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Judicial Waiver Policy and Practice: Persistence, Seriousness and Race

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Introduction

One of the most controversial contemporary criminal policy issues is whether serious or chronic young offenders should be tried and sentenced as juveniles or adults. Defining the boundary between juvenile and criminal courts depends upon the answers to a host of inter-related questions: Who are serious juvenile offenders? On the basis of what characteristics are they identified? Who should decide which system will deal with them and why? Does it make any difference, either symbolically or in terms of public safety, whether states try and sentence some youths as juveniles or adults? The diversity of legislative strategies to resolve these dilemmas reflect the practical and theoretical complexity of the problem.[1]

A waiver decision entails a sentencing policy choice between punishment in adult criminal court and rehabilitation in juvenile court.[2] Such a decision requires a choice between sanctions based

1. *See* Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 505-07 (1987) [hereinafter *Legislative Changes in Waiver*] (summarizing and analyzing waiver legislation); DEAN J. CHAMPION & G. LARRY MAYS, TRANSFERRING JUVENILES TO CRIMINAL COURTS 53-56 (1991) (discussing federal and state juvenile justice legislation).

2. Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 269 (1984) [hereinafter *Criminalizing Juvenile Justice*]; *see generally* Barry C. Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515, 516 (1978) [hereinafter *Reference of Juvenile Offenders*] (recognizing the transfer mechanism as the "gateway" between juvenile and adult criminal courts); DONNA M. HAMPARIAN ET AL., MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: YOUTH IN ADULT COURTS: BETWEEN TWO WORLDS (1982) [hereinafter BE-

on characteristics of the offender or of the offense. One fundamental dispute, for example, is whether "just deserts" and the seriousness of the offense should determine the forum, or whether the "real needs" or "amenability" of the offender should prescribe the appropriate disposition.[3] States' transfer legislation reflects and supposedly resolves the juvenile-criminal substantive policy tensions which underlie much of the current sentencing policy debates.

Legislatures, courts, and scholars have analyzed alternative mechanisms for transferring serious young offenders to criminal courts for prosecution as adults.[4] Recent increases in youth violence provoke increasingly spasmodic legislative reactions to "get tough" or to find the "right" solution. Every state has adopted one or more statutory strategies to transfer some chronic juvenile offenders to criminal courts. The alternatives include judicial waiver

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TWEEN TWO WORLDS] (examining how youth are referred to adult courts under various state statutes); MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: READINGS IN PUBLIC POLICY 169-377 (John C. Hall et al. eds., 1981) [hereinafter READINGS IN PUBLIC POLICY] (series of articles on the prosecution of juveniles in adult court); *Symposium on Serious Juvenile Crime*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 257-624 (1991) (series of articles on juvenile justice and waiver responses to serious youth crime).

Courts repeatedly emphasize that the waiver decision is appropriately regarded as a sentencing decision. *See, e.g.*, Kent v. United States, 383 U.S. 541, 556 (1966) ("'critically important' action . . ."); *In re* Hartung, 304 N.W.2d 621, 624 (Minn. 1981) ("A reference hearing is a dispositional type hearing which is forward looking. . ."); *In re* S.R.J., 293 N.W.2d 32, 35 (Minn. 1980) ("A reference hearing is a dispositional hearing. . . ."); *In re* T.D.S., 289 N.W.2d 137, 139-41 (Minn. 1980); *In re* D.M., 373 N.W.2d 845, 851 (Minn. Ct. App. 1985).

3. *See, e.g.*, Jeffrey Fagan & Elizabeth Piper Deschenes, *Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM. L. & CRIMINOLOGY 314 (1990) (investigating and analyzing the issues of transfer criteria and noting the disparity in the transfer decision); Jeffrey Fagan et al., *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259, 276 (1987) (focusing on rational, concrete factors rather than nonspecific standards); *Legislative Changes in Waiver, supra* note 1, at 472-73 ("The waiver of a serious offender into the adult system on the basis of . . . [the] offense rather than an individualized evaluation of the youth's 'amenability to treatment' or 'dangerousness' is both an indicator of and a contributor to the substantive as well as procedural criminalization of the juvenile court.").

4. *See, e.g., supra* note 2; Barry C. Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal,"* 65 MINN. L. REV. 167, 172-88 (1981) [hereinafter *Dismantling the "Rehabilitative Ideal"*] (analyzing judicial and legislative waiver mechanisms); Barry C. Feld, *Delinquent Careers and Criminal Policy: Just Deserts and the Waiver Decision*, 21 CRIMINOLOGY 195, 197 (1983) [hereinafter *Delinquent Careers and Criminal Policy*] (recognizing judicial and legislative waiver mechanisms); Franklin E. Zimring, *The Treatment of Hard Cases in American Juvenile Justice: In Defense of Discretionary Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 267 (1991) (reviewing waiver alternatives such as increasing juvenile court sanctions, decreasing age requirements, and legislative changes in transfer standards); Jeffrey Fagan, *Social and Legal Policy Dimensions of Violent Juvenile Crime*, 17 CRIM. JUST. & BEHAV. 93, 100-02 (1990) (surveying various intervention programs including the Violent Juvenile Offender Program).

of juvenile court jurisdiction, legislative exclusion of offenses from juvenile court jurisdiction, and prosecutorial choice of forum between concurrent jurisdictions.[5] Each of these statutory strategies allocates to a different branch of government—judicial, legislative, and executive—the decision of whether a youth is a criminal or a delinquent.

The most prevalent practice in virtually all jurisdictions is judicial waiver.[6] A juvenile court judge may waive juvenile court jurisdiction on a discretionary basis after a hearing to determine whether a youth is "amenable to treatment" or poses a threat to public safety. Judicial case-by-case clinical assessment of a youth's rehabilitative potential and dangerousness reflects the individualized sentencing discretion characteristic of juvenile courts.[7]

Another common transfer mechanism is legislative waiver or offense exclusion. This approach emphasizes the seriousness of the offense committed and reflects the retributive values of the criminal law.[8] Because legislatures created the juvenile court, they possess considerable latitude to define its jurisdiction and to exclude youths from juvenile court based on their age and the seriousness of the offenses committed.

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5. *See, e.g., Reference of Juvenile Offenders*, *supra* note 2, at 523 n.22; BETWEEN TWO WORLDS, *supra* note 2, at 96-97 (national data summarizing state use of alternatives); MELISSA SICKMUND, HOW JUVENILES GET TO CRIMINAL COURT (1994) (statutory analysis of waiver mechanisms); U.S. GENERAL ACCOUNTING OFFICE, JUVENILE JUSTICE: JUVENILES PROCESSED IN CRIMINAL COURT AND CASE DISPOSITIONS 8-9, 64-88 (Aug. 1995) [hereinafter GAO REPORT] (summarizing juvenile court transfer legislation); Eric Frisch & Craig Hemmings, *Juvenile Waiver in the United States 1979-1995: A Comparison and Analysis of State Waiver Statutes*, 46 JUV. & FAM. CT. J. 17 (1995) (summarizing juvenile court transfer legislation).

6. In every state except Nebraska and New York, juvenile court judges may waive jurisdiction over some young offenders following a hearing. In addition, many states either allow prosecutors to "direct file" against youths in adult criminal court or exclude youths above certain ages and charged with certain offenses from juvenile court jurisdiction. HOWARD N. SNYDER & MELISSA SICKMUND, DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT, PREVIEW 16-19 (1995) (48 states and the District of Columbia use judicial waiver, at least in part; 13 states have some provisions for prosecutorial waiver; 26 states exclude some offense from juvenile court jurisdiction). *See, e.g.*, SICKMUND, *supra* note 5; GAO REPORT, *supra* note 5; Frisch & Hemming, *supra* note 5.

7. *See Legislative Changes in Waiver*, *supra* note 1 (statutory survey and analysis of juvenile court waiver legislation).

8. *See, e.g., Reference of Juvenile Offenders*, *supra* note 2, at 556-71; *Delinquent Careers and Criminal Policy*, *supra* note 4, at 202-05; *Legislative Changes in Waiver*, *supra* note 1, at 494-99. States typically exclude youths from juvenile court jurisdiction on the basis of age and offense. For example, in New York, youths 13 years of age and older and charged with murder or other serious crimes against the person are tried in criminal court. N.Y. PENAL LAW §§ 30.00, 70.05 (McKinney 1987); N.Y. CRIM. PROC. LAW § 1.20(42) (McKinney 1992). Whereas in Utah, only youths 16 years of age and older and charged with aggravated murder are automatically tried in criminal court. UTAH CODE ANN. § 78-3a-17(1) (1992).

A third method utilized to remove some young offenders from the juvenile justice system is prosecutorial waiver or concurrent jurisdiction.[9] With this strategy, both juvenile and criminal courts share concurrent jurisdiction over certain offenses, and a prosecutor's decision to charge a youth in juvenile or criminal court determines the forum.[10]

Defining the boundary between juvenile and criminal court depends, in part, on whether one adopts a juvenile or criminal court "point of view." If the criminal law's emphasis on punishment prevails, then the seriousness of the present offense or the offender's prior record controls the transfer decision. In such a case, transfer decisions lend themselves to relatively mechanical decisional rules or presumptive sentencing guidelines. Alternatively, if the juvenile court's emphasis on rehabilitation predominates, then individualized assessments of an offender's "amenability to treatment," "dangerousness," and future welfare control the sentencing decision and courts require more open-ended, indeterminate, and discretionary processes.[11]

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9. With prosecutorial waiver, both juvenile and criminal courts share concurrent jurisdiction over certain ages and offenses, typically serious, violent, or repeat crimes. *See, e.g.*, ARK. CODE ANN. § 9-27-318 (Michie 1993) (any child 14 or older charged with capital, first, or second degree murder); WYO. STAT. §§ 14-6-203, -237 (1994) (any child 14 or older charged with a violent felony). Prosecutorial transfer is viewed as a routine "executive" charging decision that does not require judicial review. *See generally* Francis B. McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629 (1994) (arguing for prosecutorial waiver); Donna M. Bishop et al., *Prosecutorial Waiver: Case Study of a Questionable Reform*, 35 CRIME & DELINQ. 179 (1989) (examining prosecutorial waiver practice in Florida); Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281 (1991) (analyzing prosecutorial waiver statutes); *Reference of Juvenile Offenders*, *supra* note 2, at 521 n.20 (discussing prosecutorial waiver mechanisms, its variations, and its shortcomings); BETWEEN TWO WORLDS, *supra* note 2, at 6 (discussing concurrent jurisdiction provisions); Charles W. Thomas & Shay Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439, 456-70 (1985) (discussing prosecutorial waiver power and discretion).

10. This waiver mechanism may be characterized as a form of offense-based decision-making to the extent that a prosecutor's discretion to charge the case in criminal courts divests the juvenile court of jurisdiction. *See* McCarthy, *supra* note 9, at 656; Thomas & Bilchik, *supra* note 9.

11. *See* NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 13-20 (1974); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 54-55 (1968); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 11-26 (1976); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 149-59 (1985). Analyses of juvenile court sentencing practices also contrast juvenile dispositions which are offender-oriented, indeterminate and nonproportional with those which are offense-based, determinate, and proportional. *See* Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 847-91 (1988).

Each method of deciding whether a youth is a criminal or a delinquent has supporters and detractors. Proponents of judicial waiver emphasize its consistency with juvenile court sentencing philosophy, and contend that individualized judgments provide an appropriate balance of flexibility and severity.[12] In contrast, critics object that juvenile court judges lack valid or reliable clinical tools with which to assess amenability to treatment or to predict dangerousness, and that the standardless discretion judges exercise results in abuses and inequalities.[13] Other research suggests that judicial waiver decisions simply replicate and ratify earlier prosecutorial screening decisions.[14]

Proponents of legislative waiver endorse "just deserts" retributive sentencing policies, assert that offense exclusion fosters greater consistency, uniformity, and equality among similarly-situated offenders, and advocate sanctions based on relatively objective characteristics such as seriousness of the offense, culpability, or criminal history.[15] However, critics question whether a legislature can remove discretion from the waiver decision without imposing excessive rigidity, or substantially increasing the number of inappropriate youths transferred to criminal court.[16]

Proponents of concurrent-jurisdiction prosecutorial waiver claim that prosecutors can function as more neutral, balanced and

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12. *See, e.g.*, Zimring, *supra* note 4, at 268 (arguing that "discretionary waiver . . . is superior to alternative methods of handling juvenile justice's hardest" cases); Fagan, *supra* note 4, at 114-19 (advocating that waiver can adequately address violent juvenile offenders).

13. Professor Barry Feld criticizes the subjectivity of judicial waiver practices, questions the validity of individualized, clinical diagnoses or predictions, and objects to delegating sentencing policy to the discretion of social service personnel and judges. *See, e.g.*, *Reference of Juvenile Offenders*, *supra* note 2, at 529-56 (juvenile court judges lack valid or reliable clinical tools with which to make accurate amenability diagnoses or dangerousness predictions); *Legislative Changes in Waiver*, *supra* note 1, at 489; Barry C. Feld, *Bad Law Makes Hard Cases: Reflections on Teen-Aged Axe-Murderers, Judicial Activism, and Legislative Default*, 8 LAW & INEQ. J. 1 (1990) [hereinafter *Bad Law Makes Hard Cases*] (standardless discretion results in inconsistent decisions and justice by geography); Fagan & Deschenes, *supra* note 3 (noting inconsistency in transfer decisions); Fagan et al., *supra* note 3 (racial disparities in waiver decisions).

14. Robert O. Dawson, *An Empirical Study of* Kent *Style Juvenile Transfers to Criminal Court*, 23 ST. MARY'S L.J. 975, 1052 (1992) (practical role of court is "limited to finding required facts and reviewing prosecutorial" screening and charging discretion).

15. *See, e.g.*, *Delinquent Careers and Criminal Policy*, *supra* note 4; *Reference of Juvenile Offenders*, *supra* note 2.

16. Zimring, *supra* note 4, at 273-75; Franklin E. Zimring, *Notes Toward a Jurisprudence of Waiver*, *in* MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: READINGS IN PUBLIC POLICY 193, 199-200 (1981); SNYDER & SICKMUND, *supra* note 6, at 18 (reporting that "[s]tatutory exclusion [on the basis of age and offense] accounts for the largest number of [chronological] juveniles tried as adults in criminal court").

objective gatekeepers than either "soft" juvenile court judges or "get tough" legislators.[17] Critics of prosecutorial waiver strategies contend that prosecutors' exercise of discretion is just as subjective and idiosyncratic as that of judges', and further lacks the redeeming virtue of either a judicial record or appellate review.[18]

As the policy debate rages, legislatures increasingly exclude certain combinations of present offense and prior records from juvenile court jurisdiction, emphasize offenses as presumptive dispositional criteria in judicial waiver proceedings, or delegate to prosecutors the power to decide.[19] Although transferring juveniles to criminal court is the most consequential sentencing decision juvenile courts make, there is remarkably little research on the determinants of waiver, the comparative sentences that young offenders received in juvenile or criminal courts, or their subsequent criminal careers.[20] In short, despite continual legislative tinkering, there is surprisingly little information to guide policy makers about appropriate age thresholds for criminal responsibility, offender or offense characteristics that affect decisions, or the public safety consequences of adopting one policy alternative over another.

This Article analyzes judicial waiver policies and processes. In Part I, we analyze the legal framework and prior research on judicial waiver practices, summarize recent legislative changes in Minnesota's judicial waiver statutes, and examine the implications of youth crime, violence, and race on waiver policy. In Part II, we present extensive data from an urban setting, Hennepin County (Minneapolis and its surrounding suburbs), Minnesota, and analyze judicial application of the legislative criteria for adulthood. Our data analyses identify the offender and offense variables that affected 330 judicial transfer decisions between 1986 and 1992. In addition to analyzing the factors that influence transfer decisions, we also explore the judicial waiver process itself. We assess the timing of the process, the role of clinical assessments, and the ways in which judicial practices affect transfer decisions. Finally, we examine the subsequent juvenile or criminal court processing, sen-

17. *See, e.g.*, McCarthy, *supra* note 9, at 664-65.

18. Bishop & Frazier, *supra* note 9, at 299-300.

19. *Compare Legislative Changes in Waiver*, *supra* note 1, at 489 *with* CHAMPION & MAYS, *supra* note 1 *and* SICKMUND, *supra* note 5 (documenting changes in waiver legislation between 1986 and 1994). *See also* Frisch & Hemmings, *supra* note 5; GAO REPORT, *supra* note 5.

20. *See, e.g.*, Fagan & Deschenes, *supra* note 3, at 327 (noting that little empirical research existed which examined the determinants of judicial waiver); HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: A FOCUS ON VIOLENCE 28 (May 1995) [hereinafter FOCUS ON VIOLENCE] ("Given recent increases in juvenile violence, more research is needed on the impact of transferring juveniles to criminal court.").

tencing, and recidivism of youths against whom prosecutors filed waiver motions. Throughout our analyses, we assess the ways in which a youth's race and offense interact in the waiver process. In our conclusion in Part III, we consider the policy implications of our research findings, and hypothesize the likely consequences of Minnesota's recent revisions of its certification legislation.

Formulating a waiver sentencing policy entails an inevitable trade-off between emphasizing the seriousness of the present offense and the prior record or persistence of offending. While a few youths may commit a very serious offense without any prior delinquency involvement, most serious offenders are also chronic wrongdoers.[21] Although a very serious initial offense may warrant an immediate retributive response, a more utilitarian waiver policy attempts to identify persistent offenders for enhanced sanctions because they ultimately commit most of the serious crime.[22] Whether a youth is tried as a delinquent or a criminal "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."[23]

This study makes two significant contributions to our understanding of judicial waiver policy and practice. First, the quality of our data and the scope of our analyses provide a comprehensive assessment of the determinants and consequences of judicial waiver decisions. The research findings provide important information for legislatures about the roles of age, present offense, prior record, and court process in defining the boundaries of adulthood. Secondly, this study undertakes a thorough assessment of the role of a youth's race in the waiver process. Although we do not find any evidence of overt racial discrimination in waiver decisions, because of substantial racial differences in patterns of offending, waiver policies that focus on violent crimes inevitably have a racially disparate impact on minority youths.

Our analyses reveal that during the period of our study, the Hennepin County juvenile court employed an implicit waiver policy that emphasized persistence rather than seriousness. The court focused on youths' prior records as an indicator of career criminality and transferred older, chronic offenders with somewhat less empha-

21. *See* MARVIN WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT (1972) (chronic offenders account for most of the serious delinquency); PAUL TRACY ET AL., DELINQUENCY CAREERS IN TWO BIRTH COHORTS (1990) (chronic offenders account for most of the serious delinquency).

22. WOLFGANG ET AL., *supra* note 21, at 88 (finding that recidivists committed 84.2% of offenses); *Reference of Juvenile Offenders*, *supra* note 2, at 571; 2 CRIMINAL CAREERS AND "CAREER CRIMINALS" 349-50 (Alfred Blumstein et al. eds., 1986).

23. *Reference of Juvenile Offenders*, *supra* note 2, at 572.

sis on the seriousness of the current offense. By contrast, the 1994 amendments of the Minnesota waiver statute placed greater emphasis on the seriousness of the present offense. The legislative changes reflect a legitimate retributivist sentencing policy which underscores the seriousness of the present offense rather than the informal incapacitative policy reflected in the court's past emphases on age and prior record. However, because of racial differences in the rates of violent offenses committed by white and African-American juveniles, we anticipate that the Minnesota legislative decision to emphasize the seriousness of the present offense rather than the cumulative record of chronic offending will have a distinctive and racially disparate impact on future waiver decisions.

I. Juvenile Courts, Judicial Waiver, and Individualized Sentencing Decisions

A. Judicial Waiver

Ideological changes in strategies of social control[24] and in the cultural conceptions of children[25] at the end of the nineteenth century led to the creation of the juvenile court. The juvenile court

24. Criminal justice reformers attributed criminal behavior to deterministic forces rather than to deliberately chosen misconduct. Positivism superseded the classic formulations of crime as the product of free will, reduced offenders' responsibility for their misdeeds, and redirected efforts to treat offenders rather than to punish them. *See* DAVID MATZA, DELINQUENCY AND DRIFT 5 (1964); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE 50-51 (1980); ELLEN RYERSON, THE BEST-LAID PLANS 22 (1978); ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 46-74 (2d ed. 1977).

Positivistic criminology analogized treatment of offenders to the medical profession, and drew on newly emerging social sciences such as psychology and sociology to inform their "rehabilitative" endeavors. FRANCIS A. ALLEN, DECLINE OF THE REHABILITATIVE IDEAL 5-15 (1981). Identifying the causes of and prescribing the cures for crime and delinquency required an individualized, discretionary approach rather than uniform processes or standardized criteria. Several criminal justice reforms at the turn of the century—probation, parole, indeterminate sentences, and juvenile courts—reflected these indeterminate, flexible rehabilitative strategies. Francis A. Allen, *Legal Values and the Rehabilitative Ideal*, *in* THE BORDERLAND OF CRIMINAL JUSTICE 25-27 (1964); ROTHMAN, *supra* at 43.

25. *See generally* Janet E. Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1082 (1991) (changing cultural conception of childhood); JOSEPH F. KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICA 1790 TO THE PRESENT 114-16 (1977) (economic and demographic changes affected family structure and function); CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 178-209 (1980) (suggesting that demographic changes were caused in part by changes in women's self-perceptions); CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED 6-10 (1977) (discussing the rapidly changing economic system in America at the end of the 19th century that brought about the "crisis of the family"); PLATT, *supra* note 24, at 75-83 (describing the social class basis of modern conception of children and imposition of cultural norms by upper and middle classes on poor and immigrants).

synthesized the new social construction of childhood with the new approaches to social control in a specialized, bureaucratic agency staffed by experts and designed to serve the needs of the child offender.[26] Progressive "child savers" substituted the criminal law's traditional punitive strategy with a scientific and preventative approach, and used indeterminate, non-proportional discretionary dispositional processes to rehabilitate young offenders.[27]

From its inception, however, the juvenile court could relinquish its jurisdiction and subject some young offenders to prosecution in adult criminal courts.[28] The ability of juvenile courts to

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26. Many social programs created by Progressive reformers shared the newer cultural conception of childhood and advanced a "child-saving" agenda: juvenile court legislation, child labor laws, child welfare laws, and compulsory school attendance laws. *See generally* KETT, *supra* note 25, at 226-27; ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877-1920, at 169 (1967) (noting that the child was a "central theme" in the progressive agenda regarding health, education, labor, legal and penal reform); JUVENILE JUSTICE: THE PROGRESSIVE LEGACY AND CURRENT REFORMS (LaMar T. Empey ed., 1979) (juvenile court legislation); SUSAN TIFFIN, IN WHOSE BEST INTEREST? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA (1982) (social welfare legislation); WALTER I. TRATTNER, CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA (1970) (child-labor legislation); LAWRENCE A. CREMIN, THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876-1957, at 127-28 (1961) (compulsory education legislation). Additionally, several standard accounts of the creation of the juvenile court exist. *See, e.g.,* RYERSON, *supra* note 24, at 16-34; ROTHMAN, *supra* note 24, at 205-36; PLATT, *supra* note 24, at 55-61.

27. The juvenile court separated children from adult criminal offenders and provided them with a separate, non-criminal welfare system. According to juvenile court theory, an expert judge would develop an individualized treatment plan to meet the child's "real needs" based on information provided by social service personnel and probation officers. Juvenile court judges enjoyed virtually unlimited discretion to make dispositions in the child's "best interests." Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1187-1220 (1970); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109 (1909); PLATT, *supra* note 24, at 137-45.

Because juvenile courts used therapeutic methods to achieve benevolent goals, they rejected the procedural trappings of criminal prosecutions. Indeterminate and non-proportional dispositions could continue for the duration of minority. Juvenile courts employed a euphemistic vocabulary and separate facilities to avoid the stigma associated with criminal prosecutions. *See* ROTHMAN, *supra* note 24, at 217-18; RYERSON, *supra* note 24, at 35-40; PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 92-93 (1967). They excluded juries, lawyers, technical rules of evidence, and formal procedures because juvenile court proceedings focused on the child's background and welfare rather than the details of a specific crime. *See generally* ROTHMAN, *supra* note 24, at 215-17 (juvenile courts were considered non-adversarial and mainly concerned with the juvenile's background, rendering juries and attorneys unnecessary); RYERSON, *supra* note 24, at 58-63 (unlike the adult criminal court, the juvenile court was based on *parens patriae*, not due process).

28. As one author noted:

> Legislation in many states permitted juvenile court judges to transfer any given case to an adult court, an allowance that they occasionally took advantage of when the charge was especially serious. The Cook County juvenile court, for example, asked grand juries to weigh the

transfer certain serious young offenders to criminal courts provided a "safety valve" option that helped to insulate the juvenile courts from political and public criticisms that they "coddled" youths charged with highly visible or violent crimes.

Although judicial waiver reflected juvenile courts' individualized sentencing strategy, two United States Supreme Court decisions provided the procedural framework for the transfer decision. In *Kent v. United States*,[29] the Court formalized waiver hearings and required states to provide procedural safeguards, such as notice and the right to counsel.[30] Subsequently, in *Breed v. Jones*,[31] the Court required states to decide whether to try a youth in juvenile or criminal court before proceeding on the merits of the charge.[32]

Although *Kent* and *Breed* formalized waiver proceedings, the substantive criteria for waiver decisions pose greater difficulties. Most judicial waiver statutes authorize discretionary waiver based on a juvenile court's assessment of a youth's "amenability to treatment" or "dangerousness," as revealed by the offender's age, the seriousness of the present offense and prior record, and clinical evaluations and treatment prognoses.[33] Some states legislatively

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> merits of a regular indictment in about fifteen cases a year—a figure which represented no more than one percent of its cases but did include the most notorious. Typically these boys were older (sixteen, not twelve) and were arrested for "deeds of violence, daring holdups, carrying guns, thefts of considerable amounts, and rape."

ROTHMAN, *supra* note 24, at 285.

29. 383 U.S. 541 (1966).

30. "[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. In *Kent*, the Supreme Court concluded that juvenile courts provided youths with certain advantages, such as informal proceedings and confidential records, and that divestiture of those protections was a "critically important" decision that required a hearing, assistance of counsel, access to social investigations and other records, and written findings that appellate courts could review *Kent*. *Id.* at 554-57. *See* Monrad Paulsen, Kent v. United States: *The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 182-83 (criticizing *Kent*'s requirements as intrusive upon a juvenile court's exercise of discretion).

31. 421 U.S. 519 (1975).

32. *Id.* at 541. In *Breed*, the Court applied the double jeopardy provisions of the Constitution to delinquency adjudications, and prohibited adult criminal re-prosecution of a youth after a prior conviction in juvenile court. *Id.* The Court described the functional equivalence between delinquency and criminal proceedings—" 'anxiety and insecurity,' " a " 'heavy personal strain,' " and the burdens of defending in the more formal juvenile system—and concluded that little distinguished the two modes of prosecution. *Id.* at 530-31 (quoting Green v. United States, 355 U.S. 184, 187 (1955); United States v. Jorn, 400 U.S. 470, 479 (1979)).

33. *See* Fagan & Deschenes, *supra* note 3, at 324 (finding that legislatures in most states have expanded the use of transfer by reducing age eligibility and expanding offense categories); *Delinquent Careers and Criminal Policy*, *supra* note 4, at 198 (arguing that most waiver decisions are based on "amenability to treatment or

or judicially adopted the substantive criteria that the Supreme Court appended to its *Kent* decision to provide courts with additional guidance.[34]

Assessing whether a youth is amenable to treatment or poses a threat to others implicates a number of difficult sentencing policy issues. Are there demonstrably effective treatment programs for chronic or serious young offenders?[35] Can courts predict danger-

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dangerousness"); *Reference of Juvenile Offenders*, *supra* note 2, at 526 (discussing the main factors on which most waiver decisions are based); *Legislative Changes in Waiver*, *supra* note 1, at 490 (discussing the substantive bases of judicial waiver decisions); Fagan et al., *supra* note 3 (discussing race as a factor in transfer decisions). *See, e.g.*, MINN. STAT. § 260.125 (1994).

34. Although the Supreme Court decided *Kent* on procedural grounds, in an appendix to its opinion, the Court indicated some of the substantive criteria that a juvenile court might consider:

> 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 committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

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

35. *Compare* Steven P. Lab & John T. Whitehead, *An Analysis of Juvenile Correctional Treatment*, 34 CRIME & DELINQ. 60 (1989) (half the evaluation studies report no or negative effects of treatment) *and* John T. Whitehead & Steven P. Lab, *A Meta-Analysis of Juvenile Correctional Treatment*, 26 J. RES. CRIME & DELINQ. 267 (1989) (correctional intervention has depressingly little impact on recidivism rates) *and* Steven P. Lab & John T. Whitehead, *From "Nothing Works" to "The Appropriate Works": The Latest Stop on the Search for the Secular Grail*, 28 CRIMINOLOGY 405

ousness either clinically or statistically with an acceptable degree of accuracy?[36] Are there valid and reliable diagnostic tools with which a clinician or juvenile court can differentiate among youths' treatment potential or dangerousness to classify accurately any given individual offender?[37]

Judicial waiver statutes couched in terms of amenability to treatment or dangerousness give juvenile courts virtually unlimited discretion.[38] Lists of substantive factors, such as those appended in *Kent*, often reinforce rather than constrain judicial discretion.[39] Because of the subjective nature of waiver criteria, the absence of guidelines to structure the decision, and the lack of concrete indicators by which to classify youths, a variety of inequalities and dis-

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(1990) (methodological criticisms of meta-analyses that purport to show correctional treatment effectiveness) *with* D. A. Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 CRIMINOLOGY 369 (1990) (correctional treatment can be effective when delivered to appropriate clients in appropriate settings) *and* Ted Palmer, *The Effectiveness of Intervention: Recent Trends and Current Issues* 37 CRIME & DELINQ. 330 (1991). *See generally* Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1075-82 (1995) [hereinafter *Violent Youth and Public Policy*] (reviewing the empirical literature of the effectiveness of "treatment" in juvenile correctional institutions).

36. Stephen D. Gottfredson & Don M. Gottfredson, *Violence Prediction Methods: Statistical and Clinical Strategies*, 3 VIOLENCE & VICTIMS 303, 311-14 (1988); *Reference of Juvenile Offenders, supra* note 2, at 540-46; Norval Morris & Marc Miller, *Predictions of Dangerousness, in* 6 CRIME & JUSTICE: AN ANNUAL REVIEW OF RESEARCH 1 (Michael Tonry & Norval Morris eds., 1985).

