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Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the Rehabilitative Ideal

Barry C. Feld

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Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal"

Barry C. Feld*

TABLE OF CONTENTS

I. INTRODUCTION ....................................... 168
II. WAIVER MECHANISMS .................................. 172
   A. JUDICIAL WAIVER ................................ 174
   B. LEGISLATIVE WAIVER—REDEFINING JUVENILE COURT JURISDICTION TO EXCLUDE OFFENSES ...... 185

III. MINNESOTA SUPREME COURT ACTIONS ON CERTIFICATION—IN RE DAHL ...................... 189

IV. LEGISLATIVE CHANGES IN THE MINNESOTA JUVENILE CODE ...................................... 192

V. THE MEANING OF THE JUVENILE CODE REVISIONS: THE RATIONALE AND CONSEQUENCES OF REFORM ...................... 197
   A. CHANGE IN THE PURPOSE CLAUSE—WHEN IS A JUVENILE COURT NO LONGER A JUVENILE COURT? 197
   B. PROCEDURAL ASPECTS OF CERTIFICATION ............ 203
      1. Probable Cause Hearings ...................... 203
      2. Burden of Proof .............................. 205
   C. A PRIMA FACIE CASE FOR WAIVER BASED ON PROOF OF AGE AND CERTAIN OFFENSES—DID THE LEGISLATURE OVERRULE IN RE DAHL? .......... 207
      1. The Meaning of Prima Facie Case ............ 207
      2. A Rebuttable Presumption versus the Burden of Persuasion—The California Alternative .... 214
      3. The Legislature's Prima Facie Matrix—the Rationale and its Implementation ............ 218
   D. ADVERSARY NATURE AND FORMALITY OF WAIVER HEARINGS .......................... 222
      1. Rules of Evidence ............................ 222

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2. Effective Assistance of Counsel in Certification Hearings and in Juvenile Court Proceedings ..................................... 224

E. DISPOSITION OF SERIOUS YOUNG OFFENDERS AS JUVENILES AND ADULTS—TOWARD AN INTEGRATED SENTENCING SYSTEM ............................. 230
1. Dispositions of Juveniles as Juveniles ........... 231
2. Dispositions of Serious Young Offenders as Adults—the Impact of Sentencing Guidelines. 233
3. Enhanced Punishments on the Basis of Uncounseled Juvenile Convictions—The Implications of Baldasar and Burgett .......... 237

VI. CONSEQUENCES AND CONCLUSIONS—DISMANTLING THE “REHABILITATIVE IDEAL”.. 239

I. INTRODUCTION

The ambivalence and conflict of social policies aimed at controlling youthful deviance are most apparent when confronting persistent or violent young offenders.1 The justifications for intervening in the lives of young offenders—retribution, deterrence, incapacitation, and rehabilitation—suggest contradictory social policies.2 The juvenile court as a special institution for controlling youthful deviance is based on the obvious notion that youthful offenders are young as well as offenders.3 Juveniles’ immaturity, as reflected in common law in-


2. One commentator has observed that the reformers generally rejected deterrence and retribution as adequate notions to justify criminal sanctions. A criminal law based on such principles had failed to suppress crime and was cruel to individuals because of its failure to individualize treatment. Certainly such a harsh, poorly conceived system should no longer be applied to children. . . . The rules of criminal responsibility, based on what seemed to be an outmoded conception of “free will,” were thought unsuited to the progress appropriate to the new century, and certainly could have no proper application to children. . . . Children were considered educable and reformable.


3. There have been various interpretations of the development of the juvenile justice system. See generally L. Empy, Juvenile Justice: The Progressive Legacy and Current Reforms (1979); A. Platt, The Childsavers
fancy defenses,4 lessens their culpability for criminal acts. Moreover, responsibility for youthful misconduct may be widely distributed because the obligations to socialize and educate young persons, and to teach them moral values and respect for the law, are shared by their families and communities.5 Statistics suggest that low-level delinquency is often a symptom of adolescence that will be outgrown in most instances.6 Accordingly, the juvenile justice system with its underlying rationale of rehabilitation seeks to protect young offenders from the stigma of conviction through treatment and supervision, procedural informality, and confidentiality.

Nevertheless, the victims of criminal acts suffer the same injuries, regardless of the age of the perpetrators. Satisfying the individual and societal needs for retribution when juveniles perpetrate crimes may conflict, however, with the ideal of regenerative intervention. Similarly, punitive approaches to deter other offenders require the publicity and visibility of


4. Since criminal liability is premised on rational actors who make blameworthy choices and are responsible for the consequences of their acts, the common law recognized and exempted from punishment categories of persons who lacked the requisite moral and criminal responsibility. See generally J. Hall, General Principles of Criminal Law (2d ed. 1960); Westbrook, Mens Rea in the Juvenile Court, 5 J. Fam. L. 121 (1965). Children less than seven years of age were conclusively presumed to be without criminal capacity, while those fourteen years of age and older were treated as fully responsible. Between the ages of seven and fourteen years, there was a rebuttable presumption of criminal incapacity. See W. LaFave & A. Scott, Criminal Law 351 (1972); Fox, Responsibility in the Juvenile Court, 11 WM. & MARY L. Rev. 659, 660 (1970); see also Platt & Diamond, The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey, 54 Calif. L. Rev. 1227, 1233-47 (1966). This common law doctrine has continuing validity despite the development of the juvenile court and its departure from common law concepts of crime. Juvenile court delinquency jurisdiction still requires a consideration of the child's capacity to commit a crime. See In re Gladys R., 1 Cal. 3d 855, 862-67, 464 P.2d 127, 132-36, 83 Cal. Rptr. 671, 676-80 (1970); see also In re Winburn, 32 Wis. 2d 152, 164-67, 145 N.W.2d 178, 184-85 (1966).

5. Because society is responsible for educating and socializing the young, society may also share some of the blame for a youth's criminal acts that result from a failure to fulfill these obligations. See Task Force on Juvenile Delinquency, President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 226-28 (1967) [hereinafter cited as Task Force Report]. See also Confronting Youth Crime, supra note 1, at 66.

intervention and punishment, yet these requirements are inconsistent with traditionally informal and confidential juvenile proceedings. Finally, while juvenile crime rates may indicate a need to incapacitate young offenders to prevent future crimes, this need conflicts with policies intended to minimize the loss of liberty to young offenders.

Juvenile courts have traditionally assigned primary importance to individualized treatment of juvenile offenders on the theory that the interests of both offenders and society are best served by regenerative treatment. The criminal law applicable to adults accords far greater significance to the offense committed and attempts to proportion punishment. The differences between the two systems become most visible when the competing policies of juvenile and criminal courts intersect in juvenile certification proceedings.

The disposition of sophisticated, persistent, or violent juvenile offenders poses one of the most difficult issues in the administration of the juvenile justice process. This small but important class of youths challenges both the rehabilitative assumptions of the juvenile court and the propriety of informal, nonpunitive, and relatively short-term social control. These offenders are typically older youths, frequently recidivists, and usually near the maximum age of juvenile court jurisdiction.

7. See Feld, supra note 1, at 607-12.

8. The crime statistics indicate that juvenile perpetration of major crimes peaks in mid- to late adolescence. See CONFRONTING YOUTH CRIME, supra note 1, at 35-43; M. WOLFGANG, R. FIGLIO, & T. SELLIN, DELINQUENCY IN A BIRTH COHORT 251 (1972) [hereinafter cited as M. WOLFGANG]. Cf. FEDERAL BUREAU OF INVESTIGATIONS, UNITED STATES DEPARTMENT OF JUSTICE, CRIME IN THE UNITED STATES: 1978, 194-96 (1979) (perpetration of major property crimes peak in mid- to late adolescence) [hereinafter cited as F.B.I. CRIME REPORTS]; Zimring, supra note 6, at 72 (perpetration of major property crimes peak in mid- to late adolescence).


11. Feld, supra note 1, at 517-18. See CONFRONTING YOUTH CRIME, supra note 1, in which the authors concluded that

[n]o single age during mid-adolescence should be used as a sharp dividing line for sentencing policies. We have considered sentencing policy toward young offenders in both juvenile and criminal courts and recommend coordinating the policies of these two institutions so that public policy toward young offenders is based on consistent and coherent premises.

Id. at 5 (emphasis omitted).

12. See Schornhorst, The Waiver of Juvenile Court Jurisdiction: Kent Re-
Although chronologically juveniles, their criminal conduct is indistinguishable from that of adult offenders. Moreover, there is increasing evidence that this small class of youthful offenders accounts for a disproportionately large amount of the total volume of serious crime committed by juveniles.¹³

Legislatures have adopted mechanisms to transfer juvenile offenders from the jurisdiction of the juvenile courts to the jurisdiction of adult criminal courts.¹⁴ These transfer mechanisms allow legislatures to retain a high maximum age of juvenile court jurisdiction while simultaneously removing to adult criminal courts those youths whose highly visible, serious, or repetitive criminality raises legitimate concern for public safety or community outrage. Yet, the jurisdictional waiver process continues to be one of the most troublesome aspects of

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visited, 43 IND. L.J. 583, 592 (1968); Note, Problem of Age and Jurisdiction in the Juvenile Court, 19 VAND. L. Rev. 833, 858 (1966); cf. Keiter, Criminal or Delinquent? A Study of Juvenile Cases Transferred to the Juvenile Court, 19 Crime & Delinquency 528, 531, 537 (1973) (while 75% of cases studied were recidivists, the average age of the juvenile offenders tried as adults was fifteen and one half years of age).

¹³ Wolfgang found that for virtually all purposes, the most significant differences in the frequency and seriousness of delinquencies occurred between those juveniles in his sample with one or two delinquencies and those with five or more. M. WOLFGANG, supra note 8, at 88-105.

These chronic offenders represent only around 6 percent of the entire birth cohort and 18 percent of the delinquent group; yet this small group of 627 were responsible for 5,300 delinquencies, or 52 percent of all such acts committed by the entire birth cohort. They were heavily represented among those who committed violent offenses; about 55 percent of all the offenses we designated violent were committed by this small group of 627. They were responsible for 71 percent of the robberies and for all the homicides. The other offenses committed by most of the other delinquents in the birth cohort were relatively trivial, and when we tried to grade them (i.e., weight them in some way by a seriousness score that we had worked out earlier), the differences between the hard core—the chronic small group of 627—and the others became even more dramatic.


¹⁴ The procedures for removing juvenile offenders from the jurisdiction of the juvenile court for prosecution as adult offenders are known by a variety of terms, including reference or certification for adult prosecution and waiver, decline, or transfer of juvenile court jurisdiction. These mechanisms subject a chronological juvenile to criminal prosecution as an adult. Virtually every jurisdiction provides some mechanism to prosecute juveniles in adult criminal proceedings. See, e.g., 18 U.S.C. § 5032 (1976); ARIZ. CONST. art. 6, § 15 (1910, amended 1960); ALA. CODE § 12-15-54 (1975); ALASKA STAT. § 47.10.000 (1979); ARK. STAT. ANN. §§ 45-417, -420 (1977 & Supp. 1979); CAL. WELF. & INST. CODE §§ 707-707.4 (West Supp. 1980); COLO. REV. STAT. §§ 19-1-104(4)(a)-(c), -3-108 (1973). See also D. HAMPARIAN, supra note 13, at 134-55; Feld, supra note 1, at 523-24 n.22.
Juvenile justice administration in Minnesota and other states. Juvenile courts rely on clinical evaluations to determine a youth's amenability to treatment or dangerousness: a reliance that raises issues concerning the validity of clinical predictions and the propriety of delegating questions of social policy to the discretionary judgments of social service personnel and judges.

The Minnesota Supreme Court has considered several aspects of the jurisdictional waiver process, and the legislature has recently amended several provisions of the juvenile code affecting the juvenile transfer decision. This Article examines these changes to determine if the procedural or substantive issues raised by transfer have been satisfactorily resolved and to evaluate how well each change conforms to the revised purpose of the juvenile code. The Article concludes that while the legislature's adoption of specific, substantive offense criteria designed to guide juvenile court judges in the administration of the transfer statute may marginally change the number of youths referred to adult criminal courts, the reforms are not responsive to the fundamental conceptual and administrative difficulties posed by the transfer process. Furthermore, the combined effects of the juvenile code amendments and the recent changes in the sentencing provisions of the adult criminal code may make the certification process even more cumbersome and difficult to administer. Finally, in light of these conclusions, the Article considers whether the maintenance of a separate juvenile justice system remains justified.

II. WAIVER MECHANISMS

There are two principal mechanisms for transferring juve-
JUVENILE COURT REFORM

juvenile offenders to the adult criminal justice process. The most common mechanism is judicial waiver—a judge may waive juvenile court jurisdiction after a judicial hearing on the youth's amenability to treatment or threat to public safety. The alter-


mands to juvenile court,—legislative, and prosecutorial).

Prosecutorial waiver is a third mechanism for removing serious offenders from the juvenile system. See Mlyniec, Juvenile Delinquent or Adult Convict—Prosecutor's Choice, 14 AM. CRIM. L. REV. 29, 32 (1976); Stamm, Transfer of Jurisdiction in Juvenile Court: An Analysis for the Proceeding, Its Role in the Administration of Justice, and a Proposal for the Reform of Kentucky Law, 62 KY. L. REV. 122, 138 (1973). Although legislative offense exclusion, mandating adult prosecution of juveniles charged with certain offenses, is sometimes referred to as prosecutorial waiver, "pure" prosecutorial waiver vests the prosecutor's office with discretion in making the transfer decision. See, e.g., NEB. REV. STAT. § 43-202.01 (1978). See generally Comment, Due Process, Equal Protection and Nebraska's System Allowing the County Prosecutor to Determine Whether a Juvenile Will be Tried as an Adult, 7 CREIGHTON L. REV. 223 (1974). Variations on the prosecutorial waiver mechanism exist in a number of states. For example, in Florida, the prosecutor's discretion to seek a grand jury indictment rather than filing a juvenile court petition can result in a youth's prosecution as an adult. See Johnson v. State, 314 So.2d 573, 577 (Fla. 1975); FLA. STAT. § 39.02(5)(b)-(c) (Supp. 1980).

Because the prosecutor's discretion is unreviewable and there are no guidelines for making these jurisdictional determinations, the prosecutorial waiver has been criticized extensively. See, e.g., Mlyniec, supra at 36, 57; Note, Youthful Offenders and Adult Courts: Prosecutorial Discretion vs Juvenile Rights, 121 U. PA. L. REV. 1184, 1191 (1973). Every objection to the discretionary bases of judicial waiver is equally applicable to prosecutorial decisions.

Prosecutorial waiver is the least common transfer mechanism, and its use appears to be disfavored. Federal delinquency proceedings, which formerly relied on prosecutorial waiver, now employ judicial waiver to deal with serious juvenile offenders. See 18 U.S.C. §§ 5031-5032 (1976). Under the former provisions, acts punishable by death or life imprisonment were excluded from juvenile court jurisdiction, and the attorney general had discretion to transfer any youth not otherwise excluded. See Cox v. United States, 473 F.2d 334, 336-37 (4th Cir.), cert. denied, 414 U.S. 869 (1973). Under the revised statute, a judicial transfer hearing is mandated. Such hearings are the most vulnerable to constitutional challenge. See, e.g., Coates v. Johnson, 597 P.2d 328, 329-30 (Okla. 1979) (statute which may "confer discretion on the prosecutor to determine where to file" unconstitutionally vague).

19. For a discussion of judicial waiver, see notes 23-53 infra. Forty-six states and the federal courts outside of the District of Columbia employ judicial waiver to make some or all transfer decisions. In 28 states and the federal jurisdic-

tions, judicial transfer is the only mechanism for adult prosecution. See authorities cited in Feld, supra note 1, at 523 n.22. Virtually all of the comment-

ators, professional organizations, and advisory councils support judicial waiver. See, e.g., MODEL PENAL CODE § 4.10, Comment (Tent. Draft No. 7, 1957); INSTITUTE OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASS'N, JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO TRANSFER BETWEEN COURTS §§ 2.1-2.4 at 27-56 (1980) [hereinafter cited as TRANSFER BETWEEN COURTS STANDARDS]; TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION, NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, JUVENILE JUS-
native mechanism is legislative waiver—the legislature redefines juvenile court jurisdiction to exclude from juvenile courts those youths charged with certain offenses. The judicial and legislative waivers are essentially different ways of asking and answering the same questions:

who are the serious, hard-core youthful offenders, on what basis are they identified, and how shall the juvenile and adult systems respond to them? Each mechanism emphasizes different information in determining whether certain juvenile offenders should be handled as adults. Judicial waiver, through its focus on the offender, reflects the rehabilitative values of the juvenile court, while legislative exclusion, with its primary emphasis on the offense, reflects the values of the criminal law.

Although commentators and legislatures overwhelmingly favor the judicial mechanism, a legislative redefinition of juvenile court jurisdiction provides a more objective and administratively superior method of identifying which chronological juveniles are "adults" for purposes of prosecution under the criminal law.

A. JUDICIAL WAIVER

Waiver for adult prosecution is the most significant dispositional decision of the juvenile court, the United States Supreme Court and most state supreme courts are confronted with litigation surrounding this decision more than any other type of juvenile court proceeding. In Kent v. United States, the procedural and substantive issues raised by the prosecution of juvenile offenders as adults have been analyzed extensively. See generally Browne, Guidelines for Statutes for Transfer of Juveniles to Criminal Court, 4 PEPPERDINE L. REV. 479 (1977); Dixon, Juvenile Justice in Transition, 4 PEPPERDINE L. REV. 469 (1977); Edwards, The Case for Abolishing Fitness Hearings in Juvenile Court, 17 SANTA CLARA L. REV. 585 (1977); Sorrentino & Olsen, Certification of Juveniles to Adult Court, 4 PEPPERDINE L. REV. 497 (1977); Whitebread & Batey, supra note 18; Note, Wisconsin's New Juvenile Waiver Statute: When Should We Wave Goodbye to Juvenile Court Protections, 1979 Wis. L. REV. 190; Comment, Juvenile Justice in California: Changing Concepts?, 7 AM. J. CRIM. L. 171 (1979); Comment, The § 707 Fitness Hearing: An Argument for Retribution and Reform, 12 U. CAL. D.L. REV. 851 (1979). See also Feld, supra note 1, at 522 n.21.

21. Feld, supra note 1, at 523.
22. See id.
23. Although juvenile court jurisdiction over an adjudicated offender may continue for the duration of the youth's minority, this period is significantly shorter than the sentence of twenty years to life imprisonment that may be imposed if a juvenile is tried as an adult for a serious felony. Moreover, juveniles, unlike adults, enjoy private proceedings, confidential records, and protection from the stigma of a criminal conviction. See Kent v. United States, 383 U.S. 541, 556-57 (1966).
Supreme Court mandated that procedural due process be observed in judicial waiver determinations. Subsequently in *Breed v. Jones*, the Court applied the double jeopardy provisions of the Constitution to juvenile adjudications, thereby requiring a state to make its dispositional determination—whether to treat an offender as a juvenile or as an adult—before proceeding against the youth on the merits of the petition or complaint.

Although *Kent* was decided on procedural grounds, the Supreme Court in dicta appended some of the substantive criteria that a juvenile court judge might properly consider in deciding if he or she should waive jurisdiction. It is this

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25. The Supreme Court concluded that the loss of the special juvenile court protections through a waiver decision was a "critically important" action 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. "[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." *Id.* at 554. See generally Paulsen, *supra* note 2; Schornhorst, *supra* note 12.


27. *Id.* at 539-40.

28. An offense falling within the statutory limitations . . . will be waived if it has prosecutive merit and if it is heinous or of an aggravated character, or—even though less serious—if it represents a pattern of repeated offenses which indicate that the juvenile may be beyond rehabilitation under Juvenile Court procedures, or if the public needs the protection afforded by such action.

The determinative factors which will be considered by the Judge in deciding whether the Juvenile Court's jurisdiction over such offenses will be waived are the following:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

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, greater weight being given to offenses against persons especially if personal injury resulted.

4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment . . .

