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Contents

I. Introduction

Should a sixteen-year-old person who intentionally axe-murders his mother, father, and two younger siblings have his

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freedom curtailed longer than the two and one-half year maximum sentence which could be imposed if he were tried as a juvenile? For most people, the answer is easy and obvious. Yet three courts[1] applying the Minnesota juvenile waiver statute[2] to this scenario reached dramatically divergent results based on three different and inconsistent rationales. Despite the Minnesota Supreme Court's purported clarification of the waiver statute in *In re D.F.B.*,[3] members of the Minnesota Court of Appeals could not agree upon either the result or the rationale in the next factually similar case that arose.[4]

Between the nominally rehabilitative sentencing policies of the juvenile justice system and the punitive policies of the adult criminal justice system lies a mechanism for prosecuting some juvenile offenders as adults: waiver of juvenile court jurisdiction.[5] Consistent with the juvenile court's traditional emphasis on rehabilitation of offenders, waiver legislation in Minnesota and in most other states typically requires juvenile court judges to make individualized determinations as to a young offender's amenability to treatment and danger to society.[6] As the case of David F. Brom illustrates, however, application of such transfer legislation is surprisingly difficult.

Why does such a common and recurring application of sentencing legislation in Minnesota's juvenile courts produce such inconsistent and disparate results? One explanation is that the legislation fails to acknowledge, much less reconcile, two fundamental but contradictory bases for sentencing policies—the characteristics of the offender and the characteristics of the offense. The legislative failure to harmonize these contradictory sentencing policies, in turn, leaves every juvenile court judge in the position of deciding transfer cases on *ad hoc* discretionary bases devoid of any underlying principle or rationale.

The appropriate disposition of serious but isolated offenders

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1. *See In re* D.F.B., No. 88-J-0955 (Olmsted County, Minn. Dist. Ct. Apr. 21, 1988); *In re* D.F.B., 430 N.W.2d 475 (Minn. Ct. App. 1988); *In re* D.F.B., 433 N.W.2d 79 (Minn. 1988); *see infra* notes 149-250 and accompanying text.

2. Minn. Stat. § 260.125 (1988); *see infra* notes 135, 137.

3. 433 N.W.2d 79 (Minn. 1988); *see infra* notes 219-250 and accompanying text.

4. *See In re* J.L.B., 435 N.W.2d 595 (Minn. Ct. App. 1989); *see infra* notes 251-276 and accompanying text.

5. *See generally* Barry Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 Minn. L. Rev. 515 (1978) [hereinafter Feld, *Reference of Juvenile Offenders*].

6. *See generally* Barry Feld, *The Juvenile Court Meets the Principle of Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. Crim. L. & Criminology 471 (1987) [hereinafter Feld, *Principle of Offense*] (statutory survey and analysis of juvenile court waiver legislation).

is one problematic aspect of judicial waiver. This article will describe the genesis of the current legislative and judicial morass and analyze the recent appellate court decisions that did violence both to the statute as written and to the proper role of appellate review. An empirical examination of juvenile court transfer practices in Minnesota identifies some additional problems inherent in administering vague, discretionary sentencing statutes. The article recommends legislation to address the problems of sentencing serious young offenders. These recommendations reflect changes in waiver legislation occurring throughout the nation.

II. Waiver of Juvenile Offenders for Criminal Prosecution

The transfer of some serious young offenders from juvenile courts to criminal courts for prosecution as adults has received extensive legislative, judicial, and academic scrutiny.[7] A waiver decision is a *sentencing* choice between the punitive dispositions of adult criminal court and the nominally rehabilitative dispositions of juvenile court.[8] The theoretical differences between juvenile and criminal courts' sentencing philosophies become most visible in juvenile waiver proceedings. Traditionally, juvenile courts as-

7. *See, e.g.*, Barry Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal,"* 65 Minn. L. Rev. 167 (1981)[hereinafter Feld, *Dismantling the "Rehabilitative Ideal"*]; Barry Feld, *Delinquent Careers and Criminal Policy: Just Deserts and the Waiver Decision*, 21 Criminology 195 (1983) [hereinafter Feld, *Delinquent Careers and Criminal Policy*]; Feld, *Principle of Offense*, *supra* note 6.

8. Barry Feld, *Criminalizing Juvenile Justice: Rules of Procedure for Juvenile Court*, 69 Minn. L. Rev. 141, 269 (1984) [hereinafter Feld, *Criminalizing Juvenile Justice*]. *See generally* Feld, *Reference of Juvenile Offenders*, *supra* note 5; Donna Hamparian, Linda Estep, Susan Muntean, Ramon Priestino, Robert Swisher, Paul Wallace & Joseph White, Youth in Adult Courts: Between Two Worlds (1982) [hereinafter Between Two Worlds]; Readings in Public Policy 169-377 (John Hall, Donna Hamparian, John Pettibone & Joseph White eds. 1981) [hereinafter Readings in Public Policy] (series of articles on the prosecution of juveniles in adult court); Charles Whitebread & Robert Batey, *The Role of Waiver in the Juvenile Court: Questions of Philosophy and Function*, in Readings in Public Policy, *supra*, at 207-26.

Minnesota courts have repeatedly affirmed that the waiver decision is appropriately regarded as a sentencing decision. *See, e.g.*, *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).

In *In re* Hartung, 304 N.W.2d 621 (Minn. 1981), the court stated:

> A reference hearing is a dispositional type hearing which is forward looking: that is, the purpose of it is to determine on the basis of the offense charged and the present conditions 'whether, *upon an adjudication of guilt*, a juvenile can be retained within the juvenile justice system with benefit to himself and without danger to the public.'

Id. at 624 (emphasis in original) (quoting *In re* T.D.S., 289 N.W.2d 137, 141 (Minn. 1980)).

signed primary importance to individualized treatment, whereas adult criminal law accorded far greater significance to the seriousness of the offense committed and attempted to proportion punishment accordingly.[9] Transfer decisions reflect and supposedly resolve tensions—between rehabilitation and retribution, and between focusing on the offender and the offense—that underlie much of the contemporary debate about sentencing policies. Increasingly, the "Principle of Offense" has dominated this sentencing decision, as "just deserts" based on the offense prescribe the appropriate disposition, rather than the "real needs" of the offender.[10]

Nearly all legislatures have adopted a statutory mechanism to transfer some juvenile offenders from the jurisdiction of the juvenile courts to that of adult criminal courts.[11] Of these, two legislative vehicles—judicial waiver and legislative offense exclusion—pose the alternative sentencing policy choices most starkly.[12] The

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9. *See, e.g.*, *In re* D.F.B., No. 88-J-0955 (Olmsted County, Minn. Dist. Ct. Apr. 21, 1988). Judge Gerard Ring, the trial judge, notes:

> Perhaps the major difference between a juvenile delinquency proceeding and an adult criminal proceeding is the focus on the individual. In adult court where the guidelines apply, the severity of the sentence is determined largely by the *offense* itself. In juvenile court, the focus is on the *child*. A juvenile judge can legally give the same consequence to a shoplifter and a bank robber, depending upon the *characteristics of the child* in court.