37. *See, e.g.*, Don M. Gottfredson & Stephen D. Gottfredson, *Stakes and Risks in the Prediction of Violent Criminal Behavior*, 3 VIOLENCE & VICTIMS 247, 258 (1988) (arguing that current offense seriousness and weighing "stakes" and "risks" can predict future criminal acts); *Reference of Juvenile Offenders, supra* note 2, at 529-46 (discussing issues raised by assessments of dangerousness and amenability to treatment); *Dismantling the "Rehabilitative Ideal", supra* note 4, at 174-84 (noting the problematic nature of subjective judicial waiver and the Minnesota legislative response); *Delinquent Careers and Criminal Policy, supra* note 4, at 198-202; *Legislative Changes in Waiver, supra* note 1, at 489; *Violent Youth and Public Policy, supra* note 35, at 1006-08; DON GOTTFREDSON & MICHAEL TONRY, PREDICTION AND CLASSIFICATION 9 (1987) (analyzing statistical, methodological, and policy implications of prediction in legal decision-making).

38. Professor Frank Zimring characterizes waiver as " 'the capital punishment of juvenile justice' " and analogizes judicial discretion to the standardless capital punishment statutes condemned by the Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972). Zimring, *supra* note 16, at 193.

39. Judges can selectively emphasize one set of attributes or another to rationalize any decision. Critics note that "[c]ollectively, 'lists' of this length rarely serve to limit discretion or regularize procedure. By giving emphasis to one or two of the guidelines, a judge can usually justify a decision either way." TWENTIETH CENTURY FUND, TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 56 (1978) [hereinafter CONFRONTING YOUTH CRIME]. Zimring notes that "the substantive standards are highly subjective, and the large number of factors that may be taken into consideration provides ample opportunity for selection and emphasis in discretionary decisions that shape the outcome of individual cases." Zimring, *supra* note 16, at 195.

parities may occur. Juvenile courts interpret and apply discretionary waiver statutes inconsistently from county to county and court to court within a single jurisdiction.[40] National analyses of states' waiver practices document the arbitrary, capricious, and discriminatory consequences of discretionary transfer decisions.[41] A juvenile's race also may affect waiver decisions, with minority youths at greater risk of transfer.[42] Not surprisingly, research re-

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40. *See, e.g.,* SUPREME COURT JUVENILE JUSTICE STUDY COMM'N, REPORT TO THE MINNESOTA SUPREME COURT 61-78 (Nov. 1976) [hereinafter REPORT TO THE MINN. SUPREME COURT] (waiver is used for three different purposes in different parts of the state); Leonard Edwards, *The Case for Abolishing Fitness Hearings in Juvenile Court,* 17 SANTA CLARA L. REV. 595, 611-12 (1977) (county by county disparity); BETWEEN TWO WORLDS, *supra* note 2, at 150-98 (county by county disparity within states); JAMES P. HEUSER, U.S. DEP'T OF JUSTICE, JUVENILES ARRESTED FOR SERIOUS FELONY CRIMES IN OREGON AND "REMANDED" TO ADULT CRIMINAL COURTS: A STATISTICAL STUDY 30 (1985) (county by county variation in Oregon—"it appears that some counties may be over- or under-represented in terms of the proportion of cases per unit of risk population."); *Bad Law Makes Hard Cases, supra* note 13, at 41-46 (urban, suburban, and rural disparities in characteristics of youths waived to criminal court).

The location of a waiver hearing or differences in a juvenile court's organizational and philosophical characteristics influence waiver decisions as much as does a youth's dangerousness or intractability. M. A. Bortner, *Traditional Rhetoric, Organizational Realities: Remand of Juveniles to Adult Court,* 32 CRIME & DELINQ. 53, 64-70 (1986) (organizational considerations affect waiver practices as courts symbolically transfer some youths in order to preserve jurisdiction over most youth and deflect public and political criticisms of the entire system).

41. BETWEEN TWO WORLDS, *supra* note 2, at 102-07. Among the states that rely on judicial waiver for the transfer decision, the rates of waiver vary from a high of 13.5 to a low of .07 per 10,000 youths at risk; youths in Oregon have nearly 200 times the probability of being waived for trial as adults as do youths in Montana. *Id.* at 102-03. *See also* GAO REPORT, *supra* note 5 (documenting extensive state variability in waiver).

See also Fagan & Deschenes, *supra* note 3, at 345-47 (analyzing waiver decisions of violent youths in four urban jurisdictions and revealing that no consistent or uniform criteria guided the courts' transfer decisions). They reported that "[n]either multivariate analysis nor simple explorations identified strong or consistent determinants of the judicial transfer decision. Except for a relationship between extensive prior offense history and the transfer decision, none of the identified variables could significantly describe differences between youths who were or were not transferred." *Id.* at 345.

42. *See* GAO REPORT, *supra* note 5, at 59. In the four states where it was possible to perform detailed analyses of waiver rates, it was found that courts waived African-Americans more often than whites for violent, property, and drug offenses. *Id. See also* note 137 and accompanying text.

See also Joel Eigen, *The Determinants and Impact of Jurisdictional Transfer in Philadelphia, in* READINGS IN PUBLIC POLICY 333, 339-40 (John C. Hall et al. eds., 1981) (finding that black youths who murder white victims are significantly more at risk for waiver); Robert Keiter, *Criminal or Delinquent?: A Study of Juvenile Cases Transferred to the Criminal Court,* 19 CRIME & DELINQ. 528 (1973) (examining the manner and effect of the Cook County juvenile court attorney's exercise of statutory discretion in transferring juveniles to adult court); BETWEEN TWO WORLDS, *supra* note 2, at 104-05 (reporting on a 1978 study finding that, nationally, 39% of all youths transferred were minority and that in 11 states, minority youths constituted the majority of juveniles waived; however, the study was unable to control for the

ports that a youth's age in relation to the jurisdictional age limit of the juvenile court strongly affects waiver decisions; judges transfer older juveniles whose offenses requires a longer sentence than that available in the juvenile court.[43]

Transfer decisions entail two interrelated sentencing policy issues. First, individualized judicial waiver decisions within juvenile courts implicate the inherent tensions between discretion and the rule of law. Second, these decisions also involve the relationship between juvenile and criminal court sentencing practices. Formulating consistent social control responses to serious or chronic offenders requires coordinated responses to youths who make the transition between the two systems. Unfortunately, arbitrary legislative age-lines or idiosyncratic judicial decisions that determine juvenile "treatment" or adult "punishment" have no criminological relevance other than their legal consequences.

Because of differences in juvenile and criminal court sentencing policies, the two justice systems often may work at cross-purposes and may frustrate rather than harmonize social control responses to serious crime as young offenders move between the two systems.[44] A strong relationship exists between age and criminal activity.[45] Chronic offenders begin their criminal careers in their early to mid-teens, attain their peak levels of criminal activity in late adolesence or early adulthood, and then gradually reduce

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seriousness of the present offense and prior record); Fagan et al., *supra* note 3, at 276 (positing that, although no direct evidence of sentencing discrimination exist, "the effects of race are indirect, but visible nonetheless.").

43. Fagan et al., *supra* note 3, at 273 (age at offense as an indicator of the time remaining within juvenile court jurisdiction strongly affects judicial transfer decisions); GAO REPORT, *supra* note 5, at 58 ("juveniles age 16 or older were more likely to have their cases waived than juveniles under age 16 years for all three offense types . . .").

44. Barbara Boland & James Q. Wilson, *Age, Crime, and Punishment*, 51 PUB. INTEREST 22, 22-23 (1978); Peter W. Greenwood, *Differences in Criminal Behavior and Court Responses Among Juvenile and Youth Adult Defendants, in* 7 CRIME & JUSTICE: AN ANNUAL REVIEW OF RESEARCH 151, 152 (Michael Tonry & Norval Morris eds., 1986); *Delinquent Careers and Criminal Policy*, *supra* note 4, at 205.

45. *See* 1 CRIMINAL CAREERS AND "CAREER CRIMINALS" 23 (Alfred Blumstein et al. eds., 1986); WOLFGANG ET AL., *supra* note 21, at 65-87; Joan Petersilia, *Criminal Career Research: A Review of Recent Evidence, in* 2 CRIME & JUSTICE: AN ANNUAL REVIEW OF RESEARCH 321, 321-22 (Norval Morris & Michael Tonry eds., 1980). *See also* David P. Farrington, *Age and Crime, in* 7 CRIME & JUSTICE: AN ANNUAL REVIEW OF RESEARCH 189, 189 (Michael Tonry & Norval Morris eds., 1986) (analyzing age-specific crime rates and noting that crime rates peak in mid- to late-teenage years and then decline); Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552 (1983) (finding that age has a direct causal influence on crime); David F. Greenberg, *Delinquency and the Age Structure of Society, in* CRIMINOLOGY REVIEW YEARBOOK 586 (Sheldon Messinger & Egon Bittner eds., 1979)(discussing delinquency theory and age distribution of crime).

their rates of criminal involvement.[46] The jurisdictional bifurcation between juvenile and criminal courts fosters discontinuities in the responses to young career criminals who make the transition from one system to the other. For example, criminal courts may sentence more leniently chronic younger offenders when their rate of criminal activity is increasing or is at its peak, but sentence more severely older offenders whose criminal activity is declining because of their cumulative prior record.[47] In particular, chronic young property offenders typically receive more lenient sentences when they appear in criminal court as first-time adult offenders than they might have received in juvenile court.[48]

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46. Petersilia, *supra* note 45, at 358; 1 CRIMINAL CAREERS AND "CAREER CRIMINALS," *supra* note 45, at 23; Greenwood, *supra* note 44, at 163.

47. *See generally* Barbara Boland, *Fighting Crime: The Problem of Adolescents* 71 J. CRIM. L. & CRIMINOLOGY 94 (1980) (noting that young offenders committed most crimes but were not severely punished until older); Boland & Wilson, *supra, note* 44 (*stating that although an individual's crime rate decreases with age,* the punishment increases); PETER GREENWOOD ET AL., AGE, CRIME AND SANCTIONS: THE TRANSITION FROM JUVENILE TO ADULT COURT (1980) (finding that incarceration increases with a defendant's prior criminal record, which increases with age; thus, criminals in early stages of their career are less likely to be incarcerated); *Delinquent Careers and Criminal Policy*, *supra* note 4, at 205 (asserting that offenders' crime rates for many kinds of offenses peak in mid- to late adolescence).

48. *See, e.g.*, PETER GREENWOOD ET AL., FACTORS AFFECTING SENTENCE SEVERITY FOR YOUNG ADULT OFFENDERS 12-14 (1984) (finding that youthful offenders faced substantially lower chances of being incarcerated than older offenders; youthful violent offenders received lighter sentences than older violent offenders; and for approximately two years after becoming adults, youths were beneficiaries of lenient sentencing policies in criminal courts); CONFRONTING YOUTH CRIME, *supra* note 39, at 63 (youthfulness is a mitigating factor in criminal court sentencing).

Hamparian reported that criminal courts subsequently fined or placed on probation the majority of juveniles judicially transferred, and that even among those confined, 40% received maximum sentences of one year or less. BETWEEN TWO WORLDS, *supra* note 2, at 106-09. In part, these relatively lenient dispositions reflect the fact that less than one-third of the youths waived judicially were convicted of offenses against the person and that the largest proportion were property offenders, primarily burglars.

Heuser evaluated the adult sentences received by waived juvenile felony defendants in Oregon and reported that most were property offenders rather than violent offenders. HEUSER, *supra note 40, at 21-22. Heuser found that 16.7% involved* violent crime charges and 83.3% involved property crime charges. *Id.* As a consequence, only 55% of the youths convicted of felonies were incarcerated and the rest received probation. *Id.* at 23. The confinement rate is inflated somewhat because criminal courts judges almost invariably incarcerated youths convicted of violent offenses. "The incarceration rate is much higher for violent crimes (75.0%) and much lower for property crimes (51.5%)." *Id.* Moreover, even of those youths incarcerated as adults, nearly two-thirds received jail terms of one year or less and served an average of about eight months. *Id.* at 26-27. Juveniles with extensive prior records convicted of felonies in juvenile courts could receive comparable dispositions.

Gillespie and Norman analyzed youths waived in Utah between 1967 and 1980, and found that the judges transferred most youth for property crimes rather than violent offenses, and that the criminal court judges did not imprison the majority of juveniles convicted as adults. L. Kay Gillespie & Michael Norman, *Does Certifica-*

A rational sentencing policy requires a consistent response to persistent and serious offenders on both sides of the line that differentiates juvenile from adult offenders. Criminal courts often do not sanction chronic young offenders as severely as adults because of the lack of congruence between juvenile court waiver criteria and adult court sentencing practices, qualitative differences in the nature of juveniles' offenses compared with adult offenses,[49] and the lack of integration of juvenile and adult criminal records.[50] Once a legislature formulates a consistent sentencing policy, it can specify more precisely the criteria to systematize juvenile court waiver decisions with criminal court sanctions.[51] The gradual evolution of

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tion Mean Prison: Some Preliminary Findings from Utah, JUV. & FAM. CT. J., Fall 1984, at 30-32.

Bortner's evaluation of judicial waiver practices reported that criminal court judges sentenced less than one-third of the transferred juveniles convicted in adult proceedings to prison, and quickly returned significant numbers to the community. Bortner, *supra* note 40, at 56-57. She attributed these anomalous outcomes to the youths' "first time offender status in the adult system, the relatively minor nature of their offenses, and the brevity of their offense histories compared to adult offenders." *Id.*

49. *E.g.,* M. Joan McDermott & Michael J. Hindelang, ANALYSIS OF NATIONAL CRIME VICTIMIZATION SURVEY DATA TO STUDY SERIOUS DELINQUENT BEHAVIOR: MONOGRAPH ONE, JUVENILE CRIMINAL BEHAVIOR IN THE UNITED STATES: ITS TRENDS AND PATTERNS 21-54 (1981) (reporting that younger offenders are less likely than adults to be armed with guns, inflict as much injury, or steal as much property, and these age-related offense patterns affect eventual sentences).

50. In many jurisdictions, criminal court judges use the seriousness of the present offense and the prior adult criminal history to make sentencing decisions. Joan Petersilia, *Juvenile Record Use in Adult Court Proceedings: A Survey of Prosecutors,* 72 J. CRIM. L. & CRIMINOLOGY 1746, 1761-62 (1981). Criminal court judges do not rely as extensively upon an offender's juvenile history because of bureaucratic obstacles to obtaining them, such as confidentiality of juvenile court records, the functional and physical separation of court services staffs, and lack of a computerized, integrated system to track offenders' complete criminal histories. *See* GREENWOOD ET AL., *supra* note 47, at 58-61; Greenwood, *supra* note 44, at 173. A study of the effects of juvenile offense histories on adult sentencing practices reported that "local sentencing policies have much more of an impact on how young adults are treated, than any modest variations in the availability of juvenile records." GREENWOOD ET AL., *supra* note 48, at 36.

Minnesota's Sentencing Guidelines have long included some older juveniles' felony convictions in young adult offenders' criminal history scores and recent legislative changes have greatly increased their significance. MINNESOTA SENTENCING GUIDELINES II.B.4 cmts. II.B.401-05. *Compare Dismantling the "Rehabilitative Ideal", supra* note 4, at 233-37 (stating that guidelines limit the use of juvenile convictions to enhance the sentences of young adult offenders) *with Violent Youth and Public Policy, supra* note 35, at 1057-67 (stating that the 1994 legislative amendments greatly expanded the use of juvenile felony convictions in criminal history score to enhance sentences of young adult offenders).

51. In jurisdictions where the waiver legislation targets serious young offenders on the basis of the seriousness of their present offenses or their prior records, youths are more likely to receive substantial adult sentences than in states that rely upon more discretionary judicial sorting. Thomas and Bilchik's study of waived youths' dispositions in Florida, a concurrent jurisdiction/direct file state, reported that the majority of youths tried as adults were older males with prior delinquency adjudica-

Minnesota's transfer legislation represents one state's efforts to formulate a coherent jurisprudential response to serious young offenders.

B. The Evolution of Judicial Waiver in Minnesota: The "Law on the Books" and the "Law in Action"

For more than two decades, Minnesota's waiver statute has embodied two interrelated difficulties: the idiosyncratic nature of individualized transfer decisions and the disjunction between juvenile waiver decisions and criminal court sentencing practices.[52] Unstructured judicial discretion caused both problems.[53] Before 1980, Minnesota's waiver law provided minimal guidance to juvenile court judges trying to decide whether to transfer a youth for adult criminal prosecution. The statute required juvenile courts to predict a youth's "dangerousness" or to clinically determine

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tions and multiple present felony charges, typically property offenses. Thomas & Bilchik, *supra* note 9, at 470-74. Unlike Hamparian's findings, however, criminal courts sentenced approximately two-thirds of these Florida juveniles to substantial terms of imprisonment. *Compare id.* at 473-74 *with* BETWEEN TWO WORLDS, *supra* note 2, at 112-17.

Rudman et al. studied the processing and dispositions of "violent juvenile offenders"—defined as youths with a *present* violent offense and a prior felony adjudication—tried and sentenced as juveniles or as adults in several jurisdictions. Cary Rudman et al., *Violent Youth in Adult Court: Process and Punishment*, 32 CRIME & DELINQ. 75 (1986). Criminal courts incarcerated about 75% of the youths targeted as violent and convicted in criminal courts, and imposed sentences up to five times longer than those youths retained in juvenile court. *Id.* at 91-92. They concluded that "because the criminal justice system is not limited by the jurisdictional age considerations of the juvenile justice system, violent youths convicted and sentenced in criminal court receive considerably longer sentences, in adult secure facilities, than their counterparts retained by the juvenile court." *Id.* at 89.

Heuser's study of transferred juvenile felony defendants in Oregon reported that criminal courts incarcerated 75% of the youths convicted of violent offenses and committed them to prison for average sentences in excess of six years. HEUSER, *supra* note 40, at 24, 28-29.

52. *See* MINN. STAT. § 260.125 (1994). Professor Barry Feld has analyzed the evolution of the transfer statute in a series of articles. *See Reference of Juvenile Offenders*, *supra* note 2 (criticizing the totally discretionary statute in effect prior to 1980); *Dismantling the "Rehabilitative Ideal"*, *supra* note 4 (analyzing 1980 legislative changes that created a "prima facie" case or rebuttable presumption for transfer); *Violent Youth and Public Policy*, *supra* note 35 (analyzing 1994 amendments to create a presumption for certification, shifting the burden of proof to youth to justify retention in juvenile court, and using adult sentencing guidelines criteria to structure waiver decisions).

53. Minnesota's appellate courts repeatedly emphasize that trial judges enjoy the broad discretion to make waiver sentencing decisions. *See, e.g.*, *In re* K.P.H., 289 N.W.2d 722, 724 (Minn. 1980) ("The juvenile court is vested with broad discretion in determining whether either of the statutory criteria exists upon which to base its reference decision."); *In re* J.B.M., 263 N.W.2d 74, 76 (Minn. 1978); *In re* K.J.K., 357 N.W.2d 117, 119 (Minn. Ct. App. 1984) ("The court has broad discretion in determining whether a juvenile is suitable for treatment in the juvenile system, and its decision will not be overturned unless it is clearly erroneous.").

whether he or she is "amenable to treatment" even though little evidence exists of either effective interventions for serious young offenders or of clinical indicators to accurately identify those who might respond to treatment or who would re-offend.[54] Legislative amendments in 1980 purported to structure waiver decisions by creating a rebuttable presumption for transfer, although they did little to constrain judicial discretion under the "totality of the circumstances."[55] Subsequent legislative amendments in 1994 created a strong presumption for transfer, shifted the burden of proof to the youth to demonstrate affirmatively why juvenile court treatment is appropriate, and changed the waiver criteria.

During the period of our study, the county attorney initiated a reference proceeding by filing a motion for adult prosecution.[56] Fol-

54. *See* MINN. STAT. § 260.125 (1978); *Reference of Juvenile Offenders, supra* note 2, at 552-56 (arguing that juvenile court judges' broad discretion was rife with possibilities for abuse and discrimination, and that judges applied statutes inconsistently, waived less serious offenders to satisfy organizational interests, and exacerbated the "lack of fit" between juvenile and adult criminal sentencing practices). *See supra* notes 35-42 and accompanying text.

55. Subject to the constitutional constraints of the *Kent* and *Breed* cases, Minnesota's statute and Juvenile Court Rule 32 governed the process to waive juvenile court jurisdiction and prosecute a young offender as an adult. At the time of this study, juvenile courts could waive a youth if they found that "the child is not suitable to treatment or that the public safety is not served" by retaining the youth in juvenile court. MINN. STAT. § 260.125(2)(d)(2) (1992). Minn. R. P. Juv. Ct. 32.05(2) elaborates a nonexclusive list of the "totality of the circumstances" that a juvenile court may consider in determining a youth's dangerousness or amenability to treatment:

(a) the seriousness of the offense in terms of community protection,
(b) the circumstances surrounding the offense,
(c) whether the offense was committed in an aggressive, violent, premeditated or willful manner,
(d) whether the offense was directed against persons or property, the greater weight being given to an offense against persons, especially if personal injury resulted,
(e) the reasonably foreseeable consequences of the act,
(f) the absence of adequate protective and security facilities available to the juvenile treatment system,
(g) the sophistication and maturity of the child as determined by consideration of the child's home, environmental situation, emotional attitude and pattern of living,
(h) the record and previous history of the child,
(i) whether the child acted with particular cruelty or disregard for the life or safety of another,
(j) whether the offense involved a high degree of sophistication or planning by the child, and
(k) whether there is sufficient time available before the child reaches age nineteen (19) to provide appropriate treatment and control.

MINN. R. P. JUV. CT. 32.05(2). *See also supra* note 34 (*Kent* criteria); *Dismantling the "Rehabilitative Ideal", supra* note 4.

56. MINN. STAT. § 260.125(2) (1992). Rule 32 provides: "Proceedings to refer a delinquency matter . . . may be initiated only upon motion of the county attorney after a delinquency petition has been filed . . ." MINN. R. P. JUV. CT. 32.01; *see also In re* Sweats, 293 N.W.2d 67, 70 (Minn. 1980) (finding that the decision whether to prosecute as an adult is within discretion of the prosecutor).

lowing a finding of probable cause, a juvenile court may order a social study of the child[57] and, within thirty days of the filing of the motion, must conduct a hearing to determine whether the youth meets the waiver criteria.[58] The juvenile court could grant adult reference if it concluded that the child was "not suitable for treatment" or that "public safety is not served" by retention in juvenile court.[59]

1. "Prima Facie Case" or Rebuttable Presumption for Certification

In 1979, the Minnesota Supreme Court confronted some of the procedural and substantive problems inherent in the highly discretionary judicial waiver process in *In re Dahl*.[60] The court held that, while the seriousness of a juvenile's offense obviously was "*among* the relevant factors to be considered,"[61] it insisted that "[t]he record must contain direct evidence that the juvenile endangers the public safety for the statutory reference standard to be satisfied."[62] The court expressed serious concerns about the adequacy of the transfer legislation, clearly indicating to the legislature that the waiver cri-

57. The rule provides: "If probable cause has been shown, pursuant to Rule 19.03 or Rule 32.05, Subd. 1, the court, on its own motion or on the motion of the child's counsel or the county attorney, may order a social, psychiatric or psychological study concerning the child who is the subject of the reference." MINN. R. P. JUV. CT. 32.03. The rule also provides that the social report is to be paid for "at public expense," shall be filed 48 hours before the scheduled hearing, and must be made available to both parties. *Id.*

58. MINN. R. P. JUV. CT. 32.01.

59. MINN. R. P. JUV. CT. 32.05(2); *see* MINN. STAT. § 260.125(2)(d) (Supp. 1983). For general discussions of the waiver procedure in Minnesota, see *Dismantling the "Rehabilitative Ideal", supra* note 4 and *Reference of Juvenile Offenders, supra* note 2.

60. 278 N.W.2d 316 (Minn. 1979). The court commented, "[I]t is clearly apparent that [Dahl] is not the typical delinquent seen by the Juvenile Court. This offense [first degree murder] . . . appears to be an isolated delinquent act . . ." *Id.* at 317-18 (third alteration in original).

In *State v. Hogan*, 212 N.W.2d 664 (1973), the Minnesota Supreme Court indicated that the presence of several criteria, including consideration of the offense allegedly committed, allowed the lower court to certify a youth on public safety grounds. The supreme court subsequently incorporated the *Hogan* and *Kent* criteria into Minn. R. P. Juv. Ct. 32.05(2). *See also In re* J.B.M., 263 N.W.2d 74, 76 (Minn. 1978) ("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.").

61. *Dahl*, 278 N.W.2d at 321 (emphasis in original) (citing State v. Hogan, 212 N.W.2d 664, 669-70 (1973)).

62. *Id.* (emphasis added). The *Dahl* court concluded that the juvenile court could not waive jurisdiction on the basis of age and the seriousness of the offense alone without additional direct evidence of "unamenability" or "dangerousness." *Id.*

teria needed modification and greater specificity,[63] and concluded that "a re-evaluation of the existing certification process may be in order."[64]

In 1980, the Minnesota legislature responded to the *Dahl* decision, revised the juvenile code, and amended the certification statute and procedures.[65] The legislature retained, without change, the basic waiver criteria of nonamenability to treatment or dangerousness,[66] and placed the burden of proof on the prosecution to establish by "clear and convincing evidence" that juvenile court jurisdiction should be waived.[67] However, the amended legislation added a third subdivision to the certification statute[68] which ena-

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63. *Id.* at 318. Despite its concern about the adequacy of the standards, in 1983, the Minnesota Supreme Court promulgated rules of procedure for juvenile courts that included a list of factors that courts should consider in making waiver decisions. *See* MINN. R. P. JUV. CT. 32.05(2) (factors listed *supra* note 55). These factors were drawn from *Hogan*, 212 N.W.2d at 669-70, and *Kent*, 383 U.S. app. 566-67.

When the Minnesota Supreme Court adopted Rule 32, Professor Barry Feld strongly criticized it for failing to address the deficiencies of which it clearly was aware as evidenced in *Dahl*:

> The catalogue of miscellaneous factors promulgated by the Minnesota Supreme Court provides neither a "central guiding principle" nor much practical guidance of juvenile court judges struggling with this difficult sentencing decision. Instead, Rule 32's emphasis on vague, discretionary, and ultimately unquantifiable factors simply compounds all the preexisting problems of the process and submits the most important dispositional decision in the juvenile court to the subjective reaction of each individual juvenile court judge.

Criminalizing Juvenile Justice, supra note 2, at 272.

64. *Dahl*, 278 N.W.2d at 319. The *Dahl* court observed that "the standards for referral adopted by present legislation are not very effective in making this important determination." *Id.* at 318. The court went on to note that

> [d]ue to these difficulties in making the waiver decision, many juvenile court judges have tended to be overcautious, resulting in the referral of delinquent children for criminal prosecution on the erroneous, albeit good faith, belief that the juveniles pose a danger to the public.

Id. at 319.

65. *See generally Dismantling the "Rehabilitative Ideal"*, *supra* note 4, at 192-239 (analyzing 1980 legislative changes in certification).

66. The statute provides that:

> [T]he juvenile court may order a reference only if: . . .
> (d) The court 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.

MINN. STAT. § 260.125(2)(d) (1988) (emphasis added).

67. MINN. STAT. § 260.125(2)(d) (1988); *Dismantling the "Rehabilitative Ideal"*, *supra* note 4, at 205-07.

68. The legislature adopted an offense matrix that established 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 were present. Under the amended statute, the prosecution can establish a prima facie case of both

bled prosecutors to establish a "prima facie" case of nonamenability and dangerousness when a youth committed a serious crime and had an extensive prior record.[69] For example, a prosecutor could establish a prima facie case for certification by charging a sixteen-year-old, who possesses a specified prior record, with certain types of serious offenses.[70] The data analyzed in this study was gathered during the period when the "prima facie" case waiver legislation applied.

Despite the legislative attempt to use offense criteria to rationalize waiver decisions, the 1980 amendments did not significantly reduce judicial discretion.[71] Because evidence of a youth's amenability to treatment and lack of dangerousness could rebut the prosecution's prima facie case,[72] courts continued to decide most

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nonamenability and dangerousness simply by proving that the juvenile is at least sixteen years of age, that the present crime charged is a serious offense, and that the combination of the present crime charged and the prior record brings the case within one of the subdivision's clauses. MINN. STAT. § 260.125(3) (1988); *see generally Dismantling the "Rehabilitative Ideal"*, *supra* note 4, at 194-95, 195 n.96. *But see* 1994 Minn. Laws 576 (legislation repeals § 260.125(3)).

69. MINN. STAT. § 260.125(3) (1988); *see Dismantling the "Rehabilitative Ideal"*, *supra* note 4, at 207-14.

70. *See* JUVENILE JUSTICE TASK FORCE, FINAL REPORT (1994).

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

Id. at 24.

71. *See Dismantling the "Rehabilitative Ideal"*, *supra* note 4, at 209-10. Professor Feld explained that

> a prima facie case . . . [creates] a rebuttable presumption that shifts the burden of producing substantial, controverting evidence to the party opposing the prima facie case. . . . 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. . . . Functionally, then, the procedural operation of a prima facie case is equivalent to a presumption in civil actions . . .

Id. Several subsequent Minnesota court decisions endorsed this analysis. *See, e.g.*, *In re* J.F.K., 316 N.W.2d 563, 564 (Minn. 1982) (holding that where state established a prima facie case which defense rebutted with substantial evidence, court must decide waiver issue on basis of the entire record, not simply by reference to the prima facie case); *In re* Givens, 307 N.W.2d 489, 490 (Minn. 1981) (finding that an unrebutted prima facie case authorizes reference on both grounds of nonamenability and dangerousness); *In re* K.J.K., 357 N.W.2d 117, 119 (Minn. Ct. App. 1984) (stating that where a prima facie case is not established, the court must consider the totality of the circumstances).

72. *See* MINN. R. P. JUV. CT. 32.04(2).

waiver cases on a discretionary basis under the "totality of the circumstances."[73] As a consequence, our data analyses provide a good opportunity to examine the exercise of judicial discretion in waiver decisions.

