciding whether a witness speaks the truth is never easy, and judges are no better than jurors at looking inside the mind or heart of a witness and detecting mendacity.'"); see also United States ex rel. Toth v. Quarles, 350 U.S. 11, 18 n.10 (1955) (quoting People v. Garbutt, 17 Mich. 9, 27 (1868) (Cooley, C.J.), stating: The trial of criminal cases is by a jury of the country, and not by the court.... The law has established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be); see also George Fisher, The Jury's Rise As Lie Detector, 107 Yale L.J. 575, 577 & nn.2-4, 703 & n.597 (1997) (discussing rules prohibiting both judicial commentary and expert testimony on the credibility of witnesses in jury trials).

Herring v. New York, 422 U.S. 853, 862-63 (1975). Although the Court's discussion in Herring was addressed solely to closing arguments, much of what the Court said is also relevant to opening statements.


There are, of course, some cases in which the accused may benefit from having a judge, rather than jury, sit as factfinder. See generally Hertz et al., supra note 31, §21.02(b), at 480-82 (discussing case-specific factors that the defense should consider when choosing between jury and judge in those jurisdictions that permit jury trials in juvenile delinquency cases). But it is usually in the accused's interest to elect a jury trial and, when offered the choice, defendants and juvenile respondents generally do so. See Duncan v. Louisiana, 391 U.S. 145, 158 (1968) ("[T]he fact is that in most places more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court."); see also id. at 156 (observing that the framers of the federal and state constitutions sought to give the accused a choice between "the common-sense judgment of a jury" and "the more tutored but perhaps less sympathetic reaction of the single judge").

For a discussion of the susceptibility of judges to inadmissible extra-record evidence, see supra notes 65-70 and accompanying text.

For a discussion of the legal fiction that trial judges are capable of putting inadmissible evidence out of their minds, see supra note 71 and accompanying text.

Similarly, in New York City, the Family Court employs an informal administrative practice of assigning juvenile delinquency trials to a judge other than the one who presided at the Initial Appearance.

In some jurisdictions, the same practice has been adopted or recommended by the appellate courts in their supervisory capacity. See, e.g., People v. Smith, 70 Cal. Rptr. 591, 594 (Ct. App. 1968) (stating that a pretrial hearing before a judge other than the trial judge may be preferable); Commonwealth v. Goodman, 311 A.2d 652, 654 (Pa. 1973) (concluding that judges should recuse themselves when evidence inadmissible at trial is used in pretrial proceedings).

See, e.g., State v. Lawrence, 344 N.W.2d 227, 231 (Iowa 1984) (trial judge recused himself because he "felt his trial rulings might be questioned in the mistaken belief he was reacting in some way to the fact he had been asked to step aside").

See, e.g., In re Ruth H., 102 Cal. Rptr. 534, 539 (1972) ("[P]ersons appearing before the referee should have no basis to suspect him of partiality; appearances are important."); Commonwealth v. Goodman, 311 A.2d 652, 654 (Pa. 1973) (stating, we have every confidence that the trial judges of this Commonwealth are sincere in their efforts to avoid consideration of incompetent inflammatory evidence in reaching these judgments but we also are acutely aware that the appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of either of these elements);

see also American Bar Ass'n, Standards for Criminal Justice, § 6-1.7 (2d ed. 1986) ("The trial judge should recuse himself or herself whenever the judge has any doubt as to her ability to preside impartially in a criminal case or whenever the judge believes his or her impartiality can reasonably be questioned.").

See, e.g., People v. Frasco, 175 N.Y.S. 511, 516 (App. Div. 1919) (trial judge, no less than jurors, is bound by the obligation "to hold his mind open until he has listened to the summation of counsel"); Nugent, supra note 73, at 58 (observing that "judges must take the initiative to become aware of their biases so as to prevent the application of their biases in their decision-making process").

