1995

Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform

Barry C. Feld
University of Minnesota Law School, feldx001@umn.edu

Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform

Barry C. Feld*

TABLE OF CONTENTS

* Centennial Professor of Law, University of Minnesota. I benefitted greatly from the critical comments and insights of a number of colleagues who generously reviewed an earlier draft of this Article, including: Philip Bush, Gary Crippen, Debra Dailey, Richard Frase, Marcia Greenfield, Jim Hayes, Leslie Metzen, Jane Ranum, Emily Shapiro, and John Stuart. Several disagreed strongly with some of my characterizations of juvenile courts, judicial discretion, and the Task Force and legislative processes. Of course, they bear no responsibility for my obdurate failure to heed their wise counsel.

I received outstanding research assistance from Ms. Sheila T. Starkey, University of Minnesota Class of 1995, who creatively and energetically responded to my outrageous research demands.

INTRODUCTION

Citizens and politicians perceive a significant and frightening increase in youth crime and violence. Concerns about the inability of juvenile courts to rehabilitate chronic and violent young offenders, while simultaneously protecting public safety, accompany the growing fear of youth crime. A desire to "get tough," fueled in part by frustration with the intractability of crime, provides political impetus to transfer some young offenders to criminal courts for prosecution as adults and to strengthen the sanctioning powers of juvenile courts.

Within the past two decades, judicial, legislative, and administrative reforms have fostered a substantive and procedural convergence between juvenile and criminal courts.[1] This convergence has transformed juvenile courts from nominally rehabilitative welfare agencies into scaled-down, second-class criminal courts for young people. As juvenile courts approach their centenary, more general concerns about juvenile justice administration and the future of a separate court for young of-

1. *See generally* Barry C. Feld, *Criminalizing the American Juvenile Court*, *in* 17 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 197 (Michael Tonry ed., 1993) (analyzing substantive and procedural transformation of juvenile court).

fenders emerge. Either juvenile courts will remain "different" than criminal courts, administering a form of penal social control to which no adult would consent, or they will further converge and call into question the need for a separate judicial process.

I have participated in these policy debates as a scholar and researcher, as a member of law reform advisory groups, as a speaker at judicial conferences and professional associations, and as a witness before state and federal legislative committees. I recently served as a member and committee chair of the 1992-1994 Minnesota Juvenile Justice Task Force ("Task Force"), which recommended major revisions in Minnesota's juvenile code.[2] The 1994 Minnesota Legislature enacted virtually all of the Task Force's recommendations and significantly changed many aspects of juvenile justice administration.[3] Importantly, as other states contract the scope of juvenile court jurisdiction, the Minnesota Legislature expanded it. Rather than weakening the role of the juvenile court, the new Minnesota laws strengthen it. The legislature blended elements of juvenile and criminal courts, enhanced juvenile courts' sentencing authority, and acknowledged the juvenile courts' responsibility to promote public safety as well as the welfare of young offenders.

This Article provides an "outsider's" inside view of the process of law reform and analyzes of the ensuing legislation, although I am hardly an impartial commentator. The Article places specific legislative initiatives in a broader legal and policy context. It provides a detailed case study of juvenile and criminal courts' converging responses to serious young offenders. Hopefully this study will provide insight into the processes of legislative change, a contextual understanding of the legal changes, and an example of legislative policies and rationality for other states struggling to develop legal responses to serious youth crime.

Part I of this Article provides a general background for the 1994 juvenile justice law reforms by analyzing changes in youth demographics and crime, and assaying the public and political concerns that these disturbing trends instill. Part II analyzes the process of law reform. Although several previous task forces

2. *See* ADVISORY TASK FORCE ON THE JUVENILE JUSTICE SYS., MINN. SUPREME COURT, FINAL REPORT 5-11 (1994) [hereinafter TASK FORCE, FINAL REPORT].

3. 1994 Minn. Laws 576 (codified in various parts of MINN. STAT. § 260 (1994)).

and commissions examined similar issues of penal policy, only the Juvenile Justice Task Force saw its recommendations enacted. Part III of this Article analyzes in detail the specific 1994 legislative changes: certifying some juveniles for adult criminal prosecution, excluding first degree murder from juvenile court, expanding the sanctioning powers of juvenile courts, using juvenile convictions to enhance adult sentences, requiring juvenile courts to promulgate "delinquency disposition principles," and increasing the procedural safeguards afforded juveniles. The Conclusion considers the implications of these far-reaching changes for juveniles and justice.

In essence, the 1994 Juvenile Crime Act used the "modified just deserts" presumptive framework of the Minnesota Sentencing Guidelines to structure the most important juvenile court sentencing decisions. If a prosecutor charges an older youth with a crime for which the Sentencing Guidelines presume commitment to prison, the new statute creates a presumption of certification. It shifts judicial focus from clinical subjectivity and an offender's "amenability to treatment" to more objective "public safety" offense criteria that mirror the Sentencing Guidelines' emphases on the seriousness of the present offense and prior record. The 1944 Act parallels the mandatory provisions for sentencing adult defendants convicted of first degree murder by excluding youths sixteen years or older and charged with first degree murder from the jurisdiction of the juvenile court and placing them automatically in adult criminal court.

The new law creates an intermediate category of serious offenders called Extended Jurisdiction Juvenile ("EJJ") prosecutions. EJJ youths are tried and sentenced initially as juveniles, but receive all adult criminal procedural safeguards, including the right to a jury trial. The EJJ legislation uses the offense criteria of the Sentencing Guidelines to determine which youths enter this blended juvenile-criminal jurisdictional status. A court executes the adult criminal sentence only if an EJJ youth fails in juvenile probation.

Further bridging the two systems, the 1994 Act greatly expands the use of juvenile and EJJ convictions in the Sentencing Guidelines' criminal history score to enhance the sentences of young adult offenders, and to systematize control of chronic offenders in both systems. Finally, because of the increased significance of all juvenile convictions for subsequent juvenile and adult sentences, the new law expands some of the procedural

safeguards available in juvenile court, especially access to defense counsel.

Taken as a whole, the new juvenile code uses age and offense criteria to rationalize and integrate juvenile and criminal court sentencing practices. It creates a graduated continuum of controls from ordinary juvenile delinquency to EJJ prosecutions to adult criminal court, and provides escalating responses to serious youth crime. The new law demonstrates a significant procedural and substantive convergence between the juvenile and criminal justice systems.

I. JUVENILE COURTS, JUVENILE CRIME, AND THE POLITICAL REACTIONS TO YOUTH VIOLENCE

A. THE JUVENILE COURTS

The juvenile court originated at the end of the nineteenth century from the Progressives'[4] reformulation of two ideas: strategies of social control[5] and the cultural conceptions of chil-

4. The Progressive movement emerged around the turn of the century in response to the social problems caused by rapid industrialization, urbanization, and modernization. *See generally* RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1955); GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916 (1963); JAMES WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1918 (1968); ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877-1920 (1967).

5. Progressives introduced a number of criminal justice reforms at the turn of the century—probation, parole, indeterminate sentences, and the juvenile court—all of which emphasized the use of open-ended, informal, and highly flexible policies to rehabilitate the deviant. *See* FRANCIS A. ALLEN, *Legal Values and the Rehabilitative Ideal*, *in* BORDERLAND OF CRIMINAL JUSTICE 25, 25-27 (1964); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE 43-61 (1980). All Progressive criminal justice reforms included discretionary decision-making, because identifying the causes and prescribing the cures for delinquency required an individualized approach that precluded uniformity of treatment or standardization of criteria. *Id.* at 50-53.

Progressives reformulated criminal justice strategies as ideological assumptions about the causes and cures of crime changed, and as positivism challenged the classic formulations of crime as the product of free will. ALLEN, *supra*, at 25; DAVID MATZA, DELINQUENCY AND DRIFT 5 (1964); ROTHMAN, *supra*, at 50-51. Attributing criminal behavior to external, antecedent causal forces rather than to deliberately chosen misconduct reduced an actor's moral responsibility for crime and focused efforts on the reform of the offender as well as punishment for the offense. ELLEN RYERSON, THE BEST-LAID PLANS 22 (1978). The new criminology asserted a scientific determinism and sought to identify the causes of crime and delinquency. *See* MATZA, *supra*, at 4-12; ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 46-74 (2d ed. 1977); ROTHMAN, *supra*, at 50.

dren.[6] Many Progressive programs share a unifying, child-centered theme;[7] the juvenile court combined this new imagery of childhood with approaches to social control in a specialized agency designed to accommodate the child offender.

Progressive reformers envisioned juvenile court professionals using indeterminate, informal procedures to make discretionary, individualized treatment decisions.[8] They substituted a

6. Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991), provides a thorough analysis of the social construction of childhood and its role in sustaining the juvenile court. A modernizing of the family and a changing cultural conception of childhood accompanied the economic modernization and industrialization of the 19th century. Demographic changes in the numbers and spacing of children and a shift of economic functions from the family to other work environments modified the roles of women and children. JOSEPH F. KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICA 1790 TO THE PRESENT 114-16 (1977); CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED 6-10 (1975); Anne Foner, *Age Stratification and the Changing Family*, *in* TURNING POINTS: HISTORICAL AND SOCIOLOGICAL ESSAYS ON THE FAMILY 5340, 5344-52 (John Demos & Sarane S. Boocock eds., 1978).

The upper and middle classes perceived children as corruptible innocents whose upbringing required greater physical, social, and moral structure than had previously been regarded as prerequisite to adulthood. The family, particularly women, assumed a greater role in supervising a child's moral and social development. *See* PHILIPPE ARIES, CENTURIES OF CHILDHOOD 329 (1962); KETT, *supra*, at 111-13; PLATT, *supra* note 5, at 75-83; BERNARD WISHY, THE CHILD AND THE REPUBLIC: THE DAWN OF MODERN AMERICAN CHILD NURTURE 115-16 (1968).

7. The changing cultural conception of childhood informed the Progressives' policies embodied in juvenile court legislation, child labor laws, child welfare laws, and compulsory school attendance laws. *See generally* LAWRENCE A. CREMIN, THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876-1957, at 127-28 (1961) (compulsory education legislation); JUVENILE JUSTICE: THE PROGRESSIVE LEGACY AND CURRENT REFORMS (LaMar T. Empey ed., 1979) (juvenile court legislation); SUSAN TIFFIN, IN WHOSE BEST INTEREST? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA (1982) (social welfare legislation); WALTER I. TRATTNER, CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA (1970) (child-labor legislation); WIEBE, *supra* note 4, at 169 (noting that children were the central theme of humanitarian progressivism).

8. The juvenile court movement attempted to remove children from the adult criminal justice and corrections systems and to provide them with individualized treatment in a separate system of their own. PLATT, *supra* note 5, at 137-45; RYERSON, *supra* note 5, at 32-37; Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1187-1220 (1970); Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106-09 (1909). Under the guise of *parens patriae*, an emphasis on treatment, supervision, and control, rather than punishment, allowed the state to intervene affirmatively in the lives of more young offenders. *See Ex parte* Crouse, 4 Whart. 9, 11 (Pa. 1838) ("The infant has been snatched from a course which must have ended in confirmed depravity; and, not only is the restraint of her person [by the House of Refuge] lawful, but it would be an act of extreme cruelty to release her from

scientific and preventative alternative to the more punitive approach of the criminal law. Juvenile court judges thus exercised enormous discretion to make dispositions in the "best interests of the child." In their social and psychological inquiry into the whole child, the specific criminal offense a child committed was of minor significance because it indicated little about a child's "real needs." The misdeeds that brought a child before the court affected neither the intensity nor the duration of intervention because each child's "real needs" differed and no limits could be defined in advance. Indeterminate, nonproportional dispositions could continue for the duration of minority.

By separating children from adults and providing a rehabilitative alternative to punishment, juvenile courts rejected both the criminal law's jurisprudence and its procedural safeguards such as juries and lawyers. Court personnel used informal procedures and a euphemistic vocabulary to eliminate any stigma or implication of a criminal proceeding.[9] From the juvenile court's inception, judges could deny some young offenders its protective jurisdiction and transfer them to adult criminal courts.[10] The option to waive jurisdiction and remove highly visible or serious cases to adult courts also protected juvenile courts from political criticism.

For the first two-thirds of the twentieth century, juvenile court practices followed their Progressive origins. In 1967, the Supreme Court in *In re Gault* mandated procedural safeguards in adjudicating delinquency,[11] and began to alter juvenile court operations. In *Gault*, the Court reviewed the history of the juvenile justice system and the traditional rationales for denying procedural safeguards to juveniles.[12] In rejecting these rationales, the Court observed that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for prin-

---

it."); Neil H. Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae"*, 22 S.C. L. REV. 147, 180-81 (1970) (noting the juvenile court's expanding jurisdiction under the *parens patriae* rationale); Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205, 207-10 (1971) (describing early English developments in the Chancery courts).

9. *See* PLATT, *supra* note 5, at 137-45; Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 823-25 (1988).

10. ROTHMAN, *supra* note 5, at 285.

11. 387 U.S. 1, 14-17 (1967).

12. *Id.* These traditional reasons included that hearings involving juvenile offenders were not adversarial, the adjudication of delinquency was civil, not criminal, and a child was entitled to custody, not liberty, when the state acted as *parens patriae*. *Id.*

ciple and procedure" and concluded that the denial of procedural rights frequently resulted in arbitrariness rather than "careful, compassionate, individualized treatment."[13]

The *Gault* Court mandated elementary procedural safeguards because of the juvenile court's failure to realize the Progressives' ideals. These safeguards included the right to advanced notice of charges, a fair and impartial hearing, the right to the assistance of counsel with the opportunities to confront and cross-examine witnesses, and the protections of the privilege against self-incrimination.[14] The *Gault* Court narrowly confined its decision to the adjudicatory hearing which determines whether a child is a delinquent, without considering the entire procedural apparatus, jurisdictional reach, or dispositional practices of the juvenile justice system.[15] The Court noted that its rulings would not impair the court's unique procedures for processing and treating juveniles separately from adults,[16] and asserted the importance of adversarial procedural safeguards both to determine truth and to preserve individual freedom.[17]

The Supreme Court subsequently elaborated on the procedural and functional equivalence between criminal and delinquency proceedings. In *In re Winship*, the Court held that juvenile courts must establish delinquency "beyond a reasonable doubt," rather than by the lower standards of proof used in civil trials.[18] Similarly, in *Breed v. Jones* the Court held that the

13. *Id.* at 18-19.

14. *Id.* at 31-57.

15. *Id.* at 13. Several commentators have analyzed the narrow holding in *Gault* and the limitations on juvenile procedural rights. *See, e.g.*, Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 153-54 (1984); Francis B. McCarthy, *Pre-Adjudicatory Rights in Juvenile Courts: An Historical and Constitutional Analysis*, 42 U. PITT. L. REV. 457, 459-60 (1981); Irene M. Rosenberg, *The Constitutional Rights of Children Charged with Crimes: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656, 661-63 (1980).

16. *Gault*, 387 U.S. at 22.

17. *Id.* at 20-21. The Court's holding that the privilege against self-incrimination applies to delinquency adjudications clearly implicated the dual functions of procedural safeguards: to provide factual accuracy and prevent governmental oppression. *See id.* at 49-50; *see also* Feld, *supra* note 15, at 155-56 nn.46-47 (discussing the Fifth Amendment's procedural role). By recognizing the applicability of the privilege against self-incrimination, juvenile adjudications could no longer be characterized as either "non-criminal" or "non-adversarial," because the Fifth Amendment privilege acts both as the guarantor of an adversarial process and as the primary mechanism to maintain a balance between the state and the individual.

18. 397 U.S. 358, 368 (1970).

Double Jeopardy clause of the Fifth Amendment prohibits adult re-prosecution of a youth previously convicted of the same charges in juvenile court.[19]

The Court did not, however, extend to juveniles all the procedural criminal safeguards available to adults—in *McKeiver v. Pennsylvania* the Court denied to juveniles a constitutional right to jury trials in state delinquency proceedings.[20] The *McKeiver* Court held that the due process standard of "fundamental fairness" in juvenile proceedings, as interpreted and applied in *Gault* and *Winship*, emphasized "accurate fact-finding," which a judge could provide as readily as a jury.[21] The Court also expressed concern that requiring jury trials would disrupt traditional juvenile court practices.[22]

Despite the Court's reluctance in *McKeiver* to hasten the demise of the juvenile court system, its earlier decisions in *Gault* and *Winship* drastically altered the form and function of the juvenile court. By emphasizing procedural regularity as a prerequisite to a delinquency disposition, the Supreme Court shifted the focus of the juvenile court from the "real needs" of a child to proof of criminal guilt. Those decisions provided the impetus for the continuing procedural and substantive convergence of juvenile and criminal courts.

B. Juvenile Crime

Both youth and violent crime rates fluctuate markedly over time.[23] Thus, any description of crime trends is especially sensitive to the baseline selected for comparison. For example, comparing current serious crime rates with those in 1980 would show only moderate changes, whereas comparing them with the lower 1985 base rates would show more substantial increases.[24]

The Federal Bureau of Investigation ("FBI") annually publishes national data on crimes known or reported to police and

19. 421 U.S. 519, 541 (1975); *see infra* note 180 and accompanying text (describing the impact of the *Breed* decision).

20. 403 U.S. 528, 545 (1971) (Blackmun, J., plurality opinion).

21. *Id.* at 543.

22. *Id.* at 550.

23. National Research Council, Understanding and Preventing Violence 50 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1993). During the 20th century, for example, homicide rates peaked in the 1930s, slowly declined until the early 1960s, rose steadily during the 1970s to another peak in 1980, declined in the early 1980s, and then began to escalate rapidly again in 1985. *Id.*

24. *Id.*

arrests made by law enforcement.[25] Figure 1 presents both national and Minnesota crime trends for the decade of the 1980s, and indicates relative stability in serious crime rates. In 1980, there were 5950 serious crimes per 100,000 inhabitants nationally.[26] Following a decline in the mid-1980s, the rate rebounded by 1991 to 5898 per 100,000.[27] Although the trends and fluctuations follow similar patterns, Minnesota enjoys a somewhat lower rate of serious crime compared with the rest of the United States.[28] Following the national pattern, rates of serious crime dipped during the mid-1980s and then began to increase. In Minnesota, the rate of serious crimes known or reported to law enforcement in 1980 was 4780 per 100,000.[29] That rate dropped to below 4000 in 1984, and more recently rose again to 4496 per 100,000 in 1991, still four percent below the peak rate of 1981.[30]

25. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES: 1991 (1992) [hereinafter 1991 UNIFORM CRIME REPORTS]. Local law enforcement agencies transmit data to state agencies and the FBI based on reports from victims of crimes or investigations. *Id.* at 1-3. The FBI's Serious Crime Index includes both violent and property crimes and provides the most widely cited measure of trends in offenses. *Id.* at 1. The Crime Index records four violent crimes: murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault. *Id.* It also reports four property crimes: burglary, larceny-theft, motor vehicle theft, and arson. *Id.* Typically, both reported crimes and arrests are standardized as rates per 100,000 persons to control for changes in population composition.

26. *Id.* at 58.

27. *Id.*

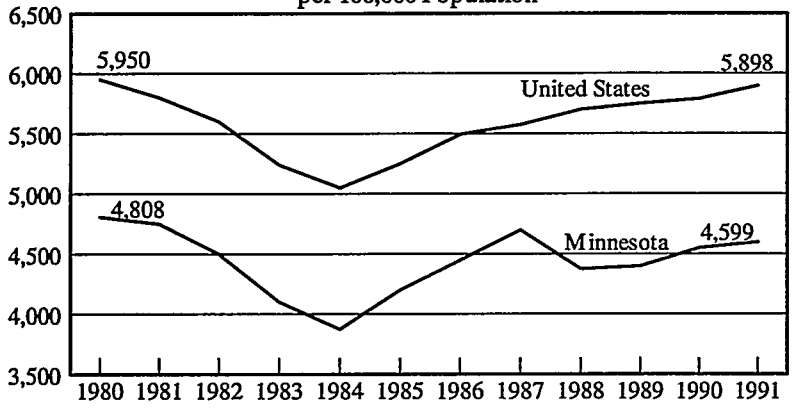
28. In 1991, Minnesota had a serious crime rate of 4496 per 100,000 persons as compared with the national average of 5898. *Id.* at 72. By contrast, the serious crime rate per 100,000 was 10,768 in the District of Columbia, 7819 in Texas, and 6773 in California. *Id.* at 68-76.

29. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES: 1980, at 52 (1980).

30. Daniel Storkamp, Overview of Juvenile Crime in Minnesota 5 (Feb. 26, 1993) (unpublished report, on file with author).

Figure 1

Serious Crime Rates
Trends in Minnesota and the Nation
per 100,000 Population



Note: Includes murder, rape, robbery, aggravated assault, burglary, larceny, auto theft and arson.
Prepared By: Criminal Justice Center, Minnesota Planning
Data Source: Bureau of Criminal Apprehension/OJP

1. National Trends

Young people commit a disproportionate amount of crime. Their arrest rates for most serious crimes peak in mid- to late-adolescence and then gradually decline.[31] During the mid-1980s, serious juvenile crime patterns mirrored the overall national decline. Serious juvenile crime rates gradually increased,

31. David P. Farrington, *Age and Crime*, *in* 7 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 189, 189 (Michael Tonry & Norval Morris eds., 1986) (analyzing age-specific crime rates and noting that crime rates peak in mid- to late-teenage years and then decline). *See generally* Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552 (1983) (critiquing the substantive justification for the longitudinal study of crime); David F. Greenberg, *Delinquency and the Age Structure of Society*, *in* CRIMINOLOGY REVIEW YEARBOOK (Sheldon Messinger & Egon Bittner eds., 1979) (discussing delinquency theory and age distriution of crime); FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES: 1992, at 227-28 (1993) [hereinafter 1992 UNIFORM CRIME REPORTS] (tabulating total United States arrests by age and offense charged).

but those rates only now approximate the peak rates of 1980.[32] Significantly, however, as a result of the demographic "baby bust," youths aged ten to seventeen constitute a smaller segment of the population structure, and their overall contribution to serious crime is decreasing.[33] Between 1980 and 1990, juveniles aged ten through seventeen decreased from 14% to 11% of the total United States population.[34] Their share of all arrests for Crime Index property crimes declined from 41% to 32%, and of all arrests for Index violent crimes, from 22% to 16%.[35]

The bulk of all FBI Part I serious crime consists of property offenses rather than violent crimes, and during the 1980s the juvenile rate of property crimes was stable or only slowly increasing.[36] By contrast, although violent crimes comprise a much smaller component of the overall serious crime index, the rates of juvenile violence, especially homicide, have surged dramatically since the mid-1980s.[37] While Index property crime by juveniles increased 11% nationally between 1983 and 1992, violent crime increased by 57%.[38] In a special section on juveniles

32. Arrest Rates Per 100,000 Population for Juveniles Aged 10-17

	1980	1985	1990
Index Violent Felonies	393.6	334.3	392.8
Index Property Felonies	2,887.2	2,491.0	2,689.3
All Index Felonies	3,280.8	2,825.3	3,082.1

Peter W. Greenwood, *Juvenile Crime and Juvenile Justice*, *in* CRIME 91, 96 tbl. 5.2 (James Q. Wilson & Joan Petersilia eds., 1994).

33. Percentage of Total Population and Index Felony Arrests Accounted for by Juveniles Aged 10-17

	1980	1985	1990
Total U.S. Population	14	12	11
Index Violent Felonies	22	17	16
Index Property Felonies	41	34	32

Id. at 95 tbl. 5.1.

34. *Id.*

35. *Id.*

36. *See* HOWARD N. SNYDER, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION FACT SHEET #3, 1992 JUVENILE ARRESTS (May 1994) (reporting that 1992 FBI Uniform Crime Report data indicate that juveniles account for 18% of all arrests for violent crime, and 33% of all property crimes; juvenile property crime arrests increased by eight percent between 1988 and 1992, and by 11% between 1983 and 1992).

37. *See* 1991 UNIFORM CRIME REPORTS, *supra* note 25, at 279; Francis B. McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629, 636-40 (1994).

38. SNYDER, *supra* note 36, at 2.

and violence in 1991, the FBI reported a record juvenile violent crime rate in 1990.[39]

From the public's perspective, the most frightening change in juvenile crime patterns is the increase in murder rates accompanying the proliferation of guns among youths.[40] Juvenile offenders account for about one homicide arrest in seven.[41] These arrest rates may overstate somewhat juveniles' violent criminal involvement because youths, more than adults, tend to commit crimes in groups, and one criminal event may produce several juvenile arrests.[42] Arrests of increasingly younger juveniles for violence, and the dramatic rise in homicide by mid- to late-adolescents, however, certainly justify public concern.[43]

The public's concern over violent crime has a clear racial component. The increase in murder rates and the proliferation of guns are especially dramatic among black juveniles.[44] The

39. The FBI reported that "[i]n 1990, the Nation experienced its highest juvenile violent crime arrest rate, 430 per 100,000 juveniles.... The 1990 rate was 27 percent higher than the 1980 rate." 1991 UNIFORM CRIME REPORTS, *supra* note 25, at 279.

40. Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 85 J. CRIM. L. & CRIMINOLOGY (forthcoming 1995) (analyzing changing patterns of age-specific homicide rates in conjunction with proliferation of guns in the illegal drug industry); *see also* 1991 UNIFORM CRIME REPORTS, *supra* note 25, at 279 ("Another item of concern is that during the past decade, there has been a 79-percent increase in the number of juveniles who commit murders with guns. In 1990, nearly 3 or 4 juvenile murder offenders used guns to perpetrate their crimes.").

41. *See* 1992 UNIFORM CRIME REPORTS, *supra* note 31, at 227 (reporting that in 1992 juvenile homicide arrests accounted for about 14.5% of all homicide arrests; juveniles were arrested for 2829 murders or negligent manslaughters while adults over 18 years of age were arrested for 16,662).

42. *See* Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867, 868-75 (1981).

43. 1992 UNIFORM CRIME REPORTS, *supra* note 31, at 227; BARBARA ALLEN-HAGEN ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION FACT SHEET #19, JUVENILES AND VIOLENCE: JUVENILE OFFENDING AND VICTIMIZATION 1 (Nov. 1994) ("Between 1988 and 1992, the number of Violent Crime Index arrests of juveniles increased by 47%—more than twice the increase for persons 18 years of age or older. Most alarming, juvenile arrests for murder increased by 51%, compared to 9% for adults."); *see also* Greenwood, *supra* note 32, at 96 ("In 1980, juveniles accounted for just 10 percent of all arrests for homicide. By 1990, juveniles accounted for 13.6 percent of all homicide arrests. Between 1984 and 1992, the number of juveniles arrested for homicide, who were *under the age of fifteen*, increased by 50 percent.").

44. The FBI reported that

> [t]he Nation experienced an upsurge in the juvenile murder arrest rate for blacks during the 1980s.... This upward trend had a profound impact on the overall juvenile murder arrest rate.... Specifically, between 1980 and 1990, the arrest rate for this [black] group increased 145 percent, while the rate for whites rose 48 percent.... When con-

FBI data show that minority youths are substantially more likely to commit violent crimes.[45] Other research that does not rely on official statistics also documents the disproportionate minority youth involvement in violent crime.[46] Thus, legislative policies that focus on violent offenses, although seemingly neutral on their face, have the potential to impact upon minority youths because of racial patterns of offending.[47]

2. Minnesota

As nationally, youths in Minnesota commit a disproportionate amount of serious crime. The amount and rate of juvenile crime have also increased in the past decade.[48] Because of the relationship between age and crime, these trends are of particular concern. In the 1990 census, Minnesota juveniles aged fifteen to nineteen constituted the smallest segment of young

---

sidering the difference in the arrest rate for black and white juveniles, the black rate was 7.5 times that of whites in 1990. From a historical perspective, 1965 to 1990, the overall murder arrest rate for juveniles increased 332 percent from 2.8 to 12.1.

Id.

45. "Of particular note is the upward trend that started in 1988 for both white and black youths. . . . In 1990, the juvenile violent crime arrest rate reached 1429 per 100,000 black juveniles, five times that for white youths." *Id.*

46. *See* ELLIOTT CURRIE, CONFRONTING CRIME: AN AMERICAN CHALLENGE 144-71 (1985) (documenting the positive correlations among race, poverty and violent crime); PAUL E. TRACY ET AL., DELINQUENCY CAREERS IN TWO BIRTH COHORTS 277 (1990) (stating that violent offense rate for nonwhites in cohort is nearly six times the rate for whites); MARVIN E. WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT 247 (1972) ("the more serious forms of bodily harm are committed by nonwhites" in the cohort); Michael J Hindelang, *Race and Involvement in Common Law Personal Crimes*, 43 AM. SOC. REV. 93, 103-04 (1978) (showing that rape, robbery, and assault are disproportionately committed by blacks).

47. *See infra* notes 58-67 and accompanying text.

48. Indicative of Minnesota youths' involvement in serious crime, in 1991 juveniles accounted for 15% of the 134 murder arrests, 14% of the 656 rape arrests, 35% of the 1075 robbery arrests, 22% of the 3990 aggravated assault arrests, 42% of the 4703 burglary arrests, 45% of the 27,142 larceny arrests, 54% of the 3551 auto theft arrests, and 55% of the 293 arson arrests. Storkamp, *supra* note 30, at 8-9.

In Minnesota between 1980 and 1991, the absolute number of serious crimes known to authorities increased by about four percent. *Id.* at 4. In 1980, there were 195,992 FBI Part I offenses reported to police. *Id.* In 1991, 203,107 crimes were reported. *Id.* Between 1980 and 1991, arrest rates for all crimes increased by 84% for adults and 22% for juveniles, although arrests of adults for violent crimes increased about 113% for adults and 88% for juveniles. Ray Lewis, Presentation to the Minnesota Corrections Association, Overview of Juvenile Crime in Minnesota: An Update 6-7 (Oct. 13, 1993) (on file with author). Police arrested 737 juveniles for violent crimes in 1980 as compared with 1383 in 1991. *Id.* at 7.

people in the population.[49] Fifteen- to seventeen-year-olds, however, had the largest numbers of arrests and highest rates of arrest for both serious property offenses and violent crimes.[50] Thus, a relatively small youth population had to be somewhat more criminally active in order to produce overall increases in reported crimes over the past decade.

There are more youths aged ten to fourteen, and even more children aged five to nine, and from birth to age four, waiting in the demographic wings.[51] As these younger people mature and reach their "crime-prone" adolescence over the next decade, there likely will be a significant increase in youth crime and violence based solely on the age-demographic shift, and without regard to any other social forces affecting youth crime.[52]

Changes in Minnesota's racial composition affect both crime rates and political reactions to youth and crime. Only 6.3% of Minnesotans are members of racial minorities, as compared with 24.4% nationally, making it proportionately the seventh smallest minority population in the nation.[53] The minority population in Minnesota, however, grew 71.7% during the 1980s, the fourth highest rate of growth in the nation.[54] African-Americans are Minnesota's largest minority group.[55] As a result of

---

49. Storkamp, *supra* note 30, at 3.

50. *Id.* at 12-13.

51. *See* 1991 UNIFORM CRIME REPORTS, *supra* note 25, at 289 ("The recent increase in the juvenile arrest rate for crimes related to violence may be indicative of future trends when considering concomitant social/demographic trends. . . . The population group 10-17 is projected to increase significantly between 1990 and 2000. This development may lead to further escalation in juvenile crimes/arrests."). Based on data presented by the Minnesota State Demographer and population projection, the youth population aged 10-19 will increase almost 14% beyond 1990 levels by the year 2000 and not return to the 1990 level until about the year 2015.

Minnesota Youth Population of 10-19 Year Olds

1990 Population Projection	1995 Population Projection	2000 Population Projection	2010 Population Projection	2020 Population Projection
610,906	663,860	694,930	640,080	595,220

Lewis, *supra* note 48, at 2.

52. *Cf.* Alfred Blumstein et al., *Demographically Disaggregated Projections of Prison Populations*, 8 J. CRIM. JUST. 1, 8-9, 11-13 (1980) (showing, however, an overall decline in crime rates due to aging of baby-boom cohort).

53. MINNESOTA STATE DEMOGRAPHER, MINNESOTA MINORITY POPULATIONS GROW RAPIDLY BETWEEN 1980 AND 1990, at 1 (Sept. 1991).

54. *Id.* at 3. By contrast, the non-hispanic white population rose only 4.7%, about the same as the national average (4.4%). *Id.*

55. *Id.* at 7. The 1990 census counted 94,944 African-American Minnesotans. While African-Americans are Minnesota's largest minority group,

both natural increase and net migration, the African-American population increased 78% during the 1980s.[56] Moreover, African-Americans are heavily concentrated in the Twin Cities of Minneapolis and St. Paul. Between 1980 and 1990 the total minority population rate in the Twin Cities nearly doubled from 12.5% to 21.3%.[57]

Minority status is linked to involvement in crime, especially violent crimes against the person. As the FBI *Uniform Crime Reports* indicate, minority youths are five times more likely than white youths to be arrested for crimes of violence, and seven and a half times more likely to be arrested for homicide.[58] Because of population differentials, white juveniles in Minnesota constitute the majority of all youths arrested for violent offenses, although the disproportionate minority involvement in violent crime figures prominently in public perceptions and political responses to serious youth crime.[59] To the extent that minority youth disproportionately commit violent crimes, penal policies that focus on violence will have a disparate impact on children of color.

There is also a relationship between Minnesota's changing racial composition and the proportion of children in poverty, which increased more than 20% during the 1980s.[60] Three dem-

---

they constitute only 2.2% of the population, well below the national average of 12.1%. *Id.*

56. *Id.* Starting with a smaller population base, Asian and Pacific Islanders had the greatest increase, 193.5%, between 1980 and 1990. *Id.* at 3. They now constitute the state's second largest minority group. *Id.*

57. *Id.* at 7. Seventy-two percent of all African-Americans reside in Minneapolis or St. Paul, and an additional 23% are in the Twin Cities suburbs. Only six percent are outside the seven-county metropolitan area and most live in either Duluth or Rochester. *Id.* at 8.

58. 1991 UNIFORM CRIME REPORTS, *supra* note 25, at 279; *see* BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993, at 447 (Kathleen Maguire & Ann L. Pastore eds., 1994); *supra* notes 44-46 and accompanying text.

59. In 1991, police arrested white juveniles for 738 violent crimes, as compared with 512 black juvenile arrests. MINNESOTA BUREAU OF CRIMINAL APPREHENSION tbl. 14 (1991). Given the differences in relative populations, however, the black juvenile disproportionality mirrored the differences in national rates. Moreover, police arrested 12 black juveniles for murder as compared with four white youths. *Id.*

60. *See* Martha McMurry, *Child Poverty in Minnesota*, POPULATION NOTES (Minnesota Planning, St. Paul, Minn.), Feb. 1994, at 5 ("Children in poverty are increasingly likely to be nonwhite, living in the Twin Cities and living in a single-parent family. . . . Minnesota's minority children are . . . much more likely to be poor than minority children in the rest of the United States."); *see also* Minnesota KIDS COUNT 2 1994 (noting that between 1980 and 1990, the percentage of Minnesota children in poverty grew 21.6%; in 1989, 45.1% of minor-

ographic changes contributed to the dramatic increase in the number of Minnesota children living in poverty: a growing proportion of nonwhite children, an increasing proportion of children living in single-mother families, and a greater probability that children in minority and single-parent households will be poor.[61] Although the poverty rate for white children in Minnesota is relatively low compared to that of the rest of the nation, the poverty rates for Minnesota's minority children, the fastest growing segments of the youth population, are among the highest in the nation.[62] The largest growth in the number of poor children occurred in the Twin Cities.[63] Because younger children are at greater risk of being poor than are older children,[64] the more numerous younger generation is further exposed to adverse social circumstances that produce greater probabilities of criminal involvement.

Changes in Minnesota's racial composition, a growing concentration of poor and minority children in urban settings, and the disproportional involvement of minority youth in crime, especially violent crime, sustain public and political perceptions of a threatening structural "underclass."[65] Scholars contend that

---

ity children lived in poverty as compared with 9.7% of white children). *See generally* MINNESOTA PLANNING, CHILD POVERTY IN MINNESOTA: TRENDS AND ISSUES (1994).

61. McMurry, *supra* note 60, at 1. Single mother families account for about 57% of poor families with children. *Id.* at 7. *See generally* NATIONAL RESEARCH COUNCIL, LOSING GENERATIONS: ADOLESCENTS IN HIGH-RISK SETTINGS 41-56 (1993) (summarizing research on demographic changes in family structure, their relationship to poverty, and the risks that poverty and single-parent households pose for adolescent development).

62. While Minnesota's white child poverty rate (9.7%) ranks 41st in the nation, the situation for minority children is much more bleak. Of Minnesota's African-American children, nearly half (49.4%, seventh in the nation) live in poverty, as do more than half (54.8%, fourth in the nation) of its Native American children, and more than one-third (37.1%, third in nation) of its Asian children. McMurry, *supra* note 60, at 3. Although nonwhite children are more likely to be poor, because of Minnesota's relatively small minority population, the great majority of poor children, about 71%, are white. *Id.* at 8.

63. *Id.* at 4 ("In the two central cities combined, the child poverty rate went up from 16.3 percent in 1979 to 28.5 percent in 1989.").

64. *Id.* at 8. "In 1989, 14.8 percent of Minnesota children under age 5 were poor. The poverty rate declined to 10.6 percent for 12- to 17-year-olds." *Id.*

65. *See generally* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993) (arguing that residential segregation is structurally responsible for the "mutually reinforcing and self-feeding spirals of decline" in black neighborhoods); THE URBAN UNDERCLASS (Christopher Jencks & Paul E. Peterson eds., 1991) (collecting essays on the economic condition of the underclass, the causes and consequences of concentrated poverty, and public policy responses); WILLIAM J. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY

these structural and contextual indicators of inequality affect official social control policies and practices.[66] They argue that in settings characterized by racial inequality—a "large concentration of the 'underclass' (i.e., minorities, poverty, female-headed families, welfare)"—political leaders and the public will view such populations as threatening and offensive, and will use the juvenile justice system to subject the "underclass" to increased social control.[67] The confluence of Minnesota's changing racial composition, increasing poverty and urban concentration of minority young people, disproportionate minority involvement in serious youth violence, and demographic projections of more poor and minority urban youths in the decade to come, provide an additional backdrop against which politicians formulated the 1994 juvenile justice reforms and criminal sentencing policies.

C. Media Coverage of Youth Crime, Public Opinion, and Political Perceptions

The mass media shape public and political attitudes and perceptions, and thereby indirectly influence the legislative process.[68] The question of "what is news," and whether changes in column-inch crime reportage correspond proportionately to actual changes in "real" rates of crime or constitute "media hype," are beyond the scope of this Article. Even proportional press coverage of youth crime and juvenile justice administration,

---

(1987) (examining the "complex web" of factors contributing to social dislocation in the urban ghetto as well as the shortcomings of current public policy approaches).

66. Robert J. Sampson & John H. Laub, *Structural Variations in Juvenile Court Processing: Inequality, the Underclass, and Social Control*, 27 Law & Soc'y Rev. 285, 305 (1993).

67. *Id.* at 293; *see* Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J. Crim. L. & Criminology 156, 166-69 (1991) (analyzing a number of the structural features that the author hypothesizes affect juvenile justice administration).

68. Julian Roberts notes that

> [t]he beliefs of public officials about public preferences for criminal justice policies affect political campaigns, decisions in individual cases, and criminal justice policy. Politicians' beliefs about the nature of public opinion probably derive from three sources: shared conventional wisdom, the perception of an association between electoral success and support for repressive criminal justice policies, and the publication of survey findings that seem to demonstrate public support for harsher sentencing.

Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, *in* 16 Crime and Justice: An Annual Review of Research 99, 101 (Michael Tonry ed., 1992).

however, shapes public perceptions and political responses.[69] Significantly, a 1986 amendment to the Minnesota juvenile code opened to the public and to the press juvenile court hearings involving youths aged sixteen or older charged with a felony, thereby allowing greater press coverage of juvenile court proceedings involving serious young offenders.[70] As a result, the media acquired greater access to youths' names and the details of their crimes at the same time that youth crime trends began to escalate.

Within the past five years, the Minneapolis-based *Star Tribune*, the largest circulation paper in Minnesota, reported many stories about alienated youth and crime,[71] violent crimes by teenagers,[72] and criminal victimization of children.[73] Other stories discussed guns,[74] gangs,[75] drive-by shootings,[76] random vio-

---

69. Greenwood discusses the role of the media in amplifying public concerns about youth crime:

> One part of the answer is clearly the attention being given to the subject by the media and elected officials. . . . [T]he popular media are often careless in distinguishing juveniles from those over eighteen years of age. Since so many young adults and gang members continue to dress and act like teenagers, adult offenders may often be mistaken for juveniles, when in fact they are not.

Greenwood, *supra* note 32, at 96.

70. *See* MINN. STAT. § 260.155(1).

71. *See, e.g.*, Mark Brunswick, *Rise in Homicides Shows Minneapolis Is Changing*, STAR TRIB. (Minneapolis), Dec. 27, 1988, at 1A (discussing the "subculture of violence" now present in Minneapolis); Mark Brunswick & Jill Hodges, *More Crime Happening at Hands of Kids: Assailants Are Less Remorseful*, STAR TRIB. (Minneapolis), Nov. 19, 1990, at 1A ("In the first nine months of this year, every fourth person arrested for murder in Minneapolis was a kid. . . . Kids who commit crimes are committing them more violently."); Pat Doyle, *"Lost boys" Were on a Road Leading to Lost Lives*, STAR TRIB. (Minneapolis), June 12, 1988, at 1A (describing a brutal murder by street teenagers who shattered the victim's skull).

72. *See, e.g.*, Bill McAuliffe, *Court Rules Brom Should Be Tried as Adult in Ax Murders*, STAR TRIB. (Minneapolis), Oct. 18, 1988, at 1A (teenager killed mother, father, younger sister, and brother with axe); Maureen M. Smith & Kevin Diaz, *Anoka Youth Held in Slayings at Brooklyn Park Home*, STAR TRIB. (Minneapolis), Oct. 14, 1992, at 1A (16-year-old arrested for murder of woman and her three-year-old daughter during apparent burglary); Margaret Zack, *Boy, 16, Guilty of Murdering Neighbor*, STAR TRIB. (Minneapolis), Feb. 9, 1988, at 1A (14-year-old killed neighbor during a burglary); *see also* Barry C. Feld, *Bad Law Makes Hard Cases: Reflections on Teen-aged Axe Murderers, Judicial Activism, and Legislative Default*, 8 LAW & INEQ. J. 1 (1989) (analyzing three courts' Brom opinions and the administration of juvenile waiver statutes).

73. *4-Year-Old Sexual-Assault Victim Is Released from Medical Center*, STAR TRIB. (Minneapolis), July 23, 1988, at 3B (describing a "girl left for dead behind a grocery store after being beaten and sexually assaulted").

74. *See, e.g.*, Kevin Diaz, *Armed and Dangerous at 16: More Kids Are Carrying, Using Firearms*, STAR TRIB. (Minneapolis), Dec. 11, 1991, at 1A (describ-

lence,[77] and "senseless" lethal encounters with juveniles.[78] Additional stories described an epidemic of teen-age drug abuse,[79] expanding caseloads in juvenile courts,[80] and the inability of the juvenile justice system to respond adequately to a "new breed" of youthful offenders.[81]

Without regard to whether such coverage accurately describes objective reality, the intensity and tenor of youth crime coverage inevitably colors both people's perceptions of reality

---

ing shootings by teenagers and noting that "[j]uvenile aggravated assaults, half of which involve guns, have tripled in the past 10 years in Minnesota").

75. *See, e.g.*, Mark Brunswick, *Now Dealing in Drugs and Violence, Gangs Are Blamed for More Bloodshed*, STAR TRIB. (Minneapolis), July 22, 1990, at 1A (describing the seemingly random murders of "the world of Twin Cities street gangs" and the "new lawlessness associated with this lack of internal gang discipline; police say gang members are younger and more trigger-happy, equally as willing to shoot a rival gang member as shoot a bystander for making a wisecrack").

76. *See, e.g.*, Conrad de Fiebre, *Four Incidents of Gunfire from Cars Reported*, STAR TRIB. (Minneapolis), Dec. 18, 1991, at 1B (discussing recent incidents of gunfire from cars).

77. *See, e.g.*, Mark Brunswick, *Troubled Neighborhood Awaits Fate of Innocent Victim*, STAR TRIB. (Minneapolis), Dec. 27, 1991, at 1A (describing innocent 12-year-old victim of unprovoked shooting on Christmas evening).

78. *See, e.g.*, Conrad de Fiebre, *15-Year-Old Fired Shots, 3 Others Say*, STAR TRIB. (Minneapolis), June 10, 1992, at 1B (alleged killer of convenience store clerks was a 15-year-old member of gang); Kevin Diaz, *Family, Friends Shocked that Man Slain for Bicycle*, STAR TRIB. (Minneapolis), Oct. 7, 1993, at 1B (describing shooting during confrontation over stolen bicycle); Tatsha Robertson, *Police Arrest Three Suspects in Shooting at Mall of America*, STAR TRIB. (Minneapolis), Feb. 25, 1993, at 1B (mall-shopper shot by juveniles over "Starter" jacket); James Walsh & Bill McAuliffe, *Man, 3 Juveniles Held in St. Paul Slayings*, STAR TRIB. (Minneapolis), June 9, 1992, at 1A (teenagers arrested for slayings at convenience store robbery).

79. *See, e.g.*, Conrad de Fiebre, *Teens Found in 'Crack Houses'*, STAR TRIB. (Minneapolis), Mar. 11, 1989, at 1B (eight boys found in crack house raid).

80. *See, e.g.*, Dennis Cassany, *Boom in Suburban Teen Crime Puzzling*, STAR TRIB. (Minneapolis), Mar. 23, 1992, at 1A (describing "skyrocketing" juvenile crime in Twin Cities suburbs); Kurt Chanleer & Bruce Benidt, *Juvenile Crime Is Up in Numbers, Violence*, STAR TRIB. (Minneapolis), July 24, 1988, at 1B (discussing factors causing increased juvenile crime and violence); Kevin Diaz, *Youth Felony Cases Crowd Hennepin's Courtrooms*, STAR TRIB. (Minneapolis), Sept. 11, 1991, at 1A (describing increase in juvenile crime and stating that "[j]uvenile rape arrests are up 42 percent; robbery is up 71 percent; aggravated assault is up 118 percent").

81. *See, e.g.*, Paul Gustafson, *Hard Young Criminals Scary, Costly to Ramsey Board*, STAR TRIB. (Minneapolis), Oct. 5, 1988, at 3B (describing a "new breed of hard-core young criminal offender in Ramsey County that scares officials and is costing the county hundreds of thousands of additional dollars to handle"); James Walsh, *Gangs Causing Problems for Juvenile Detention Centers*, STAR TRIB. (Minneapolis), May 18, 1990, at 2B (comparing gangs of the 1960s and 1970s with current gangs).

and politicians' reactions.[82] Public opinion polls over several years evidence Minnesotans' increasing concern about crime.[83] A recent opinion poll indicates increasing public fear of victimization, particularly in urban centers.[84] They provide an additional context for the 1994 legislative session.

In January 1994, the Minnesota Planning Agency issued a comprehensive crime report, *Troubling Perceptions*, which surveyed citizens' actual experiences as victims of crimes and their fears of it.[85] In that study, 31% of Minnesotans reported that they were victims of crime, as were 68% of fifteen- to twenty-four-year-old respondents in Hennepin and Ramsey counties.[86] Fear of becoming a victim of crime was even more pervasive than the actual victimization experience.[87] Moreover, respondents were "pessimistic about the possibility of reducing violent crime," and most "expected it to get worse in the next three years."[88]

These crime statistics and public opinion polls prompt many complex policy questions. Is youth crime actually rising, and, if

---

82. It is difficult for individuals to develop a realistic perception of their risk of becoming victims of crime. The number of articles in newspapers or magazines or the minutes of television and radio broadcasts given to crime reporting do not necessarily reflect the true incidence of crime. Media reporting of exceptionally violent crimes may increase fear beyond actual crime risk levels.

MINNESOTA PLANNING, TROUBLING PERCEPTIONS: 1993 MINNESOTA CRIME SURVEY 3 (Jan. 1994).

83. *See, e.g.*, Lauri Blake, *Crime, Drugs Top Worries for Twin Citians*, STAR TRIB. (Minneapolis), Feb. 21, 1989, at 1B ("Crime and drugs have replaced economic concerns as issues uppermost in the minds of Twin Cities residents . . . .").

84. Bob von Sternberg, *Another Survey Shows Crime as Minnesotans' Top Worry*, STAR TRIB. (Minneapolis), Feb. 10, 1994, at 5B ("[T]hree out of 10 Minnesotans believe crime is the single most important problem facing the state.").

85. MINNESOTA PLANNING, *supra* note 82. According to the study:

Both the incidence of crime and fear of crime were highest among respondents who said they lived in a city in Hennepin or Ramsey county. Forty-five percent of this group said they were crime victims, 41 percent were victims of property crime, and 14 percent were victims of violent crime.

Id. at 1.

86. *Id.* at 1. While young people were at greatest risk of victimization, "[f]orty-three percent of all victims of violent crime ages 15 to 24 said their assailant was a juvenile." *Id.*

87. *Id.* at 6-9. "The expectation of becoming a crime victim far exceeds the actual experience of respondents in the survey." *Id.* at 9. Although most people did not fear becoming a victim of violent crime themselves, many feared for their loved ones and 44% were afraid to walk alone at night within a mile of their homes. *Id.* at 6-7.

88. *Id.* at 2.

so, by how much? Is the current juvenile system capable of providing adequate social control of young offenders within tolerable limits, and, if not, what additional measures are necessary? How much more tax money should the state spend in an effort to increase social control, and what other public programs will receive less state support as a consequence? Legislators often allocate scarce resources and make value judgments about social policies based on subjective perceptions, rather than on objective data. Formulating a youth crime policy is no exception.[89]

II. THE MINNESOTA JUVENILE JUSTICE TASK FORCE

As part of the 1992 Omnibus Crime Control Act, the 1992 Minnesota Legislature directed the Minnesota Supreme Court to create an Advisory Task Force on the Juvenile Justice System.[90] The 1992 Omnibus Crime Act charged the Task Force to:

> conduct a study of the juvenile justice system and make recommendations concerning the following:
>
> 1) the juvenile certification process;

89. *Cf.* Alfred Blumstein, *Making Rationality Relevant*, 31 CRIMINOLOGY 1, 1 (1993) ("[S]ince policy choices inevitably involve issues of value as well as fact, in any weighing of costs and benefits, different people will assign different utilities to any particular degree of crime reduction or any kind of pain imposed on a guilty person.").

90. 1992 Minn. Laws 571, art. 7, § 13. The enabling legislation specified that the legislature, governor, supreme court, and heads of certain state agencies responsible for youth and crime, would each appoint certain members to the 20-person Task Force. *Id.*

A legislative impasse provided the impetus to create the Task Force. Some legislators wanted to "get tough" by amending the juvenile certification statute and expanding the use of juvenile felony convictions to enhance adult sentences. *See* MINN. S.F. 1850, 77th Leg. (1992) (proposing adult criminal prosecution of any previously waived juvenile, and modification of the Minnesota Sentencing Guidelines to count all felony convictions of juveniles 15 years or older as equivalent to adult felony convictions within the criminal history score). Some legislators wanted to expand juveniles' procedural protections, especially the right to counsel. Additional proposals emerged to implement juvenile sentencing guidelines and probation standards. MINN. S.F. 2006, 77th Leg. (1992); MINN. S.F. 1687, 77th Leg. (1992). Without the votes necessary to pass either conservative "get tough" sentencing laws or more liberal procedural reforms, some legislators introduced bills to create an advisory juvenile justice task force. MINN. S.F. 1687A, 77th Leg. § 2 (1992); MINN. S.F. 628, 77th Leg. § 1 (1992). The legislature recognized the complex inter-relation of juvenile waiver, sentencing, and procedural issues, and created a Task Force to develop a coherent and systematic response to youth crime and violence. *See* Interview with Sen. Allan Spear, Chair, Senate Judiciary Committee (Oct. 6, 1993) (on file with author) ("We recognized that we couldn't deal with the issues piecemeal. We needed to create a coherent, systematic response so that the pieces fit together.").