Several evaluations of Minnesota's waiver process, prior to and following the 1980 legislative "prima facie" case amendments, described judicial waiver decisions as highly idiosyncratic, geographically variable, and inconsistent with criminal court sentencing practices.[74] Shortly after the legislature amended the transfer statutes in 1980, the Minnesota Supreme Court Study Commission reconfirmed its findings of judicial variability.[75] A study of waiver

73. *See Dismantling the "Rehabilitative Ideal", supra* note 4, at 213-14, 239-40. Feld argued that under the discretionary provisions and the logic of *Dahl*, proof of a serious offense alone should not justify waiver. *Id.* at 212. Again, appellate opinions confirmed that analysis and concluded that once a juvenile rebuts the prima facie case with "significant evidence," the prosecution bears the burden of proof under the "totality of the circumstances." *See, e.g., In re* S.R.L., 400 N.W.2d. 382, 384 (Minn. Ct. App. 1987) ("In evaluating evidence under the clear and convincing standard, the court must consider the totality of the circumstances"); *In re* J.F.K., 316 N.W.2d at 564 (same).

74. In 1975-76, the Minnesota Supreme Court's Study Commission found that juvenile courts' discretion frequently yielded pronounced differences in certification outcomes in urban and rural counties throughout Minnesota. *See* REPORT TO THE MINN. SUPREME COURT, *supra* note 40, at 61-78; *see also Reference of Juvenile Offenders, supra* note 2, at 552 (summarizing the findings of the Supreme Court's Study Commission). The Commission found that urban courts transferred serious offenders and older, less serious but chronic juveniles, while rural courts waived youths to impose fines or short sentences on minor offenders. REPORT TO THE MINN. SUPREME COURT, *supra* note 40, at 61-78. The Study Commission's analyses showed that urban offenders considered for certification generally had committed more serious offenses and had more extensive prior records than did their rural counterparts. *See id.* at 71, tables 13-14, 16, 73. In addition to more recorded offenses, certified urban youths had records extending over a longer period of time and more appearances on delinquency petitions than did rural youths. *Id.* at 73, tables 16-17. Despite urban youths' substantially more serious present offenses and longer and more extensive prior records, rural judges certified more youths for adult prosecution. *See id.* at 74.

The Study Commission also noted that discretionary waiver may produce racial disparities. For example, the Study Commission found that while "15.1% of the offenses referred to Hennepin Juvenile Court in 1975 were committed by black youths, almost three times that percentage (44.8) of the cases considered for certification in Hennepin County in 1975-75 [sic] involved black juveniles." *Id.* at 68. The Study Commission attributed the geographic and racial disparities to the inherent ambiguity in the prevailing statutory waiver criteria. *Id.* at 21, 77.

75. The Study Commission analyzed data from 1979, 1980, and 1981 to evaluate the impact of the legislative changes. SUPREME COURT JUVENILE JUSTICE STUDY COMM'N, REPORT TO THE MINN. SUPREME COURT, CHANGING BOUNDARIES OF THE JUVENILE COURT: PRACTICE AND POLICY IN MINN. 3 (Mar. 1982) [hereinafter CHANGING BOUNDARIES]. According to the Study Commission, the prima facie case offense criteria did not significantly effect waiver administration: very few rural juveniles met the criteria, urban prosecutors did not file reference motions against many juveniles who did meet the criteria, and two-thirds of the youths whom juvenile courts referred to adult criminal courts did *not* meet the criteria. *Id.* at 20-21.

practices in 1986 reported that juvenile courts transferred most youths for property offenses rather than for crimes against the person,[76] that urban-rural geographic disparities continued,[77] and that little distinguished transferred youths from those who remained in juvenile court.[78]

In 1992, the Minnesota legislature created an Advisory Task Force on the Juvenile Justice System to examine the certification

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An evaluation of the Minnesota waiver process found that less than one-half of the youths for whom prosecutors sought waiver met the prima facie offense criteria and only about one-third of the youths actually referred for adult prosecution met them. Lee Ann Osbun & Peter Rode, *Prosecuting Juveniles As Adults: The Quest for "Objective" Decisions,* 22 CRIMINOLOGY 187, 194-95 (1984). As Osbun and Rode noted, however, "[f]ollowing enactment of the revised statute, there was a slight increase in the proportion of transferred cases that did satisfy the [offense] criteria—from 22.2% before enactment to 34.5% after enactment." *Id.* at 195. Furthermore, the adoption of prima facie offense criteria for waiver seems to have had little impact on the numbers or kinds of youths criminally prosecuted in Minnesota. *Id.* at 197-98. Osbun and Rode attributed the ineffectiveness of the legislatively promulgated "objective guidelines" to their failure to identify "serious" offenders better than those identified on a discretionary basis. As a result, they concluded that "[d]espite its defects and potential for abuse, the traditional discretionary process used by prosecutors and juvenile court judges to make waiver decisions appears to be more successful than the objective criteria alone in identifying the more serious juvenile offenders." *Id.* at 199-200.

76. *See Bad Law Makes Hard Cases, supra* note 13. In this study, Professor Feld compared the present offense, prior records, and treatment histories of juveniles waived to criminal court with all delinquents who remained in juvenile courts in Minnesota. Feld reported that "more than two-thirds (69.9%) of certified juveniles were charged with felony offenses, predominantly felony offenses against property. In all, slightly more than one-quarter [28.9%] of all certified juveniles were charged with serious offenses against the person while the largest single category of certified juveniles were charged with felony property offenses." *Id.* at 30-31. *See also infra* notes 82-83 and accompanying text (most judicially waived juveniles charged with property offenses).

77. Rural judges more often waived youngsters with less serious present offenses, prior records, or previous treatment exposures than did their urban counterparts. *Bad Law Makes Hard Cases, supra* note 13, at 43. "Thus, a distinctive geographic pattern emerges in which rural youths charged with less serious offenses are at greater risk for transfer than are their similarly-situated urban peers." *Id.*

Intra-state geographic variations in waiver statutes are not unique to Minnesota. *See, e.g,.* Edwards, *supra* note 40, at 610-13 (county by county disparity in California); HEUSER, *supra* note 40, at 30 (county by county variations in Oregon—"it appears that some counties may be over- or under-represented in terms of the proportion of cases per unit of risk population."); BETWEEN TWO WORLDS, *supra* note 2, at 147-98 (county by county disparity within states in Northeast Region, North Central Region, Southeast Region, South Central Region, and West Region).

78. Multivariate analyses could explain very little of the variance (only 3.1%) in the differences between waived youths and the remaining juvenile offenders. *Bad Law Makes Hard Cases, supra* note 13, at 40. Previous institutional confinement, current detention status, a youth's age, the seriousness of the present offense, and the number of charges filed significantly influenced judicial waiver decisions. *Id.* at 38-40.

process and recommend changes in the waiver statutes.[79] The Juvenile Justice Task Force conducted studies of waiver practices[80] and the sentences imposed upon waived juveniles who were convicted of felonies in adult court.[81] Consistent with the waiver data, adult criminal courts sentenced the majority of juveniles (62% in 1991) convicted as adults for property offenses rather than violent crimes.[82] Because prosecutors screened and juvenile courts waived relatively few juveniles, criminal courts convicted the small, waived population for more serious offenses than they did for all adult felons.[83] However, the waived juvenile group still experienced a lower rate of imprisonment than did comparable adult offenders.[84]

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79. *See Violent Youth and Public Policy, supra* note 35 (analyzing the process of law reform and the legislation enacted pursuant to the Task Force's recommendations).

80. The Task Force discovered that despite public fears of youth violence, prosecutors charged the majority of juveniles certified to stand trial as adults in Minnesota in 1992 with property offenses. *See* Sharon Krmpotich, Graphic Summary of Reference Hearings in Juvenile Court (Apr. 23, 1993) (on file with author). In 1992, 101 juveniles were certified for trial as adults. *Id.* Of those transferred youths, prosecutors charged more than half (52%) with property crimes, about one-third (35%) with crimes against the person and the remainder (13%) with miscellaneous offenses from weapons offenses to disturbing the peace to traffic violations. *Id.*

81. *See* MINNESOTA SENTENCING GUIDELINES COMM'N, SENTENCING PRACTICES: JUVENILE OFFENDERS SENTENCED FOR FELONIES IN ADULT COURT (Feb. 1993). The Minnesota Sentencing Guidelines Commission collects data on the sentences that juveniles waived and convicted of felony offenses receive in criminal courts. The Guidelines Commission data does not report the sentences of juveniles convicted as adults for misdemeanors nor those convicted of Murder in the First Degree which carries a mandatory life sentence.

Between 1981 and 1991, about 1.5% of all felony offenders sentenced in adult courts consisted of waived juveniles. *Id.* at 1. Over the decade, the proportion of waived juveniles sentenced as adult felons increased 26%, from 85 in 1981 to 107 in 1991. *Id.* Because of prosecutorial and judicial screening, the relatively few waived juveniles comprised a somewhat more seriously criminal group than all adult felons, although judges sentenced the majority of waived juveniles for property offenses (62% in 1991). *Id.* at 2. For example, in 1991, courts sentenced 35% of waived juveniles for crimes against the person as compared with 25% of all adult offenders. *Id.* Reflecting the escalating youth violence, "Between 1981 and 1991, the number of juveniles sentenced in adult court for persons offenses increased by 37%; the increase for property offenders was 18%," and the largest increases occurred in the proportion of waived juveniles sentenced for homicide and sex offenses. *Id.* Because the juveniles convicted as adults, as a group, committed higher severity level offenses than did all adult offenders, they received somewhat longer sentences, an average of 53.4 months for waived juveniles compared with 45.1 months for all adults. *Id.* at 4.

82. *Id.* at 4.

83. For example, in 1991, 35% of juveniles as compared with 25% of all adult offenders were convicted of crimes against the person. *Id.* at 2.

84. *Id.* at 3. Because the majority of juveniles convicted in adult court committed property offenses and had a lower criminal history score than did adult defendants, their overall rate of imprisonment remained somewhat lower than that of adult felons. Moreover, youthfulness constituted a mitigating factor in the sentences of these "adult" offenders:

Several evaluations of judicial waiver practices spanning more than a decade reported that prosecutors charged and juvenile courts waived the majority of juveniles for property crimes rather than violent crimes, and that urban-rural geographic disparities occurred in the administration of the process throughout Minnesota. Moreover, because most waived juveniles committed property offenses and had less extensive criminal history scores than their adult counterparts, they often received shorter sentences in criminal courts than did adults, or than they could have received in juvenile court. In short, the cumulative research documents both the idiosyncratic subjectivity of judicial discretion and the "lack of fit" between waiver decisions and criminal court sentencing practices.

2. 1994 Legislative Changes in Minnesota's Certification Statute: Sentencing Guidelines, Presumptive Imprisonment, and Presumptive Certification

The 1994 statutory amendments represent an important innovation in juvenile waiver policy.[85] The waiver policy changes reflect a shift in emphasis from the persistence of a youth's offending to the seriousness of the offense, and integrates more closely juvenile court waiver and criminal court sentencing practices. The 1994 amendments used the "modified just deserts" framework of the Minnesota Sentencing Guidelines to structure the most important sentencing decisions of juvenile courts.[86] Under the Minnesota Sentencing Guidelines, conviction of certain violent crimes creates a presumption that the offender should be committed to prison.[87] The new waiver statute uses the Sentencing Guidelines' Severity Level VII-X and felony firearms offenses to identify those juveniles who should be presumptively certified and those youths who, if retained as juveniles, should be subject to enhanced sanctions within

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

Id.

85. *See Violent Youth and Public Policy, supra* note 35, at 1005-1121 (analyzing changes in Minnesota waiver legislation).

86. *See Violent Youth and Public Policy, supra* note 35, at 1024-37 (analyzing legislative changes and the relationship between sentencing guidelines and certification jurisprudence).

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

juvenile courts. By using the Sentencing Guidelines' presumptive offenses to define who the serious juvenile offenders are, the new statute incorporates a consistent legal definition of "serious crimes" in both the juvenile and adult systems.

For juveniles aged fourteen to seventeen and charged with any felony offense,[88] the prosecutor may file a motion to certify and must prove by "clear and convincing evidence" that protection of "public safety" requires the juvenile's transfer to criminal court.[89] However, for youths sixteen or seventeen years old at the time of offense and charged with a Level VII-X crime or a firearm offense, there is a presumption that the juvenile should be transferred to criminal court.[90] Unlike the previous "prima facie" case approach, which created only a rebuttable presumption for waiver and left the ultimate burden on the prosecutor to justify the decision under the

88. MINN. STAT. § 260.125(1) (Supp. 1995) (allowing certification only if charged with "an offense that would be a felony if committed by an adult").

89. See MINN. STAT. § 260.125(2) providing that:

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

MINN. STAT. § 260.125(2) (Supp. 1995) (emphasis added).

90. The statute states:

> It is *presumed* that a proceeding involving an offense committed by a child *will be certified* to district court if:
>
> (1) the child was *16 or 17 years old* at the time of the offense; and
>
> (2) the delinquency petition alleges that the child committed an offense that would result in a *presumptive commitment to prison under the sentencing guidelines* and applicable statutes, or that *the child committed any felony offense while using, whether by brandishing, displaying, threatening with, or otherwise employing a firearm.* If the court determines that probable cause exists to believe the child committed the alleged offense, the *burden is on the child to rebut this presumption by demonstrating by clear and convincing evidence that retaining the proceeding in the juvenile court serves public safety.* If the court finds that the child has not rebutted the presumption by clear and convincing evidence, the court *shall* certify the child to district court.

MINN. STAT. § 260.125(2a) (Supp. 1995) (emphasis added).

"totality of the circumstances," the new law shifts the burden of proof to the juvenile.[91] Older juveniles charged with serious offenses must prove by "clear and convincing" evidence that they should remain in juvenile court consistent with "public safety."[92] If the juvenile fails to carry that burden, then waiver is non-discretionary.[93] Basing the presumption of waiver on the seriousness of the offense and shifting the burden of proof should increase significantly the numbers of youths certified to criminal court.[94]

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91. MINN. STAT. § 260.125(2)(a) (Supp. 1995). Allocating burdens of proof reflects ways to minimize and control specific types of errors. Thus, if a mistake is to be made, under a judicial waiver statute, "the preferred error . . . is to keep a juvenile in the juvenile court if there is doubt concerning which court is appropriate," whereas when a legislature excludes offenses from juvenile court jurisdiction, "[t]he favored error . . . is to keep a juvenile charged with such an offense in the criminal court. . ." McCarthy, *supra* note 9, at 659. *See also Dismantling the "Rehabilitative Ideal"*, *supra* note 4, at 215 ("Placing the burden of persuasion on a youth . . . would emphasize the policies of social defense and public safety in light of the uncertainty of the issues being determined. . . . The legislative policies that justify creating a rebuttable presumption also justify placing the burden of persuasion on the juvenile rather than the state.").

92. MINN. STAT. § 260.125(2b) (Supp. 1995).

> In determining whether the public safety is served by certifying a child to district court, the court shall consider the following factors:
>
> (1) the *seriousness of the alleged offense* in terms of community protection, including the existence of any *aggravating factors recognized by the sentencing guidelines*, the use of a firearm, and the impact on any victim;
>
> (2) the *culpability* of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any *mitigating factors recognized by the sentencing guidelines*;
>
> (3) the child's *prior record of delinquency*;
>
> (4) the child's *programming history*, including the child's past willingness to participate meaningfully in available programming;
>
> (5) the adequacy of the *punishment or programming* available in the juvenile justice system; and
>
> (6) the dispositional options available for the child. In considering these factors, *the court shall give greater weight to the seriousness of the alleged offense and the child's prior record of delinquency than to the other factors listed in this subdivision.*

Id. (emphasis added).

93. MINN. STAT. § 260.125(2a)(2) (Supp. 1995) requires that "the court *shall* certify the child." (emphasis added).

94. In 1976, California pioneered the presumption-burden-shifting waiver strategy. If the prosecution alleged certain enumerated offenses, the statute presumed the court would transfer the youth unless he or she affirmatively established amenability to treatment within the juvenile court. *See* CAL. WELF. & INST. CODE § 707(b) (West 1984 & Supp. 1995). Subsequent statutory amendments greatly expanded the catalogue of offenses which create the presumption of adulthood. *See Legislative Changes in Waiver, supra* note 1, at 508-09 (discussing the California waiver strategy and its effects).

Specifying offense criteria and shifting the burden of proof dramatically increased the number of youths tried, convicted, and sentenced as adults after being charged with one of the enumerated offenses. "Los Angeles County experienced a 318% increase in certification hearings and a 234% increase in certifications" between 1976 and 1977. KATHERINE S. TEILMANN & MALCOLM W. KLEIN, SUMMARY OF

The statutory amendments embody a fundamental shift in waiver jurisprudence, repudiate subjective clinical inquiries into "amenability to treatment," and give primacy to more objective "public safety" criteria.[95] The "public safety" approach mirrors the Sentencing Guidelines' emphases on the seriousness of the present offense and prior record.[96] The new law also assigns controlling weight to the present offense and prior delinquency record in making waiver decisions.[97] Finally, the new juvenile code excludes from juvenile court jurisdiction youths sixteen years of age or older who are indicted for first degree murder.[98]

The 1994 juvenile code amendments also create an intermediate youthful offender status— Extended Jurisdiction Juvenile Prosecutions (EJJ)—which expands the sentencing options available in juvenile court until age twenty-one rather than age nineteen, as for ordinary delinquents.[99] The EJJ provision uses the Sentencing

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INTERIM FINDINGS OF THE ASSESSMENT OF THE IMPACT OF CALIFORNIA'S 1977 JUVENILE JUSTICE LEGISLATION 30 (1977). Moreover, criminal courts convicted youths certified to stand trial as adults as often as those tried in juvenile court, and incarcerated them more frequently than their juvenile counterparts. *Id.* at 31-32.

95. MINN. STAT. § 260.125(2b) (statutory definition of "public safety" criteria).

96. *See supra* note 92.

97. *Id. See Reference of Juvenile Offenders, supra* note 2, at 528-29 (criticizing legislation that fails to rank-order or assign relative weights to the various factors courts consider when making waiver decisions); *Criminalizing Juvenile Justice, supra* note 2, at 271-72 (criticizing lists of unweighted, disjunctive factors).

98. MINN. STAT. §§ 260.015(5)(b), .111(1a), .125(6) (Supp. 1995). *See generally Violent Youth and Public Policy, supra* note 35, at 1051-56 (analyzing legislative rationale to exclude first degree murder from juvenile court jurisdiction).

99. MINN. STAT. § 260.126 (Supp. 1995). *See Violent Youth and Public Policy, supra* note 35, at 1038-51 (analyzing rationale and legislation increasing juvenile courts' sentencing options). With extended jurisdiction, the juvenile court's sentencing authority continues until age 21, rather than terminating at age nineteen, as is the case for delinquency. MINN. STAT. §§ 260.126(1); 260.181. When a prosecutor initially files a delinquency petition alleging a felony offense, the petition also must indicate whether the prosecutor seeks extended juvenile jurisdiction. MINN. STAT. § 260.131(4).

Several methods exist for a youth to enter the extended jurisdiction of the juvenile court, including an unsuccessful attempt to certify the juvenile. *See* MINN. STAT. § 260.126(1). In an "ordinary" certification hearing involving a youth 14 to 17 years of age charged with a felony, if the court does not certify the youth, then the judge has discretion whether to designate the subsequent juvenile proceeding as an extended jurisdiction prosecution or as an ordinary delinquency proceeding. MINN. STAT. § 260.126(1)(1). In presumptive certification proceedings involving youths 16 or 17 years old charged with an offense for which the sentencing guidelines presume commitment to prison, if the court does not certify the youth, then the court *must* designate the subsequent juvenile proceeding as an extended jurisdiction prosecution. MINN. STAT. § 260.126(1)(2). For youths 16 or 17 years of age charged with a presumptive certification — presumptive commitment to prison felony offense, a prosecutor may designate the case as an extended jurisdiction prosecution without any further judicial review. *Id.* Because the only alternative disposition available to a judge following a presumptive certification hearing is to designate the case as an EJJ proceeding, allowing the prosecutor directly to designate the case as an EJJ

Guidelines' offense criteria to determine which youths enter this extended, blended juvenile-criminal jurisdictional status. Youths tried in juvenile court as EJJs receive all adult criminal procedural safeguards, including the right to a jury trial.[100] The right to a trial by jury is an essential component of this new "juvenile" quasi-adult status, because following a plea or finding of guilt, the juvenile court will impose both a juvenile disposition *and* an adult criminal sentence, the execution of which is stayed pending compliance with the juvenile disposition.[101] The adult criminal sentence is executed only if an EJJ youth fails to satisfy the conditions of juvenile probation. Further bridging the two systems, the 1994 amendments expand the use of juvenile and EJJ convictions in the Sentencing Guidelines' criminal history score to enhance the sentences of youths convicted as adult offenders and to systematize control of chronic offenders in both systems.[102] The use of juvenile convictions to enhance subsequent adult criminal sentences arguably requires providing all adult criminal procedural safeguards.[103] Finally, because of the increased significance of all juvenile convic-

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proceeding provides an efficient alternative. MINN. STAT. § 260.125(5). Finally, a prosecutor may request a juvenile court to designate a youth as an EJJ instead of filing a certification motion against a non-presumptive certification youth. MINN. STAT. § 260.126(1)(3). At the EJJ hearing, the prosecution must prove by "clear and convincing evidence" that "public safety" warrants designating the proceeding as an extended jurisdiction prosecution using the same "public safety" criteria specified in the certification legislation. MINN. STAT. § 260.125(2b).

100. *See* MINN. STAT. § 260.126(3) ("A child who is the subject of an extended jurisdiction juvenile prosecution has the *right to a trial by jury* and to the effective assistance of counsel . . .") (emphasis added). *See also* MINN. STAT. § 260.155 (1)(a) ("a child who is prosecuted as an extended jurisdiction juvenile has the *right to a jury trial* on the issue of guilt") (emphasis added).

101. *See* MINN. STAT. § 260.126(4). Adult criminal procedural safeguards are a constitutional prerequisite to imposing a valid adult sentence.

102. The legislation includes all extended jurisdiction juvenile convictions in the sentencing guidelines' criminal history score in the same manner as those for other adult offenders. *See* MINN. STAT. § 260.211(1)(a) (Supp. 1995) ("An extended jurisdiction juvenile conviction shall be treated in the same manner as an adult felony criminal conviction for purposes of the sentencing guidelines."). The new law also requires juvenile courts to retain EJJ records for as long as they would retain those of adult offenders. MINN. STAT. § 260.161(1)(b) (Supp. 1995).

103. *See, e.g.*, David Dormont, *For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 MINN. L. REV. 1769, 1793-94 (1991) ("[C]ourts should not interpret *McKeiver* to justify using juvenile convictions with reduced procedural protections for punitive purposes at the adult level. Interpreted in this manner, *McKeiver* would not allow courts to enhance an adult's sentence based on juvenile sentences obtained during proceedings governed by the lower 'fundamental fairness' standard."). *See also* United States v. Johnson, 28 F.3d 151, 157 (D.C. Cir. 1994) (Wald, J., dissenting) (Sentencing Commission strayed beyond permissible boundaries of interpretation in treating juvenile sentences and periods of confinement like adult sentences and periods of incarceration for purposes of automatic increases to the defendant's criminal history category).

tions, the new law provides juveniles with increased procedural safeguards, especially access to defense counsel.[104]

The new Minnesota juvenile code uses the Sentencing Guidelines' definition of serious crimes to make certification easier and more consistent, to rationalize and integrate juvenile and criminal court sentencing practices, to emphasize more objective "public safety" factors over subjective "treatment" considerations, and to enhance the sentencing authority of juvenile courts. The 1994 amendments create a presumption to certify older juveniles charged with serious offenses. Youths charged with these violent crimes against the person are both more likely to be waived and to be imprisoned if convicted as adults. These changes emphasize primarily the seriousness of a youth's present violent offense.

By contrast, prior research indicates that Minnesota juvenile courts typically waived chronic young property offenders.[105] Because the Sentencing Guidelines presume that property offenders do not receive sentences of imprisonment, criminal courts did not sentence most of those chronic young offenders waived to criminal court to prison. Thus, chronic property offenders fell into the "punishment gap," the breach in intervention caused by the lack of fit between waiver criteria and criminal sentencing practices. Presumably, judges will now use the Extended Jurisdiction provisions available in juvenile court to sentence to enhanced terms as juveniles many of those chronic property offenders that they previously waived. The statutory changes reflect a shift in emphasis from a juvenile's persistence of offending to the seriousness of the present offense. As the next section suggests, because of racial differences in patterns of offending, the legislative policy change from persistence to seriousness will likely have a disproportional impact on minority juveniles.

C. *Youth Crime, Violence, and Race: Implications of Persistence versus Seriousness as Waiver Criteria*

The Federal Bureau of Investigation (FBI) publishes annual summaries of national data on crimes known or reported to police and arrests of offenders. The FBI's Serious Crime Index includes both property and violent offenses, and provides the most widely

104. MINN. STAT. § 260.155(1b) (1994). *See Violent Youth and Public Policy*, *supra* note 35, at 1097-1121 (analyzing the relationship between expanding sentencing authority and the need for greater procedural safeguards, especially delivery of legal services).

105. *See supra* notes 75-82 and accompanying text.

cited indicator of crime trends.[106] The bulk of all serious crime involves property offenses rather than violent crimes and, during the 1980s, the juvenile rate of property crimes was stable or only slowly increased.[107] By contrast, although violent crimes comprise a much smaller component of the overall serious crime index, the rates of juvenile violence, especially homicide, have surged dramatically since the mid-1980s.[108] While nationally, property crime by juveniles increased 11% between 1983 and 1992, violent crime increased by 57%.[109] Moreover, police arrested a disproportionately large number of minority youths, especially African-Americans, for crimes of violence.[110] In a special section on juveniles and violence in 1991, the FBI reported:

> In 1990, the Nation experienced its highest juvenile violent crime arrest rate, 430 per 100,000 juveniles . . . . The 1990 rate was 27 percent higher than the 1980 rate. . . . Of particular note is the upward trend that started in 1988 for both white and black youths . . . In 1990, the juvenile violent crime arrest rate reached 1,429 per 100,000 black juveniles, five times that for white youths.[111]

The most alarming recent change in juvenile crime is the increase in murder rates that has accompanied the proliferation of guns among youths.[112] The FBI report indicated:

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106. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES: 1991 (1992) [hereinafter UNIFORM CRIME REPORTS 1991]. Based on reports from victims and investigations of crimes, local law enforcement agencies provide data to centralized state agencies who then transmit the data to the FBI. *Id.* at 1-3. The FBI's Serious Crime Index includes four violent crimes: murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault. *Id.* The Serious Crime Index also includes four property crimes: burglary, larceny-theft, motor vehicle theft, and arson. *Id.*

107. *See* Howard N. Snyder, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION FACT SHEET #13, 1992 JUVENILE ARRESTS (May 1994) [hereinafter 1992 JUVENILE ARRESTS] (reporting that the 1992 FBI Uniform Crime Report data indicate that juveniles accounted for 18% of all arrests for violent crime, and 33% of all property crimes. Juvenile property crime arrests increased by 8% between 1988 and 1992, and by 11% between 1983 and 1992). *See also* HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 116-19 (1995) [hereinafter JUVENILE OFFENDERS AND VICTIMS] (analyzing crime trend data and reporting relative stability in juvenile property crime rates).

108. *See* JUVENILE OFFENDERS AND VICTIMS, *supra* note 107, at 110-13.

109. 1992 JUVENILE ARRESTS, *supra* note 107, at 2. *See also* FOCUS ON VIOLENCE, *supra* note 20, at 6.

110. *See* FOCUS ON VIOLENCE, *supra* note 20, at 21-22 (noting racial disparities in weapons violations and homicide arrest rates); JUVENILE OFFENDERS AND VICTIMS, *supra* note 107, at 91 (discussing minority overrepresentation in arrests for crimes of violence).

111. UNIFORM CRIME REPORTS 1991, *supra* note 106, at 279. *See also* JUVENILE OFFENDERS AND VICTIMS, *supra* note 107, at 104-07 (analyzing the rise in juvenile violence arrest rates).

112. Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 85 J. CRIM. L. & CRIMINOLOGY (forthcoming 1995) (analyzing changing patterns of age-

> The Nation experienced an upsurge in the juvenile murder arrest rate for blacks during the 1980s . . . [and] [t]his upward trend had a profound impact on the overall juvenile murder arrest rate . . . . Specifically, between 1980 and 1990, the arrest rate for this [black] group increased 145 percent, while the rate for whites rose 48 percent . . . . When considering the difference in the arrest rate for black and white juveniles, the black rate was 7.5 times that of whites in 1990. From a historical perspective, 1965 to 1990, the overall murder arrest rate for juveniles increased 332 percent, from 2.8 to 12.1. Another item of concern is that during the past decade, there has been a 79-percent increase in the number of juveniles who commit murders with guns. In 1990, nearly 3 of 4 juvenile murder offenders used guns to perpetrate their crimes.[113]

Although adults continue to account for most arrests for violent crimes,[114] the proliferation of firearms and the corresponding dramatic rise in homicide by mid- to late-adolescents, the disproportionate overrepresentation of minority youths as perpetrators and victims of violence,[115] and increasing arrests of younger juveniles for violent crimes certainly justify public concerns.[116]

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specific homicide rates in conjunction with the proliferation of guns and the illegal drug industry). *See also* FOCUS ON VIOLENCE, *supra* note 20, at 18-20 (finding recent increases in homicide rates as a result of increased firearms use); JUVENILE OFFENDERS AND VICTIMS, *supra* note 107, at 108 (discussing the surge in juvenile arrests for weapons violations).

113. UNIFORM CRIME REPORTS 1991, *supra* note 106, at 279.

114. *See* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES: 1992, at 227 (1993) [hereinafter UNIFORM CRIME REPORTS 1992] (reporting that juvenile homicide arrests accounted for about 14.5 percent of all murder arrests, or about one of seven murder arrests, and that police arrested 2,829 juveniles for murder while they arrested 16,662 adults over 18 years of age). Even these arrest rates may somewhat overstate juveniles' violent criminal involvement, since youths, more than adults, tend to commit their crimes in groups, and one criminal event may produce several juvenile arrests. *See* Franklin Zimring, *Kids, Groups, and Crime: Some Implications of a Well-known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867, 874 (1981).

115. *See* FOCUS ON VIOLENCE, *supra* note 20, at 16 (noting that black youths had significantly greater violent victimization rates than white youths); JUVENILE OFFENDERS AND VICTIMS, *supra* note 107, at 47 (finding in a 1991 study that 41% of all juvenile offenders were African-American).