Id., Memorandum at 2 (emphasis added); *see also* Feld, *Principle of Offense*, *supra* note 6, at 487-88.

10. *See* Feld, *Principle of Offense*, *supra* note 6, 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 a 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.").

11. Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 523 n.22; Between Two Worlds, *supra* note 8, at 96-97.

12. A third mechanism for removing juvenile offenders from the juvenile system is prosecutorial waiver, or concurrent jurisdiction between juvenile and criminal courts over certain offenses. *See generally* Donna Bishop, Charles Frazier & John Henretta, *Prosecutorial Waiver: Case Study of a Questionable Reform*, 35 Crime & Delinq. 179 (1989); Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 521 n.20; Between Two Worlds, *supra* note 8; Charles Thomas & Shay Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. Crim. L. & Criminology 439, 456-70 (1985). In concurrent jurisdiction states—e.g., Nebraska, Wyoming, Arkansas, and Florida—the prosecutor's charging decision determines whether a case will be heard in a juvenile or adult forum. Because this article focuses primarily on the differences between the juvenile and adult justice systems and their respective emphases on offenders and offenses in sentencing, a separate discussion of prosecutorial waiver will be omitted. To the extent that the prosecutor's decision to charge certain offenses in criminal courts divests the juvenile court of jurisdiction, however, this waiver mechanism will be treated as a subcategory of offense-based decision-making. *See* Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 557-61 n.139; Feld, *Principle of Offense*, *supra* note 6, at 511-19.

prevalent practice in virtually all jurisdictions is *judicial* waiver; a judge may waive juvenile court jurisdiction on a discretionary basis, after a hearing about a youth's amenability to treatment and threat to public safety. The juvenile court judge's case-by-case clinical evaluation of a youth's amenability to treatment or dangerousness to the public reflects the individualized, discretionary sentencing practices which are the hallmark of the juvenile court.

The other transfer mechanism may be termed *legislative* waiver, or offense exclusion, in which the legislative definition of juvenile court jurisdiction excludes youths charged with certain offenses. Legislative exclusion reflects the retributive, offense-oriented values of the criminal law.[13]

Both judicial waiver and legislative offense exclusion statutes attempt to answer essentially the same questions: Who are the serious juvenile offenders? How are they identified? Which system will deal with them? Each type of waiver mechanism emphasizes different information—the characteristics of the offender or those of the offense—in determining whether certain juvenile offenders should be handled as adults. In so doing, they reflect the tension between punishment and treatment.

Punishment and treatment can be conceptualized as mutually exclusive goals because the focus of punishment is retrospective whereas the emphasis of therapy is prospective.[14] Punishment imposes unpleasant consequences on offenders because of their *past offenses*.[15] Therapy, on the other hand, seeks to alleviate undesirable conditions and thereby improve the offender's life in the *future*.[16] Treatment assumes that certain antecedent factors are responsible for the individual's undesirable condition and that

13. *See, e.g.*, Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 556-71; Feld, *Delinquent Careers and Criminal Policy*, *supra* note 7, at 202-05; Feld, *Principle of Offense*, *supra* note 6, at 494-99.

14. Martin Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 Vand. L. Rev. 791, 793 n.16, 815-16 (1982); Feld, *Criminalizing Juvenile Justice*, *supra* note 8, at 248 n.415; Barry Feld, *Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U.L. Rev. 821, 833 (1988)[hereinafter Feld, *Punishment, Treatment*].

15. Gardner, *supra* note 14, at 793 n.18. Punishment involves state-imposed burdens on an individual who has violated legal prohibitions. *See* H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 4-5 (1968). *See generally* Andrew Von Hirsch, Doing Justice (1976).

16. Gardner, *supra* note 14, at 793 n.18. Treatment focuses on the mental health, status, or welfare of the individual rather than on the commission of prohibited acts. *See* Francis Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose 2-3 (1981)[hereinafter Allen, Decline of the Rehabilitative Ideal]; Feld, *Dismantling the "Rehabilitative Ideal,"* *supra* note 7, at 25; Herbert Packer, The Limits of the Criminal Sanction 23-28 (1968).

steps can be taken to alter those conditions. Indeed, this assumption is one of the central tenets of the positive criminology underlying the rehabilitative ideal of the juvenile court.[17]

In analyzing juvenile court waiver/sentencing practices, it is useful to examine whether the sentencing decision is based on considerations of the *offense* or of the *offender*. When the sentence is based on the characteristics of the offense, the sentence is usually determinate and proportional, with a goal of retribution or deterrence. In the case of waiver to criminal courts for punishment, *offense-based* considerations dominate when the seriousness of the present offense and/or the prior record control the transfer decision. The decision is based on an assessment of *past conduct*.

A sentence based on the characteristics of the offender, however, is typically open-ended, non-proportional, and indeterminate, with a goal of rehabilitation.[18] In the context of waiver decisions, this sentencing policy is reflected in clinical assessments of the individual offender's "amenability to treatment" or "dangerousness." The decision is based on a *prediction* about an offender's future course of conduct. Thus, waiver statutes reflect the same dispositional tensions between individualized evaluations of the offender and more mechanistic dispositions based on the characteristics of the offense that pervade the adult sentencing policy debate about indeterminate or determinate sentences and the use of sentencing guidelines.

It is also useful to distinguish the bases on which such sentencing decisions are made. Professor Matza has described the Principle of Offense as a principle of equality: treating similar cases in a similar fashion based on a narrowly defined frame of relevance.[19]

> The principle of equality refers to a specific set of substantive criteria that are awarded central relevance and, historically, to

17. David Matza, Delinquency and Drift 3 (1964); *see infra* note 44 and accompanying text.

18. "The distinction between indeterminate and determinate sentencing is not semantic, but indicates fundamentally different public policies. Indeterminate sentencing is based upon notions of rehabilitation, while determinate sentencing is based upon a desire for retribution or punishment." *In re* Felder, 93 Misc. 2d 369, 377, 402 N.Y.S.2d 528, 533 (N.Y. Fam. Ct. 1978). *See generally* Norval Morris, The Future of Imprisonment 13-20 (1974); Packer, *supra* note 16, at 54-55; Von Hirsch, *supra* note 15, at 11-26 (1976); Andrew Von Hirsch, Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals (1985). In analyzing juvenile dispositions, it is useful to contrast offender-oriented dispositions which are indeterminate and nonproportional with offense-based dispositions which are determinate, proportional, and related directly to characteristics of the offense. *See generally* Feld, *Punishment, Treatment, supra* note 14, at 847-91.