2) the retention of juvenile delinquency adjudication records and their use in subsequent adult proceedings;
3) the feasibility of a system of statewide juvenile guidelines;
4) the effectiveness of various juvenile justice system approaches, including behavior modification and treatment; and
5) the extension to juveniles of a nonwaivable right to counsel and a right to a jury trial.[91]

In May 1993, the legislature expanded the Task Force's mandate to assess the need for secure juvenile facilities.[92]

The Minnesota Supreme Court formed the Advisory Task Force on the Juvenile Justice System on October 22, 1992, and the Task Force presented its *Final Report* to the legislature in January 1994.[93] The final legislation unanimously passed both houses on April 29, 1994.[94] Governor Arne Carlson signed the legislation on May 5, 1994, although he line-item vetoed most of the funds appropriated to implement the legislation.[95]

Although the 1993 Juvenile Justice Task Force was not the first group in Minnesota to examine issues of juvenile justice administration—transfer of juveniles to criminal court, expanded procedural safeguards, access to counsel, or sentencing policy—it was the only group whose recommendations the legislature enacted. In the previous decade and a half, at least five major state-sponsored law reform groups examined some or all the problems that the Juvenile Justice Task Force considered.[96] Their research, analyses, recommendations, and especially political failures provide the context for the 1993 Task Force.

A. Previous Minnesota Juvenile Justice Task Forces

The first recent state-sponsored body to consider issues of juvenile justice was the Minnesota Supreme Court's 1975-76 Ju-

91. 1992 Minn. Laws 571, art. 7, § 13, subd. 4.

92. Task Force, Final Report, *supra* note 2, at 1.

93. *Id.* at iii.

94. The Senate approved the conference committee report on April 29, 1994, by a vote of 62-0. *Juvenile Justice Bill Passes*, Briefly: Minn. Senate Wk. in Rev. (Senate Pubs., St. Paul, Minn.), May 10, 1994, at 3, 3. The House bill, which was somewhat different, was passed on March 17, 1994, by a vote of 129-0. *Juvenile Justice*, Session Wkly. (Minn. House of Reps.), Mar. 18, 1994, at 6, 6. The House and Senate approved a compromise bill on April 29. Patricia L. Baden, *Legislature OKs Juvenile Crime Bill*, Star Trib. (Minneapolis), Apr. 30, 1994, at 1B.

95. *See infra* notes 713-715 and accompanying text (discussing Carlson's vetoes and ensuing public reaction).

96. *See infra* notes 97-149 and accompanying text.

venile Justice Study Commission.[97] This Commission found that juvenile court judges' discretion in making waiver decisions frequently yielded disparate results.[98] Specifically, the Commission found pronounced differences in certification practices in urban and rural counties throughout Minnesota.[99] Urban offenders considered for certification generally had committed more serious offenses and had more extensive prior records than their rural counterparts.[100] Yet, despite these differences, juvenile court judges certified more rural youngsters for adult prosecution.[101] In addition to urban-rural disparities, the Study Commission also found that discretionary waiver may produce racial disparities.[102]

The Study Commission attributed the geographic and racial disparities to the inherent ambiguity in the "suitability to treatment" and "threat to public safety" waiver criteria.[103] Despite its criticism of the statutory criteria, however, the Commission did not recommend specific changes to clarify the standards.[104] Susequently, the Minnesota Supreme Court, in *In re Dahl*,[105] urged the legislature to revise the statute.[106]

---

97. In September 1975, Minnesota Supreme Court Chief Justice Robert J. Sheran appointed a panel of 17 people to examine the role of juvenile courts and to recommend changes in a number of areas, including referral of some youths for adult criminal prosecution. JUVENILE JUSTICE STUDY COMM'N, MINN. SUPREME COURT, REPORT TO THE MINNESOTA SUPREME COURT 1 (Nov. 1976).

98. *See id.* at 61-79. *See generally* Barry C. Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515, 551-54 (1978) (analyzing Study Commission findings).

99. JUVENILE JUSTICE STUDY COMM'N, *supra* note 97, at 67.

100. *Id.* at 71 tbls. 13-14, 73 tbl. 16. In addition to more recorded offenses, certified urban youths had records extending over a longer period of time and more appearances on delinquency petitions than did rural youths. *Id.* at 72-73 tbls. 16-17.

101. *Id.* at 74 tbl. 19; *see also* Feld, *supra* note 72, at 41-46 (reporting similar geographic disparities a decade later).

102. For example, the Minnesota Supreme Court Study Commission found that although only 15.1% of the offenses referred to Hennepin Juvenile Court in 1975 were committed by African-American youths, 44.8% of the cases considered for certification in Hennepin County involved black juveniles. JUVENILE JUSTICE STUDY COMM'N, *supra* note 97, at 68.

103. *Id.* at 21, 77.

104. *Id.* at 22. Rather, the Study Commission recommended that the Department of Corrections assume greater responsibility to develop treatment programs and facilities for those older and more sophisticated juveniles who are most likely to be involved in certification proceedings. *Id.*

105. *In re* Dahl, 278 N.W.2d 316 (Minn. 1979).

106. *See infra* notes 217-236 accompanying text (discussing *Dahl* and legislative response).

In 1980 the Minnesota Legislature created a rebuttable presumption—a prima facie case—that youths charged with certain offenses and prior records should be tried as adults.[107] The Minnesota Supreme Court officially reactivated the Study Commission[108] and it compared certification practices before and after the revisions.[109] Analyses of certification practices from 1979-81 revealed that very few rural juveniles met the new prima facie case criteria. In urban counties, prosecutors did not file reference motions[110] against many juveniles who did meet the criteria, and two-thirds of those youths that judges actually referred to adult criminal courts did *not* meet the presumptive criteria.[111] Although the Commission concluded that "the prima facie criteria do not provide reliable guides to reference decisions,"[112] the legislature did not reconsider the 1980 "prima facie case" certification statute.

In 1980, Governor Albert Quie created a Juvenile Justice Task Force to focus on juvenile criminal offenders and justice administration.[113] The Task Force recommended that counties develop uniform, written guidelines to divert all similarly situated juvenile offenders away from the juvenile justice system

107. *See infra* notes 229-232 and accompanying text.

108. JUVENILE JUSTICE STUDY COMM'N, MINN. SUPREME COURT, CHANGING BOUNDARIES OF THE JUVENILE COURT: PRACTICE AND POLICY IN MINNESOTA (Mar. 1982) (noting that the Commission was reactivated to draft uniform rules of procedure for Minnesota's juvenile courts and to examine further juvenile court jurisdiction over status offenders, diversion practices, and certification of serious offenders).

109. *Id.* at 2.

110. A reference motion is filed to refer a juvenile to be tried as an adult.

111. JUVENILE JUSTICE STUDY COMM'N, *supra* note 108, at 20-21. An evaluation of the Minnesota waiver process found similar data. Lee A. Osbun & Peter A. Rode, *Prosecuting Juveniles as Adults: The Quest for "Objective" Decisions*, 22 CRIMINOLOGY 187, 194-95 (1984). As the authors note, however, "[f]ollowing enactment of the revised statute, there was a slight increase in the proportion of transferred cases that did satisfy the [offense] criteria—from 22.2% before enactment to 34.5% after enactment." *Id.* at 195. Furthermore, the adoption of prima facie offense criteria for waiver seems to have had little impact on the numbers or characteristics of youths criminally prosecuted in Minnesota. *Id.* at 197-98. Osbun and Rode conclude that "[d]espite its defects and potential for abuse, the traditional discretionary process used by prosecutors and juvenile court judges to make waiver decisions appears to be more successful than the objective criteria alone in identifying the more serious juvenile offenders." *Id.* at 199-200.

112. JUVENILE JUSTICE STUDY COMM'N, *supra* note 108, at 22. Despite this conclusion, the Commission again did not recommend alternatives, but simply reiterated its support for judicial discretion. *Id.* at 23.

113. Exec. Order No. 80-2., *reprinted in* Final Report of the Governor's Task Force on Juvenile Justice 19 (Nov. 1981) (on file with author).

equally.[114] It also found that juvenile detention facilities often operated over capacity, in part because of a lack of objective criteria to regulate detention decisions. It thus recommended that only juveniles who pose an "imminent danger of causing serious harm to others or who have a history of not appearing for court hearings" be placed in secure detention.[115]

The Task Force found that many juveniles did not receive procedural justice.[116] To remedy these procedural deficiencies, it recommended that all citizens charged with crime receive the same constitutional rights,[117] including the right to a jury trial[118] and a public trial.[119] Finally, the Task Force noted that individualized sentencing discretion resulted in extensive disparities, with little evidence of corresponding treatment effectiveness.[120] Accordingly, it recommended proportional sentencing guidelines based on the seriousness of a juvenile's offense and prior record.[121]

In 1983, at the direction of the legislature, the Minnesota Juvenile Justice Advisory Committee awarded a grant to the State Planning Agency to appoint a Task Force to study and rec-

114. Final Report of the Governor's Task Force on Juvenile Justice, *supra* note 113, at 7 ("The Task Force . . . feels compelled to support a new emphasis on equal treatment of children in like situations.").

115. *Id.* at 8.

116. *Id.* at 10-11. A lack of statewide rules of procedure in juvenile court, substantial procedural variations between counties, and "carelessness in some courts" in adhering to due process and evidentiary standards denied juveniles procedural justice. *Id.* In 1983, the Minnesota Supreme Court promulgated uniform, statewide rules of procedure for juvenile court. *See generally* Feld, *supra* note 15 (discussing changing conceptions of juvenile courts and critiquing Minnesota procedures adopted in 1983).

117. Final Report of the Governor's Task Force on Juvenile Justice, *supra* note 113, at 5 ("[T]he basis for a fair and humane juvenile justice system in Minnesota includes provision of the same constitutional rights . . . to all citizens subject to the criminal justice system regardless of age.").

118. *Id.* at 10. The Task Force noted that jury trials would reduce the effects of judicial bias, enhance the visibility of the process, facilitate appellate court review by requiring trial judges to articulate through jury instructions their views of the applicable law, and honestly acknowledge the "punishments now hidden under terms like 'rehabilitation' and 'best interest of the child'." *Id.* at 11.

119. *Id.* at 10. The Task Force concluded that confidential juvenile court hearings frustrate accountability and foster abuses: "[P]rivate trials can serve to establish a 'star chamber' atmosphere in court proceedings. Currently actions by judges and the faults and weaknesses of the juvenile system occur without the benefit of public scrutiny . . . ." *Id.* at 12.

120. *Id.* at 13.

121. *Id.* The 1980 Governor's Task Force did not introduce any legislation to implement its far-reaching recommendations.

ommend changes to juvenile delinquency and child protection laws. The Code Revision Task Force prepared a draft report and sponsors introduced proposed legislation in the 1986 legislative session.[122] The recommendations proposed comprehensive revision of the juvenile code and procedures for involuntary civil commitment of young people.

The Code Revision Task Force proposed major changes in the legislative purpose statement,[123] the scope of juvenile court jurisdiction[124] and pretrial detention procedures.[125] It recognized that access to counsel is fundamental to redress the imbalance of power between the individual and the state.[126] It proposed limits to judicial sentencing discretion, and required courts to impose the least restrictive disposition appropriate and sanctions proportionate to the seriousness of the offense.[127] Despite the Code Revision Task Force's proposals to convert Minnesota's juvenile courts into a "just deserts" model like adult criminal courts,[128] it did not recommend any changes any in waiver procedures or substantively rationalize transfer criteria.

The Code Revision Task Force also proposed major revisions in the process to involuntarily commit adolescents for mental health or chemical dependency "treatment."[129] Existing law provides minimal procedural or substantive protections for youths whose parents "voluntarily" commit them to restrictive

122. *See* MINN. H.F. 774, 74th Leg. (1985); MINN. S.F. 753, 74th Leg. (1985); Preliminary Draft of the Minnesota Juvenile Code Revision Task Force's Report to the Legislature (Oct. 3, 1985) (on file with author) [hereinafter Code Revision Report].

123. Code Revision Report, *supra* note 122, at 1-2.

124. *Id.* at 3-9 (proposing minimum ages for juvenile court delinquency jurisdiction).

125. *Id.* at 14-17 (proposing restrictive criteria for pre-trial detention).

126. The legislative proposals strengthened juveniles' access to an attorney at interrogation, as well as after the filing of a formal delinquency petition, and established a presumption against waiver. *Id.* at 23-25. In addition, there was a presumption against waiver. The Task Force also recommended the right to a jury trial. *Id.* at 25-27.

127. *Id.* at 28-29. The Task Force expressed concern that juvenile court judges' abuse their broad discretion to sentence in a youth's "best interests." *Id.* at 30.

128. For a discussion of continuing vitality of separate systems for juveniles and adults see generally Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120, 1133 (1977) (noting that determinate and proportional criminal sentences erode the rationale for a separate juvenile system), and Francis B. McCarthy, *Delinquency Dispositions Under the Juvenile Justice Standards: The Consequences of a Change of Rationale*, 52 N.Y.U. L. REV. 1093 (1977) (questioning the need for a separate juvenile court).

129. Code Revision Report, *supra* note 122, at 41-48.

in-patient psychiatric or chemical dependency facilities.[130] Accordingly, the Code Revision Task Force proposed provisions similar to those used to commit or admit mentally ill or chemically dependent adults to regulate the civil commitment of adolescents.[131]

130. MINN. STAT. § 253B.04. Many youths who formerly would have been status offenders, especially those who are middle-class and female, now are diverted into the private mental health or chemical dependency treatment systems by diversion, court referral, or voluntary parental commitment. Ira M. Schwartz, *Hospitalization of Adolescents for Psychiatric and Substance Abuse Treatment*, 10 J. ADOLESCENT HEALTH CARE 473, 473 (1989).

The Supreme Court in *Parham v. J.R.* ruled that the only process juveniles are due when their parents "voluntarily" commit them to secure treatment facilities is a physician's determination that it is medically appropriate. 442 U.S. 584, 609 (1979). As a consequence, most states' civil commitment laws to not provide juveniles with as stringent procedural safeguards as they do adults. *See generally* Beverly Balos & Ira Schwartz, *Psychiatric and Chemical Dependency Treatment of Minors: The Myth of Voluntary Treatment and the Capacity to Consent*, 92 DICK. L. REV. 631 (1988); Louis A. Chiafullo, *Innocents Imprisoned: The Deficiencies of the New Jersey Standard Governing the Involuntary Commitment of Children*, 24 SETON HALL L. REV. 1507 (1994); James W. Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CAL. L. REV. 840 (1974).

Many civil commitments of juveniles result from status-like social or behavioral conflicts, self-serving parental motives, and medical entrepreneurs coping with under-utilized hospitals. *See* Lois A. Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773, 774 (1988) (arguing that hospitalizing troublesome youths is generally an inappropriate way to deal with them). Coinciding with the deinstitutionalization of status offenders in Minnesota, the rate of juvenile psychiatric commitments in Minneapolis-St. Paul hospitals doubled between 1976 and 1983, from 91 to 184 youths per 100,000. Ira M. Schwartz et al., *The Hidden System of Juvenile Control*, 30 CRIME & DELINQ. 371, 375 (1984). Similarly, between 1978 and 1984 in Minnesota, juvenile psychiatric inpatients as a proportion of total inpatients increased from 16% to 26%, and juvenile chemical dependency inpatients in hospitals and treatment centers increased from 17% to 22%. Marilyn Jackson-Beeck, Institutionalizing Juveniles for Psychiatric and Chemical Dependency Treatment in Minnesota: Ten Years' Experience (Sept. 27, 1985) (unpublished report, on file with author). The combination of psychiatric hospitals seeking profits, insurance, and medicaid coverage for inpatient mental health care, and the malleability of diagnostic categories, permits deviance to be "medicalized" and troublesome children to be incarcerated without meaningful judicial supervision. *See* Schwartz et al., *supra*, at 378; Schwartz, *supra*, at 474-77; Weithorn, *supra*, at 798-808; Marc N. Sperber, Comment, *Short-Sheeting the Psychiatric Bed: State-Level Strategies to Curtail the Unnecessary Hospitalization of Adolescents in For-Profit Mental Health Facilities*, 18 AM. J.L. & MED. 251, 252 (1992).

131. *See* MINN. STAT. § 253B.04. Legislative efforts to regulate the civil commitment of minors are not unique to Minnesota. In the aftermath of *Parham*, a number of jurisdictions re-examined or revised their commitment statutes for juveniles. *See, e.g.*, Carol K. Dillon et al., *In re* Roger S.: *The Impact of a Child's Due Process Victory on the California Mental Health System*, 70 CAL. L. REV. 373, 404-13, 467-72 (1982); *see also* Lee E. Teitelbaum & James W. Ellis,

The scope of the juvenile code revisions and the proposed laws to regulate civil commitment of youths provoked massive opposition from law enforcement officials, prosecutors, juvenile court judges, court services personnel, and mental health and chemical dependency treatment providers.[132] Despite three years of hearings, research, and meetings, the Code Revision Task Force failed to mobilize a coalition for juvenile court law reform.[133]

The Minnesota Supreme Court appointed the Juvenile Representation Study Committee in 1989 to examine "the right to legal counsel in juvenile justice matters and recommend criteria for that right to the legislature."[134] The Study Committee found that most juveniles in Minnesota lack access to counsel.[135] It

---

The Liberty Interest of Children: Due Process Rights and their Application, 12 FAM. L.Q. 153 (1978) (exploring constitutional issues surrounding "voluntary" commitment of children by parents); Susan A. Turner, Comment, Parham v. J.R.: *Civil Psychiatric Commitment of Minors*, 5 J. CONTEMP. HEALTH L. & POL'Y 263, 269-73 (1989) (discussing various aspects of commitment procedures for juveniles).

132. The Minnesota Senate Judiciary Committee held 34 hours of hearings, and most of the testimony opposed various aspects of the legislation. *See, e.g.*, Mike Kaszuba, *Revised Juvenile Code Passed by Senate Panel*, STAR TRIB. (Minneapolis), Feb. 18, 1986, at 2B (opponents of bill offered more than 100 amendments to derail legislation); Mike Kaszuba, *Juvenile-Code Revision Appears in Trouble*, STAR TRIB. (Minneapolis), Feb. 20, 1986, at 1B (legislation reflects three years of testimony and hearings to make juvenile justice system more accountable and to prevent improper placement of juveniles); Sam Newlund, *Juvenile Code Reform Moves in Legislature After Fine Tuning*, STAR TRIB. (Minneapolis), at 1B (jury trials opposed by many juvenile court judges and prosecutors).

133. Its only legislative achievement was to open to the public delinquency hearings for 16- and 17-year-old youths charged with felony offenses. *See* MINN. STAT. § 260.155(1) (1986); *supra* text accompanying note 70. The fruitless experience of the Code Revision Task Force influenced the 1993 Juvenile Justice Task Force in preparing its policy recommendations.

134. The 1989 legislature authorized the Minnesota Supreme Court to create a Juvenile Representation Study Committee. 1989 Minn. Laws 335, art. 3, § 43. On October 16, 1989, Chief Justice Peter S. Popovich appointed a 13-member committee. Order Establishing the Juvenile Representation Study Committee and Appointing Members, NO-89-1824 (Minn. Oct. 16, 1989).

135. [I]t appears that in Minnesota, like many other states, less than half of all juveniles adjudicated delinquent receive the assistance of counsel to which they are constitutionally entitled. In 1984, only 46.8% of juveniles were represented. In 1986, only 45.3% [of] youths had lawyers. And in 1988, only 47.8% had attorneys at their adjudication. Professor Feld reported enormous county-by-county variations in rates of representation within Minnesota, ranging from a high of 100% to a low of less than 5%. A substantial minority of youths removed from their homes (30.7%) and those confined in state juvenile correctional institutions (26.5%) lacked representation at the time of their adjudication and disposition.

also reported geographic disparities in rates of representation.[136] The Study Committee concluded that most juveniles were unrepresented because juvenile court judges found that they waived their right to counsel. In Minnesota, as in most states, courts use the adult standard of "knowing, intelligent, and voluntary" waiver under the "totality of the circumstances."[137] The Study Committee determined that allowing juveniles to relinquish their right to counsel under the "totality of the circumstances" was an undesirable policy.[138] The questionable validity of many juveniles' waiver of the right to counsel raises collateral legal issues.[139]

The Study Committee recommended mandatory, non-waivable appointment of counsel for juveniles charged with felony or gross misdemeanor offenses, and in any proceeding that may lead to out-of-home placement.[140] It recommended mandatory consultation with counsel prior to any waiver of counsel by juveniles charged with misdemeanor offenses.[141] Finally, it recommended the creation of a juvenile appellate division within the Office of State Public Defender.[142]

Although the Study Committee expected its proposals to more than double the costs of defense representation, it was unable to estimate either the current expenditures on defense rep-

---

JUVENILE REPRESENTATION STUDY COMM., REPORT TO THE MINNESOTA SUPREME COURT 11 (1990) [hereinafter STUDY COMM., REPORT]; *see infra* notes 646-715 and accompanying text.

136. STUDY COMM., REPORT, *supra* note 135, at 12 (stating that urban youths are most likely to be represented and that the majority of rural youths charged with felony offenses did not have access to counsel).

137. *See generally* Feld, *supra* note 15, at 169-90; *infra* note 665 and accompanying text. Prior to the 1994 amendments, the Minnesota Legislature also believed that youngsters could make "knowing and intelligent" waiver decisions without parental concurrence or consultation with an attorney. MINN. STAT. § 260.155(8) (1992) ("Waiver of any right . . . must be an express waiver intelligently made by the child after the child has been fully and effectively informed of the right being waived.").

138. STUDY COMM., REPORT, *supra* note 135, at 15 (finding that waiver increases judicial convenience and encourages juveniles to accept responsibility for their actions).

139. Because appointment of counsel or a valid waiver is a constitutional prerequisite to incarceration, removal from home or confinement of an unrepresented juvenile may be improper; similarly, appointment of counsel or a valid waiver may be a prerequisite to use prior convictions to enhance subsequent sentences as a juvenile or as an adult. *See infra* notes 704-709 and accompanying text.

140. STUDY COMM., REPORT, *supra* note 135, at 19.

141. *Id.* at 21.

142. *Id.* at 22.

resentation, or to predict their fiscal impact.[143] As a result of Minnesota's 1991 budget deficit and fiscal austerity, the legislature did not enact any of the Study Committee's recommendations. The 1993 Juvenile Justice Task Force later adopted the Study Committee's recommendations and the 1994 legislature enacted its proposals.[144]

The Minnesota Supreme Court's Race Bias Task Force[145] examined the impact of judicial administration on racial minorities between 1990 and 1993, and created a Juvenile and Family Law Committee to investigate, among other things, race-related differences in juvenile courts.[146] It also identified significant disparities in the pre-trial detention and post-conviction disposition of minority youths in Minnesota's urban and non-metropolitan juvenile courts.[147] It attributed the racial and geographic

143. *Id.* at 23. Although the Committee could not estimate current expenditures, it recognized that total costs would more than double, because fewer than 50% of those juveniles entitled to representation received counsel, and because the increased presence of defense lawyers would entail additional appearances by county attorneys as well. The Committee recommended further study to determine the costs of implementing its recommendations. *Id.*

144. *See infra* notes 689-700 and accompanying text.

145. The Minnesota Legislature and the Supreme Court created the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System in December 1990. The 36-member Race Bias Task Force, chaired by Supreme Court Justice Rosalie Wahl, examined whether "statutes, rules, practices or conduct work unfairness or undue hardship on minorities in our courts" and proposed reform measures to eliminate racial bias and evaluate their effectiveness. MINNESOTA SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYS., FINAL REPORT 1 (May 1993) [hereinafter RACIAL BIAS, FINAL REPORT].

146. *Id.* at 2. Concurrently with Minnesota's efforts, many other states created similar task forces or commissioned research to examine racial bias and those investigations consistently revealed racial disparities in juvenile justice administration. *See infra* note 539 (discussing research and data regarding racial bias in juvenile courts).

147. RACIAL BIAS, FINAL REPORT, *supra* note 145, at 108. Although most delinquency petitions lacked race-specific information, the Race Bias Task Force analyzed data from Hennepin County where 80% of the cases included race data, and from 15 non-urban counties that collected sufficient data for racial analyses. *Id.* at 98. In the Hennepin County juvenile court sample, the largest proportion of minority juveniles were African-Americans (29.4%) and Native American (8.5%), while the largest proportions of minority youths in the outstate sample were Native American (16.4%) and Hispanic (4.0%). *Id.* at 2 app. D.

The Race Bias Task Force found significant geographic disparities in juvenile detention and home removal practices between Hennepin and the outstate counties. *Id.* at 17. More disturbingly, the Task Force research also "uncovered a significant association between race and detention rates in both the Hennepin and outstate samples." *Id.* at 18.

For example, the Race Bias Task Force study of juvenile court case processing data found that for

disparities in detention and sentencing to the discretion inherent in juvenile justice decision-making.[148] The 1993 Juvenile Justice Task Force subsequently re-affirmed the Race Bias Task Force's recommendations to reduce racial disparities at detention.[149]

Spanning a decade and a half, five state study committees and task forces examined Minnesota's juvenile courts. Regardless of their political affiliations or the source of their appointments, these groups identified similar problems. All recognized the profound procedural deficiencies of juvenile courts, espe-

---

> first-time delinquents in Hennepin County, there is, in fact, a significant relation between race and detention. . . . *Minority youths are detained at nearly two and one-half times the rate of whites* in each of these [offense] categories. Even for repeat delinquents within the same three offense categories a higher rate of detention existed.

Id. at 101-02.

The Race Bias Task Force findings strongly corroborated my research that reported urban minority juveniles were disproportionately at risk for pre-trial detention and home removal. Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1261-74, 1311-17 (1989). Controlling for the seriousness of the present offense and prior record, I reported that minority juveniles were more than twice as likely to be detained as white juveniles. *Id.* at 1271-74. Holding other variables constant, black and Native American juveniles were also more likely to be removed from their homes than were similarly situated white youths. *Id.* at 1314-17.

This research analyzed the impact of counsel on juvenile justice administration and reported that in Hennepin County, minority juveniles were more likely to be represented than were whites. *Id.* at 1266-68. Unfortunately, that research also "provides strong and consistent evidence that representation by counsel redounds to the disadvantage of a juvenile." *Id.* at 1330. The Race Bias Task Force noted that "[t]he Courts should use great care so as not to be influenced by the pre-adjudication determination in making a final disposition. *This merits further study by the Juvenile Justice Task Force of the Supreme Court.*" RACIAL BIAS, FINAL REPORT, *supra* note 145, at 109 (emphasis added).

The Race Bias Task Force findings also corroborated that a pattern of "justice by geography" prevailed in which geographic locale affected juvenile courts' detention and sentencing practices. *See* Feld, *supra* note 67, at 162.

148. The report stated:

> The juvenile court system still operates, to a certain degree, under the model of 'parens patriae'. Judges have a great deal of discretion to do whatever they feel is in the best interest of the juvenile. There are no rules that stipulate juveniles who are charged with similar offenses must be treated in a like manner . . . . Regardless of whatever good intentions the juvenile court system may possess, it appears that it is in need of a serious policy evaluation at this time.

RACIAL BIAS, FINAL REPORT, *supra* note 145, at 19 app. D.

149. The Juvenile Justice Task Force "strongly endorses the recommendations put forth by The Task Force on Racial Bias and recommends that the Legislature ensure resources are available for the implementation of The Racial Bias Task Force recommendations." TASK FORCE, FINAL REPORT, *supra* note 2, at 67.

cially the inadequate access to defense representation. Furthermore, the 1980 Governor's Task Force and the 1985 Code Revision Task Force recognized that juvenile courts perform the same social control functions as criminal courts, and recommended procedural parity for juveniles, including the right to a jury trial.

The various groups also agreed that juvenile court judges' individualized discretion, whether exercised to detain youths, to sentence them in their "best interests," or to assess their "amenability to treatment" and transfer them to criminal court, produced inconsistent and unequal results, as well as racial and geographic disparities. Several groups recommended objective "risk assessment" instruments or sentencing guidelines to remedy the ills of individualization at detention and disposition. These issues remained unresolved as the 1994 legislature confronted the central issues of juvenile administration against a backdrop of escalating youth violence.

B. THE 1993 JUVENILE JUSTICE TASK FORCE MEMBERSHIP AND OPERATION

The legislature named its members to the 1993 Juvenile Justice Task Force shortly after it passed the 1992 Omnibus Crime Bill, and Chief Justice A.M. Keith made his appointments by mid-summer 1992.[150] At its first meeting, the Task Force elected Justice Sandra S. Gardebring to serve as chair.[151] The Task Force formed subcommittees to address the bundles of issues that the legislative charge posed. Although many Task Force members joined one or more subcommittees, a smaller group of more active Task Force members overlapped several working groups, heavily influenced the subcommittee delib-

150. Due to delays in appointment by Governor Arne Carlson, however, the supreme court did not issue its order to establish the Task Force until October 22, 1992. The first meeting of the 20-member Task Force convened on November 24, 1992. It was apparent at that first meeting that members from "communities of color" were underrepresented in a group dealing with crime and justice issues that disproportionately affect minority youths. Within two months, the Task Force added five additional members to more adequately reflect the racial make-up of juvenile courts' clientele. When the legislature added examination of secure juvenile facilities to the Task Force's charge in May 1993, it appointed two additional legislative members to the Task Force.

151. Minutes of the Juvenile Justice Task Force 4 (Nov. 24, 1992) (on file with author).

erations and discussions, and coordinated the policy recommendations.[152]

Throughout 1993, the Task Force met monthly, and subcommittees met more frequently. Before its January 15, 1993, meeting, each subcommittee drafted a "charge" to define the policy issues that the legislative mandate posed, identify types and sources of information necessary to inform Task Force discussions, and formulate a work-plan. At subsequent meetings, juvenile justice practitioners, state data analysts, community activists, and scholars provided information, research, and data both to the subcommittees and to the Task Force. The Task Force conducted focus group meetings,[153] public hearings,[154] and site visits.[155]

The Task Force gathered information about juvenile court sentencing practices. A representative from the state of Washington described that state's juvenile guidelines, which impose

152. The Task Force's core "working group" consisted of: Justice Sandra Gardebring, executive committee members Barry Feld, John Stuart, Judge Philip Bush, Judge Larry Jorgenson, James Hayes, and Richard Quick, and Task Force members Roxanne Bartsh, Freddie Davis, Judge Leslie Metzen, and Karel Moersfelder. Although the legislature appointed six legislative members, only Sen. Jane Ranum and Rep. Bill Macklin actively participated in the process.

153. Members of the Task Force held focus group meetings with representatives of the following groups: prosecutors, corrections personnel, juvenile defense attorneys, members of the Supreme Court's Racial Bias Task Force, the Family and Juvenile Law Committee, law enforcement professionals, treatment providers and health care workers, education leaders, guardians ad litem and social service agency personnel, parents of juvenile offenders, and victims of juvenile crime. *See* Advisory Task Force on the Juvenile Justice System, Summary Report on Focus Group Meetings: February 2, 1993 to March 4, 1993, at 1-2 (unpublished report, on file with author).

154. In 1993 the Task Force held public hearings at eight locations around Minnesota. The testimony at public hearings moved Task Force members, as victims of juvenile crime and those whose children the juvenile justice process victimized described their experiences. *See, e.g.*, Kevin Diaz, *Juvenile Justice System Takes Verbal Beating*, STAR TRIB. (Minneapolis), Mar. 26, 1993, at 1B (describing testimony by relatives of victims and juvenile delinquents). One recurring theme was the juvenile courts' failure to respond to "children of color" adequately and justly. Minutes of the Juvenile Justice Task Force 8 (Apr. 23, 1993) (on file with author).

155. In spring and early summer 1993, Task Force members made site visits to a number of juvenile detention and correctional facilities in Minnesota. Task force members toured facilities and held focus group meetings with incarcerated juveniles. In addition, several Task Force members met with a group of juvenile court judges in Madison, Wisconsin, on August 25 and 26, to assess Wisconsin's experience with providing jury trials for juveniles. *See infra* notes 642-643 and accompanying text (discussing the impact of jury trial on juvenile courts).

determinate and proportional sentences based on a youth's age, the seriousness of the offense, and prior record.[156] Representatives from the Dodge-Fillmore-Olmsted ("DFO") Department of

156. WASH. REV. CODE ANN. § 13.40.010 (West 1993). The state of Washington's "just deserts" sentencing principles represent a dramatic departure from traditional juvenile court sentencing practices. *See generally* Jeffrey K. Day, Comment, *Juvenile Justice in Washington: A Punitive System in Need of Rehabilitation*, 16 U. PUGET SOUND L. REV. 399 (1992) (criticizing Washington's system); Feld, *supra* note 9 (analyzing the trend toward punishment); Richard G. Patrick & Timothy T.A. Jensen, *Changes in Rights and Procedures in Juvenile Offense Proceedings*, 14 GONZ. L. REV. 313 (1979); Syposium, *Juvenile Law*, 14 GONZ. L. REV. 285 (1979) (symposium on the revised Washington juvenile code); Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503 (1984); Report by Anne Schneider & Donna Schram, A Comparison of Intake and Sentencing Decision-Making Under Rehabilitation and Justice Models of the Juvenile System (Mar. 1983) (unpublished report, on file with author) [hereinafter Schneider & Schram, Intake and Sentencing Decision-Making]; Report by Anne Schneider & Donna Schram, A Justice Philosophy for the Juvenile Court (Mar. 1983) (unpublished report, on file with author) [hereinafter Schneider & Schram, Justice Philosophy].

Under the Washington guidelines, presumptive sentences for juveniles are determinate and proportional to the age of the offender, the seriousness of the offense, and the juvenile's prior record. *See* WASH. REV. CODE ANN. § 13.40.010(2)(d). *See generally* Patrick & Jensen, *supra*, at 313 ("The juvenile will no longer be treated as a delinquent possessing a misguided perception of society; rather, he will be classified as an offender of society who must be dealt with in a like manner."); Bruce Fisher et al., Institutional Commitment and Release Decision-Making for Juvenile Delinquents: An Assessment of Determinate and Indeterminate Approaches, Washington State—A Case Study 1-15 (1985) (unpublished study, on file with author). The Washington juvenile code creates three categories of offenders—serious, middle, and minor—with presumptive sentences and standard ranges for each. WASH. REV. CODE ANN. § 13.40.020 (West Supp. 1995). A sentencing guidelines commission developed dispositional and presumptive length-of-stay guidelines that are proportional to the seriousness of the present offense, age, and prior record. *Id.* § 13.40.030(1)(a). The sentencing judge may either impose a sentence within the standard prescribed range for that offense record, or deviate from the presumptive sentence by finding with "clear and convincing evidence" that following the dispositional guidelines would produce a "manifest injustice." *Id.* § 14.40.160(1).

Evaluations of the revised Washington code concluded that it improved juvenile sentencing practices: "Sentences in the post-reform era were considerably more uniform, more consistent, and more proportionate to the seriousness of the offense and the prior criminal record of the youth than were sentences in the rehabilitation system which existed before 1978." Schneider & Schram, Intake and Sentencing Decision-Making, *supra*, at 76.

Despite increased uniformity, certainty, and proportionality at sentencing, however, some professional commentators criticize Washington's juvenile sentencing provisions. Although institutional commitments declined in the first years following the new code's adoption, the number of incarcerated youths increased as more youths acquired extensive prior records. Allen F. Breed & Robert L. Smith, Reforming Juvenile Justice: A Model or an Ideology 25-27 (n.d.) (on file with author). The average length of stay has dropped to keep pace with

Community Corrections described the juvenile dispositional guidelines that juvenile courts used in those counties.[157] A representative from Oregon described its "restorative justice" or "balanced approach" to sentencing juveniles which gives equal weight to community protection, accountability, and individual competency development.[158]

The Task Force also received information about waived juvenile offenders sentenced for felonies in adult court.[159] Profes-

---

the increase in commitments. *Id.*; *see also* Schneider & Schram, Intake and Sentencing Decision-Making, *supra*, at 24-30.

Despite the legislation's effort to assure equality and uniformity, another recent evaluation reveals that significant racial sentencing disparities remain. At every stage of juvenile justice administration—referral, charging, detention, adjudication, conviction, sentencing, and confinement—minority youths, especially African-American juveniles, receive disproportionately harsher consequences than do white youths. *See* George S. Bridges, Racial Disproportionality in the Juvenile Justice System: Final Report 77-79 (1993) (unpublished report, on file with author)

157. Minutes of the Juvenile Justice Task Force 3-5 (Feb. 26, 1993) (on file with author); *see* Juvenile Dispositional Guidelines Project Comm., Juvenile Dispositional Guidelines (Nov. 1986) (on file with author). The DFO juvenile dispositional guidelines are similar to Minnesota's adult sentencing guidelines. "[D]ecisions relating to the basic grid, factors used for mitigating and aggravating to justify departure, general philosophical statements as well as the format have been taken from the adult guidelines." *Id.* at 2. Significantly, however, the juvenile dispositional guidelines attempt to develop a "dual component" system in which the seriousness of a youth's offense and delinquency history establish a "sanction level" and which allow a "treatment decision to be made within the sanction level." *Id.* at 1. The DFO juvenile guidelines calculate sentences in "units," and a judge may impose alternative dispositions within equivalent units to accomplish treatment objectives. *Id.* at 13. "[S]even alternatives are regularly used and can be equated . . . as follows; community work service hours, fines, counseling hours, street oriented supervision, restricted probation, regular probation and placement out of the home." *Id.* at 13. For example, under the guidelines, a typical first-time misdemeanor shoplifter could receive a disposition of either 20 hours of community service, a $70 fine, 10 hours of counseling, or 60 days of regular probation. *Id.* at 24.

An evaluation of the juvenile dispositional guidelines found that they "seem to be doing what they were intended to do—provide consistent and uniform dispositions while addressing the specific needs of the juvenile offender." Evaluation Program, DFO Community Corrections Sys., Juvenile Dispositional Guidelines: A Look at Five and One-Half Years 1986 to June 1991, at 2 (1992) (unpublished report, on file with author).

158. *See* Minutes of a Special Meeting of the Juvenile Justice Task Force 2-4 & attachment I (May. 14, 1993) (on file with author). For a description of this approach see *infra* note 566 and accompanying text.

159. *See* Minnesota Sentencing Guidelines Comm'n, Sentencing Practices: Juvenile Offenders Sentenced for Felonies in Adult Court (1993). The Minnesota Sentencing Guidelines Commission collects data on waived juveniles convicted of felony offenses in adult criminal courts. *Id.* at 1. The number of juveniles sentenced as adults rose from 85 in 1981 to 107 in 1991, an increase of 26%. *Id.* Although the majority of juveniles sentenced as adults

sor Richard Frase analyzed the Minnesota Sentencing Guidelines' success in reducing disparity and increasing uniformity in adult sentencing, while preserving flexibility. He cautioned, however, that a failure to implement guidelines carefully could increase severity and correctional overcrowding.[160]

The Task Force examined juvenile rehabilitative programs. Experts reviewed the evaluation literature, reporting little empirical evidence of treatment effectiveness,[161] but emphasizing that much evaluation research lacks methodological rigor.[162]

---

were property offenders (62% in 1991), by virtue of prosecutorial and judicial selection the relatively few waived juveniles typically have been convicted of more serious offenses than average adult felons. For example, in 1991, 35% of juveniles as compared with 25% of adult offenders were convicted of crimes against the person. *Id.* at 2. Reflecting the trends in youth violence, "[b]etween 1981 and 1991, the number of juveniles sentenced in adult court for person offenses increased by 37%; the increase for property offenders was 18%." *Id.* The proportion of juveniles sentenced for homicide and sex offenses reflected the largest proportion of the increases. *Id.* Because the juveniles sentenced as adults were convicted of higher severity level offenses, they received longer sentences than did adults. Juveniles received an average of 53.4 months compared with 45.1 months for adults (18% longer). *Id.* at 4.

Despite public fears of youth violence, most juveniles certified to stand trial as adults in 1992 were charged with property offenses rather than crimes against the person. Sharon A. Krmpotich, Graphic Summary of Reference Hearings in Juvenile Court (Apr. 23, 1993) (on file with author). In 1992, 101 juveniles were certified for trial as adults. *Id.* Of those transferred youths, more than half (52%) were charged with property crimes, about one-third (35%) were charged with crimes against the person, and the remainder (13%) were charged with miscellaneous offenses ranging from weapons violations to disturbing the peace to traffic violations. *Id.* Because the majority of juveniles convicted as adults did not commit crimes against the person and had a lower criminal history score than adult defendants,

> the imprisonment rate for juveniles was slightly lower than for adults. . . . Of the cases sentenced in 1991 for which the guidelines recommended prison, the court departed and placed the offender on probation in 58% of the cases involving juveniles and in 34% of the cases involving adults. . . . [T]he reasons cited by the courts for departing from recommended prison sentences for juveniles included: the age of the offender, the offender's amenability to treatment, and the recommendation or agreement of the prosecution.

MINNESOTA SENTENCING GUIDELINES COMM'N, *supra*, at 3.

160. Minutes of the Juvenile Justice Task Force 7 (Feb. 26, 1993) (on file with author); *see* Richard S. Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQ. J. 1, 40 (1993) (summarizing the three achievements of Minnesota's Sentencing Guidelines). *See generally* Richard S. Frase, *The Roles of the Legislature, the Sentencing Commission, and Other Officials Under the Minnesota Sentencing Guidelines*, 28 WAKE FOREST L. REV. 345 (1993) (evaluating success of the Guidelines, through 1989, in achieving the Commission's stated or apparent goals).

161. *See infra* note 483 (citing studies on the effectiveness of treatment).

162. Dr. David Ward emphasized that in the absence of strong evidence of effectiveness, all treatment programs should be considered experimental and

Echoing the findings of earlier Task Forces, some witnesses strongly cautioned the Task Force against perpetuating the individualized treatment model, and instead urged offense-based, "just deserts" sentencing for juveniles.[163]

The Task Force also pondered strategies to reduce racial disparities in juvenile justice administration.[164] The Minnesota Supreme Court's Race Bias Task Force documented that urban and non-metropolitan juvenile courts detained and sentenced minority youths differently than white youths with similar offenses and prior records.[165] The likely disproportionate impact on minority youths of changes in waiver policies deeply disturbed Task Force members.

Another Task Force meeting focused on the delivery of legal services in juvenile courts.[166] Although state law and court rules provide that juveniles have a right to counsel,[167] rates of representation continue to vary substantially around the state.[168] In 1992, for example, fewer than half of all delinquents received the assistance of counsel, and in five of Minnesota's ten judicial districts, lawyers accompanied fewer than forty percent of juveniles.[169] Differences in methods of delivering and funding legal services, judicial advisories of the right to counsel, and judicial policies regarding juveniles' waiver of counsel account for most of the variation in rates of representation.[170]

---

subject to rigorous evaluation by people other than those conducting the programs, and that all program funding should include a component for program evaluation. Minutes of the Juvenile Justice Task Force 5 (July 23, 1993) (on file with author).

163. *Id.* at 5. *See generally* INSTITUTE OF JUDICIAL ADMIN., ABA, JUVENILE DELINQUENCY AND SANCTIONS 34 (1980) (discussing determinate and proportional sentences based on offense); Feld, *supra* note 9 (discussing shift in juvenile justice practice from a rehabilitation-treatment model to a punishment model).

164. Minutes of the Juvenile Justice Task Force 2-5 (Mar. 26, 1993) (on file with author).

165. *See supra* notes 146-148 and accompanying text.

166. Minutes of the Juvenile Justice Task Force 4-7 (Apr. 23, 1993) (on file with author).

167. *See* MINN. STAT. § 260.155(2); MINN. R. JUV. P. 4, *in* MINNESOTA RULES OF COURT (West 1995) [hereinafter MINNESOTA RULES].

168. *See supra* notes 135-136 and accompanying text.

169. Sharon A. Krmpotich, 1991-92 Attorney Representation Rates: Juvenile Delinquency Cases at Adjudication 1 (n.d.) (on file with author).

170. *See supra* text accompanying notes 137-138 (discussing waiver of counsel in juvenile proceedings). The Task Force surveyed county court administrators and obtained copies of the rights advisories that juveniles received with their summons and petition. The information contained in those advisories varied considerably. The legal language often was difficult for a typical juvenile to understand. *Cf.* Karen Saywitz et al., *Children's Knowledge of Legal Terminol-*

The Task Force also examined the need for secure juvenile facilities for both pre- and post-adjudicated juveniles.[171] The Department of Corrections identified the need for more secure pre- and post-adjudication facilities, primarily in Hennepin County, where the detention facility experiences chronic overcrowding.[172] Experts analyzed secure facility policy options. They generally opposed large, physically-secure facilities, and instead endorsed small, staff-secure facilities that use rigorous risk-assessment criteria to screen placements and innovative programs for those few juveniles who require security.[173]

The Task Force held two two-day retreats in the fall of 1993 to formulate its legislative recommendations. The retreats provided Task Force members their first opportunity as a group to discuss substantive juvenile justice policy, vote for particular policies, and coordinate subcommittee recommendations. Although Task Force members initially held widely divergent policy views, they developed considerable mutual respect and tolerance of different perspectives as a result of the months of working together in subcommittees, at Task Force meetings, and at public hearings and site visits. Task Force members

---

ogy, 14 LAW & HUM. BEHAV. 523, 531-34 (1990) (examining age-related differences in children's understanding of legal constructs and concluding that children's abilities to define legal terms develop gradually with age); Trudie F. Smith, *Law Talk: Juveniles' Understanding of Legal Language*, 13 J. CRIM. JUST. 339, 350 (1985) (concluding that juveniles' understanding of legal language is moderate and confined to procedural terms, and that they do not understand technical terms or specialized vocabulary of legal profession).

Parents' financial ability to pay may actually discourage representation, because recoupment provisions authorize a court to appoint counsel for a child at public expense, and then seek reimbursement for attorney's fees expended on behalf of the child. MINN. STAT. § 260.251(4) ("[T]he court may inquire into the ability of the parents to pay for such counsel's services and, after giving the parents a reasonable opportunity to be heard, may order the parents to pay attorney's fees."); *see In re* Welfare of M.S.M., 387 N.W.2d 194, 199-200 (Minn. Ct. App. 1986) (ordering parents to reimburse state $3191).

171. *See* 1993 Minn. Laws 146, art. 2, § 4, subd. 1 (requesting that the Task Force assess the state's need for juvenile correctional facilities, including secure facilities).

172. Minutes of the Juvenile Justice Task Force 5-7 (June 25, 1993) (on file with author); Report by the Juvenile Detention Alternatives Initiative Committee, to the Hennepin County Board of Commissioners and the Fourth Judicial District 1 (Feb. 1994) (unpublished report, on file with author) (noting that Hennepin detention center housed as many as 110 juveniles in a facility with a licensed capacity of 87 beds, and that in 1993 the facility was overcrowded 75% of the time).

173. Minutes of the Juvenile Justice Task Force 3-4 (Aug. 27, 1993) (advocating rigorous risk assessment to assure that only juveniles who pose long term public safety risks are placed in physically secure facility) (on file with author).

were able to disagree in a remarkably civil fashion, and ultimately achieved a surprisingly high degree of consensus. Chair Justice Gardebring exercised strong leadership to foster unanimity and enable the Task Force to speak to the legislature from a unified position. Throughout the legislative process, Task Force members emphasized that its recommendations were a "package deal," and that if legislators attempted to pass "get tough" sentencing provisions without enacting and funding corresponding procedural reforms, for example, the proposal's balance and coherence would unravel.

The Task Force held its final substantive meeting on November 19, 1993. It adopted recommendations to create several small, regional secure facilities, and to change legislative and judicial policies affecting data privacy, juvenile court statistics, pre-trial diversion, and racial disparities in juvenile justice.[174] The Task Force approved the draft outline of the *Final Report*. It identified various interest groups whom the proposed legislation would affect and developed a strategy to enlist their support for the Task Force's legislative recommendations.[175]

The Task Force released its *Final Report* at a press conference timed to coincide with its presentation of recommendations to the legislature.[176] Task Force members met with editorial

174. *See* TASK FORCE, FINAL REPORT, *supra* note 2, at 61, 67-68.

175. The Executive Committee identified more than 60 interest groups and individuals whose support would be crucial to the successful adoption of the legislation. The Committee then assigned Task Force members to meet with and brief those groups and individuals on the proposals and elicit their support. *See* Memorandum of Sandra Gardebring, Chart of Task Force Contacts (Dec. 3, 1993) (on file with author). Task Force members met with representatives of various juvenile justice constituencies, including those involved with juvenile prosecution and defense, members of the judiciary, law enforcement agencies, divisions of state and local government, probation and corrections associations, communities of color such as the Urban League and Urban Coalition, and a variety of civic organizations, and with the legislative leadership and committee chairs in the Minnesota House and Senate. *Id.*

Task Force members began to consult and coordinate legislative strategies with many of these groups as Task Force policy recommendations began to emerge in October 1993. *See, e.g.*, Attorney General et al., 1994 DFL Legislative Proposals, Protection, Punishment, Prevention (on file with author) (outlining legislative policies proposed by the Minnesota Attorney General and Democratic members of the Minnesota House and Senate calling for presumptive certification, and the creation of a serious youth offender sentencing category, as recommended by the Task Force); Dane Smith, *DFLers Target Crime Committed by Juveniles in New Crime Package*, STAR TRIB. (Minneapolis), Dec. 1, 1993, at 1B (outlining DFL proposals).

176. Jack B. Coffman, *Panel Proposes More Juvenile Lockups*, ST. PAUL PIONEER PRESS, Jan. 19, 1994, at 1C, 14C (discussing Task Force recommendations); Kevin Diaz, *Tougher Role Seen for Juvenile Courts*, STAR TRIB.

boards of the major Twin Cities newspapers and garnered editorial endorsement of the proposals.[177] Members of the Task Force, especially Justice Gardebring and Hennepin County Juvenile Court Judge Philip Bush, met regularly with the House, Senate, and Conference committees throughout the legislative session. Both the Senate and House held hearings at which members of the Task Force and the public testified. After the respective houses approved their versions of the bill, a conference committee met over several days to resolve policy differences between the two bills. Senator Jane Ranum and Representative William Macklin, both active members of the Task Force, ably presented Task Force policy positions in their respective chambers and in conference.

III. THE TASK FORCE PROPOSES AND THE LEGISLATURE DISPOSES

The legislature charged the Task Force to recommend policies regarding waiver of juveniles to criminal courts, juvenile court sentencing practices, the use of juvenile records to sentence young adult criminal offenders, the need for secure facilities, and procedural safeguards in juvenile courts.[178] The most significant substantive legislative changes affect the sentencing of youths as adults and as juveniles. They reflect an age and offense-based continuum of controls from ordinary juvenile delinquency through extended juvenile court jurisdiction to adult prosecution.

This Section provides some legal context and analyzes the Task Force's recommendations and ensuing legislation. Part A examines the substantive criteria and processes used to certify some youths for adult criminal prosecution. Part B analyzes the extended jurisdiction juvenile prosecutions that expand the sentencing powers of juvenile courts. Part C appraises the exclusion of first degree murder from juvenile court jurisdiction. Part

(Minneapolis), Jan. 19, 1994, at 1B ("[T]ask force is recommending that the Legislature make it easier to prosecute serious juvenile offenders as adults, and at the same time grant them more rights.").

177. *See Fighting Crime: How to Capture an Aspiring Crook*, STAR TRIB. (Minneapolis), Feb. 8, 1994, at 10A (Task Force's recommendations "could go far to heighten accountability for young lawbreakers . . . [and] fulfill a societal need to control viciousness and protect the innocent"); *In Reforming System, Maintain Balance*, ST. PAUL PIONEER PRESS, Jan. 21, 1994, at 8A (Task Force adhered to balanced strategy between punishing and preventing crime, by doing both vigorously).

178. *See supra* notes 91-92 and accompanying text (quoting Task Force's statutory charge).

D considers the use of juvenile delinquency and EJJ convictions to enhance the sentences of young adult offenders. Part E critiques juvenile court sentencing of ordinary delinquent offenders. Finally, Section F probes the procedural implications of the substantive sentencing policy changes. Where the 1994 legislature simply enacted a Task Force recommendation without significant change, I will simply cite the corresponding statutory provision. Where the legislation deviates from Task Force recommendations, I will analyze the policy differences more extensively.