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense 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, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have
substantive issue—on what bases the decisions are made—that poses the principal difficulty of discretionary judicial waiver. Incorporating the Kent factors in various linguistic formulae, most jurisdictions provide for waiver on the basis of a court's assessment of a youth's treatment prognosis or threat to public safety, as indicated by the seriousness of the present offense, cumulative record, or prior criminal activity.29 Until the recent committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.


29. The amenability to treatment or dangerousness factors in waiver decisions are defined with various degrees of specificity by courts and legislatures. Typically, courts have elaborated on these conclusory standards by specifying factors relevant to fitness assessments.

The California Supreme Court, while conceding that the statutory standards (i.e., not amenable to treatment and not a fit and proper subject to be handled within the juvenile process) "lack explicit definition," ruled that "'[t]he factors upon which an unsuitability finding is based are generally those which indicated a relatively poor prognosis for rehabilitation.'" Donald L. v. Superior Court, 7 Cal. 3d 592, 601, 498 P.2d 1098, 1104, 102 Cal. Rptr. 850, 856 (1972) (quoting People v. Smith, 5 Cal. 3d 709, 714, 91 Cal. Rptr. 605, 478 P.2d 32, 37 (1971)). The California courts have filled in statutory gaps with a catalogue of considerations appropriate to the waiver decision: the minor's past record of delinquency and behavior pattern, his or her amenability to treatment, and the nature of and circumstances surrounding the alleged criminal act. See Jimmy H. v. Superior Court, 3 Cal. 3d 709, 714-16, 478 P.2d 32, 36-56, 91 Cal. Rptr. 600, 603-04 (1970).


Legislatures, struggling with the Kent criteria, have provided some additional guidance to waiving courts. Some have directed the courts to assess the offender's amenability to treatment within the time remaining for juvenile court jurisdiction. See, e.g., N.J. STAT. ANN. § 2A:4-48(c) (West Supp. 1979) ("no reasonable prospects for rehabilitation of the juvenile prior to his attaining the age of majority by use of the procedures, services and facilities available to the court"). Legislatures sometimes have instructed the courts to consider the success of prior treatment efforts. See, e.g., ALA. CODE § 1215-34(d)(3) (1977) ("[t]he nature of past treatment efforts and the nature of the child's response to such efforts"). Determinations of amenability have been based upon the availability of treatment facilities within the juvenile justice system. See, e.g., KAN. STAT. ANN. § 38-803(b)(6) (Supp. 1979) ("whether the child would be amenable to the care, treatment and training program for juveniles available through the facilities of the court"). Courts are at times instructed to explore the possibility of civil commitment as an alternative to waiver. See, e.g., ALA. CODE § 1215-34(c) (1977) ("[w]hen there are grounds to believe that the child is commitable to an institution or agency for the mentally retarded or mentally ill"). Several jurisdictions also include a catch-all amenability factor based on the child's demeanor, home environment, living patterns, or attitude. See, e.g.,
legislative amendments, Minnesota was typical of the jurisdictions in which the legislature provided only minimal direction to the judiciary. Waiver was authorized if the court concluded either that the youth was not suitable to treatment or that a disposition within the juvenile system would pose a threat to public safety.\(^{30}\)

The recent Minnesota legislative amendments were adopted in recognition of the futility of uniformly and objectively determining a youth's amenability to treatment or dangerousness.\(^{31}\) Legislation instructing a court to determine a

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\(^{30}\) The Juvenile Court Act, ch. 685, § 16, 1959 Minn. Laws 1284 (amended 1980), provided that the juvenile court could refer the child for adult prosecution only if it "finds that the child is not suitable to treatment or that the public safety is not served under the provisions of laws relating to juvenile courts." \(^{31}\) The Minnesota Supreme Court has said that the following factors should be considered to determine whether the public safety would be threatened by a retention of jurisdiction:

1. The seriousness of the offense in terms of community protection;
2. The circumstances surrounding the offense;
3. Whether the offense was committed in an aggressive, violent, premeditated, or willful manner;
4. Whether the offense was directed against persons or property;
5. The reasonably foreseeable consequences of the act; and
6. The absence of adequate protective and security facilities available to the juvenile treatment system.


31. The difficulty of making waiver decisions was noted in \textit{In re Dahl}, 278 N.W.2d 316 (Minn. 1979), where the court said, "[U]nfortunately, the standards for referral adopted by present legislation are not very effective in making this important determination." \textit{Id.} at 318. The court went on to note that due 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. Accordingly, a re-evaluation of the existing certification process may be in order.

\textit{Id.} at 319 (emphasis added). See also notes 33-38 infra and accompanying text.
youth's amenability to treatment presupposes the existence of treatment programs that will systematically improve the social adjustment of some juvenile offenders, classification systems that will differentiate the rehabilitative responsiveness of various youths, and the availability of validated and reliable diagnostic tools and indicators that will enable a clinician or juvenile court judge to determine in which class a particular youth belongs. These are all problematic assumptions.

The first criteria for waiver—a youth's amenability to treatment—involves several of these assumptions. Although the debate over the efficacy of therapeutic intervention strategies continues, it is clear that some youths persist in criminal misconduct even after treatment. There are no clinical factors, however, that indicate with certainty whether a particular youth will continue to engage in criminal behavior. All of the problems associated with the validity and reliability of psychological or psychiatric classification and diagnosis are com-

32. See Feld, supra note 1, at 533-35.
34. The problem of clinical diagnosis of a youth's amenability to treatment is one aspect of the validity and reliability problems of psychiatric diagnoses in general. For example, when dealing with the questions of validity and reliability of psychiatric diagnoses of "conventional" mental illness, as distinguished from "delinquency," most studies examining the diagnoses find consistency in classification in only half the cases or less. See generally Arnhoff, Some Factors Influencing the Unreliability of Clinical Judgments, 10 J. CLINICAL PSYCHOLOGY 272 (1954); Ash, The Reliability of Psychiatric Diagnoses, 44 J. ABNORMAL & SOCIAL PSYCHOLOGY 272 (1949); Beck, Reliability of Psychiatric Diagnoses: A Critique of Systematic Studies, 119 AM. J. PSYCHIATRY 210 (1962); Beck, Ward, Mendelson, Mock, & Erbough, Reliability of Psychiatric Diagnoses: A Study of Consistency of Clinical Judgments and Ratings, 119 AM. J. PSYCHIATRY 351 (1962); Brown, Lawyers and Psychiatrists in the Court: Afterword, 32 Md. L. REV. 36 (1972); Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif. L. REV. 693 (1974); Foulds, The Reliability of Psychiatric, and the Validity of Psychological, Diagnoses, 101 J. MENTAL SCI. 651 (1955) (now BRIT. J. PSYCHIATRY); Kendell, The Stability of Psychiatric Diagnoses, 124 BRIT. J. PSYCHIATRY 352 (1974); Rosenhan, On Being
pounded when the questions involve troublesome legal and social policy issues rather than scientific ones.\textsuperscript{35} Most juvenile amenability statutes require juvenile court judges to evaluate a youth's amenability to treatment despite the absence of: substantial evidence that serious delinquents respond to coercive intervention, behavioral categories that distinguish serious offenders who are and who are not responsive to intervention, and validated, objective indicators that allow individual diagnostic classification of amenable and nonamenable serious offenders.\textsuperscript{36}

The alternative basis for waiver requires a juvenile court to predict a youth's threat to public safety, or dangerousness.\textsuperscript{37} The evidence is overwhelming that reliable identification of a dangerous person assumes "a capacity to predict future criminal behavior quite beyond our present technical ability."\textsuperscript{38} The lack of reliable psychological or clinical indicators to predict dangerousness almost invariably results in over predicting and erroneously classifying as dangerous many young offenders who ultimately do not commit further offenses.

While predicting dangerousness is an inherently imprecise and inaccurate enterprise, different methodologies—clinical and actuarial—are available with varying degrees of reliability. To determine a juvenile's potential for committing additional dangerous crimes, clinicians in most juvenile courts review whatever information is available to develop "some psychological


35. Ennis and Litwack, supra note 34, provide a very thorough review of the literature regarding the reliability and validity of psychiatric diagnoses, including the factors that detract from consistency. They conclude that:

Human behavior is difficult to understand, and, at present, impossible to predict. Subject to constitutional limitations, the decision to deprive another human of liberty is not a psychiatric judgment but a social judgment. We shall have to decide how much we value individual freedom; how much we care about privacy and self-determination; how much deviance we can tolerate—or how much suffering. There are no "experts" to make those decisions for us.

\textit{Id.} at 752.

36. See Feld, supra note 1, at 535.

37. For a discussion of "dangerousness," see \textit{id.} at 540-46.

cal hypothesis regarding the structure and dynamics of [the] particular individual. On the basis of this hypothesis and certain reasonable expectations as to the course of outer events, [they] arrive at a prediction of what is going to happen.\textsuperscript{39}

A more reliable methodology would use actuarial or statistical tables based on the empirically observed relationships between independent predictor variables—age, prior offenses, race, and the like—and the behavior to be predicted.\textsuperscript{40} Using such tables, a judge need only determine which predictor variables are present in the individual in order to classify him or her and then locate on the tables the probabilities of the behavior to be predicted. While clinical judgments rely upon presumed professional expertise and subjective assessments to predict behavior, actuarial predictions use more objective indicators and correlational statistical tables to make aggregate predictive judgments. Increased reliance on actuarial prediction techniques is evidenced by the statistical tables used in a variety of predictive dispositional contexts. Perhaps the most dramatic instance of this increased reliance is the shift from indeterminate sentencing and clinically based release decisions to determinate or presumptive sentencing that relies on statistical tables to compute an offender's probabilities of recidivism and length of sentence.\textsuperscript{41}

\textsuperscript{40} The clear-cut superiority of actuarial methods over clinical methods of predicting future behavior is especially striking in light of the uncertainties and inconsistencies typically associated with social science research.

[O]ne should not simply assume that "intensive, clinical, psychological understanding of the individual" leads generally to more trustworthy forecast of behavior than a more behavioristic-actuarial approach to the predictive task. . . . The comparative efficacy of different methods of predicting behavior is, of course, a factual question; and in spite of the armchair plausibility of the above mentioned assumptions . . ., there exists a very sizable body of empirical evidence to the contrary . . .. Of some five dozen published and unpublished research studies known to us, there is only a single study showing, given an acceptable research design, a clearcut superiority of clinical judgment over actuarial prediction. . . . \textit{It would be difficult to mention any other domain of social science research in which the trend of the data is so uniformly in the same direction, so that any psychiatrist or psychologist who disfavors the objective, actuarial approach in a practical, decision-making context should be challenged to show his familiarity with this research literature and invited to rebut the theoretical argument and empirical evidence found therein.} Livermore, Malmquist, & Meehl, \textit{On the Justifications for Civil Commitment}, 117 U. Pa. L. Rev. 75, 76-77 n.4 (1968) (emphasis added).

Minnesota's recently adopted presumptive sentencing guidelines are representative of this trend.42 Typical of the actuarial method of dispositions, these sentencing guidelines consist of a two-dimensional table with the vertical axis rating the severity of the present offense and the horizontal axis reflecting the offender's prognosis rating or likelihood of recidivism. The use of both the present offense and other recidivism prediction variables in sentencing reflects the tension between dispositions aimed at retribution and those aimed at incapacitating the potentially dangerous.43

This tension between policy goals raises an additional issue: which variables should be included in the predictive component of the table? Choosing the variables is a two-step process: first, offender characteristics that correlate with the outcome criterion—violence, recidivism, and the like—must be identified, and second, those factors that should be included in the prediction scheme must be selected.44 Some offender characteristics such as sex, race, age, education, or employment may correlate with predictor outcomes, but their inclusion in such tables raises substantial legal and policy issues.45

42. See generally 1980 Sentencing Guidelines, supra note 41.

44. See generally Coffee, supra note 41.
45. Id. It has been observed that
trast to the use of these characteristics, a history of previous violations is the most reliable predictor of future violations. Moreover, the acquisition of a prior record is a variable that is subject to the control of the offender in ways that social characteristics are not. Not surprisingly, juvenile court judges are most influenced by a record of prior offenses and a serious present offense when making waiver decisions. The seriousness of the offense and the past history of the youth should be the only bases of waiver decisions. These bases could be implemented either through the use of tables like those contained in the sentencing guidelines or directly through legislative redefinition of juvenile court jurisdiction.

At present, judicial waiver is not generally based on statistical tables. Instead, typical waiver statutes, couched in terms of "amenability to treatment" or "dangerousness," are in effect

[f]actors other than a juvenile's present offense or prior history of offenses also appear to correlate with the probability of future violence or other official criminal misconduct. Age, sex, race, and socioeconomic status are the most obvious correlates with official delinquency. In purely probabilistic predictive terms, lower-class, non-white, adolescent males, as an aggregate, have a substantially greater probability of official criminal involvement than do, for example, white, middle-class women aged thirty and over. For obvious reasons, however, many factors with marginal predictive relevance cannot provide a legal basis for actuarial prediction. There would, for example, be an equal protection problem with certifying a black juvenile but not a white one, even if it were demonstrated that, statistically, blacks as a class have a greater probability of subsequent criminal involvement than do whites. Moreover, despite the statistical relationships between factors such as sex, age, class, and race and criminal involvement, these factors are all beyond the control of the juvenile. They are not his fault, and it would be inappropriate to punish an individual for that which he cannot change or control.

Feld, supra note 1, at 544-45. The substantial issues associated with selecting predictor criteria have been thoughtfully analyzed by Coffee, supra note 41.

46. A person's relevant past behaviors tend to be the best predictors of his future behavior in similar situations. It is increasingly evident that even simple, crude, demographic indices of an individual's past behaviors and social competence predict his future behavior at least as well as, and sometimes better than, either the best test-based personality statements or clinical judgments.

W. MISEHEL, PERSONALITY & ASSESSMENT 135 (1968).

47. This Article relies upon the same philosophical premises that the Sentencing Guidelines Commission worked from, i.e., that retribution and prevention through incapacitation are the principal justifications for penal intervention. These premises concentrate on the seriousness of the offense as evidence of culpability and on persistence of criminal conduct as evidence of the likelihood of future offenses. Because of this emphasis on culpability and the making of blameworthy choices, this Article rejects factors which might aid predictive judgments such as age, race, sex, or class because they are characteristics for which the actor is not responsible.

broad, standardless grants of discretion.\textsuperscript{49} The subjectivity inherent in the administration of waiver statutes permits a variety of inequalities to occur without any effective check on courts' application of the statutes.\textsuperscript{50} While appellate courts have been singularly unresponsive to various constitutional challenges to juvenile waiver statutes, such as "void for vagueness,"\textsuperscript{51} the empirical reality is that judges are not capable of

\textsuperscript{49} For a general discussion of the scope of judicial discretion in waiver determinations, see Comment, \textit{Juveniles in the Criminal Courts: A Substantive View of the Fitness Decision}, 23 U.C.L.A. L. Rev. 988, 1001-04 (1976); Feld, supra note 1, at 526-29. Appellate courts, like legislatures, typically refrain from specifying the determinative factors a waiving court must consider or from assigning relative weights to those factors. See, e.g., Breed v. Jones, 421 U.S. 519, 537 (1975) ("the Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court"); Juvenile v. Commonwealth, 370 Mass. 272, 282, 347 N.E.2d 667, 684 (1976) ("no specific requirement that a judge weight these factors in a certain manner or achieve some predesigned balance").

\textsuperscript{50} In Kent v. United States, 383 U.S. 541 (1966), the Supreme Court held that a juvenile court's waiver of jurisdiction over a youth must satisfy the basic requirements of due process, as well as comply with the statutory mandate of a "full investigation." A requirement of substantive standards supported by a factual record susceptible to appellate review, provided at least part of the rationale for the Court's decision in \textit{Kent}: "Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts." \textit{Id.} at 561. See also People v. Fields, 391 Mich. 206, 216, 216 N.W.2d 51, 66 (1964), rev'd \textit{sub nom.} People v. Peters, 397 Mich. 360, 244 N.W.2d 898 (1976), \textit{cert. denied}, 429 U.S. 944 (1976).

These criteria, used by lower courts when making waiver decisions, must be clear before a reviewing court can evaluate a lower court's decision. [U]nless statutory clarity exists, other guarantees of procedural due process cannot be meaningful. Typical procedural due process requirements such as written notice of charges, a hearing with an opportunity to present testimony to the hearing body, and a written decision containing the evidence relied upon and the reasons for the decision, may be of little avail when a tribunal is free to apply its own standard of what constitutes reasonable conduct.


\textsuperscript{51} There have been very few successful challenges to juvenile waiver statutes. In People v. Fields, 388 Mich. 66, 199 N.W.2d 217 (1972), the court held the waiver statute to be unconstitutional because it lacked standards a judge could use when waiving jurisdiction. The court later reversed itself, however, agreeing with the dissent in \textit{Field} that the court had the power to provide standards that the statute lacked. See People v. Peters, 397 Mich. 360, 367-69, 244 N.W.2d 898, 901-02, \textit{cert. denied}, 479 U.S. 944 (1976). \textit{Cf.} Pedrosa v. Sielaf, 434 F. Supp. 493, 495-97 (N.D. Ill. 1977), \textit{modified}, 598 F.2d 1064 (7th Cir. 1979) (although court held waiver statute unconstitutional because devoid of any standards for judge to follow, the state legislature, subsequent to petitioner's transfer, amended the
consistent, even-handed administration of these discretionary statutes. Evidence exists that a juvenile’s race may influence waiver decisions and that waiver statutes are inconsistently interpreted and applied within a jurisdiction.

statute to include standards for waiver decisions); Coats v. Johnson, 597 P.2d 328, 329-30 (Okla. 1979) (waiver statute held unconstitutionally vague). Constitutional vagueness challenges to statutes permitting waiver in terms of “amenable to treatment” or “the best interests of the child or the public” have been singularly unsuccessful. See Jimmy H. v. Superior Court, 3 Cal. 3d 708, 714, 478 P.2d 32, 35, 91 Cal. Rptr. 600, 603 (1970); Clemens v. State, 162 Ind. App. 50, 56, 317 N.E.2d 859, 863 (1974), cert. denied, 423 U.S. 859 (1975); State v. Hogan, 297 Minn. 430, 438, 212 N.W.2d 664, 669-70 (1973); Knott v. Langlois, 102 R.I. 517, 523, 231 A.2d 767, 770 (1967); Mikulovsky v. State, 54 Wis. 2d 699, 704-08, 196 N.W.2d 748, 751-53 (1972).


Courts have also used, for additional guidance, the general purpose clause of the enabling legislation creating the juvenile court. See generally State v. Owens, 197 Kan. 212, 416 P.2d 259 (1966); Lewis v. State, 86 Nev. 889, 478 P.2d 168 (1970); State ex rel. Salas, 520 P.2d 874 (Utah 1974); In re Burtts, 12 Wash. App. 564, 530 P.2d 709 (1975); In re F.R.W., 61 Wis. 2d 193, 212 N.W.2d 130 (1973), cert. denied, 415 U.S. 974 (1974).

52. See Hays & Solway, The Role of Psychological Evaluation in Certification of Juveniles for Trial as Adults, 9 Hous. L. Rev. 709, 711 (1972); Keiter, supra note 12, at 536. Keiter notes that arguably the racial breakdown of the sixty-four transferred youths reveals subtle discrimination since the backgrounds of the nonblacks indicated more serious criminal involvement than the backgrounds of a portion of the removed blacks. But, in general, these data do not clearly establish a pattern of racial discrimination and fail to prove outright abuse of the statutory discretion.

Id. at 537.