19. Matza, *supra* note 17, at 113-14.

> a set of considerations that were specifically and momentously precluded. Its meaning, especially in criminal proceedings, has been to give a central and unrivaled position in the framework of relevance to considerations of *offense* and conditions closely related to offense like prior record, and to more or less preclude considerations of status and circumstance.[20]

By contrast, the Principle of Individualized Justice differs from the Principle of Offense in two fundamental ways.

> First, individualized justice is much more inclusive: it contains many more items in its framework of relevance. . . . The principle of individualized justice suggests that disposition is to be guided by a *full understanding* of the client's personal and social character and by his "individual needs."[21]

Rather than being confined to characteristics of the offense, individualized justice encompasses every characteristic of the offender. Second, because "the kinds of criteria it includes are more diffuse than those commended in the principle of offense,. . . [t]he consequence of the principle of individualized justice has been mystification."[22] By including all personal and social characteristics as relevant, without assigning controlling significance to any one factor, individualized justice relies heavily on the "professional judgment" and discretion of juvenile court administrators.[23]

In the adult dispositional framework, determinate sentencing based on the offense has increasingly superseded indeterminate sentencing in the past decade, as "just deserts" replaces rehabilitation as the underlying sentencing rationale.[24] The "just deserts" advocates reject rehabilitation as a justification for intervention because of the discretionary power an indeterminate sentencing scheme vests in presumed experts, the inability of such experts to justify treating similarly situated offenders differently, the failure of rehabilitation in general,[25] and the inequalities, disparities, and

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20. *Id.* (emphasis in original).

21. *Id.* at 114-15 (emphasis in original).

22. *Id.*

23. *Id.* at 116.

24. *See generally* American Friends Service Committee, Struggle for Justice 45-53 (1971); Allen, Decline of the Rehabilitative Ideal, *supra* note 16, at 7 (Struggle for Justice "signaled the wide and precipitous decline of penal rehabilitationism that was to characterize the years ahead."); David Fogel, We Are the Living Proof: The Justice Model for Corrections 285-95 (2d ed. 1979); Morris, *supra* note 18, at 45-50; Richard Singer, Just Deserts: Sentencing Based on Equality and Desert (1979); Von Hirsch, *supra* note 15, at 49-55.

25. Earlier and excessively optimistic assumptions about human malleability have been challenged frequently by observations that rehabilitation programs do not consistently rehabilitate and by volumes of empirical evaluations that question both the effectiveness of treatment programs and the "scientific" underpinnings of those who administer the enterprise. *See* Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 Pub. Interest 22, 25 (1974) ("With few

injustices that result from individualized sentences. "Just deserts" sentencing, with its strong retributive foundation, punishes offenders largely according to their past criminal behavior rather than on the basis of who they are or may be predicted to become. Similarly situated offenders are defined and sanctioned equally on the basis of relatively objective characteristics such as seriousness of the offense, culpability, or criminal history.

These same shifts in sentencing philosophy are appearing in the juvenile process as well, as "just deserts" supersedes individualized sentencing.[26] The "just deserts" critiques of individualized sentencing practices raise troubling questions about the validity of the clinical diagnoses or predictions relied upon in waiver decisions, and about the propriety of delegating fundamental issues of sentencing policy to the discretionary judgments of social service personnel and judges. These critics contend that there are no valid or reliable clinical bases upon which juvenile court judges can make accurate amenability or dangerousness predictions, and that the effectively standardless discretion the criteria afford to judges results in inconsistent and discriminatory applications.[27] These criticisms have persuaded legislatures to modify the waiver criteria

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and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism."). *See generally* The Rehabilitation of Criminal Offenders: Problems and Prospects (Lee Sechrest, Susan White & Elizabeth Brown eds. 1979); David Ward, Daniel Wilner & Gene Kassebaum, Prison Treatment and Parole Survival (1971). In another survey of correctional evaluations, David Greenberg, *The Correctional Effects of Corrections: A Survey of Evaluations*, in Corrections and Punishment 111 (David Greenberg ed. 1977), Greenberg concludes:

> This survey indicates that many correctional dispositions are failing to reduce recidivism, and it thus confirms the general thrust of [Martinson]. Much of what is now done in the name of "corrections" may serve other functions, but the prevention of return to crime is not one of them. Here and there a few favorable results alleviate the monotony, but most of these results are modest and obtained through evaluations seriously lacking in rigor. The blanket assertion that "nothing works" is an exaggeration, but not by very much. . . . I never thought it likely that most of these programs would succeed in preventing much return to crime. Where the theoretical assumptions of programs are made explicit, they tend to border on the preposterous. More often they are never made explicit, and we should be little surprised if hit-or-miss efforts fail.

Id. at 140-41.

Further, "either because of scientific ignorance or institutional incapacities, a rehabilitative technique is lacking; we do not know how to prevent criminal recidivism by changing the characters and behavior of offenders." Allen, Decline of the Rehabilitative Ideal, *supra* note 16, at 34.

26. *See* Feld, *Principle of Offense*, *supra* note 6; Feld, *Punishment, Treatment*, *supra* note 14, at 851-79.

27. Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 529-56; Feld, *Principle of Offense*, *supra* note 6, at 489; *see also infra* notes 83-121 and accompanying text noting the geographic variations in Minnesota's judicial waiver practices.

by automatically excluding from juvenile court jurisdiction those youths who possess certain combinations of present offense and prior record, and/or increasing emphasis on the offense as a dispositional criterion in a judicial waiver proceeding.[28]

Analyzing waiver as a sentencing decision addresses two interrelated policy issues: (1) the bases for sentencing practices within juvenile courts, and (2) the relationship between juvenile court and adult criminal court sentencing practices. The first implicates individualized sentencing decisions and the operational tension between discretion and the rule of law. The second focuses on harmonizing social control responses to serious or chronic offenders across the two systems. By constraining judicial sentencing discretion and improving the fit between waiver decisions and criminal court sentencing practices through the Principle of Offense, legislatures may use offense criteria to address both issues simultaneously.