A. Certifying Juveniles for Adult Criminal Prosecution

Whether to waive a juvenile to criminal court for prosecution as an adult is the single most important sentencing decision that juvenile court judges make. In *Kent v. United States*, the United States Supreme Court held that due process requires some procedural protections for juveniles in judicial waiver hearings.[179] Subsequently, in *Breed v. Jones* the Court applied the Constitution's Double Jeopardy provisions to the adjudication of juvenile offenses and required states to decide whether to persecute a youth as a juvenile or adult before trial on the merits of the charge.[180]

Although *Kent* and *Breed* provide the procedural framework for judicial waiver-sentencing decisions, the substantive bases of waiver pose the principal difficulty. Most jurisdictions allow juvenile court judges to waive based on a discretionary assessment of a youth's "amenability to treatment" or "dangerousness." The

179. 383 U.S. 541, 554 (1966). The Court concluded that the loss of the special protections of the juvenile court—private proceedings, confidential records, and protection from the stigma of a criminal conviction—was a "critically important" decision that required a hearing, assistance of counsel, access to social investigations and other records, and written findings and conclusions capable of review by a higher court. *Id.* at 554-57; *see* Monrad G. Paulsen, Kent v. United States*: The Constitutional Context of Juvenile Cases*, 1966 Sup. Ct. Rev. 167, 182-83 (criticizing *Kent*'s requirements as intrusive upon a juvenile court's exercise of discretion).

180. 421 U.S. 519, 541 (1975). *Breed* posed the issue of whether the Double Jeopardy Clause of the Fifth Amendment prohibited adult criminal re-prosecution of a youth after a prior conviction in juvenile court. *Id.* at 541. The Court resolved the question by establishing a functional equivalence between an adult criminal trial and a delinquency proceeding. *Id.* at 531. The Court described the virtually identical interests implicated in a delinquency hearing and a traditional criminal prosecution, " 'anxiety and insecurity,' " a " 'heavy personal strain,' " and the increased burdens as the juvenile system became more procedurally formalized. *Id.* at 530-31 (quoting Green v. United States, 355 U.S. 184, 187 (1955); United States v. Jorn, 400 U.S. 470, 479 (1979)).

judge appraises a juvenile's age, treatment prognosis as reflected in clinical evaluations, and threat to others as reflected in the seriousness of the present offense and prior record to decide whether to order transfer.[181] Legislatures specify waiver factors with varying degrees of precision, and frequently adopt the substantive criteria appended to the Supreme Court's decision in *Kent*.[182]

The determination of whether a youth is "amenable to treatment" or "dangerous" implicates some of the most fundamental and difficult issues of penal policy and juvenile jurisprudence.[183] Legislation mandating such an inquiry assumes that effective treatment programs exist for serious or chronic young offenders, that classification systems exist to differentiate some youths' treatment potentials or dangerousness, and that clinicians or juvenile court judges possess valid and reliable diagnostic tools

---

181. Feld, *supra* note 98, at 526. Under prior Minnesota law a juvenile court judge could transfer a youth to criminal court for prosecution as an adult on findings of probable cause and if the prosecutor demonstrated by clear and convincing evidence that the child was not suitable to treatment or that the public safety would not be served by the use of the juvenile courts. MINN. STAT. § 260.125(2)(d) (1992) (amended 1994).

182. Although the Supreme Court decided *Kent* on procedural grounds, *see supra* note 179 and accompanying text, in an appendix to the opinion, it listed substantive factors that a juvenile court might consider in waiving jurisdiction:

> 1. The seriousness of the alleged offense . . . .
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
> 3. Whether the alleged offense was against persons or against property . . . .
> 4. The prosecutive merit of the complaint . . . .
> 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates . . . are adults . . . .
> 6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
> 7. The record and previous history of the juvenile . . . .
> 8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile . . . .

Kent, 383 U.S. app. at 566-67.

183. Typical "amenability-dangerousness" judicial waiver statutes are highly problematic. No valid or reliable clinical tools exist with which to assess amenability to treatment or to predict dangerousness. The judicial discretion to make that assessment fosters a variety of abuses and inequalities. In addition, the subjective and idiosyncratic criteria that juvenile court judges use to identify "serious" offenders are not the same criteria that criminal court judges use to sentence adult offenders. The lack of integration in sentencing practices often results in a "punishment gap." Moreover, the failure to coordinate and integrate sentencing practices on both sides of the juvenile-adult line is criminologically significant because when chronic young offenders make the transition to the adult system, they are at the peak of their criminal careers.

with which to determine the appropriate disposition for a particular youth.[184] Similarly, legislation allowing juvenile court judges to waive jurisdiction because a youth poses a threat to public safety assumes that a judge can predict a youth's dangerousness. Compelling evidence, however, contradicts the premise that either courts or clinicians can validly or reliably predict a youth's future criminal behavior.[185]

Couching judicial waiver decisions in terms of amenability to treatment or dangerousness effectively grants juvenile court judges broad, standardless discretion. Such waiver provisions are the juvenile equivalent of the discretionary capital punishment statutes that the Supreme Court condemned *Furman v. Georgia*.[186] The addition of long lists of substantive factors, such as those to which the Court adverted in *Kent*, does not provide objective guidance to structure discretion. "[T]he substantive standards are highly subjective, and the large number of factors that may be taken into consideration provides ample opportunity for selection and emphasis in discretionary decisions that shape the outcome of individual cases."[187] Indeed, lists of amorphous and contradictory factors reinforce juvenile court judges' discretion and allow them selectively to emphasize one element or another to justify any decision.[188]

---

184. *See* Feld, *supra* note 98, at 529-46; Barry C. Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal"*, 65 MINN. L. REV. 167, 198 (1980).

185. NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 62 (1974); *see also* Feld, *supra* note 98, at 535-46; Amicus Curiae Brief, Am. Psychiatric Assoc., Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080) (noting that psychiatrists distort the factfinding process in capital cases because predictions of future violence do not derive from psychiatrists' specialized knowledge), *cited in* Norval Morris & Marc Miller, *Predictions of Dangerousness*, *in* 6 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 1, 32 n.32 (Michael Tonry & Norval Morris eds., 1985).

186. 408 U.S. 238, 239-40 (1972) (per curiam) (holding that discretionary state capital punishment statutes constitute cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendments). Professor Frank Zimring describes the waiver of serious juvenile offenders as "the capital punishment of juvenile justice." Franklin E. Zimring, *Notes Toward a Jurisprudence of Waiver*, *in* MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: READINGS IN PUBLIC POLICY 193, 193 (John C. Hall et al. eds., 1981). Zimring notes that "[c]apital punishment in criminal justice and waiver in juvenile justice share four related characteristics: (1) low incidence, (2) prosecutorial and judicial discretion, (3) ultimacy, and (4) inconsistency with the premises that underlie the system's other interventions." *Id.*

187. Zimring, *supra* note 186, at 195.

188. "Collectively, 'lists' of this length rarely serve to limit discretion or regularize procedure. By giving emphasis to one or two of the guidelines, a judge can usually justify a decision either way." TWENTIETH CENTURY FUND, TASK

The inherent subjectivity in waiver criteria permits a variety of inequalities and disparities to occur without any effective check. Judges cannot administer these discretionary statutes consistently or even-handedly.[189] Within a single jurisdiction, judges interpret and apply waiver statutes inconsistently from county to county and court to court.[190] Empirical analyses provide compelling evidence that judges apply waiver statutes in an arbitrary, capricious, and discriminatory manner.[191] In many jurisdictions, including Minnesota, waiver practices vary by geographic locale.[192] In some research, juveniles' race also may in-

---

FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 56 (1978).

189. *See infra* note 198 and accompanying text (analyzing empirical data on transfer decisions).

190. *See, e.g.*, DONNA HAMPARIAN ET AL., MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: YOUTH IN ADULT COURTS: BETWEEN TWO WORLDS 150-98 (1982) (wide county-by-county disparity in waiver applications in a 10-state case study); JAMES P. HEUSER, JUVENILES ARRESTED FOR SERIOUS FELONY CRIMES IN OREGON AND "REMANDED" TO ADULT CRIMINAL COURTS: A STATISTICAL STUDY 30 (1985) (noting that, in examining Oregon's 36 counties, "it appears that some counties may be over- or under-represented in terms of the proportion of cases per unit of risk population"); JUVENILE JUSTICE STUDY COMM'N, *supra* note 97, at 61-78 (waiver is used for three different purposes in different parts of the state); Leonard Edwards, *The Case for Abolishing Fitness Hearings in Juvenile Court*, 17 SANTA CLARA L. REV. 595, 611-12 (1977) (county-by-county disparity); Feld, *supra* note 72, at 25-46 (empirical analysis in Minnesota reveals uneven exercise of judicial discretion disproportionately and adversely impacts upon rural juvenile offenders).

191. *See, e.g.*, HAMPARIAN ET AL., *supra* note 190, at 101-07. Jeffrey Fagan and Elizabeth Deschenes analyzed waiver decisions involving a sample of violent youths in four different jurisdictions and concluded that no uniform criteria exist to guide the transfer decision. Jeffrey Fagan & Elizabeth P. Deschenes, *Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM. L. & CRIMINOLOGY 314 (1990). Their article states:

> What we found was a rash of inconsistent judicial waiver decisions, both within and across sites. Inconsistent and standardless decisions for youths retained in juvenile court are not surprising in a judicial context which cherishes individualized justice .... But for youth who may be tried and convicted in criminal court and subjected to years of imprisonment in a secure institution, such subjective decision-making is no longer justified.

Id. at 347. Fagan and Deschenes controlled for both offense and offender variables and concluded that "[n]either multivariate analysis nor simple explorations identified strong or consistent determinants of the judicial transfer decision. Except for a relationship between extensive prior offense history and the transfer decision, none of the identified variables could significantly describe differences between youths who were or were not transferred." *Id.* at 345.

192. *See* JUVENILE JUSTICE STUDY COMM'N, *supra* note 97, at 61-78.

fluence waiver decisions.[193] The location of a waiver hearing, differences in judicial philosophies, or juvenile court organizational politics explain as much about transfer decisions as does a youth's offense or personal characteristics.[194] Courts interpret and appy waiver statutes inconsistently because of the subjectivity of the substantive issues, the lack of effective guidelines to structure the decision, and the latent as well as manifest functions that waiver serves.

Ultimately, waiver involves the appropriate dispositions of serious offenders who happen to be chronological juveniles. "Treatment" as a juvenile or "punishment" as an adult is based on an arbitrary legislative line which often results in inconsistent sentencing policies between juvenile and criminal courts. These jurisprudential antinomies may frustrate attempts to rationalize social control of serious young offenders. By classifying into binary categories, legislatures fail to recognize that young people mature constantly. Adolescence is a developmental continuum, and young people are not irresponsible children one day and responsible adults the next. There is also a strong correlation between age and progression of criminal careers with the rates of criminality peaking in mid- to late-adolescence.[195]

193. A study of violent youths found substantial disparities between the transfer rates of minority and white offenders. Although there was no direct evidence of sentencing discrimination, "it appears that the effects of race are indirect, but visible nonetheless." Jeffrey Fagan et al., *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259, 276 (1987); Joel P. Eigen, *The Determinants and Impact of Jurisdictional Transfer in Philadelphia*, *in* MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: READINGS IN PUBLIC POLICY, *supra* note 186, at 333, 339-40 (discussing the interracial effect in transfers, and observing that black youths who murder white victims are significantly more at risk for waiver).

194. Professor M.A. Bortner contends that:

> [P]olitical and organizational factors, rather than concern for public safety, account for the increasing rate of remand. In evidencing a willingness to relinquish jurisdiction over a small percentage of its clientele, and by portraying these juveniles as the most intractable and the greatest threat to public safety, the juvenile justice system not only creates an effective symbolic gesture regarding protection of the public but it also advances its territorial interest in maintaining jurisdiction over the vast majority of juveniles and deflecting more encompassing criticisms of the entire system.

M.A. Bortner, *Traditional Rhetoric, Organizational Realities: Remand of Juveniles to Adult Court*, 32 CRIME & DELINQ. 53, 69-70 (1986); *see also* HAMPARIAN ET AL., *supra* note 190, at 101-07 (noting that variations in waiver rates among jurisdictions generally reflect those jurisdictions' different philosophies on waiver).

195. *See* 1 ALFRED BLUMSTEIN ET AL., CRIMINAL CAREERS AND "CAREER CRIMINALS" 23 (1986); Joan Petersilia, *Criminal Career Research: A Review of*

Chronic offenders typically begin their criminal careers in their early to mid-teens, achieve their peak rates of criminal activity in their late teens to early-twenties, and then gradually reduce their criminal involvement.[196] Rational sentencing policy requires integrated and coordinated responses to young chronic offenders on both sides of the juvenile-adult line.

Despite the research on criminal careers, however, juvenile and criminal courts often may work at cross-purposes. Criminal courts frequently impose longer sentences on older offenders whose rate of criminal activity is declining, but do not sentence as severely younger offenders when their rate of criminal activity is increasing or at its peak, and who pose the greater risk to public safety.[197] Juvenile property offenders, in particular, typically receive lenient sentences when they appear in adult criminal court as first-time adult offenders.[198]

Recent Evidence, in 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 321, 358 (Norval Morris & Michael Tonry eds., 1980); *see also supra* notes 31-33 (noting the decreasing percentage of crimes committed by youths aged 10-17 from 1980 to 1990).

196. 1 BLUMSTEIN ET AL., *supra* note 195, at 23 fig. 1-2, Petersilia, *supra* note 195, at 358.

197. *See generally* PETER W. GREENWOOD ET AL., AGE, CRIME AND SANCTIONS: THE TRANSITION FROM JUVENILE TO ADULT COURT (1980); Barbara Boland, *Fighting Crime: The Problem of Adolescents*, 71 J. CRIM. L. & CRIMINOLOGY 94 (1980); Barbara Boland & James Q. Wilson, *Age, Crime, and Punishment*, 51 PUB. INTEREST 22 (1978).

The currently fashionable "Three Strikes and You're Out" sentencing policy is an example of such misguided emphasis. By the time typical adult offenders accumulate the prior record necessary to qualify for such enhancements, they are often on the down-cycle of criminal activity. Non-discriminate incarceration of all such offenders likely will result in geriatric prisons housing older offenders with low probabilities of recidivism.

198. Peter Greenwood, Allan Abrahamse, and Frank Zimring examined sentences of youths tried as adults in several jurisdictions and found substantial variations. PETER W. GREENWOOD ET AL., FACTORS AFFECTING SENTENCE SEVERITY FOR YOUNG ADULT OFFENDERS 12-14 (1984). In New York City and in Franklin County—the county that includes Columbus—Ohio, they found that youthful offenders faced a substantially lower chance of incarceration than did older offenders; that youthful violent offenders received lighter sentences than older violent offenders; and that, for approximately two years after becoming adults, youths benefitted from informal lenient sentencing policies in adult courts. *Id.* at 12-14. Similarly, although the seriousness of a youth's offense is the primary determinant of the severity of the adult sentence imposed in Washington, D.C., "youth, at least through the first two years of criminal court jurisdiction, is a perceptible mitigating factor." TWENTIETH CENTURY FUND, *supra* note 188, at 63; *see also* HAMPARIAN ET AL., *supra* note 190, at 106-09 (reporting that a majority of juveniles transferred to adult court in 1978 received subsequent fines or probation, and among those confined, 25% received maximum sentences of one year or less); Bortner, *supra* note 194, at 54-57 (noting that in one western metropolitan county fewer than one-third of the transferred

The justice systems' failure to sentence chronic and active young offenders when they are at the peak of their criminal careers may produce a "punishment gap." Qualitative differences between juveniles' and adults' offenses, a lack of integration between juvenile and adult criminal records, and differences between juvenile court waiver criteria and criminal court sentencing practices contribute to this anomalous gap in social control. In many jurisdictions, criminal courts rely primarily on the seriousness of a young adult's present offense and prior adult criminal history when imposing sentences. The juvenile component of offenders' criminal history often is not available because of the confidentiality of juvenile court records, the functional and physical separation of juvenile and criminal court staffs who must compile and combine these records, and sheer bureaucratic ineptitude.[199] One study of the effect of juvenile offense histories on criminal court sentences reported that "local sentencing policies have much more of an impact on how young adults are treated, than any modest variations in the availability of juvenile records."[200] Although Minnesota's Sentencing Guidelines include some older juveniles' felony convictions in their adult criminal history score, they restrict their applicability and thus limit their usefulness to identify and sanction chronic young adult offenders.[201]

---

juveniles convicted in adult proceedings were sentenced to prison); L. Kay Gillespie & Michael D. Norman, *Does Certification Mean Prison: Some Preliminary Findings from Utah*, 35 JUV. & FAM. CT. J. 23, 30-32 (1984) (reporting that between 1967 and 1980 Utah prosecutors did not charge a majority of transferred juveniles with violent offenses, and the majority of juveniles convicted as adults received no prison sentence); HEUSER, *supra* note 190, at 26 (reporting that only 55% of the youths convicted of felonies were incarcerated, and nearly two-thirds of those received jail terms of one year or less and served an average of about eight months).

In analyzing the relationships between the offense for which jurisdiction was waived and the eventual disposition, Hamparian concluded that "[t]here seems to be a direct correlation between low percentage of personal offenses waived and high proportion of community dispositions (as opposed to incarceration)." HAMPARIAN ET AL., *supra* note 190, at 112.

199. *See* Peter W. Greenwood, *Differences in Criminal Behavior and Court Responses Among Juvenile and Young Adult Defendants*, *in* 7 CRIME AND JUSTICE, *supra* note 31, at 173; Joan Petersilia, *Juvenile Record Use in Adult Court Proceedings: A Survey of Prosecutors*, 72 J. CRIM. L. & CRIMINOLOGY 1746, 1756-59 (1981); *see infra* note 406 and accompanying text (noting that many states integrate juvenile and criminal court records).

200. GREENWOOD ET AL., *supra* note 198, at 36.

201. *See* MINN. SENTENCING GUIDELINES § II.B.4 cmts. II.B.401-05 (assigning to an adult offender one point for every two prosecuted juvenile offenses, subject to specific limitations); *infra* notes 440-445 and accompanying text.

Rather than relying on judicial discretion, the legislature should propound more objective waiver criteria to integrate juvenile and criminal court sentencing practices, and to reduce the gap in intervention when youths make the transition between the two systems. It is fundamentally contradictory for juvenile court judges to send youths to adult court because they require longer sentences, and then have those criminal court judges sentence those same youths to probation.[202] For example, the Juvenile Justice Task Force found that "[t]he majority [fifty-two percent] of juveniles certified to adult court are property offenders," and only twenty-three percent of juveniles sentenced as adults were convicted of presumptive-commitment-to-prison offenses.[203] Moreover, a larger proportion of juveniles received downward departures from the Guidelines' recommended sentence than did adult defendants.[204] Task Force recommendations to link waiver criteria closely with the adult sentencing guidelines and to emphasize offense seriousness and criminal history, rather than amorphous clinical considerations, significantly rationalize transfer decision and criminal court responses to chronic young offenders.

1. Certification in Minnesota

Minnesota's judicial waiver practices pose two inter-related problems: the highly discretionary, idiosyncratic nature of individualized sentencing decisions, and the disjunction between the criteria for transfers from juvenile court and those for sentences in adult criminal courts. Judicial discretion underlies both problems.[205] Juvenile court judges attempt to make clinical determinations of a youth's "dangerousness" or "amenability to treatment" despite scant evidence of either effective intervention

202. *See supra* note 159.

203. TASK FORCE, FINAL REPORT, *supra* note 2, at 25.

204. *Id.* The Task Force noted that in 1991, 23% of the juveniles sentenced in adult court were convicted of Severity Level VII-X presumptive-commitment-to-prison offenses, 22% of Severity Level V-VI offenses, and 54% of Severity Level IV or below offenses such as non-residential burglary, theft, and forgery. *Id.*

205. Appellate courts repeatedly have emphasized the broad discretion that trial judges enjoy in making this type of sentencing decision. *See, e.g., In re* K.P.H., 289 N.W.2d 722, 724 (Minn. 1980) ("The juvenile court is vested with broad discretion in determining whether either of the statutory criteria exists upon which to base its reference decision . . . ."); *In re* K.J.K., 357 N.W.2d 117, 119 (Minn. Ct. App. 1984) ("The court has broad discretion in determining whether a juvenile is suitable for treatment in the juvenile system, and its decision will not be overturned unless it is clearly erroneous.").

strategies for serious young offenders or valid clinical indicators that identify those who might respond to intervention. They apply indeterminate waiver statutes that are rife with potential for abuse and disparity. Organizational or political pressures to waive less serious offenders further aggravate the "lack of fit" between juvenile and adult criminal sentencing practices.

Several previous Task Forces and researchers have examined Minnesota waiver practices in recent decades.[206] The Minnesota Supreme Court's Study Committee reported that rural judges certified juveniles with less serious offenses or prior records more frequently than their urban counterparts.[207] Shortly after the Minnesota legislature adopted "prima facie" offense criteria to create a rebuttable presumption to transfer, waiver decisions remained highly discretionary and idiosyncratic.[208] In 1986, judges waived more youths for property offenses than for crimes against the person, and geographic disparities continued.[209] Data presented to the Task Force again revealed that the majority of youths waived by juvenile courts committed property crimes rather than violent crimes, and many youths sentenced as adults received shorter sentences than they might have received as juveniles.[210]

Another study, completed after the Task Force issued its *Final Report*, analyzed waiver practices in Hennepin County between 1986 and 1992.[211] Unlike previous statewide studies, this research analyzed waiver decisions in an urban setting marked by more serious youth crime.[212] Although prosecutors filed most reference motions for presumptive-commitment-to-prison of-

206. *See supra* notes 97-103 and accompanying text (discussing Supreme Court Juvenile Justice Study Commission's study of juvenile courts).

207. *See supra* note 101 and accompanying text.

208. *See* Osbun & Rode, *supra* note 111, at 195 (noting that only about one-third of youths referred for adult prosecution met prima facia offense criteria).

209. Feld, *supra* note 72, at 31.

210. *See* Krmpotich, *supra* note 159 (graph showing the lower imprisonment rate for juveniles, as compared to adults, in 1992).

211. Marcy A. Podkopacz, Juvenile Reference Study (Aug. 25, 1994) (unpublished study, on file with author). The study collected data from the Hennepin County Attorney's Office, the Juvenile Court, and the Department of Community Corrections on 330 juveniles against whom the county filed reference motions between 1986 and 1992. *Id.* at 3. The study examined the offenses for which reference motions were filed, the backgrounds of the youths, the processes by which some juveniles were referred to adult court and others retained in juvenile court, and the ultimate dispositions they received in both systems. *Id.*

212. Podkopacz reported that prosecutors filed reference motions against a majority (55%) of juveniles charged with presumptive-commitment-to-prison offenses and that most had multiple felony charges. *Id.* at 29-30.

fenses, the largest proportion of juveniles charged with serious crimes did not have extensive prior records. The juvenile court transferred youths with extensive delinquency histories but who were charged with less serious current offenses more reaily than it did juveniles charged with more serious crimes.[213] The prior record, rather than the seriousness of the present offense alone, combined with the youth's age and time remaining in juvenile court jurisdiction most strongly influenced judicial waiver decisions.[214] Significantly, however, prosecutors charged minority juveniles with violent crimes and presumptive-commitment-to-prison offenses much more frequently than white juveniles.[215] These racial differences will likely affect the racial composition of youths presumptively certified and those sentenced as EJJs after the passage of the 1994 Juvenile Crime Act.

Juvenile court judges encounter their greatest quandry when they attempt to apply the transfer statute to apparently "normal" juveniles who suddenly commit a violent murder without seeming explanation. For nearly two decades, Minnesota's appellate courts have struggled unsuccessfully to develop a waiver jurisprudence for youths with no prior records of delinquency or treatment who unexpectedly commit a very serious offense.[216] In *In re Dahl*, the Minnesota Supreme Court analyzed some of the procedural and substantive problems that

---

> Over half (55%) of the juveniles who faced the possibility of transfer to adult court were charged with offenses that would result in prison commitments if they were convicted in criminal court (i.e., presumptive-commit offenses). Nearly a quarter of these juveniles (22%) came to court with only one presumptive charge, the remaining 33% were charged with two or more presumptive charges . . . .

Id. at 29.

Although about 25% of all the youths in the sample were charged with property felonies such as burglary, Hennepin County Attorney Michael Freeman decided to focus on youths charged with serious person offenses. *Id.* at 17. He filed reference motions against property felony offenders in only eight percent of reference motions in 1991 and 11% in 1992. *Id.* at 33. Although the number of prior felony adjudications and age at the time of the reference motion increased a youth's probability of waiver, the seriousness of the present offense alone was not a significant determinant of transfer. *Id.* at 40-43.

213. *Id.* at 46-48.

214. *Id.*

215. *Id.* at 35-36. Person-felony offenses were included in reference motion charges filed against 75% of African-Americans, as contrasted with 43% of whites. For the most serious crimes, prosecutors charged 66% of African-American juveniles with presumptive-commitment-to-prison offenses, as compared with only 31% of white juveniles. *Id.* at 35.

216. *See* Feld, *supra* note 184 (analyzing legislative response to *In re Dahl*); Feld, *supra* note 72 (analyzing of judicial opinions in *In re D.F.B.*).

these uncharacteristically serious offenders pose.[217] The juvenile court judge certified Dahl, an otherwise exemplary youth charged with first degree murder, to stand trial as an adult on the grounds that he was both unamenable to treatment and a threat to the public safety because of his age and the seriousness of his alleged offense, and the limited time remaining under juvenile court jurisdiction.[218] The question presented to the Minnesota Supreme Court was whether a trial court properly could certify a youth as nonamenable to treatment and dangerousness based solely on the seriousness of the offense and the juvenile's age.

The *Dahl* court criticized the judicial waiver statute,[219] and held that "the existing statutory framework does not authorize referral based on the specific crime charged .... [T]his court did not intend the . . . referral of a juvenile solely because of the alleged offense."[220] The *Dahl* court held that a proper record for

217. 278 N.W.2d 316 (Minn. 1979). Dahl, 17 years old at the time of the alleged offense and 18 years old at the time of the certification proceedings, murdered another youth with several shotgun blasts after taking him to a remote area of northern Minnesota. *Id.* at 317. Dahl, a high school senior, maintained a B average, participated in interscholastic sports, planned to attend a nearby college, and held various part-time jobs. *Id.* The court commented, "[I]t is clearly apparent that [Dahl] is not the typical delinquent seen by the Juvenile Court. This offense [first degree murder] . . . appears to be an isolated delinquent act . . . ." *Id.* at 317-18.

218. The court record in support of the certification motion contained neither psychological or psychiatric information nor negative information regarding the juvenile's background apart from the alleged homicide. *Id.* at 318. At that time Dahl could receive only three years of treatment as a juvenile, i.e., until age 21. *See* MINN. STAT. § 260.181(4) (1978). Subsequent amendments to that statute reduced the maximum age of juvenile court jurisdiction over youths from 21 to 19 years of age. *See* MINN. STAT. § 260.181 (4) (1988); *see infra* notes 352-353 and accompanying text.

219. *Dahl*, 278 N.W.2d at 318.

220. *Id.* at 321. In *In re* J.B.M., 263 N.W.2d 74 (Minn. 1978), the last certification case considered by the Minnesota Supreme Court prior to *Dahl*, the waiving judge construed the seriousness of the offense to mandate reference "if the offense is of a sufficiently dangerous nature." *Id.* at 75. The supreme court rejected that construction, observing that "[a]lthough the nature of the offense is certainly a factor to be considered in this determination and may serve as a basis for statutory reference . . . this court has not held that reference is mandatory when a serious crime is involved." *Id.* at 76.

The *Dahl* court went on to state that the offense charged was obviously *"among* the relevant factors to be considered," 278 N.W.2d at 321 (citing State v. Hogan, 212 N.W.2d 664 (1973)), but that "[t]he record must contain *direct evidence* that the juvenile endangers the public safety." *Id.* (emphasis added). The court thus remanded the case to the trial court. In order to certify the youth, the record required direct evidence, apart from the offense charged, that the juvenile was not suitable for treatment or presented a threat to the public safety. *Id.*

a waiver decision required direct evidence of "unamenability" or "dangerousness" in addition to the seriousness of the crime.[221] The court questioned whether the transfer statute provided trial judges with sufficient guidance for these uniquely difficult waiver decisions,[222] and suggested to the legislature that a "re-evaluation of the existing certification process may be in order."[223]

In 1980, the Minnesota legislature responded to the Dahl decision, revised the juvenile code, and amended the certification process.[224] The legislature modified the purpose clause's exclusively benevolent and rehabilitative objectives, and added to it the goals of maintaining the integrity of the substantive criminal law and developing individual responsibility.[225] The purpose clause amendments signalled a fundamental philosophical departure from the previous emphasis on rehabilitation, and recognized that juvenile courts also punish and exercise penal social control.

The amended legislation also included procedural changes. It mandated a probable cause hearing to support the certifica-

---

221. 278 N.W.2d at 320-21.

222. *Id.* at 318.

223. *Id.* at 319. The *Dahl* court observed that "the standards for referral adopted by present legislation are not very effective in making this important determination." *Id.* at 318. The court went on to note that "[d]ue to these difficulties in making the waiver decision, many juvenile court judges have tended to be overcautious, resulting in the referral of delinquent children for criminal prosecution on the erroneous, albeit good faith, belief that the juveniles pose a danger to the public." *Id.* at 319.

224. *See generally* Feld, *supra* note 184, at 192-239 (analyzing legislative changes).

225. The previous purpose of the law was to secure "for each minor . . . the care and guidance, preferably in his own home, as will serve the . . . welfare of the minor and the best interests of the state." Juvenile Court Act, ch. 685, § 1, 1959 Minn. Laws 1275 (repealed 1980). Under the new legislation, the exclusively benevolent and rehabilitative purpose of the juvenile court remains only for children "alleged or adjudicated neglected or dependent." MINN. STAT. § 260.011(2)(a) (effective Aug. 1, 1980). For those charged with delinquency, however,

> [t]he purpose of the laws relating to children alleged or adjudicated to be delinquent is to promote the public safety and reduce juvenile delinquency by maintaining the integrity of the substantive law prohibiting certain behavior and by developing individual responsibility for lawful behavior. This purpose should be pursued through means that are fair and just, that recognize the unique characteristics and needs of children, and that give children access to opportunities for personal and social growth.

Id. § 260.011(2)(c). The significance of the change in purpose clause is discussed *infra* notes 465-465 and accompanying text.

tion motion.[226] The legislature retained, without change, the basic waiver criteria of nonamenability to treatment or dangerousness.[227] It also placed the burden of proof on the prosecution to establish by "clear and convincing evidence" that the juvenile court should waive jurisdiction.[228]

The legislature attempted to guide juvenile court judges' discretion by adding a third subdivision to the certification statute.[229] This subdivision enabled prosecutors to establish a "prima facie" case for certification by proving various combinations of a youth's present offense and prior record.[230] Thus, a prosecutor could establish a prima facie case for certification by charging a sixteen-year-old, who possesses a specified prior record, with certain types of serious offenses.[231] Although the legislature retained the basic "nonamenability" and "dangerousness" criteria, the amendments provided prosecutors with an indirect method to prove those ultimate facts.[232]

---

226. MINN. STAT. § 260.125(2)(d) (1988); Feld, *supra* note 184, at 203-05.

227. MINN. STAT. § 260.125(1)(d).

228. *Id.* § 260.125(2)(d); *see also* Feld, *supra* note 184, at 205-07.

229. In response to *Dahl*, the legislature adopted a modified version of a matrix that establishes a prima facie case for certification under the amenability and dangerousness provisions when various combinations of a youth's present offense and/or prior record are present. Under the new statute, the prosecution can establish a prima facie case of both nonamenability and dangerousness simply by proving that the juvenile is at least sixteen years of age, that the present crime charged is a serious offense, and that the combination of the present crime charged and the prior record brings the case within one of the subdivision's clauses.

Feld, *supra* note 184, at 194 (footnotes omitted). The 1994 legislation repeals the applicable subdivision. 1994 Minn. Laws 576, § 13.

230. MINN. STAT. § 260.125(3) (1988); *see* Feld, *supra* note 184, at 207-14.

231. The legislation read:

> A *prima facie* case for certification is established if the juvenile was at least 16 years of age at the time of the offense, and is alleged to have committed:
>
> 1) First degree murder, or
> 2) an aggravated felony against a person involving particular cruelty, a high degree of sophistication or planing [sic], or use of a firearm, or
> 3) one of several other felonies listed in the statute, combined with a particular type of prior offense history specified in the statute.
>
> The presence of any of these circumstances creates a presumption that the public safety is not served or that the juvenile is unamenable to treatment within the juvenile court system.

MINN. STAT. § 260.125(3) (1988).

232. The adoption of offense criteria to structure judicial sentencing discretion is one example of recent legislative changes in waiver statutes throughout the nation. *See* Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 504-11 (1987).

The 1980 legislation that used age and offense to create a rebuttable presumption for certification based on age and offense was probably the least satisfactory of the several policy options available to the legislature.[233] The legislature could simply have excluded youths charged with certain combinations of present offenses and prior record from juvenile court jurisdiction.[234] Or, it could have placed the burdens of production and persuasion on juveniles charged with serious offenses, rather than burdening the prosecution only.[235] Although the 1980 legislature considered both of these alternatives, it rejected them

233. The 1980 "prima facie" case amendments of the waiver statutes primarily affected the allocation of burdens of production and persuasion. Feld, *supra* note 184, at 207-14. In an earlier article, I argued that creating a rebuttable presumption for waiver would do little to reduce judicial discretion. *Id.* at 209-10. Several subsequent Minnesota court decisions endorsed that analysis. *See, e.g., In re* J.F.K., 316 N.W.2d 563, 564 (Minn. 1982) (holding that when a state establishes a prima facie case that defense rebuts with substantial evidence, the court must decide the waiver issue on the basis of the entire record, not simply by reference to the prima facie case); *In re* Givens, 307 N.W.2d 489, 490 (Minn. 1981) (holding that an unrebutted prima facie case authorizes reference on both grounds of nonamenability and dangerousness); *In re* K.J.K., 357 N.W.2d 117, 119 (Minn. Ct. App. 1984) (holding that where the state fails to establish a prima facie case not established, court must consider totality of circumstances).

I also suggested that under the discretionary provisions proof of a serious offense alone would not warrant waiver. Feld, *supra* note 184, at 212. Again, appellate opinions confirm that analysis and conclude that once a juvenile rebuts the prima facie case with "significant evidence," the prosecution bears the burden of proof under the "totality of the circumstances." For example, the court in *In re S.R.L.* concluded that "[i]n evaluating evidence under the clear and convincing standard, the court must consider the totality of the circumstances." 400 N.W.2d. 382, 384 (Minn. Ct. App. 1987); *accord J.F.K.*, 316 N.W.2d at 564 (citing Feld, *supra* note 184).

Finally, I argued that the legislative prima facie case for certification based on age and seriousness of the offense would not effectively overrule the holding of *Dahl*. Feld, *supra* note 184, at 214. Whether the legislature effectively overruled *Dahl* remains a source of judicial controversy. *Compare S.R.L.*, 400 N.W.2d at 384 (holding that the amendments and supreme court's reasoning in *J.F.K.* implicitly overrule *Dahl*) *with In re* J.L.B., 435 N.W.2d 595, 601-04 (Minn. Ct. App. 1989) (Crippen, J., dissenting) (arguing for the continuing vitality of *Dahl*).

234. Legislative waiver results in automatic certification of certain youths to adult criminal court based on the offenses alleged. *See* Feld, *supra* note 98, at 573-78, 617-18. This option is nondiscretionary; there is simply no occasion for a judicial waiver hearing. The virtues of legislative waiver include objectivity, consistency, economy, equality, and ease of administration. *Id.* at 588-601; *see also* Feld, *supra* note 9, at 494-99; *infra* notes 373-391 and accompanying text.

235. I have suggested that the juvenile should bear the burden of persuasion to prove amenability and non-dangerousness to "emphasize the policies of social defense and public safety in light of the uncertainty of the issues being determined." Feld, *supra* note 184, at 215; *see also* Feld, *supra* note 72, at 95-96.

and adopted the "rebuttable presumption," or prima facie case, strategy.[236] Because the legislature neither resolved the fundamental sentencing contradictions inherent in the waiver statute nor provided clear guidance to trial judges who confront serious but isolated offenders, the problems identified in *Dahl* inevitably recurred.

In 1988, the case of *In re D.F.B.*[237] illustrated the failure of the 1980 legislative amendments to resolve the tension between sentences based on the rehabilitative potential of the offender and the seriousness of the offense.[238] Sixteen-year-old David Brom had no prior history of illegal or aggressive behavior, other than the four brutal axe-murders charged in the petition.[239] Judge Gerard Ring recognized that, despite *Dahl* and the 1980 amendments, a reference proceeding still must assess on a juvenile's treatability or threat to the public. Judge Ring ruled that the prosecution failed to prove by clear and convincing evidence either that Brom could not be treated or that he threatened public safety.[240] The reference hearing record included the testimony of two clinicians and amply supported Judge Ring's conclusions.[241] The outcome in *D.F.B.* turned on who bore the

236. Elsewhere I have thoroughly traced the history of the legislation's evolution from automatic exclusion, to burden on the juvenile, to rebuttable presumption. Feld, *supra* note 184, at 192-97, 205-22.

237. *In re* D.F.B., No. 88-J-0955 (Minn. Dist. Ct. Apr. 21), *rev'd*, 430 N.W.2d 475 (Minn. Ct. App.), *rev'd*, 433 N.W.2d 79, 82 (Minn. 1988).

238. *See* Feld, *supra* note 72 (analyzing the application of Minnesota waiver legislation in *In re D.F.B.*).

239. The trial court's undisputed finding of fact was that "[t]he child has no history of illegal behavior, drug abuse, or aggressive behavior except for the incident alleged in this petition." *D.F.B.*, No. 88-J-0955, mem. op. at 1. On the basis of the expert testimony and psychological report, Judge Ring found that "[t]he child has been diagnosed as having a major depressive disorder and it has not been shown that he cannot be successfully treated by his 19th birthday." *Id.* at 2.

240. As Judge Ring observed,

> [t]his is one place where the burden of proof becomes significant. I do not believe the child could prove suitability for treatment if the burden were placed on him. However, the prosecution has been unable to prove the contrary. Each of the experts when asked said that it is possible to complete the treatment in the time available; certainly no one said he could not. Since the evidence cannot be said to be clear and convincing proof that he cannot be treated, the petitioner has failed to carry the burden of proof on this issue.

Id. at 17.

241. Previous decisions emphasized the need for psychological data to support a finding that a juvenile is or is not suitable for treatment. *In re* Dahl, 278 N.W.2d 316, 319 (Minn. 1979); *In re* R.D.W., 407 N.W.2d 113, 117 (Minn. Ct. App. 1987) (holding that a finding that a juvenile is unsuitable for treatment "must be based on psychological data or a history of misconduct as well as the

burden of proof on subjective, clinical issues of amenability and dangerousness.[242] Although the legislature amended the waiver statute in response to *Dahl*, Judge Ring found that those amendments actually increased, rather than decreased, the difficulty of transferring atypical serious offenders, such as Brom.[243] Because uncontradicted direct, clinical evidence supported Judge Ring's decision, the appellate courts could not characterize his findings of fact as clearly erroneous or an abuse of discretion.[244]

The Minnesota Court of Appeals overturned Judge Ring's decision in *In re D.F.B.*,[245] and concluded as a matter of law that

---

juvenile's age, level of maturity, and the seriousness of the offense"); *In re* D.M., 373 N.W.2d 845, 850 (Minn. Ct. App. 1985) (holding that psychological data must support the juvenile court's conclusion); *see* Feld, *supra* note 72, at 54-59 (analyzing record of evidence introduced at reference hearing).

242. Under the statute as written and previously interpreted, the logic of Judge Ring's decision was impeccable. The prosecution's proof of a prima facie case created a rebuttable presumption for transfer. Once that presumption is rebutted or where it does not arise, the issues of amenability and dangerousness must be decided on the "totality of circumstances" based upon the whole record and not just by reference to the offense criteria or the rebuttable presumption.

Feld, *supra* note 184, at 62-63 (footnote omitted). Brom introduced controverting evidence and, by so doing, "did rebut the prima facie case." *D.F.B.*, No. 88-J-0955, mem. op. at 9. "Having done so, the burden of proof remained with the prosecution to prove the elements necessary for referral to the adult court and pursuant to the 1980 amendments that burden requires clear and convincing evidence." *Id.*

> Throughout the proceedings, the burden of proof by "clear and convincing evidence" remains with the prosecution to demonstrate either that the juvenile is not amenable to treatment or constitutes a threat to public safety. . . . A decision to refer or to retain a juvenile may not be overturned on appeal unless it is "clearly erroneous" so as to constitute an abuse of discretion.

Feld, *supra* note 184, at 62-63 (footnotes omitted).

243. *D.F.B.*, No. 88-J-0955, mem. op. at 9-11 ("[I]n my judgment the 1980 amendments did not change the burden of proof, they only raised the degree of proof required. Instead of making it easier and more likely that children would be referred to adult court, the statute has had the opposite effect."). *See generally* Feld, *supra* note 184.

244. Indeed, neither the decision of the court of appeals nor of the Minnesota Supreme Court characterized Judge Ring's findings of fact as "clearly erroneous" or an "abuse of discretion," the only permissible criteria for overturning trial court factual determinations. *D.F.B.*, 430 N.W.2d at 480-82 (Minn. Ct. App. 1988) ("We nonetheless accept as not clearly erroneous the trial court's determination that the prima facie case was rebutted."); *D.F.B.*, 433 N.W.2d at 82 (Minn. 1988).

245. The court concluded that "the burden of persuasion remains at all times upon the state." *D.F.B.*, 430 N.W.2d at 479. Because neither the language of the statute nor the rules of procedure evidenced an intention to shift the burden of persuasion to a juvenile, "[a]bsent specific indication from the legislature, we must conclude that it is only the burden of producing evidence

Brom should be tried as an adult.[246] Although the court of appeals agreed with Judge Ring's analysis of the statute and previous interpretations, it asserted that "broader consideration of the 1980 amendments to Chapter 260 is not only warranted but is required," and that such "broader consideration" inevitably led to the result that Brom should be tried as an adult.[247]

The Minnesota Supreme Court accepted Brom's appeal for review "for the limited purpose of substituting our opinion . . . for that of the court of appeals."[248] The supreme court offered a factual rationale for its decision to try Brom as an adult, rather than accept the court of appeals's legal analysis.[249] As did the court of appeals's analysis, the supreme court's analysis began with the post-*Dahl* 1980 legislative amendments.[250] However,

---

which shifts." *Id.* The court accepted Judge Ring's finding that Brom had rebutted the prosecutor's prima facie case. *Id.* at 480-81.

246. *Id.* at 483. "Such consideration irrevocably leads us, as we are certain it would have led the trial court, to a determination that D.F.B. must be referred to stand trial as an adult." *Id.*

247. *Id.* Judge Huspeni noted that in addition to amending the waiver provisions, the legislature had also modified the purpose clause of the Minnesota Juvenile Code. *Id.*; *see* MINN. STAT. § 260.011(2); *see also supra* note 225 and accompanying text (discussing purpose clause). The amended purpose clause provided the court with a means to "gloss" the specific language of the waiver statute. *See infra* notes 463-465 and accompanying text (explaining the changes in the purpose clause).

According to the court of appeals, "[i]f the words 'maintaining the integrity of the substantive law prohibiting certain behavior' are to have any meaning," then trial judges must look beyond the characteristics of the child in analyzing the "totality of the circumstances," even though that alone is the legislative mandate. *D.F.B.*, 430 N.W.2d at 483. The court was

> persuaded by the language of section 260.011 that the trial court, upon rebuttal of the prima facie case, must not be hobbled by the statutorily weakened analysis of *Dahl* and of Rule 32.05, subd. 2, especially subd. 2(h) (the record and previous history of the child), as the trial court here so clearly believed itself to be.

Id. In short, the seriousness of Brom's crime outweighs any consideration of his amenability to treatment or lack of threat to the public; the *offense* takes precedence over the *offender*.

248. *In re* D.F.B., 433 N.W.2d at 80.

249. *Id.* at 80-82.

250. Chief Justice Douglas K. Amdahl opined that *Dahl* (discussed *supra* notes 217-223 and accompanying text) decided that the purpose of a waiver hearing is to consider "all of the relevant factors—not just age or seriousness of the offense—to determine if the statutory test of reference has been met." 433 N.W.2d at 80 (citing *In re* Dahl, 278 N.W.2d 316, 321 (Minn. 1979)). The court also reviewed the 1980 amendments of the purpose clause and the waiver statute, noting that Brom, a 16-year-old charged with first degree murder, fit the prima facie case criteria. *Id.* at 81. The Minnesota Supreme Court agreed with Judge Ring that once the juvenile had rebutted the prima facie case,

> then the role for the juvenile court is to decide on the basis of the entire record, *without reference to the prima facie case*, whether the state has

unlike the court of appeals, which used the purpose clause to gloss the waiver statute, the supreme court rejected the findings of the trial judge and substituted its version of the facts.[251] In short, the court decided that Brom should be tried as an adult as a question of fact not as a matter of law.[252]

---

met its burden of proving by clear and convincing evidence that the juvenile is unamenable to treatment in the juvenile court system consistent with the public safety.

Id. (emphasis added). The court agreed with Judge Ring that the evidence that Brom introduced, bearing both on amenability to treatment and the threat to public safety, rebutted the prima facie case. The sole issue in the case, then, was whether the state had met its burden of proving by "clear and convincing" evidence, on the basis of the entire record, that Brom was either not amenable to treatment or not a threat to public safety. *Id.*

251. The court stated:

> Employing the multi-factor analysis in this case—which is what the trial court in *Dahl* was directed to do on remand—would justify a reference decision in this case even if the legislature's 1980 amendment of the purpose section was without significance. While we agree with the court of appeals' conclusion that the amendment of the purpose section makes it easier to conclude that reference is justified in this case, we do not agree with the implication that reference is justified any time a juvenile commits a heinous offense. Rather, reference in this case is justified because—bearing in mind the legislature's revised statement of purpose and looking at all the factors listed in R. 32.05, including the offense with which D.F.B. is charged, the manner in which he committed the offense, the *interests* of *society* in the *outcome* of this case, the testimony of Dr. Malmquist *suggesting* that treatment of D.F.B. *might be* unsuccessful, and the *weakness* of Dr. Gilbertson's testimony—the state met its burden of proving by clear and convincing evidence that D.F.B. is unamenable to treatment in the juvenile court system consistent with the public safety.

433 N.W.2d at 81-82 (emphasis added).

252. The Minnesota Supreme Court's entire analysis of the facts simply adverts to the general substantive factors listed in the rules and then concludes that "the state met its burden of proving by clear and convincing evidence that D.F.B. is unamenable to treatment in the juvenile court system." *Id.* at 82; *see* Feld, *supra* note 72, at 84-86.

Appellate courts normally must defer to fact-finding by trial courts. *See, e.g.*, Amadeo v. Zant, 486 U.S. 214, 223 (1988) (stating that the "clearly-erroneous standard of review is a deferential one"); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534 n.8 (1979) (finding "great value" of appellate deference). Court rules provide that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." MINN. R. CIV. P. 52.01; *see also* FED. R. CIV. P. 52(a). *See generally* Hon. John F. Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 WASH. U. L.Q. 409 (1981) (decrying appellate courts' failure to accord trial courts' findings of fact the respect and deference envisioned by the clearly erroneous rule); Charles A. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 770 (1957) (same).

In *In re D.F.B.*, the Minnesota Supreme Court never found that Judge Ring's factual findings were "clearly erroneous" or an "abuse of discretion."

The dilemmas that serious but isolated offenders such as Dahl and Brom present, the geographic disparities in waiver, the inconsistent outcomes for similarly situated offenders, and the lack of fit between juvenile and criminal court sentencing policies dramatically highlight the conceptual inadequacy of judicial determinations of amenability or dangerousness. Couching sentencing policy issues in discretionary, clinical terms, such as "amenability" or "dangerousness," disserves their rational resolution. Moreover, when the policy choices are fundamental and irreconcilable, such as whether to base sentences on characteristics of the offender or the offense, the legislature has primary responsibility to decide.

2. The Task Force Recommendations and Legislative Changes: Presumptive Certification and Serious Youthful Offenders

The Task Force identified several problems with the existing transfer law: the need for a stronger and more consistent response to serious, violent juvenile offenders, the need for clearer guidelines within an individualized sentencing process, the ineffectiveness of the prima facie case criteria to structure judicial discretion, and the lack of fit between judicial waiver decisions and criminal court sentencing practices.[253] In addition, because the age nineteen jurisdictional limit severly restrict juvenile court sanctions, judges sometimes certified older juveniles who did not necessarily require adult incarceration.[254]

In June 1993, the Certification Committee began to formulate the Task Force's recommendations to create a presumption to certify older serious offenders.[255] This presumption would shift to juveniles the burden of proving that they should be retained as juveniles.[256] It would also downplay the clinical inquiry about "amenability" and "dangerousness," emphasize "public safety," and create an expanded intermediate sentencing category for serious youthful offenders.[257]

Rather, it simply disregarded its appellate function and used a different strategy than that employed by the court of appeals to reach the politically "correct" result. 433 N.W.2d at 81-82.

253. TASK FORCE, FINAL REPORT, *supra* note 2, at 22-30.

254. *Id.* at 32-33.

255. *See* Minutes of the Advisory Task Force 8 (June 25, 1993) (on file with author).

256. Memorandum from Jim Hayes to the Juvenile Justice Task Force Certification Committee, *Food for Thought* 2 (June 11, 1993) (on file with author).

257. Minutes of the Juvenile Certification Committee 3 (June 4, 1993) (on file with author). *See generally* Memorandum from Jim Hayes, *supra* note 256

The Task Force recommended a simplified certification procedure that linked the definition of serious juvenile offenders to the definition of serious offenses in the adult sentencing guidelines. It also recommended using the Guidelines' definition of serious offenses to create an intermediate category of young offenders who could receive extended sentences in juvenile court. Under this proposal, juvenile courts would try uncertified serious youthful offenders with all the adult criminal procedural safeguards, including the right to a jury trial, impose a stayed adult criminal sentence and juvenile probationary status to retain access to juvenile treatment resources, and extend juvenile court jurisdiction to age twenty-three.[258]

Under the Sentencing Guidelines, which apply to adult defendants, conviction for certain violent crimes creates a pre-

---

(outlining proposal). The idea to create an intermediate, blended juvenile-criminal jurisdiction over "intermediate" offenders originated with Judge Philip Bush. Minutes of the Juvenile Certification Committee, *supra*, at 1. The Hennepin County juvenile court bench experimented unsuccessfully with stayed certification or "dual" jurisdiction strategies in an effort to expand the sanctioning powers of juvenile courts without relinquishing the option of an adult sentence. *Id.* at 2-3.

In earlier articles, I anticipated many of the policies eventually recommended by the Certification Committee. In Feld, *supra* note 72, I suggested that

> it appears that either of two alternatives [is] preferable to continuing the present practice. Both strategies use offense criteria—seriousness and persistence—to structure the waiver determination. One approach—presumption/burden shifting—uses offense criteria to create a presumption for waiver *and* shifts the burden of proof to the juvenile to affirmatively demonstrate why he or she should be retained as a juvenile, i.e., is amenable to treatment and poses no threat to the public .... In the face of the inherent uncertainty of clinical evaluations, placing the burden of production and the risk of nonpersuasion on youths charged with serious offenses is preferable to placing those burdens on the state.

Id. at 95; *see also* Feld, *supra* note 184, at 215 (stating that because a court cannot reliably determine amenability or dangerousness, placing the burden of persuasion on the juvenile rather than on the state shifts the risk of uncertainty).

The Certification Committee and Task Force discussed and rejected excluding certain offenses from juvenile court jurisdiction. Minutes of the Juvenile Certification Committee, *supra*, at 4. The Committee also discussed and rejected another strategy of placing youths charged with serious crimes directly in adult court with "reverse certification," i.e., returning to juvenile court those youths who proved they posed no threat to public safety and were "amenable to treatment." *Id.* at 2-3; *see, e.g.*, Simon I. Singer, *Automatic Waiver of Juveniles and Substantive Justice*, 39 CRIME & DELINQ. 253, 258 (1993) (analyzing New York's offense-exclusion waiver-back strategy and concluding that it "seems to have duplicated the discretionary decisions of juvenile justice officials").