53. The Minnesota Supreme Court Juvenile Justice Study Commission found pronounced differences in certification practices in urban and rural counties throughout Minnesota. Supreme Court Juvenile Justice Study Commission, Report to the Minnesota Supreme Court 61-78 (1976) [hereinafter cited as Supreme Court Study]. According to the study, the reference or certification process is used for three different purposes or objectives in different parts of the state:

In Hennepin County certifications are requested for youths who, in the judgment of the office of the county attorney, represent substantial threats to the public safety or cannot be effectively handled with the resources currently available through the juvenile court process. This purpose or objective is consistent with legislative intent in enacting the enabling statute. A second purpose for which certification is utilized in a number of counties is to attempt to insure that the offender will be subject to correctional or rehabilitative efforts beyond his 18th birthday. Thus youths who are approaching their 18th birthday at the time of their offense may be certified because some juvenile court judges feel that a youth committed to the Commissioner of Corrections as a juvenile "automatically" will be released from state jurisdiction when he turns 18. A third purpose for which certification is utilized is to allow
B. LEGISLATIVE WAIVER—REDEFINING JUVENILE COURT JURISDICTION TO EXCLUDE OFFENSES

Legislative waiver, the principal alternative to judicial waiver, excludes from juvenile court jurisdiction offenders who are charged with certain offenses or who have particular records of prior adjudications in conjunction with a present offense.54 Since juvenile courts are statutory entities, legislatures can modify their jurisdiction.55 Despite both due process and equal protection challenges to statutes excluding certain offenses from juvenile court jurisdiction, courts have consist-

the imposition of a sanction such as a fine or short jail sentence upon juveniles who committed relatively minor offenses and who, it is felt, are not in need of probation or other treatments available through the juvenile court.

_id._ at 20-21 (emphasis added). The use of certification to impose adult crimes on minor juvenile offenders is one of the issues addressed by the juvenile code provisions that now permits fines to be assessed in juvenile courts.

Feld, _supra_ note 1, reports that

[a]n analysis of waiver decisions in a sample of counties throughout Minnesota showed that urban offenders considered for certification had generally committed more serious offenses and had more extensive prior records than their rural counterparts. 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. Yet, despite the substantially greater seriousness of the present offense and the longer and more extensive prior records of urban youths, rural youngsters were much more likely to be certified for adult prosecution.

_id._ at 552 (citations omitted). The problem of county by county disparity in administration is not confined to Minnesota. Similar disparities have been reported in other jurisdictions. See, e.g., Edwards, _supra_ note 20, at 611-12.

54. See, _e.g._, _LA._ REV. STAT. ANN. § 13:1570A(5) (West Supp. 1980) (adult prosecution of "a child who, after having become fifteen years of age, is charged with having committed a capital crime"). Some states exclude only capital offenses or those punishable by life imprisonment. See, _e.g._, _FLA._ STAT. § 39.02(6)(c) (1944 & Supp. 1980). Other jurisdictions exclude broader categories of offenses, _see, e.g._, D.C. CODE § 16-2301(3) (1973), or youths charged with repeat offenses, _see, e.g._, _RI._ GEN. LAWS § 14-1-7.1 (Supp. 1979). Several jurisdictions supplement their judicial waiver provisions with legislative offense exclusions. See, _e.g._, _COLO._ REV. STAT. §§ 19-1-103(9), -1-104, -3-108 (1973).


[while there would probably be almost universal agreement that it is desirable for a State to maintain a juvenile court and to establish special facilities for the treatment of a separate category of "juvenile delinquents", we are aware of nothing in the constitution of the United States or of this State that requires a State to do so. People v. Jiles, 43 Ill. 2d 145, 148, 251 N.E.2d 529, 531 (1969). _Accord_, People v. Bombacino, 51 Ill. 2d 17, 20, 280 N.E.2d 697, 699, _cert. denied_, 409 U.S. 912 (1972); State v. Green, 218 Kan. 438, 442, 544 P.2d 358, 361 (1975) ("legislature could . . . withhold the protection of the doctrine of _parens patriae_ from all juveniles exceeding fifteen years of age. What the legislature may do absolutely, it may do conditionally").
ently sustained the legislative classifications.56

Statutes mandating adult prosecution on the basis of the seriousness of the offense charged, rather than on the basis of the characteristics of the offender, are inconsistent with the rehabilitative philosophy of juvenile courts. Although legislatures may subordinate individualized treatment considerations to other social control policy objectives, they have often failed to make clear which of several alternative policies were being adopted in redefining juvenile court jurisdiction. A legislature could rationally conclude that an older youth who commits a


The due process claim is directed at the nonreviewability of the charging decision and the prosecutor's exercise of discretion in removing youths from the juvenile court. The argument for procedural parity between the judicial waiver hearings required by Kent, see notes 23 & 28 supra, and the prosecutorial charging decisions under legislative offense exclusion is based on the similarity of consequences for the youth. Courts have consistently rejected the argument that the comparable consequences flowing from judicial and legislative waivers require comparable procedural safeguards by noting that exercises of prosecutorial discretion are not subject to judicial review or due process constraints except under manifestly discriminatory circumstances. See United States v. Bland, 472 F.2d at 1335-36 (1973). In a challenge to a "pure" prosecutorial waiver statute, see note 17 supra, the court in Cox v. United States, 473 F.2d 334, 336 (4th Cir.), cert. denied, 414 U.S. 909 (1973), specifically rejected procedural safeguards as a precondition to the exercise of prosecutorial discretion. The judicial reluctance to review prosecutorial decisions is based on the constitutional principle of separation of powers. See Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); United States v. Bland, 472 F.2d 1329, 1335 (D.C. Cir. 1972), cert. denied, 412 U.S. 809 (1973); see also Newman v. United States, 382 F.2d 479, 482 (D.C. Cir. 1967); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965); Feld, supra note 1, at 558 n.139; Note, Reviewability of Prosecutorial Discretion: Failure to Prosecute, 75 COLUM. L. REV. 130, 136-38 (1975).

The equal protection claim attacks the rationality of the legislative decision to treat youths charged with certain offenses as adults rather than juveniles. The courts have uniformly rejected such claims, noting that classification on the basis of offense involves neither an inherently suspect class nor a preferred freedom. As the majority in Bland noted, a legislative classification is entitled to a strong presumption of constitutional validity as a means of dealing with a problem uniquely within the legislative purview and should be invalidated only if there is no rational basis to justify it. 472 F.2d at 1333-34.
particularly heinous or serious offense deserves to be treated as an adult, and could retributively exclude such a youth on the basis of past culpability.\textsuperscript{57} Punishing solely on retributive grounds, however, tends to over-punish because many youths may only commit one serious offense and then cease to be criminally active.\textsuperscript{58}

A second rationale for legislative waiver is incapacitation of chronic offenders. A legislature could attempt to identify the persistent offenders who require greater incapacitation than is provided by the juvenile process.\textsuperscript{59} If the legislative goal is to incapacitate such offenders, then the commission of one serious offense is not the most reliable indicator. Persistent, violent offenders are legislatively distinguishable from their less criminally active peers on the basis of their persistence in criminal activity, not the seriousness of such activity.\textsuperscript{60} A first offense, even a serious one, is predictive of neither the probability nor the seriousness of future offenses because

\begin{itemize}
\item \textsuperscript{57} See Feld, \textit{supra} note 1, at 564-65.
\item \textsuperscript{58} See, e.g., M. Wolfgang, \textit{supra} note 8, at 160. Another study found that "the notion of progression from minor delinquency to violent offenses has little if any validity. The majority of our youths (54.6 percent) were arrested for violent offenses in their first police contact." D. Hamparian, \textit{supra} note 13, at 52. Yet, this study found that nearly one-third of this sample had no subsequent arrests, \textit{id.} at 52, and that only about 15% of those youths with one arrest for violence had a second arrest for violence. \textit{Id.} at 54, table 4-2.
\item \textsuperscript{59} Feld, \textit{supra} note 1, at 565. This latter policy is found in many jurisdictions' habitual offender statutes that provide enhanced sentences for recidivists. The United States Supreme Court has upheld the constitutionality of such statutes. In Rummell v. Estelle, 100 S. Ct. 1133 (1980), the Court held that the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction. . . . [T]he mandatory life sentence imposed upon this petitioner does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments. \textit{Id.} at 1145.
\item \textsuperscript{60} It has been observed that [f]rom the available evidence regarding hidden delinquency and the development of delinquent careers, it appears that many youths engage in both trivial and serious law violations at the same stage of their careers and that police arrest and process youths primarily as a function of the frequency rather than the seriousness of an individual's delinquent involvements. Apprehension thus appears to be random, resulting primarily from a youth's persistence. If this is true, then the fact that a youth is apprehended for a serious offense may not distinguish him from a youth apprehended for a minor offense whose hidden serious delinquency did not result in apprehension. Thus, the seriousness of an offense provides little basis for distinguishing those youths who are not susceptible to rehabilitation and are likely to recidivate from those for whom disposition as a juvenile is appropriate. Feld, \textit{supra} note 1, at 566-67.
\end{itemize}
many first offenders have no further criminal involvement.\footnote{61} The number of contacts a young offender has with the juvenile justice system, however, is an accurate indicator of criminal persistence.\footnote{62} While most youths desist after one or two involvements, once youths become chronic offenders there is a substantial probability that they will continue in their delinquencies.\footnote{63} Thus, a legislature attempting to identify serious offenders, whether for retributive or utilitarian reasons, should do so on the basis of persistence rather than seriousness.\footnote{64}

\footnote{61. See M. Wolfgang, \textit{supra} note 8, at 159-60. Offenders whose first arrest was for a personal injury offense were nearly as likely to desist after one offense (43\%) as were other types of first offenders. \textit{Id.}}

\footnote{62. \textit{Id.} at 88-105. See also D. Hamparian, \textit{supra} note 13, at 128; P. Strasburg, \textit{supra} note 1, at 44-46.}


In addition to Wolfgang's research, see note 8 \textit{supra}, other research supports the conclusions that serious offenders are best identified by their persistence rather than the significance of their initial offense. A study in Columbus, Ohio, of all youths born between 1955 and 1960 who had been arrested at least once for a violent offense before their eighteenth birthday found that 29.5\% of the sample had been arrested only once in their juvenile careers, their initial arrest had been for a violent offense, and they had desisted after only one incident of violence. See D. Hamparian, \textit{supra} note 13, at 52-53. Moreover, only about 15\% of those youths with one arrest for violence had a second arrest for violence. \textit{Id.} at 54. On the other hand, those juveniles who became chronic offenders, those with five or more arrests, also accounted for a disproportionate amount of the serious offenses as well. \textit{Id.} at 128.

Similar results were reported for a study of delinquents in New York. The study found that "although 29 percent of the sample was charged at least once with a serious violent crime, the proportion charged on more than one occasion with serious violence is much smaller (6 percent) ... This lends support to the contention that delinquents who engage in violent crime do not usually do so repeatedly." P. Strasburg, \textit{supra} note 1, at 35-36. The New York study also concluded that

[v]iolent acts appear, for the most part, to be occasional occurrences within a random pattern of delinquent behavior, rather than a "specialty" of juveniles. The number of delinquents who are chronically violent is quite small. Recidivists are responsible for the large majority of violent offenses by juveniles, but it is not possible to predict violence simply on the basis of prior offense records. On the other hand, the best among many unreliable predictors of future violence is a prior record of violence.

\textit{Id.} at 78 (emphasis added).

\footnote{64. The only valid basis for distinguishing chronic offenders from their less persistent counterparts is the number of prior involvements. ... [A] first offense, even a serious one, is not indicative of either future offenses or their seriousness since most first offenders, including serious ones, are likely either to desist from further criminal involvement entirely or to commit a nonindex, nonserious offense next .... [R]egardless of the type of initial offenses, youths who will be persistent, chronic violators can be identified only after they have recidivated several times. ... Thus, utilitarian legislative waiver classifications}
In *In re Dahl*, the Minnesota Supreme Court confronted procedural and substantive problems inherent in the juvenile waiver process. Dahl, a youth seventeen years old at the time of the alleged offense and eighteen years old at the time delinquency and certification proceedings were initiated, murdered another youth with several shotgun blasts after taking him to a remote area of northern Minnesota. Despite Dahl's virtues and his lack of previous contacts with the juvenile justice system, he was certified to stand trial as an adult on the grounds that he was both unamenable to treatment and a threat to the public safety. The reasons given for certifying Dahl were his age, the seriousness of his alleged offense, and the concern that he could not be adequately treated within the three years remaining under juvenile court jurisdiction. The record upon which the state's certification motion was granted contained neither psychological or psychiatric information nor negative information regarding the juvenile's background apart from the alleged homicide. The case, as presented to the Minnesota Supreme Court, thus raised the relatively narrow issue of whether a juvenile's age and the seriousness of the crime charged satisfied the statutory requirements of nonamenability or dangerousness.

In the earlier case of *State v. Hogan*, the court had indicated that the presence of several criteria, including consideration of the offense allegedly committed, allowed the lower court must be designed to identify persistent delinquents who are also serious, rather than initially serious delinquents who may ultimately be neither serious nor persistent offenders.


65. 278 N.W.2d 316 (Minn. 1979).

66. Dahl was a high school senior, who maintained a B average, participated in interscholastic sports, planned to attend a nearby college, and was a dependable worker at his various part-time jobs. The court commented, "It 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.

67. The only blemishes on Dahl's record were a two-day suspension from school for swearing and kicking his locker when an expensive watch was stolen, and a 45-day driver's license suspension for reckless driving. *Id.* at 317.

68. *Id.* at 318. The waiving court's conclusion that Dahl could only receive three years of treatment as a juvenile was based on Minn. Stat. § 260.181(4) (1978).

69. 278 N.W.2d at 318.

70. 297 Minn. 430, 212 N.W.2d 664 (1973).
to certify a youth on public safety grounds. The Hogan "threat to public safety" criteria were relied upon in subsequent cases in which the Minnesota Supreme Court upheld the certification of youths based on the offenses with which they were charged. The Hogan court referred to Mikulovsky v. State, in which the Wisconsin Supreme Court allowed a waiver solely on the basis of the seriousness of the offense alleged. The factual settings of Mikulovsky and Dahl are virtually indistinguishable. In In re J.B.M., 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." The supreme court rejected that construction with the observation 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." The obvious corollary is that application of the Hogan criteria to the seriousness of the offense would not preclude waiver on that ground alone.

The Dahl court, however, explicitly held that "the existing statutory framework does not authorize referral based on the specific crime charged. . . . this court did not intend the application of the Hogan factors to result in the referral of a juvenile solely because of the alleged offense." The court went on to say that the offense charged was obviously "among the relevant factors to be considered" and "[t]he record must contain direct evidence that the juvenile endangers the public safety for the statutory reference standard to be satisfied." The case was thus remanded to the certifying court, which, in order to recertify, had to include in the record evidence that the juvenile was not suitable to treatment or presented a threat to the

71. See note 30 supra.
72. See generally In re J.B.M., 263 N.W.2d 74 (Minn. 1977); State v. Duncan, 312 Minn. 17, 250 N.W.2d 189 (Minn. 1977).
73. 54 Wis. 2d 699, 196 N.W.2d 748 (1972).
74. Id. at 704-08, 196 N.W.2d at 751-53 (no prior contacts with juvenile authorities, no serious offense, no psychological or social testimony, but adherence to Kent offense criteria allows for discretionary waiver).
75. 263 N.W.2d 74 (Minn. 1978).
76. Id. at 75.
77. Id. at 76.
78. 278 N.W.2d at 321.
79. Id. (emphasis in original).
80. Id.
public safety.\footnote{Id.}

The case, as decided, simply resolved the narrow issue of what factual record is necessary to support a judicial determination of nonamenability to treatment or dangerousness and concluded that proof of age and seriousness of the crime alone are insufficient. In dicta, however, the court expressed serious concerns about the adequacy of the current legislation and clearly indicated to the legislature that the waiver criteria were in need of modification and greater specificity.\footnote{Id. at 318.} The court, sensitive that judicial determinations of amenability or dangerousness resulted in decisions that were potentially erroneous and prejudicial to juveniles, concluded that “[a] re-evaluation of the existing certification process may be in order.”\footnote{Id. at 319.} The sweeping language of the opinion, and the certification problems posed by youths like Dahl who commit a particularly serious offense without any prior contacts with the system, prompted public concern and ultimately legislative action.

The certification problems presented in Dahl dramatically highlight the conceptual inadequacy of judicial determinations of amenability or dangerousness. The commission of one serious offense is not reliable evidence for predicting either future offenses or amenability to treatment.\footnote{See text accompanying notes 31-38 supra.} While several courts construing judicial waiver statutes have allowed the certification of youths solely on the basis of the seriousness of the present offense,\footnote{See, e.g., Mikulovsky v. State, 54 Wis. 2d 699, 702-04, 196 N.W.2d 748, 750-53 (1972).} others have rejected waivers where “the juvenile ha[d] no prior juvenile record.”\footnote{See, e.g., State v. D.W.C., 256 S.E.2d 894, 898 (W. Va. 1979).}

Whether youths committing serious offenses should be treated as juveniles or adults is ultimately a legislative question that involves difficult social policy choices concerning protection of youths and society, sentencing structures in the juvenile and criminal justice systems, and the conceptual underpinnings of the juvenile justice system. There has been substantial legislative activity in recent years as a number of jurisdictions, including Minnesota, have re-examined their certification procedures and have experimented with a variety of options.
IV. LEGISLATIVE CHANGES IN THE MINNESOTA JUVENILE CODE

During 1980, the Minnesota Legislature actively reviewed the state’s juvenile code and significantly amended and modified a number of interrelated provisions. Changes were directed at serious young offenders, the certification process, and the interface between the juvenile and criminal courts in sentencing.

In what may prove to be one of the more far-reaching changes, the legislature redefined the purpose of the juvenile court. 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."87 Under the new legislation, the exclusively benevolent and rehabilitative purpose of the juvenile court remains only for children "alleged or adjudicated neglected or dependent."88 For those youths charged with crimes, 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.89

Maintaining the integrity of the substantive criminal law and developing individual responsibility for lawful behavior marks a fundamental philosophical departure from the previous rehabilitative purpose of the juvenile justice system to much more explicitly punitive and social control purposes.

The legislature also modified the provisions governing certification. Under the prior law, a juvenile court could only order

87. Juvenile Court Act, ch. 685, § 1, 1959 Minn. Laws 1275 (repealed 1980) provided in full:
The purpose of the laws relating to juvenile courts is to secure for each minor under the jurisdiction of the court the care and guidance, preferably in his own home, as will serve the spiritual, emotional, mental, and physical welfare of the minor and the best interests of the state; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety and protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents. The laws relating to juvenile courts shall be liberally construed to carry out these purposes.

88. MINN. STAT. § 260.011(2) (1980).

89. Id. (emphasis added). The statute continues: "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.
a juvenile referred for adult prosecution if it concluded that "the child is not suitable to treatment or that the public safety is not served under the provisions of laws relating to juvenile courts." As amended, the statute mandates a probable cause hearing on the alleged offense to provide a basis for the certification motion. The burden of proof in waiver proceedings now rests on the prosecution to establish by "clear and convincing evidence" that the juvenile court jurisdiction should be

90. Juvenile Court Act, ch. 685, § 16, 1959 Minn. Laws 1284 (amended 1980). See also Minn. Juv. Ct. R. 8-1 to 8-6 (prescribing the hearing procedures in a reference proceeding). The procedures for implementing these standards have been spelled out in several decisions. State v. Hogan, 297 Minn. 430, 431, 212 N.W.2d 664, 669-70 (1973), described some of the substantive criteria a court could use in finding a threat to public safety. See notes 70-81 supra and accompanying text.

The court in In re I.Q.S., described the hearing procedures required in Minnesota under the standards enunciated in Kent v. United States, 383 U.S. 541 (1966):

Four procedural safeguards, meeting due process requirements, must attend all waiver proceedings:

1. If the juvenile court is considering a waiver of jurisdiction, the juvenile is entitled to a hearing;

2. The juvenile is entitled to representation by counsel at such hearing;

3. The juvenile's attorney must be given access to the juvenile's social record on request; and

4. If jurisdiction is waived, the juvenile is entitled to a statement of reasons in support of the waiver order.

244 N.W.2d 30, 36 (1976). In requiring a statement of reasons, the court emphasized the necessity of statements to facilitate appellate review:

[W]e would prefer—and think it is the responsibility of the juvenile court—to have orders granting or denying reference accompanied by a sufficient statement of the reasons for and considerations leading to that decision. By this holding, we do not mandate that the statement necessarily meet formal or conventional findings-of-fact requirements. However, the statement should sufficiently demonstrate the court's full investigation of the matter, that careful consideration has led to its decision, and upon which statutory basis the court has relied. Satisfaction of this requirement would afford this court more meaningful review.