116. UNIFORM CRIME REPORTS 1992, *supra* note 114, at 227; BARBARA ALLEN-HAGEN ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION FACT SHEET #19, JUVENILES AND VIOLENCE: JUVENILE OFFENDING AND VICTIMIZATION 1 (Nov. 1994) ("Between 1988 and 1992, the number of Violent Crime Index arrests of juveniles increased by 47%—more than twice the increase for persons 18 years of age or older. Most alarming, juvenile arrests for murder increased by 51%, compared to 9% for adults."). *See also* Peter W. Greenwood, *Juvenile Crime and Juvenile Justice*, *in* CRIME 91, 96 (James Q. Wilson & Joan Petersilia eds., 1994) (noting that "[i]n 1980, juveniles accounted for just 10 percent of all arrests for homicide. By 1990, juveniles accounted for 13.6 percent of all homicide arrests. Between 1984 and 1992, the number of juveniles arrested for homicide, who were *under the age of fifteen*, increased by 50 percent.").

Because racial minorities, especially African-Americans, commit a disproportionate amount of violent crime, facially neutral juvenile and criminal justice policies which focus on crimes against the person will have a disparate impact. Recent demographic changes in Minnesota's racial composition affect both violent crime rates and political reactions to youth crime.[117] Minnesota has a relatively low proportion of racial minorities.[118] However, the state experienced the fourth highest rate of minority population growth in the nation during the 1980s.[119] African-Americans are Minnesota's largest minority group,[120] and most reside in Minneapolis and St. Paul.[121] Minnesota's changing racial composition is also reflected in the proportion of children in poverty, which increased more than 20% during the 1980s.[122] The largest growth in the number of poor children occurred in the Twin Cities, where Minne-

117. *See Violent Youth and Public Policy*, *supra* note 35, at 978-82 (contending that increases in racial minorities and violent crime provided impetus for 1994 juvenile code changes). Minority youths in Minnesota commit a disproportionate amount of violent crime, a racial pattern that figures prominently in public perceptions and political responses to youth crime. Because of population differences, white juveniles in Minnesota comprise the majority of all youths arrested for violent offenses. In 1991, for example, police arrested white juveniles for 738 violent crimes, as compared with 512 black juveniles. MINNESOTA BUREAU OF CRIMINAL APPREHENSION, Table 14 (1991). Given the differences in relative populations, however, black juveniles' disproportionate over-representation in arrests for violent crimes mirrored the national differences in rates. For example, police arrested 12 black juveniles for murder in 1991 as compared with 4 white youths. *Id.*

118. MINNESOTA STATE DEMOGRAPHER, POPULATION NOTES, MINNESOTA MINORITY POPULATIONS GROW RAPIDLY BETWEEN 1980 AND 1990, at 1 (Sept. 1991) (comparing Minnesota's minority population of 6.3% with 24.4% of the United States, giving it the seventh smallest minority population in the nation).

119. *Id.* at 3. The minority population in Minnesota grew 71.7%, as compared with the nonhispanic white population, which rose only 4.7%, about the same as the national average (4.4%). *Id.*

120. *Id.* at 7. The 1990 census counted 94,944 African-American Minnesotans. While African-Americans are Minnesota's largest minority group, they constitute only 2.2% of the population, well below the national average of 12.1%. *Id.* As a result of natural increase and net migration, the African-American population increased 78% during the decade of the 1980s. *Id.* at 6.

121. *Id.* at 7. Seventy-two percent of African-Americans reside in Minneapolis or St. Paul, and an additional 23% are in the Twin Cities' suburbs. Only 6% reside outside the seven county metropolitan area and most live either in Duluth or Rochester. *Id.* The Twin Cities' minority population increased from 12.5 to 21.3%. *Id.* *See also* MARCY R. PODKOPACZ, STRATEGIC PLAN FOR THE BUREAU OF COMMUNITY CORRECTIONS 1 (1993) (discussing the increase in Hennepin County's minority population from 1980 to 1990).

122. *See* Martha McMurry, *Child Poverty in Minnesota*, Population Notes (Minnesota State Planning, St. Paul, Minn.) Feb. 1994.

> Minnesota children were more likely to be poor in 1989 than in 1979, and poor children's characteristics changed dramatically during the decade. Children in poverty are increasingly likely to be nonwhite, living in the Twin Cities and living in a single-parent family . . . Minnesota's minority children are very economically disadvantaged relative to white children. Not only do they have extremely high poverty rates,

sota's minority populations are concentrated.[123] Because younger children are at greater risk of living in poverty than older children,[124] the more numerous younger generation is exposed to more adverse social circumstances which contribute to greater probabilities of criminal involvement. Professor Alfred Blumstein recently cautioned:

> [T]here are many factors currently in place that should make the crime problem become increasingly serious over the coming decade . . . . The effect of the changing demographic composition will increase crime rates as the population in the 15-19 age range (the one with the highest age-specific offending rates) will

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> but they are much more likely to be poor than minority children in the rest of the United States.

Id. at 1. *See also* MINNESOTA PLANNING, CHILD POVERTY IN MINNESOTA: TRENDS AND ISSUES (Mar. 1994).

Three demographic changes contributed to the dramatic increase in Minnesota's children in poverty: a growing proportion of nonwhite children, an increasing proportion of children living in single-mother families, and a greater probability that children in minority and single-parent households will be poor. *Id.* at 1. About 57% of poor families with children are headed by a single mother. *Id.* at 7. *See generally* NATIONAL RESEARCH COUNCIL, LOSING GENERATIONS: ADOLESCENTS IN HIGH-RISK SETTINGS 41-56 (1993) [hereinafter LOSING GENERATIONS] (summarizing research on demographic changes in family structure, its relationship to poverty, and the risks that poverty and single-parent households pose for adolescent development). The National Research Council concludes that:

> Changes in family income and changes in family structure over the past two decades have made it more difficult for many parents to provide their children with the security and stability that are most conducive to physical and emotional health, success in school, and the avoidance of health- and life-compromising behaviors that jeopardize the successful transition to adulthood. Single parents and families living at or below the poverty level face the greatest challenges.

Id. at 55.

123. McMurry, *supra* note 122, at 4. "More than 70 percent of the increase over the decade [in the number of poor children] came from the higher number of poor children in Minneapolis and St. Paul, with most of the rest attributable to growing numbers in Twin Cites suburbs. . . . In the two central cities combined, the child poverty rate went up from 16.3 percent in 1979 to 28.5 percent in 1989." *Id.*

Although the poverty rate for white children in Minnesota is relatively low compared with the rest of the nation, the poverty rates for Minnesota's minority children, the fastest growing segments of the youth population, are among the highest in the nation. Of Minnesota's African-American children, nearly half (49.4%, rank seventh in the nation) live in poverty, as do more than half (54.8%, fourth in the nation) of its Native American children, and more than one-third (37.1%, rank third in nation) of its Asian children. *Id.* at 3. In Hennepin County, the proportion of the nonwhite population which is in poverty is 35.6%, compared with 6.2% of the white population. PODKOPACZ, *supra* note 121, at 1.

124. McMurry, *supra* note 122, at 8. "In 1989, 14.8 percent of Minnesota children under age 5 were poor. The poverty rate declined to 10.6 percent for 12- to 17-year-olds." *Id.* The absence of affordable day-care contributes to the greater concentration of poverty among the youngest children. *See, e.g.*, DUNCAN LINDSEY, THE WELFARE OF CHILDREN (1993). Once young children enter school, which effectively provides free day-care, lone mothers are able to enter the workforce in larger numbers.

> be growing over at least the next decade, especially in the [racial] groups with the highest offending rates.[125]

Child poverty and racial minority status are linked to involvement in crime, especially violent crimes against the person.[126] As the *FBI Uniform Crime Reports* indicate, minority youths are five times more likely than white youths to be arrested for crimes of violence, and seven and a half times more likely to be arrested for homicide.[127]

Changes in Minnesota's racial composition, a growing concentration of poor and minority children in urban settings, and disproportionate involvement of minority youth in violent crime, sustain public and political perceptions of a threatening structural "underclass."[128] Professors Robert Sampson and John Laub contend that these structural and contextual indicators of racial and social inequality affect official crime control policies.[129] They argue that political leaders will respond to public anxiety and use the juvenile justice system to increase the social control of the threatening and

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125. Alfred Blumstein, *Making Rationality Relevant*, 31 CRIMINOLOGY 1, 12 (1993). *See also* JUVENILE OFFENDERS AND VICTIMS, *supra* note 107, at 111 (estimating that violent juvenile crime arrests will double over the next fifteen years based on projected population growth and controlling for racial differences in population and age-specific arrest rates).

126. *See, e.g.*, DOUGLAS S. MASSEY & NANCY M. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF AN URBAN UNDERCLASS (1993); LOSING GENERATIONS, *supra* note 122, at 152-53.

127. UNIFORM CRIME REPORTS 1991, *supra* note 106, at 279. *See also* UNITED STATES DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993, at 447 (Kathleen Maguire & Ann L. Pastore eds., 1994) (indicating that black youths are more than five times as likely to be arrested for violent crimes as white youth); JUVENILE OFFENDERS AND VICTIMS, *supra* note 107, at 57 (finding that homicide rates for black juveniles was 7.5 times higher than the rate for white juveniles); WOLFGANG ET AL., *supra* note 21, at 247 ("the more serious forms of bodily harm are committed by nonwhites"); TRACY ET AL., *supra* note 21, at 277 (stating that the violent offense rate for nonwhites is nearly six times the rate for whites); ELLIOTT CURRIE, CONFRONTING CRIME: AN AMERICAN CHALLENGE 144-71 (1985) (documenting positive correlations between race and violent crime); Michael Hindelang, *Race and Involvement in Common Law Personal Crimes*, 43 AM. SOC. REV. 93, 103-04 (1978) (finding that blacks disproportionately commit rape, robbery, and assault).

128. *See* MASSEY & DENTON, *supra* note 126 (arguing that residential segregation is structurally responsible for the "mutually reinforcing and self-feeding spirals of decline" in black neighborhoods); WILLIAM J. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987) (analyzing the numerous factors contributing to social dislocation in the urban ghetto as well as ineffective public policy responses); THE URBAN UNDERCLASS (Christopher Jencks & Paul E. Peterson eds., 1991) (collecting essays on the economic condition of the underclass, the causes and consequences of concentrated poverty, and public policy responses).

129. Robert J. Sampson & John H. Laub, *Structural Variations in Juvenile Court Processing: Inequality, the Underclass, and Social Control*, 27 LAW & SOC'Y REV. 285, 305 (1993).

offensive "underclass" population.[130] Seen in this light, the 1994 changes in Minnesota's juvenile waiver and criminal sentencing policies constitute a predictable response to changing racial composition, increasing poverty and urban concentration of minority young people, disproportional minority involvement in serious youth violence, and demographic projections of more poor and minority urban youths in the decade to come.[131]

D. Judicial Discretion, Waiver, and Race

Empirical evaluations of juvenile court sentencing practices consistently indicate that, after controlling for the effects of present offense and prior record, judicial discretion often results in racial disparities in delinquency dispositions.[132] Moreover, juvenile justice administration involves multiple judgments; screening decisions at earlier stages of the process may amplify racial effects as youths proceed through the system.[133] For example, juvenile court personnel are more likely to hold African-American youths than white youths in pretrial detention, and detained youths receive more severe sentences than those at liberty pending adjudication and disposition.[134] Recent juvenile justice policy initiatives at-

130. *Id.* at 293. In an earlier study, Professor Feld analyzed a number of the structural features—racial composition, poverty, female-headed household, and crime rates—that Sampson and Laub hypothesized would affect the severity of juvenile justice administration. Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J. CRIM. L. & CRIMINOLOGY 156, 166-169 (1991) [hereinafter *Justice by Geography*].

131. *Violent Youth and Public Policy, supra* note 35, at 982.

132. *See generally* MINORITIES IN JUVENILE JUSTICE (Kimberly Kempf-Leonard et al. eds., 1995); Carl E. Pope & William H. Feyerherm, *Minority Status and Juvenile Justice Processing: An Assessment of the Research Literature (Part I)*, 22 CRIM. JUST. ABSTRACTS 327 (1990) (finding that a greater degree of latitude in juvenile judicial decision-making acts to disadvantage minority youth); Carl E. Pope & William H. Feyerherm, *Minority Status and Juvenile Justice Processing: An Assessment of the Research Literature (Part II)*, 22 CRIM. JUST. ABSTRACTS 527 (1990) (providing research guidelines to address the problem of race-based juvenile justice decision-making); CARL E. POPE & WILLIAM FEYERHERM, MINORITIES AND THE JUVENILE JUSTICE SYSTEM (1992); Edmund F. McGarrell, *Trends in Racial Disproportionality in Juvenile Court Processing: 1985-1989*, 39 CRIME & DELINQ. 29 (1993); BARRY KRISBEG & JAMES AUSTIN, REINVENTING JUVENILE JUSTICE 122-34 (1993); Jeffrey Fagan et al., *Blind Justice? The Impact of Race on the Juvenile Justice Process*, 33 CRIME & DELINQ. 224 (1987) (reporting racial disparities in juvenile justice processing); Belinda McCarthy & Brent L. Smith, *The Conceptualization of Discrimination in the Juvenile Justice Process: The Impact of Administrative Factors and Screening Decisions on Juvenile Court Dispositions*, 24 CRIMINOLOGY 41 (1986) (finding that race and social class significantly affect juvenile court dispositions).

133. *See, e.g.*, Fagan et al., *supra* note 132, at 228; McCarthy & Smith, *supra* note 132, at 58-61; Donna M. Bishop & Charles Frazier, *The Influence of Race in Juvenile Justice Processing*, 25 J. RES. CRIME & DELINQ. 242 (1988).

134. *See, e.g.*, M. A. Bortner & Wornie L. Reed, *The Preeminence of Process: An Example of Refocused Juvenile Justice Research*, 66 SOC. SCI. Q. 413, 420-21 (1985);

tempt to account for and reduce the consistent findings of racial disparities in juvenile justice administration.[135]

A waiver decision represents the final step of all of the cumulative discretionary decisions in a juvenile delinquent's court career. Research suggests that judicial discretion in waiver decisions may also produce racial disparities.[136] For example, a recent report by the General Accounting Office found:

> [B]lacks were more likely than whites to have their cases waived for violent, property, and drug offenses. For violent offenses, the differential rates are fairly consistent across states, with black juveniles having waiver rates from 1.8 times to 3.1 times higher than whites. The differences varied more widely for drug offenses. . . . Pennsylvania black juveniles were more than twice as likely to have their cases waived than whites. There were some large differences, however; for example, for juveniles charged with drug offenses, Arizona's waiver rates for whites were twice those of California; while for blacks, Arizona's rates were 55 times those of California.[137]

Similarly, an earlier national study reported that in a number of states, minority juveniles constituted the majority of youths waived.[138] However, neither of those studies controlled simultaneously for the effects of age, seriousness of present offense, and length of the prior record, all of which are highly relevant to judicial waiver decisions. Although other studies suggest some effects of a youth's race on waiver decisions,[139] the most methodologically sophisticated prior study reported no direct evidence of racial discrim-

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Barry C. Feld, *The Right To Counsel in Juvenile Court: An Empirical Assessment of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1261-74, 1311-17 (1989) [hereinafter *Right to Counsel*] (finding that urban minority juveniles are disproportionately at risk for pre-trial detention and subsequent home removal after controlling for influence of legal variables such as present offense and prior record); Charles E. Frazier & John K. Cochran, *Detention of Juveniles: Its Effects on Subsequent Juvenile Court Processing Decisions*, 17 YOUTH & SOC'Y 286, 299 (1986).

135. *See, e.g.*, 42 U.S.C. § 5633(a)(16) (1988 & Supp. V 1993) (requiring states applying to the United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention for juvenile justice formula grants to review the causes of minority overrepresentation and incarceration in juvenile justice system); National Council of Juvenile and Family Court Judges, *Minority Youth in the Juvenile Justice System: A Judicial Response*, JUV. & FAM. CT. J., 1990, at 13-32; MINNESOTA SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYSTEM, FINAL REPORT (May 1993) [hereinafter RACIAL BIAS, FINAL REPORT].

136. *See supra* note 42 (studies analyzing the role of race in waiver decisions).

137. GAO REPORT, *supra* note 5, at 59.

138. BETWEEN TWO WORLDS, *supra* note 2, at 104-05 (finding that nationally, 39% of all youths transferred in 1978 were black; in 11 states, minority youths constituted the majority of juveniles waived).

139. *See, e.g.*, Eigen, *supra* note 42, at 339-40 (reporting that black youths who murder white victims are significantly more at risk for waiver); Keiter, *supra* note 42, at 537 (analyzing transferred youth revealed "subtle discrimination").

ination, but concluded that "the effects of race are indirect, but visible nonetheless."[140]

When the Minnesota Supreme Court's Racial Bias Task Force undertook an analysis of racial disparities in waiver administration, it confronted the same data deficiencies that limited the ability of other researchers to assess the impact of a youth's race on waiver decisions.[141] Justice Alan Page's dissent in *In re M.E.P.*[142] echoed the Racial Bias Task Force's concerns about racial disparities in waiver administration. In *M.E.P.*, the juvenile court denied the state's reference motion alleging first-degree murder against a sixteen-year-old white juvenile with no prior record.[143] Justice Page found the case factually indistinguishable from that of a black youth, M.R.G., whom another juvenile court waived for criminal prosecution as an adult.[144] Despite Justice Page's well-founded concerns about racial bias, so long as the appellate standard to overturn waiver decisions is the trial judge's "abuse of discretion,"[145] even a pattern of racial disparities remains almost impervious to reversal.

II. Empirical Analyses of Judicial Waiver Practices

Despite public and political concern about serious youth crime, remarkably little empirical data exists about this small group of offenders or about the administration of the process to prosecute them as adults. We undertook this analysis to provide criminal justice researchers and juvenile justice practitioners and policy makers—prosecutors, judges, probation and parole officers, public

140. Fagan et al., *supra* note 3, at 276.

141. *See* RACIAL BIAS, FINAL REPORT, *supra* note 135, at 99.

> From 1987 through 1991 there were 183 juveniles with identifiable race who were certified as adults . . . . Eighty-five (46.4%) of them were people of color and 98 (53.6%) were white. Given the relatively small number of cases and the complexity of the certification decision, it is not possible to say that these numbers prove a pattern of racial bias in this area, but the disproportionate ratio raises a red flag and cries out for closer scrutiny.

Id. Because counties collected racial data incompletely, the small sample size and the inability to control for offense type and delinquency history precluded statistical analyses of the effects of race on waiver decisions. *Id.* at app. D.

142. *In re* M.E.P, 528 N.W.2d 240 (Minn. 1995).

143. *See In re* M.E.P., 523 N.W.2d 913 (1994), *aff'd*, 528 N.W.2d 240 (Minn. 1995).

144. 528 N.W.2d at 243 ("The only significant distinction between M.E.P. and M.R.G. is that M.E.P. is white and M.R.G. is black . . . . I believe that M.R.G. was properly referred to district court. The nature of the acts committed by M.E.P. are essentially the same and support a similar conclusion.").

145. *See In re* D.F.B., 433 N.W.2d 79 (Minn. 1988). *See also Bad Law Makes Hard Cases*, *supra* note 13, at 77-89 (criticizing the Minnesota Supreme Court for substituting its factual assessment for that of the juvenile court judge in a controversial waiver decision without finding that the trial judge abused his discretion).

defenders, and legislators—with an objective assessment of the determinants of waiver decisions.[146] We especially wanted to analyze the effects of race on waiver administration. Anecdotal evidence, such as that expressed by Justice Page in *M.E.P.*, suggests that juvenile courts certify minority youth, particularly African-Americans, more frequently, more quickly, and with less extensive scrutiny than non-minority youth. Because the individualized discretionary nature of juvenile justice decision-making readily lends itself to racial disparities, we designed our study to provide an objective empirical assessment of those anecdotal beliefs.

The judicial waiver process employed in Minnesota is the most common transfer strategy used in the United States.[147] Because most other jurisdictions use similar waiver criteria and procedures, the data we collected and analyzed may have broad applicability to waiver practices in other states. Moreover, because we collected our data in Minnesota's most populous county with the highest proportion of serious crime and minority juveniles, our research findings will have important implications for juvenile and criminal justice policies in other jurisdictions facing similar levels of serious crime. Importantly, the quality of our data enable us to overcome many of the deficiencies of previous studies which have been limited by small sample sizes, inadequate operationalization of critical variables such as the present offense, and an inability to construct fully either the record of prior offenses or the subsequent sentences and recidivism.

A. Data Sources and Methods

We analyzed waiver practices in Hennepin County (Minneapolis and its surrounding suburbs), Minnesota, between 1986 and 1992, when the certification statute created a "prima facie" case or rebuttable presumption for waiver. The prosecutor's decision to file a reference motion for the first time against youth between 1986 and 1992 defined our sample.[148] We documented the factors associ-

146. *See* MARCY R. PODKOPACZ, HENNEPIN CO. DEP'T OF COMMUNITY CORRECTIONS, JUVENILE REFERENCE STUDY (Aug. 1994). The current analysis is based largely on this study which was conducted during 1993-94.

147. *See supra* note 6 and accompanying text.

148. One potential limitation of this study is that it may suffer from a population selection bias. Selection bias is present when observations are selected in a manner that is not independent of the outcome variable, in this case certification. These biases potentially pose a threat to the external and internal validity of our findings.

In this study, selection bias results from the prosecutor's selection of the population we studied. The county attorney decides against which offenders to file motions for reference for adult prosecution. We do not have information about the other youths against whom the prosecutor did not file a reference motion or what factors influenced that charging decision. We do not know how those juveniles against

ated with the filing of an initial reference motion: the type of present offense, the prior record, and past treatment efforts. We analyzed court data to determine when and why judges refer some juveniles to adult court, and retain others in the juvenile system. In addition, we examined the administrative processes by which courts make this critical sentencing decision and documented the evaluative services provided by the probation department and court psychologists. Following the decision to waive or retain jurisdiction, we tracked these youth through the juvenile or adult justice systems to assess how the respective courts sentenced them. Finally, after the courts sentenced these young offenders, we analyzed their subsequent criminal activity or recidivism.

Offender Characteristics: We collected information regarding each juvenile's education, employment, status offenses, truancy, arrest and detention, bench warrants, prior probation, prior parole, type of past court involvement, race, age, gender, and gang involvement. We also collected family information, including the person with whom the juvenile lived, the juvenile's length of residence in Hennepin County, the extent to which the father was involved in the juvenile's upbringing, family criminality, abuse patterns (sexual, physical and neglect), the juvenile and family members' chemical abuse or psychological problems, and prior non-delinquency related out-of-home placements. In addition, the data coders documented any other significant life event recorded in the files which occurred prior to the filing of the reference motion. We analyzed this information to ascertain whether and how offenders' social cir-

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whom the prosecutors *did not file* a reference motion differ from those against whom they did, or whether or how many of them the juvenile courts would have certified if the prosecutors had filed reference motions.

We balance this potential drawback against the contribution this study makes to the literature. We collected extensive data on every juvenile who faced this "final" decision over a seven year period. We did not exclude any types of crimes from our sample, as have other studies. *E.g.*, Fagan & Deschenes, *supra* note 3. We carefully confined our analyses only to the first reference motion filed against a youth, and analyzed subsequent reference motions as instances of recidivism, an issue virtually ignored in previous research. We also improved substantially the data elements from past studies. For example, this is the first certification study to include probation officers' and psychologists' recommendations, and juvenile court judges as independent court process variables affecting the outcomes of reference motions.

Our future research will explore prosecutorial discretion in the filing of a reference motion. In a preliminary examination, for example, we found that the prosecutors charged over 300 juveniles with presumptive offenses in 1992 alone, yet filed reference motions against less than ten percent of these offenders. We will attempt to ascertain what, if any, legal or social characteristics distinguish these two groups of serious young offenders. *See, e.g.*, *Bad Law Makes Hard Cases*, *supra* note 13, at 40 (comparing certified juveniles with all delinquents and concluding that "no single factor or group of factors explains why or how certified juveniles are selected from the larger universe of juveniles.").

cumstances affected the court's decision to retain them as juveniles or certify them as adult offenders.

Offense Characteristics: We collected extensive data about the present offense alleged in the reference motion. We focused on the offense(s) charged and whether the juvenile used a weapon while committing the crime, and, if so, the type of weapon. We noted if co-defendants participated, and whether the co-defendants were juveniles or adults. Finally, in crimes against the person, we determined the characteristics of the victim(s).

In addition, we collected data on all delinquency charges in a youth's records resulting in adjudications or dismissals. We sorted offenses other than the present offense into prior adjudication history,[149] and subsequent recidivism. If the court's files indicated the juvenile had lived in another part of Minnesota or another state, or that criminal information existed in any other jurisdictions, we attempted to collect this delinquency or conviction information.[150] Subsequent criminality included all juvenile adjudications after the present offense as well as all adult convictions in Hennepin County, in other counties of Minnesota, or in states other than Minnesota.[151]

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149. We collected data on all charges, regardless of whether they resulted in adjudications or dismissals. However, we only included in a youth's prior history those offenses that resulted in a conviction. Therefore, a juvenile may be in the category of "no priors" if he or she had no prior adjudications but did have prior charges which were dismissed or not proven.

150. Obtaining complete juvenile prior adjudication information was difficult because of juvenile court privacy and confidentiality, and a lack of automated records. We followed each lead even if the court had extensive current local information about the offender. We sent two series of letters to other jurisdictions in an attempt to locate prior delinquency/criminal information. We followed these letters by phone calls. In a few instances, the Juvenile Court judge called those other jurisdictions to obtain access to juvenile records.

A review of juveniles not originally from Hennepin County demonstrates the extensive amount of outside information we obtained. County prosecutors filed reference motions against 91 juveniles (28%) whose family moved to Hennepin County from another location. Most of these offenders' families moved to Hennepin County a number of years prior to the present offense charged. Of the 91 juveniles within this category, 35 (11% of the total) had moved into the County more recently (within two years of the reference motion offense). These juveniles seemed the most likely to have incomplete information on their delinquency history. However, of these 35 juveniles, we were unable to document the past adjudication history of only five (less than 2% of the total). Of those juveniles who had lived in Hennepin County for more than two years, we did not receive outside juvenile information about an additional five juveniles, but we did have complete delinquency information within our own jurisdiction. A non-response from an outside jurisdiction may have meant that no delinquency file existed on the juvenile or that the jurisdiction simply did not respond.

151. Outside of Hennepin County but within Minnesota, we obtained adult criminal information from the Minnesota Sentencing Guidelines Commission. Adult criminal information was restricted to felony level crimes (charges and convictions

Court Processes: We also examined the juvenile court waiver process. We studied the length of the administrative process, and judicial and clinical resources expended on these cases. Did the court order psychological examinations in conjunction with the waiver hearings? Did probation staff conduct a reference study? If psychologists or probation officers made recommendations based on their assessments, how often did the court heed them? Did the court conduct a full reference hearing, or make its waiver decision as part of a quasi-plea bargain that included the anticipated juvenile or adult sentence as well? Did the youth or prosecutor appeal the waiver decision? What effect does the particular judge have on the ultimate referral decision?

Methodology: We pre-tested an extensive data collection protocol, then collected data from juvenile court files.[152] Court psychologists conducted a psychological examination and wrote a full report for about half of the juveniles against whom the prosecutors filed a reference motion. The Juvenile Probation Department completed an in-depth reference study on almost all of those juveniles evaluated by Psychological Services. The juvenile court files contained these reports as well as information on delinquency charges, adjudications, and dispositions, and social history reports. The crime information, the psychological report, and the reference study provided rich sources of information for this study. In addition, we reviewed all disposition reports, probation progress reviews, program progress reviews, and program exit summaries for any other information to supplement the primary sources. We also interviewed the various participants in the waiver process, and observed court proceedings and pre-hearing conferences.

As we thoroughly reviewed juveniles' court files, we discovered that the files contained surprisingly little standardized family or individual information about many of these offenders. The lack of information could mean either that the court did not deem the information relevant and did not record it, or that the information simply was unavailable. In designing the data collection form, we

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for Hennepin County and convictions only for the rest of Minnesota). Criminal activity that occurred outside of Minnesota was also restricted to felony convictions. For juvenile offenses, we collected all charges including misdemeanors, regardless of where they occurred. However, as noted above, we only included adjudications or convictions in our discussions of prior adjudication history or subsequent criminal involvement.

152. We trained five employees, loaned from the Department of Community Corrections, the Hennepin County Attorney's Office, and the Hennepin County Juvenile Court to collect the data used in this study. Data collection averaged about three and one-half hours per court file. The range was between one-half hour and six hours.

attempted to compile all pertinent information and included certain items in our coding format even though our pre-tests indicated we would not find them consistently. Although we expected that many social background characteristics should have been meaningful indicators for a clinical decision-maker, we found that court personnel did not consistently collect seemingly important information about juveniles' family circumstances, educational attainment, employment status, or the like, and that these types of information apparently did not affect judges' decisions when presented.[153]

B. Findings and Analyses

At first glance, the anecdotal beliefs that racial disparity existed in the handling of minority youths seem to have merit. Although 19% of Hennepin County juveniles were members of racial minorities, minorities represented 72% of the youths against whom prosecutors filed reference motions. However, this study focused on the court's reference decision rather than the prosecutor's motion decision.[154] Within the population defined by the prosecutors' motions we analyzed how the juvenile court made its decision to certify or retain, and whether extra-legal factors, such as race, contributed to the court's decision.

1. Reference Motions Filed

Although the "prima facie" case waiver statute provides a type of legal definition to guide the selection of juveniles to refer for adult certification, prosecutors are neither required to select all youths whose delinquencies fit the definition nor precluded from filing motions against those who do not. Thus, the prosecutors' unrestricted charging discretion necessarily defines the characteristics of the youths included in the study, because they decide against whom to file reference motions. As Table 1 indicates, during the period of our study, white juveniles comprised 81% of the ten- to seventeen-year-old youth population in Hennepin County.[155] Afri-

153. An example of this type of limited data is education level. Most files mentioned the juvenile's school situation at some point but it was very difficult to systematically collect the last year of school that the juvenile had successfully completed at the time of the reference motion or any other single type of educational assessment. Less than 40% of the juveniles in this study had information in their court files that allowed us to determine the last year of school they had completed.

154. We are initiating research to determine against whom and why prosecutors file motions for adult reference. Besides answering the questions regarding disparity among minority members, this research will also assess the nature of the selection bias in the current study.