258. TASK FORCE, FINAL REPORT, *supra* note 2, at 26-37.

sumption that the offender should be committed to prison.[259] The Task Force used the Sentencing Guidelines to structure juvenile court waiver and sentencing decisions. It proposed that older juveniles charged with presumptive-incarceration offenses be presumptively certified. If juvenile court judges retained youths charged with those presumptive offenses, the youths would be subject to enhanced sanctions within juvenile courts. Thus, the Task Force used the Sentencing Guidelines' definition of serious offenses to make certification easier and more consistent, to integrate juvenile and criminal court sentencing practices, to emphasize public safety over treatment considerations, and to enhance the sentencing authority of juvenile courts.[260]

The Task Force proposed, and the new legislation provides, that a prosecutor may file a motion to transfer only against juveniles charged with felony-level offenses.[261] The new statute retains a revised version of the waiver process. For juveniles aged fourteen to seventeen and charged with any felony offense, the prosecutor must prove by "clear and convincing evidence" that protection of "public safety" requires the juvenile's transfer to criminal court.[262]

---

259. MINN. SENTENCING GUIDELINES § V (Offense Severity Reference Table) (including in Severity Level VII-X offenses such crimes as: second and third degree murder, first degree assault, first degree criminal sexual conduct, and aggravated robbery).

260. TASK FORCE, FINAL REPORT, *supra* note 2, at 27.

261. *Id.* Under prior law, juveniles charged with any offense could be transferred. Feld, *supra* note 72, at 30; *see id.* at 42 (22.9% of certified juveniles were charged with misdemeanors as were 42.9% of juveniles certified in rural counties). The new statute provides that "[w]hen a child is alleged to have committed, after becoming 14 years of age, *an offense that would be a felony if committed by an adult*, the juvenile court may enter an order certifying the proceeding to the district court for action under the criminal laws." MINN. STAT. § 260.125(1) (emphasis added to note new statutory language).

262. MINN. STAT. § 260.125(2). "The burden of proof, under current law, is always on the prosecution. The Legislature should provide that under the new certification process the burden of proof will remain on the prosecution for regular certifications and will be shifted to the defense for presumptive certifications." TASK FORCE, FINAL REPORT, *supra* note 2, at 30.

> A juvenile court may order a certification to district court only if:
> (2) a motion for certification has been filed by the prosecuting authority;
> . . . .
> (5) the court finds that there is probable cause . . . ; and
> (6) the court finds either:
> (i) that the presumption of certification created by subdivision 2a applies and the child has not rebutted the presumption by clear and convincing evidence demonstrating that retaining the proceeding in the juvenile court serves public safety; or

For youths aged sixteen or seventeen at the time of offense who are charged with a crime requiring presumptive commitment to prison under the Minnesota Sentencing Guidelines, the Task Force recommended a *presumption* of transfer to criminal court.[263] The new legislation incorporated the Task Force's recommendations.[264] While a prosecutor bears the burden of proof in an "ordinary" certification proceeding, the presumption shifts the burden of proof to older juveniles charged with serious offenses to show by "clear and convincing" evidence that retaining their case in juvenile court serves "public safety."[265] The prima

---

(ii) that the presumption of certification does not apply and the *prosecuting authority has demonstrated by clear and convincing evidence that retaining the proceeding in the juvenile court does not serve public safety. If the court finds that the prosecutor has not demonstrated by clear and convincing evidence that retaining the proceeding in juvenile court does not serve public safety, the court shall retain the proceeding in juvenile court.*

MINN. STAT. § 260.125(2) (emphasis added).

263. TASK FORCE, FINAL REPORT, *supra* note 2, at 27.

264. The statute states:

It is *presumed* that a proceeding involving an offense committed by a child *will be certified* to district court if:

(1) the child was *16 or 17 years old* at the time of the offense; and

(2) the delinquency petition alleges that the child committed an offense that would result in a *presumptive commitment to prison under the sentencing guidelines* and applicable statutes, or that *the child committed any felony offense while using, whether by brandishing, displaying, threatening with, or otherwise employing a firearm.*

If the court determines that probable cause exists to believe the child committed the alleged offense, the *burden is on the child to rebut this presumption by demonstrating by clear and convincing evidence that retaining the proceeding in the juvenile court serves public safety.* If the court finds that the child has not rebutted the presumption by clear and convincing evidence, the court *shall* certify the child to district court.

MINN. STAT. § 260.125(2)(a) (emphasis added).

265. Professor Francis McCarthy notes that the allocation of burdens of proof and the type of waiver scheme used reflect ways of minimizing and controlling specific types of errors. Thus, if a mistake is to be made, under a judicial waiver statute, "the preferred error . . . is to keep a juvenile in the juvenile court if there is doubt concerning which court is appropriate," whereas when a legislature excludes offenses from juvenile court jurisdiction, "[t]he favored error . . . is to keep a juvenile charged with such an offense in the criminal court." McCarthy, *supra* note 37, at 659.

Similarly, I have argued that even within the context of a judicial waiver proceeding, it is possible to use the burden of proof to strike the balance differently and choose a process that favors criminal prosecution in certain cases:

> Placing the burden of persuasion on a youth . . . would emphasize the policies of social defense and public safety in light of the uncertainty of the issues being determined. In many cases, a court cannot reliably determine whether a youth is amenable or dangerous. In these ambig-

facie case approach created only a rebuttable presumption that shifted the burden of production but left the ultimate burden of proof on the prosecutor.[266] Under the new legislation, however, older juveniles charged with serious offenses bear the risk of non-persuasion.[267] If a youth fails to meet that burden, waiver is non-discretionary.

Although the Task Force explicitly linked presumptive certification to the adult sentencing guidelines, the legislature expanded somewhat the catalogue of offenses supporting the presumption, adding cases involving juveniles who employ firearms in committing felony offenses.[268] The Minnesota Criminal Code and Sentencing Guidelines impose a three-year mandatory minimum sentence for conviction of certain offenses while using a firearm.[269] Most of the firearms offenses to which the mandatory minimum provisions apply are already presumptive-commitment-to-prison offenses that carry terms longer than the mandatory minimum.[270] But presumptive certification may not

---

uous cases the decision whether or not to waive is determined by which party bears the burden of persuasion. The legislative policies that justify creating a rebuttable presumption also justify placing the burden of persuasion on the juvenile rather than the state.

Feld, *supra* note 184, at 215.

266. *See supra* notes 229-231 and accompanying text. The *Final Report* of the Task Force explains that

> [u]nlike the *prima facie* case, a presentation by the defense of rebuttal evidence will not shift the burden of proof back to the prosecution. Under the presumptive certification system, the defense will always have the burden of proving the juvenile should be retained in the juvenile system.

TASK FORCE, FINAL REPORT, *supra* note 2, at 27.

267. In close cases, the allocation of the burden of proof may determine the outcome of the waiver proceeding. *See supra* notes 236-251 and accompanying text (discussing *In re D.F.B.*).

268. MINN. STAT. § 260.125(2)(a)(2) (quoted *supra* note 264).

269. *Id.* § 609.11(5).

270. The crimes for which mandatory minimum sentences shall be served as provided in this section are: murder in the first, second, or third degree; assault in the first, second, or third degree; burglary; kidnapping; false imprisonment; manslaughter in the first or second degree; aggravated robbery; simple robbery; criminal sexual conduct . . . ; escape from custody; arson in the first, second, or third degree; drive-by shooting . . . ; a felony violation of chapter 152 [drug offenses]; or any attempt to commit any of these offenses.

Id. § 609.11(9).

Some of the Severity Level VI or other less serious offenses when committed with a firearm arguably are appropriate for presumptive certification and adult incarceration, for example, aggravated assault with a dangerous weapon or kidnapping without great bodily harm. *See id.* §§ 609.222(1), 609.25(2)(1). With the addition of a presumptive commitment mandatory-minimum firearms charge, judges may imprison those offenders under the sentencing guidelines

be appropriate for every type of firearm felony, for example, negligent manslaughter in a hunting accident.[271] Although a youngsters use of a firearm is obviously an "aggravating" factor for politicians, these may be appropriate cases for judicial discretion.

Basing a presumption for waiver on an allegation of a serious crime and placing the burden upon the youth to prove why remaining in juvenile court serves public safety should significantly increase the number of youths certified to criminal court.[272] To further expedite transfer to criminal court, the Task Force recommended a change in waiver criteria to give primacy to "public safety."[273] Rather than asking unanswerable

---

without finding additional aggravating factors to justify an upward departure. *See* MINN. SENTENCING GUIDELINES cmt. II.E.01. "However some cases carry a mandatory prison sentence under state law but fall above the dispositional line on the Sentencing Guidelines Grid, e.g., Assault in the Second Degree. When that occurs, imprisonment of the offender is the presumptive disposition. The presumptive duration is the mandatory minimum sentence." *Id.* cmt. II.E.02. "The fact that a firearm was involved in the offense triggered the application of the mandatory minimum term . . . ." State v. Olson, 325 N.W.2d 13, 15 (Minn. 1982) (holding that presumptive disposition is the mandatory minimum).

271. *See* MINN. STAT. § 609.205(2)-(4) (manslaughter second degree—hunting accident, Severity Level V).

272. California pioneered the presumption-burden-shifting strategy in 1976 when it amended its waiver statute. If the prosecution has alleged certain enumerated offenses, transfer is presumed unless the youth affirmatively establishes his or her amenability within the juvenile court. *See* CAL. WELF. & INST. CODE § 707(b) (West 1984 & Supp. 1995). Subsequent amendments have greatly expanded the catalogue of offenses which create the presumption of adulthood. *See infra* note 385 and accompanying text (discussing California's legislative amendments).

Evaluations of the California legislative changes indicate that using offense criteria to shift the burden of proof dramatically increased the number of youths tried, convicted, and sentenced as adults after being charged with one of the enumerated offenses. "Los Angeles County experienced a 318% increase in certification hearings and a 234% increase in certifications" between 1976 and 1977. Katherine S. Teilmann & Malcolm W. Klein, Summary of Interim Findings of the Assessment of the Impact of California's 1977 Juvenile Justice Legislation 30 (n.d., unpublished report, on file with author). Moreover, the juveniles who were certified to stand trial as adults were as likely to be convicted as youths tried in juvenile court, and following their convictions, they were more likely to be incarcerated than their juvenile counterparts. *Id.* at 32.

273. TASK FORCE, FINAL REPORT, *supra* note 2, at 27. The shift in emphasis did not emerge until relatively late in the Task Force process. At a meeting of the certification committee on September 14, 1993, I proposed alternatives to the current factors. Minutes of the Juvenile Certification Committee 3-4 (Sept. 14, 1993) (on file with author) (proposing length of prior record, seriousness of prior record, prior exposure to treatment, age of onset of delinquency). At the Task Force retreat on September 29-30, 1993, the Certification Subcommittee still recommended retention of "amenability to treatment" and "dangerousness" as waiver criteria and the factors listed in MINN. R. JUV. P. 32(a)-(k), *in* MINNE-

questions about a youth's "amenability to treatment" or "dangerousness," the Task Force proposed using more objective offense criteria to define "public safety."[274] Quite apart from criminal liability, I urged the Task Force to include an offender's culpability as a principal or accessory as a component of the waiver decision.[275] Because juveniles are highly susceptible to peer group influences and more likely than adults to commit their crimes in

---

SOTA RULES, *supra* note 167, as factors. Minutes of the Juvenile Certification Committee 3 (Oct. 12, 1993) (on file with author). Ms. Karel Moersfelder, a Hennepin County prosecuting attorney, and I expressed the strongest objection to continued reliance on "clinical" considerations. At my urging, the Task Force adopted objective offense, culpability, and "public safety" criteria to structure waiver decisions. Minutes of Juvenile Justice Task Force 9 (Oct. 16, 1993) (on file with author).

274. TASK FORCE, FINAL REPORT, *supra* note 2, at 27 (recommending increased use of offense criteria, e.g., seriousness of the present offense, culpability of the juvenile and prior record of delinquency, in order to emphasize public safety, increase objectivity, and simplify the process). I had long advocated that Minnesota use objective offense criteria to structure waiver decisions, *e.g.*, Feld, *supra* note 98, and others supported such a policy as well. A Minnesota House of Representatives legislative analyst wrote a policy brief supporting similar criteria. *See* EMILY SHAPIRO, MINN. HOUSE RESEARCH, POLICY BRIEF: REFERENCE OF JUVENILES TO ADULT COURT 2 (1989). The analyst stated:

> A reference process that relies primarily on *objective criteria*, such as *the nature of the crime, the age of the juvenile, and the extent of prior, adjudicated delinquent conduct*, is more likely to result in consistent and principled results than one that relies primarily on the exercise of unstructured discretion by the juvenile court judge.

Id. (emphasis added).

275. *See* Feld, *supra* note 232, at 523. I previously stated:

> Assessments of seriousness, however, also include the quality of the actor's choice to engage in the conduct that produced the harm. "The other major component of seriousness is the degree of the offender's culpability: that is, the degree to which he may justly be held to blame for the consequences or risks of his act."

Id. (footnote omitted) (quoting A. VON HIRSCH, DOING JUSTICE 80 (1976)).

In *In re K.C.* the court of appeals analyzed the juvenile's role in the offense and rejected the claim that waiver required more than "passive" complicity:

> The statutory requirement that a juvenile must be alleged "to have committed" a certain type of felony does not imply a higher standard of criminal liability than that established in the Minnesota criminal code. The [prima facie case] statute relies on the seriousness of the felony, not the juvenile's degree of participation, to target those offenses particularly meriting reference. Just as an adult defendant may be charged as an accomplice under Minn. Stat. § 609.05 (1992), a juvenile may be referred for adult prosecution based on that degree of participation. The court is, of course, free to consider the juvenile's degree of participation in determining whether the county's burden of proof has been met . . . .

513 N.W.2d 18, 21 (Minn. Ct. App. 1994).

groups,[276] I felt that some mechanism was necessary to distinguish between active participants and passive accomplices.

The Task Force's emphasis on "public safety" reflects the political reality that the public's fear of serious youth crime, rather than a child's responsiveness to treatment, is the real reason for waiver.[277] I have repeatedly urged the legislature to define "public safety" itself rather than to delegate that question to the subjective, discretionary assessment of each member of the judiciary.[278]

The legislative definition of "public safety" closely parallels the Task Force's recommendations and further links the definition of serious juvenile offenses to the adult sentencing guidelines:

> In determining whether the public safety is served by certifying a child to district court, the court shall consider the following factors:
> (1) the *seriousness of the alleged offense* in terms of community protection, including the existence of any *aggravating factors recognized by the sentencing guidelines*, the use of a firearm, and the impact on any victim;
> (2) the *culpability* of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the sentencing guidelines;
> (3) the child's *prior record of delinquency*;
> (4) the child's *programming history*, including the child's past willingness to participate meaningfully in available programming;

---

276. Zimring, *supra* note 42, at 873-75 (arguing that juveniles' group participation in criminal activity overstates their age contribution to overall crime rates). Juveniles are routinely adjudicated delinquent or waived to criminal court on the basis of accomplice liability. *See In re* T.L.C., 435 N.W.2d 581, 583 (Minn. Ct. App. 1989) (rejecting argument that misconduct of juvenile's accomplices had to be attributable to him in reference proceeding); *In re* D.K.K., 410 N.W.2d 76, 77 (Minn. Ct. App. 1987) (juvenile adjudicated delinquent based on evidence she aided and abetted theft); MINN. SENTENCING GUIDELINES § II.D.2.a.(2) (mitigating factor that "offender played a minor or passive role" in crime).

277. The issue of waiver arises primarily in the context of a concern for public safety. Therefore, legislatures may address the questions of an offender's record of recidivism or the seriousness of the current offense directly, rather than circuitously, through a judicial inquiry into amenability to treatment or dangerousness. The value judgment about whether public safety justifies waiver reflects a tension between retribution and utilitarian prevention.

Feld, *supra* note 232, at 498.

278. *See, e.g., id.* at 499 ("These issues of public policy and safety should be debated and decided in the open political arena by democratically elected legislators rather than behind closed doors on an idiosyncratic basis by individual judges."). In the Task Force deliberations, I stood behind my argument that "[t]he most reliable and relevant criteria on which to base these [public safety] judgments are the present offense and the prior record." *Id.* at 497.

(5) the adequacy of the *punishment or programming* available in the juvenile justice system; and
(6) the dispositional options available for the child.
In considering these factors, *the court shall give greater weight to the seriousness of the alleged offense and the child's prior record of delinquency than to the other factors listed in this subdivision.*[279]

The statutory addition of the "punishment or programming" language to the Task Force's recommended list of "public safety" factors reflects a compromise between House and Senate conferees.[280] The legislation assigns controlling importance to the present offense and prior record, and represent a significant rationalizing of the decision.[281]

The Task Force also recommended and the statute includes "prior program history" and juvenile court "dispositional options" among the "public safety" factors. In the past, juvenile courts certified many youths who received no prior exposure to intensive treatment programs.[282] Inclusion of juveniles' programming history, and the adequacy of juvenile court programs and dispositional options, may reinstate *sub rosa* more subjective clinical considerations into waiver decisions.

Legislatively linking presumptive certification with the Sentencing Guidelines also implicates many court decisions interpreting the Guidelines' policy and jurisprudence. For example, adult defendants may rebut the Sentencing Guidelines' presumption of commitment to prison by showing that they are "amenable to probation."[283] In *State v. Wright* the defendant

279. MINN. STAT. § 260.125(2b) (emphasis added).

280. In the April 20, 1994, conference committee, Sen. Allan Spear objected that "punishment" too narrowly defined juvenile court dispositions and argued that "programming is a broader term that includes both the punitive and the therapeutic aspects." Minutes of the Juvenile Justice Task Force 4 (Apr. 20, 1994) (on file with author). Rep. Phil Carruthers insisted that the law should retain "punishment" language: "Sometimes, kids deserve to be punished. If they do something serious . . . let's not beat around the bush. They [sic] are times when they deserve to be punished." *Id.* The conferees agreed to include both terms in the statute.

281. *See* MINN. STAT. § 260.125(2b). I have criticized Minnesota and other states for failing to rank-order or assign relative weights to the various factors that courts consider when making waiver decisions. *See* Feld, *supra* note 98, at 527-29 (arguing that without rank-ordering or assigning controlling weight to the factors they are to use, legislatures give judges wide discretion). Legislative "lists" rarely serve to limit discretion, as a judge can emphasize one or two factors to justify almost any decision. Feld, *supra* note 15, at 271-72; *see also supra* notes 182-188 and accompanying text.

282. *See* Feld, *supra* note 72, at 35 (fewer than half of certified youths received previous home removal or institutional dispositions).

283. *See generally* Richard S. Frase, *Sentencing Reform in Minnesota, Ten Years After: Reflections on Dale G. Parent's structuring Criminal Sentences:*

faced a presumptive prison term of twenty-four months, but the trial court stayed the term, made a mitigated dispositional departure, and ordered probation with six months in jail and treatment.[284] The Minnesota Supreme Court upheld the departure because the defendant was "particularly unamenable to incarceration" and he was "particularly amenable to individualized treatment in a probation-setting."[285] Subsequently, in *State v. Tracy*, the court upheld a mitigated downward departure based solely on a finding that the defendant was "amenable to probation."[286]

Thus, to the extent that the Sentencing Guidelines' rebuttable presumption jurisprudence shapes interpretation of the analogous presumptive-certification provisions, trial judges in certification hearings must still determine whether a youth is amenable to an EJJ probationary disposition.[287] Despite the legislature's emphasis on "public safety" and "proportional sentencing," a substantial degree of individualized sentencing discretion remains inherent in presumptive certification. Professor Frase's criticism of the vagueness of "amenability to probation" departures echoes my critiques of judicial waiver discretion based on assessments of "amenability to treatment."[288]

The Evolution of Minnesota's Sentencing Guidelines, 75 MINN. L. REV. 727, 740 (1991) (discussing the operation of Minnesota's sentencing guidelines).

284. 310 N.W.2d 461, 461 (Minn. 1981).

285. *Id.* at 462-63. The court found that because of his immaturity, Wright would be easily victimized in prison or misled into criminal activity by other inmates. The court also found that he needed psychiatric treatment that would not be available in an institutional setting and that he would not endanger public safety if he received appropriate treatment on an out-patient basis. *Id.* at 462.

286. 323 N.W.2d 28, 31 (Minn. 1982).

287. *See* Frase, *supra* note 283, at 740-48. Both the presumption of feasibility and infeasibility of community-based treatment may be overcome in exceptional circumstances. *Id.* at 746. Professor Frase contends that the Guidelines' mixed retributive-utilitarian approach makes sentencing policy sense. For those for whom probation will likely be unsuccessful, "[p]romptly giving such defendants their full 'just deserts' incapacitates high-risk offenders and sends appropriate deterrent messages to the public." *Id.* at 747. At the same time, allowing amenability departures helps to counterbalance the prison crowding impact of upward departures based on findings of nonamenbility to probation, and avoids other less visible charging or plea bargaining strategies that prosecutors or courts might resort to in order to achieve the same results. *Id.* at 745-46.

288. *Compare id.* at 747 (arguing that amenability departures are vague, and as a result, popular with criminal justice officials who are likely to overuse them, and that the Guidelines Commission should have "sought to develop more precise definitions of 'amenability' and 'unamenbility,' including objective

In the final analysis, a juvenile court judge who decides to certify a youth in the interest of "public safety" effectively must decide whether the youth's offense severity, criminal history, and "unamenability to probation" warrant adult imprisonment. In 1989 about thirty percent of all adult defendants convicted of presumptive-commitment-to-prison offenses received mitigated downward departures, and courts formally justified about half of those departures (fifteen percent) with findings of amenability to probation.[289] Unless prosecutors are more selective in filing certification motions than they are in charging adult criminal defendants, similar rates of non-certification should occur.

The new legislation still requires a juvenile court judge to conduct a waiver hearing whether the prosecutor charges a youth with a presumptive-certification offense or seeks certification on "public safety" grounds.[290] A prosecutor initiates a certification proceeding by filing a motion, and the court must conduct a hearing within thirty days.[291] Because the charges filed determine whether the presumption for certification applies, and thus which party bears the burden of proof, the court must make a threshold determination of probable cause.[292]

In *State v. Florence*, the Minnesota Supreme Court defined the type of probable cause required by the rules of criminal procedure.[293] Probable cause may be "based upon the entire record including reliable hearsay in whole or in part" rather than litigated in an adversarial hearing.[294] In authorizing non-adversarial probable cause procedures, the *Florence* court relied on

---

criteria for making these findings") *with* Feld, *supra* note 98, at 529 n.49 (judicial determinations of amenability to treatment are inherently vague.)

289. Richard S. Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J.L. & PUB. POL'Y 279, 320-26 (1993).

290. MINN. STAT. § 260.125(2).

291. *Id.* MINN. R. JUV. P. 32.04(1)(B), *in* MINNESOTA RULES, *supra* note 167. The 30-day time period for the hearing may be extended for an additional 60 days for "good cause." MINN. STAT. § 260.125(2)(4); MINN. R. JUV. P. 32.04.1(B), *in* MINNESOTA RULES, *supra* note 167.

292. MINN. STAT. § 260.125(2)(d); *see also* MINN. R. CRIM. P. 11.03 ("A finding by the court of probable cause shall be based upon the entire record including reliable hearsay in whole or in part."); MINN. R. JUV. P. 32.04(3)(B), *in* MINNESOTA RULES, *supra* note 167 (probable cause determination made pursuant to Minnesota Rules of Criminal Procedure 11).

293. 239 N.W.2d 892, 899 (1976).

294. *Id.* The court concluded that "[i]n most instances, the information available to the judge presiding at an omnibus hearing will form an adequate basis for determining probable cause, thus making unnecessary the production and cross-examination of witnesses in court." *Id.* at 900.

Gerstein v. Pugh,[295] where the Supreme Court upheld ex parte judicial determinations of probable cause.[296] In the vast majority of criminal cases, probable cause is based on the complaint supported by police reports and statements by witnesses.[297] An adversarial probable cause determination occurs only in those relatively rare instances in which a defendant produces witnesses whose testimony, if believed, would negate a finding of probable cause.[298] Thus, in practice, probable cause determinations in certification hearings entail only judicial review of the documentary record.

Even though certification hearings focus primarily on "public safety" considerations, rather than "amenability to treatment," some clinical issues remain formally in the guise of "dispositional options" and "adequacy of . . . programming," and, practically, as findings of "amenability to probation."[299] Consequently, a court may require a social or psychological study of a child in a certification proceeding.[300] Such evaluations raise constitutional issues similar to those posed by a determination of a criminal defendant's competency to stand trial or sanity at the time of the offense. In *In re S.R.J.*, the Minnesota Supreme Court analyzed how to obtain psychiatric evaluations and clinical evidence for certification hearings without violating the Fifth Amendment privilege against compelled self-incrimination.[301] The *S.R.J.* court attempted to resolve the dilemma by

---

295. 420 U.S. 103 (1975).

296. *Florence*, 239 N.W.2d at 901.

297. *Id.* at 902. The *Florence* court noted that

> [a] carefully drawn and sufficiently detailed complaint made by an investigating officer and incorporating reliable hearsay could in some limited situations be adequate support for a finding of probable cause, at least where the essential truth of the facts averred in the complaint is not contested. In the more usual situation, the complaint will and should be buttressed by the police report, including verified statements of witnesses whose observations form the basis for the complaint and, in addition, the results of disclosure and discovery procedures required by the rules.

Id. (footnote omitted).

298. *Id.* at 902-03.

299. MINN. STAT. § 260.125(2b)(5), (6).

300. *Id.* § 260.151(1) (1994) ("The court may order any minor coming within its jurisdiction to be examined by a duly qualified physician, psychiatrist or psychologist appointed by the court."); MINN. R. JUV. P. 32.03, *in* MINNESOTA RULES, *supra* note 167 (court may order social, psychiatric, or psychological studies).

301. 293 N.W.2d 32 (Minn 1980). The Supreme Court extended the Fifth Amendment privilege against self-incrimination to juvenile court proceedings in 1967. *See supra* notes 11-17 and accompanying text (discussing *In re* Gault, 387 U.S. 1 (1967)). Shortly after the Minnesota court decided *S.R.J.*, I argued

providing a form of limited use-immunity to compel the interview but restrict its use.[302] The Minnesota Supreme Court, however, decided *S.R.J.* prior to *Estelle v. Smith*, which held that the privilege against self-incrimination applied to a court-ordered psychiatric examination conducted for purposes of a subsequent sentencing hearing and restricted psychiatrists' permissible disclosures.[303]

Since the court decided *Smith*, several state courts have held that any court-ordered psychological evaluation of a youth to determine "amenability" either violates the Fifth Amendment privilege against self-incrimination[304] or requires a youth's attorney to be present at the interview.[305] If instead of disclosure in a court-ordered psychological evaluation, a juvenile testifies at a certification hearing about the alleged offense, may a prosecutor introduce that testimony as evidence at a subsequent delinquency, EJJ, or criminal trial on the merits,[306] and, if a

---

that the court's resolution of the Fifth Amendment claim was inconsistent with its treatment of similar claims by adult defendants who raised an insanity defense. *See* Feld, *supra* note 184, at 213-14 n.183. At least the Minnesota court recognized the existence of the Fifth Amendment issue, however. Recently, one court rejected the argument that constitutional rights even apply in waiver hearings. People v. Hana, 504 N.W.2d 166, 177 (Mich. 1993), *cert. denied*, 114 S. Ct. 1074 (1994).

302. "Any matters disclosed by the juvenile to the doctor in the course of the examination may not be evidence or the source of evidence in any subsequent adjudicatory procedure against the accused." *S.R.J.*, 293 N.W.2d at 36. It can be difficult to conduct evaluations where confidentiality of communications cannot be assured. A juvenile may deny committing the alleged offense because of *genuine* non-participation, a *strategic* calculation of the affects of admitting it at trial, an *avoidance* or inability to acknowledge negative behavior, or *repression*, a dissociative reaction against the memory of the offense. Richard Barnum, *Self-Incrimination and Denial in the Juvenile Transfer Evaluation*, 18 BULL. AM. ACAD. PSYCH. L. 413, 419 (1990).

Other jurisdictions may bar a juvenile from introducing expert testimony on the question of amenability if the youth does not submit to an examination by an expert for the state. *See, e.g.*, Wayne W. v. Commonwealth, 606 N.E.2d 1323, 1330 (Mass. 1993) ("[A] defendant who speaks on his own behalf thereby gives up his privilege of silence and may be compelled to respond to questions posed by the State on matters reasonably related to the subject matter of his own testimony.").

303. 451 U.S. 454, 462-69 (1981). " '[T]he availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.' " *Id.* at 462 (quoting *In re* Gault, 387 U.S. 1, 49 (1967) (Blackmun, J., plurality opinion)).

304. *E.g.*, R.H. v. State, 777 P.2d 204 (Ala. Ct. App. 1989).

305. Christopher P. v. State, 816 P.2d 485, 489 (N.M. 1991).

306. MINN. R. JUV. P. 32.04(4), *in* MINNESOTA RULES, *supra* note 167. The rules of procedure do not provide an explicit use immunity for the youth's testimony at the certification hearing. *See* Simmons v. United States, 390 U.S. 377,

youth's attorney obtains a clinical evaluation to aid the defense in a waiver hearing, may the prosecution call the psychiatrist as a witness in a subsequent criminal prosecution?[307] Because a certification hearing is a type of sentencing proceeding, the new statute also provides parity between juveniles and adult criminal defendants with respect to the confidentiality of psychological evidence.[308]

---

394 (1968) (holding that a defendant's testimony in support of a motion to suppress evidence on Fourth Amendment grounds can not be used against him at trial); State v. Christenson, 371 N.W.2d 228, 332 (Minn. Ct. App. 1985) (same).

In *Ramona R. v. Superior Court* the California Supreme Court held that any statements a juvenile gives in a certification hearing must receive use immunity, meaning that such statements can not be used in a subsequent delinquency or criminal trial. 693 P.2d 789, 793-95 (Cal. 1985). The court in *Ramona R.* analogized to the self-incrimination dangers posed for probationers in revocation hearings and reasoned that without a grant of use-immunity, a juvenile would be dissuaded from contesting a certification motion. *Id.* at 794-95. Analogizing to the dangers of self-incrimination posed for a probationer in a revocation hearing, the court recognized that a juvenile at a certification hearing faced the cruel-trilemma of contempt, self-incrimination, or perjury:

> He might . . . seriously incriminate himself if he exercises his right to be heard, particularly where his testimony would consist of a truthful explanation of mitigating circumstances. . . . If he remains silent he not only loses his opportunity to present a conceivably convincing case against . . . [waiver] but also incurs the risk that notwithstanding the ideals of the Fifth Amendment . . . his silence will be taken as an indication that there are no valid reasons why . . . [he should not be tried as an adult]. To avoid the adverse effects of the foregoing alternatives, the . . . [juvenile] may be tempted to testify falsely in a manner which will not damage his defense at a subsequent criminal trial.

Id. at 794.

307. In *State v. Rhomberg*, defense counsel employed a psychiatrist to obtain evidence for the juvenile's waiver hearing. 516 N.W.2d 803, 807 (Iowa 1994). Although the psychiatrist did not testify on the juvenile's behalf, the state called him as a rebuttal witness at the youth's subsequent criminal prosecution. *Id.* The court ruled that "the physician-patient privilege does not preclude the State from calling a psychiatrist . . . as a witness against [the] defendant" because the psychiatrist was retained not to aid in treatment but for litigation purposes. *Id.* at 808.

308. *Compare* MINN. STAT. § 260.155(1)(c) ("[T]he court may exclude the public from portions of a certification hearing to discuss psychological material or other evidence that would not be accessible to the public in an adult proceeding.") *with* MINN. R. JUV. P. 32.04(1), *in* MINNESOTA RULES, *supra* note 167 (same).

Prior to the amendment, all delinquency and reference hearings were open to the public if a youth was 16 years of age or older and charged with a felony. MINN. STAT. § 260.155(1) (1992). Many commentators analyzed the conflicting policies between media access to court proceedings and the confidential nature of juvenile court hearings to protect youths from stigma and public labelling. Richard D. Hendrickson, *Media Access to Juvenile Courts: An Update*, 4 JUV. & FAM. CT. J., No. 3, 1993, at 27; David Katz, *The Grim Reality of Open Juvenile Delinquency Hearings*, 28 N.Y.L. SCH. L. REV. 101 (1983); Stephen Jonas, *Press*

B. Extended Jurisdiction Juvenile Prosecutions

The Task Force recognized that one fundamental deficiency of *all* waiver legislation is its binary quality, *either* juvenile *or* adult, even though adolescence is a developmental continuum requiring a continuum of controls.[309] To avoid re-creating a false dichotomy, the Task Force recommended

> a more graduated juvenile justice system that establishes a new *transitional component between the juvenile and adult systems*. . . . [T]his new [Serious Youthful Offender] category will create viable new dispositional options for juvenile court judges facing juveniles who have committed serious or repeat offenses. It will give the juvenile *one last chance* at success in the juvenile system, with the threat of adult sanctions as an incentive not to re-offend. The juvenile court, for a Serious Youthful Offender, will be very similar to adult court, with the exception that juvenile treatment would be available.[310]

In recommending the creation of a category for serious youthful offenders, the Task Force proposed a substantial departure from prior juvenile court legislation. The new, intermediate category envisioned that courts would try youths in juvenile court with all adult procedural safeguards, and then impose both a juvenile court sentence and a stayed adult criminal sentence.[311]

Access to the Juvenile Courtroom: Juvenile Anonymity and the First Amendment, 17 Colum. J.L. & Soc. Probs. 287 (1982); Note, *The Public Right of Access to Juvenile Delinquency Hearings*, 81 Mich. L. Rev. 1540 (1983); *see* Note, *Juvenile Court Records: Confidentiality vs. the Public's Right to Know*, 23 Am. Crim. L. Rev. 379, 399-401 (1986) (table summarizing statutory access provisions).

In a certification proceeding, however, either side could present psychological evidence that would be confidential if offered at the sentencing of an adult criminal defendant. Minn. R. Crim. P. 27.03(C) (disclosure of "non confidential portion of the presentence investigation report" only). When a juvenile court judge restricted press access to the "psychological" phase of a waiver hearing in the highly visible Jason Williams murder case, the court of appeals reversed and granted admission. Star Tribune v. Bush, 20 Media L. Rep. (BNA) 2293 (Minn. Ct. App. 1993). The court of appeals dismissed the trial court's concern about the " 'significant danger' that psychological information related to the juvenile's amenability to treatment would be 'available to the public.' The legislature has weighed the balance between the juvenile's rights and public access, and has concluded that public access is appropriate in certain serious cases." *Id.* at 2294. As a result of the court of appeals's decision to grant press access to the reference hearing, Williams waived his right to a waiver hearing in order to avoid the public disclosure of psychological information that his attorney feared would be prejudicial. Kevin Diaz, *Boy Waives Rights and Will Stand Trial as Adult in Slayings*, Star Trib. (Minneapolis), Feb. 24, 1993, at 2B.

309. Task Force, Final Report, *supra* note 2, at 32-33.

310. *Id.* (alteration in original) (emphasis added).

311. Elsewhere I have proposed the idea of an intermediate, blended juvenile-adult sentence. Feld, *supra* note 98, at 583-84 (proposing a sentencing cat-

Although a few jurisdictions provide some mixed or blended juvenile-adult intermediate categories for sentencing serious young offenders,[312] they typically either use inadequate juvenile court procedures or impose standard adult sentences. In Texas, for example, juveniles may be indicted for certain serious crimes, tried in juvenile court with all adult criminal procedural safeguards, including the right to a jury trial, and sentenced to up to forty years of confinement with their term beginning in juvenile facilities and, if not released from the Youth Commission, continuing in an adult correctional facility.[313] By contrast, young offenders are committed to the California Youth Authority ("CYA") either as juveniles or as young adults. The CYA exercises jurisdiction over them until age twenty-five.[314] Juveniles tried in juvenile courts do not have a right to a jury trial, and they may receive longer CYA sentences than young

---

egory for chronological juveniles sentenced as adults to encourage courts to incarcerate young offenders with considerable juvenile histories).

312. New Mexico recently created a "youthful offender" status for juveniles charged with serious crimes, N.M. STAT. ANN. § 32A-2-3(I) (Michie 1993). Juveniles in New Mexico enjoy the right to a jury trial. *Id.* § 32A-2-16. The statute authorizes either an adult criminal sentence, or a juvenile disposition with extended jurisdiction until age 21 with a waiver hearing to decide whether to sentence the juvenile as an adult or youthful offender. *Id.* § 32A-2-20.

313. TEX. FAM. CODE ANN. §§ 53.045, 54.04, 54.11 (West 1986 & Supp. 1995). The Texas determinate sentencing law subjects children 10 to 16 years of age to sentences of up to 40 years in prison if they are indicted for one of six designated felonies. *Id.* § 54.04(d)(3). Juveniles receive the same procedural guarantees as do adult criminal defendants. *Id.* § 53.045(a). Juveniles begin their sentences in juvenile facilities, and at age 18 a court conducts a hearing to decide if they will be retained within the juvenile correctional system for the duration of their minority (until age 21), or complete their determinate sentence in the Texas Department of Corrections. *Id.* §§ 54.04(d)(3), 54.11. Challenges to the law have been unsuccessful. *See, e.g., In re* D.S., 833 S.W.2d 250, 253 (Tex. Ct. App. 1992) (equal protection claim).

The Texas legislation greatly increases the sanctioning power of juvenile courts to respond to youths below 15 years old, the minimum age to transfer juveniles to criminal courts, and provides prosecutors with a powerful alternative to adult prosecution. *See* Robert O. Dawson, *The Third Justice System: The New Juvenile-Criminal System of Determinate Sentencing for the Youthful Violent Offender in Texas*, 19 ST. MARY'S L.J. 943, 946 (1989) [hereinafter Dawson, *Third Justice System*] (explaining that the primary focus of the determinate sentencing system is on violent offenses committed by 13- and 14-year-olds as well as on providing prosecutors with alternative to discretionary transfer for older violent juveniles); Robert O. Dawson, *The Violent Juvenile Offender: An Empirical Study of Juvenile Determinate Sentencing Proceedings as an Alternative to Criminal Prosecution*, 21 TEXAS TECH L. REV. 1897, 1921-24 (1990) (examining the age distribution of the juveniles handled under the Texas determinate sentencing statute).

314. CAL. WELF. & INST. CODE § 1731.5 (West 1992); *see* Feld, *supra* note 9, at 877-78 & nn.286-89 (discussing California legislation).

adult offenders convicted for the same offense in criminal court.[315] Thus, the Minnesota Juvenile Justice Task Force attempted to wend its way between using adult criminal procedures and sentences in juvenile court on the one hand, and using the deficient procedures of juvenile courts to enhance sanctioning powers, on the other hand.

Currently, most waived juveniles are sixteen or seventeen years old.[316] Prior to the 1994 amendments, juvenile courts' dispositional authority ended when individuals reached age nineteen.[317] A juvenile's time remaining within the jurisdiction of juvenile courts often provides the impetus to waive older youths.[318] Thus, increasing juvenile courts' dispositional jurisdiction from age nineteen to age twenty-one or twenty-three could reduce the pressure to certify some youths.[319] Due to concerns that a longer jurisdictional period might unduly prolong some youth's exposure to probation revocations or discourage judges from certifying them, some Task Force members favored extending jurisdiction only until age twenty-one.[320]

---

315. The California Supreme Court in *People v. Olivas* limited the maximum sentence that could be imposed upon an adult misdemeanant committed to the CYA to the maximum length that could be imposed on an adult sentenced for the same offense. 551 P.2d 375, 389 (Cal. 1976). By contrast, in *In re Eric J.* the court refused to apply the *Olivas* adult sentence limits to juveniles sentenced to the CYA. 601 P.2d 549, 552-54 (Cal. 1979). Juvenile courts may impose a longer term on a juvenile than could be imposed on an adult sentenced for the same offense because "[j]uvenile commitment proceedings are designed for the purposes of rehabilitation and treatment, not punishment." *Id.* at 554. *See generally* Robert V. Vallandigham Jr., People v. Olivas*: The Concept of "Personal Liberty" as a Fundamental Interest in Equal Protection Analysis*, 4 HASTINGS CONST. L.Q. 757 (1977) (discussing the potential impact of *Olivas*); Comment, *Equality of Sentencing Between Juveniles and Adults: A Logical Extension of* People v. Olivas, 10 PAC. L.J. 161 (1978) (arguing against any disparity between juvenile and adult sentencing schemes); People v. Olivas*: Equalizing the Sentencing of Youthful Offenders with Adult Maximums*, 4 PEPP. L. REV. 389 (1977) (same).

316. McCarthy, *supra* note 37, at 651 (noting that the vast majority of transfer cases involve 16- and 17-year-old males); *see also* Podkopacz, *supra* note 211, at 45 (data from Hennepin County, Minnesota).

317. MINN. STAT. § 260.181 (1992). The 1982 amendment of § 260.181 shortened the period of juvenile court jurisdiction from age 21 to age 19. 1982 Minn. Laws 615, § 4.

318. *See, e.g.*, Fagan & Deschenes, *supra* note 191, at 341 (youth's age at the time of offense was the most consistent factor in waiver decisions, with older youths transferred more often).

319. TASK FORCE, FINAL REPORT, *supra* note 2, at 33. Even if this is the case, use of the new category would still result in stronger consequences for serious and repeat offenders. *Id.*

320. *Id.* at 33, 36. A minority of the members of the Task Force recommended that SYO extended jurisdiction terminate at age 21:

For older juveniles charged with presumptive-certification offenses, the Task Force recommended that, at the conclusion of a waiver hearing, the *only* sentencing options available to a juvenile court judge would be either to certify the youth to adult court or designate the juvenile as a Serious Youthful Offender.[321] The legislature renamed that category Extended Jurisdiction Juvenile Prosecution ("EJJ") because it sounded more bureaucratic and less attractive to young toughs.[322] For non-presumptive-certification juveniles against whom the state filed a certification motion but who were not certified, the Task Force proposed that juvenile court judges retain broader discretion either to designate the youth as an EJJ or to impose an ordinary juvenile court disposition.[323]

Some Task Force members characterized EJJ status as "one last chance" for juvenile rehabilitation. Others described EJJ as enhancing juvenile court sanctioning powers, a juvenile court "on steroids," or one with "a longer handle and a stronger leash." Effectively, EJJ status reflects both descriptions because

---

> Concern was expressed that extending the jurisdiction to age 23 created too lengthy an exposure for juveniles in which they could reoffend. Concern was also expressed that the adult criminal system may be overwhelmed if large numbers of juveniles reoffend and have their adult sentences executed.

Id. at 33. Commissioner of Corrections Frank Wood expressed concern that many juveniles whom judges had already deemed inappropriate for adult incarceration by declining to certify them would enter adult prisons as a result of probation violations.

321. *Id.* at 28, 32-35.

322. The legislature changed the name from "serious youthful offender" to extended jurisdiction juvenile prosecutions to make the label less attractive to delinquent "wannabees." " 'We were told that we might somehow be encouraging youths to be tough, so we settled on something less, uh, glamorous,' said Sen. Jane Ranum, DFL-Minneapolis, the Senate bill's sponsor." Patricia L. Baden, *Senate Oks Juvenile Crime Bill; Violent Youths Could Get Adult Penalties*, STAR TRIB. (Minneapolis), Apr. 30, 1994, at 1B, 5B. For simplicity, this Article uses the Extended Jurisdiction Juvenile Prosecution (EJJ) label rather than the serious youthful offender (SYO) label.

323. Some juveniles would not meet the presumptive certification criteria because either they were younger than 16 years of age, or their offenses were less serious. The Task Force recommended that in these cases judges have somewhat broader sentencing discretion:

> The Legislature should provide that at the end of the [ordinary] certification hearing the court will have three options:
> a. deny the motion and keep the juvenile in juvenile court,
> b. deny the motion, designate the juvenile as a Serious Youthful Offender and keep the Serious Youthful Offender in juvenile court, or
> c. grant the motion and refer the certified adult to adult court for trial.

TASK FORCE, FINAL REPORT, *supra* note 2, at 30.

juveniles designated as EJJs will be tried in juvenile court, but will be given all adult criminal procedural safeguards, including the right to a jury trial.[324] Because juvenile courts use adult procedures to try EJJs, judges could impose adult criminal sentences as well as juvenile dispositions.[325] If a youth violated the conditions of the juvenile sentence, the stayed adult criminal sentence could be executed.[326]

Certification Committee and Task Force members debated thoroughly the extent to which probation revocation should be automatic or non-discretionary. Unable to define the circumstances requiring mandatory revocation, the Task Force ultimately proposed that courts treat EJJ revocations in the same way as adult probation violations.[327] Because EJJs receive adult criminal procedural safeguards, the Task Force recommended including their EJJ convictions in their criminal history.[328]

Whether to allow prosecutors to designate "presumptive-certification" juveniles as EJJs without filing a certification motion divided Task Force members. Many had misgivings about prosecutorial overcharging and the potential for abuse.[329] As a

---

324. The Task Force recognized that "[i]mplementing a significantly more severe juvenile justice system response, including the potential of an adult sanction, will require extending a mandatory right to counsel and the option of a jury trial to juveniles designated as Serious Youthful Offenders." *Id.* at 34. Accordingly, the Task Force made such recommendations. *Id.* at 36; *see infra* notes 596-709 and accompanying text (analyzing more extensively the provision of jury trials and counsel in juvenile court).

325. TASK FORCE, FINAL REPORT, *supra* note 2, at 33.

> Serious Youthful Offenders would receive an adult sentence for their offense, which would initially be stayed, and a juvenile disposition would be ordered. This category would give the public the best of both systems. The juvenile court would retain access to juvenile programming, and would have the availability of adult sanctions if the program is not successful.

Id. at 33-34.

326. *Id.* at 34, 37.

327. *Id.*

328. The Task Force recommended that "Serious Youthful Offender convictions carry the same weight as similar adult convictions should the offender be sentenced for an adult crime in the future. Unlike the current system, Serious Youthful Offender convictions will become a part of the Serious Youthful Offender's adult criminal record." *Id.* at 34; *see infra* notes 403-449 and accompanying text (discussing use of juvenile records in the Minnesota Sentencing Guidelines).

329. *Cf.* McCarthy, *supra* note 37, at 657-58 (noting that most prosecutors are officials elected locally, who may prosecute a juvenile criminally in a well-publicized case to appease local public pressure). *See generally* Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB.

concession to prosecutors, the Task Force endorsed prosecutorial classification of presumptive-certification juveniles as EJJs without judicial review.[330] Some Task Force members feared that allowing prosecutors to designate EJJs without judicial review could result in adult confinement of inappropriate youths if courts revoked their EJJ probation status. They concluded, however, that restricting EJJ eligibility to older, presumptive-certification juveniles, requiring prosecutors to use adult criminal procedures to try EJJ cases, and removing the EJJ designation from youths convicted of lesser, non-presumptive offenses, would foster realism in charging and provide adequate checks on prosecutorial designation of EJJ cases.[331]

The legislature followed the Task Force's recommendations, and created the intermediate EJJ status.[332] When a prosecutor initially files a delinquency petition alleging a felony offense, the petition must indicate whether the prosecutor seeks an EJJ designation.[333] The new statute provides several methods for

---

POL'Y 281 (1991) (philosophy and practice of prosecutorial waiver in Florida); Donna M. Bishop et al., *Prosecutorial Waiver: Case Study of a Questionable Reform*, 35 CRIME & DELINQ. 179 (1989) (same); Wallace J. Mlyniec, *Juvenile Delinquent or Adult Convict—The Prosecutor's Choice*, 14 AM. CRIM. L. REV. 29, 36-46 (1976) (examining the validity and desirability of prosecutorial discretion).

330. The Task Force recommended:

> The second option would allow the prosecutor to designate the juvenile as a Serious Youthful Offender on the charging petition. This designation could apply to juveniles 16 or 17 years of age at the time of the offense, who are charged with a felony offense that, if they were an adult, would be a presumptive commitment of prison offense under the Minnesota Sentencing Guidelines. *If it is later determined that the offense at plea or conviction is less serious than originally charged, the designation would be removed and the offender returned to regular juvenile status for disposition.*

TASK FORCE, FINAL REPORT, *supra* note 2, at 34 (emphasis added). The italicized language and the Task Force's recommendation to allow juveniles convicted of lesser-included, non-presumptive certification offenses to resume their regular juvenile status became known as the "bounce back" provision.

As a former prosecutor, I recognize the potentials for abuse of prosecutorial overcharging. In the analogous context of prosecutorial over-charging under excluded offense waiver legislation, I argued that "[t]he provision for 'rejuvenating' young offenders not convicted of excluded offenses by basing dispositional jurisdiction on convictions rather than on initial charges provides an important additional check on the prosecutor's charging discretion." Feld, *supra* note 98, at 582.

331. TASK FORCE, FINAL REPORT, *supra* note 2, at 36.

332. MINN. STAT. § 260.126(1); *see supra* note 322 (describing the name change from SYO to EJJ).

333. *See* MINN. STAT. § 260.131(4).

subjecting a youth to an EJJ prosecution.[334] One gateway is an unsuccessful attempt to certify a youth. In an ordinary certification hearing involving a youth fourteen to seventeen years of age and charged with any felony, if a court does not certify the youth, the judge may designate the subsequent proceeding as either an EJJ proceeding or an ordinary delinquency proceeding.[335] Although the certification statute does not cross-reference the EJJ provision, presumably a judge will use the EJJ "public safety" criteria to make the EJJ or delinquency determination.

In a presumptive-certification proceeding involving a sixteen- or seventeen-year-old youth charged with a firearms felony or other offense for which the Sentencing Guidelines presume commitment to prison, if a court does not certify the youth, it *must* designate the subsequent juvenile proceeding as an EJJ prosecution.[336] Assuming that the "worst of the worst" will be certified, the mandatory EJJ provisions subject the "less bad of the worst" to more stringent controls than those ordinarily available in juvenile courts. Effectively, a decision not to certify a presumptive-certification youth entails a determination that the youth is "amenable to probation" under the juvenile court's strengthened EJJ provisions.

A second gateway to EJJ status arises when a prosecutor charges a youth sixteen or seventeen years of age with a presumptive-certification offense, and designates the case as an EJJ prosecution without any further judicial review.[337] Because the only alternative disposition available to a judge following a presumptive-certification hearing is to designate the case as an EJJ proceeding,[338] allowing the prosecutor to designate the case as an EJJ proceeding provides an efficient alternative. Thus, prosecutors need not file *pro forma* certification motions when

334. *See id.* § 260.126(1).

335. *Id.* § 260.126(1)(1). The rules of procedure for the juvenile court provide that "[i]f the court does not order certification in a case in which certification is not presumed, the court *may consider* designating the proceeding an extended jurisdiction juvenile prosecution." To do so, the prosecution must prove that "public safety" requires such designation. MINN. R. JUV. P. 32.05(5)(B), *in* MINNESOTA RULES, *supra* note 167.

336. MINN. STAT. § 260.126(1)(2); MINN. R. JUV. P. 32.05(5)(A), *in* MINNESOTA RULES, *supra* note 167.

337. *See* MINN. STAT. § 260.126(1)(2) (providing for this procedure).

338. *See id.* § 260.125(5) ("If the juvenile court decides not to order certification in a case in which the presumption described in subdivision 2a applies, the court *shall designate the proceeding an extended jurisdiction juvenile prosecution* . . . .") (emphasis added).

they do not desire adult status, and they obtain greater plea bargaining leverage in the most serious juvenile cases.[339]

Finally, the legislature followed the Task Force's rationale and provided a third gateway to EJJ prosecution for other serious offenders. Instead of filing a certification motion against a non-presumptive-certification youth, a prosecutor may request that the court designate the youth an EJJ.[340] A judge may deny a motion to certify and designate a fourteen- to seventeen-year-old charged with any felony as an EJJ when public safety requires;[341] a judicial hearing on a prosecutor's request for EJJ designation provides for the same result.[342] At the EJJ hearing, the prosecution must prove by "clear and convincing evidence" that public safety warrants designating the proceeding as an EJJ prosecution, using the same criteria specified in the certification legislation.[343]

Regardless of the mechanism by which an EJJ prosecution commences, a youth receives greater procedural protections than those currently available in juvenile court, including the right to a jury trial.[344] The right to a trial by jury is an essential component of this new quasi-adult status, because a court imposes both a juvenile sentence and an adult sentence which is stayed pending compliance with the juvenile probation.[345] The legislation also includes all EJJ convictions in the Sentencing

339. TASK FORCE, FINAL REPORT, *supra* note 2, at 34-35. "The prosecutor designation option will make it possible for older juveniles who commit violent person offenses to be designated as Serious Youthful Offenders [EJJ] in an expedient manner" without the administrative burdens of filing a certification motion. *Id.*

340. MINN. STAT. § 260.126(1)(3).

341. *See supra* note 335 and accompanying text.