McKeiver v. Pennsylvania, 403 U.S. 528, 548 (1971) ("There is, of course, nothing to prevent a juvenile court judge, in a particular case where he feels the need, or when the need is demonstrated, from using an advisory jury."); see also People v. Superior Court, 539 P.2d 807 (Cal. 1975) (construing California juvenile code as authorizing judges to appoint advisory panels to assist in factfinding in delinquency cases). But see State ex rel. Upham v. McElligott, Nos. SC S43433, SC 343551, 1998 WL 148848, at *1 (Or. March 26, 1998) (holding that trial court exceeded statutory authority when it granted defense's motion to empanel advisory jury).

This is not to suggest either that prosecutors have no responsibility to correct systemic flaws or that prosecutors
have no role to play in accomplishing this goal. All members of the legal profession bear "special responsibility for the quality of justice," Model Rules of Professional Conduct, Preamble (1997), which requires that they "propose[e] and support[ ] legislation and programs to improve the system," Model Code of Professional Responsibility EC 8-1 (1997), and seek whatever changes in legal procedure or the legal system are "in the public interest," id. EC 8-4. As an "administrator of justice," the prosecutor bears a particularly heavy responsibility "to seek justice, not merely to convict," Standards for Criminal Justice §§ 3-1.1(b)-(c) (1982), "to seek to reform and improve the administration of criminal justice," id. § 3-1.4, and to seek to remedy any "inadequacies or injustices in the substantive or procedural law [that] come to the prosecutor's attention," id. If, as we have suggested here, there is an undue systemic imbalance in favor of the prosecution in bench trials, then juvenile court prosecutors bear a proportionately greater obligation to scrutinize the merit of cases and dismiss unmeritorious cases rather than leaving it to the judge to sort out the guilty from the innocent at trial. Similarly, at trial, prosecutors should take the initiative to dismiss counts or even the entire case if the prosecutor concludes that the evidence she presented did not satisfy the applicable standard. Finally, if the prosecutor concludes in the aftermath of a bench trial that the judge wrongly convicted the accused, the prosecutor's "minister of justice" function requires that she act to correct the injustice.

[FN115]. See, e.g., Marilyn J. Berger et al., Trial Advocacy: Planning, Analysis, & Strategy 279 (1989) ("[W]e suggest that the presentation of your case take the form of a story because jurors benefit from being able to fit the pieces of evidence into a coherent, logical structure.") (emphasis added); Thomas A. Mauet, Trial Techniques 373 (4th ed. 1996) ("How should you deliver your closing argument? The simple answer is: in whatever way persuades the jurors to decide in your favor. What things are the jurors looking for?") (emphasis added); Richard Lempert, Telling Tales in Court: Trial Procedure and the Story Model, 13 Cardozo L. Rev. 559, 559, 560, 569-571 (1991) (stating at the beginning of the article that "[t]here are three ways in which stories may figure prominently at trials," and then describing one aspect of lawyers' presentation of evidence "to jurors" and two aspects of jurors' consideration of evidence).


[FN117]. See, e.g., Berger et al., supra note 115, at 202 ("In this chapter we will concentrate on opening statements to a jury but you should keep in mind the appropriate content and presentation for an opening statement in a case where a judge is the factfinder."). The assumption underlying such explanations to the reader--that the described techniques are, for the most part, transferable to the bench trial setting--is sometimes articulated explicitly. See Michael E. Tigar, Examining Witnesses xii (1993) ("Mostly, this book is about jury trials, civil and criminal.... You will find, however, that persuasive techniques are the same whether a judge or jury is deciding."). On the rare occasion that trial advocacy books or trial manuals discuss the unique aspects of a bench trial and the consequent adjustments lawyers must make in that setting, the discussions tend to be relatively brief. See, e.g., Roger Haydock & John Sonsteng, Trial: Theories, Tactics, Techniques § 4.11, at 141-43 (1991); Hertz et al., supra note 31, at 692-95.