155. Census information provided courtesy of Hennepin County Office of Planning and Development, 1990 U.S. Census, PUMS files (on file with author).

can-American youths accounted for 9% of the County's youths and other minority youths accounted for an additional 10%. However, when we examine police apprehension of juveniles for FBI Part I index offenses,[156] a different pattern emerges. Police arrested white youths for 55% of all serious crimes, African-American youths for 32%, and other minority youths for the remaining 12%. Significantly, police arrested most of the white juveniles for property crimes, and most of the African-American juveniles for violent crimes.[157] Thus, because police cleared most property crime with arrests of white juveniles, and most violent crimes with arrests of African-American youths, the racial disproportionality in juvenile justice administration and waiver begins with the type of crime at the time of arrest.

When we analyzed the racial characteristics of youths against whom the prosecutors filed reference motions, the race-offense relationship emerges even more starkly. Although white youths comprised more than half (55%) of the arrests for serious crimes, they comprised somewhat more than one-quarter (28%) of the youths against whom prosecutors filed reference motions.[158] By comparison, African-American youths comprised about one-third (32%) of the arrestees for serious crimes but constituted over half (55%) of the reference motion sample. This racial disproportionality reflects the prosecutors' emphasis on violent crimes in their decision to file reference motions. But this is only a partial explanation. Although about one-third (34%) of juveniles arrested for violent crimes were white, white youth comprised less than one-fifth (19%) of the violent offenders against whom prosecutors filed reference motions. While African-American youths comprised a majority (54%) of all juvenile arrests for violent crimes, they made up nearly two-thirds (65%) of the population against whom prosecutors filed reference motions for felonies against the person. This racial amplification may reflect bias, more serious violent crimes, or differences in Afri-

156. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES: 1993 (1994). Local law enforcement agencies transmit data to state agencies and the FBI based on reports from victims of crimes or investigation. *Id.* at 1-3. The FBI's Serious Crime Index includes both violent and property crimes and provides the most widely cited measure of offenses. *Id.* at 1. The Crime Index records four violent crimes: murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault. *Id.* It also reports four property crimes: burglary, larceny-theft, motor vehicle theft, and arson. *Id.* Typically, both reported crimes and arrests are standardized as rates per 100,000 persons to control for changes in population composition.

157. See supra note 111 and accompanying text (FBI Uniform Crime Reports for 1991 regarding African-American youth violence).

158. We categorized juveniles on the basis of the most serious offense alleged in the reference motion. If the prosecutor charged a youth with offenses against the person and property, we classified the youth as an offender against the person.

Table 1
Hennepin County Juvenile Statistics

Hennepin County Juvenile Population Statistics							
Whites 81%		African-Americans 9%		Other Minorities 10%			
Hennepin County Juvenile Arrest Statistics*				Hennepin County Juveniles Motioned for Adult Reference			
	Whites	African-Americans	Other Minorities		Whites	African-Americans	Other Minorites
Part I Crime Index	55%	32%	12%	Motioned Juveniles (N=330)	28%	55%	17%
Violent Crime Index	34%	54%	13%	Motioned for Person Felony (N=209)	19%	65%	16%
Property Crime Index	57%	31%	13%	Motioned for Property Felony (N=82)	50%	28%	22%

* Race information was unavailable for a large part of the Hennepin County area for 1992 arrest statistics. Therefore, all arrest statistics are based on an average of 1991 and 1993 and then averaged with rates for 1986.

can-American juveniles' prior records, such as a larger proportion of violent offenses. By contrast, there was rough racial parity in arrests and reference motions on felony property crimes.

Table 2
Changes Across Time in Offense and Offender Characteristics

	1986	1987	1988	1989	1990	1991	1992	Total
Number of Motions Filed	53	41	61	46	54	40	35	330
Percent Retained	30%	22%	43%	30%	28%	55%	37%	35%
Percent Referred to Adult Court	70%	78%	57%	70%	72%	45%	63%	65%
Present Offense								
Percent Prima Facie Cases	2%	0	3%	24%	37%	46%	54%	21%
Percent Presumptive Offense	53%	51%	51%	41%	54%	73%	74%	55%
Percent Person Felony	66%	61%	54%	54%	57%	80%	80%	63%
Percent Property Felony	28%	32%	33%	28%	26%	7%	11%	25%
Past Adjudication History								
Average Number of Felonies	2.11	2.51	1.59	1.46	1.65	1.22	1.57	1.73
Percent One Felony or Less	40%	32%	57%	59%	57%	72%	57%	53%
Percent Two or More Felonies	60%	68%	43%	41%	43%	28%	43%	47%
Racial Background								
Percent White	36%	44%	31%	33%	19%	20%	11%	28%
Percent African American	59%	34%	44%	46%	65%	70%	74%	55%
Percent Other Minority	6%	22%	25%	22%	17%	10%	14%	17%

Table 2 displays the number of first motions across each of the years included in this study. The third row reports the percentage of youths whom the juvenile court certified to adult criminal court in each year. Over the seven-year period, the Hennepin County juvenile court heard an average of forty-seven waiver cases per year, and referred about two-thirds (65%) of them for adult prosecution. With the exception of 1988, when prosecutors filed a larger number of reference motions, the earlier years between 1986 and 1990 exhibited a relatively stable certification rate of above 70%.

Somewhat lower rates of judicial certification prevailed in 1991 and 1992. Two factors account for the decrease in the latter years. First, the judge who presided over the Hennepin County juvenile court from 1986 until 1990 rotated off the juvenile court bench; three other judges made reference decisions in the remaining years. Second, the Hennepin County Attorney's Office changed its reference motion filing policy.[159] During the period of our study, the prosecutor had to prove that the juvenile was not amenable to treatment, posed a threat to public safety, or fit the "prima facie"

159. Interview with Diane Ward, Chief, Juvenile Prosecution Division, Hennepin County Attorney's Office (1993).

offense criteria for certification. In the latter years, the County Attorney's Office filed a larger proportion of its reference motions against youths who met the "prima facie" case offense criteria. Indeed, the percentage of cases which met the serious offense criteria increased from less than 3% in the earlier years of our study to nearly half of cases in the later years (e.g., 54% in 1992).

Correspondingly, the number of juveniles charged with presumptive commitment offenses increased significantly (p=.02). In the earlier years, between 1986 and 1990, prosecutors filed reference motions against about half of the juveniles for presumptive commitment offenses. In 1991 and 1992, nearly three-quarters of all juveniles charged fell into the presumptive certification category (73% and 74%, respectively).

Over the seven-year period, the typical crimes for which prosecutors filed reference motions were felonies against the person. However, the proportion of reference motions filed for crimes against the person increased from about 60% in the earlier years to about 80% by the end of the period covered in our study. Property felonies, which accounted for between 25 and 30% of the reference motions filed in the earlier years, declined to only about 10% of the reference motions filed in the later years.[160]

There was an inverse relationship between filing reference motions on the basis of a serious present offenses and the length of the prior record. As prosecutors filed reference motions increasingly based upon the seriousness of juveniles' present offenses, the length of their prior delinquency record decreased. The number of prior felony adjudications in the juveniles' delinquency records decreased over time, from 2.11 prior felonies in 1986 to 1.57 in 1992,[161] a statistically significant change (p=.005).

The County Attorney's policy decision to emphasize the seriousness of the present offense affected the proportion of minority juveniles against whom prosecutors filed reference motions over the period of our study. Even in 1986, minority juveniles comprised nearly two-thirds (64%) of the youths against whom prosecutors filed reference motions, and by the end of our study period, minority juveniles comprised nearly nine out of ten (88%) of the youths whom prosecutors sought to waive. This significant change in the

160. This decline was statistically significant (p=.005).

161. Most of these juveniles did not have prior adjudications for felony offenses against the person and this did not change over the course of the study. However, a statistically significant decrease occurred across the years in the amount of prior property felony adjudications (p=.002). In addition, the number of juveniles with prior drug felony convictions increased between 1986 and 1992, but because they comprised a smaller part of juveniles against whom prosecutors filed reference motions, they did not change the overall recent pattern of decreasing felony records.

racial composition of the reference population (p=.01) reflected the greater propensity of minority youths to be arrested for and charged with the most serious, violent crimes. As we discuss later, the 1994 legislative changes in the certification statute to create a presumption to waive older youths charged with presumptive commitment offenses has important racial implications for which youths will be transferred and which will enter the Extended Jurisdiction Juvenile status.

2. Characteristics of Youths Against Whom Prosecutors Filed Reference Motions

Age: The age at which juveniles commit their first offense or make their first court appearance may be "one of the best predictors . . . of the future course of the criminal career."[162] The younger the age at which a person begins to offend, the greater the likelihood he or she will commit additional offenses. We used two indicators of the onset of a delinquent career: age of first juvenile court appearance[163] and age at first finding of delinquency.[164] We also examined the youth's age at the time of the present offense for which the prosecutor filed the reference motion.

As Table 3 indicates, over sixty percent (60.6%) of the youths in our sample made their first appearance in juvenile court by the time they were thirteen years old. Juvenile courts found over half (55.5%) of them delinquent by the time they were fourteen. The average age for those juveniles adjudicated delinquent was 14.2 years of age.[165]

Another important variable in the waiver process is the juvenile's age at the time of the present offense because it indicates the length of time remaining to treat the youth in the juvenile system. The minimum age to file a reference motion is fourteen years old; at

162. David P. Farrington et al., *Advancing Knowledge About the Onset of Delinquency and Crime, in* 13 ADVANCES IN CLINICAL CHILD PSYCHOL. 283, 283 (Benjamin B. Lahey & Alan E. Kazdin eds., 1991).

163. The youths' age at their first court appearance is not necessarily related to delinquency. It could also be related to dependency or neglect, CHIPS (Children in Need of Protective Services), status offenses, termination of parental rights or even adoption issues.

164. The coders documented the date of the first finding of delinquency (i.e., a juvenile court hearing response of admit or proven). Some juveniles may not have this second indicator if they had no prior adjudications and the juvenile court referred them to adult court (thereby still having no delinquency finding, only a criminal finding).

165. Interestingly, 22 of the 330 youths (6.7%) did not have any prior delinquency record nor did the juvenile court find them delinquent on the present offense. Rather, the court certified most of these youths who had no prior delinquency records (16 of the 22). Because most of those certified (15 of the 16) pled guilty or were convicted in adult court, a juvenile court never found them delinquent.

Table 3
Characteristics of Youths Against Whom Prosecutor Filed Reference Motion

	Number	Percent
Age at First Court Appearance		
Less than 12 Years Old	94	28.5%
12 or 13 Years Old	106	32.1%
14 or 15 Years Old	71	21.5%
16 or Older	59	17.9%
Age of First Delinquency Finding		
No delinquency finding	22	6.7%
12 Years Old	69	20.9%
13 Years Old	52	15.8%
14 Years Old	62	18.8%
15 Years Old	43	13.0%
16 Years Old	39	11.8%
17 Years Old	43	13.0%
Age at Present Offense		
14 Years Old	10	3.0%
15 Years Old	24	7.3%
16 Years Old	98	29.7%
17 Years Old	198	60.0%
Present Offense — Type of Charges		
Misdemeanor	9	2.7%
Other Felony	3	.9%
Drug Felony	27	8.2%
Property Felony	82	24.8%
Person Felony	140	42.4%
Person + Other Felonies	69	20.9%
Present Offense — Number and Level of Charges		
Misdemeanor	9	2.7%
1 Felony	103	31.2%
2 Felonies	80	24.2%
3 Felonies	51	15.5%
4 + Felonies	87	26.4%
Present Offense — Presumptive Offenses		
Presumptive	183	55.5%
Non-Presumptive	147	44.5%
Present Offense — Weapon Use		
Yes	159	48.2%
No	171	51.8%
Present Offense — Victim Offense		
Yes	201	60.9%
No	129	39.1%
Race of Juvenile		
White	93	28.2%
African-American	182	55.2%
Other Minority	55	16.7%
Gender		
Male	318	96.4%
Female	12	3.6%

the time we conducted this research, the juvenile court's jurisdiction ended at age eighteen and its maximum dispositional authority extended until age nineteen.[166] Prosecutors filed very few reference motions against juveniles younger than sixteen years of age. In the seven-year span of our study, prosecutors filed reference motions against only thirty-four juveniles (10%) for crimes they committed when less than sixteen years of age; twenty-four of those youths were fifteen years old, and only ten were fourteen years old. On the other hand, fully 60% of juveniles referred for certification were seventeen years old.

Present Offense: Prosecutors typically filed a reference motion against a juvenile for a single behavioral incident, although that criminal event may produce more than one charge. In the typical scenario, no other outstanding offenses remain unresolved, and the juvenile appears in court on the reference motion for the present offense. Eighty-five percent of the cases fit this category. However, for 15% of the youths, prosecutors filed multiple reference motions at the same time for several different behavioral incidents, or other outstanding charges were pending when the prosecutor filed the motion, and the court handled and disposed of all of the offenses simultaneously.[167]

Prosecutors charged nearly all the youths against whom they filed reference motions with felony level offenses, although prior to 1991, they charged a few (2.7%) with only misdemeanors. The most common charge filed against these juveniles alleged a felony against the person. Nearly two-thirds of the reference motions charged at least one crime of violence (this includes both the "person felony" category (42.4%), and the "person + other felony" group (20.9%)). Prosecutors charged about one-quarter (24.8%) of the youths for whom they sought adult reference with felonies against property (typically burglary or auto theft) and an additional 8% with drug felonies. Prosecutors filed multiple counts against most of the youths in this sample. Although about one-third (31.2%) of the reference motions alleged only a single felony, prosecutors charged over one quarter (26.4%) of the juveniles with four or more felonies.

166. MINN. STAT. § 260.185 (1994).

167. Because of these atypical situations, we defined the present offense to include all offenses with identical adjudication dates as the offense listed on the first reference motion (the delinquency decisions occurred together), or all reference motion decisions occurring on the same date as the first reference motion decision (separate reference motions handled together at the same time). This definition allowed us to capture the full account of decisions that, for fifteen percent of the cases, often were pled down to offenses not listed on the first reference motion filed with the court.

Presumptive Offenses: Because of the 1994 changes in the Minnesota juvenile code, we analyzed separately whether prosecutors charged youths with presumptive certification offenses. Presumptive certification cases constituted over half (55.5%) of the cases in our sample. While they charged nearly a quarter of these juveniles (22%) with only one presumptive commitment offense, an additional one-third (33%) of our sample faced two or more presumptive commitment charges.

Weapons: Juveniles used some type of weapon in about half (49.2%) the offenses alleged.[168] As will be seen, whether a juvenile used a weapon to commit the present offense significantly influenced the court's decision to refer the juvenile to adult court.

Victims: Most of the certification proceedings (60.9%) involved youths charged with a crime against the person. The juvenile court's files contained incomplete information about characteristics of victims. For example, they noted victims' ages in only 45% of cases,[169] racial background in 44% of cases,[170] and gender in 78% of the primary victims.[171] The files often noted whether any prior relationship existed between the offender and victims.[172] Finally, we determined the extent of the injury to the victims in only 78% of the cases.[173]

Race: African-American juveniles comprised the majority (55.2%) of the juveniles against whom prosecutors filed motions for adult prosecution. Other minority juveniles represented 17% of our sample. White juveniles comprised slightly more than one-quarter (28.2%) of the youths against whom prosecutors filed reference motions.

Gender: Prosecutors only filed twelve reference motions against female juveniles between 1986 and 1992 (less than 4%). They charged four of these girls with presumptive commitment of-

168. Juveniles' first choice of weapon was firearms (46%), followed by knives (22%), blunt instruments (15%), or some other type of weapon such as a chain (17%).

169. Of those which included age information, the average victim age was twenty-five and the median age was twenty years old.

170. Of those that included victim racial information, 42% were white, 37% were African-American, 12% were Native American, 3% were of Hispanic background, and 6% were Asian.

171. Sixty-four percent of those victims with gender information were males and 36% were females.

172. Of the people that these juveniles victimized, 64% were strangers, 28% were some type of acquaintance or friend, 4% were family members, and an additional 4% were either peace officers or correctional facility staff members.

173. These juveniles killed 24% of their victims, and shot, stabbed, beat severely, or sexually assaulted an additional 43% of their victims. Eighteen percent of the victims were injured or slightly injured, and 23% sustained no physical injury.

fenses, and the remaining eight with less serious non-presumptive offenses.

Prior Records and Dispositions: The vast majority (84.5%) of youths had some prior delinquency history. We used three different measures of their records. First, as an indicator of seriousness, we determined whether the youth's prior record included a presumptive commitment offense. Second, we counted the number of prior felony or misdemeanor adjudications, and weighted all felonies equally. Third, we distinguished prior offenses by the type of crime, for example, felony offenses against the person, property felonies, or drug felonies. Because some juveniles' prior records included both felonies against the person and other types of felonies, we used a separate "person + other felonies" category to assess whether courts regarded juveniles adjudicated for person offenses differently from those having other additional offenses. In our analyses of prior records, we classified juveniles on the basis of their most serious behavior.[174] We used these different formulations of prior records to test whether quantitative gauges of prior crimes alone explained reference decisions, or whether judges employed qualitative information about the adjudication history as well.

Table 4 describes the record of delinquency accumulated by these juveniles prior to the present motioned offense. Fifty-one juveniles (15.5%) in our sample had no prior adjudications. Of those with no prior adjudications, previous allegations were dismissed or not proved against ten (20%) of them. We failed to locate either prior charges or adjudications for the remaining forty-one (12%) juveniles. For five of them, we were unable to obtain criminal history information from the jurisdiction of their previous residence.[175] The remaining thirty-six had no prior charges or adjudications. Another 16% had only misdemeanor convictions in their adjudication history. By contrast, over two-thirds (69%) of these youths had at least one felony adjudication, and 27% had three or more felony adjudications in their past. Although the majority of these juveniles had a felony conviction in their delinquency his-

174. For example, we classified a juvenile with one felony adjudication and multiple misdemeanor adjudications in the "one felony" group.

175. As noted earlier, the lack of response from the other jurisdiction could mean either that these youths had no prior records or that the court did not respond. Because we analyzed the data with and without these five juveniles and found no significant differences, we included them in our sample.

Table 4
Indicators of Motioned Juvenile's Prior Record

	Number	Percent
Prior Record — Past Adjudications		
None	51	15.5%
Misdemeanor Only	54	16.4%
One Felony	71	21.5%
Two Felonies	65	19.7%
3 or more Felonies	89	27.0%
Prior Presumptive Adjudications		
No Presumptive Offenses	282	85%
One or More Presumptive	48	15%
Prior Record — Type of Past Adjudications		
None	51	15.5%
Misdemeanor Only	54	16.4%
Other Felony	3	.9%
Drug Felony	13	3.9%
Property Felony	117	35.5%
Person Felony	29	8.8%
Person + Other Felonies	63	19.1%
On Probation Prior to Present Offense		
Yes	244	73.9%
No	86	26.1%
On Parole Prior to Present Offense		
Yes	117	35.5%
No	213	64.5%
Prior Delinquent Out of Home Placements		
None	111	33.6%
One	46	13.9%
Two	33	10.0%
Three	34	10.3%
Four	43	13.0%
Five or more	63	19.1%

tory,[176] courts previously adjudicated only 15% for presumptive commitment offenses.[177]

176. The juveniles in each of the felony categories may have had prior adjudications or misdemeanor activity as well, but we grouped them according to their most serious offense history. Indeed, of those juveniles who are grouped into the property felony category, meaning they have property felonies in their past delinquent behavior but no person felonies, 27% have person misdemeanor adjudications as well as their property felony history. A similar proportion (26%) of those juveniles with only a misdemeanor history have person misdemeanor adjudications as well. For those in the drug felony category, only two of the eleven offenders were also adjudicated for person misdemeanors, and in the final category of "Other Felony," two of the three have person misdemeanor adjudications.

177. Prosecutors charged 31% of these juveniles with presumptive offenses prior to the present offense that led to the reference motion. However, they were able to substantiate less than half of those charges (47%) in court with an adjudication.

Among those with prior records, the courts had adjudicated 9% for felony offenses against the person and an additional 19% with at least one person felony and some other type of felony as well. Courts adjudicated more than one-third (35%) of these youths only for property felonies and another 4% only for drug felonies in the past. Three juveniles whose felony backgrounds that did not fit one of the above categories comprise the "Other Felony" category. Unlike the charges they currently face on their reference motions, the vast majority of these juveniles' prior felony activity consisted of property crimes.

Juvenile courts placed about three-quarters (74%) of these juveniles on probation prior to the prosecutor filing the reference motion for the present offenses. In addition, 36% of these juveniles had been on parole prior to the filing of the reference motion.[178] Thirty-five percent of the juveniles in this study had previously been on both probation and parole through Hennepin County.

As a consequence of their extensive prior delinquencies, many of these youths previously received juvenile court dispositions and correctional placements. We counted both the number of unique treatment programs to which courts committed these youths, and the total number of times courts ordered an out-of-home placement, regardless of where that placement occurred.[179] Thirty-three percent received no prior out-of-home placements—15% because they had no prior delinquency adjudication, and the additional 18% because they received some other type of non-placement disposition such as probation or work squad.

As Table 4 indicates, two-thirds (66.7%) of the juveniles received at least one prior program placement, and the court placed 42% of the youths outside their home at least three times. Other research indicates that the previous disposition explains the most variance in a juvenile's current sentence;[180] in this study as well, prior home removal dispositions related significantly to whether or not the juvenile court ultimately certifies a juvenile.[181] The greater the number of prior out-of-home placements, the greater the likeli-

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Therefore, only 15% have been previously adjudicated for presumptive commitment to prison offenses.

178. A parole status entailed a previous sentence to the Commissioner of Corrections and confinement in one of the state's training schools.

179. The first indicator represents the number of different programs tried by the juvenile system while the second represents the total number of out-of-home placements. If a child was sent to County Home School—Alpha program twice and Red Wing once—his unique program indicator would be a value of two, whereas his total program indicator would be three.

180. *Right to Counsel, supra* note 134, at 1305-11.

181. This variable also adds a significant unique contribution to multivariate testing for determinants of referral to adult court. When we entered it in conjunction

hood that the juvenile court will refer the youth for adult criminal prosecution. Lack of effectiveness or exhaustion of correctional resources is certainly consistent with a legislative policy to waive juveniles who are unamenable to treatment.

Presumptive Present Offense: As Table 5 indicates, a relationship exists between a youth's age and the type of offense with which he or she is charged. Recall that fourteen- or fifteen-year-old offenders constituted only about 10% of the sample. However, prosecutors charged more than three-quarters (79%) of these younger juveniles with presumptive commitment offenses. More than half (54%) of these younger offenders faced charges of murder, compared with only 12% of the older youths. In comparison, 53% of the sixteen- and seventeen-year-olds fell in the presumptive commitment category. Prosecutors filed reference motions against older youths for less serious present offenses because their criminal history provided an additional basis for reference.

Prosecutors charged two-thirds (67%) of the African-American juveniles and nearly as many (60%) of other minority youths with presumptive offenses, as contrasted with less than one-third (31%) of the white juveniles. The juveniles whom prosecutors charged with presumptive offenses often had less extensive delinquency histories than did those charged with non-presumptive offenses.

Prior to conducting this research, Hennepin County practitioners anecdotally characterized juveniles facing the possibility of certification as fitting two patterns, either serious or persistent.[182] Prosecutors typically filed reference motions either if the present offense was very serious, even if the delinquency history was limited, or if the youth was a chronic offender, even if the present offense was not a violent crime but simply the last straw. The data in the final section of Table 5 confirm the existence of this bimodal population of serious and persistent offenders. More than two-thirds (69%) of the juveniles with one felony or less in their delinquency history were charged with a presumptive offense. By contrast, most (60%) juveniles with two or more prior felony adjudications were charged with non-presumptive offenses. The County Attorney's charging policies reflected an operational trade-off between seriousness and persistence, and anticipated the 1994 statutory changes.

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with delinquency history, it acted as a significant proxy for criminal history. Table 15 provides the multivariate results.

182. Interviews with Diane Ward, Chief, Juvenile Prosecution Division, Hennepin County Attorney's Office (1993); Interviews with the Honorable Philip Bush, Hennepin County Judge, Juvenile Division (1992-94).

Table 5
Juvenile Characteristics Regarding Severity of Present Offense

	Presumptive Percent	Non-Presumptive Percent
Age		
14-15 Years (N=34)	79%	21%
16-17 Years (N=296)	53%	47%
Race		
White (N=93)	31%	69%
African-American (N=182)	67%	33%
Other Minority (N=55)	60%	40%
Prior Adjudications		
One Felony or Less (N=176)	69%	31%
Two Felonies or More (N=154)	40%	60%

Race, Present Offense, and Prior Record: We reported above that prosecutors charged more minority juveniles than white youths with presumptive offenses. Table 6 further refines the relationships between juveniles' race, their present offense, and prior records. Prosecutors filed reference motions against white juveniles for property crimes three times as often as against African-American juveniles, and they charged African-American and other minority youth most often with felonies against the person. The racial differences in the type of present offenses are statistically significant.[183] As will be seen, administration of the waiver process varies with the nature of the present offense. Because of the striking racial differences in the offenses charged, the waiver process for white and minority juveniles varied considerably.

The pattern of racial differences which emerged for present offenses existed for prior adjudications as well. Twice as many minority juveniles as white juveniles had a prior adjudication for a felony against the person; conversely, twice as many white juveniles as African-American youths had a prior adjudication for a property felony. While only 15% of all the juveniles had a prior adjudication for a presumptive commitment offense, African-American youths constituted three-quarters of that group. Twenty percent of all African-American juveniles had a presumptive com-

183. The level of significance for the racial differences in presumptive compared to non-presumptive offenses was p=.0001 whereas the significance of the number of person felony charges on the present offense by racial groups was p=.004. When the present offense is categorized according to the number of felony charges filed against the different racial groups without taking into account the type of crimes, there were no significant differences between racial groups.

Table 6
Offense Characteristics by Racial Background

	White N=93	African-American N=182	Other Minority N=55
Present Offense			
Percent with Person Felony	43%	74%	62%
Percent with Property Felony	44%	13%	33%
Percent with Presumptive	31%	67%	60%
Prior Record			
Average Number of Felonies	1.97	1.52	2.04
Percent with Person Felony	15%	34%	31%
Percent with Property Felony	50%	27%	40%
Percent with Presumptive	7%	20%	11%
Prior Out-of-Home Placements			
Average Number	3.17	2.48	3.37

mitment offense in their delinquency history, compared with 11% of other minority juveniles and 7% of the white youths.[184] Although the type of prior adjudications differed by race, the average number of prior felony adjudications did not. Whites averaged 1.97 felonies prior to the filing of reference motions, African-Americans averaged 1.52, and other minority juveniles averaged 2.04.

The juveniles also differed on the basis of their prior juvenile court dispositions. African-American juveniles averaged the fewest prior out-of-home placements (2.48), while other racial minority juveniles received the most (3.37). These two groups differed significantly from one another on prior out-of-home placements (p=.04). White juveniles' average number of prior placements (3.17) fell between these two extremes and did not differ significantly from either of the other groups. These mixed findings confound the conventional belief that the juvenile court removed African-American youths from their homes more frequently than delinquents of other races. However, they suggest that African-American delinquents may receive less access to the treatment resources available in the juvenile justice system than other youths, or that the juvenile court may certify them without exhausting all the available options.

184. The same pattern of significance held for prior offense as well as present offenses; significant differences in presumptive adjudications by racial groups (p=.009), significant differences in the percent of past person felony adjudications (p=.004), and no significant racial differences in the number of total felony adjudications when type of crime is disregarded.

3. Judicial Administration of Waiver

Despite the number of waiver studies analyzing decision outcomes, virtually none examine the processes by which courts reach those decisions.[185] We examined the impact of the presiding juvenile court judge on reference decisions, the time expended on the reference process, the role of clinical and psychological evaluations on decisions, and other procedural issues related to the most important sentencing decision of juvenile courts.

a. Judge and Case Processing

In Hennepin County, serving as juvenile court judge is not a career assignment. Although one judge presided over the juvenile court for about half of the period covered by our study, several other judges rotated through juvenile court for shorter tenures of one or two years.[186] Thus, the judicial and administrative philosophy of the presiding judge may be an important variable affecting the reference process.

Table 7 below lists the judges who heard 85% of all the first reference motions filed and the years of their tenure. It presents the number and percentage of cases that each judge decided, and the percentage of cases they referred to adult court or retained in juvenile court. For example, Judge #1 referred to adult court about three quarters (75%) of the youths against whom prosecutors filed a reference motion as compared with Judge #4 who referred only about half (54%) of the cases he decided.

The apparent variability of judicial outcomes prompts several observations. First, there is no agreed upon standard rate at which to refer juveniles to adult criminal court. Research in other jurisdictions indicates substantial variation in waiver rates.[187] Other factors besides the particular judge's personal predilections affect transfer rates. The seriousness and prevalence of youth crime, County Attorney charging policies that affect the characteristics of youths, defense attorney plea negotiation strategies, and the availability of juvenile placement options could all affect judicial waiver rates. For example, prosecutors filed reference motions alleging

185. Another study that reviews the system process for violent youths was Jeffrey A. Fagan et al., *System Processing of Violent Juvenile Offenders: An Empirical Assessment, in* VIOLENT JUVENILE OFFENDERS: AN ANTHOLOGY (Robert Mathias et al. eds., 1984).

186. Hennepin County judges now serve a three year rotating schedule in juvenile court that allows each judge to handle approximately 35 to 50 reference motions. During his last year in juvenile court (1993), Judge #4 heard another 23 motions, not included in this study, bringing his total cases to 49.

187. *See, e.g.*, Fagan, *supra* note 4, at 112 (transfer rates in other cities ranges from 21% (Boston), 31% (Detroit), 41% (Newark) and 71% (Phoenix)).

Table 7
Reference Decision by Juvenile Court Judge and Years on Juvenile Court Bench

	Judge #1 1986-90	Judge #2 1990-92	Judge #3 1990-92	Judge #4 1991-92	Other Judges 1986-92	Total
All Cases						
Number	179	35	38	26	52	330
Percent	54%	11%	12%	8%	16%	100%
Retained						
Number	45	11	15	12	32	115
Percent	25%	31%	39%	46%	62%	35%
Referred						
Number	134	24	23	14	20	215
Percent	75%	69%	61%	54%	38%	65%
Cases Where Present Offense was Presumptive						
Number	83	28	24	20	28	183
Percent	46%	74%	69%	77%	54%	55%
Referred on Presumptive Present Offense						
Number	63	18	19	11	12	123
Percent	76%	64%	79%	55%	43%	67%

presumptive commitment to prison offenses against only 46% of the juveniles whose cases Judge #1 decided, compared with 74% of those Judge #2 decided, 69% that Judge #3 heard, and 77% of those before Judge #4. Because juveniles charged with presumptive commitment offenses often are younger offenders with less extensive delinquent histories and fewer previous attempts at treatment, the decision whether to waive them to criminal court may be more difficult.