342. *See* MINN. STAT. § 260.126(2) (requiring prosecutor to show by clear and convincing evidence that an EJJ prosecution serves public safety); MINN. R. JUV. P. 32A.01(4), *in* MINNESOTA RULES, *supra* note 167.

343. MINN. STAT. § 260.126(2); *see* MINN. R. JUV. P. 32A.05, *in* MINNESOTA RULES, *supra* note 167 (setting forth factors to be considered in determining whether an EJJ prosecution serves public safety); *see also supra* notes 277-292 and accompanying text (analyzing how "public safety" is determined under the new legislation).

344. MINN. STAT. § 260.126(3) (child prosecuted as an EJJ has the right to jury trial and effective assistance of counsel); *id.* § 260.155(1)(a) (child prosecuted as an EJJ has the right to jury trial on the issue of guilt).

345. *See id.* § 260.126(4) (allowing court to impose both a juvenile and an adult sentence); MINN. R. JUV. P. 32A.08, *in* MINNESOTA RULES, *supra* note 167 (same). Adult criminal procedural safeguards may be a constitutional prerequisite to imposing a valid adult sentence. TASK FORCE, FINAL REPORT, *supra* note 2, at 34 ("Implementing a significantly more severe juvenile justice system response, including the potential of an adult sanction, will require extending a mandatory right to counsel and the option of a jury trial . . . .").

Guidelines' criminal history score the same as for adult offences.[346] It requires juvenile courts to retain EJJ records for as long as they would retain those of adult offenders.[347] Using juvenile convictions to enhance subsequent adult criminal sentences arguably requires providing to juveniles all adult criminal procedural safeguards.[348]

To restrict prosecutorial over-charging of juveniles as presumptive-certification EJJs, the Task Force recommended that the courts remove EJJ designations from youths who plead or are convicted of non-presumptive-commitment offenses and sentence those youths as delinquents.[349] The EJJ statute, however, distinguishes between findings of guilt on a lesser-included, non-presumptive-commitment offense *after trial* and *after a guilty plea*.[350] If, *after trial*, a youth is convicted of a non-presumptive-commitment offense, the youth may only be sentenced as a delinquent because the prosecutor incorrectly assessed the seriousness of the underlying offense in designating the juvenile as an EJJ. To expedite plea bargaining, however, a youth may enter a *guilty plea* to a non-presumptive-commitment offense and still *consent* to an EJJ disposition. This provision allows juveniles to plea-bargain for non-presumptive-commitment adult offenses to avoid incarceration and to protect their criminal history scores. It also allows prosecutors to avoid judicial hearings at which they would have to prove that public safety requires an EJJ

346. *See* MINN. STAT. § 260.211(1)(a). This, in turn, requires amendment of the juvenile court record keeping and reporting provisions, *id.* § 260.166(1)(a) (record of adjudication), and of the Sentencing Guidelines. 1994 Minn. Laws 576, § 60 ("The sentencing guidelines commission shall modify the guidelines to take effect January 1, 1995, to provide that an extended jurisdiction juvenile conviction is treated under the guidelines in the same manner as a felony conviction of an adult."); *see infra* notes 439-442 and accompanying text (discussing use of juvenile records in sentencing adult offenders).

347. MINN. STAT. § 260.161(1).

348. *See infra* notes 434-438 and accompanying text.

349. *See supra* notes 330-331 and accompanying text.

350. MINN. STAT § 260.126(4)(b).

> If a child prosecuted as an extended jurisdiction juvenile after designation by the prosecutor in the delinquency petition *is convicted of an offense* after trial that is not an offense described in subdivision 1, clause (2) [presumptive commitment], the court *shall adjudicate* the child delinquent and order a disposition under section 260.185. If the extended jurisdiction juvenile proceeding results in a *guilty plea* for an offense not described in subdivision 1, clause (2), the court *may impose* a[n EJJ] disposition under paragraph (a) *if the child consents.*

Id. (emphasis added).

designation for a youth charged with a non-presumptive-commitment felony.[351]

Although the Task Force recommended that jurisdiction over serious young offenders continue until age twenty-three,[352] the statute lowered the maximum age of juvenile court jurisdiction over EJJs to twenty-one.[353] This provision reflects a compromise between the original House bill, which extended juvenile court jurisdiction for all delinquent and serious young offenders to age twenty-three,[354] and the Senate version, which only extended jurisdiction over serious young offenders to age twenty-one.[355] The Senate supported the lower age jurisdiction to limit youths' prolonged exposure to probation revocations, and to avoid the wide mix of ages that could occur in EJJ facilities if probation failures did not occur quickly. Although the House wanted to maximize control over all young offenders until age twenty-three, it agreed to the Senate position on jurisdiction in exchange for agreement on automatic certification.[356] Moreover, some legislators feared that the longer jurisdiction might actually discourage some judges from certifying youths.

The Task Force regarded an EJJ prosecution as "one last chance at success in the juvenile system,"[357] and discussed how to prevent "one last chance" from becoming two or three, or four more chances. Although some Task Force members wanted juvenile probation violations or any new offenses to result in automatic execution of the adult sentence, others feared that mandatory revocation for technical violations or trivial offenses could be excessively rigid. Unable to fashion specific criteria to trigger an automatic revocation, the Task Force ultimately recommended that courts treat EJJ probation violations in the

351. *See id.* § 260.126(3).

352. *See supra* note 319 and accompanying text (discussing ramifications of extending juvenile court's jurisdiction).

353. MINN. STAT. § 260.181(4)(b); TASK FORCE, FINAL REPORT, *supra* note 2, at 33. The amendment to reduce the age to 21 was added to S.F. No. 1845 on March 14, 1994. MINN. S.F. 1845, 78th Leg. § 21 (1994). "Commissioner of Corrections Frank Wood testified that the number of offenders in a secure facility aged 21 to 23 was small, because the offenders were either proceeding toward community re-entry, or had re-committed offenses and were placed in adult facilities." *Juvenile Justice Bill Approved*, BRIEFLY: MINN. SENATE WK. IN REV. (Senate Pubs., St. Paul, Minn.), Mar. 18, 1994, at 3.

354. MINN. H.F. 2074, 78th Leg. § 26 (1994).

355. MINN. S.F. 1845, 78th Leg. § 21 (1994).

356. *See infra* note 392 and accompanying text (discussing legislative "package deal").

357. TASK FORCE, FINAL REPORT, *supra* note 2, at 33.

same manner as they would treat subsequent offenses or probation violations by adults.[358]

Because revocation of probation entails a loss of liberty, the Constitution requires minimum procedural safeguards.[359] Although probation revocation is a summary procedure in Minnesota, a probationer has the right to counsel[360] and a contested hearing,[361] and the opportunity to "present mitigating circumstances or other reasons why the violation, if proved, should not result in revocation."[362] Even if the prosecution proves a probation violation, a court retains discretion either to continue the stay or sentence, or to execute the previously imposed sentence.[363]

The legislature generally followed the Task Force's recommendation. If an EJJ allegedly violates the conditions of the stayed sentence or committed a new offense,

> the court may, without notice, revoke the stay and probation and direct that the offender be taken into immediate custody. The court shall notify the offender in writing of the reasons alleged to exist for revocation of the stay of execution of the adult sentence. If the offender challenges the reasons, the court shall hold a summary hearing on the issue at which the offender is entitled to be heard and represented by counsel.[364]

The provisions for written notice, appointment of counsel, and a summary hearing correspond to the adult probation revocation procedures.[365]

Significantly, even if a court finds by clear and convincing evidence that an offender violated the conditions of probation or committed a new offense, it need not execute a previously stayed

---

358. *Id.* at 34. The Task Force stated:

> [I]f a Serious Youthful Offender commits a new offense or a probation violation, the court will treat the Serious Youthful Offender in the same manner as adults are treated on subsequent offenses or probation violations, including being subject to the execution of the stayed adult sentence. Juveniles will know there is a certainty of punishment, combined with an opportunity to be successful in the juvenile system.

Id.

359. Gagnon v. Scarpelli, 411 U.S. 778, 785-89 (1973); *see also* Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (according procedural due process in parole revocation).

360. MINN. R. CRIM. P. 27.04(2)(1)(a).

361. *Id.* at 27.04(2)(1)(b).

362. *Id.* at 27.04(2)(1)(d).

363. *Id.* at 27.04(3).

364. MINN. STAT. § 260.126(5).

365. *Compare* MINN. R. JUV. P. 32A.09, *in* MINNESOTA RULES, *supra* note 167 (regarding juvenile probations revocation) *with* MINN. R. CRIM. P. 27.04 (regarding adult probation revocation).

sentence and may continue the stay and place the offender on probation.[366] To avoid stretching "one last chance" into several chances and thereby diminishing the significance of an EJJ designation, however, the legislature strengthened probation revocation procedures for presumptive certification or prosecutor-designated EJJs. If an EJJ youth convicted of a presumptive-commitment-to-prison or firearms offense[367] commits a new offense, or violates the conditions of the stayed sentence, "the court *must order execution of the previously imposed sentence* unless the court makes written findings regarding the mitigating factors that justify continuing the stay."[368] For these youths, the court must execute the stayed sentence unless it finds mitigating circumstances, presumably circumstances that would justify a downward departure under the Minnesota Sentencing Guidelines.[369] Because the Guidelines require courts to provide "substantial and compelling" reasons to justify downward departures from presumptive sentences[370] courts should provide justifications at least as strong to depart from the even stronger presumption in the EJJ revocation provision.

---

366. MINN. R. CRIM. P. 27.04(3)(3)(b).

367. *Id.*; MINN. STAT. § 260.126(1)(2) (defining extended jurisdiction juvenile proceeding). The statutory cross-reference creates some ambiguity whether "automatic" revocation applies simply to prosecutorially designated EJJs, only to presumptive certification youths, i.e., those 16 and 17 years old and convicted of presumptive-commitment-to-prison offenses, or to youths of any age who are convicted of presumptive-certification offenses. *Id.*

368. MINN. STAT. § 260.126(5); *see also* MINN. R. JUV. P. 32A.09(3)(C)(2), *in* MINNESOTA RULES, *supra* note 167 ("[T]he court *shall order the execution of the sentence* or make written findings indicating the mitigating factors that justify continuing the stay.") (emphasis added).

369. *See* MINN. SENTENCING GUIDELINES § II.D.2.a (non-exclusive list of mitigating factor that may be used as reasons for departure from presumptive sentence). The House members of the conference committee strongly advocated for a compulsory revocation provision:

> [T]his serious youthful offender category should be taken that way. We should assume that the court will be imposing the adult sentence unless there's a mitigating factor. . . . [W]e didn't want it to be automatic, we didn't want it to be mandatory. . . . We're not saying it always absolutely has to be, but if they violate the order of their sentence, they're going to go to prison.

Hearings on H.F. 2074 Before the Judiciary Conference Committee, 78th Leg. (Apr. 20, 1994) [hereinafter *Hearings*] (transcribed by and on file with author) (statement of Rep. Skoglund); *see also* MINN. R. JUV. P. 32A.09(3)(C)(2), *in* MINNESOTA RULES, *supra* note 167 (providing that if EJJ conviction was for a presumptive-commitment-to-prison offense, then "the court *shall* order the execution of the sentence or make written findings indicating the mitigating factors that justify continuing the stay").

370. MINN. SENTENCING GUIDELINES cmt. II.D.03.

Although provisions to revoke probation and execute the adult sentences are essential elements of the EJJ status, some Task Force members feared that many youths might enter adult facilities through this procedural back door. An EJJ youth is one whom a judge or a prosecutor already determined can be retained in juvenile court consistently with public safety. And yet, even if a new probation violation is not a presumptive-commitment-to-prison offense, he or she will likely be incarcerated as an adult offender. While there must be limits to "one last chance," some juveniles' "adult" status may now be decided in the context of summary probation revocation hearings rather than certification hearings. Although the Task Force, legislature, and Sentencing Guidelines Commission recognized that the EJJ provisions had the largest potential bed-impact on adult facilities, they could not estimate the precise effect of these changes. There was no basis to determine the rate at which EJJ courts would revoke probation and execute their adult prison sentences.[371]

At least a few youths sentenced as EJJs may have their probation revoked, serve an adult sentence, and still return to the community as chronological juveniles. If they re-offend, they would still be under juvenile court jurisdiction. Although certified youths who manage to re-offend before their eighteenth birthday are prosecuted as adults,[372] no official has determined that public safety requires the former EJJ to be prosecuted as an

371. *See* MINNESOTA SENTENCING GUIDELINES COMM'N, BED-SPACE IMPACT ANALYSIS: JUVENILE JUSTICE BILL 2 (1994). The Minnesota Sentencing Guidelines Commission candidly noted that "because this bill includes new policies which are substantially different than the existing system, it is difficult to precisely estimate the impact. Estimating the impact of the legislation is further complicated by the difficulty in predicting prosecutorial and judicial practices for these cases." *Id.* With respect to EJJ probation revocations, the Guidelines Commission cautioned: "The impact of this [EJJ] provision on the adult prison system will depend on the frequency with which the juveniles violate their conditions or commit new offenses. It is estimated that the impact could range from 130 beds (if 10% are revoked) to 326 (if 25% are revoked)." *Id.* at 4.

The 1994 Minnesota Legislature requested the Legislative Audit Commission to evaluate recidivism rates for youthful offenders released from state juvenile correctional facilities. While recidivism rates varied somewhat for different facilities, the Legislative Auditor found very high rates of re-offending by juveniles and certified adults, and cautioned that even the higher EJJ bed-space impact may under-estimate the likely rates of probation violations and adult confinement. *See* OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINN., RESIDENTIAL FACILITIES FOR JUVENILE OFFENDERS 62-75 (1995).

372. MINN. STAT. § 260.125(3)(a) ("[T]he court shall order a certification in any felony case if the prosecutor shows that the child *has been previously prosecuted* on a felony charge *by an order of certification.*") (emphasis added).

adult for all subsequent purposes. Presumably only a certification proceeding can settle definitively a juvenile's "adult" status.

C. THE LEGISLATURE EXCLUDES FIRST DEGREE MURDER FROM JUVENILE COURT JURISDICTION

In my first articles about transferring serious young offenders to criminal court, I naively extolled the virtues of eliminating judicial discretion and legislatively excluding certain categories of offenses from juvenile court jurisdiction.[373] Although Professor Franklin Zimring "applaud[ed my] efforts to create a rule of law for such a critical decision,"[374] he questioned whether a legislature can remove discretion from waiver decisions without substantially increasing the number of juveniles transferred to criminal court.[375] Moreover, Zimring doubted that states would enact waiver criteria as restrictive as those I originally proposed.[376] Finally, Zimring questioned whether a narrowly drawn list of excluded offenses could resist the tendency to ex-

---

373. For example, in 1978 I argued:

> Using a legislative waiver system, it is possible to exclude from the jurisdiction of the juvenile court those relatively few juveniles who are exceptionally sophisticated on a rational and legally defensible basis—their present offense and prior record. By focusing on the seriousness and persistence of a youth's delinquent career, a legislature can differentiate between the hardcore offenders and the vast majority of juveniles who are unlikely to repeat and who are therefore appropriately handled by the juvenile court. By stressing the more objective records rather than subjective, impressionistic clinical factors, juveniles can be separated on a basis that avoids many of the dangers of abuse of discretion and discrimination inherent in judicial sorting.

Feld, *supra* note 98, at 613; *see also* Feld, *supra* note 184, at 198 (discussing assumptions required in classifying youth offenders); Barry C. Feld, *Legislative Policies Toward the Serious Juvenile Offender: On the Virtues of Automatic Adulthood*, 27 CRIME & DELINQ. 497, 508 (1981) (discussing legislative waiver systems).

374. Franklin E. Zimring, *The Treatment of Hard Cases in American Juvenile Justice: In Defense of Discretionary Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 267, 273 (1991).

375. *Id.* at 274 (stating that legislative waiver approach is necessarily overbroad to encompass the worst cases within any particular offense category). "Discretion can be removed only at the price of a rigidity that increases the punitive bite of legal policy toward youth crime." *Id.* at 275.

376. *See* Zimring, *supra* note 186, at 199 (responding to Feld, *supra* note 98). There, he noted that

> it may be impossible to define in advance all those elements that should be weighed in the decision to waive; and it is certainly unrealistic to expect a legislature to approve (or long maintain) criteria as restrictive as those recommended by the [Juvenile Justice] Standards or in the proposed Minnesota legislation appended to Professor Feld's article.

pand to encompass larger categories of crimes in response to the inexorable political pressures on legislators to "get tough" and forcefully condemn every "worst case" crime in their district.[377]

Nevertheless, long before the Task Force's recommendations reached the legislature, there was political support to exclude some serious offenses from juvenile court jurisdiction.[378] At the beginning of the Task Force process, Attorney General Hubert H. Humphrey advocated automatic exclusion of all juveniles sixteen years of age or older charged with presumptive-commitment-to-prison offenses.[379] Although the Task Force's bill introduced in the Senate did not exclude any offenses from juvenile court jurisdiction,[380] the House version of the bill proposed to exclude youths sixteen or older charged with first degree murder, intentional murder in the second degree, and criminal sexual conduct in the first degree.[381] Other House bills would have placed additional offenses directly in adult criminal court.[382]

Id. Professor Zimring also noted that "[o]nce such [excluded offense] legislation is passed, the most typical form of amendment is the addition of new crimes to the list of those incurring waiver." *Id.*

With "automatic adulthood," there are additional questions whether prosecutors, judges, and juries actually would convict and send young offenders to adult prisons, even for very serious conduct, and where the adult corrections system would confine them if they did. *See, e.g.*, Dawson, *Third Justice System*, *supra* note 313, at 953-54 (analyzing the policy implications of transferring extremely young offenders to adult correctional facilities).

377. Zimring, *supra* note 186, at 200.

378. *See, e.g.*, Statement of Attorney General Hubert H. Humphrey regarding the 1993 Criminal Justice Initiatives: Gang Violence and Juvenile Justice Proposals 3 (Jan. 13, 1993) (on file with author) (recommending that state automatically try as adults juveniles 16 or older charged with Sentencing Guidelines Severity Level VII-X offenses).

379. *Id.* (stating that proposal treats all juveniles who are charged with certain violent crimes consistently, and may deter some youths from committing offenses with a firearm).

380. MINN S.F. 1845, 78th Leg. § 11 (1994). Another Senate bill, however, MINN. S.F. 2164, 78th Leg. § 4 (1994), included offense exclusion provisions comparable to those contained in the House bill. *See infra* note 382 (discussing the House bill).

381. MINN. H.F. 2074, 78th Leg. § 10 (Feb. 24, 1994). The House bill provided that "[t]he term delinquent child does not include a child alleged to have committed murder in the first degree or criminal sexual conduct in the first degree after becoming 16 years of age." *Id.* The House bill was amended March 14, 1994, and the list of excluded offenses was expanded also to include intentional murder in the second degree.

382. *See, e.g.*, MINN. H.F. 2449, 78th Leg. § 5 (1994) (excluding any juvenile 14 years of age or older charged with a presumptive-commitment-to-prison offense who used a firearm while committing the offense); MINN. H.F. 610, 78th Leg. § 1 (1993) (excluding any child 15 years of age or older and charged with

The Task Force, by contrast, shared Zimring's concerns and rejected excluded-offense legislation for several reasons.[383] It recognized that even within the most serious offense categories, statutory classifications are too broad and imprecise to make refined culpability differentiations. Moreover, excluded-offense statutes cannot adequately distinguish between principals and accessories, because all are equally liable under aiding and abetting provisions.[384] Finally, the Task Force feared that legislative lists would expand from a narrow exception to juvenile court jurisdiction into a wholesale catalogue of exclusions. There is ample evidence that once lists of offenses enter the legislative hopper, they tend to expand well beyond their initial rationale, creating a legislative crime-du-jour.[385]

House members of the Conference Committee offered several rationales to exclude certain offenses. Juvenile court judges already certified virtually all sixteen- or seventeen-year-old offenders charged with the most serious crimes. If they failed to do so, they were reversed on appeal, as in the case of David

---

murder or attempted murder in the first, second, or third degree; assault in the first degree; or criminal sexual conduct in the first degree).

When the Minnesota House approved H.F. No. 2074 and sent it to the Conference Committee, it excluded from juvenile court jurisdiction youths 16 years or older charged with murder in the first degree, intentional murder in the second degree, or criminal sexual conduct in the first degree. MINN. H.F. 2074, 78th Leg. § 10.

383. *See supra* note 257 and accompanying text (discussing Task Force's decisions).

384. *See* MINN. STAT. § 609.05; *supra* note 275 and accompanying text (discussing components of "seriousness"). In some instances, an accomplice may be liable simply for passive presence, and in others, an accessory hires a principal to commit the offense. Legislative language cannot practically distinguish the two situations.

385. The California Legislature amended its judicial waiver statute in 1976 and placed the burden of proving fitness for juvenile court treatment on the youth if the prosecutor alleged 11 enumerated serious offenses such as murder, rape, or armed robbery. CAL. WELF. & INST. CODE § 707(b) (West 1976). The legislature amended the "narrow list" of serious offenses creating a presumption for waiver seven different times between 1977 and 1993. *Id.* § 707(b)(16) (West 1977); *id.* § 707(b)(5)-(8) (West 1979); *id.* § 707(b)(17)-(20) (West 1982); *id.* § 707(b)(21) (West 1989); *id.* § 707(b)(22) (West 1990); *id.* § 707(b)(23)-(24) (West 1991); *id.* § 707(b)(25) (West 1993). The extended list of "horribles" now includes drug crimes, carjacking, and escape from a juvenile correctional facility. *Id.* § 707(b)(26)-(29) (West Supp. 1995).

In little more than a decade, the list of offenses in Minnesota's "prima facie" case for reference doubled. In its initial version the legislature emphasized a combination of aggravated felonies and prior records in five paragraphs. MINN. STAT. § 260.125(3) (1980). Since then the legislature has added "burglary of a dwelling," "escape from confinement," and "gang" and "drug" related offenses. *Id.* § 260.125(3).

Brom.[386] The committee did not regard the serious crimes by sixteen- or seventeen-year-old offenders as qualitatively different from those of eighteen-year-old adults.[387] Some committee members advanced principled retributivist arguments that serious crimes deserve severe consequences.[388] Others advanced deterrent arguments that the certainty of adult criminal prosecution for serious crimes would reduce youth violence.[389] Some feared that judges might use the EJJ sentencing option as an inappropriate alternative to certifying the most serious

386. *See supra* notes 237-252 and accompanying text (discussing the Brom case).

387. *Hearings, supra* note 369 (statement of Rep. Carruthers). According to Rep. Phil Carruthers:

> You've got somebody committing first degree murder, premeditated murder, to me what's the difference where you're talking about a sixteen year old or a seventeen year old versus an eighteen year old? What's the difference in terms of, why should the eighteen year old get so much tougher treatment than the sixteen year old? . . . I don't understand the magic difference. You're talking about the most serious crime in our society and the fact someone is sixteen or seventeen, hey.

Id.

388. *See Hearings on H.F. 2074 Before the Judiciary Conference Comm.*, 78th Leg. (Apr. 21, 1994) [hereinafter *Hearings*] (transcribed by and on file with author). Phil Carruthers argued that:

> I think the frustration that the House felt was that these are the most serious offenses and the juvenile system, even with the SYO system, just does not give the kind of tools or the adequate punishment to acknowledge the gravity of the crime. . . . [G]iven the gravity of the crime, the current jurisdictional limit does not adequately acknowledge it.

Id. (statement of Rep. Carruthers).

389. *But see* Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQ. 96, 100-02 (1994) (finding no deterrent effect of legislative waiver on rates of juvenile violent crime); Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 LAW & SOC'Y REV. 521, 532 (1988) (finding no measurable deterrent effect of New York's excluded offense legislation).

juveniles.[390] And, frankly, there was strong political pressure in the House to "get tough" with automatic certification.[391]

The House and Senate agreed to exclude only youths sixteen years or older and charged with first degree murder. This legislative "package deal" also reduced EJJ jurisdiction to age twenty-one, restricted prosecutorial designation of EJJs to the presumptive-certification category, and allowed prosecutors to obtain judicial designation of EJJs as an alternative to filing a certification motion against youths fourteen to seventeen years of age and charged with any felony.[392] The House's acquiescence reflected another political reality: automatically placing larger numbers of youths in criminal court would have a more substantial fiscal and bed-space impact on adult prisons.[393]

Finally, automatic certification of first degree murder is consistent with Minnesota sentencing policy. The Sentencing Guidelines do not apply to first degree murder, which is the only

---

390. [T]here was a concern that some courts or some judges might look at that extended jurisdiction and say, "Well we've got a sixteen year old, but we've got five years under the Senate bill or seven years under the House bill to deal with them and there is a greater likelihood that we will be able to correct their behavior and use treatment procedures that are typically available for juveniles." I think that that was a concern that there might be less . . . certifications, that maybe because of that extended jurisdiction, they'd be less likely that there would be certification in those cases. . . . [T]he House was of a mind that for these very, very serious violent crimes that we wanted to make sure that those sixteen and seventeen year olds that they were dealt with in the adult court system.

Hearings, *supra* note 369 (statement of Rep. Macklin).

391. *Hearings*, *supra* note 388 (statement of Rep. Carruthers) ("I think we'd have a problem if we didn't come back with some automatic certification provisions. I think we'd have a major problem trying to come back to the House on that.").

392. MINN. STAT. §§ 260.126(2), 260.181(4)(b); *see supra* notes 354-356 and accompanying text (discussing competing House and Senate bills). Senator Patrick McGowan, a conservative Minneapolis police detective, cautioned House conferees who supported excluding additional offenses that doing so could adversely affect prosecutors' plea bargaining leverage. *Hearings*, *supra* note 369. The conferees discussed the case of a highly visible murder of a police officer in which prosecutors agreed to a plea bargain to second degree murder with a juvenile in order to obtain his testimony implicating several adult gang members. *See* Donna Halverson, *McKenzie Convicted in Haaf Slaying*, STAR TRIB. (Minneapolis), Oct. 24, 1993, at 1A. McGowan emphasized that if the legislature had excluded that "lesser included" offense, prosecutors could not have obtained the plea, testimony, or conviction.

393. The Sentencing Guidelines Commission estimated that the automatic certification legislation alone would require 90 additional prison beds. MINNESOTA SENTENCING GUIDELINES COMM'N, *supra* note 371, at 2.

mandatory imprisonment offense.[394] Thus, excluding first degree murder from juvenile court jurisdiction is consistent with the use of the Sentencing Guidelines' presumptive commitment-to-prison offenses to define presumptive certification and EJJ jurisdiction. That consistency also provides a principled basis by which to resist further expansion of the list of excluded offenses. Finally, the legislature also definitively resolved the jurisprudential dilemma posed by cases like *Dahl* and *D.F.B.*[395]

Minnesota initiates a first degree murder prosecution by filing a grand jury indictment.[396] The new statute automatically excludes youths charged with first degree murder from the otherwise "original and exclusive" juvenile court jurisdiction.[397] The rules of juvenile court procedure attempt to resolve this conflict between "original and exclusive" jurisdiction and "automatic exclusion" by allowing prosecutors to file a certification motion and petition alleging first degree murder and staying further proceedings pending presentation of the case to a grand jury for indictment.[398]

The legislature also reduced juvenile court jurisdiction over young traffic offenders,[399] and placed all youths sixteen or sev-

394. *See* MINN. STAT. § 609.185 (stating that a convicted defendant "*shall be sentenced* to imprisonment for life"); MINN. SENTENCING GUIDELINES § V ("First Degree Murder is excluded from the guidelines by law, and continues to have a mandatory life sentence.").

395. *See supra* notes 217-252 and accompanying text (discussing *Dahl* and *D.F.B.*).

396. MINN. R. CRIM. P. 17.01 ("An offense which may be punished by life imprisonment shall be prosecuted by indictment . . . .").

397. MINN. STAT. §§ 260.015(5)(b), .111(1)(a), .125(6).

398. MINN. R. JUV. P. 32.08, *in* MINNESOTA RULES, *supra* note 167. The commentary to the rule explains:

> Under Minn. Stat. §§ 260.111, subd. 1a., 260.015, subd. 5(b) and 260.125, subd. 7 (1994), the accusation of first degree murder by a 16 or 17 year old child takes the case out of the delinquency jurisdiction of the juvenile court. If this accusation is first made by complaint, and is followed by an indictment that does not accuse the child of first degree murder but of some other crime, the proceedings come within the exclusive jurisdiction of the juvenile court, but subject to action of the juvenile court on any motion for certification of the proceedings to adult court. In these circumstances, the juvenile court would deal with an accusation by indictment in the same fashion as proceedings might otherwise occur on a juvenile court petition. Once adult court proceedings begin on an indictment for first degree murder, regardless of the ultimate conviction, the proceedings remain within the adult court jurisdiction.

Id. cmt.

399. MINN. STAT. § 260.193(3) ("A child who commits an adult court traffic offense and at the time of the offense was at least 16 years old shall be subject to the laws and court procedures controlling adult traffic violators and shall not be

enteen years old and charged with alcohol-related misdemeanor or gross misdemeanor offenses directly into adult court.[400] The legislature concluded that because young drivers enjoy adult rights, they should also suffer adult consequences,[401] but it limited any confinement to juvenile facilities.[402] Because the Department of Public Safety already includes juvenile traffic convictions in a youth's driving record, which is a public document, concerns about confidentiality of juvenile proceedings are less significant.

D. The Use of Juvenile Convictions to Enhance Adult Criminal Sentences

The legislature charged the Task Force to examine "the retention of juvenile delinquency adjudication records and their use in subsequent adult proceedings."[403] In this Part, I analyze the Task Force's reluctance to expand the use of juvenile court convictions, other than those of EJJ youths, because of concerns about the quality of procedural justice and the reliability of delinquency adjudications. Despite the Task Force's reservations, however, the 1994 Juvenile Crime Act greatly expands the use of juvenile convictions to enhance the sentences of adult offenders.

The use of prior juvenile convictions to enhance adult sentences has a long lineage.[404] Prior to the passage of the Sentencing Guidelines, the Minnesota Supreme Court approved the use of juvenile records to sentence adult offenders.[405] Thus,

---

under the jurisdiction of the juvenile court."). Prior to the amendment, adult courts exercised jurisdiction only over youths 16 or 17 years of age and charged with petty misdemeanor traffic offenses. Minn. Stat. § 260.193(3) (1992). Juvenile courts heard all cases of "underage" traffic violators and other criminal traffic offenses. *Id.*

400. *Id.* § 260.193(1)(c)(2) (providing that adult courts have jurisdiction over all 16- and 17-year-olds charged with drunk driving).

401. *Hearings*, *supra* note 369 (when 16- and 17-year-old engages in adult activity and is held to an adult standard of care, adult court should have jurisdiction) (statement of Rep. Macklin); *id.* (driving is an adult responsibility, and consolidates DWI prosecutions in one place) (statement of Sen. Speare).

402. Minn. Stat. § 260.193(3). The statute restricts pre-trial detention and out-of-home placement of young traffic offenders to juvenile detention and correctional facilities. *Id.* § 260.193(7a).

403. Task Force, Final Report, *supra* note 2, at 1.

404. *See generally* Daniel E. Feld, Annotation, *Consideration of Accused's Juvenile Court Record in Sentencing for Offenses Committed as an Adult*," 64 A.L.R.3d 1291 (1975) (discussing cases where adult courts have considered whether to include juvenile records for sentencing purposes).

405. State v. Johnson, 216 N.W.2d 904, 907-08 (Minn. 1974) ("[W]e see nothing improper in the court's taking into consideration the past conduct of a juve-

Minnesota, along with other states and the United States Sentencing Guidelines, includes some juvenile prior convictions in an adult defendant's criminal history score.[406]

The use of juvenile prior convictions to enhance young adult offenders' sentence is based on extensive research on the development of criminal careers. There is a strong correlation between age and criminal activity, with the rates of many kinds of criminality peaking in mid- to late-adolescence.[407] Although most delinquent youths desist after one or two contacts with the justice system, if a youth becomes a chronic offender (five or more criminal involvements), there is a substantial probability that the youth will continue to engage in delinquency and crime.[408] Career offenders begin their pattern of criminal activity in their early- to mid-teens, persist into their twenties, and then gradually "mature out" of their criminal involvement.[409] Moreover, the chronic offenders, a relatively small subset of all delinquents, account for a disproportionately large amount of the total serious violent and repetitive property crime.[410] Rational sentencing policy thus requires a standardized means to identify both juvenile and adult criminally active young offenders.

A record of persistent offending, whether as a juvenile or as an adult, is the "best evidence" of career criminality. The traditional role of confidentiality in juvenile court proceedings to

---

nile in determining what sentence could be proper. How else could he evaluate the past performance of a juvenile who had been in trouble before he came before the court?").

406. *See* MINN. SENTENCING GUIDELINES § II.B.4.; Feld, *supra* note 184, at 233-37 (analyzing inclusion of juvenile convictions in Minnesota's Sentencing Guidelines); *see also* 42 PA. CONS. STAT. § 9721(b) (1982) (juvenile adjudications may be counted when there was an express finding that the offense constituted a felony or one of the weapons misdemeanors); UNITED STATES SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 4A1.2(d) (1994) (sentence enhancements based on "offenses committed prior to age eighteen").

407. 1 BLUMSTEIN ET AL., *supra* note 195, at 22-23. Studies of the development of delinquent careers suggest that serious offenders are best identified by their persistence rather than by the nature of their initial offense. The criminal career research indicates that young offenders do not "specialize" in particular types of crime, that serious crime occurs within an essentially random pattern of delinquent behavior, and that a small number of chronic delinquents are responsible for many offenses and most of the violent offenses committed by juveniles. *Id.*

408. *Id.* at 75-76.

409. *Supra* note 31 and accompanying text.

410. TRACY ET AL., *supra* note 46, at 279-80 (small group of chronic offenders account for the majority of all delinquent acts and an even larger proportion of the most serious and violent crime).

avoid stigmatizing delinquents often hindered criminal courts' access to juvenile conviction records.[411] For several administrative and policy reasons, adult criminal courts could not systematically consider the juvenile components of an offender's criminal history at sentencing.[412]

When the Minnesota Legislature adopted the Sentencing Guidelines in 1980, it amended the provisions on juvenile court records to assure that they would be available to criminal courts when sentencing young adult offenders.[413] But the legislature

411. *See, e.g.*, MINN. STAT. § 260.161(2) (1978) (records of juvenile courts are not open to inspection and contents cannot be disclosed without court order); *id.* § 260.211(2) (1978) (repealed 1980) (juvenile court may disclose information to proper persons "if the court considered such disclosure to be in the best interests of the child or of the administration of justice"). Policies on access to juvenile records pose a conflict between the rehabilitative goals of the juvenile court and the public safety interests of identifying career criminals.

> Juvenile records are of particular concern because of the bifurcation between the adult and the juvenile criminal justice system. Records of juvenile adjudications are typically unavailable to the adult criminal justice system, presumably to avoid lifetime stigmatization as a result of some minor juvenile escapades. While that principle is certainly reasonable for individuals whose juvenile involvement is indeed minor and especially for those who do not persist into an adult criminal career, the bifurcation does not seem reasonable for juveniles whose delinquency careers are serious and who persist into serious adult offending. Thus, while juvenile records should continue to be protected from general public access, the adult criminal justice system should have access to juvenile records of at least those offenders arrested as adults on a felony charge.

1 BLUMSTEIN ET AL., *supra* note 195, at 197.

412. *See supra* notes 199-200 and accompanying text (discussing how confidentiality requirements coupled with bureaucratic inertia made it difficult to include a juvenile component of an offender's criminal history); GREENWOOD ET AL., *supra* note 197, at 62-63; Petersilia, *supra* note 199, at 1747-49.

Other impediments to the use of juvenile court records include practices of sealing and purging the records in order to avoid stigmatizing offenders. The National Academy of Science's study of career criminals concluded that

> [t]he prohibitions against merged juvenile and adult records, the failure to routinely include juvenile court data in policy record systems, and the sealing and purging of juvenile records create a situation in most jurisdictions in which criminal justice authorities frequently make their decisions with no information about police contacts with juveniles. . . . For those who advocate the use of juvenile records, the challenge is to respond to these concerns by designing systems and procedures that inform adult just system decision makers more fully about juvenile delinquent careers without undermining the rehabilitative goal of juvenile courts.

1 BLUMSTEIN ET AL., *supra* note 195, at 193.

413. MINN. STAT. § 260.161(1) (1980) ("The court shall keep and maintain records pertaining to delinquent adjudications until the person reaches the age of 23 years and shall release the records on an individual to a requesting adult court for purposes of sentencing."). At the time, juvenile court records were not

carefully limited the impact of a prior juvenile record on the sentences of young adult offenders. Initially, the Sentencing Guidelines included in the adult criminal history score only juvenile felony convictions obtained after the age of sixteen, and limited their effect to a maximum of one point.[414] In 1989, the Sentencing Guidelines Commission modified the juvenile component of the criminal history score and allowed a young adult offender to receive a maximum of two points if one of the juvenile convictions was for a presumptive-commitment-to-prison felony of violence.[415] Even with this expanded juvenile component of the criminal history score, however, a young adult offender whose present offense alone is not a presumptive-commitment-to-prison offense still would not be incarcerated based on a prior juvenile record, no matter how extensive.

The decision to continue to limit the practical impact of juvenile prior convictions on adult sentences stemmed from strong misgiving about the quality of procedural justice in juvenile courts and the Sentencing Guidelines Commission expressed serious reservations about "the disparities in the procedures used

---

uniformly or consistently available. Feld, *supra* note 184, at 234 ("By recommending the record disclosure amendment, the commission intended to insure that records of serious and persistent juvenile offenders would be readily available for use by sentencing authorities under a standardized procedure.").

414. MINN. SENTENCING GUIDELINES § II.B.306 (1982). Significantly, the Guidelines required two juvenile felony adjudications to achieve the one point maximum score. *Id.*

While I applauded the Sentencing Guidelines Commission's policy decision to make available the records of serious and persistent juvenile offenders to adult criminal courts, I noted that the stringent limits it placed on the computation of those juvenile prior convictions practically negated their usefulness in sentencing young adult career criminals.

> The failure of the Minnesota Sentencing Guidelines Commission to integrate fully the juvenile and adult records for sentencing purposes perpetuates the gap in intervention exactly at the peak of chronic and serious activity. Except for youths who are imprisoned as adults solely on the basis of a present offense against the person, the inclusion of the juvenile criminal history will not result in presumptive incarceration of a chronic young burglar or thief until he or she has committed at least two additional adult felonies, and even then only if those convictions occur before the age of twenty-one . . . . Moreover, under the sentencing guidelines a juvenile with only two juvenile felony convictions is treated the same way as a juvenile with ten felony convictions, even though persistence is the most reliable indicator of probable recidivism and seriousness.

Feld, *supra* note 184, at 236-67.

415. *See* MINN. SENTENCING GUIDELINES § II.B.4. The Sentencing Guidelines also assign "weights" to each prior felony in the criminal history score, so that Severity Level VI and VII felonies are "worth" 1.5 points, and Severity Level VIII-X offenses are "worth" two points. *Id.* § II.B.1.a.

in the various juvenile courts."[416] The Commission was principally concerned with denial to juveniles of a constitutional or statutory right to a jury trial,[417] and the practical unavailability of counsel in many of Minnesota's juvenile courts.[418]

The enhancement of adult sentences on the basis of prior juvenile convictions acquires greater salience as a result of the 1994 legislative changes. The legislature followed the Task Force's recommendation to count EJJ convictions in the same manner as adult felony convictions.[419] These youths will have received all adult criminal procedural safeguards, including the right to a jury trial.[420] The Task Force, however, like the Sentencing Guidelines Commission, discouraged additional use of ordinary juvenile delinquency convictions to enhance adult sentences because of the continuing procedural deficiencies of juvenile courts.[421]

Once the Minnesota Sentencing Guidelines Commission included juveniles' prior records in the adult criminal history score, Minnesota courts had to ascertain the procedural "quality" of juvenile court convictions. In *State v. Little*, the Minnesota Court of Appeals upheld the use of juvenile adjudications to enhance the sentence of an adult defendant.[422] The court insisted that juvenile court procedures were adequate to include juvenile convictions in Little's criminal history score, rejected his claim that convictions obtained without a right to a jury trial denied him fundamental fairness, and emphasized that he received the assistance of counsel in his juvenile proceedings.[423]

The *Little* court's emphasis on the assistance of counsel in juvenile proceedings was crucial because of two lines of cases,

---

416. *Id.* cmt. II.B.406.

417. *See infra* notes 596-610 and accompanying text (choosing the right to a jury trial).

418. *See supra* notes 135-136 and *infra* notes 659-661, and accompanying text.

419. *See* TASK FORCE, FINAL REPORT, *supra* note 2, at 8, 37; MINN. STAT. § 260.161(1); 1994 Minn. Laws 576, § 60 ("The sentencing guidelines commission shall modify the guidelines . . . to provide that an extended jurisdiction juvenile conviction is treated under the guidelines in the same manner as a felony conviction.").

420. MINN. STAT. § 260.126(3).

421. "The Task Force supports the Sentencing Guidelines Commissions' position that juvenile adjudications should continue to have only limited use in the adult system, when full due process is not accorded the juvenile and it is not required the juvenile receive effective assistance of counsel." TASK FORCE, FINAL REPORT, *supra* note 2, at 39.

422. 423 N.W.2d 722 (Minn. Ct. App. 1988).

423. *Id.* at 724-25.

one prohibiting incarceration without representation, and the other barring enhancement of sentences on the basis of prior, uncounselled convictions. In *Argersinger v. Hamlin*, the United States Supreme Court considered whether counsel must be appointed for an indigent defendant charged with and imprisoned for a minor offense.[424] It held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony unless he was represented by counsel."[425] In *Scott v. Illinois*, the Supreme Court clarified an ambiguity in *Argersinger* by addressing whether counsel must be appointed because of the statutory penalty authorized or the actual sentence imposed.[426] It held that in misdemeanor proceedings, only an actual order of incarceration, rather than the possibility of incarceration, requires appointment of counsel for the indigent.[427]

The Minnesota courts have taken a different approach regarding when a defendant must receive assistance of counsel. Shortly after *Gideon v. Wainwright*,[428] the Minnesota Supreme Court in *State v. Borst* used its inherent supervisory powers to require the appointment of counsel in misdemeanor cases "which may lead to incarceration in a penal institution."[429] The *Borst* court relied, in part, upon *Gault*'s provision of counsel in delinquency cases to expand the right to counsel for adult defendants in misdemeanor or ordinance prosecutions that could result in confinement.[430] In light of *Scott* and *Borst*, the initial

424. 407 U.S. 25, 26-27 (1972).

425. *Id.* at 37.

426. 440 U.S. 367, 369 (1979).

427. *Id.* at 373-74.

428. 372 U.S. 335 (1963). In *Gideon*, the Court held that the Sixth Amendment's guarantee of counsel applied in state felony criminal proceedings as well as to prosecutions in federal courts. *Id.* at 344. "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.*

429. 154 N.W.2d 888, 894 (Minn. 1967). In Minnesota, there are no limitations on the dispositional authority of juvenile court judges. MINN. STAT. § 260.185(1). Any adjudication of delinquency for any underlying offense—felony, misdemeanor, or ordinance—may lead to removal from the home or commitment to the State Department of Corrections. Thus, every juvenile proceeding includes the possibility of confinement. Moreover, even routine delinquency dispositions may continue until the age of 19.

430. 154 N.W.2d at 891. Like the Court in *Gault*, *Borst* recognized the adversarial reality of even "minor" prosecutions:

> [T]he possible loss of liberty by an innocent person charged with a misdemeanor, who does not know how to defend himself, is too sacred a right to be sacrificed on the altar of expedience. Any society that can afford a professional prosecutor to prosecute this type of crime must

confinement of an unrepresented juvenile or adult may be improper.

Moreover, it may be improper to consider prior felony convictions obtained without counsel to enhance subsequent sentences. Significantly, in *United States v. Tucker*, the United States Supreme Court remanded for re-sentencing a defendant whose prior sentence was based on uncounselled convictions.[431] In *Burgett v. Texas*, the Court noted that because it was unconstitutional to convict a person of a felony without benefit of a lawyer or a valid waiver of that right, it was also impermissible to use that conviction to enhance subsequent sentences.[432] A number of courts have applied the principle of *Tucker* and *Burgett* in several sentencing contexts involving uncounselled juvenile convictions.[433]

A defendant must receive assistance of counsel before a court may use a prior conviction to enhance subsequent sentences; arguably the lack of a jury trial should also limit the use of juvenile convictions to enhance adult sentences.[434] In de-

---

assume the burden of providing adequate defense, to the end that innocent people will not be convicted without having facilities available to properly present a defense.

Id. at 894-95.

431. 404 U.S. 443, 449 (1972) ("The *Gideon* case established an unequivocal rule 'making it unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one.' ") (quoting Burgett v. Texas, 389 U.S. 109, 114 (1967)).

432. 389 U.S. 109, 115 (1967). The defendant must validly waive the right to counsel on the record when entering a guilty plea for the conviction to be used to enhance the term of incarceration for a subsequent offense. *See, e.g.*, Reeves v. Mabry, 615 F.2d 489, 491 (8th Cir. 1980) ("Where . . . a jury in imposing an enhanced term of imprisonment . . . considered or may have considered a constitutionally invalid prior conviction, the . . . sentence that was imposed must generally be set aside."); United States *ex rel.* Lasky v. LaVallee, 472 F.2d 960, 963 (2d Cir. 1973) ("If [the defendant] was not represented by counsel [the court] cannot use the conviction for the purpose of enhancing [the defendant's] sentence.").

433. *See, e.g.*, Rizzo v. United States, 821 F.2d 1271, 1274 (7th Cir. 1987) ("[T]he judge may have impermissibly relied on the uncounseled [juvenile] adjudication in imposing sentence . . . ."); Majchszak v. Ralston, 454 F. Supp. 1137, 1142 (W.D. Wis. 1978) (remanding for resentencing a denial of parole release because the presentence report included prior uncounseled delinquency adjudications); Stockwell v. State, 207 N.W.2d 883, 889 (Wis. 1973) (holding juvenile adjudications obtained without counsel could not be considered in subsequent sentencing proceedings).

434. Many courts have rejected this argument with a conclusory reference to *McKeiver*. *See, e.g.*, State v. Little, 423 N.W.2d 722, 724-25 (Minn. Ct. App. 1988) (stating that defendant had no right to a jury trial when a juvenile and that use of these convictions to enhance his sentence did not violate fundamental fairness); United States v. Williams, 891 F.2d 212, 215 (9th Cir. 1989) ("If it

nying juveniles the right to a jury, Justice Byron White's concurrence in *McKeiver* emphasized that conviction as a juvenile was for purposes of treatment rather than punishment.[435] Judge Patricia Wald's dissent in *United States v. Johnson* questioned the Federal Sentencing Guidelines' "policy of treating adult sentences and periods of incarceration like juvenile sentences and periods of confinement for purposes of calculating a defendant's criminal history score."[436] Because a juvenile's commitment to an institution is often based on the offender's treatment needs, rather than on the seriousness of the offense, it may continue longer than the comparable adult penalty.[437] It is thus inconsistent to use less stringent procedures to obtain convictions in juvenile court in the name of rehabilitation, and then to use those same convictions to enhance subsequent criminal sentences as adults.[438]

Thus, because of juvenile courts' persisting procedural deficiencies, both the Minnesota Sentencing Guidelines Commission and the Task Force were reluctant to increase the weight of juvenile adjudications in the Guidelines' criminal history score. The 1994 legislature, nevertheless, greatly expanded their use.

---

does not violate due process for a juvenile to be deprived of his or her liberty without a jury trial, we fail to find a violation of due process when a later deprivation of liberty is enhanced due to this juvenile adjudication."), *cert. denied*, 494 U.S. 1037 (1990).

435. McKeiver v. Pennsylvania, 403 U.S. 528, 552 (1971) (White, J., concurring). "Supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply be imposing pains and penalties." *Id.*; *see infra* notes 452-549 and accompanying text (exploring the line between treatment and punishment); *infra* notes 586-714 and accompanying text (arguing that procedural protection is necessary to achieve substantive justice for juveniles).

436. 28 F.3d 151, 157 (D.C. Cir. 1994) (Wald, J., dissenting).

437. *Id.* at 159-60; *see supra* note 429.

438. As stated by one commentator:

> The Supreme Court approves of lower standards for incarceration procedures only in treatment-oriented proceedings where the government has disavowed any interest in criminal prosecution or punishment.... Accordingly, courts should not interpret *McKeiver* to justify using juvenile convictions with reduced procedural protections for punitive purposes at the adult level. Interpreted in this manner, *McKeiver* would not allow courts to enhance an adult's sentence based on juvenile sentences obtained during proceedings governed by the lower "fundamental fairness" standard.

David Dormont, Note, *For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 MINN. L. REV. 1769, 1793-94 (1991). Moreover, juvenile courts use less formal and reliable procedures to protect juveniles from the stigma and consequences of conviction as adults. *McKeiver*, 403 U.S. at 540 (Blackmun, J., plurality opinion) (stating that a finding of delinquency is substantially less onerous than criminal guilt).

Whereas the Guidelines previously considered only felony offenses occurring after a juvenile's sixteenth birthday, the amended Guidelines consider felonies "committed after the offender's *fourteenth birthday*."[439]

In addition, the legislature extended the time during which juvenile convictions may be used to enhance adult sentences. While the juvenile component of the criminal history score previously applied only to young adult offenders under age twenty-one at the time they committed a felony, the new legislation extends their use until age twenty-five.[440] To assure the availability of juvenile records to be criminal courts sentencing young adults, the legislature increased from age twenty-five to age twenty-eight the period in which juvenile courts must maintain records of delinquency adjudications.[441] The legislature also eliminated the two-point maximum "cap" on the juvenile component of the criminal history score for all juvenile convictions of presumptive-commitment-to-prison offenses.[442]

The Minnesota House of Representatives initiated the expanded the use of juvenile prior convictions.[443] In support of their position, House members argued that both the age of onset and prior juvenile convictions provide strong evidence of career criminality, and that current limitations on the use of juvenile records eroded effective social control. Although the House originally proposed to use prior juvenile convictions to enhance adult sentences until age twenty-eight, the conferees agreed to limit their use until age twenty-five. By then, "real" career offenders would have ample opportunity to acquire "real" adult convictions.

As a result of the Guidelines' changes, a fourteen-year-old youth who went on a burglary or auto theft "spree" could face presumptive imprisonment for burglaries committed a decade later.[444] Similarly, a fifteen-year-old convicted of several aggravated robberies who remained crime-free for nearly a decade would receive a nearly doubled sentence if convicted of another

439. MINN. SENTENCING GUIDELINES cmt. II.B.403.

440. *Id.* cmt. II.B.404.

441. MINN. STAT. § 260.161(1).

442. MINN. SENTENCING GUIDELINES cmt. II.B.405.

443. *See* MINN. H.F. 2074, 78th Leg. § 57.2 (1994) (2d engrossment). The Senate bill contained no provisions expanding the use of juvenile records.

444. *See* MINN. SENTENCING GUIDELINES § IV (calculating sentence on Sentencing Guidelines Grid with a Severity Level V crime and criminal history score of three).

robbery as an adult.[445] Even in the absence of any intervening offenses, the legislature apparently concluded that these are the types of "career" offenders meriting scarce penal resources.

There are two important consequences of expanding the Guidelines' criminal history score component of prior juvenile felony convictions. Defense counsel have an even greater professional responsibility to vigorously contest non-serious felonies in delinquency proceedings because of their collateral enhancement effects. Similarly, the increased significance of each conviction may subject the plea bargaining process in juvenile court to greater constraints, controls, and supervision. Under present practice, no formal relationship exists between the offense to which a juvenile pleads and the eventual disposition. As a consequence, prosecutors and defense attorneys are relatively cavalier in plea bargaining, because even one admission provides the court with sufficient legal authority for maximum intervention.[446] When each offense now acquires independent significance as part of a young offender's criminal history score, prosecutors may be less inclined to dismiss some charges in return for admissions on others. Similarly, defense attorneys may be less willing to allow their clients to admit to charges. The increased significance of each offense may foster greater adversariness in both negotiation and litigation.