[FN119]. See, e.g., Bennett & Feldman, supra note 118, at 3-10; Pennington & Hastie, supra note 118, at 192, 193, 210-13, 217.
See, e.g., Anthony G. Amsterdam & Randy Hertz, An Analysis of Closing Arguments to a Jury, 37 N.Y.L. Sch. L. Rev. 55 (1992); Neal R. Feigenson, The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility, 47 Hastings L.J. 61 (1995); Philip N. Meyer, "Desperate for Love": Cinematic Influences Upon a Defendant's Closing Argument to a Jury, 18 Vt. L. Rev. 721 (1994); Binny Miller, Give Them Back Their Lives: Recognizing Client Narrative in Case Theory, 93 Mich. L. Rev. 485 (1994); see also Symposium, Lawyers As Storytellers & Storytellers As Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law, 18 Vt. L. Rev. 565 (1994); Symposium, Legal Storytelling, 87 Mich. L. Rev. 2073 (1989); Symposium, Speeches from the Emperor's Old Prose: Reexamining the Language of Law, 77 Cornell L. Rev. 1233 (1992). Increasingly in recent years, treatises on trial techniques are coming to use the insights that emerge from such scholarship to advise practicing lawyers how to fashion a case theory and present a case to a jury. See, e.g., Berger et al., supra note 115, at 22 (drawing on Bennett & Feldman, supra note 118, to explain the role of storytelling in lawyers' development and use of the theory of the case in preparing for and conducting trials); Mauet, supra note 115, at 462 (observing that, during the past 20 years psychology, communications, and graphic arts have made significant contributions to our understanding of juries .... While for the most part this research is consistent with what effective trial lawyers have learned from experience, it has organized and explained jury behavior in a systematic way that significantly contributes to our understanding of how jurors think, how they decide, and how they can be influenced).


The only detailed analyses of lawyers' storytelling to judges of which we are aware have focused on the appellate context. See Anthony G. Amsterdam, Telling Stories and Stories About Them, 1 Clin. L. Rev. 9 (1994) (oral arguments); Anthony G. Amsterdam, Thurgood Marshall's Image of the Blue-Eyed Child in Brown, 68 N.Y.U. L. Rev. 226 (1993) (oral arguments); Richard K. Sherwin, The Narrative Construction of Legal Reality, 18 Vt. L. Rev. 681 (1994) (appellate briefs); see also Peggy Cooper Davis, The Proverbial Woman, 48 Rec. Ass'n B. City N.Y. 7 (Jan./Feb. 1993) (analyzing role of narrative in appellate process by examining appellate courts' opinions); Rubinson, supra note 81, at 4 (using United States Supreme Court decisions to explore cognitive limitations of current conceptions of judicial opinion-writing).

See, e.g., Bennett & Feldman, supra note 118, at 6 ("[T]he interpretation of stories requires that teller and listener share a set of norms, assumptions, and experiences. If witnesses and jurors differ in their understanding of society and social action, stories that make sense to one actor in a trial may be rejected by another."); Pennington & Hastie, supra note 118, at 194 ("The story that is accepted [by a juror] is the one that provides the greatest coverage of the evidence and is the most coherent, as determined by the particular juror.").

Bruner, supra note 121, at 177 ("Legal narratives are, of course, contending versions of a story offered up for adjudication.").

E.g., Manson v. Brathwaite, 432 U.S. 98, 112 (1977) ("The witness' recollection of the stranger can be distorted easily by the circumstances or by later actions of the police."); United States v. Wade, 388 U.S. 218, 229 (1967) ("[T]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor--perhaps it is responsible for more such errors than all other factors combined."); Dickerson v. Fogg, 692 F.2d 238, 245-46 (2d Cir. 1982); State v. McMorris, 570 N.W.2d 384, 389, 390 & n.9 (Wis. 1997).

See, e.g., Gunning v. State, 701 A.2d 374, 385 n.4 (Md. 1997) (trial judge's refusal to give jury instruction was
abuse of discretion because, inter alia, defendants "were convicted solely on the uncorroborated identification of a single eyewitness who had no prior contact with the defendants"); State v. Green, 430 A.2d 914, 919 (1981) ("[t]he potential danger of mistaken eyewitness identification is particularly significant here" because of "[t]he absence of any eyewitness other than [the victim] directly connecting defendant to the crime, the discrepancies in the description, and defendant's denial"); People v. Lawrence, 447 N.Y.S.2d 793, 796 (App. Term. 1981) ("A more serious threat to the rights of the people ... occurs in cases of 'pure' identification i.e., when no corroborative evidence is presented to support the testimony of a single eyewitness who forcefully states that the accused person committed a criminal act."{(footnote omitted).