A. Judicial Waiver and Individualized Offender-Oriented Dispositions

The juvenile court is the product of changes in two ideas in the nineteenth century: strategies of social control[29] and the cul-

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28. Feld, *Principle of Offense*, *supra* note 6, at 489.

29. The Progressives introduced a number of criminal justice reforms at the turn of the century—probation, parole, indeterminate sentences, and the juvenile court—all of which emphasized open-ended, informal, and highly flexible policies to rehabilitate the deviant. Francis Allen, *Legal Values and the Rehabilitative Ideal*, in Borderland of Criminal Justice 25-27 (1964) [hereinafter Allen, *Rehabilitative Ideal*]; David Rothman, Conscience and Convenience 43 (1980). A pervasive feature of all Progressive criminal justice reforms was discretionary decision-making, because identifying the causes and prescribing the cures for delinquency required an individualized approach which precluded uniformity of treatment or standardization of criteria.

The Progressives' reformulation of criminal justice strategies reflected changing ideological assumptions about the causes and cures of crime and deviance. Positivism—the identification of antecedent causal variables producing crime and deviance—challenged the classic formulations of crime as the product of free will. Allen, *Rehabilitative Ideal*, *supra*; Matza, *supra* note 17, at 5; Rothman, *supra*, at 50-51. Attributing criminal behavior to external, antecedent forces rather than to deliberately chosen misconduct reduced an actor's moral responsibility for crime and focused efforts on the reform of the offender rather than the punishment of the offense. Ellen Ryerson, The Best-Laid Plans 22 (1978). The new criminology, as distinguished from the old "free will," asserted a scientific determinism of deviance and sought to identify the causal variables producing crime and delinquency. *See* Matza, *supra* note 17, at 4-12; Anthony Platt, The Child Savers: The Invention of Delinquency 46-74 (2d ed. 1977); Rothman, *supra*, at 50. In its quest for scientific legitimacy, criminology at the turn of the century borrowed both methodology and vocabulary from the medical profession as metaphors such as pathology, infection, diagnosis, and treatment provided popular analogues for criminal justice professionals. Allen, *Rehabilitative Ideal*, *supra*; Platt, *supra*, at 18; Rothman, *supra*, at 56.

tural conceptions of children.[30] While many Progressive[31] programs shared a unifying, child-centered theme,[32] the juvenile court synthesized the new approaches to childhood and social control into a specialized, bureaucratic agency staffed by experts and designed to serve the needs of the child offender. The Progres-

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These deterministic interpretations of human behavior redirected research efforts to identify the causes of crime by scientifically studying the offender, because the ability to identify the causes of crime also implied the correlative ability to cure it.

The conjunction of positivistic criminology, analogies to the medical profession in the treatment of criminals, and the growth of new social science professionals gave rise to the "Rehabilitative Ideal," a prominent feature of all Progressive criminal justice reforms. *See* Allen, *Rehabilitative Ideal*, *supra*, at 25; Allen, Decline of the Rehabilitative Ideal, *supra* note 16, at 11-15.

30. A modernizing of the family and a changing cultural conception of childhood accompanied economic modernization and industrialization. Demographic changes in the numbers and spacing of children and a shift of economic functions from the family to other work environments modified the roles of women and children. Joseph Kett, Rites of Passage: Adolescence in America 1790 to the Present 114-16 (1977). *See generally* Carl Degler, At Odds: Women and the Family in America from the Revolution to the Present 178-209 (1980); Turning Points: Historical and Sociological Essays on the Family (John Demos & Sarane Boocock eds. 1978); Christopher Lasch, Haven in a Heartless World: The Family Besieged 6-10 (1977).

Especially within the upper and middle classes, a more modern conception of childhood emerged. Children were perceived as corruptible innocents whose upbringing required greater physical, social, and moral structure than had previously been regarded as prerequisite to adulthood. The family, particularly women, assumed a greater role in supervising a child's moral and social development. *See* Philippe Aries, Centuries of Childhood 329 (1962); Degler, *supra*, at 86-110; Kett, *supra*, at 109-43; Platt, *supra* note 29, at 75-83; Bernard Wishy, The Child and the Republic: The Dawn of Modern American Child Nurture 116 (1968).

31. During the last third of the nineteenth century and the beginning decades of the twentieth century, rapid industrialization, economic modernization, urbanization, immigration, and social change overwhelmed traditional social stability and posed fundamental new problems of social control. *See generally* Samuel Hays, The Response to Industrialism 1885-1914 (1957); Richard Hofstadter, The Age of Reform: From Bryan to F.D.R. (1955); David Noble, America by Design: Science, Technology, and the Rise of Corporate Capitalism (1977); Robert Wiebe, The Search for Order 1877-1920 (1967). The Progressive movement emerged around the turn of the century in response to the social problems caused by rapid industrialization, urbanization, and modernization. *See generally* Hofstadter, *supra*; Gabriel Kolko, The Triumph of Conservativism: A Reinterpretation of American History, 1900-1916 (1963); James Weinstein, The Corporate Ideal in the Liberal State 1900-1918 (1968); Wiebe, *supra*.

32. The changing cultural conception of childhood informed the Progressives' policies embodied in juvenile court legislation, child labor laws, child welfare laws, and compulsory school attendance laws. *See generally* Wiebe, *supra* note 31, at 169; Kett, *supra* note 30, at 226-27; Juvenile Justice: The Progressive Legacy and Current Reforms (LaMar Empey ed. 1979) (juvenile court legislation); Susan Tiffin, In Whose Best Interest? Child Welfare Reform in the Progressive Era (1982)(social welfare legislation); Walter Trattner, Crusade for the Children: A History of the National Child Labor Committee and Child Labor Reform in America (1970) (child-labor legislation); Lawrence Cremin, The Transformation of the School: Progressivism in American Education, 1876-1957, at 127-28 (1961)(compulsory education legislation).

sives envisioned that juvenile court professionals would use indeterminate and informal procedures to make discretionary, individualized treatment decisions, thus achieving benevolent goals by substituting a scientific and preventative approach for the traditional punitive intent of the criminal law.[33] In the ideal juvenile court, an expert judge, assisted by social service personnel, clinicians, and probation officers who investigated the child's background, would identify the sources of the child's misconduct and develop a treatment plan to meet the child's needs.

Because their aims were benevolent, their solicitude individualized, and their intervention guided by science, juvenile court judges were given enormous discretion to make dispositions in the "best interests of the child." The juvenile court's methodology encouraged collecting as much information as possible about the child to allow rational, scientific analysis of the facts which would presumably reveal the proper diagnosis and prescribe the cure. Principles of psychology and social work, rather than formal decisional rules, guided decision-makers. In the factual inquiry into the whole child—his or her life, character, environment, and social circumstances—the specific criminal offense a child committed was accorded minor significance because it indicated little about a child's "real needs."