Expanding the juvenile component of the criminal history score also has long-term implications for prison populations. In allocating scarce penal resources and developing the Guidelines' grid, the Minnesota Sentencing Guidelines Commission worked backward from the prison bed-space available,[447] determining the lengths of sentences, in part, by their expected impact on prison populations. By substantially increasing the role of EJJ offenses and juvenile offenses in the criminal history score, the legislature changed an important variable in the equation. As more adult inmates serve increasingly longer sentences because of their prior EJJ and juvenile convictions, the prison population will not "turn over" as quickly and will cumulate gradually over time. Because the juvenile justice process lacks even rudimentary data about juvenile delinquent careers or criminal histo-

445. *Id.* (calculating sentence on Sentencing Guidelines Grid based on prior convictions of Severity Level VII offenses adds 1.5 points each to the criminal history score). The Severity Level VII presumptive sentence for a criminal history score of three is 74-82 months, compared with 44-52 months for a criminal history score of zero. *Id.*

446. *See* MINN. STAT. § 260.015(5) (defining delinquent child).

447. *See* MINN. SENTENCING GUIDELINES § I.3.

ries, the Task Force could not determine the extent to which juvenile prior convictions presently increase adult prison use.[448] Nevertheless, the Minnesota Sentencing Guidelines Commission estimated that including prior EJJ offenses and juvenile offenses in the adult criminal history score would have a substantial bed-impact.[449]

E. SENTENCING JUVENILE OFFENDERS: "DELINQUENCY DISPOSITION PRINCIPLES" IN JUVENILE COURT

The 1992 legislature requested that the Task Force study "the feasibility of a system of statewide juvenile [sentencing] guidelines," and to consider "the effectiveness of various juvenile justice system approaches, including behavior modification and treatment."[450] In short, the legislature charged the Task Force to examine fundamental juvenile sentencing policy issues,[451] reconcile all of the conflicts of sentencing policy (needs or deeds,

448. Indeed, the Task Force recommended that the juvenile justice system expand the type and quality of data it routinely collected to enable it to "track information by juvenile offender across counties for routine law enforcement and court purposes," to compile statewide criminal history data about individual youths, and to conduct analyses and evaluations of juvenile justice administration. TASK FORCE, FINAL REPORT, *supra* note 2, at 68.

449. The absence of a juvenile data tracking system inhibited the Sentencing Guidelines Commission's ability to estimate the effects of the statutory changes in the Guidelines. For example, it could only "guess-timate" the number of juveniles age 14 to 16 who committed more than one felony, how many who committed a felony after age 16 had committed another one previously, and the number of juveniles who committed presumptive-commitment-to-prison offenses. MINNESOTA SENTENCING GUIDELINES COMM'N, *supra* note 371, at 4. In addition, the legislative extension of the use of juvenile prior convictions from age 21 to age 25 increased the total time "at risk," during which offenders may serve longer sentences. Despite these data limitations, the Sentencing Guidelines Commission estimated that including EJJ convictions in the adult criminal history score would require an additional 50 prison beds, *id.* at 7, and that the use of juvenile convictions an additional 60 beds, *id.* at 8, a total bed-impact second only to that of EJJ probation revocations. *Id.* at 2.

450. TASK FORCE, FINAL REPORT, *supra* note 2, at 1.

451. The Task Force debated whether rehabilitation and treatment provide a tenable justification to sentence two similarly situated juvenile offenders differently, or to sentence juveniles differently than adults. The Task Force also discussed whether juvenile sentences should be based on individualized assessments of the offender or on the seriousness of the offense. *Id.* at 64. The Task Force also considered whether judicial sentencing discretion to address the needs and "best interests" of a juvenile offender can be reconciled with the rule of law. Finally, the Task Force confronted the racial implications of discretionary decisions: if sentences based on individualized social circumstances rather than past behavior have a systematic disparate racial impact, or produces no tangible benefits, can the exercise of discretion be defended either morally or legally? *Id.* at 67.

offenders or offenses, past behavior or future welfare, retribution or utility, rules or discretion), and to recommend a sentencing jurisprudence for young offenders.

This Article contends that the Task Force failed in its mission to critically re-assess these principles, and that the legislature's subsequent hesitancy reflects this default. Despite Minnesota's nominal commitment to rehabilitation, the reality of juvenile justice is penal social control. In part, the juvenile court's inevitable subordination of individual welfare to custody and control stems from its fundamentally criminal focus. Juvenile court delinquency jurisdiction is defined by the commission of a criminal offense for which a youth is responsible, rather by by characteristics of children for which they are not responsible and for which intervention could improve their life circumstances. This criminal focus reinforces retributive rather than reformative impulses.

Thus, Minnesota's juvenile courts exercise essentially the same penal social control function as adult criminal courts. This implicates policies both about secure facilities and juvenile sentencing guidelines, and criminal procedural safeguards for juveniles, especially the jury trial. All of the reasons that led Minnesota to adopt the Sentencing Guidelines for adult criminal defendants apply equally to juvenile court sentencing practices. Finally, despite the Task Force's unwillingness to abandon rehabilitation as a justification for intervention, this Article suggests that the Task Force's recommendations and the legislation implementing them signal the first steps toward the development of an offense-based dispositional framework for juveniles.

In Minnesota, as in most states, after a juvenile is adjudicated a delinquent, a court may order any of a number of dispositions "deemed necessary to the *rehabilitation* of the child."[452] Courts, as well as legislatures, envision juvenile courts as benevolent treatment agencies making individualized dispositions

452. MINN. STAT. § 260.185(1) (emphasis added). The statute specifies a variety of dispositions which can be used alone or in combination, including: counselling the child or the parents; placing the child under the supervision of a probation officer; transferring legal custody to a county home school, group home, foster home, or the Commissioner of Corrections; ordering the child to make reasonable restitution, or to pay a fine of up to $700; and cancelling the child's driver's license. *Id.* Similarly, juveniles committed to the Commissioner of Corrections "for care, custody, and rehabilitation," *id.* § 241.01(3a)(a), may not be discharged until the commission is satisfied that "the child has been rehabilitated." *Id.* § 241.19. *See generally* Feld, *supra* note 9, at 823-25 (tracing states' juvenile court sentencing legislation from the Progressive era's rehabilitative approach through modern retributive changes).

in the "best interests" of the child rather than as punitive bodies.[453] As a result, they fail to analyze the differences between treatment as a juvenile and punishment as a criminal.

The Supreme Court, however, has developed criteria in other contexts to determine whether seemingly punitive and coercive governmental intervention constitutes punishment.[454] Even when a state confines a person for conduct that is criminal, the question remains whether the purpose of the restraint is penal.[455] For example, if a state places a juvenile delinquent in a

453. For example, the *McKeiver* Court noted that although the guiding consideration for courts of law dealing with threatening conduct should be the protection of the community, rehabilitating offenders through individualized treatment is still the most appropriate manner to deal with juvenile offenders. McKeiver v. Pennsylvania, 403 U.S. 528, 546 n.6 (1971) (Blackmun, J., plurality opinion).

454. *See generally* J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976) (comprehensive critique of the Court's handling of punishment in various criminal and civil contexts). For example, the Court in *Kennedy v. Mendoza-Martinez* stated:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purposes assigned are all relevant to the inquiry, and may often point in differing directions.

372 U.S. 144, 168-69 (1963) (footnotes omitted).

455. In Allen v. Illinois, 478 U.S. 364 (1986), the Supreme Court considered the distinctions between "punishment" and "treatment" in deciding whether a person incarcerated under a "Sexually Dangerous Persons Act" was entitled to invoke the Fifth Amendment privilege against self-incrimination. *Id.* at 365. Even though commitment under the Act was triggered by the filing of criminal charges and accompanied by many criminal procedural safeguards, the Court endorsed psychiatrically "compelled" testimony because it concluded that commitment was " 'essentially civil in nature' " and that the aim of the statute was to provide " 'treatment, not punishment.' " *Id.* at 367 (quoting People v. Allen, 481 N.E.2d 690, 694-95 (Ill. 1985)). Although it acknowledged that a "civil label is not . . . dispositive," *id.* at 369, the Court concluded that the state purpose to provide " 'care and treatment' " and the indeterminate commitment "disavowed any interest in punishment." *Id.* at 370 (quoting ILL. REV. STAT. ch. 38, para. 105-08 (1985)).

Distinguishing *Gault*, the *Allen* Court subtly shifted the rationale of the *Gault* Court's Fifth Amendment holding. "The Court in *Gault* was obviously persuaded that the State intended to *punish* its juvenile offenders, observing that in many States juveniles may be placed in *adult penal institutions* for conduct that if committed by an adult would be a crime." *Id.* at 373 (second emphasis added). The *Allen* Court thus implied that it was the possibility of placing a juvenile in an adult penal institution that required recognizing the privilege against self-incrimination. But *Gault*'s rationale for requiring the privilege was

state training school for conduct that would be a felony if committed by an adult, is the youth's confinement punishment or treatment?

Several commentators have identified factors that courts may examine to assess whether a juvenile is being treated or punished.[456] For example, courts might consider juvenile court legislative purpose clauses and court opinions, conditions of institutional confinement and evaluations of their effectiveness, and juvenile court sentencing statutes and sentencing practices.[457]

1. The Purpose of Juvenile Court Sanctions

The stated legislative purpose is among the factors the Supreme Court considers to determine whether seemingly punitive and coercive governmental intervention constitutes punishment or an "alternative purpose" of treatment.[458] Most states' juvenile codes contain a purpose clause that declares the under-

considerably more broad: "[C]ommitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'" *In re* Gault, 387 U.S 1, 50 (1967). It was the "deprivation of liberty" per se that accounted for the *Gault* ruling, with the Court noting "the equivalence . . . of exposure to commitment as a juvenile delinquent and exposure to imprisonment as an adult offender." *Id.*

Finally, the *Allen* Court concluded that confinement constituted punishment if it was "essentially identical to that imposed upon felons with no need for psychiatric care." *Allen*, 478 U.S. at 373. The Court acknowledged that the "conditions of . . . confinement [could] amount to 'punishment' and thus render 'criminal' the proceedings which led to confinement." *Id.* at 374.

456. *E.g.*, Feld, *supra* note 9, at 838-47 (describing federal and state court attempts to distinguish punishment from treatment); Martin R. Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV. 791, 809-16 (1982) (suggesting a conceptual frame work to identify the punitive aspects of the juvenile justice system in order to asses juvenile rights); Robert E. Shepherd, Jr., *Challenging the Rehabilitative Justification for Indeterminate Sentencing in the Juvenile Justice System: The Right to Punishment*, 21 ST. LOUIS U. L.J. 12, 35-40 (1977) (discussing treatment and punishment in the context of indeterminate sentencing of juveniles); Anna L. Simpson, Comment, *Rehabilitation as the Justification of a Separate Juvenile Justice System*, 64 CAL. L. REV. 984, 1003-17 (1976) (conducting an empirical criticism of rehabilitation as a justification for the juvenile justice process and proposing a juvenile system similar to the adult one).

457. Feld, *supra* note 9, at 838-909 (exploring of the difference between punishment and treatment); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 709-17 (1991) (same); Feld, *supra* note 1, at 245-54 (same).

458. *Allen*, 478 U.S. at 368-70; Gardner, *supra* note 456, at 799-800 ("The Court's conception of punishment turns heavily on an examination of legislative purpose . . . .").

lying legislative rationale as an aid to courts in interpreting the statute. These preambles provide one indicator of the goals of juvenile court intervention.

Although forty-two states' juvenile codes contain such a legislative purpose clause, in the decades since *Gault* and *McKeiver* about one-quarter of the states have redefined their juvenile codes' statements of legislative purpose.[459] These recent amendments have downplayed the role of rehabilitation in the child's "best interest" and acknowledge the importance of public safety, punishment, and individual accountability in the juvenile justice system.[460]

In 1980, the Minnesota Legislature redefined the purpose of its juvenile courts.[461] Minnesota derived its new statement of purpose from the Juvenile Justice Standards, which recommend jury trials[462] and determinate sentences that are proportional to the seriousness of the offense and injury.[463] Although Minnesota's new, more punitive purpose clause marked a fundamental philosophic departure from its previous rehabilitative orientation, the legislature did not provide a general right to a jury trial in juvenile proceedings either in 1980 or in the more recent 1994 reforms.[464]

---

459. Feld, *supra* note 9, at 842 & nn.83-84 (listing statutes).

460. *See, e.g.*, CAL. WELF. & INST. CODE § 202 (West Supp. 1995)) ("provide for the protection and safety of the public"); FLA. STAT. ANN. § 39.001(2)(a) (West 1988) ("protect society . . . [while] recognizing that the application of sanctions which are consistent with the seriousness of the offense is appropriate in all cases"); HAW. REV. STAT. § 571-1 (1985) ("render appropriate punishment to offenders"); IND. CODE ANN. § 31-6-1-1 (Burns 1987) ("protect[ ] the public by enforcing the legal obligations children have to society"); Feld, *supra* note 9, at 842 & n.84 (listing statutes). A distinguishing characteristic of the "new" juvenile law is that "in many jurisdictions accountability and punishment have emerged among the express purposes of juvenile justice statutes." Walkover, *supra* note 156, at 523.

461. *See supra* note 225 (quoting MINN. STAT. § 260.011). *See generally* Feld, *supra* note 184, at 197-203 (discussing changes in purpose clauses away from rehabilitatory goals).

462. INSTITUTE OF JUDICIAL ADMIN., ABA, JUVENILE JUSTICE STANDARDS RELATING TO ADJUDICATION 4.1(A) (1980).

463. *See* INSTITUTE OF JUDICIAL ADMIN., ABA, JUVENILE JUSTICE STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS 5.2 (1980).

464. *See supra* note 344, *infra* notes 623-637 and accompanying text. Moreover, in *In re* K.A.A., 410 N.W.2d 836 (Minn. 1987), the Minnesota Supreme Court held that a juvenile could not voluntarily waive juvenile court jurisdiction in order to obtain a jury trial in an adult criminal proceeding. *Id.* at 842. "The legislature could, and apparently did, conclude that allowing a juvenile to waive juvenile court jurisdiction for some perceived short-term benefit ignores the best interests of the State in addressing juvenile problems as well as the overall interest of the juvenile." *Id.* at 840. By formally recognizing the legiti-

Some courts recognize that amendments to legislative purpose clauses signal basic changes in philosophical direction,[465] and increasingly acknowledge that "punishment" is an important aspect of a juvenile court's "therapeutic" sentences.[466] Changes in purpose clauses are not simply cosmetic—they provide a basis for deciding cases. The Minnesota Court of Appeals, for example, decided to transfer David Brom from juvenile to criminal court based on the language of the amended purpose clause.[467] Thus, the explicit purpose of Minnesota's juvenile

---

macy of punitive and deterrent sanctions for criminal offenses juvenile courts will be properly and somewhat belatedly expressing society's firm disapproval of juvenile crime and will be clearly issuing a threat of punishment for criminal acts to the juvenile population.

465. *See, e.g.*, State *ex rel.* D.D.H. v. Dostert, 269 S.E.2d 401, 409 & n.8 (W. Va. 1980) (holding that a juvenile court cannot justify incarceration in a secure facility based on rehabilitation alone; specific factors must support such a disposition). In *In re* Javier A., 206 Cal. Rptr. 386 (Ct. App. 1984), the court analyzed changes in juvenile purpose clauses and concluded that "[i]n 1984 the emphasis is on protecting the citizens of the state of California from the child." *Id.* at 417. The court also noted that "the United States Supreme Court had recognized the actual purposes already were similar to those of the adult criminal system." *Id.* at 418.

466. In *State v. Lawley*, the Washington Supreme Court reasoned with Orwellian logic that sometimes punishment can be treatment. 591 P.2d 772, 773 (Wash. 1979). It upheld the legislature's conclusion that "accountability for criminal behavior, the prior criminal activity and punishment commensurate with age, crime and criminal history does as much to rehabilitate, correct and direct an errant youth as does the prior philosophy of focusing upon the particular characteristics of the individual juvenile." *Id.*; *supra* note 156 (discussing Washington State's juvenile sentencing laws and sentencing practices); *see also In re* Seven Minors, 664 P.2d 947, 950 (Nev. 1983) (endorsing punishment as a legitimate purpose of its juvenile courts). In an unusual burst of judicial candor, the court in *D.D.H. v. Dostert* acknowledged that "it is now generally recognized that caring for the juvenile and controlling the juvenile are often quite contradictory processes." 269 S.E.2d at 408-09 (footnote omitted). After describing the inherent conflicts of the rehabilitative model, the *D.D.H.* court "acknowledge[d] what has been an unspoken conclusion: *our treatment looks a lot like punishment.*" *Id.* at 415 (emphasis added).

467. *In re* D.F.B., 430 N.W.2d 475 (Minn. Ct. App. 1988). In *D.F.B.* the court of appeals emphasized that

> the 1980 amendments [to the purpose clause] also reflect a shift in legislative attitude regarding punishment as a goal of juvenile courts. Prior to the amendments the stated purpose of those courts was to secure care and guidance, and to serve the welfare of the minor child. . . . Prior to 1980, legislative concentration had been directed toward rehabilitating all errant youths, not to punishing them. . . . Subsequent to the 1980 amendment, . . . [f]or youths charged with the commission of a crime, a more punitive approach [has been] emphasized.

Id. at 478. The Minnesota Supreme Court subsequently provided an alternative rationale for Brom's transfer. *See supra* notes 237-252 (discussing Minnesota Supreme Court's *D.F.B.* decision).

courts is not simply to "rehabilitate" young offenders, but also to punish them.

2. Conditions of Confinement and Evaluations of Treatment Effectiveness

Juvenile correctional institutions and their effectiveness provides another indicator of whether involuntary confinement constitutes punishment or serves a therapeutic "alternative purpose." Indeed, institutional conditions motivated the Court in *Gault* to afford juveniles procedural safeguards.[468] Although the Court has never held that involuntary confinement per se constitutes punishment,[469] the *Gault* Court correctly perceived incarceration per se as a severe penalty, a substantial deprivation of autonomy, and a continual reminder of one's delinquent status, all of which are elements of punishment.[470]

The Court in *Gault* recognized the contradictions between the rhetoric of rehabilitation and the reality of custodial confinement that have characterized juvenile institutions since their inception.[471] Evaluations of juvenile correctional facilities in the years since *Gault* reveal a continuing gap between rehabilitative

468. *In re* Gault, 387 U.S. 1 (1967). There, the Supreme Court noted:

> The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours . . . ." Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.

Id. at 27 (quoting in part *In re* Holmes, 109 A.2d 523, 530 (Pa. 1954) (Musmanno, J., dissenting)).

469. *See, e.g.*, Allen v. Illinois, 478 U.S. 364, 374 (1986) ("We . . . cannot say that the conditions of petitioner's confinement themselves amount to 'punishment . . . .'"); Addington v. Texas, 441 U.S. 418, 428 (1979) ("In a civil commitment state power is not exercised in a punitive sense.").

470. *Gault*, 387 U.S. at 26-27.

471. David Rothman's study of the early juvenile training schools describes institutions that not only failed to rehabilitate, but were scarcely distinguishable from their adult penal counterparts. ROTHMAN, *supra* note 5, at 261-89. Steven Schlossman provides a similarly pessimistic account of the reality of juvenile correctional programs under the aegis of Progressivism. STEVEN SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT (1977). Indeed, historians trace the juvenile court's lineage of punitive, custodial confinement in the name of rehabilitation back to its institutional precursors in the Houses of Refuge. *See, e.g.*, JOSEPH M. HAWES, CHILDREN IN URBAN SOCIETY: JUVENILE DELINQUENCY IN NINETEENTH-CENTURY AMERICA (1971) (studying the historical origins of juvenile delinquency treatment and describing the shortcomings of such institutions today); DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL

rhetoric and punitive reality. Studies of juvenile institutions in several states describe facilities in which staff physically beat inmates, and frequently failed to prevent inmate abuse by other inmates.[472] One study attributed institutional violence to inappropriately designed facilities, inadequate staffing, and substantial overcrowding.[473] Despite the rhetoric of rehabilitation, staff and inmate violence, predatory behavior, and punitive custodial incarceration constitute the daily reality for juvenile offenders confined in many "treatment" facilities.[474]

During the period of these post-*Gault* evaluation studies, lawsuits alleged that the conditions of confinement in juvenile institutions violated the committed youths' "right to treatment,"[475] or inflicted "cruel and unusual punishment."[476] In *Nelson v. Heyne*, the court found that institutional staff routinely beat inmates with a "fraternity paddle," injected them with psychotropic drugs for social control purposes, and deprived them of minimally adequate care and individualized

---

ORDER AND DISORDER IN THE NEW REPUBLIC 235 (1971) (describing a military-type environment for inmates).

472. *See generally* CLEMENS BARTOLLAS ET AL., VICTIMIZATION: THE INSTITUTIONAL PARADOX 259 (1976) ("The juvenile correctional institution . . . is or can be far more cruel and inhumane than most outsiders ever imagine. . . . [It] is a culmination of the worst features of a free society."); BARRY C. FELD, NEUTRALIZING INMATE VIOLENCE: JUVENILE OFFENDERS IN INSTITUTIONS (1977) [hereinafter FELD, NEUTRALIZING INMATE VIOLENCE] (studying violence in institutions based upon the characteristics and organization of inmate subculture, staff ideology, and cottages); Barry C. Feld, *A Comparative Analysis of Organizational Structure and Inmate Subcultures in Institutions for Juvenile Offenders*, 27 CRIME & DELINQ. 336, 352-56 (1981) (significance of staff-inmate relations towards inmate aggression); Eric D. Poole & Robert M. Regoli, *Violence in Juvenile Institutions: A Comparative Study*, 21 CRIMINOLOGY 213 (1983) (study of relevant variables which effect inmate aggression and violence from four juvenile correctional institutions).

473. *See generally* Feld, *supra* note 9, at 893 (discussing research in California).

474. *Id.*

475. The right to treatment derives from the state's invocation of its *parens patriae* power to intervene for the purported benefit of the individual. Incarcerating an individual without treatment is punishment; subjecting a person to punishment requires full criminal procedural safeguards. Thus incarceration without the benefit of criminal procedural safeguards is justified only if rehabilitative treatment is forthcoming. *See generally* David L. Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742, 752-53 (1969) (commenting on the judicial need for a "right to treatment"); Stephen M. Goodman, *Right to Treatment: The Responsibility of the Courts*, 57 GEO. L.J. 680, 697 (1969) (arguing that the promise of treatment must be fulfilled in a *parens patriae* proceeding).

476. *See* Feld, *supra* note 15, at 260 n.461; Feld, *supra* note 98, at 535-38.

treatment.[477] In *Inmates of Boys' Training School v. Affleck*, the court found inmates confined in dark, cold, dungeon-like cells in their underwear, routinely locked in solitary confinement, and subjected to a variety of punitive practices.[478] In *Morales v. Turman*, the court found numerous instances of physical brutality and abuse, including hazing by staff and inmates, staff administered beatings, exposure of inmates to tear gas, homosexual assaults, extensive use of solitary confinement, repetitive and degrading make-work, and minimal clinical services.[479]

Unfortunately, these cases are not atypical.[480] Although juvenile correctional facilities are not as uniformly deplorable as most adult prisons,[481] rehabilitative euphemisms, such as "[providing] a structured environment,"[482] should not disguise the punitive reality of juvenile institutional confinement.

The juvenile court "treatment" model assumes that social or psychological factors cause delinquent behavior, that individualized sentences should be based on assessments of needs, that release should occur when the juvenile improves, and that intervention will reduce recidivism. Evaluations of juvenile rehabilitation programs provide scant support that juvenile confinement

477. 355 F. Supp. 451, 452 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). For a discussion of *Nelson v. Heyne*, see Michael Frisch, *Constitutional Right to Treatment for Juveniles Adjudicated to be Delinquent*—Nelson v. Heyne, 12 AM. CRIM. L. REV. 209 (1974).

478. 346 F. Supp. 1354, 1358-62 (D.R.I. 1972).

479. 383 F. Supp. 53, 72-85 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977).

480. *See* Feld, *supra* note 9, at 894-95 (discussing other cases); Barry Krisberg et al., *The Watershed of Juvenile Justice Reform*, 32 CRIME & DELINQ. 5, 32 (1986) (summarizing additional unreported cases and concluding that there is "growing evidence that harsh conditions of confinement continue to plague juvenile detention centers and training schools").

481. *See* Martin Forst et al., *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 1, 3 (1989).

482. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, COMPREHENSIVE STRATEGY FOR SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS 21 (Dec. 1993) [hereinafter OJJDP] ("The criminal behavior of many serious, violent, and chronic juvenile offenders requires the application of secure sanctions to *hold these offenders accountable for their delinquent acts* and to provide a *structured* treatment environment." (emphasis added)); Charles H. Logan & Gerald G. Gaes, *Meta-Analysis and the Rehabilitation of Punishment*, 10 JUST. Q. 245, 256 (1993) (stating that rehabilitative euphemisms create a "facade of fine-sounding programs that masks the harsh reality of doing time").

in institutions effectively treats rather than punishes, or reduces recidivism rates.[483]

Recent evaluations of the effects of penal intervention on recidivism rates counsel skepticism about the availability of programs that consistently or systematically rehabilitate adult or serious juvenile offenders. A report by the National Academy of Science's panel on "Research on Rehabilitation Techniques" concluded:

> The research literature currently provides no basis for positive recommendations about techniques to rehabilitate criminal offenders. The literature does afford occasional hints of intervention that may have promise, but to recommend widespread implementation of those measures would be irresponsible. Many of them would probably be wasteful, and some might do more harm than good in the long run.[484]

A meta-analysis of juvenile correctional treatment evaluations appearing in the professional literature between 1975 and 1984, and meeting certain methodological criteria, concluded that "[t]he results are far from encouraging for rehabilitation proponents."[485]

---

483. *See* Gene G. Kassebaum & David A. Ward, *Analysis, Reanalysis and Meta Analysis of Correctional Treatment Effectiveness: Is the Question What Works or Who Works?*, 2 SOCIOLOGICAL PRAC. REV. 159, 160 (1991) (criticizing analyses of treatment programs); GENE G. KASSEBAUM ET AL., PRISON TREATMENT AND PAROLE SURVIVAL: AN EMPIRICAL ASSESSMENT v-vii, 285 (1971). *See generally* NEW DIRECTIONS IN THE REHABILITATION OF CRIMINAL OFFENDERS (Susan E. Martin et al. eds., 1981); Steven P. Lab & John T. Whitehead, *An Analysis of Juvenile Correctional Treatment*, 34 CRIME & DELINQ. 60 (1988) (surveying professional literature with approximately half showing no or a negative impact on recidivism); John T. Whitehead & Steven P. Lab, *A Meta-Analysis of Juvenile Correctional Treatment*, 26 J. RES. CRIME & DELINQ. 267, 288-91 (1989) (reporting that studies of different types of treatment, subjects, methodology, or time periods, show that correctional intervention has discouragingly little effect on recidivism rates); THE REHABILITATION OF CRIMINAL OFFENDERS: PROBLEMS AND PROSPECTS (Lee B. Sechrest et al. eds., 1979) (evaluating effectiveness of rehabilitation in light of random experiments, cost-benefit analyses, and ethics); CORRECTIONS AND PUNISHMENT (David F. Greenberg ed., 1977) (overview of organizational and social structure of correctional institutions, its goals and problems).

484. Panel on Research on Rehabilitative Techniques, *The Prospects of Rehabilitation*, *in* THE REHABILITATION OF CRIMINAL OFFENDERS: PROBLEMS AND PROSPECTS, *supra* note 483, at 88, 102.

485. Lab & Whitehead, *supra* note 483, at 77. Meta-analyses are studies of studies. By coding each evaluation study on a number of variables (e.g., characteristics of the research design, subjects studied, treatment applied, and outcome measures), and combining and re-analyzing the studies, "meta-analysis may be able to separate treatment effects from differences due to uncontrolled characteristics of the subjects, or other deficiencies of research design." Logan & Gaes, *supra* note 482, at 247. *See generally* Steven P. Lab & John T. Whitehead, *From 'Nothing Works' to 'The Appropriate Works': The Latest Stop on the Search for the Secular Grail*, 28 CRIMINOLOGY 405 (1990) (methodological cri-

Although some studies resist the general conclusion that "nothing works" in juvenile or adult corrections, the conclusion has not been persuasively refuted.[486] Several researchers offer literature reviews, meta-analyses, or program descriptions contending that some types of intervention may have positive effects on selected clients under certain conditions.[487] Even an optimistic assessment of the rehabilitation of "rehabilitation" concludes only that "several methods seem promising, but none [has] been shown to usually produce major reductions [in recidivism] when applied broadly to typical composite samples of offenders."[488] The most extensive meta-analysis of the most rigorous evaluation studies concluded that treating delinquents decreased recidivism rates by about five percent, from fifty to forty-five percent.[489]

Because there is little evidence of effective treatment of serious juvenile offenders, the Task Force recommended independent evaluation research to assess the efficacy of intervention.[490] Significantly, the Minnesota Legislature requested the Legislative Audit Commission to evaluate both state-run institutions serving juvenile offenders, and the four largest private programs into which courts place children who are removed from their

---

tique of meta-analyses purporting to show effectiveness of correctional treatment).

486. *E.g.*, NEW DIRECTIONS IN THE REHABILITATION OF CRIMINAL OFFENDERS, *supra* note 483, at 3 ("It would be more accurate to say instead that nothing yet tried has been demonstrated to work.").

487. *See, e.g.*, D.A. Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 CRIMINOLOGY 369, 375-77 (1990) (effectiveness of correctional treatment is dependent upon what is delivered to whom in particular settings); Jeffrey Fagan, *Social and Legal Policy Dimensions of Violent Juvenile Crime*, 17 CRIM. JUST. & BEHAV. 93, 106-09 (1990) (proportionate correctional interventions, with an emphasis on community reentry and reintegration furthers rehabilitation); Peter W. Greenwood & Susan Turner, *Evaluation of the Paint Creek Youth Center: A Residential Program for Serious Delinquents*, 31 CRIMINOLOGY 263, 270-75 (1993) (experimental program with intensive intervention services and activities received significantly better treatment services reviews than traditional training schools).

488. Ted Palmer, *The Effectiveness of Intervention: Recent Trends and Current Issues*, 37 CRIME & DELINQ. 330, 340 (1991).

489. *See* Mark W. Lipsey, *Juvenile Delinquency Treatment: A Meta-Analytic Inquiry into the Variability of Effects*, *in* META-ANALYSIS FOR EXPLANATION: A CASEBOOK 83, 97-98 (Thomas D. Cook et al. eds., 1992).

490. TASK FORCE, FINAL REPORT, *supra* note 2, at 61 (legislature should fund independent evaluations of residential treatment facilities and programs).

homes.[491] The Legislative Auditor conducted a very thorough analysis of recidivism rates of youths released from state correctional and private facilities in 1985 and 1991.[492] While delinquents committed to residential facilities constituted the most serious and chronic young offenders, the majority of youths released in 1991 faced new charges as juveniles or adults within two years.[493] The vast majority of delinquents released from state correctional institutions in 1985 continued their criminal careers into adulthood,[494] and an even larger proportion of certified juveniles released from adult facilities persisted in serious criminality.[495] Despite the state's commitment to rehabilitating young offenders, the Legislative Auditor concluded that "Minnesota's most-used residential programs have shown a limited ability to change entrenched criminal values and behavior patterns among juveniles."[496]

There are a variety of reasons why the juvenile courts' claim of rehabilitation remains "unproven." Many evaluations of treatment effectiveness lack either methodological rigor[497] or use insufficiently sensitive outcome measures.[498] Moreover, many treatment programs lack a theoretical rationale or consistent intervention strategies based on that rationale. Many studies fail to assess whether the program staff implemented the

491. 1994 Minn. Laws 576, § 63. The evaluation of state-run programs focusses on recidivism, program participation, and subjective assessments by correctional officials and juveniles.

492. OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 371, at 51-75.

493. *Id.* at 64 ("[B]etween 53 and 77 percent of male juveniles . . . received new delinquency petitions or were arrested as adults within two years. The percentage of juveniles who were adjudicated as delinquent or convicted as adults ranged from 38 to 62 percent for programs serving males . . . .").

494. *Id.* at 71 (noting high percentage of Red Wing juveniles and Sauk Centre males who were convicted of at least one adult felony and receive prison sentences before the age of 23).

495. *Id.* at 73 ("Eighty-nine percent of certified adults released from St. Cloud in 1985 were convicted of a felony within five years, and most [84%] of them returned to prison.").

496. *Id.* at 75. This conclusion is consistent with evaluations of reoffense rates of juvenile offenders in other states which report rearrest rates in excess of 50%. *Id.* at 113-15 (analyzing recidivism rates in 12 studies).

497. Panel on Research on Rehabilitative Techniques, *supra* note 484, at 54-60.

498. *See, e.g.*, Fagan, *supra* note 487, at 98 (suggesting that rather than relying upon dichotomous recidivism measures, more sensitive measures of behavioral changes, such as a reduction in the rates or severity of crime, or the time between crime, might better assess the incremental effects of intervention).

treatment with integrity.[499] Thus, the inability to measure treatment effectiveness may reflect either methodological flaws, poorly implemented programs, or, in fact, the absence of effective methods of treatment.

Even if some programs might work for some offenders under some conditions, in the face of unproven efficacy, the possibility of an effective rehabilitation program cannot justify confining young offenders "for their own good," while providing fewer procedural safeguards than are afforded adults.[500] Even if some "model" programs appear effective, fiscal constraints, budget deficits, and competition from other interest groups make it unlikely that such treatment services for delinquents actually will be provided universally. Even if intervention does produce some marginal improvements in the lives of some young offenders, those benefits are not sufficient to justify the inevitable racial disparities that result from the exercise of individualized discretion.[501] If significant and effective intervention resources are not forthcoming, the practical differences between treatment and punishment will remain unclear.

The legislature also charged the Task Force to assess "the need for secure juvenile facilities in the state."[502] Determining whether to create a secure juvenile facility implicates several complex issues: the effectiveness of institutional treatment, the continuum of services from secure treatment to community reintegration, and the procedural safeguards that must precede long-term confinement in programs of unproven efficacy. Although Minnesota does not have a physically secure "youth prison," the Department of Corrections operates several public juvenile correctional institutions. The state Departments of Corrections and Human Services license additional private correctional, residential treatment, and mental health facilities,

499. *See* Paul Gendreau & Robert R. Ross, *Revivification of Rehabilitation: Evidence from the 1980s*, 4 JUST. Q. 349, 354, 355 (1987) (questioning the control, skill-level, and treatment philosophies of staff in biomedical and diversion methods of rehabilitation).

500. *See, e.g.*, Logan & Gaes, *supra* note 482, at 251-52 (questioning whether rehabilitation, even if effective, is a morally defensible penological justification).

501. *See infra* notes 537-542 and accompanying text (pointing out the racial dispartities as juveniles proceed through the system).

502. TASK FORCE, FINAL REPORT, *supra* note 2, at 1. The Task Force recognized that a "secure facility" was a place of confinement. "[A] physically secure facility will generally have secure perimeter fencing utilizing a double fence and/or razor wire, visual or electronic monitoring of movement within the facility, and security lighting." Minutes of the Secure Facilities Committee 1 (Oct. 15, 1993) (on file with author).

some of which have a secure capacity.[503] In addition, some courts, particularly those from the metropolitan area, may send juveniles to secure treatment programs in other states.[504] The Task Force recommended that the few youths requiring long-term secure confinement to protect public safety should be certified. County correctional administrators from some judicial districts, however, expressed a need for a physically secure facility for serious and chronic young offenders for whom certification is not appropriate.[505]

Evaluation research strongly indicates that incarcerating young offenders in large, congregate juvenile institutions does not effectively rehabilitate them.[506] In contrast, some research

503. TASK FORCE, FINAL REPORT, *supra* note 2, at 56. The Minnesota Department of Corrections operates about 30-35 physically secure beds in state correctional facilities, and licenses an additional 30-35 secure treatment beds in private facilities. *Id.* at 57. The Department of Human Services licenses "about 90 secure treatment beds, 29 secure beds for adolescent chemical dependency treatment and about 230 secure beds in inpatient, locked adolescent psychiatric facilities." *Id.*; *see also* OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 371, at 18-26 (describing secure correctional capacities in institutions).

504. TASK FORCE, FINAL REPORT, *supra* note 2, at 57. According to a survey by the Department of Human Services, between January 1, 1992, and October 1, 1993, juvenile courts ordered approximately 125 delinquents into out-of-state programs, although it could not determine how many of those were physically secure placements. *Id.* at 57-58.

A 1994 amendment requires the Department of Corrections to certify that the out-of-state facility to which Minnesota juveniles are sent meets all Minnesota licensure standards for residential treatment programs. MINN. STAT § 260.185(6).

505. TASK FORCE, FINAL REPORT, *supra* note 2, at 54-55. Although several judicial districts indicated no need for additional physically secure settings, Hennepin County (Minneapolis) correctional administrators expressed the "strongest support for physically secure capacity," and estimated that it would require approximately 30 secure beds to meet the placement needs for serious, repeat, and younger juveniles. *Id.* at 55-56.

506. OJJDP, *supra* note 482, at 21. Evaluations of juvenile corrections consistently report that violent inmate subcultures are a function of institutional security arrangements; the more authoritarian controls are imposed to facilitate security, the higher the level of covert inmate violence within the subculture. *See, e.g.*, ROBERT COATES ET AL., DIVERSITY IN A YOUTH CORRECTIONAL SYSTEM (1978) (reporting that institutionalization does not result in lower recidivism rates than non-incarcerative sanctions with close supervision in the community, and may actually increase the rates); FELD, NEUTRALIZING INMATE VIOLENCE, *supra* note 472, at 132-38, 163-69 (describing higher levels of violence in custody-oriented facilities); DAVID STREET ET AL., ORGANIZATION FOR TREATMENT: A COMPARATIVE STUDY OF INSTITUTIONS FOR DELINQUENTS 199 (1966) (asserting that institutional organization affects inmate behavior).

Juveniles sentenced to long terms under "get tough" legislation are the most serious and chronic offenders, yet facilities designed to handle them often suffer from limited physical mobility, inadequate program resources, and intense interaction among the most problematic youths in the system. The re-

suggests that smaller, community-based intensive supervision programs are less destructive and may reduce or postpone some delinquents' likelihood or rate of reoffending.[507] Promising programs provide a continuum of services from early secure-care in small, non-debilitating settings, to community reintegration with extensive aftercare supervision and intervention.[508] Successful programs for serious young offenders are "part of a continuum, linked together by principles for intervention . . . and tactics such as case management for maintaining the consistency and logic of services in disparate settings."[509]

Because small facilities are preferable to large, physically secure institutions, the Task Force recommended adding to the continuum of correctional programming regionally-based secure facilities with an eight- to twelve-bed capacity.[510] Although the Task Force regarded the existing juvenile corrections system as adequate for most youths, successful implementation of the EJJ

---

sulting correctional "warehouses" exhibit all of the worst characteristics of adult penal facilities. *See generally* DALE G. PARENT ET AL., CONDITIONS OF CONFINEMENT: A STUDY TO EVALUATE CONDITIONS IN JUVENILE DETENTION AND CORRECTIONS FACILITIES (1993) (describing institutional crowding as a pervasive problem, associated with higher rates of institutional violence and suicide).

507. *See generally* OJJDP, *supra* note 482, at 38-39 (summarizing evaluation of research on the effectiveness of community-based programs in Massachusetts and Utah); JAMES F. AUSTIN ET AL., UNLOCKING JUVENILE CORRECTIONS: EVALUATING THE MASSACHUSETTS DEPARTMENT OF YOUTH SERVICES (1991) (analyzing effectiveness of Massachusetts's closing of training schools); PETER W. GREENWOOD & FRANKLIN E. ZIMRING, ONE MORE CHANCE: THE PURSUIT OF PROMISING INTERVENTION FOR CHRONIC JUVENILE OFFENDERS (1985) (assessing the effectiveness of private-sector programs for dealing with serious juvenile offenders); BARRY KRISBERG & JAMES F. AUSTIN, REINVENTING JUVENILE JUSTICE 143 (1993) (summarizing the necessary components of effective juvenile correctional programs); Fagan, *supra* note 487, at 102-09 (analyzing the effectiveness of programs aimed at reintegrating violent delinquents by using continuity of intervention and extensive aftercare).

508. *E.g.*, Fagan, *supra* note 487, at 104, 108 (reporting that programs with strong implementation of reintegration strategy successfully delayed rearrest upon a juvenile's return to the community).

509. *Id.* at 126.

510. Task Force member Senator Jane Ranum strongly advised that the legislature expected the Task Force to recommend some type of secure capacity and that to fail to do so could undermine the credibility of other Task Force recommendations. The Task Force endorsed small, 8- to 12-bed regional facilities to avoid creating a custodial warehouse or "youth prison." TASK FORCE, FINAL REPORT, *supra* note 2, at 59. The private sector could provide the secure capacity, subject to state funding and licensure, or the Department of Corrections could operate such programs. *Id.* at 61. *See generally* KRISBERG & AUSTIN, *supra* note 507, at 144-48 (describing Massachusetts's system of small, regional secure treatment programs, many of which private not-for-profit agencies operate under state contract).

recommendations might require a secure capacity for some serious or chronic youthful offenders.[511] Accordingly, the Task Force recommended that facilities use rigorous, objective risk assessment criteria to screen those youths who would be eligible for secure placement.[512]

The legislature followed the Task Force's recommendations and endorsed community-based residential and non-residential treatment programs "to provide a continuum of services for serious and repeat juvenile offenders who do not require secure placement."[513] The legislature authorized the Department of Corrections to license several small regional facilities to provide secure programming for delinquents and EJJ youths.[514] In addition, the legislature created a Juvenile Programming Task Force to comprehensively survey existing programs for juveniles and recommend any additional services necessary to provide a full continuum of programming.[515]

The Task Force recommendation and the legislation creating a few small, regional secure facilities reflect a penological temporizing. The Task Force responded to the political impera-

511. TASK FORCE, FINAL REPORT, *supra* note 2, at 58. The Task Force recognized that some non-EJJ youths might be placed in a secure setting and, conversely, that not all EJJ youths would necessarily require a secure setting. *Id.* at 59.

512. *Id.* "Risk assessments should be based on clearly defined objective criteria that focus on (1) the seriousness of the delinquent act; (2) the potential risk of reoffending, based on the presence of risk factors; and (3) the risk to public safety." *Id.*

513. MINN. STAT. § 242.32(1) (directing the Commissioner of Corrections to develop community-based services for residential placement and nonresidential programming).

514. *Id.* § 242.32(2). The legislature mandated the Commissioner of Corrections to "license several small regional facilities providing secure capacity programming for juveniles who have been adjudicated delinquent or convicted as extended jurisdiction juveniles and require secure placement." *Id.* The legislature followed the Task Force's recommendation about size and location, required the secure capacity to be "distributed throughout the state," and restricted to a "maximum of 100 beds statewide" the number of new residential programs. *Id.* § 242.32(3).

515. 1994 Minn. Laws 576, § 62. The law requires the Commissioners of Corrections and Human Services to conduct a comprehensive survey of residential and non-residential juvenile programming, determine the process by which juveniles are placed in those programs, identify the racial and gender characteristics of juveniles and staff in the programs, assess the types of services provided, and identify the sources of payment for such programs. *Id.* § 62(2); *see* MINNESOTA DEP'T OF CORRECTIONS, REPORT OF THE TASK FORCE ON JUVENILE PROGRAMMING, EVALUATION, AND PLANNING (1994) (analyzing existing programs, additional service needs, and likely fiscal implications of implementing EJJ and delinquency legislative changes).

tive to "do something" and "get tough," despite practical uncertainty about the effectiveness of programs for serious youth offenders or the state's needs for a secure capacity. Although large, congregate "youth prisons" are clearly the wrong response to youthful offenders, it does not necessarily follow that small, regional treatment facilities are the right one. For youths tried as EJJs and sentenced to secure juvenile facilities, whether or not their treatment is "effective" is less troublesome, because they receive proper criminal safeguards, and could be punished in any event. For youths adjudicated delinquent under less stringent juvenile court procedures and confined in secure facilities, however, the question of treatment efficacy has greater significance and may pose constitutional questions. It is hard to justify denying them criminal procedural safeguards when long-term, secure confinement does not produce any significant improvement in recidivism rates. Even if confinement occasionally does confer some ancillary benefit on some youths, it still may not be a sufficient justification, because sometimes, "treatment is punishment."

3. The Juvenile Court Sentencing Framework

Juvenile courts' sentencing statutes and dispositional practices provide another indicator of whether involuntary confinement is punishment or serves a therapeutic, "alternative purpose." Sentences based on the offense are usually determinate and proportional, with a goal of retribution or deterrence. Sentences based on characteristics of the offender are typically indeterminate, with a goal of rehabilitation or incapacitation.[516] Under indeterminate sentencing, correctional administrators use the offense only for diagnostic purposes, and decide when an offender is "rehabilitated." Thus, contrasting offender-oriented individualized dispositions, which are indeterminate and non-proportional, with offense-based dispositions, which are determinate, proportional, and based on the past offense provides another indicator of a therapeutic or punitive purpose.[517]

Historically, juvenile courts focused on the "best interests" of the child, and imposed indeterminate and non-proportional

516. *See, e.g.*, AMERICAN FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE 37 (1971) (explaining that treatment models seek to reduce crime by tailoring sentences to individual characteristics); MORRIS, *supra* note 185, at 28-36 (describing the factors currently used in sentencing); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 23-28 (1968) (discussing the differences between punishment models of sentencing and treatment models).

517. *See* INSTITUTE OF JUDICIAL ADMIN., *supra* note 163, at 34-37.

dispositions.[518] Recently, however, many states' juvenile court sentencing legislation increasingly emphasize punishment.[519] Despite a history of indeterminate sentencing, about one-third of the states now formally use the present offense and/or prior record to regulate at least some juvenile court sentencing decisions through determinate or mandatory minimum sentencing statutes, or correctional, parole, or administrative release guidelines.[520]

According to legal theory, juvenile court sentencing in Minnesota is indeterminate.[521] In actual practice, however, a youth's present offense and prior record strongly determine the sanctions imposed. In 1980, the Minnesota Department of Corrections administratively implemented a determinate sentencing plan for youths committed to the state's juvenile institutions. Based on a juvenile's present offense and prior record, the plan "provide[s] a more definite and distinct relationship between offenses and the amount of time required to bring about positive behavior change."[522] Under the Minnesota Department of Corrections institutional release guidelines, a juvenile's length of stay is based on the seriousness of the offense

518. From its inception, juvenile court intervention was deliberately flexible, individualized, and highly discretionary to afford maximum latitude to juvenile justice administrators. ROTHMAN, *supra* note 5, at 58-63, 248-60.

519. *See supra* notes 459-467 and accompanying text (discussing courts' use of legislative purpose clauses to determine the nature of juvenile sentences).

520. Feld, *supra* note 9, at 851 (summarizing state juvenile sentencing statutes).

521. MINN. STAT. § 260.185. In addition to providing the customary range of dispositional options, Minnesota's dispositional statute requires a written "findings of fact" for the disposition and includes the following language that was adopted in 1976: "[The court] shall also set forth in writing the following information: (a) why the best interests of the child are served by the disposition ordered; and (b) what alternative dispositions were considered by the court and why such dispositions were not appropriate in the instant case." *Id.* § 260.185(1)(h).

522. MINNESOTA DEP'T OF CORRECTIONS, JUVENILE RELEASE GUIDELINES 2 (1980) [hereinafter JUVENILE RELEASE GUIDELINES]. The Department sets a juvenile's projected minimum length of stay based on the present offense and prior record within seven weeks after admission to an institution. MINNESOTA DEP'T OF CORRECTIONS, OFFICE OF JUVENILE RELEASE § 5-204.4(a) (1985). It determines the actual parole release within the minimum and maximum range based upon both the presumptive sentence, which reflects aggravating and mitigating factors associated with the commitment offense, and subsequent institutional conduct, including the completion of an agreed upon treatment plan. *Id.* § 5-204.2. The Department adopted the guidelines because an evaluation of institutional release decisions could find no factors, other than the institution to which a child was committed, to explain the differences in treatment of youths. DAVID B. CHEIN, DECISION MAKING IN JUVENILE CORRECTIONS INSTITUTIONS: RESEARCH SUMMARY AND RECOMMENDATIONS 1, 35-37 (1976).

and "risk of failure factors" that are "predictive to some degree of future delinquent behavior."[523] Similarly, juvenile courts in Dodge-Fillmore-Olmsted ("DFO") Counties use dispositional guidelines that base presumptive determinate sentences on the severity of the present offense and the prior delinquency history, including probation violations.[524] Minnesota's Sentencing Guidelines for adult offenders, which are explicitly punitive and expressly designed to achieve "just deserts," employ these same factors.[525]

Some of Minnesota's juvenile courts use informal sentencing guidelines as well. In *In re Welfare of D.S.F.*, a juvenile received a ninety-day sentence of incarceration for an assault.[526] Rejecting a less restrictive disposition, the trial court confined the juvenile because "a specific consequence was necessary to impress upon D.S.F. the seriousness of his behavior."[527] The court of appeals upheld the disposition as within the judges broad sentencing discretion.[528] The dissent, however, characterized the disposition as "a purely offense-based determinate sentence of incarceration as a largely predetermined consequence for a serious assault."[529] The *D.S.F.* dissent correctly perceived that determinate sentencing strikes at the very heart of the traditional juvenile court system and undermines the rationale for provid-

523. *See* JUVENILE RELEASE GUIDELINES, *supra* note 522, at 3.

524. *See* Juvenile Dispositional Guidelines Project Comm., *supra* note 157, at 1-11 (describing experiment using dispositional guidelines in the DFO community corrections system).

525. MINN. SENTENCING GUIDELINES §§ II.A, II.B.

526. 416 N.W.2d 772, 773 (Minn. Ct. App. 1987).

527. *Id.* at 774.

528. *Id.* at 775. In *In re* Welfare of M.A.C., 455 N.W.2d 494 (Minn. Ct. App. 1990), the court of appeals reversed a trial court's modification of a first-time drug-offender's sentence within a few days of his original disposition to impose a more severe, out-of-home sentence. *Id.* at 499. The trial court modified his sentence in order to send a signal to the students in the school that possessing and selling illicit drugs on school grounds would not be tolerated and would lead to significant consequences. *Id.* at 496. Significantly, the court of appeals noted that had the trial court imposed the out-of-home placement disposition initially, it would not have been reversible as an abuse of discretion. *Id.* at 498.

529. *D.S.F.*, 416 N.W.2d at 775 (Crippen, J., dissenting). The dissent asserts that D.S.F.'s sentence was based on "unpublished sentencing guidelines." *Id.* at 779. These guidelines to which Judge Crippen refers provide that "in making dispositional recommendations, juvenile probation officers should be guided by four primary considerations: 1) the need for public safety, 2) the need for accountability, 3) the competencies and rehabilitative needs of the child, 4) concern for the victim." Hennepin County Juvenile Probation Div., Guidelines for Dispositional Recommendations 1-1 (1991) (on file with author).

ing with juveniles fewer procedural safeguards than those afforded adult criminal defendants.[530]

Moreover, Minnesota's courts endorse the principle of proportionality in sentencing juveniles. In *In re L.K.W.*, the trial judge sentenced a first-time misdemeanor shoplifter to a residential facility 150 miles from her family for ninety to one hundred days.[531] In reversing the trial judge's dispositional order, the court of appeals interpreted the juvenile court sentencing statute to require consideration of less restrictive alternatives and proportionality of sanctions.

> To measure what is necessary, a trial court must assess two factors, the severity of the child's delinquency, and the severity of the proposed remedy. When the severity of intervention is *disproportionate* to the severity of the problem; the intervention is not necessary and cannot lawfully occur. The court must take the least drastic necessary step.[532]

In affirming the relationship between offense and consequence as a principle of juvenile court sentencing, the *L.K.W.* court acknowledged that "[r]eason does not permit a distinction between punitive incarceration and a so-called 'placement' to 'teach you discipline.' "[533]

Juvenile court judges decide what to do with a child, in part, by reference to legal mandates. In Minnesota, the legislative purpose clause, appellate court opinions, Department of Corrections's juvenile release guidelines, and formal and informal sentencing guidelines emphasize offense considerations. This emphasis seeks to implement principles of accountability, proportionality, and determinacy in juvenile sentences.