Id. at 38. These procedural requirements were reaffirmed in State v. Duncan, 250 N.W.2d 189 (Minn. 1977), where the court declined to constitutionally require a probable cause hearing, but suggested that "[w]hile the juvenile court is not required to find probable cause, in the absence of other relevant grounds for referral, such as past record, the court can and should consider in sufficient detail the facts of the crime in order to justify a referral for adult prosecution." Id. at 197.

91. MINN. STAT. § 260.125(2)(d) (1980) provides that a juvenile court may order a reference only if it finds that

1. there is probable cause . . . to believe the child committed the offense alleged by delinquency petition and

2. the prosecuting authority has demonstrated by clear and convincing evidence that the child is not suitable to treatment or that the public safety is not served under the provisions of laws relating to juvenile courts.

Id. (emphasis added).
The legislature retained, without change, the basic waiver criteria of nonamenability to treatment and dangerousness.

A simple re-enactment of the nonamenability and dangerousness criteria would not be responsive to either the problems inherent in the former waiver statute or the supreme court's directive in *Dahl*. Accordingly the legislature, purporting to give greater guidance and direction to juvenile courts in administering the waiver provisions, added a third subdivision to the certification statute that allows a prosecutor to establish

[a] *prima facie case that the public safety is not served or that the child is not amenable for treatment* . . . if the child was at least 16 years of age at the time of the alleged offense and:

1. Is alleged by delinquency petition to have committed an aggravated felony against the person and (a) in committing the offense, the child acted with particular cruelty or disregard for the life or safety of another; or (b) the offense involved a high degree of sophistication or planning by the juvenile; or

2. Is alleged by delinquency petition to have committed murder in the first degree; or

3. Has been adjudicated delinquent for an offense committed within the preceding 24 months, which offense would be a felony if committed by an adult, and is alleged by delinquency petition to have committed murder in the second or third degree, manslaughter in the first degree, criminal sexual conduct in the first degree or assault in the first degree; or

4. Has been adjudicated delinquent for two offenses, not in the same behavior incident, which offenses were committed within the preceding 24 months and which would be felonies if committed by an adult, and is alleged by delinquency petition to have committed manslaughter in the second degree, kidnapping, criminal sexual conduct in the second degree, arson in the first degree, aggravated robbery, or assault in the second degree; or

5. Has been previously adjudicated delinquent for three offenses, none of which offenses were committed in the same behavioral incident, which offenses were committed within the preceding 24 months and which offenses would be felonies if committed by an adult, and is alleged by delinquency petition to have committed any felony other than those described in clauses (2), (3) or (4).

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92. *See id.*

93. *See id.*

94. *Minn. Stat.* § 260.125(3) (1980) (emphasis added). The "aggravated felonies against the person," *id.* at § 260.125(3)(1), were defined to include violations of a number of provisions of the criminal code: *Minn. Stat.* § 609.135 (1978) (murder in the first degree); *id.* at § 609.19 (murder in the second degree); *id.* at § 609.15 (murder in the third degree); *id.* at § 609.20(1)-(2) (manslaughter); *id.* at § 609.45 (aggravated robbery-armed); *id.* at §§ 609.342, -343, -344(c)(d), -345(c)(d) (criminal sexual conduct); *id.* at § 609.551 (arson in the first degree); *id.* at § 609.58(2)(b) (burglary of a residence while armed); *id.* at 609.713 (terroristic threats); *id.* at §§ 609.221, .222, .223, .243 (Supp. 1979) (aggravated assaults).
In response to *Dahl*, the legislature adopted a modified version of a matrix\(^9\) 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.\(^9\) 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 subdivisions' clauses.\(^9\) The statute is intended to overrule the Minnesota Supreme Court's position, earlier enunciated in *Dahl*, that "age and seriousness of the crime" alone are insufficient conditions for certification and that there must be "direct evidence that the juvenile endangers the public safety" before he or she can be certified.\(^9\)

Although the effective date of the legislation was August 1, 1980, a juvenile's offenses committed prior to that date are also considered as part of the prior juvenile offense history.\(^9\) In addition, the new legislation requires the juvenile court that


96. The legislative matrix incorporated in this subdivision establishes a prima facie case of both nonamenability and dangerousness by proving that a youth is 16 and:

<table>
<thead>
<tr>
<th>Present Crime Charged</th>
<th>Prior Juvenile Offense History</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Aggravated Felony:</td>
<td>No prior record</td>
</tr>
<tr>
<td>a) cruel or b) sophisticated</td>
<td></td>
</tr>
<tr>
<td>(2) Murder 1st Degree</td>
<td>No prior record</td>
</tr>
<tr>
<td>(3) Murder 2nd or 3rd degree. Manslaughter 1st degree. Criminal Sexual Conduct 1st degree. Assault 1st degree.</td>
<td>One (1) prior felony adjudication within previous 24 months</td>
</tr>
<tr>
<td>(4) Manslaughter 2nd degree. Kidnapping. Criminal sexual conduct 2nd degree. Arson 1st degree. Aggravated robbery. Assault 2nd degree.</td>
<td>Two (2) prior felony adjudications within previous 24 months</td>
</tr>
<tr>
<td>(5) Any felony not subsumed in the foregoing provisions</td>
<td>Three (3) prior felony adjudications within previous 24 months</td>
</tr>
</tbody>
</table>

MINN. STAT. § 260.125(3) (1980).

97. *See* id.

98. 278 N.W.2d 316, 320 (Minn. 1979). *See* notes 78-86 *supra* and accompanying text.

99. "[S]ections are effective August 1, 1980 and apply to offenses committed on or after that date except with respect to the history of offenses provided for in [*§ 260.125(3)*]." Juveniles and Corrections Act, § 23, 1980 Minn. Sess. Law Serv. (West 1980).
grants or denies a motion for reference for adult prosecution to issue an order in writing that contains "findings of fact and conclusions of law" which support the decision, but this requirement is in keeping with prior judicial opinions mandating findings and conclusions to facilitate appellate review.  

The legislature further changed the manner in which hearings are conducted in juvenile courts. Although juvenile court hearings "shall be without a jury and may be conducted in an informal manner," the rules of evidence are now applicable both to juvenile adjudicatory hearings and to certification proceedings. The types of evidence typically relied upon in certification proceedings may be restricted or at least more difficult to introduce under this new limitation. Although youths in certification proceedings previously enjoyed the right to counsel, the legislature has now provided that the right entails "effective assistance of counsel."  

The legislature also added a new provision that grants juvenile courts the power to levy fines of up to $500 for offenses. This provision may change the population of youths for whom certification is ultimately sought. To the extent that certification was previously used in rural counties to impose the "adult" disposition of a fine, this new power for juvenile courts may obviate the resort to a waiver subterfuge.

The final action with direct implications for certification is the legislature's adoption of determinate, presumptive sentencing guidelines. The sentencing guidelines, which are only applicable to adult offenders, provide that both the disposition of an offender—whether or not to imprison—and the length of the sentence are to be based on a combination of the seriousness of the present offense and the offender's prior criminal record. In calculating an adult offender's prior criminal record, the sentencing guidelines mandate that the offender's juvenile offense history must be partially considered. Moreover, juveniles transferred for prosecution as adults will be sen-

100. See Minn. Stat. § 260.125(5) (1980); note 80 supra.
102. Section 260.155(1) now provides that "[t]he rules of evidence . . . and the laws of evidence shall apply in . . . hearings conducted pursuant to section 260.125 [certification]."
104. See id. at § 260.185(1)(f).
105. See note 53 supra and accompanying text.
106. See Minn. Stat. § 244.09 (1980); see generally 1980 Sentencing Guidelines, supra note 41.
tenced under the same presumptive guidelines affecting offenders over the age of eighteen.\textsuperscript{108} Thus, the presumptive sentencing guidelines affect both juvenile justice administration and certification by including juvenile convictions within an adult's offense history and by sentencing certified juveniles in the same way as other adults.

For a juvenile court to administer the new prima facie certification matrix, and for an adult criminal court to compute a juvenile’s prior record within an adult offense history for sentencing, both must have access to juvenile court records. Because juvenile court records and proceedings have traditionally been kept confidential, the legislature mandated that juvenile court judges keep records of delinquent adjudications until offenders reach the age of twenty-three years, release the records of an individual to a requesting adult court for purposes of sentencing, and provide copies of the records concerning a particular child to any other requesting juvenile court.\textsuperscript{109}

V. THE MEANING OF THE JUVENILE CODE REVISIONS: THE RATIONALE AND CONSEQUENCES OF REFORM

This section of the Article identifies some of the remaining deficiencies, examines the resulting newly created problems, and explores possible rationales and consequences of the recent amendments to Minnesota's juvenile code. Because the amendments have effectively eliminated most of the distinctions between the adult and juvenile court systems, new problems will now be encountered.

A. CHANGE IN THE PURPOSE CLAUSE—WHEN IS A JUVENILE COURT NO LONGER A JUVENILE COURT?

The change in the juvenile code’s purpose clause embodies a fundamental, philosophical shift in the treatment of juvenile offenders.\textsuperscript{110} Historically, juvenile courts were viewed as rehabilitative social service agencies functioning as surrogate parents for youngsters who had incidentally violated the law. The amended purpose clause, with its emphasis on promoting public safety and reducing delinquency, reflects a substantial repudiation of the deterministic and immaturity assumptions of

\textsuperscript{108} Id. at 36.
\textsuperscript{110} See text accompanying notes 87-89 supra.
Although the juvenile court's new purpose statement is similar to that of the criminal code, the criminal code ironically articulates a greater commitment to the "rehabilitative ideal" of justice than does the juvenile code.

A number of important philosophical, administrative, and procedural differences between juvenile courts and adult criminal courts are premised on the different emphases placed on treatment and punishment in the two systems. Thus, juvenile court proceedings are conducted informally, confidentially, without juries, and under circumstances that are foreign to adult criminal courts. The Supreme Court, in *McKeiver v. Pennsylvania,* held that fourteenth amendment due process did not require states to provide jury trials in juvenile court adjudications because "fundamental fairness" required only reliable factual determinations that could be made by a judge as readily as by a jury. The Court feared that jury trials would

111. See notes 2-5 supra and accompanying text.
112. The criminal code is intended "[t]o protect the public safety and welfare by preventing the commission of crimes through the deterring effect of the sentences authorized, the rehabilitation of those convicted, and their confinement when the public safety and interest requires." MINN. STAT. § 609.01(1)(1) (1978).
113. See Feld, supra note 1, at 601-05.
115. *Id.* at 543. In analyzing the *McKeiver* decision, one commentator noted that

[T]he Court held that the only requirement for "fundamental fairness" in juvenile court proceedings is "accurate factfinding" and reasoned that this requirement could be as well satisfied by a judge as by a jury. But in suggesting that nothing more than accurate factfinding was required to satisfy the requirements of due process in the juvenile context, the Court departed significantly from its own prior analysis of the dual function of procedures in juvenile court adjudications, for earlier decisions actually appear to have been premised on *two* rationales—accurate factfinding and protection against governmental oppression.

Feld, supra note 1, at 602-03 (citations omitted) (emphasis in original). This commentator further observed that

[t]his dual function of procedures was clearly recognized, for example, by the Supreme Court in *In re Gault,* 387 U.S. 1 (1967), when it held, inter alia, that juveniles must be accorded the fifth amendment privilege against self-incrimination in connection with juvenile court adjudications of delinquency. See *id.* at 55. If the Court in *Gault* had been concerned solely with the reliability of juvenile confessions and the accuracy of fact finding, safeguards other than the fifth amendment privilege—for example, a requirement that all confessions be shown to have been made voluntarily—would have sufficed. See *id.* at 75-78 (Harlan, J., concurring in part and dissenting in part). The Court, however, recognized that fifth amendment safeguards were not required simply to ensure accurate fact finding or reliable confessions, but to serve as a fundamental bulwark of the adversary system and a means of maintaining a balance between the individual and the state.
interfere with the flexibility and informality of juvenile court proceedings. Reluctant to "disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young," the Court expressed serious reservations about the impact of juries on juvenile court proceedings.

The denial of jury trials in juvenile court proceedings, however, has led to a "right to treatment" for incarcerated young offenders. Following the McKeiver decision, incarceration of a juvenile without the benefit of criminal procedural safeguards, such as a jury trial, could be justified only if the juvenile was receiving rehabilitative treatment. Incarceration without appropriate treatment constitutes punishment which, if imposed without the procedural safeguards of the criminal process, violates due process.

The change in the purpose of Minnesota's juvenile courts

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Feld, supra note 1, at 603 n.284.

116. "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." 403 U.S. at 551.

117. Id. at 547.

118. The court in McKeiver concluded that "the jury trial, if required as a matter of constitutional precept, will make the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal, protective proceeding." 403 U.S. at 454. The court also pointed out that "[i]f the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial." Id. at 550.


121. See cases cited in note 120 supra.
conflicts with the basic premise of the *McKeiver* Court in denying juries to juveniles—that juvenile court systems are primarily committed to the rehabilitation of young offenders. When a state's legislature departs from these rehabilitative purposes to emphasize more punitive, traditional criminal law purposes, has the legislature in fact repudiated the treatment differences that distinguish the juvenile and criminal systems and that justify both denying juveniles the right to trial by jury and maintaining a separate system of justice for young offenders?

Other states that have amended their juvenile code purpose clauses to emphasize public safety and retribution have been confronted with the issue of a juvenile's right to trial by jury. The state of Washington, for example, undertook a far-reaching revision of its juvenile code that included a purpose clause similar to Minnesota's new clause. In *State v. Law-

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122. 403 U.S. at 544 n.5.
123. Compare Ind. Code Ann. § 31-5-7-1 (Burns 1973) with Ind. Code Ann. § 31-6-1-1 (Burns Supp. 1979) (providing inter alia "a juvenile justice system that protects the public by enforcing the legal obligations children have to society"); compare Va. Code § 16.1-240 (Supp. 1975) with Va. Code § 16.1-227 (Supp. 1979) ("protect the community against those acts of its citizens which are harmful to others and to reduce the incidence of delinquent behavior").
   It is the intent of the legislature that a system capable of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders, as defined by this chapter, be established. It is the further intent of the legislature that youth, in turn, be held accountable for their offenses and that both communities and the juvenile courts carry out their functions consistent with this intent. To effectuate these policies, it shall be the purpose of this chapter to:
   (a) Protect the citizenry from criminal behavior;
   (b) Provide for determining whether accused juveniles have committed offenses as defined by this chapter;
   (c) Make the juvenile offender accountable for his or her criminal behavior;
   (d) Provide for punishment commensurate with the age, crime, and criminal history of the juvenile offender;
   (e) Provide due process for juveniles alleged to have committed an offense;
   (f) Provide necessary treatment, supervision, and custody for juvenile offenders;
   (g) Provide for the handling of juvenile offenders by communities whenever consistent with public safety;
   (h) Provide for restitution to victims of crime;
   (i) Develop effective standards and goals for the operation, funding, and evaluation of all components of the juvenile justice system and related services at the state and local levels; and
   (j) Provide for a clear policy to determine what types of offenders shall receive punishment, treatment, or both, and to determine the jurisdictional limitations of the courts, institutions and community services.
a juvenile argued that the changes in the Washington juvenile code had “altered the law’s focus from concern for treatment and rehabilitation of the juvenile to imposition of punishment according to the offense and the record of the juvenile. Therefore . . . the proceedings [were] in the nature of a criminal prosecution entitling [him] to a jury trial as part of due process.” The Washington Supreme Court acknowledged that emphasis on accountability for criminal behavior and punishment based on the juvenile’s present and past offenses could effectively convert juvenile court proceedings into criminal proceedings, but found that the statutory provisions did not treat and sentence juveniles as if they were adult offenders. The court, relying on the dubious rationale that sometimes “punishment is treatment,” held that the legislature could permissibly conclude 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 juveniles.” The court reasoned that because the legislature authorized treatment as well as punishment of young offenders, and because juveniles were incarcerated in facilities separate from adult penal institutions, a jury trial was not mandated.

125. 91 Wash. 2d 654, 591 P.2d 772 (1979).
126. Id. Lawley was statutorily denied a jury trial on the basis of WASH. REV. CODE § 13.40.021(2) (1977).
127. The court assumed beneficial consequences could flow from coercive social control. 91 Wash. 2d at 656-57, 591 P.2d at 773.
128. Id.
129. Id. A strong dissent in Lawley reasoned that because juvenile court proceedings first adjudicated the alleged offense and then punished the offender in proportion to the offense adjudicated, a jury trial was required. The dissent analyzed the Washington purpose clause, as had the majority, and concluded that the legislature has made it clear that it is no longer the primary aim of the juvenile justice system to attend to the welfare of the offending child, but rather to render him accountable for his acts, to punish him, and to serve society’s demand for retribution. While the punishment prescribed may well be less than that imposed upon offending adults for the same offense, it nevertheless involves . . . a loss of liberty . . . [n]o longer is the punishment geared to fit the needs of the child rather it is related to the seriousness of the offense . . . Thus, the system has been converted from one which was or ostensibly was designed to protect and rehabilitate the child to one which is designed to protect society. The present act focuses upon the purposes which are generally served by adult criminal law.

Id. at 662, 591 P.2d at 775-76 (Rosellini, J., dissenting). The dissent reasoned that while the McKeiver Court was reluctant to constitutionally impose jury trials on state juvenile proceedings that were at least nominally rehabilitative,
The majority in Lawley failed to address the issue of whether the similarities of or the differences between the criminal and juvenile justice systems allowed the juvenile system to dispense with criminal procedural safeguards. Reasoning that the solution of social problems is a legislative function, the court simply deferred to the legislature’s conclusion that punishment might be as effective as individualized treatment in the rehabilitation of juveniles.130 There are, of course, many ways to alter people’s behavior—education, counseling, rehabilitative treatment, economic incentives, punishment, and the like—and the legislature is free to choose whichever strategy it desires to modify behavior. When the legislature chooses to shape behavior through punishment, however, the procedural safeguards of the criminal law must be observed despite any social benefits that may result. Although the length of confinement of a juvenile may be less than that of an adult, and the place of confinement not penal, confinement still entails a loss of liberty imposed to punish violations of the law, and determinate sentences do not take into account a youth’s “need” for such restraint.131

As juvenile proceedings become increasingly formal and “criminalized,” courts are often being asked “whether so many of the attributes of a juvenile proceeding have been discarded that the proceeding is in effect ‘criminal’ in nature.”132 Whether a juvenile’s disposition is in effect treatment or punishment is not readily apparent, especially when a court, as in Lawley, confounds both language and reason to conclude that sometimes punishment is treatment. Other courts have been more sensitive to this linguistic perversion and have recognized that “[w]hen, however, the protections provided to the juvenile criminal offender have been so eroded away that what is actually a punishment is characterized as a treatment, an abuse of constitutional dimension has occurred, and, a jury trial is required before punishment, although appropriate, may be inflicted.”133

Some analytical tools are available to aid courts in deter-

130. Id. at 657, 591 P.2d at 773.
131. Juvenile offenders in Washington receive determinate sentences proportional to their age, the seriousness of their offense, and their prior criminal history. See WASH. REV. CODE § 13.40.030 (West 1977).
133. Id. at 372, 402 N.Y.S.2d at 531.
mining whether the purpose of a juvenile's disposition is punishment or treatment. Dispositions based on considerations of the offense—retribution or deterrence—are characteristically determinate and proportional; those based on considerations of the offender—rehabilitation or incapacitation—are typically indeterminate. Applying this simple test to the juvenile sentencing provisions in Washington reveals that the Lawley court erred in denying the juvenile a jury trial because juvenile dispositions in Washington are determinate and proportioned according to the seriousness of the present offense and prior criminal history.