The misdeeds that brought the child before the court affected

33. The juvenile court movement attempted to remove children from the adult criminal justice and corrections systems, and to provide them with individualized treatment in a separate system of their own. Sanford Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 Stan. L. Rev. 1187 (1970); Julian Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104 (1909); Platt, *supra* note 29, at 137-45; Ryerson, *supra* note 29, at 32-37. Under the guise of *parens patriae*, an emphasis on treatment, supervision, and control, rather than punishment, allowed the state to intervene affirmatively in the lives of more young offenders. *Ex parte* Crouse, 4 Whart. 9 (Pa. 1838); Neil Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae,"* 22 S.C.L. Rev. 147, 180-81 (1970); Douglas Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C.L. Rev. 205, 207-10 (1971).

In separating children from adult offenders, the juvenile court also rejected the jurisprudence and procedures of criminal prosecutions. Courtroom procedures were modified to eliminate any implication of a criminal proceeding; a euphemistic vocabulary and a physically separate court building were introduced to avoid the stigma of adult prosecutions. Rothman, *supra* note 29, at 217; Ryerson, *supra* note 29, at 35-37; Task Force on Juvenile Delinquency, President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 92-93 (1967). Proceedings were initiated by a petition in the welfare of the child, rather than by a criminal complaint. Juries and lawyers were excluded because the important issues in juvenile court proceedings were the child's background and welfare rather than the details surrounding the commission of a specific crime. Judges dispensed with technical rules of evidence and formal procedures in order to obtain all the information available. Hearings were confidential, access to court records limited, and the child found to be delinquent rather than guilty of committing a criminal offense to avoid stigmatizing a youth.

neither the intensity nor the duration of intervention because each child's "real needs" differed and no limits could be defined in advance. Dispositions were indeterminate, nonproportional, and continued for the duration of minority. The individualized justice of the juvenile court was as variable as that administered by the Kadi in the marketplace "who renders . . . decisions without any reference to rules or norms but in what appears to be a completely free evaluation of the particular merits of every single case."[34] As reflected in juvenile sentencing practices, an extremely wide frame of relevance and an absence of controlling rules or norms characterized this type of decision-making.

From the court's inception, juvenile court judges could also sentence young offenders by denying them the protective jurisdiction of the juvenile court and subjecting them to adult criminal courts.[35]

> [L]egislation 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 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." These transfers probably muted criticism of the courts for coddling the criminal.[36]

Thus, waiver was always a possible disposition and its availability also protected juvenile courts from political criticism by allowing the transfer to adult courts of highly visible or serious cases.

Although judicial waiver reflected individualized sentencing practices from its inception, the decision-making process has been substantially revised. In *Kent v. United States*,[37] the United States Supreme Court held that some procedural due process protections must be accorded juveniles in judicial waiver determinations, thereby formalizing this special sentencing decision.[38] *Kent* also anticipated many of the same procedural safeguards afforded by *In*

34. Matza, *supra* note 17, at 118 (quoting Max Weber on Law in Economy and Society at xlvii (Max Rheinstein ed. 1954)). Kadi justice is administered by a Moslem judge. The dispostion of each case depends on the unique skills and experience of each judge. *Id.*

35. Rothman, *supra* note 29, at 285.

36. *Id.*

37. 383 U.S. 541 (1966).

38. *Id.* at 554.

re Gault's later formalization of delinquency adjudications.[39] Subsequently, in *Breed v. Jones*,[40] the Court applied the double jeopardy provisions of the Constitution to the adjudication of juvenile offenses,[41] thereby requiring the states to make the juvenile or adult dispositional determination before proceeding against a youth on the merits of the charge.

Although *Kent* and *Breed* provide the formal procedural framework within which the judicial waiver/sentencing decision occurs, the substantive bases of the waiver decisions pose the principal difficulty. Most jurisdictions provide for discretionary waiver based on a juvenile court judge's assessment of a youth's amenability to treatment or dangerousness as indicated by (1) age, (2) the treatment prognosis, as reflected in clinical evaluations, and (3) the threat to others, as reflected in the seriousness of the present offense and prior record.[42] Legislatures specify waiver factors with varying degrees of precision, typically adopting the substantive criteria appended to the Supreme Court's decision in *Kent*.[43]

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39. *Compare Kent with In re* Gault, 387 U.S. 1 (1967). In *Kent*, the Supreme Court concluded that the loss of the special protections of the juvenile court—private proceedings, confidential records, and protection from the stigma of a criminal conviction—through a waiver decision was a "critically important" action that required a hearing, assistance of counsel, access to social investigations and other records, and written findings and conclusions capable of review by a higher court. *Kent*, 383 U.S. at 554-57 (1966). "[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." *Id.* at 554. *See generally* Monrad Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 Sup. Ct. Rev. 167.

40. 421 U.S. 519 (1975).

41. In *Breed v. Jones*, the Court held that the protections of the double jeopardy clause of the fifth amendment prohibited adult criminal re-prosecution of a youth after a prior conviction in juvenile court. At issue was the applicability of the double jeopardy clause of the fifth amendment to delinquency proceedings. The Court resolved the question by establishing a functional equivalence between an adult criminal trial and a delinquency proceeding. The Court described the virtually identical interests implicated in a delinquency hearing and a traditional criminal prosecution—"anxiety and insecurity," a "heavy personal strain," and the increased burdens as the juvenile system became more procedurally formalized. *Id.* at 528-29. In light of the potential consequences of a delinquency proceeding, the Court concluded that there was little basis to distinguish it from a traditional adult criminal prosecution. *Id.* at 530.

42. *See* Feld, *Delinquent Careers and Criminal Policy*, *supra* note 7, at 198; Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 526; Feld, *Principle of Offense*, *supra* note 6, at 490; *see, e.g.*, Minn. Stat. § 260.125 (1988).

43. 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

As sentencing criteria, determining whether a youth is amenable to treatment or dangerous implicates some of the most fundamental and difficult issues of penal policy and juvenile jurisprudence. The underlying legislative assumptions—that effective treatment programs for serious or persistent juvenile offenders exist, that classification systems can differentiate the treatment potential or dangerousness of various youths, and that validated and reliable diagnostic tools enable a clinician or juvenile court judge to determine the proper disposition for a particular youth—are all highly problematic and controversial.[44] Similarly, legislation authorizing a judge to waive juvenile court jurisdiction because a youth poses a threat to public safety requires the judge to predict the youth's dangerousness despite compelling evidence that the "capacity to predict future criminal behavior [is] quite be-

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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 v. United States, 383 U.S. 541 app. at 566-67 (1966).