[FN127]. See Amsterdam & Hertz, supra note 120, at 64-83, 110-22.

[FN128]. The subtext described above will be particularly apparent if the case law on which counsel relies includes cases in which an appellate court reversed a bench trial conviction for insufficiency of the evidence. In New York State, for example, an argument that a single-witness eyewitness identification should be deemed insufficient could be supported by the following decisions, each of which involved an appellate reversal of a bench trial conviction for insufficiency of the evidence in a one-witness identification case: People v. Giocastro, 619 N.Y.S.2d 354, 355 (App. Div. 1994); In re Kyle O., 612 N.Y.S.2d 665, 667 (App. Div. 1994); In re Gregory J., 611 N.Y.S.2d 515, 517 (App. Div. 1994); People v. Lawrence, 447 N.Y.S.2d 793, 797 (App. Term. 1981).

[FN129]. For examples of opinions expressing skepticism about the veracity of police officers' "dropsy" claims, see, for example, Dixon v. State, 327 A.2d 516, 517-18 & n.1 (Md. Ct. Spec. App. 1974) (noting in dicta that "'dropsy' cases ... ha[ve] afflicted law enforcement with [a] ... yawning credibility gap") (citing Comment, Police Perjury in Narcotics 'Dropsy' Cases: A New Credibility Gap, 60 Geo. L.J. 507 (1971)); People v. Quinones, 402 N.Y.S.2d 196, 198 (App. Div. 1978) ("'Dropsy' cases have been criticized frequently as attempts to legitimize searches-and-seizures otherwise illegal.").

[FN130]. A similar strategy is available at suppression hearings, where counsel may find it useful to couch a factual argument in terms of the prosecution's failure to meet its burden of production. See, e.g., People v. Berrios, 270 N.E.2d 709, 713-14 (N.Y. 1971) ("Where the Judge at the suppression hearing determines that the testimony of the police officer is unworthy of belief, he should conclude that the People have not met their burden of coming forward with sufficient evidence and grant the motion to suppress."). See generally Hertz et al., supra note 31, § 22.03(d), at 496-501; id., § 22.06, at 517.

[FN131]. For a discussion of the use of narratives in closing arguments, see Tigar, supra note 117, at 156-57.

[FN132]. See supra notes 97-102 and accompanying text.

[FN133]. Cf. State v. Gipson, 645 So. 2d 1198, 1201-02 (La. Ct. App. 1994) (reversing jury trial conviction based on police officer's identification of accused, even though eyewitness testimony of "a trained police officer ... is usually sufficient," because even in those cases where there is only one officer who testifies, there is some additional corroborating evidence such as audio or visual surveillance recordings, testimony of a confidential informant or at least an immediate identification and arrest of the defendant after the transaction ... [and] [ [ [h]ere, the state failed to present such corroborating evidence).

[FN134]. See supra note 99 and accompanying text.

[FN135]. See supra notes 97-102 and accompanying text.

[FN136]. See, e.g., Fiske & Taylor, supra note 81, at 257-65. For an explanation of how jurors are influenced by their
individual frame of reference, see Rubinson, supra note 81, at 28-29 & nn.141-44.

[FN137]. It has been suggested that literature and written personal narratives may provide judges from privileged backgrounds with bridges across the chasms of race and class. See Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 Tex. L. Rev. 1929, 1957 (1991) (discussing the potential and the limitations of literature as a means of providing judges with empathy-expanding narratives). An opening statement in a criminal or delinquency case can serve the same function, perhaps even more effectively, by aiding the factfinder to see the world through the eyes of the accused. As Professor Mari Matsuda has pointed out, Angela Davis' two-hour opening statement to the jury in her own trial "educated the jury about the reality of government oppression of blacks, and in particular blacks who are Communists." Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 323 n.3 (1987).


[FN140]. Kent, 383 U.S. at 556 (1966); Gault, 387 U.S. at 18 n.23 (quoting Kent, 383 U.S. at 556).


END OF DOCUMENT