The Minnesota Legislature's enactment of a new juvenile code purpose clause raises a serious issue of whether juveniles in Minnesota are entitled to trial by jury in juvenile court proceedings. The new language of the purpose clause is functionally indistinguishable from the language in the criminal code's purpose clause; while some procedural differences remain between the two systems, the systems are increasingly similar. An analysis of other changes in juvenile court legislation and administration will aid in determining whether juvenile proceedings are sufficiently akin to criminal proceedings that a jury is now constitutionally required.

B. PROCEDURAL ASPECTS OF CERTIFICATION

1. Probable Cause Hearings

Minnesota's certification legislation resolves several procedural issues previously raised by waivers of juvenile court jurisdiction. Prior to any transfer decision, a probable cause hearing is now required to determine whether there is a reasonable basis to believe that the youth committed the offense(s) alleged in the petition. Waiver statutes in other jurisdictions often require similar probable cause hearings.

134. "The distinction between indeterminate and determinate sentencing is not semantic, but indicates fundamentally different public policies. Indeterminate sentencing is based upon notions of rehabilitation, while determinate sentencing is based upon a desire for retribution or punishment." Id. at 374, 402 N.Y.S.2d at 533. See generally N. Morris, supra note 10; H. Packer, supra note 10; A. von Hirsch, supra note 43; H.M. Hart, supra note 10; see also Symposium—Sentencing, 7 Hofstra L. Rev. 1-139, 243-470 (1978).

135. See note 131 supra.

136. See notes 89 & 112 supra and accompanying text.


138. See, e.g., Me. Rev. Stat. tit. 15, § 3104(4) (1978). In the absence of probable cause hearing provisions, certified youths have challenged the constitutionality of transfer. The issue was somewhat clouded by Breed v. Jones, 421
Although Minnesota now requires a probable cause hearing in waiver proceedings, the nature of the hearing is unclear. The amended statute simply requires that the court find that "there is probable cause, as defined by the rules of criminal procedure." Whether the probable cause determination is to be an adversarial one akin to a preliminary hearing, or a determination based on a written record, is ambiguous. Under the rules of criminal procedure, admissible evidence in probable cause determinations includes hearsay, written statements of witnesses, and summaries by policy officers of their own or other officers' investigations.

The Minnesota Supreme Court clarified the probable cause showing required by the rules of criminal procedure in State v. Florence. The court found that the rules supplanted the statutorily-required adversarial preliminary hearing, and held that a determination of probable cause could be "based upon the entire record including reliable hearsay in whole or in part."

U.S. 519 (1975), when the Supreme Court held that jeopardy attached to juvenile court adjudications and prohibited subsequent adult criminal prosecution for the same offense. Id. at 531. Thus, Breed requires a state to decide in which system—juvenile or adult—it will proceed against an offender before there is an adjudication on the merits. The court in Breed left unresolved whether a probable cause hearing was constitutionally required in the juvenile court as a condition precedent to transfer; the Court did note that "nothing decided today forecloses States from requiring, as a prerequisite to the transfer of a juvenile, substantial evidence that he committed the offense charged, so long as the showing required is not made in an adjudicatory proceeding." Id. at 538 n.18.

In State v. Duncan, 250 N.W.2d 189 (Minn. 1977), the Minnesota Supreme Court considered the question of whether a probable cause hearing was a constitutional prerequisite of adult waiver. The court, noting that "Breed declined to express any opinion as to whether an evidentiary hearing with respect to the commission of the offense was a necessary component of a transfer hearing," surveyed the procedural practices in other jurisdictions in which state legislatures had not required probable cause hearings and concluded that "a probable cause hearing at the time of referral is not constitutionally required." 250 N.W.2d at 196-97. The court observed, however, that a probable cause hearing would be a salutary addition to waiver proceedings. Id.

141. Minn. R. Crim. P. 11.03 provides:
The court shall hear and determine all motions made by the defendant or prosecution, including a motion that there is an insufficient showing of probable cause to believe that the defendant committed the offense charged in the complaint, and receive such evidence as may be offered in support or opposition. Each party may cross-examine any witnesses produced by the other. A finding by the court of probable cause shall be based upon the entire record including reliable hearsay in whole or in part.
142. Minn. R. Crim. P. 18.06(1).
143. 306 Minn. 442, 239 N.W.2d 892 (1976).
144. Id. at 452, 239 N.W.2d at 899.
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."\(^{145}\) In authorizing nonadversarial probable cause procedures, the *Florence* court relied on *Gerstein v. Pugh*,\(^ {146}\) in which the Supreme Court upheld ex parte judicial determinations of probable cause.\(^ {147}\) 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 of the complaint and, in addition, the results of disclosure and discovery procedures required by the rules.\(^ {148}\)

The net result of the *Florence* decision is that, in the vast majority of criminal cases, probable cause is based upon the complaint supported by police reports, statements by witnesses, the omnibus hearing, and the products of discovery. An adversarial probable cause determination occurs only in those relatively rare instances when the defendant produces witnesses whose testimony, if believed, would exonerate him or her. It is significant to note, however, that juvenile court proceedings provide for neither a pre-adjudicative omnibus hearing at which probable cause would be established nor a carefully drawn and sufficiently detailed allegation of probable cause in a juvenile court petition.\(^ {149}\) Thus, the formal provision of probable cause determinations in waiver hearings may only entail a review of a documentary record, despite the additional, and significantly greater, screening safeguards afforded adults.\(^ {150}\)

2. **Burden of Proof**

The Minnesota Legislature also codified the burden of

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\(^{145}\) *Id.* at 453, 239 N.W.2d at 900.

\(^{146}\) 420 U.S. 103 (1975).

\(^{147}\) *Id.* at 119-25.

\(^{148}\) 307 Minn. at 457, 239 N.W.2d at 902.

\(^{149}\) *See In re Hitzemann*, 281 Minn. 275, 279-80, 161 N.W.2d 542, 545 (1968) (authorizing conclusory factual allegations in a delinquency petition).

\(^{150}\) The Supreme Court has refrained from flatly holding "that all rights constitutionally assured for the adult accused are to be imposed upon the state juvenile proceeding." *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).
proof in juvenile transfer proceedings, requiring the prosecuting authority to demonstrate "by clear and convincing evidence that the child is not suitable to treatment or that the public safety is not served." The Minnesota Juvenile Court Rules require this same standard of proof.

The legislature adopted the "clear and convincing evidence" standard of proof over the less stringent "preponderance of the evidence" standard. The preference of one standard over the other is a function of the underlying policies of allocating burdens of proof and the dangers of erroneous factual determinations. As noted by McCormick, while "the traditional measure of persuasion in civil cases is by a preponderance of evidence, there is a limited range of claims and contentions in which the party is required to establish by a more exacting measure of persuasion." Typically, this more exacting civil burden of proof is required when "the particular type of claim should be disfavored on policy grounds." The legislature apparently concluded that waiver of juvenile court jurisdiction should be subjected to the more exacting burden of proof because the policies underlying the juvenile court system as a separate entity dictate that "juveniles should, in the ordinary case, be subject to juvenile court jurisdiction. Transfer, therefore, should be the exception and not the rule."

The burden of proof is ultimately a verbal formula used to describe the degree to which the fact finder must be persuaded. The wisdom of the legislature's decision in assigning a requisite degree of persuasion to a particular claim depends upon the substantive decision the fact finder must make. In its revision of the juvenile code, the Minnesota Legislature has not addressed the fundamental transfer issue—whether it is possible

155. McCormick, supra note 153, at 796.
156. Id. at 798. Accord, Wigmore, supra note 154, at 325-35.
to determine a youth's amenability to treatment or dangerousness with any degree of certainty or reliability. If amenability and dangerousness cannot be determined with any degree of precision on the basis of clinical indicators, then the legislature's use of the more exacting "clear and convincing evidence" standard of proof will compound the difficulties inherent in making those determinations. The significance of imposing on the prosecution a more stringent burden of proof must also be considered in light of the burden of persuasion when establishing a prima facie case.

C. A Prima Facie Case for Waiver Based on Proof of Age and Certain Offenses—Did the Legislature Overrule In re Dahl?

One of the more significant aspects of the Minnesota Juvenile Code revision is the adoption of Minnesota Statutes section 260.125 subd. 3 (1980), which provides that if the prosecution proves that the youth is sixteen years of age or older and is charged with certain types of offenses or possesses a certain prior record, a prima facie case that the public safety is threatened or that the youth is not amenable to treatment is established.158 Previously, only evidence that directly proved or supported an inference of nonamenability or dangerousness could result in a youth's certification.159 Thus, while still retaining the "nonamenability" or "dangerousness" criteria, the legislature has provided the prosecutor with an additional way to prove those facts besides by direct evidence.

1. The Meaning of Prima Facie Case

The revised statute gives rise to two critical issues: what is the meaning of prima facie case as used in the statute and what effect does proving a prima facie case have upon the allocation of the burdens of production and persuasion in certification hearings. The first problem, defining prima facie case, is compounded because the term "is often used in two senses and is therefore an ambiguous and often misleading term."160 As described by Wigmore, the term prima facie may mean either that: a) the evidence presented is sufficient to get the case to the finder of fact (i.e., to withstand a motion for a directed verdict by the opposing party); or b) the evidence is sufficient to

159. See In re Dahl, 278 N.W.2d 316, 321 (Minn. 1979).
shift the burden of production to the party against whom the prima facie case is established (i.e., a form of rebuttable presumption).\textsuperscript{161}

The second issue, the effect that proving a prima facie case has on the ultimate burdens of production and persuasion in certification proceedings, poses problems of statutory construction. If the prosecution establishes its prima facie case by proving only the various offenses described in section 260.125(3) and rests, and if the defendant introduces no rebuttal evidence and rests, \textit{may} a juvenile court judge waive jurisdiction under the new statute based solely on that showing? \textit{Must} a juvenile court judge waive jurisdiction on that showing alone? If the prosecution establishes its prima facie case and the defense also submits evidence in response, then what is the effect of the prima facie case language on the court's decision? These problems of statutory construction are aggravated by the conflicting use of permissive language in the statute's second subdivision—"the juvenile court \textit{may} order a reference . . ."—and the nondiscretionary language in the third subdivision—"a prima facie case . . . \textit{shall} have been established."\textsuperscript{162}

In recognizing the possible alternative meanings of prima facie case\textsuperscript{163} in civil cases,\textsuperscript{164} the Minnesota Supreme Court

\textsuperscript{161} The term '\textit{prima facie evidence}' or '\textit{prima facie case}' is used in two senses, and it is often difficult to detect which of these is intended in the judicial passage in hand:
(1) (1) In discussing presumptions, the term '\textit{prima facie}' is sometimes used as \textit{equivalent to the notion of a presumption}, even in the strict sense of a ruling of the judge putting upon the opponent the duty of producing evidence.
(2) But the phrase '\textit{prima facie}' is also, and clearly enough, found used in a very different sense . . . namely, where the proponent having the first duty of producing some evidence in order to pass the judge to the jury, has fulfilled that duty, satisfied the judge, and may properly claim that the jury be allowed to consider his case. This \textit{sufficiency of the evidence to go to the jury . . . is also referred to as a 'prima facie' case}. Wigmore, supra note 154, at 293-94 (emphasis in original) (footnotes omitted).

\textsuperscript{162} Compare Minn. Stat. § 260.125(2) (1980) (emphasis added) \textit{with id. at} § 260.125(3) (emphasis added).

\textsuperscript{163} \textit{See}, e.g., Fidelity Bank & Trust Co. v. Fitzimons, 261 N.W.2d 586, 590 n.10 (Minn. 1977) (while prima facie case may shift the burden of proof "in the sense of going forward with evidence, to the opposing party") it can also be used in the sense of "creat[ing] a question for the factfinder").

\textsuperscript{164} The use of a prima facie case to create presumptions in criminal cases is beyond the scope of this analysis because the issue in a certification proceeding is dispositional, not adjudicative, and thus governed by issues of civil and not criminal procedure. \textit{See generally} Breed v. Jones, 421 U.S. 519 (1975); \textit{In re T.D.S.}, 289 N.W.2d 137 (Minn. 1980).

Suffice it to say, the issue of presumptions in the context of criminal prosecutions is greatly complicated by the requirement that the prosecution prove every material element beyond a reasonable doubt. \textit{See generally} Mullaney v.
tends to treat a prima facie case as a rebuttable presumption that shifts the burden of producing substantial, controverting evidence to the party opposing the prima facie case. Once a party has established its prima facie case, the burden of producing evidence is shifted to the opposing party to rebut the presumptive facts. Thus, the factual presumption created by a prima facie case stands unless and until rebutted by placing contrary evidence on the record. If substantial, countervailing evidence is presented, then the matter is to be determined by the trier of fact on the basis of the entire record and not by reference to the prima facie case. In civil cases, if the party against whom a prima facie case is established does not introduce rebuttal evidence, the proponent is entitled to prevail on that issue. Functionally, then, the procedural operation of a


165. See Fire Marshall v. Sherman, 201 Minn. 594, 596, 277 N.W. 249, 250 (1938) ("prima facie case which the statute purports to create, simply means that the burden of going forward with the evidence shifts"). Accord, Holton v. Parker, 302 Minn. 167, 175-77, 224 N.W.2d 139, 145 (1974); Olson v. Duluth M. & IR. Ry., 213 Minn. 106, 113, 5 N.W.2d 492, 496 (1942); Hudson-Duluth Furriers, Inc. v. McCullough, 182 Minn. 581, 584-85, 235 N.W. 537, 539 (1931).

166. In the absence of evidence invalidating a prima facie case, the party who establishes it is entitled to a directed verdict on the issue. See generally Riley v. Lake, 295 Minn. 43, 49, 203 N.W.2d 331 (1972); Minneapolis Fire & Marine Ins. Co. v. Baltimore & O. R.R., 237 Minn. 111, 53 N.W.2d 828 (1952); Lee v. Molter, 227 Minn. 557, 55 N.W.2d 801 (1949); Flitton v. Daleki, 216 Minn. 549, 13 N.W.2d 477 (1944); Wojtowicz v. Belden, 221 Minn. 461, 1 N.W.2d 409 (1942); Topinka v. Minnesota Mut. Life Ins. Co., 189 Minn. 75, 248 N.W. 660 (1933).


168. The party establishing a prima facie case prevails in the absence of evidence invalidating it. See notes 165-66 supra. See also Fidelity Bank & Trust Co. v. Fitzimons, 261 N.W.2d 586, 590-91 (Minn. 1977); Elk River Concrete Prods.
prima facie case is equivalent to a presumption in civil actions under the Minnesota Rules of Evidence.\textsuperscript{169}

Does the new legislation, allowing the prosecutor to establish a prima facie case of a youth's nonamenability to treatment or dangerousness, overrule Dahl? The burden of proof and risk of nonpersuasion remain on the prosecution to establish by clear and convincing evidence that a youth meets the statutory grounds for waiver of nonamenability or dangerousness. The prosecution can meet this burden either by direct proof under subdivision two or by indirect proof establishing the prima facie case for waiver under subdivision three of the statute.

Two examples illustrate the problems posed by these provisions. First, assume, as in Dahl, that the prosecution proves that the youth was seventeen at the time the alleged offense was committed, and that he is charged with murder in the first degree.\textsuperscript{170} Without introducing any psychological data or psychiatric testimony, the prosecution then rests its prima facie case. Suppose, contrary to the facts of Dahl, that the defendant introduces no evidence in response to the prosecution's prima facie case, and also rests. It would appear that the juvenile court must certify the youth since "[a] prima facie case simply means one that prevails in the absence of evidence invalidating it" and when "the prima facie case is unopposed by evidence, a verdict must be directed accordingly."\textsuperscript{171}

Even in the "easy case"—a prima facie case with no rebuttal evidence—however, is it clear that certification is mandated? The legislature did not entirely erase the discretion of the juve-

\textsuperscript{169} Proving a prima facie case, and thereby creating a legal presumption that shifts to the opposing party an obligation to respond, has the same effect as \textsuperscript{MINN. R. EVID.} § 301, which provides that a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. The procedural operation of presumptions requires the opponent to introduce evidence to rebut the assumed fact. Once the presumption is rebutted, it has no further evidentiary function, although the underlying evidence giving rise to or rebutting the fact may still be probative of the ultimate issues being determined. \textit{See generally} Thompson, \textit{Presumptions and the New Rules of Evidence in Minnesota}, 2 WM. MITCHELL L. REV. 167 (1976).

\textsuperscript{170} \textit{See In re Dahl}, 278 N.W.2d 316, 317 (Minn. 1979); text accompanying notes 65-86 supra.

\textsuperscript{171} Wojtowicz v. Belden, 211 Minn. 461, 465, 1 N.W.2d 409, 410-11 (1942). \textit{See generally} Riley v. Lake, 295 Minn. 43, 203 N.W.2d 331 (1972); Flitton v. Dalecki, 216 Minn. 549, 13 N.W.2d 477 (1944).
Juvenile court as the statute still provides that "the juvenile court may order reference only if: . . . the prosecuting authority has demonstrated by clear and convincing evidence" that the youth is dangerous or not amenable to treatment.\(^{172}\) Certification under this statutory language has never been mandatory and the Minnesota Supreme Court has consistently emphasized that reference is merely discretionary and permissive.\(^{173}\) When the statute's permissive language "may order a reference" is read in conjunction with the phrase "only if," and the burden of establishing the grounds for waiver is by "clear and convincing" evidence,\(^{174}\) it appears that reference is still only to be ordered in exceptional circumstances. While there is thus an argument that even an unrebuted prima facie case may be insufficient to require reference, the legislature's intent to overrule *Dahl* and the shifting of the burden of production should result in a waiver in this situation.

On the other hand, suppose that in the "easy case"—a prima facie case with no rebuttal evidence—the juvenile court does certify the youth for adult prosecution and in its written findings and conclusions opines simply that the youth is seventeen years old and charged with first degree murder. The state's "prima facie case . . . shall have been established"\(^{175}\) presumably by clear and convincing evidence. Can the Minnesota Supreme Court now reverse such a certification? Perhaps, but only by the rather convoluted reasoning that the prima facie case alternative in subdivision three modifies the general permissive waiver provision of subdivision two, and that under the latter provision a judgment of nonamenability and dangerousness requires proof of more than age and present offense. It


\(^{173}\) Section 260.125 has been repeatedly interpreted as permissive. See *In re F.C.R.*, 276 N.W.2d 636, 639 (Minn. 1979) ("juvenile court need not waive jurisdiction even where a serious crime is involved"); see also *In re K.P.H.*, 289 N.W.2d 722, 724-25 (Minn. 1980); *State v. Duncan*, 312 Minn. 17, 24-26, 250 N.W.2d 189, 194 (1973); *State v. Hogan*, 297 Minn. 430, 438-39, 212 N.W.2d 664, 669-70 (1973). In *In re J.R.M.*, 263 N.W.2d 74 (Minn. 1978) (per curiam), the court reemphasized the permissive and discretionary nature of reference as it corrected a misinterpretation of *Duncan*. The Minnesota Supreme Court stated that

... the juvenile court is vested with broad discretion in determining whether either of the statutory criteria exists upon which to base its reference decision. Although 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 (emphasis added).


\(^{175}\) *Id.* at § 260.125(3).
is much more likely that the waiver would be upheld since the legislation was intended to restrict the supreme court's ability to control juvenile court certification decisions through appellate review. Thus, giving appropriate deference to the legislature's intent to certify youths like Dahl and more serious offenders in general, waivers should probably be compelled and upheld on the basis of an unrebutted prima facie case.

In the second example, assume, as in Dahl, that the prosecution simply proved its prima facie case and then the defendant introduced substantial rebuttal testimony. The state's proof of a prima facie case shifted the burden of producing rebuttal evidence to the defendant. Under the "bursting bubble" view of presumptions, once the defendant has introduced substantial rebuttal testimony, the evidentiary significance of the presumption vanishes and the ultimate question is submitted to the trier of fact for resolution on the basis of the entire record without regard to any initial presumptions and with the burden of persuasion remaining on the prosecution.