Despite these caveats, however, discrepancies remain in the referral rates which reflect the philosophy and policies of the presiding judge. For example, if we control for the seriousness of the offense for which the prosecutor filed the reference motion, Judge #1 referred 76% of those youths charged with presumptive commitment to prison offenses, while Judge #2 referred 64% of the youths charged with presumptive offenses, Judge #3 referred 79%, and Judge #4 waived 55%. Recall, however, that juveniles in the latter years had less extensive prior records of adjudication.[188] Finally, a

188. In addition, these three judges (#2, #3, and #4) decided a relatively smaller number of cases compared with Judge #1. Thus, their reference rates could change

reference decision is only part of the overall sentencing process. In many cases, after the juvenile court judge refers a youth for adult criminal prosecution, he or she will simply "switch hats" and preside as criminal court judge over the adult component of the same case. While the juvenile or the defense attorney may request a different judge, as will be seen, often the waiver decision is part of a plea-bargained "package deal." Thus, judicial reference decisions cannot be viewed in isolation from the subsequent sentences a youth receives as a juvenile or adult.[189]

b. Length of Time of Reference Process

Because certification proceedings tend to be the lengthiest and most labor-intensive decision in the juvenile system, we analyzed the amount of time required to decide these cases and some of the factors that contributed to the prolongation of the process. We divided the process into three separate stages: (1) from the time the county attorney filed a reference motion until the juvenile court made the final reference decision; (2) from the time the court made the reference decision until the youth was adjudicated as a delinquent or convicted as an adult; and (3) from the time the youth was adjudicated or convicted until a court imposed a juvenile disposition or adult sentence. Finally, we calculated the total length of time for the entire process from the initial filing of the motion to ultimate sentence or disposition.

Table 8 displays the three decision points involved in the reference process by year. On average, it took the court about two months to make a reference decision. It took an additional seventeen days to conduct a hearing or trial to determine guilt or innocence, although this average length of time increased during the period of our study, from thirteen or fourteen days in the late 1980s to twenty-seven days in 1992. Once the court decided a youth's guilt or innocence, it required an additional seven days to sentence or dispose of the case, although again the average length of time increased from three days in 1986 to fourteen days in 1992.

The differences in average time periods for the three separate decision segments did not differ significantly across years. How-

drastically if they each decided a few additional reference cases all in the same direction.

189. For example, although Judge #1 certified a larger proportion (75%) of juveniles and more chronic property offenders, when he sentenced these youths as adults, he committed 78% to a county jail (where the sentence is one year or less) and sentenced only 16% to prison. By contrast, Judges #3 and #4 initially referred a lower proportion of youths to criminal court (61% and 54% respectively), but sentenced a much larger proportion of those that they did certify to prison (50% and 64% respectively), rather than to shorter term jail sentences (38% and 29%).

Table 8
Average Length of Reference Process in Days+ by Year the Juvenile was First Motioned: (Number of Juveniles)

	1986	1987	1988	1989	1990	1991	1992	Total
From Reference Motion to Reference Decision	58 days (49)	57 days (39)	68 days (58)	45 days (44)	62 days (52)	69 days (38)	64 days (30)	**60 days (310)**
From Reference Decision to Adjudication/Conviction	14 days (49)	13 days (39)	18 days (58)	12 days (44)	17 days (52)	20 days (38)	27 days (30)	**17 days (310)**
From Adjudication/ Conviction to Disposition/ Sentence	3 days (47)	4 days (37)	7 days (52)	4 days (41)	6 days (48)	8 days (36)	14 days (28)	**7 days (289)**
Overall Average Length of Reference Process*	62 days (47)	76 days (37)	91 days (52)	62 days (41)	79 days (48)	97 days (36)	106 days (28)	**80 days (289)**

+ We removed statistical outlier cases from this temporal analysis so that a picture of the 'true average' could be drawn. For example, nine cases involved an appealed reference decision that would have greatly exaggerated the average length of time for the remaining cases. In addition, cases that were three standard deviations away from the mean were considered statistical outliers. Sixteen cases were identified using this method and were removed from the averages given in this table. Additionally, sixteen cases were dismissed at the adjudication or conviction decision point and were excluded from the final two rows of this table.
* p=.01 The overall difference in the average length of the reference process is statistically significant across years.

ever, the overall length of the process from the filing of the reference motion to the final sentencing or disposition decision did change in a statistically significant way over the period of the study (p=.01). While the overall average length of time for the reference process is eighty days or slightly more than two and one-half months, the average length of time increased from 62 days (about two months) in 1986 to 106 days (almost three and one-half months) in 1992.

c. Litigated Reference Hearings

Although appellate opinions such as *Kent* and *Breed* may create an impression that juvenile court judges decide most waiver cases in an adversary hearing, it appears in Hennepin County that contested proceedings seldom occur; the juvenile court decided most reference motions without holding a full hearing. In the seven-year period of our study, the juvenile courts conducted only twenty-seven full reference hearings, or only about 8% of the motions filed. Whether or not the court held a reference hearing did not significantly affect its reference decisions. Courts waived to adult court 63% of those juveniles for whom they conducted full reference hearings, compared with 65% of those juveniles whose fate they decided without conducting full reference hearings.

The characteristics of juveniles whose cases were decided in contested reference hearings differed from the overall population of youths against whom prosecutors filed reference motions. The contested cases typically involved younger offenders, charged with very serious crimes, and who had very little prior exposure to juvenile treatment resources. Recall from Table 3 that prosecutors filed reference motions against only about 10% of juveniles aged fourteen or fifteen. However, more than twice that proportion (22%) of younger juveniles had contested reference hearings. Prosecutors charged with presumptive offenses virtually all (96%) of the juveniles who requested contested hearings and charged more than two-thirds (70%) of them with homicide. These juveniles also faced more criminal charges. For example, prosecutors charged more than half (59%) of these youths with three or more felony offenses as compared with only 40% of youths who waived their right to a reference hearing. Because most of these juveniles had less extensive prior records, they also experienced less juvenile court treatment intervention. Slightly more than one-quarter (26%) had been adjudicated for two or more felonies compared with about half (49%) of those youths who relinquished their right to a waiver hearing. As a result, juvenile courts had not previously removed most (56%) of them from their homes prior to the filing of a reference motion, and

Table 9
Comparison of Variables for Litigated versus Waived Reference Hearings

	Litigated Hearing N=27	Waived Hearing N=303
Age at Present Offense		
14 Years Old	7%	3%
15 Years Old	15%	7%
16 Years Old	41%	29%
17 Years Old	37%	62%
Prior Out-Of-Home Placements		
None	56%	32%
One to Three Placements	26%	35%
Four or More Placements	18%	33%
Prior Adjudications		
One Felony or Less	74%	51%
Two Felonies or More	26%	49%
Present Offense — Number of Charges		
Two or Fewer Felony Charges	41%	60%
Three or More Felony Charges	59%	40%
Severity of Present Offense		
Presumptive Offenses	96%*	52%
Non-Presumptive Offenses	4%	48%
Reference Decision		
Referred to Adult Court	63%	65%
Retained in Juvenile Court	37%	35%

* Eighteen of these cases were for homicide and another one for vehicular homicide.

had committed only 7% to the Department of Corrections. The juveniles who received contested hearings confronted juvenile court judges with the most difficult of the "hard" cases, as did the youths in the *Dahl* and *Brom* cases.[190]

The prosecutor, defense counsel, and the juvenile court judge negotiated informally the outcomes of more than 90% of all reference motions filed. In these negotiations, the judges often indicated both their likely resolution of the reference motion and the juvenile or adult sentence that would ensue. Although differences in judicial philosophies affect the rates of waiver, the types of cases waived, and the lengths of sentences imposed, except for the "hard" cases, whether a youth was tried as a juvenile or an adult was negotiated rather than litigated. Because of the plea-bargained nature

190. *See Bad Law Makes Hard Cases, supra* note 13, at 46-47; *Violent Youth and Public Policy, supra* note 35, at 1015.

of most reference motions, formal challenges to waiver decisions seldom occurred. Juveniles appealed only nine reference decisions made during the entire seven-year period of this study.[191]

d. Clinical Assessments in Reference Decisions

Two different divisions within the Hennepin County Department of Community Corrections—Juvenile Probation and Psychological Services—provide the juvenile court with clinical insights about juveniles facing reference motions. At the request of the juvenile court, either or both of these divisions may complete evaluations of the personal or psychological characteristics of the offender, family background, education, and delinquency background.

Table 10
Additional Court Services Completed By Year Motioned for Adult Reference

	1986	1987	1988	1989	1990	1991	1992	TOTAL
Probation Studies								
Done								
Number	21	18	25	16	23	20	18	141
Percent	40%	44%	41%	35%	43%	50%	51%	43%
Not Done								
Number	32	23	36	30	31	20	17	189
Percent	60%	56%	59%	65%	57%	50%	49%	57%
Psychological Evaluations								
Done								
Number	23	18	25	17	25	25	20	153
Percent	43%	44%	41%	37%	46%	63%	57%	46%
Not Done								
Number	30	23	36	29	29	15	15	177
Percent	57%	56%	59%	63%	54%	37%	43%	54%

Probation Department: The juvenile court may request the Juvenile Probation department to provide a detailed social report, called a reference study, about a youth against whom the prosecutor files a reference motion. Courts do not request reference studies automatically, and did so in only 43% of the cases of youths facing possible prosecution in criminal court. As Table 10 indicates, the number of reference study requests increased to about 50% in the final two years of our study, the period during which the length of

191. Two of the cases were withdrawn prior to hearing before the appellate court. The remaining seven cases heard by the appellate court were not reversed.

time to complete the reference process also increased. As Table 11 indicates, whether or not the court requested a reference study did not significantly affect the outcomes of cases. The court retained jurisdiction over 34% of those youths for whom it requested reference studies, and over 37% of those juveniles for whom it did not request a study.

Table 11
Additional Court Services by the Reference Decision

	Probation Study		Psychological Evaluation	
	Done N=141	Not Done N=189	Done N=153	Not Done N=177
Retained in Juvenile Court	34%	37%	37%	33%
Referred to Adult Court	67%	64%	63%	67%

When probation officers conducted reference studies, they collected and summarized the available social, behavioral, and clinical information about the subject, and recommended to the court

Table 12
Referral Rates by Court Services Recommendation

	Probation Recommends*		Psychologist Recommends**	
	Juvenile N=47	Adult N=89	Juvenile N=54	Adult N=65
Retained in Juvenile Court	87%	6%	80%	6%
Referred to Adult Court	13%	94%	20%	94%

* There were 5 probation studies where a recommendation could not be determined.
** There were 34 psychological evaluations where a recommendation could not be determined.

whether the youth should be tried as a juvenile or adult. As appears in Table 12, the probation officer's recommendation exerted a statistically significant influence on juvenile court judges' decisions (p=.0001). The court retained jurisdiction in 87% of the cases in which the probation officer recommended that the juvenile be retained, and waived jurisdiction in 94% of the cases in which the probation officer recommended the court refer the juvenile to adult court. These consistencies may reflect either heavy judicial reliance

on the probation staff's recommendations, or the probation staff's familiarity with and anticipation of judicial expectations and practices.[192]

Psychological Evaluations: As Table 10 indicates, the juvenile court ordered a few more youths to undergo psychological evaluations than reference studies (153 versus 141), although the two groups of juveniles overlapped substantially. Overall, the courts requested psychological evaluations of 46% of the juveniles against whom prosecutors filed reference motions, and the percentage of cases increased in the latter years of our study (63% in 1991 and 57% in 1992). As was the case for reference studies, Table 11 suggests that a request for a psychological evaluation was not a statistically significant factor affecting the reference decision. Juvenile courts retained jurisdiction over 37% of the youths whom a court psychologist examined and 33% of those who did not see a clinician.

Unlike probation officers, psychological services staff members reported uncertainty as to whether the court expected them to make a definitive recommendation whether to refer a youth to criminal court or retain him in juvenile court. In thirty-four of the 153 psychological examinations (22%), the data coders could not ascertain any specific reference recommendation. Of the remaining cases in which psychologists made clear-cut recommendations, the court retained jurisdiction in 80% of the cases in which psychologists recommended a youth's retention in juvenile court, and certified juveniles in 94% of the cases in which the psychologist recommended a youth's transfer to criminal court.

When probation officers recommended in their reference study that the court transfer a youth to criminal court, psychological services staff concurred 63% of the time. When probation staff recommended that the juvenile court retain jurisdiction over a youth, the psychologists agreed 77% of the time. The instances of nonconcurrence almost all occurred when probation staff made either recommendation and the psychologists declined to make any recommendation.

e. Court Processing and Race

African-American juveniles constituted the largest group of youths for whom the juvenile court requested reference studies and psychological evaluations. Probation officers completed signifi-

192. *See, e.g.*, Robert M. Emerson, *Role Determinants in Juvenile Court, in* HANDBOOK OF CRIMINOLOGY 612, 644-47 (Daniel Glaser ed., 1974) (documenting a clinical anticipation of the court's likely disposition and organizational pressures to "conform to prevailing court standards of what is reasonable and to eschew risk-taking . . ."); MATZA, *supra* note 24.

cantly more reference studies in the cases of African-American (52%) juveniles than they did for cases involving white (31%), or other minority (33%) youths (p=.001). Similarly, juvenile courts also requested significantly more psychological evaluations to assist them with the cases of African-American (55%) juveniles, than they did in the cases for white (34%), or other minority (38%) juveniles (p=.002). These results contradict another common belief that juvenile courts refer minority youths hastily and without extending system resources, and white youths more carefully and therefore over a longer period of time. Rather, the court expended extra evaluative resources on minority youths compared to white youths because of the greater seriousness of their present offenses.

Table 13
Additional Court Services by Racial Background

	Whites N=93	African-American N=182	Other Minority N=55	Total N=330
Probation Studies				
Done	31%	52%	33%	141
Not Done	69%	48%	67%	189
Psychological Evaluations				
Done	34%	55%	38%	153
Not Done	66%	45%	62%	177

Courts requested reference studies and psychological evaluations more often when prosecutors charged a youth with a crime of violence, regardless of race. However, because prosecutors filed far more reference motions against African-American and other minority juveniles for crimes against the person than they did against white juveniles, court staff prepared more reference studies and psychological evaluations for minority youths than they did for white juveniles. When we controlled for whether or not the reference motion alleged a felony against the person, the differences between the races disappeared. Clinicians examined white youths with the same frequency as minority youths if prosecutors charged them with a crime against the person.

Probation officers often require additional time to complete reference studies, and the juvenile court generally grants an additional thirty to sixty days to complete a requested study. Earlier, in Table 8, we examined the length of time the court required to make several decisions in the reference process—reference decision, adjudication-conviction, and disposition-sentence. Table 14 reports the

Table 14
Average Length of Reference Process in Days+ by Racial Background (Number of Juveniles)

	Whites	African-Americans	Other Minorities	Total
From Reference Motion to Reference Decision*	44 days (88)	68 days (170)	65 days (52)	60 days (310)
From Decision to Adjudication/Conviction	15 days (88)	19 days (170)	13 days (52)	17 days (310)
From Adjudication/ Conviction to Disposition/ Sentence	5 days (85)	8 days (156)	6 days (48)	7 days (289)
Overall Average Length of Reference Process**	65 days (85)	90 days (156)	78 days (48)	80 days (289)

+ We removed some cases from this analysis so that a picture of the "true average" could be drawn. For example, nine cases involved an appealed reference decision that would have greatly exaggerated the average length of time for the remaining cases. In addition, cases that were three standard deviations away from the mean were considered statistical outliers. Sixteen cases were identified using this method and were also removed from the averages given in this table. Finally, sixteen cases were dismissed at the adjudication or conviction decision point and were excluded from the final two rows of this table.
* $p<.001$ The statistical difference in the length of time between the filing of the reference motion and the reference decision is between whites when compared with African Americans and when compared with other minorities. The difference between African Americans and other minorities is not statistically significant.
** $p=.01$ The statistical difference is between whites compared with African Americans. The other two comparisons (whites with other minorities and African Americans compared with other minorities) are not significant.

length of time it took the court to decide the cases of youths of different racial backgrounds. The court took significantly longer to decide whether to refer cases involving African-American and other minority youths than it did to refer the cases of white juveniles ($p=.001$). The court decided whether to certify or retain white youths in about forty-four days, as contrasted with sixty-eight days for African-American youths, and sixty-five days for other minority juveniles. Similarly, the overall length of the reference process differed for youths of different races. The only statistically significant difference in processing time, however, is between African-American juveniles (ninety days or three months) and white youths (sixty-five days or slightly over two months).[193] Other minority youths fall between these two groups (seventy-eight days or two and one-half months) and do not differ significantly either from white or African-American juveniles.

193. $p=.01$.

The difference in the length of time for each racial group occurs mainly during the first segment of the reference process, from the time the County Attorney files its reference motion to the time the juvenile court makes its reference decision. This is also the period during which the court obtains proportionally larger numbers of probation studies and clinical evaluations for African-Americans than for the other two racial groups.

In general, the Department of Community Corrections expended more evaluative resources on those youths charged with a felony against the person, regardless of race. The additional services requested by the court for youths charged with a serious crime against the person, most of whom were African-Americans, also accounted for the significantly greater length of time the court needed to make its reference decisions in cases involving African-American youths as opposed to those of white or other minority youths.

f. Court Processing and Case Outcomes

Overall, the juvenile courts certified about two-thirds (65%) of the youths against whom prosecutors filed reference motions. Table 15 reports the relationships between many of the variables previously analyzed and the reference outcomes. For example, a juvenile's age at the time the prosecutor filed a reference motion significantly affected the court's decision whether to waive jurisdiction (p=.001) and refer the case to adult court. Indeed, the likelihood of certification increased for older juveniles even though younger juveniles often faced more serious charges. Courts referred 24% of the fourteen- or fifteen-year-old juveniles, as compared with 70% of those aged sixteen or seventeen. When we refined age further, its relationship to the reference decision became even clearer. Courts referred to adult court only 10% of the fourteen-year-old juveniles, as compared with 29% of the fifteen-year-olds, 61% of the sixteen-year-old youths and 74% of the seventeen-year-old juveniles.

Courts certified as adults 62% of the juveniles charged with non-presumptive offenses compared to 67% of the juveniles charged with presumptive offenses, a statistically insignificant difference in waiver rates. We analyzed the relative importance of seriousness and persistence further because we were somewhat surprised to discover that the gravity of the present offense alone was not a significant determinant of certification decisions. Unlike the seriousness of the offense alone, the number of present offenses alleged did affect judicial waiver decisions. As the number of charges increased, so too did the likelihood of adult reference. For example, the courts certified to criminal court 56% of those juveniles charged

only with misdemeanor offenses, 58% of those charged with only one felony, 60% of those with two felony charges, 73% of those with three felony charges and 75% of those with four or more felony charges.[194]

Finally, we examined the relationship between the court's certification decision and the specific types of offenses alleged. Recall from Table 3 that prosecutors charged most of the youths against whom they filed reference motions with a felony against the person, either alone (42.4%), or in conjunction with some other felony offenses (20.9%), or for property felonies (24.8%). Courts referred seventy percent of the juveniles charged only with a felony against the person, and two-thirds of juveniles charged with felony property offenses (66%), or with a combination of crimes against the person and other types of felony offenses (67%). By contrast, the courts referred only 40% of youths charged with drug felonies, and only one-third of those charged with some other type of felony. Interestingly, the court also certified five of the nine offenders (56%) charged with misdemeanor level offenses.

Recall in Table 4 that relatively few youths (15%) had prior convictions for presumptive commitment offenses before the filing of the reference motion; this "qualitative" aspect of the prior record did not significantly affect the courts' decision whether or not to certify a youth. As demonstrated in Table 15, courts waived jurisdiction in 65% of cases of youths with no prior history of presumptive offenses, as compared with 69% of those with a presumptive background.

While the "quality" of a juvenile's prior record did not affect the court's certification decisions in a statistically significant manner, the "quantity" did. A significant relationship appears between the number of past felony adjudications and the court's decision to certify a juvenile. The court transferred to adult court only about half of the youths with no prior adjudication history (51%) or only a misdemeanor conviction in their background (54%). Once a juvenile acquired a prior felony record, however, the court's rate of certification increased sharply. The court waived about two-thirds (66%) of those having at least one felony adjudication, and this rate increased to nearly three-quarters (74%) of those with multiple felony adjudications (three or more prior felonies). This relationship between prior adjudications and certification was only significant ($p < .001$) for juveniles sixteen or seventeen years of age. For juveniles only fourteen or fifteen years of age, prior adjudications were not significant. These results reflect the importance of age as an in-

194. The statistical significance was p=.007.

Table 15
Variables Influencing Outcome of Reference Decision

	Referred	Retained
Age at Present Offense*		
14-15 Years (N=34)	24%	76%
16-17 Years (N=296)	70%	30%
Racial Background		
White (N=93)	71%	29%
African-American (N=182)	63%	37%
Other Minority (N=55)	64%	36%
Present Offense Severity		
Presumptive (N=183)	67%	33%
Non-Presumptive (N=147)	62%	37%
Number of Present Offense Charges*		
Misdemeanor (N=9)	56%	44%
One Felony (N=103)	58%	42%
Two Felonies (N=80)	60%	40%
Three Felonies (N=51)	73%	27%
Four or More Felonies (N=87)	75%	25%
Type of Present Offense Charges		
Misdemeanor (N=9)	56%	44%
Other Felonies (N=3)	33%	67%
Drug Felonies (N=27)	41%	59%
Property Felonies (N=82)	66%	34%
Person Felonies Only (N=140)	70%	30%
Person and Other Felonies (N=69)	67%	33%
Prior Offense Severity		
Presumptive Adjudication (N=48)	69%	31%
No Presumptive Adjudications (N=282)	65%	35%
Number of Prior Adjudications*		
No Priors (N=51)	51%	49%
Misdemeanors Only (N=54)	54%	46%
One Felony (N=71)	66%	34%
Two Felonies (N=65)	72%	28%
Three or More Felonies (N=89)	74%	26%
Type of Prior Adjudications		
No Priors (N=51)	51%	49%
Misdemeanors Only (N=54)	54%	46%
Other Felonies (N=3)	100%	—
Drug Felonies (N=13)	62%	38%
Property Felonies (N=117)	74%	26%
Person Felonies Only (N=29)	59%	41%
Person and Other Felonies (N=63)	71%	29%
Prior Parole*		
Yes (N=117)	81%	19%
No (N=213)	56%	44%
Prior Probation		
Yes (N=244)	68%	32%
No (N=86)	58%	42%
Combined Present Offense Severity and Extent of Prior Adjudications*		
Presumptive-Little History (N=122)	63%	37%
Presumptive-Large History (N=61)	75%	25%
Non-Presumptive-Little History (N=54)	46%	54%
Non-Presumptive-Large History (N=93)	72%	28%

* Significant relationship, $p < .01$

dependent determinant of the reference decision. For those few younger offenders (fourteen or fifteen years old) who accumulated a higher felony history (two or more), their youthful status apparently mitigated their delinquency history.

The courts certified to adult court significantly more juveniles (81%) who had been committed previously to the Commissioner of Corrections than it did those youths (56%) who had not been committed to the state training schools. This relationship remained statistically significant even when we controlled for the prior delinquency history as well. Because the training schools represent the "final step" in juvenile corrections, exhaustion of those resources leaves the juvenile courts with few "treatment" options. By contrast, the relationship between a youth's prior probation status and certification is not significant. Courts certified 68% of youths on probation compared with 58% of those who had never been on probation.

Present Offense, Prior Record, and Reference Decision: We did not observe a statistically significant relationship between the prosecutor's decision to charge a youth with a presumptive or non-presumptive offense and the court's decision of whether to certify the youth. Similarly, courts certified youths charged with more serious offenses against the person (70%) at about the same rate as they did those charged with property crimes (66%). Although this lack of significance of the present offense was surprising, a more straightforward pattern emerged when analyzed in conjunction with the prior record. We categorized juveniles on the basis of their present offense—presumptive and non-presumptive charges—and their prior records, which we dichotomized—a large delinquency history with two or more prior felonies, or a small history of one felony, misdemeanor only, or no priors—and examined the relationship between these four combinations of cases and the certification decisions.

The last four rows of Table 15 report the percentages of youths whom courts referred based on combinations of the present offense and prior history. Juvenile courts referred to adult court 75% of the juveniles charged with a presumptive offense who had an extensive prior record of adjudications, as compared with 63% of those serious offenders with a less extensive adjudication history. Similarly, the court certified 72% of those juveniles whom prosecutors charged with a non-presumptive offense and who had a lengthy prior delinquency history, compared with only 46% of those with a small history of adjudications. The prior record, rather than just the seriousness of the present offense, appears to most strongly influence the waiver decision.

Juveniles charged with a presumptive offense but with a small adjudication history constitute more than one-third (37%) of all the youths in our sample. Youths charged with a non-presumptive present offense but with extensive prior delinquency records comprised nearly the same proportion (28%) of our sample. The two extreme categories, youths charged with presumptive offenses with extensive criminal records accounted for about one-fifth (18%) of the referred juveniles, and the remainder (16%) consisted of juveniles charged with less serious non-presumptive offenses and meager prior records. Interestingly, the number of "presumptive offense and small history" cases pulled down the certification rate of the presumptive offense group, while the number of "non-presumptive offense and large history" cases raised the reference rate for the non-presumptive category as a whole. These patterns confirm court practitioners' descriptions of bimodal populations of certified youths as both serious and chronic.

Clearly, an extensive adjudication history affected reference decisions more than the seriousness of the present offense. As a youth acquired a lengthier delinquency history, prosecutors required a less serious present offense to file a motion for adult reference. Conversely, if the present offense was a very serious one, then prosecutors filed reference motions even if the juvenile possessed a relatively minor prior delinquency record. The "trade-off" between seriousness and persistence produced some interesting racial patterns in reference decisions. Recall from Table 1 that most property offenders were white juveniles and most violent offenders were minority juveniles. Because the juvenile court appeared to emphasize cumulative persistence rather than just present seriousness, and racial groups did *not* differ in the lengths of their prior records (Table 6), the court certified 71% of white juveniles against whom prosecutors filed a motion for referral to adult court, as compared with 63% of African-American, and 64% of other minority juveniles. The racial difference in referral rates was not statistically significant.

4. Multivariate Analysis

Multivariate analyses assess the relative impact of each independent variable (for example, the seriousness of the present offenses, level of prior delinquency history, age, prior out-of-home placements, and the like) on the dependent variable (certification) while holding all other independent variables constant. In addition, multivariate regression techniques allowed us to estimate and evaluate the relative strength and significance of the independent contributions of a number of factors to the dependent variable's ex-

planation or prediction. Because the outcome of the reference decision was a dichotomous variable, either to retain a youth in juvenile court or to refer him to criminal court, we used a logistic regression technique to model the determinants of the decision.[195] Table 16 summarizes the significant independent variables included in the logistic regression analyses of the reference decision.

Table 16
Significant Predictor Variables in the Logistic Regression Model

	Reference Decision	
	Referred	**Retained**
Independent Variables		
Court Services Recommendations		
PO & Psychologist — Adult (N=87)	97%	3%
PO & Psychologist — Juvenile (N=54)	11%	89%
PO & Psychologist disagree (N=11)	64%	36%
No Recommendations (N=178)*	66%	34%
Reference Decision Judge		
Judge #1 (N=179)	75%	25%
Other Judge (N=151)*	54%	46%
Age at Present Offense		
14 Years Old (N=10)	10%	90%
15 Years Old (N=24)	29%	71%
16 Years Old (N=98)	61%	39%
17 Years Old (N=198)*	74%	26%
Prior Delinquency Placements		
None (N=111)	54%	46%
One to Three Placements (N=113)	62%	38%
Four or More (N=106)*	80%	20%
Present Offense Charges		
Two Felony Charges or Less (N=192)*	59%	41%
Three Felony Charges or More (N=138)	74%	26%
Present Offense Characteristics		
Person Felony — Weapon (N=155)	72%	28%
Person Felony — No Weapon (N=54)	61%	39%
Non-Person Felony (N=121)*	59%	41%

* Reference category

In constructing our model, we exercised care to maintain consistency in the excluded categories of our independent variables.

195. In the case of dichotomous variables, linear or ordinary least squares regression can lead to incorrect analyses of the effects of the independent variables upon the dependent variable. *See* JOHN ALDRICH & FORREST NELSON, LINEAR PROBABILITY, LOGIT, AND PROBIT MODELS 9-10 (1984).

For example, within the age variable we chose seventeen-year-old youths as the excluded category. Because older juveniles were more likely to have had four or more prior out-of-home placements, the higher number of prior placements became the excluded category on that variable. In general, youths with these two characteristics were more often property offenders and property offenders generally had fewer charges pending on the current offense alleged in the reference motion. Therefore, the excluded category on the number of current offense charges was two or fewer charges, and the excluded category for the type of current offense was non-person offense. Finally, because older property offenders with significant delinquency histories were less likely to be evaluated by either court services department, the excluded category for court service recommendations was no recommendation. Because the coefficient for each variable represents a contrast with the omitted category, this consistency allowed for a clearer interpretation of the relationships in our model.