Whether *Kent* required some formal sentencing criteria as due process norms is unclear. The Court has never confronted the substantive issue, however, because most jurisdictions have adopted the *Kent* factors either through legislation or judicial gloss. Feld, *Principle of Offense*, *supra* note 6, at 503-11; Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 525-26.

44. *See, e.g.*, Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 529-46; Feld, *Dismantling the "Rehabilitative Ideal,"* *supra* note 7; Feld, *Delinquent Careers and Criminal Policy*, *supra* note 7, at 198-202; Feld, *Principle of Offense*, *supra* note 6, at 489; *see also supra* note 17 and accompanying text.

yond our present technical ability."[45]

Judicial waiver statutes, couched in terms of amenability to treatment or dangerousness, are effectively broad, standardless grants of sentencing discretion characteristic of the individualized, offender-oriented dispositional statutes of the juvenile court. They are the juvenile equivalent of the discretionary capital punishment statutes condemned by the Supreme Court in *Furman v. Georgia*.[46] The addition of long lists of supposed substantive standards, such as the one offered in *Kent*, do not provide objective indicators to guide discretion. "[T]he substantive standards are highly subjective, and the large number of factors that may be taken into consideration provides ample opportunity for selection and emphasis in discretionary decisions that shape the outcome of individual cases."[47] Indeed, such catalogues of amorphous and contradictory factors reinforce juvenile court judges' exercise of virtually unreviewable discretion by allowing selective emphasis of one set of factors or another to justify any disposition.[48]

Like individualized sentencing statutes, the subjectivity inherent in waiver administration permits a variety of inequities and disparities to occur without any effective check. The empirical reality is that judges cannot administer these discretionary statutes on a consistent, even-handed basis.[49] Within a single jurisdiction, waiver statutes are inconsistently interpreted and applied from county to county and from court to court.[50] Hamparian's nation-

45. Morris, *supra* note 18, at 62; *see also* Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 540-46. *See generally* Norval Morris & Marc Miller, *Predictions of Dangerousness*, 6 Crime & Just. 1 (1985).

46. 408 U.S. 238 (1972). Professor Frank Zimring has described the waiver of serious juvenile offenders as "the capital punishment of juvenile justice." Franklin Zimring, *Notes Toward a Jurisprudence of Waiver*, in Readings in Public Policy, *supra* note 8, at 193. Zimring notes that "[c]apital punishment in criminal justice and waiver in juvenile justice share four related characteristics: (1) low incidence, (2) prosecutorial and judicial discretion, (3) ultimacy, and (4) inconsistency with the premises that underlie the system's other interventions." *Id.*

47. Zimring, *supra* note 46, at 195.

48. "Collectively, 'lists' of this length rarely serve to limit discretion or regularize procedure. By giving emphasis to one or two of the guidelines, a judge can usually justify a decision either way." Task Force on Sentencing Policy Toward Young Offenders, Twentieth Century Fund, Confronting Youth Crime 56 (1978) [hereinafter Confronting Youth Crime] (background statement by Franklin Zimring).

49. *See infra* notes 83-121 and accompanying text analyzing empirical data of transfer decisions in Minnesota in 1986. *See generally* Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 546-56; Between Two Worlds, *supra* note 8.

50. *See, e.g.*, Supreme Court Juvenile Justice Study Commission, Report to the Minnesota Supreme Court 61-78 (1976) (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 8, at 150-98 (county by county disparity within states); James Heuser, Juveniles Arrested for Serious Felony

wide analysis of waiver in 1978 provides compelling evidence that judicial waiver practices are inherently arbitrary, capricious, and discriminatory.[51] In addition to "justice by geography," there is evidence that a juvenile's race may influence the waiver decision.[52] Bortner concludes that a juvenile court's organizational and polit-

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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").

51. Between Two Worlds, *supra* note 8, 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.

Fagan analyzed waiver decisions involving a sample of violent youths in four different jurisdictions and concluded that there were no uniform criteria guiding the transfer decision. Jeffrey Fagan, Elizabeth Piper & Martin Forst, The Juvenile Court and Violent Youth: Determinants of the Transfer Decisions (Nov. 1986) [hereinafter Juvenile Court and Violent Youth].

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

Id. at 20-21. Fagan, et al., tested seven offense and offender variables to identify determinants of the transfer decision within a sample of violent youths. They report 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 youth who were or were not transferred." *Id.* at 19.

52. *See generally* Joel Eigen, *The Determinants and Impact of Jurisdictional Transfer in Philadelphia*, in Readings in Public Policy, *supra* note 8; Between Two Worlds, *supra* note 8, at 104-05; Robert Keiter, *Criminal or Delinquent?: A Study of Juvenile Cases Transferred to the Criminal Court*, 19 Crime & Delinq. 528 (1973).

Hamparian reported that nationally, 39% of all youths transferred in 1978 were black and that in 11 states, minority youths constituted the majority of juveniles waived. Between Two Worlds, *supra* note 8, at 104-05. Without being able to control for the seriousness of the present offense and prior record, however, it is not possible to ascribe the disproportionate over-representation of minority youths in waiver proceedings to racial discrimination per se. Eigen reports an interracial effect in transfers; black youths who murder white victims are significantly more at risk for waiver. Eigen, *supra*, at 339-40. *But cf.* McKleskey v. Kemp, 481 U.S. 279 (1987) (Statistical evidence that black defendants whose victims are white are disproportionately at risk for execution does not result in violations of due process or equal protection.).

Fagan's study of transfer of violent youths also found substantial disparities in the rates of minority and white offenders. Although there was no direct evidence of sentencing discrimination, "it appears that the effects of race are indirect, but visible nonetheless." Jeffrey Fagan, Martin Forst & Scott Vivona, *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 Crime & Delinq. 259, 276 (1987) [hereinafter *Racial Determinants of Judicial Transfer*].

ical characteristics explain more about the waiver decision than does the inherent dangerousness or intractability of a youth.[53]

> [P]olitical and organizational factors, rather than concern for public safety, account for the increasing rate of remand. In evidencing a willingness to relinquish jurisdiction over a small percentage of its clientele, and by portraying these juveniles as the most intractable and the greatest threat to public safety, the juvenile justice system not only creates an effective symbolic gesture regarding protection of the public but it also advances its territorial interest in maintaining jurisdiction over the vast majority of juveniles and deflecting more encompassing criticisms of the entire system.[54]

Idiosyncratic differences in judicial philosophies and the locale of a waiver hearing are far more significant for the ultimate transfer decision than is any inherent quality of the criminal act or characteristic of the offending youth.[55] The inconsistency in the interpretation and application of waiver statutes is hardly surprising in view of the inherent subjectivity of the dispositional issue, the lack of effective guidelines to structure the decision, and the latent as well as manifest functions the process serves. In short, judicial waiver statutes reveal all of the defects characteristic of individualized, discretionary sentencing schema.