In this "difficult case"—a prima facie prosecution case with extensive defendant rebuttal evidence—may the juvenile court certify the youth based solely on the youth's age and present offense? While a prima facie case for waiver was established under subdivision three when the prosecution initially proved the youth's age and offense, the case was presumably rebutted by the defendant's proof. Thus, at least where the defendant has introduced substantial evidence of his amenability to treatment and nondangerousness and has rebutted the prima facie case, the case should be decided under the discretionary waiver provision of subdivision two rather than under subdivision three. If the waiver decision is made under subdivision two, proof of age and present offense alone may not carry the state's burden of persuasion because the Minnesota Supreme Court would probably summarily reverse, citing Dahl.

176. Dahl clearly established that he was "not the typical delinquent seen by the Juvenile Court." In re Dahl, 278 N.W.2d 316, 317-18 (Minn. 1979). See text accompanying notes 65-86 supra.

177. See, e.g., Thompson, supra note 169, at 169 (substantial evidence rebutting the presumed fact destroys the presumption and the presumption has no further function). The "bursting bubble" has been described, most dramatically, in McCormick, supra note 153, at 821.


179. Since the statute creates a prima facie case for reference on either grounds of nonamenability or dangerousness, it is necessary for the defendant to present evidence invalidating both grounds. See generally State v. Wolkoff, 250 Minn. 504, 85 N.W.2d 401 (1957).
It is unlikely that the Minnesota Supreme Court will soon be confronted with either of these hypothetical cases; thus, the statutory prima facie case for waiver, established by proof of age and prior offenses, will be illusory. The court has implied, and the legislature has mandated, that juveniles in reference hearings should receive effective assistance of counsel. In light of the substantial likelihood of defense rebuttal testimony, a case decided solely on proof of age and prior offenses will be rare. Rather, the prosecution will be encouraged to prove a youth's prior record and present offense both initially to establish the prima facie case and later to sustain the burden of persuasion on the ultimate questions of non-amenability or dangerousness. But the prosecution has been urged to introduce evidence of prior record and present offense since State v. Hogan. Moreover, the prosecution has been prompted by the In re S.R.J. decision to introduce whatever

180. The Minnesota Supreme Court has stated that "[t]o effectively discharge his role as an advocate in a reference proceeding, a juvenile's attorney should search for a plan which may persuade the court that the welfare of the child and the public safety can be served without reference." In re T.D.S., 289 N.W.2d 137, 141 (Minn. 1980).
182. See text accompanying notes 76-86 supra.
183. In re S.R.J., 293 N.W.2d 32 (Minn. 1980), raised the issue of how psychiatric evaluations and testimony can be secured and used in juvenile reference hearings. The court held that Minn. Stat. § 260.151(1) (1978), permits the court to order a psychiatric evaluation of the juvenile in order to assist the court in making its discretionary judgment about the youth's disposition:

If psychiatric or psychological evaluations are to be made, the report should go to the court with copies made available to the state and the minor or his counsel. At the time of appointment, either the state or the minor may suggest names of doctors to the judge. However, the doctor so appointed shall be regarded as a court witness. The court or either party may call and cross-examine the doctor regarding the basis for any conclusions and recommendations made to the court. The juvenile court may, in its discretion order additional examinations. . . . We perceive no constitutional impairment in such a procedure. 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.

In re S.R.J., 293 N.W. at 36 (emphasis added). The court's failure to perceive any constitutional impairments when compelling psychiatric evaluations is revealing. In re Gault, 387 U.S. 1 (1967), extended the fifth amendment privilege against self-incrimination to juvenile court proceedings. Id. at 47-55. The Minnesota Supreme Court had earlier held in State v. Olson, 274 Minn. 225, 143 N.W.2d 69 (1966), that under the state and federal constitutions, the state lacked the power to compel psychiatric evaluations of a defendant in a criminal proceeding who raised the issue of insanity. Id. at 231, 143 N.W.2d at 74. The court found it necessary to adopt Minn. R. Crim. P. 20.02(1), which provides for a bifurcated hearing on the issue of insanity in order to authorize compulsory
social, psychological, or psychiatric evidence it has available to bolster its case. Similarly, defense attorneys, obligated to effectively assist their juvenile clients, are likely to introduce substantial evidence of their clients' redeeming social value. Following this morass of evidence, juvenile court judges will continue to decide on a discretionary basis if a youth is amenable to treatment or not dangerous despite the absence of clinical tests or objective, validated indicators that accurately predict such traits.

In the final analysis, the problem lies not with the operative significance of the prima facie case language on the burden of proof, but with asking judges questions that they are unequipped to answer and then attempting to control judicial discretion when the judges' answers go awry. This is the problem that resurfaced in *Dahl*, which the legislature not only failed to address, but has now compounded.

2. *A Rebuttable Presumption versus the Burden of Persuasion—The California Alternative*

The decision to create a rebuttable presumption for certification based on age and offense was one of several alternative procedural strategies available to the Minnesota Legislature. Indeed, depending on the policies the legislature intended to advance and the Minnesota Supreme Court's interpretation of the prima facie case language, this strategy may be the least satisfactory resolution of the problem. If the goals of the legislature were to certify more youths generally, to certify youths with significant criminal histories more quickly and consistently, to constrain judicial discretion, to achieve equality throughout the state in the administration of waiver proceedings, and to increase the severity of punishment imposed on juveniles committing serious felonies, then at least two other legislative alternatives were preferable.

The legislature could have redefined juvenile court jurisdiction to exclude from juvenile courts youths with certain combinations of present offense and prior record. Such a legislative waiver results in "automatic" certification of certain mental examinations of the defendant. Unless the court bars introduction of compelled psychiatric testimony in all subsequent proceedings, the authority granted in *S.R.J.* runs afoul of the court's fifth amendment analysis in *Olson*.

184. Such a redefinition is often termed a legislative waiver. See notes 54-64 *supra* and accompanying text. Legislative redefinition of juvenile court jurisdiction is the mechanism advocated by the author. See Feld, *supra* note 1, at 573-78, 617-18.
youths to adult criminal court; this option is nondiscretionary—there is simply no occasion for a judicial waiver hearing. The virtues of legislative waiver include objectivity, consistency, economy, and ease of administration.

A second alternative would have been to shift the burdens of proof and persuasion to the juvenile. Rather than shifting the burden of proof, the legislature instead created a rebuttable presumption, the effect of which is simply to control the burden of production. Given the inherent uncertainties of a waiver proceeding, however, the creation of a rebuttable presumption may not effectively advance the legislature's underlying policies. One commentator, noting the significance of shifting these burdens, has stated that

the policy which gives rise to the presumption could justify placing the burden of persuasion on the opponent of the presumption. However, if the burden of persuasion is placed upon the other party it is not because of the presumption, rather it is because the underlying policy justifies it as a matter of substantive law. Judges and legislators must analyze more carefully to distinguish between the effects and use of burden of persuasion and presumptions.\(^{185}\)

Placing the burden of persuasion on a youth to prove amenability and nondangerousness 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 ambiguous 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 on the state. Indeed, this is the way in which California has resolved the balance of proof in certification proceedings.\(^{186}\)

California, prior to 1976, employed judicial certification, allowing a court to waive jurisdiction if it concluded that "the minor would not be amenable to the care, treatment, and training program available through the facilities of the juvenile court."\(^{187}\) The substantial disparities and inconsistencies in administration of such a broad statute,\(^{188}\) even when interpreted

\(^{185}\) Thompson, supra note 169, at 179.

\(^{186}\) See CAL. WELF. & INST. CODE § 707(b) (West Supp. 1980). See note 191 infra.


\(^{188}\) Edwards, supra note 20, at 611-12. "This wide disparity in unfitness rates indicates that judges from county to county may be applying very different criteria in deciding whether to find a minor unfit." Id.
in several California Supreme Court opinions, resulted in the legislature's addition of statutory criteria to guide the juvenile court in making its amenability determination. The following year the waiver statute was amended to make transfer mandatory upon the commission of certain enumerated offenses unless the youth affirmatively established his or her amenability within the juvenile court. The latest amendment placed the burden of proving amenability on the youth, rather than requiring the state to prove the youth's nonamenability. One commentator has noted that "[t]he legislature apparently believed that the state should not have to allege particular egregious circumstances in order to transfer a juvenile to adult court if the juvenile were accused of a particularly violent crime."

An obvious question arises: to what extent did shifting the burden of proof to the juvenile affect the numbers and characteristics of young offenders being certified for adult prosecution? If, as contended, the amenability determination is an inherently unanswerable question, then shifting the risk of uncertainty and the burden of persuasion should have substantially increased the number of juveniles waived. Indeed, there was a substantial and dramatic increase in the number of youths who were tried as adults after having been charged with


190. CAL. WELF. & INST. CODE § 707(a) (West Supp. 1980) (emphasis added) provides:

the juvenile court may find that the minor is not a fit and proper subject to be dealt with under the juvenile court law if it concludes that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, based upon an evaluation of the following criteria:

(1) The degree of criminal sophistication exhibited by the minor.
(2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.
(3) The minor's previous delinquent history.
(4) Success of previous attempts by the juvenile court to rehabilitate the minor.
(5) The circumstances and gravity of the offense alleged to have been committed by the minor . . . .

191. The waiver statute now includes such offenses as murder, arson, armed robbery, sex offenses with force, kidnapping, and assault with a firearm or with force. See CAL. WELF. & INST. CODE § 707(b) (West Supp. 1990).

192. See id. at § 707(c).

one of the enumerated offenses. After accounting for possible fluctuations in the rates of juvenile crime, researchers evaluating the impact of shifting the burden of proof reported, for example, that "Los Angeles County experienced a 318% increase in certification hearings and a 234% increase in certifications" between 1976 and 1977. 194 Moreover, this evaluation found that 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 conviction, they were more likely to be incarcerated than their juvenile counterparts. 195 Thus, by shifting the burden of proof and the risk of nonpersuasion the California Legislature increased the numbers of juveniles certified, achieved greater equality in the administration of waiver throughout the state, and increased the severity of sanctions imposed upon those youths ultimately tried and convicted as adults.

Whether the Minnesota legislation, which creates a rebuttable presumption of adulthood but leaves the burden of proof on the prosecution, will have the same effect is uncertain. The effect of the legislation will depend, to a considerable degree, on the manner in which juvenile courts apply the prima facie case guidelines and the extent to which the Minnesota Supreme Court attempts to regulate juvenile court discretion in cases decided on a full evidentiary record under the more permissive subdivision two. 196 The legislature directed the Governor’s Crime Control Planning Board to evaluate the impact of the new legislation; the board will compare the numbers of waivers granted before and after its adoption and survey the characteristics of offenders certified. 197 If the net effect of the

195. Id. at 32.
When minors are sent to criminal court, they face the same probability of being convicted that they would face if they had remained in the juvenile court, but are a little more likely to be incarcerated as a result, even after controlling for difference in types of offenses considered by the two courts. About 40% of all juveniles convicted in criminal court received non-juvenile sentences, while about 54% go to the California Youth Authority and only 5% are not incarcerated at all. We must conclude that there has been some increase in the severity of treatment for these juvenile felons as a result of the new law. Certainly, juveniles arrested for 707(b) offenses face a higher risk of certification since the law went into effect in Los Angeles County.

Id. at 34-35.
196. See Minn. Stat. § 260.125(2) (1980); notes 162-83 supra and accompanying text.
legislation is only a marginal rural/urban shift in certification cases, then the legislature may want to reconsider the California waiver alternative.

3. The Legislature's Prima Facie Matrix—the Rationale and its Implementation

The legislature's decision to make certain combinations of present offense and prior record a prima facie case for certification raises some questions about the policy rationale for the choices made. By using offense rather than offender characteristics to make certification decisions, legislators relied on retributive or utilitarian justifications for punishment rather than the traditional, rehabilitative rationale.\textsuperscript{198} A retributive rationale excludes young offenders from juvenile court jurisdiction on the basis of the seriousness or culpability of a past offense; a utilitarian/preventive rationale uses past offenses to predict the likelihood of future violations and thus the need for restraint. A retributive decision can be based on the seriousness of the present offense alone, whereas a reliable utilitarian judgment requires more extensive evidence of persistence. The tension between past-oriented retributive decisions and future-oriented utilitarian decisions exists in virtually all offense-oriented sentencing schemes.\textsuperscript{199}

This same tension is reflected in the certification matrix.\textsuperscript{200}

\textsuperscript{198} See text accompanying notes 180-81 \textit{supra}.


\textsuperscript{200} Selecting the matrix criteria also entails an explicit value choice about the quantity and quality of youthful deviance that will be tolerated within the juvenile system before a more punitive adult response is mandated. Since youths will normally not receive better rehabilitative services in the adult correctional system than are available in the juvenile system, the decision to transfer a youth to the adult process must ultimately be defensible on either retributive or general prevention grounds. From the community's perspective the principal values of exclusion are enhanced community protection through the greater security and longer sentences available in the adult system, increased general deterrence through the greater certainty of consequences, and reaffirmation of fundamental societal norms regarding intolerable deviance. Since most offenders, adults and juveniles alike, do not require penal incarceration, however, legislative exclusion is appropriate only when an offender's past record of persistence and the seriousness of his present offense appear to society to warrant confinement. The value judgment as to when this situation is reached reflects a tension between retribution and utility. While a retributive value choice might dictate automatic exclusion of those who commit a serious, heinous offense, a choice based on utility requires that the serious offender be excluded only if shown to be a chronic recidivist.

Feld, \textit{supra} note 1, at 572.
Exclusion solely on the basis of serious offenses against the person or those committed with "particular cruelty" reflects the retributive rationale, while exclusion on the basis of extensive juvenile felony histories embodies the predictive rationale. The legislature emphasized the seriousness of a juvenile's present offense in constructing its matrix. The Sentencing Guidelines Commission also used a retributive sentencing rationale in drawing its imprisonment disposition line. Consequently, for juveniles committing serious offenses, there is a striking parallelism between those youths whose offenses render them presumptively out of the juvenile court and those whose same offenses and offense histories render them presumptively "in" prison under the adult sentencing guidelines. Thus, there is reason to expect that the legislature's goal of significantly increasing the penalties imposed on serious juvenile offenders will be realized for those youths committing offenses against the person and tried as adults.

Some of the specific elements of the new Minnesota matrix raise problems of consistency or implementation. For example, the decision to presumptively exclude only youths over sixteen years of age reflects existing certification practices that typically reach only older youths within the juvenile court's jurisdiction. However, the legislature has already determined that youths aged fourteen and older "may be prosecuted for a criminal offense" following appropriate certification proceedings. Moreover, developmental psychology research strongly supports this legislative endorsement of the common law judgment that by age fourteen youths have acquired the requisite capacity to be responsible for their criminal acts. Thus, there is no obvious reason for the legislature's decision to confine its prima facie case to juveniles sixteen years of age or older. Youths whose exclusion results from persistence—the utilitarian portion of the matrix—will probably be sixteen or older simply because it takes some time to acquire the requisite history of prior offenses. For youths whose exclusion is rooted in the seriousness of their offenses—the retributive portion of the matrix—there is no obvious difference between a first degree


203. Feld, supra note 1, at 609-11, nn.307 & 308.
murder committed by a fifteen-year-old and the same crime committed by a somewhat older youth.

There are some administrative problems posed by the portion of the matrix that excludes youths committing aggravated felonies against the person when the offense is committed with "particular cruelty or disregard for the life or safety of another." This is an inherently vague grant of discretion within a statute that already suffers from extreme imprecision. While obviously distinguishable, adult certification is the "capital punishment" of the juvenile court. Similar language in capital punishment statutes has been found to inject an impermissible potential for abuse into the decision-making process.

In Godfrey v. Georgia, the defendant was convicted of murder and sentenced to death for the shotgun killings of his wife and mother-in-law on the statutory ground that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." The United States Supreme Court re-emphasized its earlier holdings in Furman v. Georgia and Gregg v. Georgia that punishment should not be inflicted in an arbitrary, inconsistent, or totally discretionary fashion and that "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." A plurality of the Court observed that "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman,'" and held that "[t]he petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder." Thus, if the shotgun murder in Godfrey could not be characterized as "outrageously or wantonly vile," would the killing in Dahl be one committed with

205. See notes 206-12 infra.
206. 100 S. Ct. 1759 (1980).
207. Id. at 1762 (quoting Ga. Code Ann. § 27-2534.1(b)(7) (1978)).
208. 408 U.S. 238 (1972).
210. 100 S. Ct. at 1764 (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976)).
211. Id. at 1765 (quoting Ga. Code Ann. § 27-2534.1(b)(7) (1978)).
212. Id. at 1767. An inflammatory dissent that dramatically and graphically described the killings to prove that the defendant fit the statute revealed a crime virtually indistinguishable from that committed in Dahl. Compare Godfrey v. Georgia, 100 S. Ct. at 1775-76 ("[t]he police eventually found her face down on the floor with a substantial portion of her head missing and her brain, no longer cabined by her skull, protruding for some distance onto the floor") with In re Dahl, 278 N.W.2d 316, 317 (1979) ("witness described the frontal section of his head as 'just disappeared, gone' ").
“particular cruelty”? In the final analysis, does this legislative standard of “particular cruelty” do anything other than encourage judicial arbitrariness by providing an inherently vague and discretionary statute that will ultimately reflect little more than variations in judges’ revulsion?

To establish a prima facie case for waiver several subsections of subdivision three require proof of an adjudication of one or more felony offenses “within the preceding 24 months” in addition to the present offense. The emphasis on prior felony convictions reflects the utilitarian/predictive components of the statute and provides the most reliable basis for deciding which juveniles are adults. The legislature apparently wanted to include in its presumptive exclusion provisions only those felonies committed by juveniles after they were fourteen years of age, that is, when they possessed common law criminal capacity. Since both sixteen- and seventeen-year-old youths can be certified under the provision, this legislative restriction can result in substantially different treatment of two juveniles with identical records and offenses because of the mere fortuity of when they happened to commit their prior crimes. Furthermore, there is little justification for considering only those felonies committed “within the preceding 24 months,” because most studies of the development of delinquent careers consistently reveal that the length of the record, not the time period in which the offenses are committed, is the best indicator of probable future delinquency. The imposition of a 24-month limitation simply introduces further arbitrariness and inconsistency in certification proceedings. Fortunately, this particular problem could be resolved by a statutory amendment specifying that the prior offenses to be considered are those committed after the youth is fourteen years of age.

Despite the legislative changes in the certification of serious juvenile offenders, two major problems remain. One problem is the requirement that a previously waived youth who commits another offense while still a chronological juvenile must be recertified prior to adult prosecution. Even with

214. See notes 59-64 supra and accompanying text.
215. See note 4 supra and accompanying text.
216. See notes 13 & 63 supra and accompanying text.
217. For example, the statute could be amended to read: “Has been adjudicated delinquent for an offense committed after the child was fourteen years of age, which offense would be a felony if committed by an adult . . . .”
218. Feld, supra note 1, at 582.
adoption of the sentencing guidelines, recertification is likely to occur in the case of the persistent juvenile property offender.\textsuperscript{219} For example, a youth with an extensive record of juvenile felonies—burglaries, thefts, stolen automobiles, and the like—excluded from the juvenile court shortly after reaching age sixteen could still be recertified and convicted of adult felonies three or four times before being presumptively imprisoned as an adult. The legislature could eliminate repetitive certification by providing that once a juvenile is transferred to adult criminal court and convicted of an offense within the prima facie case matrix, he or she will remain an adult for purposes of subsequent criminal prosecution.

The second problem is more fundamental. The waiver criteria of nonamenability to treatment and dangerousness are essentially broad grants of discretion incapable of even-handed administration.\textsuperscript{220} Most courts, recognizing the inherent ambiguity of these statutes, attempt to implement the legislature's will. These attempts are futile, however, when the legislature has failed to enunciate the proper function of juvenile courts and the basis upon which a waiver decision should be made. The most recent prima facie case reform is a tentative step toward resolving this fundamental problem. But the inclusion of offense-based criteria within a discretionary and permissive offender-oriented statute fails to address the conceptual inadequacies of the statute itself.\textsuperscript{221}

D. \textbf{ADVERSARY NATURE AND FORMALITY OF WAIVER HEARINGS}

Two changes in the juvenile code—the application of the rules of evidence to waiver hearings and the requirement that juveniles receive "the effective assistance of counsel"\textsuperscript{222}—will make waiver hearings and other juvenile court proceedings more lengthy, complex, formal, and adversarial.