The interpretation of logistic regression can be described within the framework of the odds of an event occurring. This is different from the informal usage of the term "odds" which generally is used to indicate probability. For our purposes "odds" is used to indicate the ratio of the probability of an event occurring (a juvenile being referred to adult court) compared with the probability of the event not occurring. Under this interpretation, the logistic coefficients can be seen as the change in log odds with one unit change in an independent variable. A positive logistic coefficient indicates greater odds while negative coefficients indicate reduced odds. For categorical variables, the coefficients must be interpreted in relation to the excluded category. Using categorical variables in logistic regression not only allowed us to determine whether the variable as a whole was significant but also if and how each of the included categories differs from the excluded category.

a. Significant Variables

Court Services Recommendations: The recommendation that court services personnel gave to the court constituted one of the most powerful variables in our model. As noted earlier, the probation department and psychological services completed evaluations of about half of the juveniles with reference motions filed against them.[196] These professionals provided the court with a portrait of

196. Recall from Table 11 that whether or not the court requested a reference study or a psychological evaluation did not significantly affect the court's decision to refer a youth to adult court. Courts were neither more nor less likely to certify youths because they received additional clinical evaluation services. Thus, a judicial

Table 17
Logit Regression Analysis of Reference Decision By Court Process, Offender and Offense Characteristics

Independent Variable		Beta	S.E.
Court Services Recommendations[a]			
P.O. & Psychologist Agree Adult		4.7	1.3***
P.O. & Psychologist Agree Juvenile		-2.7	.6****
P.O. & Psychologist Disagree		.8	1.0
Dummy Code of Judge #1[b]		1.4	.3****
Age at Present Offense[c]			
14 Years Old		-4.1	1.6**
15 Years Old		-4.7	1.3***
16 Years Old		-.8	.4*
Number of Prior Program Placements[d]			
No Prior Delinquency Placements		-1.1	.4**
One to Three Prior Placements		-1.0	.5*
Dummy Code for Present Offense Charges[e] (Three or more charges)		.9	.4*
Present Offense Characteristics[f]			
Person Felony — Weapon Involved		1.0	.4**
Person Felony — No Weapon		.3	.5
CONSTANT		.4	.4
Model Characteristics			
Sample Size	330		
Base Rate — Percent Referred	65%		
Selection Ratio — Percent the Model Predicts to be Referred	70%		
Percent Random Accuracy	56%		
Percent Observed Accuracy (Correctly Classified)	85%		
Improvement Over Chance	29%		
Percent False Positive	7%		
Percent True Positive	93%		
Percent False Negative	28%		
Percent True Negative	72%		
Percentage of Total Variation (log-likelihood) Explained	40%		

[a] Reference category is No Recommendation
[b] Reference category is Judge other than #1
[c] Reference category is Juveniles 17 Years Old
[d] Reference category is 4 or More Prior Placements
[e] Reference category is Two or Fewer Felony Charges
[f] Reference category is Non-Person Offense
* Significant at .05
** Significant at .01
*** Significant at .001
**** Significant at .0001

each youth—his or her social background, the alleged crime and delinquency history, clinical assessments, and possible treatment available within the juvenile system—and recommended whether the court should refer or retain the youth.[197]

Although probation and psychological services personnel conducted their assessments separately, members of each department often shared information. For example, if a probation officer reviewed possible treatment programs for the offender and did not find any options available, he or she could communicate that information to the psychologist. We could not determine how often or to what extent probation and psychological personnel shared information, nor how much the shared information influenced their respective recommendations. Because they did not conduct their evaluations in a completely independent manner, we combined their appraisals in our model to capture agreement or disagreement between court services personnel. We constructed the categories as follows: (1) both the probation officer and the psychologist agreed that the juvenile should be referred to adult court; (2) both agreed the youth should remain in juvenile court; (3) the probation officer and the psychologist disagreed on the reference recommendation;[198] and finally, (4) neither conducted an assessment. The third category in this variable, disagreement between the probation and clinical evaluators, contained a very small number of juveniles (eleven). The high level of congruence reinforced our conclusion that the probation and psychological staff did not conduct their evaluations entirely independently. Keeping this disagreement category separate from the other categories allowed for a more exact interpretation of each.

When the probation officer and psychologist agreed on an outcome recommendation, either to retain juvenile court jurisdiction or to refer the youth to adult court, there was a statistically significant probability that the court would follow that advice. In particular, if both the probation officer and the court psychologist recommended that a juvenile be tried as an adult, the highly significant logistic

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request for a clinical evaluation did not constitute a de facto waiver decision. Courts requested clinical evaluations more often for younger juveniles charged with violent offenses who had less extensive prior records.

197. For a comprehensive description of the types of clinical information available to Minnesota juvenile court judges in reference hearings, see *Bad Law Makes Hard Cases, supra* note 13, at 54-69.

198. A few cases exist where one assessor gave a recommendation and the other did not provide a recommendation even though they completed an evaluation (5 of the probation studies and 34 of the psychological evaluations had this result). In these cases, we assigned the recommendation we had to an agreement category according to the recommendation that was provided.

coefficient (4.7, p<.001) indicates that transfer of the juvenile was a near certainty. When both court personnel recommended that the juvenile court retain jurisdiction over the youth, the odds of transfer to adult criminal court decreased significantly ($p < .0001$). The negative sign accompanying the logistic coefficient (–2.7) indicates reduced odds that the court would certify this group of youths as compared with the no recommendation group.

When court services personnel agreed either to refer or retain a juvenile, their concurrence produced dramatically different odds when compared to cases in which they made no recommendations. Where court officials disagreed about a youth's disposition, they did not significantly affect the likelihood of certification. The outcomes in the disagreement category did not differ significantly from those cases in which court services personnel did not evaluate a juvenile or make any recommendation.[199]

Juvenile Court Judge: The juvenile court judge who decided the case constituted another important process variable that produced significant results.[200] During the course of our study, Judge #1 decided about half (54%) of the reference cases, and certified youths at a higher rate than did the other judges. Because none of the other judges heard enough cases to constitute a separate variable category, we created a dummy code for Judge #1. Holding other variables constant, juveniles appearing before Judge #1 had significantly increased odds of being referred when compared with youths appearing before the other judges (1.4, p<.0001). This finding is consistent with our contention that judicial waiver practices reflect an individualized, discretionary juvenile court sentencing "point of view." If an adult criminal court "point of view" prevailed, then standardized decisional rules or presumptive sentencing guidelines would produce greater consistency and reduce the influence of the presiding judge as a dispositional variable. Instead, it matters *who* the judge is; after we controlled for all other variables, the outcomes of certification motions depended significantly upon which judge decided the case.

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199. Categories with a small number of cases do not automatically produce insignificant effects. For example, in our data, the variable of age at present offense included only ten 14-year-old juveniles, and yet produced a significant negative effect on certification when compared to 17-year-old youths. Thus, a small number of cases can produce significant effects if the strength of the relationship is meaningful.

200. Waiver decisions reflect the judicial philosophy of the presiding juvenile court judge. Since we did not collect direct information about their varying policies to transfer juveniles to adult court, their decisions themselves provide the best indicator of differences in orientation. See Table 7 *supra* and accompanying text for further analyses of judicial differences in sentencing referred youths. It would be interesting to determine whether a judge's explanation of his or her waiver philosophy would enable us to predict certification practices or outcomes in specific cases.

Age at Present Offense: A youth's age at the time the prosecutor filed the reference motion constituted a powerful variable influencing the juvenile court's reference decisions. The older the youth, the greater the likelihood that the court would refer the case to criminal court. However, several possible explanations exist for the salience of age as a determinant of waiver. First, a youth's age may act as a proxy for prior delinquency. Older juveniles have a longer opportunity to acquire a more extensive prior record. Second, a youth's age determines the length of time remaining for treatment in the juvenile system. The longer the length of time remaining within juvenile jurisdiction, the more likely the court will find the youth amenable to treatment. Finally, the court may use age as a surrogate for culpability, view younger offenders as less blameworthy or responsible even for serious crimes, and decline to certify them as readily.

The excluded category for this variable is seventeen-year-old juveniles. Each of the other three age groups (youths fourteen, fifteen, and sixteen years of age) had significantly lower likelihoods of being transferred to adult court than the seventeen-year-olds. The negative coefficients are particularly large for juveniles fourteen and fifteen years of age (–4.1 and –4.7, respectively) indicating a lower likelihood of certification for these two groups when compared to seventeen-year-old youths. This is particularly salient for the fourteen-year-old juveniles because that category included only ten youths. The negative coefficient was also statistically significant for the sixteen-year-olds (–.79) compared to the excluded category but not nearly as strongly as the two younger age groups.[201]

Prior Program Placements: We had full use of all prior delinquency history and analyzed a number of different alternative measures. Prior analyses of juvenile court sentencing practices in Minnesota indicated that the previous dispositions imposed on juveniles explained the greatest variance in their subsequent sentences as well.[202] Because a youth's amenability to treatment is a crucial issue in the waiver decision, the extent of previous disposi-

201. For 14-year-olds, p=.01; for 15-year-olds, p=.001; for 16-year-olds, p=.05.

202. *See Right to Counsel*, *supra* note 134, at 1305-06. "Of the independent variables, a previous disposition of removal from the home is the most powerful determinant of the present decision to remove a juvenile from the home . . . . Similarly, a previous disposition of secure confinement is the most powerful determinant of the present decision to incarcerate a youth." *Id.* *See also* Terence P. Thornberry & R. L. Christianson, *Juvenile Justice Decision-Making as Longitudinal Process,* 63 SOC. FORCES 433, 437 (1984) (asserting that prior dispositions strongly influence current dispositions); John C. Henretta et al., *The Effect of Prior Case Outcomes on Juvenile Justice Decision-Making*, 65 SOC. FORCES 554, 561 (1986) (escalating progression in disposition severity with current sentence more severe than previous ones).

tions provides an indicator of a juvenile's exhaustion of rehabilitative resources as well as a rationale to transfer a youth to adult criminal court. We found that prior program placement was the most robust indicator of prior juvenile court involvement and was highly correlated with prior delinquency record (r=.7). Notably, when we included both variables in the model, we gained no additional information from prior delinquency history. In our model, we included only prior program placements as the single indicator of past juvenile justice involvement because it provided a stronger predictor of judicial decision-making, served as a parsimonious proxy for prior delinquency, and simplified analyses.

In our study, we categorized prior out-of-home placements in three groupings; (1) no prior delinquency placements; (2) one to three prior placements; and (3) four or more prior placements (the excluded category). We found that both of the first two categories differed significantly from the final category (logistic coefficients of −1.1 and −.98, respectively).[203] Prior placements did not become a meaningful factor in the certification decision until a youth achieved a threshold of four or more placements. Because we could have constructed this variable in several ways, the actual number of placements for this threshold is somewhat arbitrary. The important point is that youths with no prior placements and only a few (one to three) prior placements experienced significantly lower odds of being certified to adult court than did those youths in the alternative category of four or more program placements.

Number of Present Offense Charges: We constructed this variable by dichotomizing the number of present offenses alleged in the reference motion into two or fewer felony charges (the excluded category), and three or more felony charges. The number of felony charges that the prosecutor alleged in the reference motion significantly affected whether or not the court certified a juvenile (.9, $p<.05$). The more charges, the greater the likelihood the court would transfer the youth. Multiple charges likely provided an additional indicator of the seriousness of the case pending against a youth.[204] If the prosecutor alleged three or more felony charges in the reference motions, it significantly increased the odds that the juvenile court would refer the youth to criminal court.

Present Offense Characteristics: We constructed and analyzed several different configurations to gauge the seriousness of the present offense. We ultimately differentiated three categories of al-

203. For no prior placement, p=.01; for one to three prior placements, p=.05.

204. *See Right to Counsel, supra* note 134, at 1280-82 (finding multiple charges as indicator of greater seriousness of case).

leged offenders: (1) committed a felony offense against the person *and* used a weapon in the offense; (2) committed a felony offense against the person but did not use a weapon; or (3) committed some type of felony (e.g., property or drug) other than a crime against the person.[205] As discussed earlier, prosecutors charged nearly two-thirds (63%) of the juveniles in this study with some type of felony against the person. Our model shows that in Hennepin County, charging a youth with a crime against the person did not necessarily increase the likelihood of transfer. Indeed, when we controlled for the other variables, the juvenile court was no more likely to certify youths charged with a felony offense against the person than it was to waive those charged with property offenses, provided that the juvenile did not use a weapon (.3, not significant). If the prosecutor alleged that the youth committed a crime against the person *and* used a weapon in the commission of the offense, however, then the court was significantly more likely (1.0, $p<.01$) to waive the youth to criminal court.

Variables Not Found To Be Significant: Contrary to our expectations, we noted several variables that were not statistically significant in our multivariate analyses. In particular, the category of crime did not significantly affect the certification process. This finding differs from some previous studies reporting that courts certified most juveniles for property offenses.[206] One explanation is that other jurisdictions use certification more often for chronic property offenders than Hennepin County. Alternatively, they might have fewer violent offenders in their serious offender mix. Finally, aggregated statewide data might obscure the substantial contextual variation in crime characteristics and justice system responses.[207] In an urban setting, where prosecutors file reference motions most often for violent offenses and courts certify youths on the basis of their cumulative delinquency records, the seriousness of the present offense alone may be a secondary consideration.

Although a juvenile's use of a weapon to commit a felony against the person added to the predictive strength of the regression model, we did not find the extent of injury to the victim that resulted from the weapons use to be significant. Further, neither age at first court appearance nor age at first finding of delinquency contributed to our understanding of which juveniles the court re-

205. Four youths possessed a weapon, but were not charged with a crime against the person. We coded them with the other non-person offenders.

206. *See, e.g.*, Bortner, *supra* note 40, at 59; BETWEEN TWO WORLDS, *supra* note 2, at 109, 298.

207. *See Justice by Geography*, *supra* note 130, at 208-09; Sampson & Laub, *supra* note 129, at 286.

ferred or retained. Of course, prior delinquency history and prior placements accounted for most of the variance associated with earlier age of onset of a delinquent career.

In view of the disproportionate overrepresentation of minority youths against whom prosecutors filed reference motions, the fact that we did *not* find a positive effect for racial minorities is an important finding.[208] Our result is consistent with another multivariate analysis reporting that race did not appear to influence the reference decision, but which cautioned that the homogeneous violent offender population in their study may have obscured the independent significance of race.[209] Our research sample included a more heterogeneous group of offenders, and, like another recent multivariate analyses,[210] we did not find racial bias in waiver decisions. Further research is necessary to determine whether disparate racial selectivity occurs in the prosecutor's initial decisions to file reference.

b. Predictive Strength of the Statistical Model

We can demonstrate the strength of our model in several different ways. One method commonly used for logit regression is the percentage of correctly classified cases. This model correctly classified 85% of the cases. This means that we could correctly predict the reference decision of more than eight out of ten juveniles simply by knowing the information included in the variables in the model.[211] This represents a considerable improvement in our ability to correctly predict which youths the court will certify. If we possessed no information about individual youths and their backgrounds, we would base our predictions on the percentage of past referrals. We would expect random accuracy of 56% in the absence of individual information.[212] By using the information contained in the significant variables, our model accurately predicts about 85%

208. Because this study used three racial categories, we dummy coded for African-Americans and other minorities, and entered each into the equation using whites as the reference category. The overall race effect was *not* significant. However, we did find that African-Americans were significantly *less* likely to be referred when compared with whites. Other minority youth were not significantly different from either African-Americans or whites. Because the overall effect was not significant and the findings did not improve the explanatory power of the model, we did not include race.

209. *See* Fagan et al., *supra* note 3, at 271.

210. Tammy M. Poulos & Stan Orchowsky, *Serious Juvenile Offenders: Predicting the Probability of Transfer to Criminal Court*, 40 CRIME & DELINQ. 3, 7, 15 (1994).

211. The model does a better job of correctly predicting which youths the court referred (93% accuracy), than it does which youths the court retained in the juvenile system (70%).

212. *See* Rolf Loeber & T. Dishion, *Early Predictors of Male Delinquency: A Review*, 94 PSYCHOL. BULLETIN 68-99 (1983).

of cases, a substantial improvement of 29% more youths (about ninety-six juveniles) correctly predicted over random accuracy.

Another method used by researchers to test the strength of a multivariate model is to assess the amount of variance (R^2) that the variables in the equation can explain. For logistic regression, we can calculate a pseudo R^2, a conservative proxy for the multiple regression R^2.[213] Our model explains 40% of the variance in reference decisions. This is a substantial improvement over the approximately 3% explained variance reported in an earlier analysis of reference decisions for all of Minnesota in 1986.[214] The earlier study provided a one-year snapshot of reference decision-making for the entire state, but possessed fewer details about each waiver decision. By contrast, our model used a larger sample of certification motions, spanned a longer time period, examined a specific locale, and included more complete information about offenders, offenses, and the decision-making process.

5. Post-Waiver Juvenile or Criminal Court Sentencing of Young Offenders

Once the juvenile court decides whether or not to transfer a juvenile, what happens to the case? Because most states lack integrated, offender-based data systems to track youths between juve-

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CALCULATIONS FOR MODEL IMPROVEMENT OVER CHANCE

		Observed: Referred	Observed: Retained	
Predicted	Referred	199 Valid Positives	32 False Positives	231
	Retained	16 False Negatives	83 Valid Negatives	99
		215	115	330

Base rate = referral rate over the 7 years = 215/330 = 65%
Selection ratio = number of youths predicted to be referred by the model = 233/330 = 70%
To calculate random accuracy:
215/330 x 231/330 = .46 (random correct values (RCV) for valid positives)
115/330 x 99/330 = .10 (random correct values (RCV) for valid negatives)
RCV valid positives + RCV valid negatives = random accuracy
(.46 + .10) = .56
To calculate observed accuracy:
Model valid positives + model valid negatives
199 + 83 = 282/330 = .85
Improvement Over Chance = Observed Accuracy – Random Accuracy
.85 – .56 = .29 x 100 = 29%

213. ALDRICH & NELSON, *supra* note 195, at 12-15. *See also* ALFRED DEMARIS, LOGIT MODELING: PRACTICAL APPLICATIONS 56-60 (1992).

214. *Bad Law Makes Hard Cases*, *supra* note 13, at 37-40 (regression equation explained only 3.1% of sentencing variance).

nile and criminal courts, most waiver studies do not report the subsequent dispositions of transferred youths. We followed the subsequent justice system careers of each youth to determine whether a conviction ensued in juvenile or criminal court, and what sentence the judges imposed. Finally, we analyzed the post-waiver recidivism of youths in both systems to assess the impact of juvenile or adult sentences on the progress of a criminal career.

Dismissal and Charge Reduction: We examined the rates of dismissal in juvenile and criminal court, and the rates of charge reduction to determine whether the rates differed for referred or retained juveniles, for youths of different racial groups, or for different types of offenses. As reported in Table 18, the overall rate of cases dismissed or unproved at this point in the process was very low, only 6%. The courts dismissed charges against 14% of the youth retained in the juvenile system, but only 3% of those referred to adult criminal court.[215] Clearly, prosecutors experienced less difficulty establishing the guilt of those youths referred to criminal court. This suggests either that juvenile courts implicitly screen waiver cases for their prosecutive merits, or that prosecutors pursue less vigorously the juvenile cases in which they anticipate less penal pay-off for their efforts.

If the original reference motion alleged only one offense, then both retained and referred youths enjoyed a greater likelihood of dismissal. Conversely, the greater the number of charges originally alleged, the greater the likelihood that the youth would be adjudicated or convicted of some offense. Rates of dismissal did not vary significantly for juveniles of different races.[216]

Although youths charged originally with a larger number of offenses experienced a lower overall dismissal rate, they enjoyed a greater reduction in charges at their adjudications or convictions. As Table 18 indicates, prosecutors or courts reduced the level of the offense at conviction for about 10% of those youths originally charged with only one felony offense. By contrast, for those juveniles charged with more than one felony offense, the likelihood of reduction in charges at plea or conviction increased sharply: only one-fifth (20%) of youths charged with two felonies, one-third (31%) of youths charged with three felonies, and one-half (50%) of youths charged with four or more felonies were convicted of offenses at the same level of seriousness. Overall, half (50%) of all juveniles pled or were convicted of offenses of the same gravity as those with

215. Fagan, *supra* note 4, at 114 (finding twice as high dismissal rates in juvenile court than in criminal court).

216. Juvenile and criminal courts dismissed charges against 4% of the white juveniles, 8% of African-American youths, and 4% of the other minority youths.

Table 18
Rate Of Reduction or Dismissals By Present Offense Charges

Charge On Present Offense	Number of Cases	Adjudication or Conviction at Same Level	Adjudication or Conviction at Lower Level	Dismissed or Unproved
Misdemeanor (s)	9	89%	0%	11%
One Felony	103	77%	10%	13%
Two Felonies	80	20%	78%	2%
Three Felonies	51	31%	67%	2%
Four or More Felonies	87	50%	47%	3%
TOTAL	330	50%	44%	6%

which prosecutors charged them in the reference motion; the remainder were adjudicated or convicted of less serious offenses (44%), or had their cases dismissed or unproved (6%). Feld's analyses of juvenile court sentencing practices reported a similar pattern of charge reductions and dismissals, and suggested that juveniles charged with more serious offenses or multiple counts enjoy greater opportunities to plea bargain to lesser included offenses or for dismissal of some charges.[217] On the other hand, where prosecutors charge juveniles with several serious offenses, even with some charge reductions or dismissals, they still may be convicted of at least one offense at the original level of severity.

For those juveniles originally charged with a presumptive offense, about one-fifth (21%) ultimately were adjudicated or convicted for a non-presumptive offense. As with outright dismissals, the rate of reduction from presumptive to non-presumptive pleas or convictions was greater for youths retained in juvenile courts (28%) than for those referred to criminal court (19%). There were no statistically significant differences in the rates of dismissals or charge reductions for retained or referred youths of different racial backgrounds.[218]

217. *See Right to Counsel*, *supra* note 134, at 1282-85.

218. Table 5 demonstrated that prosecutors charged only 31% of 93 white youths, 67% of 182 African-American youths, and 60% of 55 other minority juveniles with presumptive charges. Prosecutors or courts reduced the level of conviction from presumptive to non-presumptive offenses for 19% of African-American and other minority youths as compared with 35% of white youths. This racial difference is not statistically significant, and is most likely attributable to there being much fewer white juveniles that originally faced presumptive commitment offenses.

The racial groups did not differ significantly in the average number of felony charges (2.60 for whites, 2.91 for African-Americans, and 2.91 for other minority youths), nor in the average number of offenses for which courts adjudicated or con-

a. Dispositions and Sentences of Youth in Juvenile and Criminal Court

A primary rationale to transfer some youths to criminal court is for them to receive longer sentences as adults than are available in the juvenile justice system. However, several studies report a "punishment gap" and question whether criminal courts in fact impose more severe sanctions on waived youths than juvenile courts could if they retained jurisdiction.[219] Some research reports that chronic property offenders who constitute the bulk of waived juveniles in most states receive shorter sentences as adults than do young property offenders retained in juvenile court.[220] Other studies, however, report that youths convicted for violent offenses in criminal courts receive dramatically longer sentences as adults than do their juvenile counterparts.[221] For juveniles and adults convicted of comparable crimes, both types of disparities—shorter sentences for waived youths than for juveniles convicted of property offenses, and substantially longer sentences for youths convicted of violent crimes as adults—raise difficult issues of penal policy and justice. Is there a social control justification for either type of disparate outcome? Is there any waiver policy rationale for the disjunction?

Our research attempted to answer these questions by examining the types of sentences that juvenile and criminal courts imposed on retained and referred youth. What types of sentences did courts levy? What proportion of offenders did they incarcerate in correctional facilities? Of those confined, what length of sentence did they receive? By comparing the commitment rates and the lengths of sentences, we can assess the efficacy of social control and the equality in outcomes between the two systems.

Juvenile and Adult Sentences: Recall from Table 7 that the Hennepin County juvenile court retained 115 of 330 youths in the juvenile system. Although the juvenile court subsequently dismissed the cases of about one-seventh of these retained juveniles (14%), as Table 19 indicates, it sentenced most (54%) of the remaining youths to some type of long-term juvenile correctional facil-

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victed them (1.26 for whites, 1.18 for African-Americans, and 1.29 for those in the other minority group).

219. *See supra* notes 47-50 and accompanying text (regarding the "punishment gap").

220. *See, e.g.*, Bortner, *supra* note 40, at 56-59; HEUSER, *supra* note 40, at 19-21.

221. *See, e.g.*, Rudman et al., *supra* note 51; Marilyn Houghtalin & G. Larry Mays, *Criminal Dispositions of New Mexico Juveniles Transferred to Adult Court*, 37 CRIME & DELINQ. 393, 402-03 (1991).

ity.[222] The court sentenced an additional one-fifth (20%) of the retained juveniles to some type of short-term local programs, in-patient treatment facilities, work camps, or ranches. The court placed on probation the remaining 12% of youths who did not receive sentences that resulted in out-of-home placement or correctional confinement, and imposed conditions such as a fine, a letter of apology, work squad, day treatment programs, or a stayed sentence to a correctional facility. After we controlled for the seriousness of the present offense, no statistically significant differences existed in the correctional sentences that the juvenile court imposed on youths of different racial backgrounds.

Table 19
Comparison of Sentences and Dispositions

Adult Sentences	Referred N=215	Retained N=115	Juvenile Dispositions
Dismissals	3%	14%	Dismissals
Stayed Prison Term + Conditions of Probation	7%	12%	Conditions of Probation
Jail Only	8%	20%	Short Term or Residential Treatment Center
Stayed Prison Term + Jail	57%	54%	Correctional
Prison	25%		

Recall that the juvenile court transferred about two-thirds (65%) of the youths against whom prosecutors filed reference motions. Of these 215 certified youths, the criminal courts sentenced 82% to a local or state correctional facility. The courts sentenced about one-quarter of the certified youths to the state prison where the minimum sentence length is one year or longer. The courts sentenced the remaining incarcerated youths to county jails where the maximum sentence length is one year. The criminal courts, however, also ordered stayed prison terms for virtually all of the youths confined in local jails. If those young offenders violated the terms of their probation following release from jail, their stayed prison

222. The court committed virtually all (51%) of these youths to long-term juvenile institutions such as the Hennepin County Home School-Alpha program, County Home School-Sex Offender program, the State Training Schools at Red Wing or Sauk Center, or to out-of-state long-term placements, such as Glen Mills in Pennsylvania. The court sentenced the remaining 2% to one of these facilities, and included an additional stayed commitment to another correctional institution in their disposition.

terms could be executed to extend their confinement. Seven percent of the juveniles received stayed sentences of confinement coupled with other conditions of probation such as restitution, community service, random urinalysis, chemical dependency treatment or psychological treatment. When we controlled for the offenses for which criminal courts sentenced these youths, no statistically significant differences between racial groups appeared.[223]

Table 20
Comparison of Sentences and Dispositions by Severity of Conviction

Referred			Retained		
Adult Sentence	Presumptive N=98	Non-Presumptive N=111	Presumptive N=40	Non-Presumptive N=59	**Juvenile Disposition**
Stayed Prison Term + Conditions of Probation	6%	12%	10%	17%	Conditions of Probation
Jail Only	1%	14%	25%	22%	Short Term or Residential Treatment Center
Stayed Prison Term + Jail	42%	74%	65%	61%	Correctional
Prison	51%	4%			

The adult criminal courts incarcerated 93% of the youth convicted of a presumptive offense. By comparison, the juvenile court imposed long-term confinement on 65% of the youth retained in juvenile court and adjudicated delinquents for a presumptive offense. For youths convicted of non-presumptive offenses, the adult criminal courts confined 78% in jail or prison, whereas the juvenile court committed only 61% of those adjudicated delinquent to a correctional facility. Thus, for both presumptive and non-presumptive of-

223. Recall from Table 6 that the types of present offenses for which juvenile courts certified youths differed significantly by race. Because criminal courts sentenced youths on the basis of their present offenses, racial difference in patterns of offenses resulted in variations in sentences. *See* MINN. SENTENCING GUIDELINES § V (Offense Severity Reference Table). For example, courts sentenced to prison 15% of white youths, 32% of African-American youths and 23% of other minority youths, but none of these differences were statistically significant. Criminal courts sentenced most youths to jail time and a stayed prison sentence. Courts imposed this type of sentence on 62% of white offenders, 52% of African-American youths, and 66% of other minority youths.

fenses, criminal courts incarcerated youths convicted as adults significantly more often than did the juvenile court. Even allowing for the selection for seriousness inherent in the waiver process, the differences in rates of dismissal, conviction and incarceration between the two systems are striking.[224]

Length of Sentence: We also examined the actual lengths of sentences[225] imposed on those youths whom the court incarcerated. The amount of time an offender actually serves in a correctional institution may differ considerably from that which the court orders due to "good time" reductions or releases to reduce overcrowding in adult facilities, and for a myriad of reasons in juvenile facilities, such as escape, termination, assault against a staff member, noncompliance with treatment goals, and the like. Moreover, it is difficult to collect information about both length of time sentenced and time actually served because most of this information is either not automated or is automated within each particular institution and not in a single central repository. The least complicated and most complete information available about the largest group of offenders consisted of the length of placement ordered by the court. We gathered information on the lengths of criminal sentences from the adult court system.[226] We obtained information on the length of juvenile placements from the juvenile court files or from the automated Hennepin County Juvenile Family Tracking System (JFTS). For any outside delinquency or criminal information sought, we specifically requested commitment length, that is, length of time sentenced by the court and *not* actual time served.

Because juvenile sentences are indeterminate,[227] it is difficult to obtain information about the length of time juvenile courts order youths to stay in particular facilities. For example, when the juvenile court commits juveniles to a residential treatment facility, the program personnel and probation officers assess the juvenile's

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224. The sentencing disparities that we report are more pronounced than those found in Fagan's comparison of sentencing of violent youths in both systems. *See* Fagan, *supra* note 4, at 116 ("Violent youths waived to and convicted in criminal court received more severe sanctions [89%] than youths whose cases remained in juvenile court [84%] . . .").

225. We defined the sentence length as the amount of time a court ordered an offender committed or confined for the offense(s) for which the prosecutor filed the reference motion.

226. We gathered adult sentence length information by using queries of a Hennepin County court system called Subject in Process (SIP). The sentence ordered by the presiding district court judge is part of the entire set of information related to criminal offenses.

227. *See Violent Youth and Public Policy*, *supra* note 35, at 1067-96 (discussing juvenile court sentencing law and practice in Minnesota); Feld, *supra* note 11, at 847-50 (discussing indeterminate sentencing practices in juvenile courts).

treatment progress and determine the length of time to be served.[228] We encountered fewer difficulties establishing the length of time juveniles spent at the state correctional facilities in Red Wing and Sauk Center. When the juvenile court sentences a juvenile to one of the state facilities, staff members at the training school, rather than the court, determine the youth's institutional length of stay. The Minnesota Department of Corrections uses determinate release guidelines which enabled us to establish equivalent lengths of sentences to those ordered by a judge.[229] When the juvenile court judge sentenced a juvenile to the Hennepin County Home School, the placement order included a proposed length of commitment which we retrieved from the court files and juvenile tracking system.