B. Legislative Exclusion of Offenses

Legislative waiver, the principal alternative to judicial waiver, excludes from juvenile court jurisdiction youths who are charged with specified offenses or who have records of prior adjudications in addition to the present offense.[56] Because legislatures created juvenile courts, legislatures may modify the court's jurisdiction as they please. Appellate courts have consistently upheld, against both due process and equal protection challenges, legislation that excludes from juvenile court jurisdiction youths who commit certain offenses.[57]

Statutes mandating the prosecution of a youth as an adult on the basis of the offense charged or the offense history, however, are inconsistent with the individualized rehabilitative philosophy of juvenile courts. Although legislatures may subordinate individ-

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53. M.A. Bortner, *Traditional Rhetoric, Organizational Realities: Remand of Juveniles to Adult Court*, 32 Crime & Delinq. 53, 69-70 (1986).

54. *Id.*

55. Between Two Worlds, *supra* note 8, at 101-07.

56. *See* Feld, *Principle of Offense*, *supra* note 6, at 511-19 (summary of offense exclusion legislation).

57. Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 556-71; *see, e.g.*, United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973).

ualized treatment considerations to other social control policy objectives, they have often failed to make clear which of several alternative sentencing policies—retribution, selective incapacitation, or deterrence—they sought to achieve in redefining jurisdiction.

The primary justification for waiver is the need for minimum confinement periods longer than the maximum sanctions typically available to juvenile court, i.e., a sixteen-year-old could not be confined "for long enough" if juvenile court retained jurisdiction.[58]

> [T]he justification for waiver is singular: transfer to criminal court is necessary when the maximum punishment available in juvenile court is clearly inadequate. . . . [T]he standard for making a waiver decision is a determination that the maximum social control available in juvenile court falls far short of the minimum social control necessary if a particular offender is guilty of the serious crime he is charged with.[59]

Fagan reports that the length of time from age at offense to the jurisdictional age limit, rather than the offender's prior record, appears to dictate the judicial transfer decision; judges transfer juveniles where the seriousness of the offense requires a longer sentence than that available in the juvenile court.[60]

If the rationale for adult prosecution is the need for minimum lengths of confinement in excess of the juvenile court's maximum remaining jurisdiction, then the theories of punishment which structure the choice of waiver criteria are retribution and selective incapacitation. Packer propounds an integrated theory of punishment that emphasizes both retributive and utilitarian goals.[61] Retributive punishment is necessary because it limits the imposition of criminal sanctions to the culpable and blameworthy, introduces a degree of certainty to the process, and confines the issue of waiver to the most serious types of criminal conduct for which the longest terms of confinement are authorized.[62]

By itself, retribution theory may be overly inclusive and produce the undesirable infliction of harm without any offsetting utilitarian gain. Selective incapacitation is an appropriate theory to couple with retribution because there is a limited class of offenders whose persistent history of wrongdoing indicates the inadequacy of

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58. Zimring, *supra* note 46, at 197. *See generally* Institute of Judicial Admin.—ABA Joint Comm'n on Juvenile Justice Standards, Standards Relating to Transfer Between Courts 3, 19-21 (1977).

59. Zimring, *supra* note 46, at 201.

60. Juvenile Court and Violent Youth, *supra* note 51, at 11.

61. Packer, *supra* note 16, at 62-70.

62. *See id.* at 68.

juvenile court sanctions.[63] Persistent offending may evidence greater culpability—the actor was on notice that his or her behavior was condemned yet repeated it. In the allocation of scarce penal resources, selective incapacitation of persistent offenders[64] constitutes a reasonable rationing strategy and may have the incidental benefit of preventing some future crimes.[65]

Translating these jurisprudential premises into legislative waiver criteria requires an explicit acknowledgement of the actual sentencing goals being pursued. A legislature seeking retribution could rationally conclude that an older youth who commits a particularly heinous offense *deserves* to be treated as an adult and exclude that youth from the juvenile system. If the legislative goal in redefining juvenile court jurisdiction is to selectively incapacitate chronic offenders, however, excluding offenders solely on the basis of the seriousness of their present offense may not be the most effective strategy. The seriousness of a first offense provides little basis for distinguishing those youths who are likely to recidivate from those who are not.[66] The number of *contacts* a young offender has with the juvenile justice system, however, is the most reliable indicator of the likelihood of future criminality.[67]

63. Jacqueline Cohen, *Incapacitation as a Strategy for Crime Control: Possibilities and Pitfalls*, 5 Crime & Just. 1 (1983).

64. Although selective incapacitation attempts to identify those offenders with a substantially greater probability of future criminal involvement, juveniles waived pursuant to this strategy are waived not on the basis of a prediction regarding the future, but rather because of their past conduct. By confining the predictor criteria to past criminal history, many of the legitimate civil liberties objections to over-prediction, false positives, and preventive incarceration may be avoided. *See* Feld, *Reference of Juvenile Offenders*, *supra* note 5; Feld, *Delinquent Careers and Criminal Policy*, *supra* note 7, at 208-10; Von Hirsch, *supra* note 15, at 84.

65. *See generally* Cohen, *supra* note 63; Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates (Alfred Blumstein, Jacqueline Cohen & Daniel Nagin eds. 1978); Peter Greenwood, Selective Incapacitation (1982).

66. The available evidence on the development of delinquent careers indicates that many youths engage simultaneously in both trivial and serious violations of the law, and that police arrest and process youths primarily as a function of the frequency, rather than the seriousness, of their delinquent behavior. *See, e.g.*, Marvin Wolfgang, Robert Figlio & Thorsten Sellin, Delinquency in a Birth Cohort (1972) [hereinafter Delinquency in a Birth Cohort]; *see also* Marvin Wolfgang, From Boy to Man, From Delinquency to Crime (1987); Donna Hamparian, Richard Schuster, Simon Dinitz & John Conrad, The Violent Few (1978); Paul Strasburg, Violent Delinquents (1978).