1. \textit{Rules of Evidence}

Before the recent juvenile code amendments became effective, determinations of amenability and dangerousness were typically based on "soft" evidence—psychological and psychiat-

\textsuperscript{219} See generally 1980 Sentencing Guidelines, supra note 41.
\textsuperscript{220} See notes 29-31 supra and accompanying text.
\textsuperscript{221} For a discussion of the criteria's inadequacies, see notes 23-64 supra and accompanying text.
\textsuperscript{222} See Minn. Stat. § 260.155(1), -(2) (1980).
ric testimony,223 social history reports224 including summaries of school records, police reports, statements of neighbors, and the opinions of social workers and probation officers. A considerable amount of evidence in waiver hearings was hearsay and opinion evidence not subject to confrontation or cross-examination; almost any information about the youth was theoretically "relevant and material" to the waiver decision.225

The new statute requires waiving courts to adhere to the rules of evidence226 and thus represents a substantial departure from past practice. The Minnesota Juvenile Code, before the recent amendments, expressly provided that hearings "shall be without a jury and may be conducted in an informal manner."227 Standards of admissibility of evidence in juvenile court hearings were traditionally relaxed because juvenile proceedings were informal and conducted before a judge rather than a jury. The new statute will result in more formal and time-consuming proceedings. Adherence to evidentiary rules may also cause the exclusion of some evidence that was formerly admissible, despite the supreme court's insistence that a waiving court should have as much evidence available to it as possible.228

Two recent Minnesota Supreme Court opinions reaffirmed the court's support of relaxed evidentiary standards. In In re S.R.J.229 the court reiterated that "a reference hearing is a dispositional hearing and the strict rules of evidence are not applicable" and held that the "appropriate test is whether the evidence is relevant and material."230 In In re T.D.S.231 the

223. For example, in Kent v. United States, 383 U.S. 541 (1966), defense counsel arranged for Kent's evaluation by two psychiatrists and a psychologist who were prepared to testify on his behalf. Id. at 545. Recently, the Minnesota Supreme Court in In re S.R.J., 293 N.W.2d 32 (Minn. 1980), established procedures by which psychiatric or psychological evaluations are to be made and their reports used in waiver proceedings. See note 183 supra.

224. Providing defense counsel with access to the contents of the social history file was one of the due process rights guaranteed by Kent v. United States, 383 U.S. at 562. Accord, In re I.Q.S., 244 N.W.2d 30, 36 (Minn. 1976).

225. MINN. JUV. CT. R. 6-5, 8-6 (admit all "material and relevant" evidence "including hearsay and opinion evidence") (MINN. STAT. § 480.0595 directs the state supreme court to promulgate new juvenile court rules).


228. 293 N.W.2d 32 (Minn. 1980).

230. Id. at 35. This holding is consistent with the recommendations of the American Bar Association's Juvenile Justice Standards Project. See Institute of Judicial Administration, American Bar Ass'n, Juvenile Justice Standards: Standards Relating to Dispositional Procedures (1980); Transfers Between Courts Standards, supra note 19, § 2.2C at 39-44.

231. 289 N.W.2d 137 (Minn. 1980).
court, upholding the admission of police officers’ testimony about their investigation and interviews with the victim and a co-defendant, noted that

[when hearsay is reliable and an opportunity to dispute it is afforded, application of strict exclusionary rules of evidence to reference hearings would impede both the state and the juvenile in fully advising the court of relevant considerations.232]

Perhaps unknowingly, the legislature, in requiring adherence to the rules of evidence, overruled these cases and the pre-existing practices far more successfully than it overruled Dahl.233

Some of the testimony that would usually be excluded under the rules of evidence will still be admissible if out-of-court declarants testify directly and are subjected to cross-examination. Although much of the information collected by probation officers in their compilations of a juvenile’s social history will also inadmissible, all of the individuals consulted may be subpoenaed to testify directly. Adherence to the rules of evidence, however, will increase the cost of reference proceedings and may either prolong the proceedings or force the state to forego presentation of some of its evidence.

2. Effective Assistance of Counsel in Certification Hearings and in Juvenile Court Proceedings

The recent legislation also provides that a juvenile shall receive the “effective assistance of counsel” both in waiver hearings and in other juvenile court proceedings.234 Determining what “effective assistance of counsel” means in reference pro-

232. Id. at 140 (emphasis added). Having ruled that the statutes and rules allowed the admission of the hearsay, the Minnesota Supreme Court also rejected the juvenile’s claim that receipt of hearsay testimony violated his constitutional rights to confrontation and cross-examination, citing Kent v. United States, 383 U.S. 541 (1966), and In re Gault, 387 U.S. 1 (1967). The court reasoned that “[s]ince there is no adjudication of guilt or innocence at the reference proceeding, the full panoply of trial rights is inapplicable.” Id. at 141. The court did not consider whether the denial of confrontation and cross-examination also denied the youth the effective assistance of counsel to which he is entitled. See note 234 infra and accompanying text.

233. See notes 65-86 supra and accompanying text.

234. Minn. Stat. § 260.155(2) (1980). In one sense, the addition of the language “effective assistance of counsel” is redundant because juveniles have been constitutionally entitled to the assistance of counsel in reference hearings since Kent v. United States, 383 U.S. 541, 561 (1966), and in delinquency adjudications since In re Gault, 387 U.S. 1, 36-37 (1967). By definition, the assistance of counsel required by these decisions must be effective, since ineffective assistance of counsel is a constitutional violation, a deprivation of the fundamental right that those decisions recognized. See, e.g., United States v. DeCoster, 487 F.2d 1197, 1201 (D.C. Cir. 1973); Gardner v. Florida, 430 U.S. 349, 358 (1977).
ceedings and delinquency adjudications presents a difficult issue. This determination requires standards of conduct by which appellate courts can review the challenged performance of attorneys. Because "attorneys functioning in a legal system that serves benevolent as well as punitive goals are likely to view their role somewhat differently from attorneys acting within the adult criminal justice system," the question remains whether there should be any difference in the standards of performance to which counsel in criminal and juvenile proceedings are held.

Whatever philosophical differences between juvenile and adult criminal proceedings once may have existed, the role of effective counsel in juvenile adjudications and waiver hearings must now be that of an adversary and an advocate comparable to the role of counsel in criminal proceedings. The purpose of juvenile courts in Minnesota is no longer exclusively benevolent. A juvenile's prior felony adjudications now affect his or her exclusion from juvenile court under the prima facie case matrix. Exclusion from juvenile court results in the loss of a variety of benefits and the far more serious consequences of an adult criminal conviction. Any juvenile felony conviction obtained after a youth is sixteen years of age is included in the youth's adult criminal history for purposes of increasing sentences under the adult sentencing guidelines. Given these significant consequences, "effective assistance of counsel" necessarily requires a role much more consonant with the criminal justice system than with the traditional, rehabilitative juvenile court.

Although a full explication of effective assistance of counsel in waiver hearings and juvenile proceedings is beyond the scope of this Article, it is worth noting that appellate courts have drawn on several sources to evaluate the performance of counsel, including various American Bar Association standards and appellate court decisions. These standards and

235. Feld, supra note 1, at 601.
237. The American Bar Association has promulgated certain standards that analyze various aspects of counsel's responsibilities during the course of a criminal trial and at the time of sentencing. See generally INSTITUTE OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASS'N, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (1971); INSTITUTE OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASS'N, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (1968). These standards have received sub-
decisions provide a basis for determining the meaning of "effective assistance of counsel" in waiver hearings and juvenile adjudications. For example, uncounseled juveniles should not be permitted to waive their right to the assistance of counsel because the consequences of certification are substantial, the determination of a juvenile's competence to make a knowing and intelligent waiver is problematic, and the social utility of allowing juveniles to waive counsel is minimal.

Once a juvenile's counsel has been appointed, the attorney "should seek to discover at the earliest opportunity whether transfer will be sought and, if so, the procedure and criteria according to which that determination will be made." Given the inherent uncertainties, the breadth of the inquiry, and the nature of the facts at issue, adequate preparation for a certification proceeding is apt to be more time-consuming and demanding than preparation for a trial. Counsel must be prepared to respond to more than the factual issues surrounding the offense alleged because "the inquiry may range over the entire social, psychological and behavioral history of the respondent." Counsel must also become familiar with any local var-

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238. The performance of counsel in juvenile proceedings has been the subject of appellate court review and supervision. See, e.g., Geboy v. Gray, 471 F.2d 575, 579-80 (7th Cir. 1973); In re T.D.S., 289 N.W.2d 137, 149 (Minn. 1980).

239. See Kent v. United States, 383 U.S. 541, 558 (1966); COUNSEL FOR JUVENILES STANDARDS, supra note 237, § 8.1 at 161-63; TRANSFERS BETWEEN COURTS STANDARDS, supra note 19, § 2.3A at 45-46.

240. Notwithstanding the Supreme Court's decision in Faretta v. California, 422 U.S. 806 (1975), which allowed criminal defendants to waive counsel and proceed pro se, and the possibility that some juveniles may possess sufficient maturity to make such a decision, the complexities of certification decisions, the scope of the inquiry, and the extensive reliance on the expert testimony, militate against encouraging waivers.

241. COUNSEL FOR JUVENILES STANDARDS, supra note 237, § 8.2(a) at 163.

242. Added time for preparation may be even more essential in a case involving a juvenile than in the case of the average adult offender, including "the need to investigate an entire life, to devise a plan for a useful future," and the inability to rely on the immature judgment of the juvenile client. Geboy v. Gray, 471 F.2d 575, 579 (7th Cir. 1973) (quoting Miller v. Quatso, 332 F. Supp. 1269, 1275 (E.D. Wis. 1971)).

243. COUNSEL FOR JUVENILES STANDARDS, supra note 237, § 8.2(a) at 163-65.
iations in procedures and any informal criteria used by the court that may affect defense strategies and planning.

To be effective, a juvenile's counsel thus must be given an adequate opportunity to prepare for the extensive inquiry.\(^{244}\) He or she should examine all of the reports, social histories, documents, and other evidence that the state intends to introduce or on which the court may rely.\(^{245}\) Although a probation officer's report to the juvenile court typically includes much of the information needed for an amenability or dangerousness determination, an effective attorney will independently investigate the information contained in the social history in order to supplement or correct it.\(^{246}\) An effective attorney should employ an independent psychiatrist or psychologist to help evaluate the evidence if such aid appears warranted.\(^{247}\) In addition to securing an independent expert witness to examine the youth and preparing the expert witness to testify, the attorney should also investigate the range of available treatment and security facilities in order to offer the court an alternative to waiver.\(^{248}\)

Following the adoption of the rules of evidence, a waiver hearing is in every sense a formal, trial-like proceeding. Thus, at the time of the transfer hearing "it is the lawyer's duty to make all motions, objections or requests necessary to the protection of the client's rights in such form and at such time as

\(^{244}\) See Geboy v. Gray, 471 F.2d 575, 579 (7th Cir. 1973); cf. Haziel v. United States, 404 F.2d 1275, 1279 (D.C. Cir. 1968) (the child's advocate must fully investigate the alternatives to waiver).

\(^{245}\) COUNSEL FOR JUVENILES STANDARDS, supra note 237, § 8.2(b) at 165.

\(^{246}\) Id. Counsel is obliged to supplement the reports when incomplete and challenge them when inaccurate. See Kent v. United States, 383 U.S. 541, 563 (1966).

\(^{247}\) The Institute of Judicial Administration has commented on the importance of independent psychological evaluations in transfer proceedings:

Since the respondent's mental condition is always relevant to and sometimes determinative of the appropriateness of transfer, representation at this stage will frequently demand presentation of expert opinion on the client's behalf. While clinical services may be available at or through the court, the tendency of psychiatrists and psychologists who work frequently with judges and probation officers to adjust their evaluations to the known views of those with whom they deal has been well established. The lawyer should, therefore, also be prepared to seek appointment of independent psychiatric or psychological witnesses where that course seems warranted. Consultation with an independent expert will provide counsel with knowledge concerning the child and his or her condition which can contribute significantly to effective examination of prosecution evidence and, possibly, a source of qualified rebuttal evidence on the child's behalf.

COUNSEL FOR JUVENILES STANDARDS, supra note 237, § 8.2(b) at 166 (citations omitted).

\(^{248}\) See In re T.D.S., 289 N.W.2d 137, 141 (Minn. 1980).
will best serve the client's legitimate interests at trial or on appeal. In addition, counsel's effective representation of a juvenile's interests may also require the lawyer to rigorously cross-examine witnesses and court personnel. Some courts have, however, suggested that counsel in waiver hearings should only present evidence that will aid the court in its decision and not "denigrate the [social services] staff's submissions and recommendations." Indeed, many juvenile court judges tend to be protective of their social services personnel and are disinclined to subject them to effective cross-examination. Such a defensive posture, however, was clearly rejected by the Supreme Court in Kent v. United States:

[I]f the staff's submissions include materials which are susceptible to challenge or impeachment, it is precisely the role of counsel to "denigrate" such matter. There is no irrebuttable presumption of accuracy attached to staff reports. If a decision on waiver is "critically important" it is equally of "critical importance" that the material submitted to the judge . . . be subjected, within reasonable limits having regard to the theory of the Juvenile Court Act, to examination, criticism and refutation.

Although regular juvenile practitioners may be reluctant to jeopardize their relationships with the juvenile courts by subjecting social services personnel to searching scrutiny, "[i]t is unprofessional conduct for counsel knowingly to forego or limit examination of a witness when it is obvious that failure to examine fully will prejudice the client's legitimate interests."

Counsel also has the responsibility to minimize the influence improper considerations have on the determination. Many waivers are sought on the basis of a very visible or sensational offense that has aroused strong public opinion and


[C]ounsel has the duty to protect the client's interests by every lawful means, including resort to ordinary principles of proof and disproof. Counsel should, of course, exercise professional judgment in deciding whether to challenge any given question or offer of evidence, and failure formally to raise an objection is often consistent with sound trial strategy rather than abandonment of responsibility. As in every other situation, however, counsel's professional judgment must be exercised in the client's interests. When evidence is offered or a ruling made that the lawyer considers prejudicial to the client's interest and there exists a good faith basis for challenge, the attorney is obliged to make proper objection, not only for purposes of informing the trial judge but also for appellate purposes.

Id. § 7.4(b) at 143-44.

250. Id. § 7.8(a) at 149.


253. Counsel for Juveniles Standards, supra note 237, § 7.8(a) at 149.
thereby created almost irresistible pressures on the court. Counsel must neutralize the court’s tendency to “sacrifice” a youth in order to avoid ensuing scandal.254

The provision for effective assistance of counsel is not confined to waiver hearings, but applies to delinquency determinations within the juvenile court as well. The requirement that juveniles be effectively assisted by counsel in adjudications has important implications for the role of counsel when representing juveniles in these proceedings. A youth’s offense history is now significant for two reasons: it may cause the presumptive exclusion of the youth from juvenile court jurisdiction, and it is a liability if the youth is sentenced as an adult. The effect of sustained or admitted felonies in both contexts should encourage attorneys to defend more aggressively the legal interests of their young clients.255 Because of the cumulative impact of felony convictions, attorneys representing juveniles must consider not only the probable disposition on the basis of the present charge but also the collateral consequences of an admission or conviction for subsequent adjudications.

This increased significance of offenses will influence defense attorneys both in their litigation strategies and their plea

254. See Comment, Representing the Juvenile Defendant in Waiver Proceedings, 12 St. Louis U.L.J. 424, 437-38 (1968). One writer has observed that Community fear and outrage in the wake of dramatic increases in violent crimes by juveniles as well as the influence of “law and order” political leaders are undeniably factors which intrude upon the fitness decisions of the juvenile courts. This is true whether a judge shares public sentiments or simply seeks to divert pressure from the entire juvenile justice system by sacrificing the most serious of delinquents through transfer to the criminal courts. Comment, supra note 49, at 1008-09.

255. The cooptation of defense attorneys in adult criminal proceedings has been analyzed in Blumberg, The Practice of Law as Confidence Game: Organizational Cooptation of a Profession, 1 L. & Soc’y Rev. 51 (1967). Blumberg argues that institutional pressures and the desire to maintain stable relationships with judges and other personnel thwart effective advocacy. Defense attorneys become dependent on prosecutors’ and judges’ cooperation. Conversely, prosecutors and judges depend on defense attorneys to cooperate in order to expedite a large number of cases in a short period of time. Consequently, the system becomes one of informal relationships in which the maintenance of organizational stability may be more important than the representation of any given client. This analysis has been applied to juvenile court attorneys. See A. Platt, supra note 3, at 163-75. See generally Duffee & Siegel, The Organization Man: Legal Counsel in the Juvenile Court, 7 Crim. L. Bull. 544 (1971); Platt & Friedman, The Limits of Advocacy: Occupational Hazards in Juvenile Court, 116 U. Pa. L. Rev. 1156 (1968). Resistance of cooperative pressures through adversarial representation is one of the underlying assumptions of the American Bar Association’s standards, see Counsel for Juveniles Standards, supra note 237.
bargaining practices. With the significance of prior felony offenses, amplified by the prima facie case matrix and the sentencing guidelines, both prosecutors and defense attorneys may find themselves constrained in their negotiating flexibility and forced to resolve more cases by litigation.

An attorney representing a juvenile with one or two prior felony adjudications should almost automatically litigate every subsequent felony allegation unless the prosecutor will accept a plea to a misdemeanor. A juvenile has an absolute right to put the state to its proof, and a defense strategy based solely on the possibility that a critical witness will not appear or that the juvenile will only be convicted of a lesser included misdemeanor is a preferable tactic to adding another felony conviction to the running total. Traditionally, juvenile courts, unlike adult criminal courts, have not varied their dispositions on the basis of whether the defendant was adjudicated a delinquent or had entered an admission to the petition. It is arguably per se ineffective assistance of counsel if an attorney advises a juvenile to plead guilty to a felony when the juvenile has been found guilty of two prior felonies because any subsequent felony allegation, regardless of its ultimate merit, establishes a prima facie case for prosecution as an adult.

E. DISPOSITION OF SERIOUS YOUNG OFFENDERS AS JUVENILES AND ADULTS—TOWARD AN INTEGRATED SENTENCING SYSTEM

Ultimately, the issue of certification is a question of the appropriate dispositions of serious young offenders who happen to be chronological juveniles. The traditional distinction between “treatment” as a juvenile and “punishment” as an adult is based on an arbitrarily drawn line that has no criminological significance other than its legal consequences. The inconsistencies between the juvenile and adult systems often make futile any attempt to rationalize social control and the response to serious youthful deviance. These inconsistencies arise from the legislative failure to recognize that children are constantly

256. Under the present practice, there is no necessary relationship between the offense for which a juvenile pleads or is adjudicated a delinquent and the ultimate disposition. As a consequence, there is a relatively cavalier attitude on the part of prosecutors and defense attorneys in plea bargaining, since an admission of even one offense provides the court with all the legal authority it needs for maximum intervention.

Feld, supra note 1, at 607.

257. P. STRASBURG, supra note 1, at 90.
maturing; they are not irresponsible children one day and responsible adults the next, except as a matter of law.\textsuperscript{258} Moreover, there is a strong correlation between age and criminal activity with the rates of many kinds of criminal involvements peaking in mid-adolescence.\textsuperscript{259} The continuation of the artificial juvenile/adult dichotimization has resulted in a disservice to the public safety.\textsuperscript{260} The new Minnesota legislation and sentencing guidelines reveal the first, tentative moves toward the goal of integrated and rational sentencing policy, but further changes are needed before the goal can be attained.