We encountered similar analytic difficulties when attempting to compare the lengths of confinement in juvenile institutions with those in adult facilities, because the two justice systems pursue different goals and use different rationales to impose sentences. Juvenile courts theoretically impose indeterminate sentences to better rehabilitate offenders;[230] thus, a youth's progress in a program may affect the length of time served. By contrast, criminal courts impose determinate, presumptive sentences on adult offenders for specified periods of time, although offenders often see their sentences reduced for "good behavior." Because the Minnesota Department of Corrections employs juvenile release guidelines, we es-

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228. We were unable to obtain information about eighteen juveniles sentenced to several residential treatment centers.

229. The Minnesota Department of Corrections uses juvenile release guidelines to determine the length of a juvenile's stay in the training schools. *See Violent Youth and Public Policy, supra* note 35, at 1084-85 n.522 and accompanying text (summarizing the Department of Corrections sentencing scheme).

> In 1980, the Minnesota Department of Corrections administratively implemented a determinate sentencing plan for youths committed to the state's juvenile institutions. Based on a juvenile's present offense and prior record, the plan "provide[s] a more definite and distinct relationship between offenses and the amount of time required to bring about positive behavior change." Under the Minnesota Department of Corrections institutional release guidelines, a juvenile's length of stay is based on the seriousness of the offense and "risk of failure factors" that are "predictive to some degree of future delinquent behavior."

Id. at n.522 (citations omitted). "The Department sets a juvenile's projected minimum length of stay based upon the present offense and prior record within seven weeks after admission to an institution." MINNESOTA DEP'T OF CORRECTIONS, OFFICE OF JUVENILE RELEASE § 5-204.4(a) (June 1985). It determines the actual parole release within the minimum and maximum range based upon both the presumptive sentence, which reflects aggravating and mitigating factors associated with the commitment offense, and subsequent institutional conduct, including the completion of an agreed upon treatment plan. *Id.* § 5-204.2.

230. *See Violent Youth and Public Policy, supra* 35, at 1084 ; Feld, *supra* note 11, at 848-50.

timated the approximate length of time ordered to serve in juvenile institutions, and established equivalency between adult and juvenile sentence lengths. A further constraint on comparing adult and juvenile sentence length concerned credits for "time served." In the adult system, the amount of time an offender spends in pre-trial custody while the criminal justice system decides the case is usually applied toward his or her sentence as jail credit days. The juvenile court held virtually all youths in secure detention during the pendency of reference proceedings, yet juveniles sentenced in the juvenile system *do not receive credit* for the time they spend in pretrial confinement. Recall from Table 8 that the juvenile court required about two months to make its reference decision. While waived youths receive credit against their sentences for the pre-reference period in secure detention, retained juveniles do not. Thus, adding two months to the lengths of juvenile commitments provided greater equivalency with the adult sentence to better compare how long each of these groups is incarcerated.

Our analyses of juvenile and criminal court sentences replicated the inconsistent and disparate sentences reported in other studies. Table 21 reports the median sentences imposed on youths convicted as juveniles or adults for presumptive and non-presumptive offenses.[231] Those youths convicted as adults of presumptive offenses received sentences substantially longer than those imposed on juveniles convicted of comparable offenses. By contrast, the juvenile court sentenced youths found delinquent for non-presumptive, property offenses for terms longer than their adult counterparts.

Because the adult and juvenile systems differ, it is difficult to compare directly sentence lengths in custodial facilities. Criminal courts have two correctional confinement options (prison or jail) while juvenile courts have only one incarceration option, long-term correctional facilities. Criminal courts sentenced most youths (60%) convicted of presumptive offenses to prison, and they imposed a median sentence length of 1459 days, or about four years. If criminal court judges made a mitigated downward departure from the presumptive guidelines and sentenced these youths only to jail, they imposed a median sentence of one year, the maximum allowed for jail confinement. By contrast, the juvenile court sentenced

231. We used the sentence median rather than the mean because the median is less sensitive to extreme values than the average. The criminal courts sentenced a few of these youths to life in prison, thus, we employed a statistic less affected by these extreme values. Another method would be to remove cases with extreme values, known as statistical outliers. We did not choose this option, however, because of the small number of cases.

Table 21
Median Number of Commitment Days: Comparison of Adult and Juvenile Length of Sentence

Convicted or Adjudicated		Referred Youths Cases	Median Days	Median Days	Retained Youths Cases	
PRESUMPTIVE	Prison	50	1459	266	23	Correctional
	Jail*	33	365			
NON-PRESUMPTIVE	Prison	4	411	182	32	Correctional
	Jail*	79	120			

* Recall that adult incarceration options included jail time with a corresponding stayed prison commitment and a few individuals with only a commitment of jail time. Only the former is included here. This excludes 17 juveniles whose only sentence included a short jail stay and no stayed prison time.

youth retained in the juvenile system and convicted of presumptive offenses to median terms of incarceration of 266 days, or about nine months. Thus, youths sentenced as adults to either prison or jail served substantially longer terms than their counterparts convicted of comparable offenses in the juvenile system.

For youths convicted of non-presumptive offenses, criminal courts sentenced the vast majority (95%) to local jails for median terms of 120 days or about four months, and made aggravated, upward departures in only four cases (5%) to send youths convicted of non-presumptive offenses to prison. By contrast, the juvenile court incarcerated the thirty-one juveniles adjudicated delinquent for non-presumptive offenses to median terms of 182 days, or about six months. The juvenile court imposed significantly longer sentences on less serious property offenders than did adult criminal court. This anomalous disparity between juvenile and criminal court sentencing practice perpetuates the "punishment gap." It makes no penological sense for juvenile court judges to send youths to adult court to receive longer sentences, and then to have those criminal court judges impose shorter sentences than those meted out in juvenile court.

b. Recidivism

A fundamental question of penal policy is "what works"? Do any juvenile treatment programs, waiver policies, or criminal sentencing strategies reduce subsequent recidivism by offenders? We

constructed an accurate record of the subsequent official delinquent and criminal justice responses to the group of serious young offenders. We coded as recidivism all offenses for which courts adjudicated or convicted youths that occurred after the offense for which the prosecutor filed the initial reference motion.[232] The juvenile court heard some youths' subsequent offenses as prosecutors filed additional reference motions after the initial motion that placed them in our sample. The criminal courts heard most youths' subsequent offenses, because the youths had exceeded the age limit of juvenile court jurisdiction by that time.

Table 22
Number of Total Reference Motions Filed on Juveniles by Year the Juvenile was First Motioned*

	1986	1987	1988	1989	1990	1991	1992	Total	Percent Referred
One Motion Only**	35 66%	28 68%	46 75%	30 65%	46 85%	37 93%	32 91%	254 77%	64%
Two Motions Filed***	10 19%	7 17%	8 13%	8 17%	3 6%	2 5%	3 9%	41 12%	81%
Three to Five Motions Filed***	8 15%	6 15%	7 12%	8 17%	5 9%	1 2%	0 0	35 11%	100%
Total Juveniles	53	41	61	46	54	40	35	330	

* Each juvenile appears in the year of their first reference motion. For example, if prosecutors filed a first motion for a juvenile in 1987 and a subsequent reference motion in 1988, this youth would appear in the column for 1987 but in the row for two reference motions.
** One Motion only: Juveniles with only a first motion filed against them.
*** Two (or more) Motions Filed: Juveniles with a first motion filed as well as a second motion filed that is based on a separate behavioral incident and that is unrelated, dispositionally, to the first motion.

Subsequent Reference Motions: Table 22 reports the number of times that prosecutors filed reference motions in juvenile court against the 330 youths in our sample. Prosecutors filed a new reference motion if the subsequent offense was serious and the juvenile remained under age eighteen at the time the new alleged offense occurred regardless of the result of the first reference decision. The

232. We used actual adjudications or convictions in our conservative definition of recidivisim because we worked from juvenile and criminal court records. Other studies have used rearrests as an indicator of recidivism. *See, e.g.*, ALLEN J. BECK & BERNARD E. SHIPLEY, RECIDIVISM OF YOUNG PAROLEES (1987); LYNN GOODSTEIN & HENRY SONTHEIMER, A STUDY OF THE IMPACT OF 10 PENNSYLVANIA RESIDENTIAL PLACEMENTS ON JUVENILE RECIDIVISM (1987); PATRICIA A. STEELE ET AL., UNLOCKING JUVENILE CORRECTIONS: EVALUATING THE MASSACHUSETTS DEPARTMENT OF YOUTH SERVICES (1989).

first row of Table 22 reports the number of youth against whom prosecutors only filed one reference motion; the juvenile court certified 64% of those youths on that initial motion. The second and third rows summarize the subsequent waiver experience of youths against whom prosecutors filed additional, subsequent reference motions. Prosecutors filed second reference motions against 12% of these youths based on a second, separate behavioral incident that occurred after the first motion. Whether or not the court had certified a youth on the first motion, it certified 81% of those against whom the prosecutors filed a second reference motion. The prosecutors filed three, four, or five motions against a small subset of these youths (6%, 3%, and 2%, respectively). The juvenile court transferred all youths against whom prosecutors filed three or more certification motions. This table indicates the total number of reference motions filed on separate behavioral incidents per juvenile.[233] From 1986 through 1992, prosecutors filed 463 reference motions, 330 of which were first motions. Although the county attorney filed only one reference motion against approximately three-quarters (77%) of the youth in our sample, further recidivism following an unsuccessful waiver motion or subsequent serious criminality while still a chronological juvenile caused the prosecutor to file additional reference motions against seventy-six juveniles (23%).

Recidivism — New Adjudications and Convictions: After the prosecutors filed the initial reference motions against these youths, juvenile or criminal courts convicted 55% of them for new offenses they committed during the period of our data collection (through December 31, 1993). Table 23 displays the information about these youths' subsequent recidivism. Of the 55% of youths convicted of new offenses, as few as 7% committed only misdemeanors; the remainder committed at least one felony offense.[234] Courts subsequently convicted 20% of these youths for three or more felonies after the prosecutor filed the initial reference motion. Of those who re-offended, courts convicted 6% for drug felonies, 21% for property felony offenses, and another 21% for at least one felony against the person. Of the latter group, 11% committed multiple felonies that included one person felony as well. Because courts imposed signifi-

233. The second and third rows indicate the number of juveniles who had two through five separate motions filed. We collapsed into one row those youths with three, four, or five reference motions for presentation here.

234. Because we classified offenders on the basis of their most serious subsequent convictions, some of the youths in the felony categories had misdemeanors convictions as well. In addition, the source for criminal offenses outside Hennepin County systematically collected data only for felony convictions; thus, our data may understate the number of misdemeanor convictions in the adult system.

cant sentences on many of these youths, some remained confined and did not have an opportunity to commit new offenses during the period of our data collection follow-up.

Table 23
Recidivism — New Adjudications or Convictions — N=330

	Percent
Number and Level of New Crime	
No New Crime	45%
Misdemeanor Only	7%
One Felony	19%
Two Felonies	9%
Three Felonies	9%
Four or More Felonies	11%
Type of New Crime	
No New Crime	45%
Misdemeanor Only	7%
Drug Felonies	6%
Property Felonies	21%
Person Felonies	10%
Person + Other Felonies	11%
Two Years 'Street Time' *	
No New Conviction or Adjudication	48%
New Conviction or Adjudication	52%

* N=266 This excludes juveniles from 1992 and those incarcerated for two years following their Present Offense.

New Convictions Within Two Years of "Street Time": To assess the recidivism of those youths who actually had an opportunity to commit new crimes, we analyzed only those juveniles who had a full two years in which they could have committed a new offense and excluded the youth against whom prosecutors filed reference motions in 1992 (thirty-five individuals). In addition, we excluded from our "street time" calculus the 10% of youths in our sample who remained in prison for the two years following their initial conviction. For each of the remaining 266 youths, we then calculated their recidivism within a two-year "window of opportunity" following their sentence and release for the offense for which the prosecutors originally filed the reference motion. This method standardized the length of time available for all remaining juveniles. In this analysis, subsequent conviction or adjudication for any offense constituted recidivism. Using our conservative definition of recidivism, over half (52%) of the youths who had an opportunity to commit additional crimes did so. These reconviction recidivism rates fall within the broad range of reconviction recidi-

vism rates reported in other studies of juvenile reoffending.[235] Within the two year window following the initial reference motion offense, there were no statistically significant differences in recidivism rates between members of different racial groups. Fifty percent of the African-American youth recidivated, as did 52% of the white youth, and 60% of the youth of other minority groups.

Table 24
Percent Recidivism by Offender Characteristics — New Adjudication or Convictions within Two Years 'Street Time' — N=266

	No New Crimes	New Crimes
Racial Background		
White (N=85)	48%	52%
African-American (N=134)	50%	50%
Other Minority (N=47)	40%	60%
Year of First Motion*		
1986 (N=50)	44%	56%
1987 (N=39)	41%	59%
1988 (N=56)	46%	54%
1989 (N=41)	32%	68%
1990 (N=46)	54%	46%
1991 (N=34)	73%	27%
First Reference Motion Decision*		
Retained (N=102)	58%	42%
Referred (N=164)	42%	58%

* Significant beyond .01

When we compared recidivism rates across the years of our study, we found a statistically significant difference (p=.01). The

235. *See, e.g.*, BECK & SHIPLEY, *supra* note 232 (national study completed in 1987 found a rearrest recidivism rate of 47% in the two years following prison incarceration for 17-22 year olds); JOHN C. STEIGER & CARY DIZON, REHABILITATION, RELEASE AND REOFFENDING: A REPORT ON THE CRIMINAL CAREERS OF THE DIVISION OF JUVENILE REHABILITATION "CLASS OF 1982" (1991) (documenting that 68% of 926 males released from Washington state division of juvenile rehabilitation in 1982 were reconvicted within two years, and 53% committed at least one violent offense); Ted Palmer & Robert Wedge, *California's Juvenile Probation Camps: Findings and Implications*, 35 CRIME & DELINQ. 234, 238 (1989) (reporting that 65% of 2835 youths released from "probation camps" reconvicted within two years); OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINN., RESIDENTIAL FACILITIES FOR JUVENILE OFFENDERS 64 (Feb. 1995) (assessing recidivism rates in Minnesota's juvenile correctional institutions and reporting that "between 53 and 77 percent of male juveniles. . . received new delinquency petitions or were arrested as adults within two years. The percentage of juveniles who were adjudicated as delinquent or convicted as adults ranged from 38 to 62 percent for programs serving males. . . ."); *Id.* at 113-15 (summarizing juvenile recidivism studies in other jurisdictions).

youths against whom prosecutors filed reference motions in the earlier years committed new offenses at a much higher rate than those charged in the later years. This probably resulted from the differences in the types of offenders against whom prosecutors filed reference motions. In the earlier years, prosecutors filed more reference motions against chronic property offenders than they did in the later years when they charged more youths who had less extensive delinquent histories with presumptive offenses. A focus on chronic offending, or "quantity," is more likely to identify high base-rate career offenders than is an emphasis primarily on the gravity of the present offense, or "quality."

Finally, we compared the recidivism rates of youths waived to adult criminal court with youths over whom the juvenile court retained jurisdiction. A larger proportion of certified youths committed new offenses within two years than did those who remained in the juvenile justice system. Nearly three-fifths (58%) of the youths whom juvenile court judges referred for criminal prosecution as adults committed an additional crime, as compared with 42% of those who remained in juvenile court.

There are several possible explanations of the differences in recidivism rates in the two systems. First, because juvenile courts emphasized youths' prior records of offending to make certification decisions, they used a valid and reliable tool with which to identify high base-rate career criminals who possessed a greater probability of subsequent recidivism. Thus, the discretionary certification process did a reasonably good job of identifying the most chronic and prolific offenders even within the population of serious offenders. Second, some might attribute the lower recidivism rates among the retained juvenile population to the "effectiveness of treatment" within the juvenile correctional system. However, the population selection biases inherent in the waiver process and the absence of a control group make it difficult to attribute the differences in recidivism rates between the juvenile and adult groups to "treatment" effects. On the other hand, if the legislature and courts intended to deter youths from committing additional offenses by subjecting those who have not desisted from delinquency to the more severe punishment of the adult criminal justice system, our data indicate that they are not achieving that goal.

III. Discussion

Courts only can decide the cases presented to them. A significant finding of this study, and one which is consistent with national data, is that police arrested and prosecutors charged African-Amer-

ican youths with different types of crimes than their white counterparts. Prosecutors' charging decisions determine which cases the juvenile court considers in waiver proceedings. The racial characteristics of youths arrested for serious violent and property crimes differed significantly from those against whom prosecutors eventually filed reference motions.[236] Moreover, during the period of our study, 1986-1992, the Hennepin County Attorney's Office changed its charging policies, which subsequently affected the characteristics of youths who appeared before the courts for waiver decisions. In filing reference motions, Hennepin County prosecutors increasingly emphasized the seriousness of a youth's present offense rather than the prior record of offending. The proportion of youths charged with crimes against the person increased from about 60% to 80%, and those charged with the most serious, presumptive commitment to prison offenses, increased from about half to nearly three quarters of juveniles over the period of our study,[237] with a corresponding decrease in the lengths of their prior records.[238]

The FBI's Uniform Crime Reports indicate that nationally police arrest minority juveniles for a disproportionately larger amount of violent crime than white juveniles. In our study as well, we found a strong relationship between juveniles' race and the type of crime with which the prosecutors charged them.[239] Although African-American juveniles comprised less than 10% of the Hennepin County youth population, police arrested them for more than half of the violent crimes, and prosecutors filed reference motions against two-thirds (67%) of them for violent presumptive commitment offenses.[240] By contrast, police arrested and prosecutors charged the bulk of white juveniles with serious property offenses. The race-and-offense charging pattern is stark: prosecutors charge proportionally twice as many African-American juveniles as whites with presumptive commitment offenses, and more than three times as many white juveniles as African-Americans with property offenses.[241] Because prosecutors increasingly emphasized violent crime in their charging decisions, the proportion of white juveniles facing waiver decisions declined and that of African-American juveniles enlarged.[242]

236. *See* Table 1.

237. *See* Table 2.

238. *See* Table 2.

239. *See* Table 6.

240. See Table 6. Prosecutors charged 60% of other minority youths with violent presumptive commitment offenses, compared with 31% of white juveniles.

241. *See* Table 6.

242. *See* Table 2.

Although we analyzed the racial differences in judicial waiver administration closely for evidence of discrimination, we attribute the differences in the juvenile courts' processing of minority and white juveniles to the types of offenses with which prosecutors charged them, rather than to racial bias in the system. For example, prosecutors charged more African-American juveniles with violent offenses. All youths charged with violent offenses were more likely to receive court evaluative services, and clinical evaluations slowed waiver administration.[243] Similarly, after controlling for other variables such as age, person offense *and* weapons use, prior placements, clinical recommendations, and the like, a youth's minority racial status did not exert any additional positive effect on waiver decisions.

This study provides the most complete assessment available of judicial administration and the effects of the process itself on waiver decisions. For example, we explored the ways in which the "judicial philosophies" of the presiding juvenile court judges affected waiver decisions. Critics of judicial waiver contend that subjective and idiosyncratic judicial discretion yields disparate results. Our data clearly indicates that the various judges within the same urban county and court applied the same law and decided cases of similarly-situated offenders significantly differently. These judicial differences influenced both the characteristics of youths waived or retained and the subsequent sentences imposed upon them as juveniles or as adults.

Despite judicial variability, however, certain consistent commonalities affected waiver decisions. A youth's age and prior record of program placements significantly affected waiver decisions.[244] All other things being equal, the court transferred older youths and those with several prior program placements. Both of these variables provide a rational judicial operationalization of "amenability to treatment." A youth's age determines the amount of time remaining within juvenile court jurisdiction and thus the "length" of the court's intervention. In our logistic analyses, we examined both a youth's prior record of offending and prior record of program placements, and concluded that the latter better explained waiver decisions. Clearly, exhaustion of treatment resources, as indicated by prior program placements, provides a rational indicator of nonresponsiveness to treatment.

Initially, we were somewhat surprised to discover that the seriousness of the present offense, apart from whether the juvenile

243. *See* Tables 6, 13, and 14.

244. *See* Table 17.

used a weapon, did not significantly affect judicial waiver decisions.[245] However, further analyses indicated that youths against whom prosecutors filed reference motions for offenses against the person *and* who used a weapon had increased odds of being referred when compared with youths motioned for offenses other than against a person. No difference existed in the odds of being referred for those youths motioned on person offenses who did not use a weapon when compared with non-person offenders.

The evaluations and recommendations of court services personnel—psychologists and probation officers—strongly influenced waiver outcomes.[246] The significant impact of clinical assessments on the court process is consistent with the individualized "treatment" decision that waiver entails. Although we attempted to collect extensive "social" data about these youths' family background, social circumstances, education and work experiences, we found substantial gaps in the recording of this information in the court's files. Court services recommendations carried considerable weight despite the apparent absence of some type of standardized family and social information.[247] The juvenile court sought probation studies and psychological evaluations in about half of the cases it decided.[248] The judicial request for a clinical evaluation was not a de facto waiver decision, because whether or not court services evaluated a youth did not itself affect rates of referral or retention.[249]

Whether the court requested a court services evaluation affected the rapidity with which it made its waiver decision. This was due to the extensive time needed to complete a reference social study. Over the period of our study, the length of time the court required to finally dispose of waiver cases nearly doubled.[250] Significantly, because the court requested clinical evaluations more frequently for violent offenders than for property offenders, and prosecutors charged many more minority youths with violent crimes, African-American youths received more extensive clinical assessments.[251] Because clinical evaluations slowed the timing of the waiver process, and violent offenders, most of whom were Afri-

245. *See* Table 17.

246. *See* Table 17.

247. This does not mean that the court acted without necessary information or that there was an absence of family history information in the files. On the contrary, the files contained volumes of critical assessments at different points in the juvenile's delinquent career. However, the format of the information was not standardized among juveniles, because their particular situations were unique to them.

248. *See* Table 10.

249. *See* Table 11.

250. *See* Table 8.

251. *See* Table 13.

can-American, received more clinical assessments, the overall length of the reference process differed for youths of different racial backgrounds.[252] However, after controlling for offenses, the differences between the races in the length of the reference process disappeared.

Although the Supreme Court decisions in *Kent* and *Breed* and appellate court opinions implied that waiver decisions were litigated, adversarial proceedings, the Hennepin County juvenile court decided most waiver cases without a hearing.[253] Our research indicated that the vast majority of reference cases (over 90%) are plea-bargained "package deals" in which the prosecutor, defense attorney, and judge informally negotiated and decided whether or not to waive, and the subsequent juvenile and adult sentences. In part, these negotiations take place under the shadow of the courtroom working group's understanding of the "going rate" for different patterns of age, offense, and prior record. The litigated reference hearings, by contrast, occur in instances in which the "going rate" is less clear. Because age and prior program placements established the "going rate," litigated waiver hearings more often involved younger juveniles with fewer prior adjudications or program placements who were charged with a very serious offense.[254] Of the twenty-seven litigated reference hearings, two-thirds involved charges of homicide, two-thirds involved juveniles sixteen or younger, three-quarters had no prior felony adjudications, and more than half had no prior program placements.

Following the juvenile court's waiver decision, we tracked the youths to determine their subsequent convictions and sentences in juvenile or criminal court. The 115 youths retained in juvenile court experienced a higher rate of dismissal (14%) than did their counterparts in criminal court (3%), suggesting either that waiver decisions provide a qualitative case screening or that prosecutors are disinclined to pursue cases in which they anticipate less penal "bang for their buck."[255] For presumptive and non-presumptive offenses, criminal courts incarcerated youths significantly more often than did juvenile courts.[256]

When we compared the types of sentences imposed on youths sentenced as juveniles or adults, a dichotomous pattern emerged.[257] On the one hand, youths tried and convicted as adults

252. *See* Table 14.
253. *See* Table 9.
254. *See* Table 9.
255. *See* Table 19.
256. *See* Table 19.
257. *See* Table 20.

for violent crimes for which the Sentencing Guidelines presume commitment to prison received criminal sentences substantially longer than did their counterparts convicted and sentenced for similar offenses as juveniles. Even waived juveniles whose presumptive sentence was a mitigated downward departure received longer sentences than juveniles retained and sentenced in juvenile court for presumptive offenses. Thus, for violent youths, waiver results in higher probabilities of conviction and incarceration for longer periods of time.[258] By contrast, the juvenile court imposed substantially longer sentences on youths convicted of property offenses than the criminal courts imposed on young adult property offenders.[259] In part, this pattern reflects the adult Sentencing Guidelines constraints on sentences of non-violent felony offenders. Thus, for non-violent offenders, the lack of integration between juvenile waiver criteria and criminal court sentencing practices perpetuate the "punishment gap" and allows chronic adult property offenders to "fall between the cracks" as they make the transition from the one system to the other.

Both types of disparities for similarly-situated offenders—longer adult sentences for violent offenders and longer juvenile sentences for property offenders—occurred because the two systems lack a coherent sentencing policy that spans both. Although we observed no evidence of racial discrimination in the waiver process, because prosecutors charged and the court waived most African-American youths for presumptive offenses and most white juveniles for property offenses, the interaction of present offense and sentences consigns most violent African-American youths to prison and most adult white property offenders to shorter periods of confinement in jail.

The 1994 amendments of Minnesota's certification statute used the Sentencing Guidelines' presumptive offense criteria to create a consistent sentencing jurisprudence in both systems. Both the criminal and juvenile justice systems now employ a congruent definition of serious offenses to rationalize social control, reduce the role of judicial subjectivity and idiosyncracy, and improve the fit between juvenile court waiver decisions and criminal court sentencing practices. Explicitly linking presumptive certification and EJJ prosecutions to the Sentencing Guidelines' presumptive commitment offenses and "public safety" criteria integrates certification with adult sentencing practices, maximizes juvenile court sanctions for the most serious and chronic juvenile offenders, and reinforces

258. *See* Tables 21 and 22.
259. *See* Table 22.

the public policy that incarcerating violent offenders is Minnesota's penal priority.

We used the presumptive commitment-presumptive certification offense criteria in our data analyses to assess the likely impacts of the significant legislative reforms. We emphasized the retributive or utilitarian sentencing policy trade-offs between stressing seriousness and persistence. Under the former "prima facie case" discretionary reference statute, unless the juvenile used a weapon, the juvenile court primarily waived older chronic offenders with less regard to whether their present offense was a property felony or a crime of violence. The new presumptive certification statute accentuates "public safety," violent offenses, and weapons use, and shifts the waiver decision's focus from the cumulative record of persistent offending to the seriousness of the present offense.

Although a legislative policy that maximizes sanctions for serious violent offenders is jurisprudentially defensible as a retributive value choice, the likely impact of these policy changes on racial minorities is troubling. The Hennepin County Attorney's Office's change in charging policies anticipated this jurisprudential shift. By the end of our waiver study, it charged about three-quarters (74%) of the youths against whom it filed waiver motions with presumptive offenses. Over the course of our study, the proportion of white youths against whom prosecutors filed waiver motions decreased from about one-third of all youths in the earlier years to less than one-fifth of all youths in the later years. Because minority, especially African-American, youths commit violent crimes at significantly higher rates than do white juveniles, proportionally even more minority juveniles will be eligible for and presumptively certified under the new law than under the previous discretionary system in which judges emphasized persistence rather than seriousness. Conversely, because Minnesota's Adult Sentencing Guidelines reserve scarce prison bed-space for violent offenders, juvenile courts likely will certify proportionally fewer property offenders than they did previously. Under the extended jurisdiction (EJJ) provisions, juvenile courts can impose even longer probationary sentences on these youths as juveniles than they could if they sentenced the same offenders as adults. Thus, the new law provides an additional incentive to bifurcate between serious violent offenders, predominantly African-American, and property offenders, who are predominantly white. The wide disparity between the sentences that violent offenders receive as adults or as juveniles likely will decrease, because most juveniles who are not waived but who are convicted of crimes against the person in juvenile court will be sentenced to enhanced terms under the extended jurisdiction provi-

sions. By contrast, the gap between juveniles and adults convicted of property crimes likely will widen further because the extended jurisdiction allows the juvenile court to impose even longer sentences on property offenders than are available in criminal court. Indeed, a rational young chronic property offender concerned only with sentence length and "doing time" would probably prefer to be sentenced as an adult rather than as an EJJ in juvenile court.

Although most serious delinquents in Minnesota are white, patterns of offending differ by race. Because police arrest minority juveniles disproportionately for violent crimes, the demographic projections and new legislation will amplify sentencing differences by race. African-American juveniles prosecuted for violent crimes will comprise the vast majority of urban youths presumptively certified and imprisoned as adults. By contrast, property offenders and very young violent offenders will comprise the bulk of youths sentenced under the enhanced EJJ juvenile court status. After we controlled for the relevant variables, we did not find racial disparities in judicial waiver decisions even though minority offenders constituted the majority of youths prosecuted as adults. Under the new certification legislation, because of racial differences in patterns of offending, we anticipate even starker disparities, again without a discriminatory component.

Conclusion

This study improves on previous analyses of judicial waiver administration in two important ways. First, it provides a complete and comprehensive analysis of the judicial waiver process from the prosecutor's initial filing of the reference motion to the eventual juvenile or criminal court sentences and youths' subsequent recidivism. It identifies the factors that influence waiver decisions and how those factors affect the administration of the waiver process itself. Second, it provides a sophisticated assessment of the role a youth's race plays in the most important sentencing decision juvenile courts make. The analyses indicate that the apparent racial disparities in judicial waiver administration stem from significant differences in the types of offenses with which prosecutors charge minority and white youths, rather than from discriminatory decision-making once they are charged. Prosecutors charge most minority juveniles with violent crimes and more white offenders with property offenses; most differences in waiver administration result from the way the juvenile court processes violent and property offenses, regardless of race.

The differences in racial patterns of offending raise issues of social justice that extend well beyond juvenile court reforms that tinker with the boundaries of youth or adulthood. Because the relationship between race and violence is rooted in social structure and public policies, sentencing policies that emphasize seriousness rather than persistence will inevitably create a disparate impact. Moreover, many demographic features exist that threaten to compound racial divisions and amplify youth violence: increasing numbers of children growing up in single-parent families, living in social isolation and concentrated poverty, and without hope for the future.[260] In the prophetic words of the Kerner Commission nearly three decades ago, "Our Nation is moving toward two societies, one black, one white — separate and unequal."[261] Racial divisions and youth crime and violence will cumulate unless and until our society makes a commitment to social justice and social welfare that addresses the family, health, housing, nutrition, and educational needs of all young people, especially those at greatest risk of poverty and of crime.

260. *See, e.g.*, LOSING GENERATIONS, *supra* note 122; MASSEY & DENTON, *supra* note 126; WILSON, *supra* note 128.

261. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968) (Kerner Commission Report).