---

530. *See D.S.F.*, 416 N.W.2d at 777 (Crippen, J., dissenting).

531. 372 N.W.2d 392, 394 (Minn. Ct. App. 1985).

532. *Id.* at 398. *See generally* Sarah J. Batzli, Case Note, *Minnesota Articulates Standards for Delinquency Disposition*, 13 WM. MITCHELL L. REV. 247 (1987) (arguing that *L.K.O.* exemplifies how judicial discretion may result in disproportionate sentences for juveniles). *But see D.S.F.*, 416 N.W.2d at 774 (holding that preference of allowing children to remain at home applies only to children adjudicated dependent or neglected, not to children found to be delinquent).

533. *L.K.W.*, 372 N.W.2d at 399. The court also emphasized the disproportionality between the sentence L.K.W. received as a juvenile and that which she likely would have received as an adult. *Id.* at 398. In *In re Welfare of M.R.S.*, the court of appeals reaffirmed its commitment to proportionality in juvenile dispositions. 400 N.W.2d 147, 151-52 (Minn. Ct. App. 1987) ("There is virtually no relationship in the court's findings between the child's need for treatment and the disposition rendered. Rather it appears that the child was merely being punished and that the punishment was disproportional in relation to her crimes, which were very minor.").

Analyses of how juvenile court judges actually sentence delinquents also indicate that offense factors are the primary determinants of dispositions. Although evaluations of juvenile court sentencing practices yield contradictory results, two general findings emerge.[534] First, the present offense and prior record account for most of the variance that can be explained in sentences.[535] Practical bureaucratic considerations provide an impetus to base sentences on the offense. Avoiding scandals and unfavorable political and media attention constrain juvenile court judges to impose more formal and restrictive sentences on more serious delinquents.[536] Complex organizations that pursue multiple goals develop bureaucratic strategies to simplify individualized assessments. The present offense and prior record provide such a basis to rationalize decisions.[537] Juvenile courts' sentencing practices are often more similar to adult courts' in their emphases on present offense and prior record than statutory language might suggest.[538]

534. For methodological critiques of prior juvenile sentencing research that attribute the inconsistent findings to different jurisdictions, different time periods, different methodological strategies, and differing theoretical perspectives, see Jeffrey Fagan et al., *Blind Justice? The Impact of Race on the Juvenile Justice Process*, 33 CRIME & DELINQ. 224, 229-30 (1987) (critiquing social class considerations in sentencing), and Belinda R. McCarthy & Brent L. Smith, *The Conceptualization of Discrimination in the Juvenile Justice Process: The Impact of Administrative Factors and Screening Decisions on Juvenile Court Dispositions*, 24 CRIMINOLOGY 41, 43-47 (1986) (reviewing prior explanations of contradictory and ambiguous findings).

535. In multivariate studies, offense variables typically explain about 25%-30% of the variance in sentencing. *See, e.g.*, Stevens H. Clarke & Gary G. Koch, *Juvenile Court: Therapy or Crime Control, and do Lawyers Make a Difference?*, 14 LAW & SOC'Y REV. 263, 276-86 (1980) (analyzing factors that affect juvenile court disposition); Allan Horowitz & Michael Wasserman, *Some Misleading Conceptions in Sentencing Research: An Example and a Reformulation in the Juvenile Court*, 18 CRIMINOLOGY 411, 416-21 (1980) (assessing the weight that different factors receive in juvenile court decisions). *See generally* Feld, *supra* note 9, at 879-89 (concluding that offense variables account for most of the variance in dispositions that can be explained); Fagan et al., *supra* note 534, at 229-30 (1987) (critiquing social class considerations in sentencing); McCarthy & Smith, *supra* note 534, at 43-47 (noting that record and offense severely become less influencial as screening proceeds).

536. *See, e.g.*, ROBERT M. EMERSON, JUDGING DELINQUENTS: CONTEXT AND PROCESS IN JUVENILE COURT 86 (1969); *cf.* M.A. BORTNER, INSIDE A JUVENILE COURT: THE TARNISHED IDEAL OF INDIVIDUALIZED JUSTICE 63-92 (1982) (discussing external variables in juvenile judges' decision-making process).

537. *See* MATZA, *supra* note 5; Irene H. Marshall & Charles W. Thomas, *Discretionary Decision-Making and the Juvenile Court*, 34 JUV. & FAM. CT. J. 47, 55-57 (1983) (offense factors provide a bureaucratic decisional rule).

538. A survey of juvenile sentencing practices in California reported that, despite claims of individualization, juvenile dispositions appear to be based pri-

The second consistent finding is that after controlling for present offense and prior record, individualized discretion is often synonymous with racial discrimination.[539] Scholars report that black youths are more likely to be detained than are white youths, and that detained youths are more likely to receive se-

---

marily on the youth's present offense and prior record. The study concluded that

> [c]omparisons of juvenile and adult sentencing practices suggest that juvenile and criminal courts in California are much more alike than statutory language would suggest, in the degree to which they focus on aggravating circumstances of the charged offense and the defendant's prior record in determining the degree of confinement that will be imposed.

PETER W. GREENWOOD ET AL., YOUTH CRIME AND JUVENILE JUSTICE IN CALIFORNIA 51 (1983).

539. *See generally* MINORITIES IN JUVENILE JUSTICE (Kimberly Kempf-Leonard et al. eds., forthcoming 1995); Carl E. Pope & William H. Feyerherm, *Minority Status and Juvenile Justice Processing: An Assessment of the Research Literature (Part I)*, 22 CRIM. JUST. ABSTRACTS 327 (1990) [hereinafter Pope & Feyerherm, *Part I*]; Carl E. Pope & William H. Feyerherm, *Minority Status and Juvenile Justice Processing: An Assessment of the Research Literature (Part II)*, 22 CRIM. JUST. ABSTRACTS 527 (1990); Edmund F. McGarrell, *Trends in Racial Disproportionality in Juvenile Court Processing: 1985-1989*, 39 CRIME & DELINQ. 29 (1993); Carl E. Pope, *Racial Disparities in Juvenile Justice*, OVERCROWDED TIMES, Dec. 1994, at 1, 5. The Race Bias Task Force made the same finding. *See supra* note 148 and accompanying text.

The United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, spurred evaluations of racial disparities in juvenile justice administration in the states. *See* 42 U.S.C. § 5633(a)(16) (1988 & Supp. V 1993) (requiring that state applying for juvenile justice formula grant must review the overrepresentation of minority youth incarcerated in its juvenile justice system); H.R. REP. No. 756, 102d Cong., 2d Sess. 24 (1992), *reprinted in* 1992 U.S.C.C.A.N. 4229, 4234 (discussing 1988 amendment). Virtually every state that has examined racial bias in juvenile courts confirms its presence at pre-trial detention and sentencing. *See, e.g.*, Bridges, *supra* note 156 (reporting on Washington); KIMBERLY L. KEMPF ET AL., AN ANALYSIS OF APPARENT DISPARITIES IN THE HANDLING OF BLACK YOUTH WITHIN MISSOURI'S JUVENILE JUSTICE SYSTEM (1990); KIMBERLY L. KEMPF, THE ROLE OF RACE IN JUVENILE JUSTICE PROCESSING IN PENNSYLVANIA (1992); Donna M. Bishop & Charles E. Frazier, *The Influence of Race in Juvenile Justice Processing*, 25 J. RES. CRIME & DELINQ. 242 (1988) (analyzing the effect of race on processing of juveniles in a southern state); KRISBERG & AUSTIN, *supra* note 507, at 122-34 (analyzing causes of racial disproportionality in the California juvenile justice system). *See generally* CARL E. POPE & WILLIAM FEYERHERM, MINORITIES AND THE JUVENILE JUSTICE SYSTEM (1992) (comprehensive assessment of empirical research on racial disparities in juvenile courts). In response to the consistent research findings, the National Council of Juvenile Family Court Judges recommended policy changes to reduce pervasive racial disparities at arrest, detention, adjudication, and disposition. *See* National Council of Juvenile and Family Court Judges, *Minority Youth in the Juvenile Justice System: A Judicial Response*, JUV. & FAM. CT. J. No. 3A, 1990.

vere sentences.[540] Although initial screening decisions may not be overtly discriminatory, racial disparities amplify as minority youths proceed through the system.[541] Studies report that race, as well as legal factors, influence sequential processing decisions, with black youths at a disadvantage relative to white youths as they move through the system.[542] Accounting for the prevalence of and reducing racial disparities in juvenile court case-processing and sentencing are emerging as a primary juvenile justice policy objective.[543]

In pursuit of its mandate to examine the feasibility of dispositional guidelines for juvenile courts, the Task Force collected data and initiated several studies of Minnesota juvenile court sentencing practices. The Task Force conducted a survey of Minnesota probation officers. It found that the most important factors influencing probation officers' dispositional recommendations were the seriousness of a youth's offense and the youth's criminal history.[544]

Research available to the Task Force conducted by the Racial Bias Task Force reported that the seriousness of the present offense, prior record, pre-trial detention status, *and* a juvenile's

---

540. M.A. Bortner & Wornie L. Reed, *The Preeminence of Process: An Example of Refocused Justice Research*, 66 SOC. SCI. Q. 413, 420-21 (1985); Feld, *supra* note 147, at 1269-74; Charles E. Frazier & John K. Cochran, *Detention of Juveniles: Its Effects on Subsequent Juvenile Court Processing Decisions*, 17 YOUTH & SOC'Y 286, 299 (1986).

541. Pope & Feyerherm, *Part I*, *supra* note 539, at 330; *see also* Barry Krisberg et al., *The Incarceration of Minority Youth*, 33 CRIME & DELINQ. 173, 194 (1987) ("Postarrest decisions are very important in understanding differential incarceration rates.").

542. Bishop & Frazier, *supra* note 539, at 251, 258. One study stated:

> The probability of an initial referral resulting in movement through the system to a disposition of incarceration/transfer is nearly twice as great for blacks (10.2%) as for whites (5.4%).... Blacks are more likely to be recommended for formal processing, referred to court, adjudicated delinquent, and given harsher dispositions than comparable white offenders.

Id. This research emphasizes the importance of analyzing juvenile justice decision-making as a multi-stage process, rather than focusing solely on the final dispositional decision. *See* Bortner & Reed, *supra* note 540, at 421 (pointing out the "indivisibility of focusing exclusively on one juncture of a complex decision-making process, especially final disposition").

543. *See supra* note 539.

544. TASK FORCE, FINAL REPORT, *supra* note 2, at 63. In a survey of juvenile probation officers, 53% ranked criminal history including the current offense first, and an additional 28% ranked offense variable second or third. Memorandum from Janet Marshall to Justice Sandra Gardebring, *Probation Officer Survey Results* (Oct. 12, 1993) (on file with author). Of those variables probation officers considered most important, no other factor besides criminal offense garnered more than 10%. *Id.*

race most significantly influenced juvenile court sentences.[545] The Race Bias Task Force also reported substantial geographic disparities in sentencing that compounded racial disparities.[546] Although empirical evaluations indicate that the seriousness of the offense, the length of the prior record, and pre-trial detention status most strongly influence sentencing decisions, the Juvenile Justice Task Force found that those variables could account for little of the variance in dispositions. Thus, according to the Juvenile Justice Task Force, "the design of a dispositional order remains individualized to the specific offender."[547]

Minnesota adopted its Sentencing Guidelines for adult criminal defendants because it could not justify idiosyncratic judicial sentencing practices, inequality among similarly situated offenders, racial disparities, and geographic variations under a system of statewide criminal laws.[548] Although identical disparities exist in the sentencing of juveniles, the Task Force was unwilling to recommend a similar solution. To the contrary, the Task Force recommended that "[s]tatewide juvenile delinquency

---

545. *See supra* notes 145-149 and accompanying text.

546. RACIAL BIAS, FINAL REPORT, *supra* note 145, at app. D 17-19. The Race Bias Task Force's findings of geographic and racial disparities in sentencing paralleled the Minnesota Gender Bias Task Force's earlier findings of gender and geographic differences in pre-trial detention and home removal decisions for female juvenile offenders. *See Minnesota Supreme Court Task Force for Gender Fairness in the Courts: Final Report*, 15 WM. MITCHELL L. REV. 825, 907-13 (1989). The Gender Bias Task Force reported gender-based differences in detention rates and dispositions for male and female juveniles and that those disparities were especially significant for girls charged with non-criminal status offenses. *Id.* at 910-11. Unfortunately, the Task Force recommended only improved data collection to further study the disparities. *Id.* at 911-12.

547. TASK FORCE, FINAL REPORT, *supra* note 2, at 63. The findings of the Gender Bias Task Force, the Race Bias Task Force, and the Juvenile Justice Task Force corroborated my own analyses of the salience of offense variables in sentencing juveniles on the one hand, and persistent patterns of gender, racial, and geographic disparity on the other. *See, e.g.*, Feld, *supra* note 147, at 1319, 1344-45; Feld, *supra* note 67, at 187-94.

548. The statement of purpose for the Guidelines reads:

> The purpose of the sentencing guidelines is to establish rational and *consistent sentencing standards which reduce sentencing disparity* and ensure that sanctions following conviction of a felony are proportional to the severity of the offense of conviction and the extent of the offender's criminal history. Equity in sentencing requires (a) that *convicted felons similar with respect to relevant sentencing criteria ought to receive similar sanctions* . . . .

MINN. SENTENCING GUIDELINES § I (emphasis added); *see also* James K. Appleby, *Legislative History*, 5 HAMLINE L. REV. 301, 305-06 (1982) (describing the disagreement between Minnesota House and Senate members over amount of and place for discretion in the sentencing process).

sentencing guidelines should not be established in the State of Minnesota."[549]

In rejecting statewide dispositional guidelines, the Task Force and the legislature failed to follow the logic of their own policies for sentencing serious young offenders. The fundamental problem with certification was the subjective, individualized, and unequal exercise of judicial discretion. The Task Force and the legislature used the framework of the adult Sentencing Guidelines to structure presumptive certification and EJJ designation, used present offense and prior record as the primary criteria to determine "public safety," and rank-ordered these criteria.[550] In short, they created a form of presumptive sentencing guidelines with objectively structured discretion to govern certification.

Although I urged the Task Force to recommend a Juvenile Sentencing Guidelines Commission to develop dispositional guidelines and to monitor judicial compliance,[551] the Task Force resisted for several reasons. Many Task Force members were judges, probation officers, or corrections administrators, and imposing guidelines restricts their own exercise of "sound discretion." Because of Minnesota's historical experience with adult sentencing guidelines, the term "guidelines" carries negative connotations that many Task Force members were reluctant to endorse. Moreover, most Task Force members sincerely subscribe to the "rehabilitative" mission of the juvenile court.[552]

549. TASK FORCE, FINAL REPORT, *supra* note 2, at 65. "The Task Force is recommending that Minnesota's juvenile justice system retain the *concept of individualized dispositions*. However, there is a balancing need for *consistency* and significant support was expressed for a basic level of community standards relative to juvenile offenders." *Id.* at 64.

550. *See supra* notes 279-281 and accompanying text.

551. *See, e.g.*, Memorandum from Barry Feld to Sentencing Guidelines Subcommittee 1-2 (July 20, 1993) (on file with author) (stating that individualized sentencing discretion cannot be justified by evaluations of treatment effectiveness, especially in light of demonstrated racial and geographic disparities in sentencing otherwise similarly situated offenders).

552. For example, James Hayes, Director of Juvenile Probation, Ramsey County Community Corrections, wrote several reflective memoranda to Task Force members articulating the traditional, rehabilitative mission of the juvenile court. *See, e.g.*, Memorandum from James H. Hayes to the Juvenile Justice Task Force, *Minority Recommendation: Jury Trials* (Aug. 3, 1993) (on file with author) (stating that juveniles are different from adults; dispositions must be individualized to respond to their treatment needs; overall, sentencing of juveniles is basically fair; and disparities result from wider social conditions that sentencing guidelines cannot remedy).

Minnesota's Sentencing Guidelines only apply to adults sentenced for felony offenses and presume commitment to prison for less than a quarter of those offenders.[553] Thus, criminal sentencing of all adult misdemeanants and most felons remains discretionary and local. Similarly, prosecutors charge the vast majority of juveniles are charged with misdemeanors, and they receive local, non-custodial dispositions such as community service, fines, restitution, or probation supervision.[554] Minnesota judges removed about seventeen percent of juveniles from their homes, and placed many of these offenders in group homes or local treatment facilities rather than committed to the state Department of Corrections—the juvenile analogue of a commitment to prison.[555] The Task Force thus concluded that "Minnesota's juvenile justice system is primarily county-based, giving us considerable variation that reflects local community standards, resources, and priorities."[556]

Rather than mandate a system of statewide juvenile sentencing guidelines, the Task Force recommended that "the judges of each judicial district, in consultation with county attorneys, public defenders, local corrections personnel, and the public, reduce to writing and publish, the criteria used by the judges in determining juvenile delinquency dispositions."[557] The legislature enacted the Task Force's recommendation that each judicial district develop and promulgate "delinquency disposition principles."[558]

---

553. *See* Frase, *supra* note 289, at 332.

554. TASK FORCE, FINAL REPORT, *supra* note 2, at 63 (presenting a survey of dispositions).

555. *Id.* (in only 17% of the 15,500 studied cases was the juvenile removed from the home).

556. *Id.* at 64. Indeed, many urban-rural geographic disparities in sentencing juveniles likely reflect differences in the resources and placements available, a criminological variation of Parkinson's Law that "bodies expand to fill the bed-space allotted." Feld, *supra* note 67, at 197; *see also* OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 371, at 48-50 (stating that state-county financial reimbursement policies, rather than the seriousness of youths' offenses, tend to determine institutional commitment rates).

557. TASK FORCE, FINAL REPORT, *supra* note 2, at 65-66.

558. By January 1, 1996, the chief judge in each judicial district shall *publish the written criteria used* by judges in the district *in determining juvenile delinquency dispositions*. The judges of the district shall develop the written criteria in consultation with local county attorneys, public defenders, local corrections personnel, victim advocates, and the public. Each chief judge shall submit a copy of the written criteria to the head of the conference of chief judges by September 1, 1995, who shall submit copies of the criteria to the chairs of the senate crime prevention committee and the house judiciary committee by November 1, 1995.

Development of a separate dispositional framework within each judicial district allows for regional variation and flexibility in sentencing that reflects local options. Requiring the involvement of various participants in the sentencing process also provides some balance in the formulating criteria. Requiring judges to reduce to writing and publish the criteria used to sentence juveniles better enables appellate courts to review sentences, assess departures from formal criteria, and evaluate the grounds for such deviations.

Juveniles have a right to appeal from "a final order of the juvenile court affecting a substantial right," which includes appeals from dispositional orders.[559] The 1994 Juvenile Crime Act created a juvenile appellate division within the Office of State Public Defender to implement this right to appeal.[560] Juveniles rarely appeal their cases, both because many lack counsel at trial who can make a record, and because even fewer have access to appellate counsel to perfect an appeal.[561] The only available empirical analysis of juvenile appellate practices attributed the differences between juvenile and criminal appeals to the persistence of a *parens patriae* rehabilitative culture among lawyers in public defender offices.[562] The study questioned whether juveniles could practically vindicate their theoretical right to challenge trial court decisions when there persists among juvenile court practitioners "a generally shared set of values, a juvenile court subculture, which, in the tradition of *parens patriae*, effectively nullifies the autonomy of juveniles and their parents to decide whether or not to challenge the legality of their adjudication or commitment."[563]

The new statutory requirement that each judicial district promulgate "delinquency disposition principles," coupled with the creation of an appellate division in the office of the state pub-

---

1994 Minn. Laws 576, § 59 (emphasis added).

559. MINN. STAT. § 260.291(1)(a). Juvenile court adjudications of delinquency and dispositions may be appealed to the court of appeals as a matter of right. MINN. R. JUV. P. 31.03(1)(A)(3), *in* MINNESOTA RULES, *supra* note 167.

560. *See* MINN. STAT. § 611.25(1).

561. *See generally* Donald J. Harris, *Due Process v. Helping Kids in Trouble: Implementing the Right to Appeal from Adjudications of Delinquency in Pennsylvania*, 98 DICK. L. REV. 209 (1993) (analyzing impediments to juveniles' exercise of appellate rights).

562. *Id.* at 223. These lawyers regarded "appeals as an obstacle to getting the child back on track . . . . [M]any defenders view the attorney's role as a combination of advocate and guardian, with a goal of salvaging the children." *Id.* at 223. Harris also attributes attorneys' reluctance to advise juveniles of their appellate rights to their clients' immaturity. *Id.*

563. *Id.* at 228.

lic defender, has the potential to subject juvenile courts to the accountability of appellate review. Perhaps over time a common law of juvenile sentencing principles will emerge from appeals of juvenile sentences. Whether this occurs will depend on the specificity of the criteria included in the "delinquency dispositional principles." If those "principles" consist of little more than an undifferentiated "list of factors" such as those that purported to guide waiver decisions in the past,[564] discretion will remain effectively unrestricted and practically unreviewable. It will also depend on the autonomy of state public defenders and their commitment to vigorously appeal actions that may disrupt the stability of the "courtroom work group."[565]

a. *Restorative Justice*

The new legislation includes several other provisions affecting the disposition of young offenders. The Task Force had met with several proponents of "restorative justice," or the "balanced approach" to juvenile disposition, which attempts to balance the community's interests in public safety by holding offenders accountable and enhancing their competency through individualized intervention.[566] Although the basic factors included in a "balanced" disposition are certainly plausible, there has been

564. *See supra* notes 182-188 and accompanying text (criticizing lists of factors used in waiver decisions).

565. JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS 294 (1977) (analyzing processing and disposition of adult felony cases using the model of a "courtroom work-group").

566. TASK FORCE, FINAL REPORT, *supra* note 2, at 20. *See generally* DENNIS MALONEY ET AL., JUVENILE PROBATION: THE BALANCED APPROACH 5 (1988) (noting that "a spectrum of basic values—*community protection, accountability, competency development*, and *individualized assessment*—represent the core elements"). The theme of community protection emphasizes public safety, which includes both protection of citizens from crime and protection of children from abuse and neglect. *Id.* at 6. The theme of accountability makes offenders "aware of and responsible for the loss, damage, or injury perpetrated upon the victim," and makes service providing agencies responsible for the efficacy of their intervention. *Id.* Competency development refers to individualized "treatment" goals and the acquisition of basic educational, vocational, and coping skills. *Id.* at 6-7. Balancing to achieve all three goals simultaneously required an individualized assessment. *Id.* at 7, 10-11.

In 1991, the Oregon Legislature enacted elements of the "balanced approach," and provided funding to encourage counties to develop local juvenile case management programs. OR. REV. STAT. § 420.860 (Supp. 1994). To apply for a juvenile justice development grant, a county must provide a detailed plan that demonstrates juvenile accountability, community protection, and juvenile skills development. *Id.* § 420.870. Oregon courts have endorsed the "balanced approach." *See* State v. Reynolds, 857 P.2d 842, 849 (Or. 1993) (stating that the juvenile code is focused on the best interests and welfare of the child).

virtually no evaluation of the effectiveness of the strategy. In the quest for crime control panaceas or quick-fixes, superficially plausible strategies, for example "scared straight and boot-camps,[567] tend to garner proponents until subsequent evaluation research demonstrates their ineffectiveness. The "balanced approach" may be the latest fad to join this list, as the Task Force recommended,[568] and the legislature funded, several local demonstration programs that "implement[ ] restorative justice principles."[569]

b. *Pretrial Diversion*

Although Progressive reformers created the juvenile court to shift youths from criminal courts, more recent reforms attempt to divert eligible youths away from juvenile court.[570] Diversion is promoted as a strategy to dispose of cases informally, to refer youths quickly to appropriate services and reintegrate them into the community, and to avoid the stigma and negative labelling of formal court intervention.[571] The Progressive ideology of early identification and treatment, however, is inherently expansive and lends itself easily to over-reaching. One scholar contends that diversion programs do not restrict themselves to youths who would otherwise enter the juvenile justice system, but also encompass "youngsters who otherwise would have been counseled and released without further action."[572] Moreover, diversion programs allow police, prosecutors, or juvenile court per-

567. *See* JAMES O. FINCKENAUER, SCARED STRAIGHT! AND THE PANACEA PHENOMENA (1982); U.S. GENERAL ACCOUNTING OFFICE, PRISON BOOT CAMPS: SHORT-TERM PRISON COSTS REDUCED, BUT LONG-TERM IMPACT UNCERTAIN (1993) (concluding that boot camp graduates have only marginally lower recidivism than similar inmates in traditional prisons and differences diminish over time); Merry Morash & Lila Rucker, *A Critical Look at the Idea of Boot Camp as a Correctional Reform*, 36 CRIME & DELINQ. 204, 218 (1990) (stating that boot-camps are unlikely to provide panacea for rehabilitation or reduce prison overcrowding).

568. TASK FORCE, FINAL REPORT, *supra* note 2, at 66.

569. 1994 Minn. Laws 576, § 67, subd. 4.

570. H. TED RUBIN, JUVENILE JUSTICE: POLICY, PRACTICE, AND LAW 176-77 (2d ed. 1985); *see also* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 2 (1967) (recommending that minor offenders and status offenders be diverted and handled informally); Malcolm W. Klein, *Deinstitutionalization and Diversion of Juvenile Offenders: A Litany of Impediments*, *in* 1 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 145, 146 (Norval Morris & Michael Tonry eds., 1979) (diversion is "legislatively sanctified, theoretically justified, and socially promoted").

571. RUBIN, *supra* note 570, at 178.

572. *Id.* at 179.

sonnel to retain social control over juvenile offenders without the benefit of establishing jurisdiction.[573] Thus, although diversion is theoretically intended to reduce the court's client population, it may have the opposite effect of "widening the net of social control." As the number of juveniles referred to court remains relatively constant, juveniles who were previously ignored or released are now subject to other forms of intervention.[574] Moreover, diversion provides a rationale to shift discretion from the juvenile court itself, where it is subject to some procedural formality under *Gault*, to the periphery, where police, prosecutors, or intake "gate-keepers" operate on an informal pre-*Gault* basis with little accountability.[575]

Although the Task Force did not extensively discuss the policy of diversion, it recommended that counties implement juvenile diversion programs if they have not yet done so.[576] The new statute mandates that "every county attorney shall establish a pretrial diversion program for offenders,"[577] formally strengthening prosecutors' "gate-keeping" role in juvenile court.[578]

---

573. *Id.* at 184.

574. *Id.* at 184-85; *see also* Scott H. Decker, *A Systematic Analysis of Diversion: Net Widening and Beyond*, 13 J. CRIM. JUST. 206, 214 (1985) (arguing that after controlling for other factors, the number of youths referred to juvenile court actually increased following the introduction of a court diversion program); Kenneth Polk, *Juvenile Diversion: A Look at the Record*, 30 CRIME & DELINQ. 648, 653 (1984) ("[I]f being referred to the diversion program was backed by a threat of referral to court, then the allegedly nonpunitive agency in reality becomes an extension of the justice system and the diversion is a legal fiction.").

575. Professor John Sutton analyzed the history of regulating "stubborn children," and concluded that diversion "sanctified and encouraged a strategy for circumventing due process, assured that programs would stay in the discretionary hands of local officials, and encouraged the privatization of long-term social control." JOHN SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES, 1640-1981, at 215 (1988).

576. TASK FORCE, FINAL REPORT, *supra* note 2, at 65.

577. MINN. STAT. § 388.24(2).

578. *See generally* John H. Laub & Bruce K. Mac Murray, *Increasing the Prosecutor's Role in Juvenile Court: Expectations and Realities*, 12 JUST. SYS. J. 196 (1987) (reporting on research investigating the effect of increased prosecutorial presence in Massachusetts juvenile courts); H. Ted Rubin, *The Emerging Prosecutor Dominance of the Juvenile Court Intake Process*, 26 CRIME & DELINQ. 29 (1980) (discussing prosecutorial control at intake as a means to screen cases and determine which are most appropriate to refer to court); Inger J. Sagatun & Leonard P. Edwards, *The Role of the District Attorney in Juvenile Court: Is the Juvenile Court Becoming Just Like Adult Court?*, JUV. & FAM. CT. J., May 1979, at 17 (analyzing a survey answered by California District Attorney offices after that state strengthened its juvenile code).

Diversion seeks to avoid formal court referral, reduce juvenile court costs and caseloads, and minimize offender recidivism.[579] Prosecutors may divert any youth who has not been diverted previously, and who is or could be charged with any crime other than an offense against the person.[580] Because youths who have been previously diverted are ineligible for additional diversion, the statute also mandates the creation of a data information system to monitor program participation.[581] Diversion is not "voluntary" because the prosecutor retains authority to file a delinquency petition against a youth who does not satisfy conditions of program participation.[582] Because filing a petition is not a prerequisite for referral to a diversion program, youths do not have access to court appointed counsel. There is no practical way to assess the legal justification for intervention.[583] Like other states' efforts to formalize diversion,[584] the new statute institutionalizes low visibility, coercive intervention without effective oversight, a type of de facto "informal guilty plea" recently condemned by the Minnesota Court of Appeals.[585]

F. Procedural Justice in Juvenile Court

There is an intimate connection between substance and procedure in juvenile courts. Progressive reformers used informal procedures to make discretionary substantive decisions in the child's "best interests." The Supreme Court in *Gault* insisted on

---

579. Minn. Stat. § 388.24(2).

580. *Id.* § 388.24(1)(1)(i), (iii). Diversion programs provide screening services to the court, monitor juveniles' compliance with program goals, perform chemical dependency assessment and make referrals for treatment where appropriate, provide counseling services, administer payment of restitution to victims, identify community resources, provide educational services, and provide the juvenile court, prosecutors, and defense attorneys with information about the diverted offender's performance. *Id.* § 388.24(3).

581. *Id.* § 388.24(4) (mandating a report to the Minnesota Bureau of Criminal Apprehension identifying information about the program participant, including date of entry and date of successful completion or failure in the program). *Id.* The information becomes part of a youth's "record," and is "entered into and maintained in the criminal history file of the Minnesota criminal justice information system." *Id.*

582. *Id.* § 388.24(1)(2).

583. The statute provides that a child is an offender if "the child is petitioned for, or *probable cause exists to petition* or take the child into custody for, a felony, gross misdemeanor, or misdemeanor offense." *Id.* § 388.24(1)(1)(i) (emphasis added).

584. *See, e.g.*, Wash. Rev. Code §§ 13.40.070, .080 (1993) (providing for diversion agreement administered by juvenile court intake).

585. *In re* D.S.S., 506 N.W.2d 650 (Minn. Ct. App. 1993); *see also infra* note 709 (discussing *D.S.S.*).

greater procedural safeguards because of the continuing gap between the rhetoric and reality of rehabilitation.[586] Since *Gault*, the increased emphasis on procedural formality corresponds with a shift in juvenile justice theory and practice away from individualized treatment to punishment based on the offense committed.[587] When the Supreme Court decided *McKeiver* in 1970, states did not use either determinate or mandatory minimum statutes to regulate juvenile court judges' sentencing decisions. Since then, about one-third of the states have adopted determinate sentencing guidelines, "designated felony" and serious offender sentencing legislation, mandatory minimum statutes, and correctional administrative or parole release guidelines.[588] Legislative amendments to juvenile courts' purpose clauses, and appellate court decisions endorsing punishment fruther create juvenile courts' rehabilitative premise.[589]

The explicit emergence of punishment as a primary element of sentencing policy in many states, including Minnesota,[590] repudiates juvenile courts' original postulates that children should be treated differently than adults, that judges act in the child's "best interest," and that each case is unique and cannot be circumscribed by fixed-terms based on the offense committed.[591] The increased substantive emphasis on punishment in juvenile courts contradicts *McKeiver*'s assumptions that juveniles require fewer procedural safeguards than do adult criminal defendants, and requires a re-assessment of the quality of procedural justice in juvenile courts.

Although *Gault* provided the impetus for the formal procedural convergence of juvenile and criminal courts,[592] a substan-

586. *See supra* notes 11-17 and accompanying text (explaining *Gault* decision).

587. *See, e.g.*, Martin R. Gardner, *Punitive Juvenile Justice: Some Observations on a Recent Trend*, 10 INT'L J.L. & PSYCHIATRY 129, 133 (1987) (discussing the "emergence of the punitive sanction and its corresponding emphasis on personal responsibility"); Martin R. Gardner, *The Right of Juvenile Offenders to be Punished: Some Implications of Treating Kids as Persons*, 68 NEB. L. REV. 182, 198-208 (1989) (presenting a theory for a constitutional right to be punished). *See generally* Feld, *supra* note 9 (analyzing the change from consideration of youth's best interest to an emphasis on the "principle of the offense").

588. Feld, *supra* note 9, 846 tbl. 1.

589. Walkover, *supra* note 156, at 547-54; *see supra* notes 458-467 and accompanying text (analyzing the purpose of juvenile sanctions).

590. Feld, *supra* note 9, at 846 tbl. 1.

591. ROBERT COATES ET AL., INSTITUTIONAL COMMITMENT AND RELEASE DECISION-MAKING FOR JUVENILE DELINQUENTS: AN ASSESSMENT OF DETERMINATE AND INDETERMINATE APPROACHES, A CROSS-STATE ANALYSIS 11 (1985).

592. Feld, *supra* note 1, at 198.

tial gulf remains between theory and practice, between law on the books and law in action. In theory, *Gault* guaranteed delinquents the right to formal hearings and the assistance of counsel. In practice, however, many juveniles do not receive even the limited procedural justice that *Gault* envisioned. Nearly three decades ago, the Supreme Court observed that "juvenile justice" is an oxymoron: "the child receives the worst of both worlds: he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[593] Although juvenile courts increasingly converge with criminal courts, most states do not provide youths with either procedural safeguards equivalent to those of adult criminal defendants, or with special procedures that more adequately protect them from their own immaturity. Instead, states place juveniles on an equal footing with adult criminal defendants when formal equality acts to their detriment, and employ less effective juvenile court procedures when they provide the state with an advantage.[594] Allowing juveniles to "waive" their right to counsel under the adult standard of "knowing and intelligent" is an example of formal equality producing practical inequality, while denying them the right to a jury trial is an example of the less adequate juvenile court procedures that confer an advantage to the state. Young people know what "real" trials are like from viewing courtroom dramas or highly publicized criminal trials. The contrast between the idealized adult proceedings in which defense attorneys aggressively represent their clients before a jury, and the reality of a juvenile bench trial often conducted without the effective assistance of counsel undermines the legitimacy of the justice process.[595]

1. The Right to a Jury Trial

In *McKeiver v. Pennsylvania*, the Supreme Court limited the extension of procedural rights of juveniles by denying a constitutional right to jury trials in state delinquency proceedings.[596] The Court held that the due process standard of "fundamental fairness" in juvenile proceedings developed in *Gault* and *Winship*, emphasized "accurate fact-finding," an ob-

593. Kent v. United States, 383 U.S. 541, 556 (1966).

594. Feld, *supra* note 1, at 198-99. *See generally* McCarthy, *supra* note 15 (examining pre-adjudicatory constitutional rights of juveniles); Rosenberg, *supra* note 15 (analyzing the juvenile court's conflicting feelings about end actions toward young people).

595. *See* Ainsworth, *supra* note 6, at 1119.

596. 403 U.S. 528, 545 (1971) (Blackmun, J., plurality opinion).

jective as readily attained by a judge as a jury.[597] In suggesting that due process in the juvenile context required nothing more than accurate fact-finding, however, the Court significantly departed from its prior analyses of the *dual* functions of juvenile court procedures: to assure accurate fact-finding *and* to protect against government oppression.[598]

By identifying accurate fact-finding as the sole underlying rationale of the fundamental fairness doctrine, the Court ignored its analysis in *Gault*, which held that the Fifth Amendment's privilege against self-incrimination was necessary to protect against government oppression, even though it might compromise accurate fact-finding.[599] Invoking the mythology of the sympathetic, paternalistic juvenile court judge, *McKeiver* denied that juveniles required protection against government oppression,[600] and rejected the argument that the inbred, closed nature of the juvenile court system could adversely affect accurate fact-finding.[601]

The *McKeiver* Court feared that requiring jury trials would disrupt the juvenile court's traditional adjudicative practices.[602] The Court noted the potential adverse impact of jury trials on the informality, flexibility, and confidentiality of juvenile court proceedings.[603] According to the court, requiring a jury trial would both render juvenile courts virtually indistinguishable from criminal courts and raise the more basic question of whether there is any need for a separate juvenile court.[604]

---

597. *Id.* at 543.

598. *See generally* Feld, *supra* note 15.

599. *See id.* at 206-08 (discussing *Gault*'s emphasis on procedural safeguards).

600. 403 U.S. at 550.

601. According to the Court, concern about procedural safeguards such as jury trials are necessary to assure accurate fact-finding and protection against governmental oppression ignores the notion of benevolence and compassion as the premise of the juvenile court system. *Id.* at 550-51.

602. *Id.* at 550.

603. *Id.*

604. *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."); *see, e.g.*, *In re* Javier A., 206 Cal. Rptr. 386, 430 (Ct. App. 1984) (denying petitioner a jury trial in a juvenile proceeding, but urging the supreme court to reconsider prior decisions in light of evidence that juvenile court proceedings have taken on many attributes of criminal trial proceedings). In *Javier A.* the court noted that "[j]uvenile proceedings now feature the same contests over admission of evidence as adult proceedings since only proof admissible in a criminal trial can be used to support a finding the juvenile committed the criminal offense." *Id.* at 419.

Although *McKeiver* Court found faults with the juvenile process, it asserted that jury trials would not correct those deficiencies but would instead make the juvenile process unduly formal and adversarial.[605] The Court did not consider whether its earlier decision in *Gault* effectively foreclosed renewed concern with flexibility and informality, what the possible advantages of increased formality in juvenile proceedings might be,[606] or why formality at trial was incompatible with therapeutic dispositions. Most importantly, *McKeiver* did not analyze the crucial distinctions between treatment in juvenile courts and punishment in criminal courts that justified differing procedural safeguards.[607] The Court reviewed no factual record of dispositional practices or conditions of confinement when it asserted that juvenile court intervention was benevolent rather than punitive.[608] The Court simply noted that the ideal juvenile court system is "an intimate, informal protective proceeding,"[609] even though courts seldom, if ever, realize that "ideal."[610]

The Supreme Court's decision in *McKeiver* to deny juveniles a right to a jury trial emphasized functional parity between the quality of juvenile and adult adjudications.[611] The assertion of comparable federal accuracy despite fewer procedural rights, however, is subject to question. Judges and juries apply *Winship*'s "proof beyond a reasonable doubt" standard differently:

> Juries serve special protective functions in assuring the accuracy of factual determinations, and studies show that juries are more likely to acquit than are judges. Substantive criminal guilt is not just "factual guilt" but a complex assessment of moral culpability. The power of jury nullification provides a nexus between the legislature's original criminalization decision and the community's felt sense of justice in

605. The *McKeiver* Court noted that providing for trial by jury in juvenile court "would bring with it . . . the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial." 403 U.S. at 550.

606. One of the Court's rationales for imposing procedural formality on juvenile delinquency proceedings was that "[d]epartures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness." *In re* Gault, 387 U.S. 1, 18-19 (1967).

607. *See infra* notes 615-618 and accompanying text.

608. Compare *McKeiver* with Allen v. Illinois, 478 U.S. 364 (1986). In *Allen*, the Court denied petitioner the protections of the Fifth Amendment's privilege against self-incrimination in a "sexually dangerous person" commitment proceeding. *Id.* at 367. Because the privilege is only available when the State purports to "punish," the Court based its ruling, in part, on petitioner's failure to disprove the State's assertion that it provided treatment. *Id.* at 373-74; *see supra* note 455 (discussing *Allen*).

609. *McKeiver*, 403 U.S. at 550.

610. *Id.* at 547-48.

611. *Id.* at 543-48.

> the application of laws to a particular case. These tendencies are attributable to various factors, including differences in jury-judge evaluations of evidence, jury sentiments about the "law" (jury equity), and jury sympathy for the defendant [of which youthfulness garnered the greatest support].[612]

In *Sullivan v. Louisiana*, the Supreme Court emphasized that the criminal standard of proof beyond a reasonable doubt and the right to have a jury apply it are "interrelated."[613] Given the same evidence, a judge in juvenile court is more likely to convict a youth at trial than is a jury of detached citizens in a criminal proceeding.[614]

---

612. Feld, *supra* note 1, at 245. *See generally* REED HASTIE ET AL., INSIDE THE JURY 121-34 (1983) (studying the characteristics of juror behavior); HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 182-90 (1966) (analyzing sources of differences between judge and jury "reasonable doubt").

613. 113 S. Ct. 2078, 2081 (1993). The Court further stated that "[i]t would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt." *Id.* The Court held that a constitutionally defective reasonable-doubt jury instruction could not be a harmless error. *Id.* at 2079.

614. *See, e.g.*, GREENWOOD ET AL., *supra* note 538, at 30-31 (comparing the attrition rates of similar cases in juvenile and adult courts in California and concluding that "it is easier to win a conviction in the juvenile court than in the criminal court, with comparable types of cases").

I have discussed elsewhere Professor Janet Ainsworth's arguments regarding the reasons juvenile court judges convict more readily than do juries:

> Fact-finding by judges and juries is intrinsically different, since the former try hundreds of cases every year while the latter hear only one or two. As a result of hearing many cases routinely, judges may become less meticulous in considering evidence, may evaluate facts more casually, and may apply less stringently the concepts of reasonable doubt and presumption of innocence than jurors. The personal characteristics of judges differ from those of the members of a jury pool and it is more difficult for a defendant to determine how those personal characteristics will affect the decision in a case. Through *voir dire*, litigants may examine jurors about their attitudes, beliefs, and experiences as they may bear upon the way they will decide the case; there is no comparable opportunity to explore a judge's background to determine the presence of judicial biases. In addition to the novelty of deciding cases, juries and judges evaluate testimony differently. Juvenile court judges hear testimony from the same police and probation officers on a recurring basis and develop a settled opinion about their credibility. Similarly, as a result of hearing earlier charges against a juvenile, or presiding over a detention hearing or pre-trial motion to suppress evidence, a judge already may have a pre-determined view of a youth's credibility and character, or the merits of the case. Fact-finding by a judge differs from that by a jury because an individual fact-finder does not have to discuss either the law or the evidence with a group before reaching a conclusion. Although a jury must be instructed explicitly about the law to be applied to a case, the judge in a bench trial is not required to articulate the law and it is more difficult to determine whether the judge correctly understood and applied it.

Moreover, the *McKeiver* decision simply ignored that procedural safeguards function to prevent governmental oppression.[615] In *Duncan v. Louisiana*, the Court emphasized that fundamental fairness in adult criminal proceedings requires both factual accuracy *and* protection against governmental oppression.[616] The *Duncan* Court identified the manifold benefits of a jury trial: protections from a weak or biased judge, injection of the community's values into the decision-making process, and provision of visibility of and accountability for the workings of the process.[617] All of these considerations apply equally in juvenile proceedings.[618]

The increasing role of punishment in juvenile justice raises a dilemma of constitutional dimensions. Very few states that sentence juveniles for their offenses provide juveniles with jury trials.[619] Several states that use offense-based sentencing

---

Feld, *supra* note 1, at 220-21 (citations to Ainsworth, *supra* note 6, inter alia, omitted).

615. *See supra* notes 11-15 and accompanying text.

616. 391 U.S. 145, 155-56 (1968).

617. *Id.* The Court stated:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.... Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trials provisions . . . reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Id. at 155-56.

618. *See, e.g.*, R.L.R. v. State, 487 P.2d 27, 58 (Alaska 1971) (holding that the Alaska constitution guarantees children the right to a public trial); *In re* Javier A., 206 Cal. Rptr. 386, 426 (Ct. App. 1984) ("These benefits appear to have as much meaning for juvenile delinquency proceedings as for adult criminal court.").

619. Currently, about a dozen states provide for jury trials in juvenile court: ALASKA STAT. § 47.10.070 (1994); COLO. REV. STAT. § 19-1-106(1)(a) (1986 & Supp. 1994); MASS. ANN. LAWS ch. 119, § 55A (Law. Co-op. Supp. 1984); MICH. COMP. LAWS ANN. § 712A.17 (West 1993); MONT. CODE ANN. § 41-5-521 (1993); N.M. STAT. ANN. § 32A-2-16A (Michie 1988); OKLA. STAT. ANN. tit. 10, § 1110 (West 1987); TEX. FAM. CODE ANN. § 54.03(c) (West 1986); W. VA. CODE § 49-5-6 (1992); WIS. STAT. ANN. § 48.243(g) (West 1987); WYO. STAT. § 14-6-224(a) (1994).

schemes have rejected requests for jury trials.[620] For juvenile justice operatives, the jury trial has symbolic implications out of proportion with its practical impact.[621] Providing a jury trial acknowledges that despite our best intentions, juvenile justice may be punitive, and that even benevolently motivated governmental coercion requires procedural limitations. Benevolence, therapy, and rehabilitation are expansive concepts that widen the net of social control, because no one can be critical of "doing good."[622] By contrast, punishment acknowledges that coercion is harmful and requires procedural limitations and proportionality.[623]

The Task Force unanimously agreed that juveniles tried as EJJs must have a right to a jury trial.[624] EJJs receive stayed adult sentences. If they violate the conditions of their probationary juvenile dispositions, the right to a jury is a constitutional pre-requisite to executing adult criminal sentences and incarcerating them in jail or prison.[625] Extending juvenile court jurisdiction for additional years, subjecting youths to secure placements, and using EJJ convictions to enhance subsequent criminal sentences provide additional rationales for full procedural parity with criminal adult trials.[626]

---

620. *See, e.g., In re* Daedler, 228 P. 467, 472 (Cal. 1924) (en banc); State v. J.K., 383 A.2d 283, 289 (Del. 1977) (reasoning that offense-based mandatory sentence is an aspect of the rehabilitative efforts); State v. Schaaf, 743 P.2d 240, 250 (Wash. 1987) (focusing on adverse administrative impact of jury trials on juvenile justice system).

621. Although opponents of jury trials in juvenile court argue that they substantially disrupt juvenile proceedings, there is apparently no basis for such an objection, as evidenced both by the dozen jurisdictions that provide juveniles with the right to a jury and empirical studies of their use. *See infra* notes 642-643 and accompanying text.

622. *See* ALLEN, *supra* note 5, at 25, 36-38 (arguing that professionalism and devotion to science provide immunity from the usual forms of restraint); Fred Cohen, *Juvenile Offenders: Proportionality vs. Treatment*, CHILDREN'S RTS. REP., (Juvenile Research Project, ACLU, New York, N.Y.), May 1978, at 2, 5 (arguing that the rehabilitative ideal is a "noble lie").

623. *See, e.g.*, Sanford J. Fox, *The Reform of Juvenile Justice: The Child's Right to Punishment*, JUV. JUST., Aug. 1974, at 2, 4 (noting that the juvenile justice system requires a compromise between punishment and treatment); Cohen, *supra* note 622, at 5.

624. TASK FORCE, FINAL REPORT, *supra* note 2, at 43.

625. *Id.*; *see supra* notes 324-326, 344-348 and accompanying text.

626. The Task Force emphasized that

> [s]ince Serious Youthful Offenders will receive special labeling, extended jurisdiction of the juvenile court, more severe sanctions, potential incarceration with adults, and the accumulation of a juvenile record which can be used in later adult sentencing, the extension of a right to a jury trial to Serious Youthful Offenders is critical. The juve-

Although the Task Force agreed that EJJ prosecutions require a right to a jury, it disagreed about extending the right to a jury trial to other delinquents charged with criminal conduct.[627] The Task Force majority declined to recommend a right to a jury in delinquency proceedings.[628] Most members believed that juvenile courts remain significantly different from criminal courts, and that their adjudications can be fair and accurate without a jury.[629] They were concerned that providing juries might impose practical administrative burdens on juvenile courts.[630] Some Task Force members denied juveniles the right to a jury based on a political calculus about the impact of such a recommendation on the legislature.[631]

A minority of the Task Force members initially endorsed granting all juveniles the same right to a jury enjoyed by adult criminal defendants. A substantial majority of the Task Force originally approved granting the right to a jury trial for all sixteen- and seventeen-year-old juveniles charged with felony offenses.[632] The Task Force, however, later reversed itself and the

---

nile court for a Serious Youthful Offender will not differ fundamentally from an adult criminal court, and therefore the Task Force is clear that Serious Youthful Offenders must be afforded full due process rights and protections including the option of requesting a trial by jury.

TASK FORCE, FINAL REPORT, *supra* note 2, at 43.

627. *Id.* at 41. "The possibility of extending the right to a jury trial to all juveniles in delinquency cases was discussed extensively by the Task Force." *Id.*

628. *Id.* at 41. According to the *Final Report*:

[T]he Task Force was concerned about the potential administrative burden of treating all juveniles like adult defendants. Concerns were also raised that such a broad based granting of jury trial rights to all juveniles may spur initiatives to abandon the juvenile justice system altogether and thus jeopardize portions of the juvenile justice system that are effective in handling the large majority of juvenile offenders.

Id.

629. *See* Memorandum from James H. Hayes, *supra* note 552 (expressing the opinion of a minority who opposed the Task Force's initial position to recommend a right to jury trials to all 16- and 17-year-old juveniles charged with felony level offenses because jury is not needed for fairness, will significantly increase the level of plea bargaining, and will impose administrative burdens). At its retreat on October 16-17, 1993, a majority of the Task Force adopted the "minority" position and denied to older juveniles charged with a felony the right to a jury trial.

630. TASK FORCE, FINAL REPORT, *supra* note 2, at 41.

631. *Id.* at 74.

632. *Id.* The Task Force stated:

That position was based on simple justice. The rationale was that trials of juveniles 16 or older charged with felonies are already open to the public, so there are no confidentiality problems. In addition, older juveniles' felony proceedings typically may result in more serious consequences which require greater procedural protections. Finally, these

majority recommended that only EJJs have a right to a jury.[633] Task Force members feared that equating juvenile and adult criminal procedures would strengthen the position of "get tough" legislators who wanted to exclude offenses from juvenile court jurisdiction and who could argue that procedural equality with adults should produce correspondingly longer sentences.

Because I have long advocated procedural justice for juveniles,[634] the Task Force delegated to me the responsibility of writing a *Minority Report* on behalf of those members who supported extending to juveniles a statutory right to a jury.[635] In my report, I contended that the realities of modern day juvenile courts contradict the historical justifications for denying juveniles the full panoply of criminal procedural protections.[636] Since *McKeiver*, both nationally and in Minnesota, juvenile justice theory and practice have shifted from therapeutic individualized dispositions toward an emphasis on public safety, the seriousness of a youth's offense, and social control.[637] Consequently, there is very little to distinguish sentencing policies for youths charged with crimes from those for adults.[638]

The Task Force majority denied that the contemporary juvenile court is little more than a scaled-down, second-class crim-

---

are also the cases in which juvenile convictions can result in criminal history score points that later may be used to enhance adult sentences.

Id.

633. *Id.* As noted previously, *supra* notes 340-343 and accompanying text, the legislature enacted the Task Force's recommendation.

634. *See, e.g.*, Feld, *supra* note 15; Feld, *supra* note 147; Feld, *supra* note 1.

635. TASK FORCE, FINAL REPORT, *supra* note 2, at 43-45, 70-74.

636. *Id.* at 70. I stated in my report:

> Because young people brought to juvenile court are charged with crimes and face the prospect of coercive state intervention, they should receive the same criminal procedural safeguards as any other citizen, including the right to a jury trial. There is no principled justification for denying to young people the same procedural protections that other citizens receive as a matter of constitutional right. The justifications to deny juveniles this fundamental right are based on either an historical vision of an informal, rehabilitative juvenile court that is inconsistent with contemporary reality or political expediency that sacrifices the rights of young offenders.

Id.

637. *See generally* Feld, *supra* note 9 (analyzing movement from treatment to punishment models).