1. \textit{Dispositions of Juveniles as Juveniles}

One provision of the revised juvenile code that governs disposition of juvenile offenders will directly affect certification. A new code section allows juvenile courts to “require the child to pay a fine of up to $500.”\textsuperscript{261} Rural courts that had previously certified juveniles in order to impose “adult” fine dispositions in misdemeanor cases,\textsuperscript{262} are now authorized to fine juveniles without resort to the subterfuge of an adult certification.\textsuperscript{263} Although the United States Supreme Court, in \textit{Baldwin v. New York},\textsuperscript{264} allowed the imposition of fines for “petty offenses”

\begin{footnotes}
\item[258] See text accompanying note 11 supra.
\item[259] See note 63 supra and accompanying text. See also FBI Crime Reports, supra note 8, at 194-96.
\item[260] See Confronting Youth Crime, supra note 1, at 5; Boland & Wilson, supra note 9 at 29-32; Boland, Fighting Crime: The Problem of Adolescents, 71 J. Crim. L. & Criminology 94, 96-97 (1980).
\item[262] See Supreme Court Study, supra note 53, at 21.
\item[263] Most of the courts imposing such fines were in rural areas. See note 53 supra. The availability of fining power in juvenile court and the less serious crime problems experienced in rural counties should result in certification becoming an almost exclusively urban county phenomenon under the presumptive exclusion provisions. Zimring reports that [t]o the extent that official statistics mirror reality, serious youth violence occurs more often in cities than in non-urban areas, involves boys far more frequently than girls, and is concentrated among low social status, ghetto-dwelling urban youth .... Offenses of violence, particularly robbery, are intensely concentrated in the nation's large cities.
\end{footnotes}
without a jury trial,\textsuperscript{265} the propriety of expanding the fining power of juvenile courts is questionable.

At the same time that the legislature granted juvenile courts the authority to levy fines, the Minnesota Department of Corrections administratively implemented a plan providing for determinate sentences in juvenile institutions based on a juvenile's present offense and prior record.\textsuperscript{266} In part, the decision to implement a determinate sentencing system reflects the inadequacies and inequities of individualized treatment dispositions. An evaluation of commitment and release decision-making in juvenile correctional institutions in Minnesota concluded that:

There is no relationship between the juvenile’s offense and the disposition of his case at either the State Training School or the Minnesota Home School.

Status offenders stay slightly longer in the institutions than serious offenders. . . . Juveniles at the State Training School stay longer than juveniles at the other two institutions.

All in all, there are no consistent or systematic criteria used in making decisions about whether or not to institutionalize and when to parole juveniles.\textsuperscript{267}

The study found that commitment and release decisions were so “individualized” that no factors explained the behavior of institutional staff in their handling of different youths.\textsuperscript{268} There was no relationship between the most serious offenses in juveniles' files and their dispositions;\textsuperscript{269} the most significant variable affecting the length of youths' incarceration was the institution to which they were committed.\textsuperscript{270} Studies in other jurisdictions have also discovered that within a nominally “indeterminate” juvenile sentencing system incarcerated youths serve “fixed sentences” based on the institutions to which they are committed. The studies conclude that a pattern of uniformity in sentences, rather than individualized differentiation,
prevails in such institutions.\textsuperscript{271} Thus, the Department of Corrections' decision to implement presumptive determinate sentences, which are similar to those mandated by the adult sentencing guidelines, introduces greater "individualization" of dispositions than the former "therapeutic" regime. The decision is clearly a step toward rationality and justice, albeit a departure from the "rehabilitative" tradition.

2. \textit{Dispositions of Serious Young Offenders as Adults—the Impact of Sentencing Guidelines}

An amendment to the code requires juvenile courts to preserve juveniles' offense records until the offenders reach twenty-three years of age and to share those records with other juvenile and adult sentencing courts.\textsuperscript{272} With the increased significance of juvenile felony convictions, access to juvenile criminal records is necessary both for juvenile courts to implement the prima facie matrix and for adult sentencing authorities to calculate an offender's juvenile criminal history. The decision of the Sentencing Guidelines Commission to include juvenile felony convictions within the adult criminal history was a significant step toward developing an integrated sentencing policy for serious young offenders.\textsuperscript{273}

The use of prior juvenile convictions in adult sentencing decisions is a policy followed in many jurisdictions.\textsuperscript{274} The

\textsuperscript{271} G. WHEELER, COUNTER-DETERRENCE: A REPORT ON JUVENILE SENTENCING AND EFFECTS OF PRISONIZATION 36 (1978).


\textsuperscript{273} Effective May 1, 1980, Minnesota adopted a system based on presumptive, determinate sentencing guidelines that govern both the dispositional decision—whether or not to imprison an offender—and the durational decision—for how long to imprison. See 1980 SENTENCING GUIDELINES, supra note 41, at 8-11. Both of these decisions—disposition and duration—are determined by reference to a matrix—a two-dimensional grid integrating the seriousness of the current offense and the extensiveness of the prior criminal history. Id. at 27-29, 38. For purposes of this analysis, the most significant aspect of the presumptive sentencing guidelines is the decision to include up to two juvenile felony adjudications occurring after an offender's sixteenth birthday for a maximum of one point in the adult criminal history score. Id. at 29. Juvenile felony convictions are used for adult sentencing purposes until the offender is 21 years old. Id.

\textsuperscript{274} See, e.g., People v. McFarlin, 389 Mich. 557, 575, 208 N.W.2d 504, 514 (1973); Annot., 64 A.L.R.3d 1291, 1295-1304 (Supp. 1980).
Minnesota Supreme Court, in State v. Johnson, approved the consideration of a juvenile record in the sentencing of an adult offender: "[w]e see nothing improper in the court's taking into consideration the past conduct of a juvenile 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?" Similarly, prior juvenile convictions were relied upon in several adult sentencing cases in which the United States Supreme Court upheld the propriety of the sentences imposed.

Prior to the amendments, there had been questions about the availability of a youth's juvenile court records to certifying courts and adult sentencing authorities; the recent amendments clarify juvenile courts' responsibility to retain and disclose these records. The Sentencing Guidelines Commission's decision to include juvenile felony convictions in an adult criminal history score was predicated on several substantial policy considerations. The commission initially found that including such information was consistent with existing adult sentencing practices, especially in the urban counties of the state. 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.

The commission chose to include in the sentencing framework features of incapacitation, which focus on persistence of criminal activity, as well as features of "just deserts," which focus on the seriousness of criminal activity. A pattern of

275. 299 Minn. 143, 216 N.W.2d 904 (1974).
276. Id. at 148, 216 N.W.2d at 908.
278. MINN. STAT. § 260.161(2) (1978) states that the records of juvenile court are not open to inspection and their contents cannot be disclosed without a court order. MINN. STAT. § 260.211(2) (1978) (repealed 1980) further stated that the juvenile court is not precluded from disclosing information to the proper persons "if the court considers such disclosure to be in the best interests of the child or of the administration of justice." Juvenile court records that are not sealed under MINN. R. JUV. CT. 11-3 are authorized to be released by MINN. R. JUV. CT. 11-2(2) (MINN. STAT. § 480.0595 directs the state supreme court to promulgate new juvenile court rules).
280. Id.
281. See text accompanying note 43 supra.
criminal violations is reliable evidence of persistence, regardless of whether it occurs while the offender is a juvenile or an adult. Thus, the commission decided to “identify only those whose juvenile record included repetitive felony-type adjudications, which occurred during the last two years of their minority, and which would be considered only during the first three years of their majority.”

The commission's decision to include juvenile felony adjudications in adult criminal history scores was made after substantial deliberation and despite considerable opposition from some juvenile court judges. Although the inclusion of juvenile felony adjudications helps to pass information from the juvenile courts to adult sentencing authorities, the decision to include only a limited number of offenses with a set maximum of one point in the criminal history score impedes the development of a rational criminal sentencing policy.

The need to focus maximum intervention and criminal sanctions on the most active and persistent offenders calls for inclusion and equal weighting of all juvenile felony adjudications in the adult criminal history. Adolescents pose a serious street crime problem. Juveniles are disproportionately involved in criminal activity and their involvement in serious crime is increasing faster than the rates of crime in general. Moreover, there is increasing evidence that a relatively small subset of the youthful population—those youths with five or more criminal involvements—accounts for a disproportionately large amount of the total serious violent and repetitive property crime. The age at which a youth becomes a chronic, persistent, and therefore serious offender, is somewhere in the mid-to late teens. Thus, the evidence suggests that youths become chronic offenders in their mid-teens, persist in criminal activity into their mid-twenties, and then gradually reduce their

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283. Crime rates are high not because large numbers of people commit one or two crimes in a lifetime but because a relatively small number of people are habitual offenders . . . Most crime is committed by offenders when they are young, either as juveniles or young adults. Currently, the criminal justice system is not organized to restrain active young offenders.
284. See CONFRONTING YOUTH CRIME, supra note 1, at 3; F.B.I. CRIME REPORTS, supra note 8, at 194-96; Zimring, supra note 6, at 67-68.
285. See notes 6 & 13 supra and accompanying text.
286. See notes 6, 9, 13, 63 supra.
287. Id. (approximately 14 to 19 years old).
rates of involvement.\textsuperscript{288}

Despite this well-documented pattern of criminal career development, criminal sentencing policies have tended to maximize sanctions on older offenders whose criminal activity is declining while withholding sanctions from chronic younger offenders when their rate of activity is increasing.\textsuperscript{289} The punishment gap—the failure to maximize intervention in the lives of chronic and active criminal offenders—occurs because of the failure to integrate juvenile and adult criminal records for sentencing purposes. Adult criminal courts tend to rely on the seriousness of the present offense and the prior adult criminal history when making sentencing decisions.\textsuperscript{290} The failure to include the juvenile component of the adult offender’s criminal history stems from the confidential nature of juvenile court records,\textsuperscript{291} the functional and physical separation of the respective court services staffs,\textsuperscript{292} and the sheer bureaucratic ineptitude that makes the maintenance of an integrated offender tracking system and criminal history data set extremely difficult.\textsuperscript{293} When persistent juvenile offenders appear in adult criminal court for the first time, they are all too frequently treated as “instant virgins”—adult first-offenders—and entitled to all of the leniency typically accorded first-offenders.\textsuperscript{294}

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.\textsuperscript{295} Except for youths who are imprisoned as adults solely on the basis of a present offense against the person,\textsuperscript{296} 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.\textsuperscript{297}

\textsuperscript{288} \textit{Id.}
\textsuperscript{289} See Boland, supra note 260, at 94.
\textsuperscript{291} See note 278 supra.
\textsuperscript{292} See generally Boland, supra note 260.
\textsuperscript{293} See \textit{id}.
\textsuperscript{294} See generally 1980 Sentencing Guidelines, supra note 41.
\textsuperscript{295} See note 288 supra and accompanying text.
\textsuperscript{296} Youths can be imprisoned as adults solely on the basis of one present offense against the person that mandates incarceration on a “just deserts” basis. \textit{See} 1980 Sentencing Guidelines, supra note 41, at 9.
\textsuperscript{297} Id. at 38.
If the adult felonies occur after twenty-one, the juvenile history is ignored, and the pattern of "imprisoning offenders when their criminal activity is low and falling rather than high and rising"298 is perpetuated. 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.

3. **Enhanced Punishments on the Basis of Uncounseled Juvenile Convictions—The Implications of Baldasar and Burgett**

Apart from the policy rationale for using prior juvenile convictions to enhance penalties in both certification and adult sentences, there is a separate legal issue regarding the use of prior convictions. In a formal legal sense, there is virtual parity between juvenile and adult convictions.

Like adults, juveniles are entitled to due process in delinquency adjudications,299 and the state is required to establish their guilt beyond a reasonable doubt.300 Although juveniles have no right to jury trials, the Supreme Court has stated that a juvenile judge's factual determinations are as reliable as a jury's.301 Because of the parity between juvenile and adult adjudications, there is no inherent impropriety in using juvenile felony convictions both to exclude youths from the juvenile court and to punish them under an adult sentencing scheme.302

There is, however, a substantial problem with using prior convictions to enhance subsequent penalties if the prior convictions were obtained without the assistance of counsel or an adequate waiver of counsel. In *Baldasar v. Illinois*,303 the defendant was denied the assistance of counsel, convicted of a misdemeanor, and fined and placed on probation.304 In an earlier case,305 the United States Supreme Court had held such a practice to be constitutionally valid if the uncounseled convic-

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302. Although *McKeiver* may have been wrongly decided, the decision reflects the Supreme Court's belief that juvenile adjudications are the functional equivalent of adult determinations. See *id.*; notes 113-18 *supra* and accompanying text. See also Feld, *supra* note 1, at 601-05.
303. 100 S. Ct. 1585 (1980).
304. *Id.* at 1586.
tion did not result in incarceration. In Baldasar, however, the defendant was convicted a second time for a similar offense, and under an enhanced penalty statute, the prior uncounseled 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 the defendant's felony conviction. Justice Stewart 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." Justice Marshall 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." The Court's decision in Baldasar is consistent with an earlier line of cases that had held that an uncounseled felony conviction could not be used in a later trial to enhance punishments under recidivist statutes. In Burgett v. Texas, the Supreme Court noted that because it was unconstitutional to convict a person for a felony without benefit of a lawyer or the valid waiver of that benefit,

[t]o permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.

Although In re Gault extended the sixth amendment right to counsel to juveniles, many juveniles in Minnesota are still routinely adjudicated, or enter guilty pleas, without the assistance of counsel, an opportunity to consult with counsel, or a valid waiver of counsel. It has been estimated that as many as twenty-five percent of the juveniles in Hennepin County—the county with the state's most systematic juvenile legal services delivery system—routinely plead guilty at their arraignments without consulting counsel or making a "knowing and intelligent" waiver, and that an even greater proportion of

306. 100 S. Ct. at 1586.
307. Id. at 1587 (Stewart, J., concurring) (emphasis in original).
308. Id. (Marshall, J., concurring).
311. Id. at 115.
312. See note 183 supra and accompanying text.
Before juvenile felony convictions can be used to enhance punishment, both under the presumptive exclusion matrix and the adult sentencing guidelines, it must be established that the prior convictions were validly obtained. An extraordinarily heavy burden is imposed upon a juvenile court judge to determine if a juvenile's waiver of counsel is intelligently made with knowledge that the plea could be used for subsequent certification and adult sentencing purposes. Given the significance of felony convictions, if a defense attorney acquiesces in a juvenile's waiver of counsel he or she may not be effectively assisting the juvenile. Moreover, because the prima facie matrix applies to convictions obtained prior to August 1, 1980, defense counsel must be prepared to challenge the introduction of past felony convictions. To maximize social control of chronic juvenile offenders, prosecutors should be wary of waivers of counsel that may later render convictions invalid for purposes of certification and adult sentencing.

V. CONSEQUENCES AND CONCLUSIONS—DISMANTLING THE "REHABILITATIVE IDEAL"

Despite the extensive changes it made, the Minnesota Legislature must be faulted for failing to address the fundamental inadequacies of the waiver criteria—amenability to treatment and dangerousness. While the prima facie case option may facilitate more certifications, most cases will continue to be resolved by a prediction of a juvenile's amenability to treatment or dangerousness based on a greatly expanded court record. 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. Adopting a prima facie case standard or shifting the burden of proof does not resolve the problems posed by the inherently vague waiver criteria. Thus, the futility of using waiver standards that re-

314. Id.
316. See note 99 supra.
quire essentially subjective decisions based on soft evidence and inadequate predictors remains.

Although any conclusive assessment of the impact of the juvenile code revisions will require additional research, certain consequences seem likely. Because of the prima facie case offense matrix, a substantial increase in the number of motions for adult reference can be expected. If the Minnesota Supreme Court construes the prima facie language to permit a waiver based simply on a showing of various combinations of present offense and prior record, there will probably be an increase in the number of youths actually certified for adult prosecution. Because serious juvenile offenders are concentrated in urban areas, most of the youths certified under the new matrix will be residents of the state's urban counties. Many of the rural youths previously waived for minor offenses will probably remain under the juvenile court jurisdiction where juvenile courts will exercise their new power to levy fines. Fortunately, the legislature has directed the Governor's Crime Control Planning Board to evaluate the impact of this legislation, and the board's assessment of changes in certification practices will be available in 1982.

The legislative revisions will have an impact on other aspects of juvenile justice administration as well. Substantially more juvenile felony cases will probably go to trial. The increased litigation will stem from two sources: the implications of every juvenile felony determination for the prima facie offense matrix, and the inclusion of juvenile felony convictions within the sentencing guidelines' criminal history score. Since every felony counts within the matrix and a cumulation of felonies alone can ultimately result in exclusion, it can be expected that effective defense counsel will seldom allow clients to plead guilty to felonies; counsel will either insist on reduced charges or go to trial in hopes of acquittals, dismissals, or convictions on lesser included offenses. Similarly, the inclusion of juvenile felony convictions within the offense history score of the adult sentencing guidelines provides an additional impetus for defense counsel to resist juvenile convictions. Juvenile felony convictions will increase both the likelihood of eventual adult prosecution and the probability of adult incarceration.

The serious consequences of juvenile convictions should encourage defense counsel to provide the effective assistance mandated by the legislature. Although the ultimate meaning of "effective assistance" awaits judicial clarification, the expan-
sion of defendants' rights to effective counsel, the increasingly higher standards set by appellate courts, and the availability of standards promulgated by the American Bar Association suggest some probable directions. The clear implication is that effective counsel will have to prepare more thoroughly for waiver hearings and other juvenile court adjudications. Furthermore, juvenile felony convictions that are obtained in the absence of defense counsel or an effective waiver of counsel may not be used in making waiver decisions or determining adult sentences.

The legislature's juvenile code revisions may focus more of the system's scarce resources on serious juvenile offenders. This will reinforce the development of a two-track juvenile justice system, with a primary emphasis on formal adjudication of serious juvenile offenders while minor offenders are handled informally, if at all. Indeed, if most delinquency is spontaneously outgrown, a rationing system encouraging nonintervention is salutory.

The increased litigation generally will be more complex, time-consuming, and formal. This is partly a function of the expanded presence of lawyers and their responsibilities to juveniles, in both waiver proceedings and felony adjudications. Because the burden of persuasion will remain on the prosecution despite proof of a prima facie case, defense counsel will be encouraged to introduce more extensive social histories and other forms of rebuttal evidence. Finally, the application of the rules of evidence to waiver and adjudicative hearings will further expand the role of attorneys in juvenile litigation and will increase the complexity, costs, and time associated with juvenile court proceedings.

These developments raise the further question of whether juveniles should be tried by jury, at least in felony adjudications. The legislative and administrative reforms will probably create more formal and adversarial juvenile court proceedings and will force greater emphasis on the more serious juvenile offenders. The revisions will have implications for adjudicative and waiver hearings, adult criminal sentences, determinate dispositions in juvenile correctional facilities, and the very purpose of the juvenile code. Viewed as a whole, the revisions eliminate almost all remaining distinctions between juvenile and adult criminal proceedings. Except for the absence of jury trials, juvenile court proceedings now encompass all of the trappings of a criminal prosecution. The ramifications of juve-
nile felony convictions for eventual adult waiver and adult sentences make juvenile adjudications far more significant than they had been previously. The use of determinate sentences in juvenile institutions, based on the present offense and prior record, calls into question the "therapeutic" rationale of juvenile dispositions. Moreover, the juvenile code's revised purpose clause, with its greater emphasis on the integrity of the substantive criminal law, eliminates even rhetorical support for the traditional rehabilitative goals of juvenile justice. Whether Minnesota can still deny jury trials to juveniles because they are being "rehabilitated" within the juvenile justice system is a question that remains unanswered.

The question of jury trials suggests another inquiry: When is a juvenile court still a juvenile court? If juvenile proceedings are now criminal prosecutions in all but name and if juries should thus be provided, there seems to be little justification for maintaining a separate juvenile justice system. Is there any reason not to try all offenders, regardless of age, in district court with full procedural safeguards? Following conviction in district court, juvenile offenders could receive appropriate dispositions on the bases of present offenses, criminal history, age, and availability of appropriate facilities. The new reality of the juvenile and criminal justice systems is a virtual convergence in procedure and substance. In light of the many real similarities, not the nominal differences, there is scant reason to persist in the fiction of a separate, and ultimately second-class, juvenile adjudicative process.