638. Earlier, I examined this pattern in Minnesota as evidenced by the changes in the legislative statement of purpose, appellate court opinions, the use of determinate sentencing guidelines by the Department of Corrections and some juvenile courts, and empirical evaluations of juvenile court judges' sentencing practices. *Supra* notes 458-549 and accompanying text.

inal court for young people.[639] It asserted that juvenile dispositions are benign and therapeutic, and that therefore youths require fewer procedural safeguards than adults: "The current juvenile justice system is appropriate and effective for the great majority of the children coming before it."[640] Although some witnesses at public hearings presented anecdotal evidence or testimonials, no evaluation research demonstrates that Minnesota's juvenile courts consistently or systematically rehabilitate, lower recidivism rates, or provide any other long-term benefit for young offenders, and a considerable body of research contradicts such claims. In the absence of substantial evidence that youths sentenced for crimes are rehabilitated, juveniles deserve the same protection from coercive intervention that is available to adults. At a minimum, the burden of proof should rest with proponents of the status quo to justify procedural differences between juvenile and criminal courts with evidence, not just rhetoric or anecdotes.

The Task Force also rejected a right to a jury trial out of concern for the administrative impact of juries on juvenile courts.[641] The available empirical evidence, however, contradicts concerns that jury trials substantially disrupt delinquency proceedings.[642] Instead, the right to a jury appears to have, at most, a marginal practical impact on juvenile justice administration. The Task Force surveyed states in which juveniles have a right to a jury and found that youths, like adults seldom exercised the option.[643] Some commentators argue that because adult defendants seldom exercise their right to a jury, its denial

639. TASK FORCE, FINAL REPORT, *supra* note 2, at 73 ("The basic philosophical and jurisprudential question whether juveniles should have a right to a jury on a par with adults is ultimately a value judgment and not an empirical question.").

640. *Id.* at 12.

641. *Id.* at 41. Concern about administrative impact is a recurring theme in those jurisdictions that deny juveniles the right to a jury. *See, e.g.*, State v. Schaaf, 743 P.2d 240, 241 (Wash. 1987) (acknowledging enormous negative impact of jury trials, and inability of juvenile justice system, as presently structured, to absorb such change without substantial restructuring).

642. *See* Charles H. Burch & Kathianne Knaup, *The Impact of Jury Trials Upon the Administration of Juvenile Justice*, 4 CLEARINGHOUSE REV. 345, 358 (1970) (stating that the number of jury trials accounted for less than two percent of total volume of cases heard); Joseph B. Sanborn Jr., *The Right to a Public Jury Trial: A Need for Today's Juvenile Court*, 76 JUDICATURE 231, 237 (1993) (juveniles' right to jury trial has been exercised rarely, thus no administrative burden); Patricia Shaughnessy, Note, *The Right to a Jury Under the Juvenile Justice Act of 1977*, 14 GONZAGA L. REV. 401, 420-21 (1978) (rate of jury trials ranged between 0.5% and 3% of total petitions).

643. TASK FORCE, FINAL REPORT, *supra* note 2, at 72-73.

to juveniles is of little consequence.[644] Even if the right to a jury is little more than a chip in the plea-bargaining game, it is not self-evident why young offenders should be dealt fewer cards than somewhat older players.

Although I criticized the Task Force majority, I must acknowledge the political astuteness of compromising principle with expediency. Several previous Task Forces and Commissions maintained the policy high-ground, recommended a statutory right to a jury trial, and failed to achieve *any* significant juvenile justice reform.[645] Following the Task Force's initial tentative vote to recommend a right to a jury, some "hard line" legislators tried to exploit that proposal to discredit the entire legislative package. The Task Force's subsequent retreat from a politically charged symbol prevented its opponents from focusing hearings on a peripheral issue, and from using an "idealistic" recommendation as an opening to disparage and even scuttle the broader reform proposals.

2. The Right to Counsel

The Supreme Court's *Gault* decision mandated procedural safeguards in adjudicating delinquency, including the assistance of counsel.[646] The *Gault* Court granted juveniles the right to counsel based on the Fourteenth Amendment Due Process Clause, rather than the Sixth Amendment.[647] It asserted that as a matter of due process "the assistance of counsel is . . . essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution."[648] The contemporaneous President's Commission on Law Enforcement

---

In Oklahoma, for example, about 1% of juveniles received a jury trial (51/4365), and in Texas, less than 1% (192/21,970) did. In all of Wisconsin, but Milwaukee, the rate was less than 3% (272/10,000). A delegation of the Task Force visited with Wisconsin juvenile court judges who indicated that they had very little philosophical or administrative difficulty accommodating juries in juvenile courts. In short, where available, juveniles use the jury even less frequently than do adult defendants.

Id.

644. *See* Irene M. Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 169 (observing that a trial without a jury is not itself "catastrophic," but is "a chip to be used in the poker game of plea bargaining").

645. *See supra* notes 113-133 and accompanying text.

646. *In re* Gault, 387 U.S. 1, 27-29 (1967).

647. *Id.*

648. *Id.* at 36-37.

and the Administration of Justice[649] strongly influenced the *Gault* Court's holding.[650] The President's Commission recommended that juvenile courts appoint counsel "whenever coercive action is a possibility, without requiring any affirmative choice by child or parent."[651] *Gault* acknowledged that lawyers could make juvenile court proceedings more formal and adversarial, but asserted that their presence would impart "a healthy atmosphere of accountability."[652] *Gault*'s narrow holding, however, required only that "the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child."[653]

At the time the Court decided *Gault*, attorneys seldom appeared in juvenile courts.[654] Following the *Gault* decision, states amended their juvenile codes to conform with its constitutional mandate to provide counsel in juvenile court.[655] Despite the formal changes of laws on the books, the actual delivery of legal services to juveniles did not occur as readily. Scholars examining judicial compliance with the *Gault* decision found that many judges did not adequately advise juveniles of their right to counsel or appoint counsel.[656] Recent evaluation of rates of legal representation in several states report that many juveniles still do not have counsel.[657] The only study to analyze data from en-

649. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 570.

650. *Gault*, 387 U.S. at 38.

651. *Id.* The *Gault* Court extensively quoted the recommendations of the President's Commission on Law Enforcement and the Administration of Justice's reports the Court, which touted the importance of counsel. *Id.* at 38 n.65.

652. *Id.* While conceding that lawyers would make juvenile court proceedings more formal and adversarial, the Court asserted that this was desirable, because "informality is often abused." *Id.*

653. *Id.* at 41.

654. *See, e.g.*, David R. Barrett et al., Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 796-99 (1966) (attorneys appear for juveniles in no more than five percent of cases).

655. *See* CAL. WELF. & INST. CODE § 317 (West 1984); COL. REV. STAT. § 19.1.106(1) (1986 & Supp. 1994); CONN. GEN. STAT. § 46B.135(a) (West 1986); IND. CODE ANN. § 31.6.7.2 (Burns 1987); MISS. CODE ANN. § 43.21.201 (1972); OHIO REV. CODE ANN. § 2151.35.2 (Anderson 1994); WASH. REV. CODE ANN. § 13.40.140(2) (West 1994).

656. Norman Lefstein et al., *In Search of Juvenile Justice:* Gault *and Its Implementation*, 3 LAW & SOC'Y REV. 491, 506-16, 537 n.92. (1969).

657. In North Carolina, the juvenile defender project represented only 22.3% of juveniles in Winston-Salem, N.C., and only 45.8% in Charlotte, N.C. Clarke & Koch, *supra* note 535, at 297. Aday found rates of representation of

tire states reported substantial inter-state variations; in three of the six states, counsel represented, at most, about half of youths.[658]

In Minnesota, evaluations of rates of representation also indicate that many youths appear without counsel.[659] More than a decade ago, I reported significant intra-state variation in rates of representation, ranging from a high of over ninety percent to a low of less than ten percent.[660] A substantial minority of youths whom judges removed from their homes or confined in correctional institutions were unrepresented at their trial or sentencing hearings.[661]

There are several explanations for why so many youths still appear without counsel. Affluent parents may be reluctant to retain an attorney.[662] Public-defender legal services may be inadequate or non-existent in non-urban areas. Juvenile court judges may encourage and readily find waivers of the right of counsel in order to ease administrative burdens on the courts. For example, courts may give cursory advisories of rights that imply that waiver is just a formal technicality. Moreover, traditional, treatment-oriented judges may resent legal advocacy

---

26.2% and 38.7% in the jurisdiction he studied. David P. Aday, Jr., *Court Structure, Defense Attorney Use, and Juvenile Court Decisions*, 27 Soc. Q. 107, 114 (1986). An evaluation of a large, midwestern county's juvenile court showed that "Over half (58.2 percent) of [the juveniles] were not represented by an attorney." Bortner, *supra* note 536, at 139; *see also* Kempf et al., *supra* note 539, at 82 (substantial majority of urban and rural juveniles in Missouri appeared in juvenile court without counsel).

658. Barry C. Feld, *In re* Gault *Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 Crime & Delinq. 393, 401 (1988) (reporting that interstate rates of representation were highly variable: California, 85%; Minnesota, 48%; Nebraska, 53%; New York, 96%; North Dakota, 38%; and Pennsylvania, about 90%).

659. Feld, *supra* note 147, at 1214 (reporting that in 1986, rates of representation ranged from a high of 100% to a low of less than five percent); K. Fine, Out of Home Placement of Children in Minnesota: A Research Report 48 (1983) (unpublished report, on file with author).

660. Feld, *supra* note 15, at 188-90 & nn.161-62.

661. Feld, *supra* note 147, at 1238.

> [O]f the 18.5% of juveniles who were removed from their home, 69.3% were represented and 30.7% were not. Similarly of the 11.1% of juveniles who were incarcerated, 73.5% had counsel and 26.5% did not. In short, more than one-quarter of the juveniles in secure confinement and nearly one-third of those removed from their homes *did not* have counsel.

Id.

662. *See supra* note 170 (discussing reimbursement provision of Minnesota law).

that attempts to limit their discretion.[663] Judges also may decide what a juvenile's likely disposition will be, and decline to appoint counsel when they anticipate a probationary sentence.[664] Whatever the reasons, many juveniles waive their right to counsel without consulting with an attorney or appreciating the consequences of foregoing their right to counsel, and confront the coercive power of the state without legal assistance.

Waiver of counsel is the most common reason why so many juveniles are unrepresented. In most states, including Minnesota, courts determine the validity of a waiver of a constitutional right by assessing whether it was "knowing, intelligent, and voluntary" under the "totality of the circumstances."[665] Until the 1994 statutory amendments, the Minnesota Legislature approved juveniles' "knowing and intelligent" waivers of constitutional rights without either parental concurrence or consultation with an attorney.[666]

The United States Supreme Court's decisions in *Johnson v. Zerbst*[667] and *Faretta v. California*[668] recognize criminal defendants' right to waive counsel and appear *pro se*. The Court in *Faretta* held that adult defendants in state criminal trials had a constitutional right to proceed without counsel if they voluntarily and intelligently elect to do so.[669] Although the Supreme Court has not decided whether juveniles validly can waive their

663. *See, e.g., In re* M.R.S., 400 N.W.2d 147, 152 (Minn. Ct. App. 1987) (reversing a trial court that had summarily dismissed a juvenile's court appointed attorney for appealing its decision, noting that "[t]his kind of arbitrary action can have no other but a chilling effect on conscientious advocacy").

664. Feld, *supra* note 15, at 190; Lefstein et al., *supra* note 656, at 531; *see also* BORTNER, *supra* note 536, at 140 (noting that court officials are likely to recommend counsel only in cases with the potential for serious dispositions).

665. *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 725 (1979) (articulating requirements for adequate waiver of a juvenile's right to an attorney); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (finding that a defendant may waive her right to counsel); *In re* M.D.S., 345 N.W.2d 723, 732 (Minn. 1984) (placing burden on state to show a valid waiver of rights); *In re* L.R.B., 373 N.W.2d 334, 337 (Minn. Ct. App. 1985) (stating that the totality test must consider all the surrounding circumstances); State v. Nunn, 297 N.W.2d 752, 755 (Minn. 1980) (upholding juvenile's waiver of *Miranda* rights); MINN. R. JUV. P. 6.01(2), *in* MINNESOTA RULES, *supra* note 167 (codifying the state of mind an "totality of circumstances" test for waiver of the right to remain silent). *See generally* Feld, *supra* note 15, at 169-90 (detailing waiver of right to counsel jurisprudence in the juvenile court setting).

666. MINN. STAT. § 260.155(8) (1992) (quoted *supra* note 137).

667. 304 U.S. 458 (1937).

668. 422 U.S. 806 (1975).

669. *Id.* at 836. The *Faretta* Court emphasized that the Sixth Amendment guarantees defendants the "assistance of counsel." *Id.* at 860. The *Faretta* Court noted, however, that in order to represent himself, the waiver of counsel

right to counsel in delinquency proceedings, it has upheld youths' waiver of their *Miranda* right to counsel during pretrial "custodial interrogation" under the "totality of the circumstances."[670]

Although the Minnesota Supreme Court necessarily recognizes an adult defendant's *Faretta* right to waive counsel and proceed *pro se*, it strongly encourages trial courts to appoint stand-by counsel to assist a defendant at trial and temporary counsel with whom to consult prior to the entry of a guilty plea.[671] In *State v. Rubin*, the supreme court described the type of "penetrating and comprehensive examination" that must precede a "knowing and intelligent" waiver and strongly encouraged trial courts to appoint counsel "to advise and consult with the defendant as to the waiver."[672] The Minnesota Supreme Court reversed several adult defendants' convictions when their mental competency, youthfulness, or below average intelligence raised questions about their capacity to waive the assistance of counsel knowingly and intelligently.[673]

Whether juvenile or adult defendants can waive counsel "voluntarily and intelligently," particularly without consulting counsel, is the critical question. When the judges who give the waiver advisories seek predetermined results—waivers of counsel—they compound the problem, as this affects both what they tell the juveniles and how they interpret their responses.[674] Many scholars have criticized the "totality" approach to

---

must be "knowing and intelligent." *Id.* at 835; *accord Zerbst*, 304 U.S. at 464-65.

670. Fare v. Michael C., 442 U.S. 707, 728 (1979). *See generally* Feld, *supra* note 15, at 171-72 (discussing the Minnesota Supreme Court's approach to the application of the "totality of the circumstances" test to juvenile proceedings).

671. *See, e.g.*, State v. Rubin, 409 N.W.2d 504, 506 (Minn. 1987) ("[A] trial court may not accept a guilty plea to a felony or gross misdemeanor charge made by an unrepresented defendant if the defendant has not consulted with counsel about waiving counsel and pleading guilty."); Burt v. State, 256 N.W.2d 633, 635 (Minn. 1977) ("One way for a trial court to help ensure that a defendant's waiver of counsel is knowing and intelligent would be to provide a lawyer to consult with the defendant concerning his proposed waiver . . . .").

672. 409 N.W.2d at 506.

673. *See* Burt v. State, 256 N.W.2d 633, 636 (Minn. 1977) (ruling that defendant, who was "18 years old, had only a tenth grade education and [low scores on I.Q. tests,] suggesting strongly that petitioner was of considerably lower than average intelligence," did not intelligently waive his rights); State v. Bauer, 245 N.W.2d 848, 856 (Minn. 1976) (reversing trial court conviction after establishing serious doubt as to defendant's competence to waive rights).

674. *Cf. In re* John D., 479 A.2d 1173, 1178 (R.I. 1984) ("[E]xceptional efforts must be made in order to be certain that an uncounseled juvenile fully understands the nature and consequences of his admission of delinquency.").

juveniles' waiver of rights.[675] Not surprisingly, the empirical research indicates that juveniles are not as competent as adults to waive their rights in a "knowing and intelligent" manner.[676] Particularly for younger juveniles, their capacity to understand and waive rights is especially problematic:

> As a class, juveniles younger than fifteen years of age failed to meet both the absolute and relative (adult norm) standards for comprehension .... The vast majority of these juveniles misunderstood at least one of the four standard *Miranda* statements, and compared with adults, demonstrated significantly poorer comprehension of the nature and significance of the *Miranda* rights.[677]

Although "juveniles younger than fifteen manifest significantly poorer comprehension than adults of comparable intelligence," the research also questioned whether youths sixteen and older adequately understood the implications of waiver.[678] A few states recognize the developmental differences between juveniles and adults, and prohibit waivers of the right to counsel, or incarceration of unrepresented delinquents.[679] In most states, however, including Minnesota, juveniles may waive their *Miranda* rights and their right to counsel in delinquency proceedings without even consulting an attorney.[680]

Attorneys may not represent their juvenile clients effectively even when counsel are appointed for delinquents. The juvenile court as an institution actually works against the adversarial process.[681] Indeed, organizational pressures to

---

675. *See generally* Feld, *supra* note 15, at 173-76; Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1139-40 (1980); Comment, *Juvenile Confessions: Whether State Procedures Ensure Constitutionally Permissible Confessions*, 67 J. CRIM. L. & CRIMINOLOGY 195 (1976).

676. *See, e.g.*, THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 106-07 (1981); Grisso, *supra* note 675, at 1160; Richard Lawrence, *The Role of Legal Counsel in Juveniles' Understanding of their Rights*, JUV. & FAM. CT. J., Winter 1983-84, at 49, 56-57.

677. Grisso, *supra* note 675, at 1160.

678. *Id.* at 1157.

679. *See* Feld, *supra* note 15, at 187 & nn.152-53 (discussing Iowa and Wisconsin); *see also* INSTITUTE OF JUDICIAL ADMIN.-ABA JOINT COMM'N ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS 5.1 cmt. 81 (advocating that the juvenile should have the mandatory and nonwaivable right to effective assistance of counsel at all stages of the proceedings).

680. *See, e.g.*, *In re* L.R.B., 373 N.W.2d 334, 338 (Minn. Ct. App. 1985) (upholding *Miranda* waiver by 14-year-old who had a below normal I.Q.). *But see* Burt v. State, 256 N.W.2d 633, 635-36 (Minn. 1977) (requiring extensive inquiry into defendant's capacity to waive right).

681. Feld, *supra* note 15, at 187 ("Organizational pressures to cooperate, judicial hostility toward adversarial litigants, role ambiguity created by the dual goals of rehabilitation and punishment, reluctance to help juveniles 'beat a

maintain stable, cooperative working relations with other adult personnel in the system may impede effective adversarial advocacy on behalf of the child.[682]

Several scholars question whether lawyers can perform as advocates in a *parens patriae* rehabilitative juvenile justice system.[683] Some studies indicate that when lawyers represent juveniles in more traditional juvenile courts, they actually may place their clients at a disadvantage at trial or sentencing.[684] For example, courts appear more likely to incarcerate juveniles who appear with counsel than they do those without counsel.[685] In Minnesota, after controlling for the influence of other legal variables, such as the seriousness of the offense, prior record,

---

case,' or an internalization of a court's treatment philosophy may compromise the role of counsel in juvenile court."); Clarke & Koch, *supra* note 535, at 305 (noting the juvenile courts' treatment of lawyers as an "impediment"). *See generally* BORTNER, *supra* note 536, at 136-39 (illustrating the role of counsel in juvenile court).

682. *See, e.g.*, BORTNER, *supra* note 536, at 138 (examining the influence of court personnel on lawyer's perceived role in juvenile court); VAUGHAN STAPLETON & LEE TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS 102-06 (1972) (discussing the juvenile court as a "quasi-cooperative system"); Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Coaptation of a Profession*, 1 LAW & SOC'Y REV. 15, 18-24 (1967) (arguing the impact of institutional pressures upon the ability of attorneys to maintain advocacy posture).

683. *See, e.g.*, STAPLETON & TEITELBAUM, *supra* note 682, at 156-64 (finding juvenile court philosophy limits the ability of lawyers to adequately perform as advocates); Barrett et al., *supra* note 654, at 797 (reporting the observations and interviews of juvenile justice personnel in several jurisdictions and finding that "an overzealous defense attorney may produce an adverse reaction in the court"); Fox, *supra* note 8, at 1236 (characterizing the role of attorneys as accommodating to the institutional needs of the juvenile justice philosophy).

684. *See, e.g.*, BORTNER, *supra* note 536, at 139-40 (characterizing the disadvantages of attorney representation for juvenile defendants); Barrett et al., *supra* note 654, at 797-98 (describing the negative consequences for juvenile clients of overzealous defense attorneys); Clarke & Koch, *supra* note 535, at 304-06 (suggesting the absence of an attorney may benefit a juvenile client).

685. BORTNER, *supra* note 536, at 139-40 ("*[R]egardless of the types of offenses with which they were charged*, juveniles represented by attorneys receive more severe dispositions."); STAPLETON & TEITELBAUM, *supra* note 682, at 63-96; Clarke & Koch, *supra* note 535, at 306; David Duffee & Larry Siegel, *The Organization Man: Legal Counsel in the Juvenile Court*, 7 CRIM. L. BULL. 544, 552 (1971). An evaluation of the impact of counsel in delinquency proceedings in six states reported that

> it appears that in virtually every jurisdiction, representation by counsel is an aggravating factor in a juvenile's disposition . . . . In short, while the legal variables [of seriousness of present offense, prior record, and pretrial detention status] enhance the probabilities of representation, the fact of representation appears to exert an independent effect on the severity of dispositions.

Feld, *supra* note 658, at 418-19.

and pre-trial detention status, "representation by counsel is an additional aggravating factor in a juvenile's disposition."[686]

The Task Force findings and recommendations echoed those of the earlier Supreme Court Juvenile Representation Study Committee.[687] The Task Force found that

> [i]n 1992, of the delinquency petitions disposed of statewide, in approximately 50 percent of the cases the juveniles were not represented by an attorney at the adjudication hearings.
>
> There continues to be enormous variations between counties in the rates of representation. In 1992, the rates of representation ranged from seven counties reporting less than ten percent of all the delinquency petitions having an attorney present at adjudication, to four counties reporting a 98 to 100 percent representation rate.[688]

Counsel is essential in juvenile court not only to assure that findings of delinquency are fair and just, but to assist the court in making appropriate dispositions.

The Task Force achieved early agreement to reaffirm the recommendations of the Legal Representation Study Committee.[689] It recommended changes in statutes and court procedural rules to require the appointment of counsel, or stand-by counsel if waived, for all juveniles facing felony or gross misdemeanor charges, or out-of-home placement.[690] Although a juvenile charged with a misdemeanor could "knowingly, intelligently, and voluntarily" waive the right to counsel, the Task Force recommended that the youth consult with a lawyer in person prior to appearing in court, that the juvenile receive meaningful information about rights and procedures, and that the attorney accompany the youth into the courtroom as a prerequisite to a valid waiver.[691] Finally, the Task Force urged the Supreme Court to revise its Juvenile Court Rules of Procedure to clarify the role of parents when an attorney consults with the child.[692]

---

686. Feld, *supra* note 147, at 1330.

687. TASK FORCE, FINAL REPORT, *supra* note 2, at 47; *see supra* notes 134-142 and accompanying text (referring to Juvenile Representation Study Committee findings and recommendations).

688. TASK FORCE, FINAL REPORT, *supra* note 2, at 48.

689. *See supra* text accompanying note 144.

690. TASK FORCE, FINAL REPORT, *supra* note 2, at 53.

691. *Id.* at 53 (recommending that for juveniles charged with misdemeanors, "in person consultation with a defense attorney be mandatory prior to the waiver of counsel").

692. *Id.* at 49, 53. The Task Force also recommended that attorneys advise youths of their rights "in language the juvenile can understand and should, among other things, explain the court processes and the potential consequences of an adjudication of delinquency." *Id.* at 49. Furthermore, the Task Force rec-

The earlier Legal Representation Study Committee's recommendation foundered on its inability to estimate the costs of implementing a full-representation juvenile justice system. The Task Force encountered difficulty calculating the financial impact of expanding representation.[693] The process of appointing counsel and the costs of representing juveniles varies throughout the state. In some judicial districts state public defenders provide defense representation, and they often cannot determine the separate costs of the delinquency component of their caseloads. In other judicial districts, courts or counties contract with local private attorneys to provide criminal defense representation; neither the counties nor the attorneys can ascertain the portion spent solely on delinquency representation.[694] Thus, the Task Force could not easily determine how much juvenile courts currently spend on defense representation, or estimate the fiscal consequences of doubling those expenditures.

As the chair of the Due Process committee, I proposed two methods to estimate the costs of a full-representation system. The first method estimated the costs of full representation based upon the number of attorneys required to handle the anticipated volume of delinquency filings.[695] A second method estimated costs by calculating the average expenditures per case based on partial financial data from several judicial districts.[696] Using similar methods to estimate the current outlay to provide partial and inadequate legal services, the Task Force estimated that the "additional costs of increasing the representation system for juveniles would be between $4,849,000 and $5,400,000."[697]

The legislature enacted the recommendations of the Task Force virtually without change. The new statute provides that:

> The child, parent, guardian or custodian have the right to effective assistance of counsel in connection with a proceeding in juvenile court. Before a child who is charged by delinquency petition with a misdemeanor offense waives the right to counsel or enters a plea, the child

---

ommended the use of a uniform advisory form throughout the state to inform juveniles and their parents of their rights. *Id.*

693. *See supra* notes 143-144 and accompanying text.

694. TASK FORCE, FINAL REPORT, *supra* note 2, at 50.

695. *See id.* at 51 ("[A]pproximately 24,000 petitions will be filed in 1995. Estimating that each full time equivalent defense attorney would handle 300 petitions in a year, 80 full time equivalent attorneys would be needed."). The maximum caseloads were based on professional standards for reasonable representation. The estimated costs per attorney included all of the overhead costs to enable an attorney to function in a professional manner, e.g., partial expenses for an office, secretary, investigators, experts, and transcripts. *Id.*

696. *Id.* at 51-52.

697. *Id.* at 53.

> *shall consult in person* with counsel who shall provide a full and intelligible explanation of the child's rights. The court *shall appoint counsel, or stand-by counsel* if the child waives the right to counsel, for a child who is:
>
> (1) charged by delinquency petition with a gross misdemeanor or felony offense; or
>
> (2) the subject of a delinquency proceeding in which out-of-home placement has been proposed.[698]

In short, the assistance of counsel or stand-by counsel is mandatory in all cases involving felony or gross-misdemeanor charges or possible out-of-home placement. As a practical matter, counsel will represent virtually all juveniles charged with misdemeanors as well. Because an attorney must be present prior to any court appearance to meet privately with a juvenile charged with a misdemeanor, and must accompany the child into the courtroom as a pre-requisite to any waiver, most juveniles will avail themselves of defense representation.[699] Even if a juvenile charged with a misdemeanor chooses to waive counsel, the juvenile court still "may appoint stand-by counsel to be available to assist and consult with the child at all stages of the proceedings."[700] For youths charged with a misdemeanor or ordinance violation, the Juvenile Court Rules of Procedure provide additional incentives for juvenile court judges to appoint stand-by counsel. No misdemeanor delinquency adjudication obtained without counsel may provide the basis for any subsequent probation violation, contempt proceeding, or home removal.[701]

These rules differ from those the United States Supreme Court has crafted. In *Baldasar v. Illinois*, the Supreme Court prohibited enhancement of the defendant's sentence based on a

---

698. MINN. STAT. § 260.155(2).

699. The Rules of Juvenile Procedure provide:

> In any proceeding in which the child is charged with a misdemeanor, the court *shall* appoint counsel at public expense to represent the child if the child cannot afford counsel and private counsel has not been retained to represent the child, and the child has not waived the right to counsel. If the child waives the right to counsel, the court *may* appoint stand-by counsel to be available to assist and consult with the child at all stages of the proceedings.

MINN. R. JUV. P. 4.02(2), *in* MINNESOTA RULES, *supra* note 167 (emphasis added). "The child must be fully and effectively informed of the child's right to counsel and the disadvantages of self-representation by an *in-person* consultation with an attorney, and *counsel shall appear with the child in court* and inform the court that such consultation has occurred." *Id.* at 4.03(1) (emphasis added).

700. *Id.* at 4.02(2).

701. *Id.* commentary to 4.02.

prior uncounselled misdemeanor conviction that had not resulted in incarceration.[702] In *Nichols v. United States*, however, the Supreme Court overruled *Baldasar*, and held that uncounseled misdemeanor convictions that are constitutionally valid under *Scott* because the sentencing court did not order imprisonment, could also be used to enhance subsequent sentences.[703] The dissent in *Nichols* objected to using collaterally a conviction that could not support incarceration initially to extend a period of imprisonment.[704] As a result of *Nichols*, under the Constitution, trial court judges may deny counsel to misdemeanor defendants, even if they request a lawyer, as long as they do not incarcerate them at that time. Trial court judges may then use those convictions to increase substantially a defendant's subsequent sentence.

Minnesota law provides greater protections for defendants than does *Nichols*. The Minnesota Sentencing Guidelines include prior misdemeanor convictions in calculating a defendant's criminal history score; those prior convictions require the assistance of counsel or a valid waiver of counsel to enhance later sentences.[705] In *State v. Nordstrom*, the Minnesota

702. 446 U.S. 222 (1980) (per curiam). Since *Baldasar's* initial misdemeanor conviction resulted only in a fine and probation, but not actual incarceration, the right to counsel, as announced in Scott v. Illinois, 440 U.S. 367 (1979), did not apply. 446 U.S. at 222-23; *see supra* notes 426-427 and accompanying text (discussing *Scott*). When Baldasar was convicted a second time for a similar offense, under the enhanced penalty statute, the court used the prior conviction was used to convert the second conviction into a felony for which the defendant was imprisoned. In a *per curiam* opinion, the Supreme Court reversed Baldasar's felony conviction. 446 U.S. at 224. Justice Potter Stewart's concurrence condemned the increased penalty noting that the defendant "was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense." *Id.* at 224. Justice Thurgood Marshall's concurrence stated that a defendant's "prior uncounseled misdemeanor conviction could not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction." *Id.* at 226.

703. 114 S. Ct. 1921, 1927 (1994). "[A]n uncounseled conviction valid under *Scott* may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment. Enhancement statutes . . . do not change the penalty imposed for the earlier conviction." *Id.*; *see* Lily Fu, Note, *High Crimes from Misdemeanors: The Collateral Use of Prior, Uncounseled Misdemeanors Under the Sixth Amendment,* Baldasar *and the Federal Sentencing Guidelines*, 77 MINN. L. REV. 165, 194 (1992) (urging Court to adopt rationale of *Baldasar* dissent and rule that all constitutionally procured uncounseled misdemeanor convictions be used for sentence enhancements).

704. *See Nichols*, 114 S. Ct. at 1931-37 (Blackmun, J., dissenting) (contending that the rationale of *Nichols* is inconsistent with *Scott*).

705. *See* MINN. SENTENCING GUIDELINES § II.B.3; State v. Edmison, 379 N.W.2d 85, 87 (Minn. 1985) (holding that state must "prove that defendant was

Supreme Court held that a prior misdemeanor conviction based on an uncounselled guilty plea may not be used to convert a subsequent offense into a gross misdemeanor absent a valid waiver of counsel on the record at the prior proceeding.[706] Similarly, in *State v. Edmison* the Minnesota Supreme Court held that a sentencing court may not use a defendant's prior misdemeanor convictions to determine the presumptive sentence under the Guidelines unless the state proves that the prior conviction was obtained with the assistance of counsel or a valid waiver of the right.[707]

Finally, in *In re D.S.S.*, the Minnesota Court of Appeals vacated a juvenile's disposition when the sentencing court relied upon prior juvenile convictions that had been obtained without an adequate advisory or waiver of the right to counsel.[708] *D.S.S.* provides an egregious confirmation of the Sentencing Guidelines Commission's concerns about procedural injustice in juvenile courts and the use of juvenile convictions for sentence enhancement.[709] The Rules of Juvenile Court Procedure follow Minne-

represented by counsel or that there was a valid waiver of the right to counsel on the record of each of the prior convictions"); State v. Thomas, 374 N.W.2d 586, 588 (Minn. Ct. App. 1985) (reducing sentence based on defendant's convictions outside Minnesota because the state failed to prove he "would have been prosecuted as an adult in Minnesota under similar circumstances").

706. 331 N.W.2d 90 (Minn. 1983).

707. 379 N.W.2d at 87. The defendant bears the burden of production on this question, and absent evidence to the contrary the court will presume prior convictions were not obtained in violation of the right to counsel. State v. Goff, 418 N.W.2d 169, 172 (Minn. 1988).

708. 506 N.W.2d 650, 655 (Minn. 1993). "Because these 'informal' proceedings carried the risk of adjudication and commitment, *Gault* requires strict adherence to criminal procedure." *Id.* at 655.

709. *See supra* notes 416-421 and accompanying text. In *D.S.S.*, the juvenile appeared in court on four different petitions, a social worker informally advised him of his right to counsel, and he admitted to the charges in court without a formal advisory on the record as required by juvenile rules of procedure. 506 N.W.2d at 651-52. In one of the four appearances, he was adjudicated a delinquent. *Id.* at 652. Counsel accompanied D.S.S. when he appeared on several subsequent petitions. *Id.* When Juvenile Court Judge Dennis Challeen sentenced D.S.S. on his sixth and seventh petition, he denied D.S.S.'s motion to vacate the prior uncounseled admissions, expunge the one delinquency adjudication, and refrain from considering the uncounseled offenses in determining his disposition. *Id.*

The court of appeals rebuked Judge Challeen, held that the advisories and waivers of counsel were invalid, and ruled that "[i]n resentencing D.S.S., the juvenile court must disregard the first four uncounseled admissions and make no reference to or use of them." *Id.* at 656. Of course, because juvenile court judges' sentencing authority is unrestricted, as long as the court does not explicitly refer to those earlier convictions, it may impose the identical sentence based on the present petitions alone. MINN. STAT. § 260.181.

sota state law and preclude the use of uncounselled misdemeanor or ordinance convictions either as a predicate for a home removal disposition, or to enhance a subsequent sentence that results in home removal.[710]

By mandating defense representation for juveniles, the legislature addressed a decades-long blot on Minnesota's juvenile justice system. Equally important, it appropriated funds to implement its statutory directive. The Task Force estimated the additional costs of defense representation at approximately five million dollars. The State Board of Public Defense requested an additional $5.8 million to implement the legislation.[711] In the final bill, the legislature allocated $2.65 million for the six-month period from January 1, 1995, to June 30, 1995, with annual appropriations thereafter.[712]

On May 5, 1994, Governor Arne Carlson signed into law the Juvenile Justice Crime Bill. He hailed it as "one of the most significant achievements of the 1994 session," and predicted that it would "go far in addressing our troubling juvenile crime rates."[713] Unfortunately, Carlson line-item-vetoed all of the financial appropriations necessary to implement the substantive changes. Carlson's veto message criticized the legislature for its lack of "financial planning." By signing the law mandating appointment of counsel while vetoing state appropriations to pay for the requirement, however, Carlson imposed enormous financial and administrative burdens on public defenders in the many counties that currently do not provide counsel.[714] For example,

---

710. MINN. R. JUV. P. 4.02(3), *in* MINNESOTA RULES, *supra* note 167 (providing that "a child retains an absolute right to withdraw any plea obtained without the assistance of counsel or to obtain a new trial if adjudicated delinquent without the assistance of counsel, if those convictions provide the underlying predicate for an out-of-home placement").

711. *Funding for Juvenile Justice Bill*, BRIEFLY: MINN. SENATE WK. IN REV. (Senate Pubs., St. Paul, Minn.), Mar. 11, 1994, at 3 (reporting on Crime Prevention Finance Division's consideration of appropriations to implement S.F. 1845: "Of the appropriations, $5 million is requested for counsel and appellate services for juveniles. Kevin Kajer of the State Board of Public Defense presented a fiscal note of $5.8 million for public defenders and support staff.").

712. 1994 Minn. Laws 576, § 67, subd. 3; *see also* MINNESOTA DEP'T OF CORRECTIONS, *supra* note 515, at 45 (estimating additional funding requirements for State Public Defender's Office of $ 5.3 million annually for juvenile court cases).

713. J. HOUSE REP., 78TH SESS. (Minnesota), May 6, 1994, at 8578.

714. Editorials decried Governor Carlson's veto as short-sighted and counterproductive:

> But in the contest for shortsighted vetoes, the slicing of the juvenile crime bill surely takes the cake. . . . Carlson assented to the bill's provisions to heighten accountability and stiffen penalties for young law-

the Public Defender in Minnesota's Third Judicial District found that in January 1995, juvenile caseloads increased an average of 146%.[715]

CONCLUSION

The 1994 Juvenile Crime Bill incorporates profound changes in Minnesota's juvenile courts. The new certification law finally addresses the basic conceptual flaws of the previous waiver legislation: idiosyncratic subjectivity and "lack of fit" between juvenile waiver decisions and criminal court sentencing practices. For nearly two decades, I have argued that Minnesota's and most other states' criteria for judicial waiver, "amenability to treatment" and "dangerousness," contain serious defects.[716] Judges lack valid or reliable clinical tools with which to either assess "amenability to treatment" or predict "dangerousness." Asking them to do so reinforces judicial subjectivity, and encourages inconsistent, idiosyncratic, and disparate applications of law. Unstructured judicial discretion is antithetical to the rule of law. The legislature's previous inability to articulate the public policy that some young criminals are not children exacerbated the lack of integration between juvenile court waiver decisions and adult criminal court sentencing practices.

The new law uses the conceptual jurisprudence of the Sentencing Guidelines to structure most of the important decisions in juvenile courts. The legislative change from "amenability to treatment" to "public safety" significantly alters the framework

---

> breakers . . . [b]ut . . . balked at providing the manpower needed to fulfill the bill's promise. He refused to fund public defenders to represent the 50 percent of Minnesota youngsters whose right to counsel is now unfulfilled . . . .

Crime Fight: Pinching Pennies, Scrimping on Justice, STAR TRIB. (Minneapolis), May 16, 1994, at 12A. The 1994 Legislature transferred responsibility to the State Public Defender to provide defense representation in juvenile delinquency cases. *See* MINN. STAT. §§ 611.14, 611.27.

715. Letter from Candace Rasmussen, Third Dist. Public Defender, to Barry Feld (Feb. 24, 1995) (on file with author).

716. In my critique of the earlier statutory revisions, I concluded that

> the Minnesota Legislature must be faulted for failing to address the fundamental inadequacies of the waiver criteria—amenability to treatment and dangerousness. . . . The legislature's insistence that juvenile courts address and answer these inherently unanswerable questions is the continuing and fundamental flaw of the entire legislative scheme. Requiring courts to collect clinical, psychological, and social data, which ultimately has only marginal utility in making predictive determinations, forces judges to engage in standardless, arbitrary, and discretionary decisionmaking.

Feld, *supra* note 184, at 239.

of the most important sentencing decision in juvenile court. The public safety offense criteria provide somewhat greater certainty and objectivity than the previous clinical assessments of "amenability to treatment." Courts can more readily apply the public safety criteria because they share the same "just deserts" principles embodied in the Sentencing Guidelines. Legislatively assigning greater weight to the seriousness of the present offense and prior record further reinforces the "deserts" bases, and more closely ties waiver decisions to the sentencing framework of the adult guidelines. Appellate courts may use the Guidelines' jurisprudence to review trial judge certification decisions without entering into a morass of conflicting clinical assessments.

By using a consistent definition of serious young offenders in both the adult and juvenile justice systems, the new statute rationalizes social control. Explicitly linking presumptive certification and EJJ prosecutions to the Sentencing Guidelines' presumptive-commitment-to-prison offenses integrates certification and criminal court sentencing practices, maximizes juvenile court sanctioning of the most serious juvenile offenders, and reinforces the public policy that incarcerating violent offenders is the penal priority. The increased use of juvenile prior convictions to enhance adult sentences will further strengthen the sentencing linkages between the two systems.

Formulating legislative waiver policy reflects both empirical judgments and value choices. The empirical questions concern such matters as the development of criminal careers, probabilities of recidivism, the relationship between persistent and serious offending, and the like. But certification "also entails an explicit value choice about the quantity and quality of youthful deviance that will be tolerated within the juvenile justice system before a more punitive adult response is mandated."[717] By excluding offenders sixteen years or older and charged with first degree murder, the new statute clearly defines the limits of legislative tolerance. First degree murder is the only offense to which the Sentencing Guidelines' presumptive framework does not apply. It is consistent for the legislature to exclude it from juvenile court jurisdiction as *sui generis*. The almost irresistible legislative tendency, however, is for lists of excluded offenses to expand. The 1994 Minnesota Legislature nevertheless demonstrated remarkable responsibility; it did not succumb to the temptation to use the issue of youth crime demagogically. It remains to be seen whether future legislatures can resist that ap-

717. Feld, *supra* note 98, at 572.

peal, particularly if a political opponent frames it as being "soft on crime." Again, however, the policies and values embedded in the Guidelines themselves provide the strongest justification to adhere to the current exclusion.

The EJJ status constitutes a significant sentencing policy innovation and exemplifies the substantive and procedural convergence between juvenile and criminal courts. Trying youths with adult criminal procedural safeguards in juvenile court preserves both access to juvenile treatment resources and the possibility of adult sentences if a youth fails as an EJJ or re-offends. While other states have shrunk the jurisdiction of their juvenile courts, Minnesota pursues the opposite policy. Providing young offenders with opportunities to redirect their lives is preferable to simple custodial confinement, and the prospect of a presumptive commitment to prison may provide the motivation to reform they previously lacked.[718] Ultimately, the success of the EJJ sentencing option hinges on the integrity of its implementation. If secure facilities are not simply youth prisons, if meaningful treatment resources are available and implemented with integrity, and if continuous aftercare successfully re-integrates youths into the community, then the EJJ concept may prove a promising legislative strategy.

The new certification and EJJ legislation contain several unknown features. Standing alone, the enactment of presumptive-certification legislation, the shifting of the burden of proof to the juvenile, and the greater emphasis on offense factors would likely increase the numbers of youths transferred to criminal court. The EJJ provisions, however, greatly expand the sentencing authority of juvenile court judges. Except for those older, chronic youths charged with the most serious offenses, juvenile court judges can impose EJJ juvenile sentences comparable to or even greater than those available in criminal courts. The EJJ option provides judges with a potential win-win scenario. If a court uses the EJJ option in lieu of certification and a youth successfully completes juvenile probation, so much the better. If a youth fails to complete treatment or re-offends, a judge may then revoke the probation and execute the previously stayed adult sentence. While presumptive certification pushes youths into criminal court, EJJ furnishes a counter-pull to retain them

718. *But see* OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 371, at 73-75 ("Our findings for certified adults suggest that these offenders—who have been in prison and know that they may return to prison for new offenses—still reoffend at relatively high rates [89%].").

in juvenile court. The Sentencing Guidelines' jurisprudence and judicial assessments of presumptive offenders' "amenability to probation" provide the only indicators of the likely implementation of the analogous EJJ provisions. Because of the many variables, most conspicuously youthfulness, there is no way to anticipate how many more, or fewer, youths will be certified as a result of the new legislation.

Depending on the resolution of the tension between certification as an adult or sentencing as an EJJ, the question of whether the new legislation ultimately provides serious young offenders with one last chance at rehabilitation, or whether it consigns less serious youths to the adult corrections system without the benefit of a certification hearing poses a second unknown feature. EJJ may provide judges with a sentencing alternative for some youths who otherwise would have been certified. If courts, however, use EJJ more extensively for many youths who would not be certified either previously or under the new regime, and these youths violate their juvenile probations, then EJJ may have a net-widening effect and increase the number of youths consigned to adult facilities. Ironically, in these cases, a juvenile court judge already has determined that EJJ youths do not pose a threat to "public safety" requiring adult incarceration. And yet, a new offense, which itself would not warrant certification, may provide the basis to revoke probation and execute the adult sentence. Again, how often this will occur cannot be predicted in advance.

One of the most troubling aspects of the legislative changes is its likely impact on racial minorities. Under the former reference law, juvenile court judges waived primarily chronic, older property offenders. The new presumptive-certification provisions address "public safety" and violent offenders. Because minority juveniles commit violent crimes at higher rates than do white youths, they will likely be presumptively certified at even greater rates than under the previous discretionary regime. Despite the racial population differentials, the majority of presumptively certified youths will likely be minority juveniles charged with violent crimes; the bulk of youths entering the EJJ status will likely be white, chronic property offenders who earlier might have been certified.

While the presumptive-certification and EJJ provisions are important and may affect five to ten percent of youths, the new legislation requiring appointment of counsel for the majority of juveniles currently without representation is more fundamental

and far-reaching. Perhaps, finally, juvenile justice will no longer be an oxymoron; nearly three decades after *Gault*, its promise of counsel may be realized. The new legislation requires appointment of counsel or stand-by counsel for all youths charged with felony or gross misdemeanor offenses, or possible out-of-home placement. It also restricts any use of misdemeanor convictions obtained without counsel. The Minnesota Legislature and Supreme Court finally acknowledged that allowing immature and impressionable young juveniles to "waive" their right to counsel under the "totality of the circumstances" was unworkable and gave judges unlimited and unreviewable discretion to deprive juveniles of their most fundamental procedural safeguard.

Again, the substantive convergence between juvenile and criminal courts reinforces the need for comparable procedural safeguards. Juvenile court convictions acquire greater long-term significance. The legislative modifications of the Sentencing Guidelines to include all juvenile felony convictions in the criminal history score, to extend the period during which criminal courts may use juvenile convictions to enhance adult sentences, and to eliminate the two-point maximum cap for juveniles convicted of violent crimes, impose a greater responsibility on defense counsel. Thus, quite apart from any current disposition, defense counsel must always consider collateral consequences. Because every felony counts, especially presumptive-commitment-to-prison offenses, effective defense counsel should seldom allow clients to plead guilty to felonies, and either insist on pleas to reduced charges or go to trial in hopes of acquittals, dismissals, or convictions on lesser included offenses. For youths in EJJ proceedings, juvenile court is criminal court.

Although the serious short- and long-term consequences of juvenile convictions impose additional responsibilities on defense counsel, whether attorneys can satisfy those obligations is less clear. Certainly, without adequate funding for defense services, attorneys cannot professionally accommodate the dramatic increases in caseloads that the new law mandates. Moreover, the role of counsel in juvenile court remains more ambiguous, and the co-optative pressures are greater even than those in criminal courts. It is unclear what it means to be an effective defense attorney in a court system in which many of the participants, juvenile court judges, probation officers, prosecutors, and even defense attorneys, do not regard an acquittal as a "victory." When virtually all youths may be convicted of some offense, it

becomes difficult, if not impossible, for attorneys to become more familiar with dispositional alternatives and more effective advocates for the substantive interests of their clients.

The uneasy relationship between procedure and substance persists in juvenile court. Minnesota provides a premier exemplar of the "criminalizing" of juvenile justice. The changes in juvenile court purpose, the use of formal or informal offense-based guidelines by the Department of Corrections and courts, the practical significance of offense variables at sentencing, the dubious efficacy of penal intervention, and the legislative movement toward "principles of sentencing" all evidence the convergence between juvenile and criminal courts. Despite the penal reality of juvenile justice, neither a majority of the Task Force nor the legislature could acknowledge that penal social control requires all criminal procedural safeguards, including the right to a jury trial.

Young delinquent offenders are brought to juvenile court because they have committed a crime. No amount of "rehabilitative rhetoric" can negate that central fact. The fundamental shortcoming of the juvenile court is not a failure of implementation, but a failure of conception. The original juvenile court was conceived of as a social service agency in a judicial setting, a fusion of welfare and coercion. Legislatures, however, define juvenile courts delinquency jurisdiction by criminal law violations, rather than by needs for social services. Juvenile court intervention inevitably subordinates care to control, and reinforces punitive rather than rehabilitative impulses. Instead of using characteristics for which children are not responsible and which identify needs for affirmative intervention, such as lack of decent education or adequate housing, unmet health needs, deteriorated family and social circumstances, juvenile court law focuses on violations of criminal law that are their fault and for which they are responsible. As long as juvenile courts emphasize the characteristics of children least likely to elicit sympathy and ignore the social conditions most likely to engender a desire to nurture and help, the law reinforces retributive, rather than rehabilitative, impulses.

If the child is a criminal and the primary purpose of formal intervention is penal social control, there is no need for a separate juvenile court. Young offenders could be tried in criminal courts alongside their adult counterparts. Shorter sentences for reduced responsibility is a more modest rationale to treat young offenders differently from adults than the rehabilitative claims

of Progressive childsavers.[719] If youthfulness is a "mitigating factor," adult courts can impose shorter sentences for reduced culpability and legislatures can explicitly provide youths with categorical fractional reductions of adult sentences. This could take the form of a formal "youth discount" at sentencing. For example, a fourteen-year-old might receive thirty-three percent of the adult penalty, a sixteen-year-old sixty-six percent, and an eighteen-year-old the full penalty, as is presently the case. A proposal for explicit fractional reductions in youth sentences can be made only against the backdrop of realistic, humane, and determinate adult sentencing practices in which courts can determine, and then discount, "real-time" sentences. Minnesota's Sentencing Guidelines already include a non-exclusive list of mitigating factors with which "youthfulness" would be consistent.[720] Even explicitly punitive youth sentences do not require incarcerating juveniles in adult jails and prisons, as increasingly

719. Although Task Force members briefly indulged my "abolition" argument, they did not engage in any fundamental reconsideration of the juvenile court as an institution. For a summary of this approach see Feld, *supra* note 1, at 260-67.

Elsewhere I have argued that "youthfulness" mitigates criminal responsibility and proposed a rationale to sentence young offenders differently, and more leniently, than older defendants. *See, e.g.*, Feld, *supra* note 9, at 892-902; Feld, *supra* note 1, at 260-67. There are a variety of doctrinal and policy justifications for sentencing young people less severely than their adult counterparts. The original juvenile court assumed that children were immature and irresponsible. Ainsworth, *supra* note 6, at 1097. The assumptions about youths' lack of criminal-capacity build upon the common law's infancy *mens rea* defense. Walkover, *supra* note 156, at 509-13. Common law infancy and other diminished responsibility doctrines reflect developmental differences that render youths less culpable or criminally responsible and provide a conceptual basis for shorter sentences for juveniles than for their adult counterparts.

The Supreme Court in Thompson v. Oklahoma, 487 U.S. 815 (1988), analyzed the criminal responsibility of young offenders and provided additional support for shorter sentences for reduced culpability even for youths older than the common-law infancy threshold of age 14. In vacating Thompson's capital sentence, the plurality concluded that "a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty." *Id.* at 823.

Deserved punishment must reflect individual culpability and "[t]here is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults." *Id.* at 834. Although Thompson was responsible for his crime, because of his age he could not be punished as severely as an adult. The Supreme Court in *Stanford v. Kentucky* subsequently upheld the death penalty for youths who were 16 or 17 at the time of their offenses on the narrow ground that there was no clear national consensus that such executions violated "evolving standards of decency" in the Eighth Amendment's prohibition against "cruel and unusual" punishment. 492 U.S. 361, 377-78 (1989).

720. *See* MINN. SENTENCING GUIDELINES § II.D.2.a.(3) ("lacked substantial capacity for judgment"); *id.* § II.D.2.a.(5) ("other substantial grounds exist which tend to excuse or mitigating the offender's culpability").

will be the case following presumptive certifications and EJJ probation revocations.

Despite the profound statutory reforms, no amount of juvenile or criminal justice legislative tinkering with the boundaries of youth or adulthood will significantly reduce the amount of crime in the community, offenders' probabilities of recidivism, or increase public safety.[721] Providing for child welfare ultimately remains a societal responsibility, rather than a judicial one. It is unrealistic to expect juvenile courts, or any other legal institution, to resolve all of the social ills afflicting young people or to have a significant impact on youth crime. Despite claims of being a child-centered nation, we care less about other people's children than we do our own, especially when they are children of other colors or cultures. There are a number of profoundly disturbing demographic forces that auger ill for youth and crime in the coming decade: increasing numbers of children growing up in single parent families, living in racial isolation and concentrated poverty, without hope for the future.[722] Without a commitment to social justice and a social welfare system that adequately meets the minimum family, health, housing, nutrition, and educational needs of all young people, the juvenile court provides only a mechanism for involuntary control, however ineffective it may be in delivering services or rehabilitating offenders. As long as juvenile courts operate in a societal context that does not provide adequate social services for children in general, intervention in the lives of those who commit crimes inevitably will be for purposes of social control, rather than social welfare.

---

721. The Task Force emphasized that

> juvenile crime is directly related to the quality of life in a community—not to the degree of punishment handed out by the government. . . . The inter-relationships among family, religion, health care, education, housing, employment, community values, and crime mean that all segments of the community must play an active role in combatting juvenile delinquency : . . . [T]he solution lies in the broader social and economic context of the society.

TASK FORCE, FINAL REPORT, *supra* note 2, at 16.

722. *See supra* notes 60-66 and accompanying text.