67. Studies of the development of delinquent careers suggest that serious offenders are best identified by their persistence rather than by the nature of their initial offense. *See* sources cited *supra* note 66. The criminal career research indicates that young offenders do not "specialize" in particular types of crime, that serious crime occurs within an essentially random pattern of delinquent behavior, and that a small number of chronic delinquents are responsible for many offenses and most of the violent offenses committed by juveniles. *See* sources cited *supra* note 66

Although most youths desist after one or two contacts, there is a substantial probability that chronic offenders will continue to commit delinquent acts.[68] Thus, a legislature attempting to identify serious offenders should emphasize an offender's cumulative persistence rather than just the current offense.[69]

Legislatively defining adulthood entails not only an empirical judgment as to who the persistent and serious offenders are, but an explicit legislative value choice about the quantity and quality of deviance that will be tolerated within the juvenile system before a more punitive response is mandated. Because, in most cases, youths will not receive better rehabilitative services in the adult correctional system than are available in the juvenile system, the decision to transfer a youth to the adult process must ultimately be defensible on the grounds of retribution or selective incapacitation. From the community's perspective, the principal values of exclusion are enhanced community protection through the greater security and longer sentences available in the adult system, increased general deterrence through greater certainty and visibility of consequences, and reaffirmation of fundamental norms. Because most offenders, adults and juveniles alike, do not require penal incarceration, legislative exclusion is appropriate only when a juvenile offender's record of persistence and the seriousness of the present offense warrant confinement for a substantially longer term than could be imposed on him or her as a juvenile.

To satisfy these community values, a legislature might address the questions of an offender's record of recidivism or the seriousness of the current offense directly by emphasizing offense criteria, rather than addressing these public safety issues circuitously and less visibly through judicial inquiry into amenability to treatment or dangerousness. The value judgment about when public safety justifies waiver further reflects the tension between retribution and utilitarian prevention. Whereas a retributive choice

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and authorities cited therein. Although it is not possible to predict violence on the basis of prior offense records, a prior record of violence or crime is the best indicator of similar behavior in the future. *See, e.g.*, Peter Greenwood, *Differences in Criminal Behavior and Court Responses Among Juvenile and Young Adult Defendants*, 7 Crime & Just. 151, 164-65 (1986) [hereinafter Greenwood, *Criminal Behavior and Court Responses*].

68. 1 Criminal Careers and "Career Criminals" 18, 75-76 (Alfred Blumstein, Jacqueline Cohen, Jeffrey Roth & Christy Visher eds. 1986) [hereinafter Criminal Careers]; Joan Petersilia, *Criminal Career Research: A Review of Recent Evidence*, 2 Crime & Just. 321, 343-45 (1980); Delinquency in a Birth Cohort, *supra* note 66, at 247-49.

69. Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 565; Feld, *Delinquent Careers and Criminal Policy*, *supra* note 7; Greenwood, *Criminal Behavior and Court Responses*, *supra* note 67, at 164-65.

might dictate automatic exclusion of any juvenile who committed a heinous offense—intentional homicide, rape, armed robbery, assault with a weapon or with substantial injury to the victim—a choice based on prevention suggests that the serious offender should be excluded only if shown to be a chronic offender.

In addition to defining offense categories or histories, the legislature also needs to prescribe a minimum age of criminal liability for excluded offenders—sixteen, fifteen, or fourteen.[70] At what age is it appropriate to hold a youth as responsible for a serious crime as an eighteen-year-old adult? "There is no compelling or convincing evidence that persons aged sixteen to eighteen differ significantly from persons aged eighteen and over in their capacity to understand the outcomes and consequences of their acts. . . . [S]erious crime should be treated seriously regardless of the offender's age."[71]

Offense categories are necessarily crude and imprecise classifications. Many youths charged and tried as adults will ultimately plead to or be found guilty of lesser, nonexcluded offenses. Again, if the rationale of legislative exclusion is that youths who commit certain "worst case" offenses should be sentenced as adults, then regardless of the initial charge, if an individual is subsequently found not to have committed one of the offenses excluded from juvenile court jurisdiction, he or she should be returned to juvenile court for disposition.[72]

Ultimately, the question of waiver involves the appropriate dispositions of serious young offenders who, chronologically, happen to be juveniles. The traditional distinction between "treatment" as a juvenile and "punishment" as an adult is based on an arbitrary legislative line that has no criminological significance other than its legal consequences. The inconsistencies in sentencing policies between the juvenile and adult systems often make fu-

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70. *See, e.g.*, Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 609-11.

71. Confronting Youth Crime, *supra* note 48, at 25 (Marvin Wolfgang dissenting from the Task Force's report).

72. Where the rationale for transfer, whether judicial or legislative, is based on the seriousness of the offense and the need for extended confinement, then permanent divestiture of juvenile court jurisdiction should be based upon the offense for which a youth is ultimately convicted, not the one initially charged.

> Return to juvenile court is certainly consistent with the statutory policies providing for differential treatment on the basis of offense committed. Moreover, the policy reasons that militate against subjecting the prosecutor's charging decision to prior judicial review do not preclude examining it after the fact. Finally, in the absence of a transfer-back provision, legislative waiver statutes lend themselves to prosecutorial abuse via overcharging.

Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 564.

tile any attempt to rationalize social control and the response to serious deviance among the young.[73] These inconsistencies arise from the legislative failure to recognize that young people are continually maturing; they are not irresponsible children one day and responsible adults the next, except as a matter of law. Moreover, there is a strong correlation between age and criminal activity, with the rates of many kinds of criminality peaking in mid to late adolescence.[74] Chronic offenders are disproportionately involved in criminal activity, committing their first offenses in their early to mid-teens, persisting in criminal activity into their twenties, and then gradually reducing their criminal involvement.[75] "[T]hose individuals who are arrested as juveniles are three to four times more likely to be arrested as adults than are those who are not arrested as juveniles."[76] An integrated sentencing policy requires coordinated responses to young offenders on both sides of the line distinguishing juveniles from adults, based on a standardized means of identifying and subsequently sanctioning the chronic and ultimately serious young criminal.

Despite the criminal career research findings, criminal sentencing policies tend to maximize sanctions for older offenders whose criminal activity is declining, while withholding sanctions from chronic younger offenders at the point when their rate of activity is increasing or at its peak.[77] When juvenile offenders appear in criminal court for the first time as adult offenders, they are typically accorded the leniency of adult first offenders.[78] Ana-

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73. Feld, *Delinquent Careers and Criminal Policy*, *supra* note 7, at 205.

74. Criminal Careers, *supra* note 68, at 22-23.

75. Criminal Careers, *supra* note 68, at 18, 22-24; Greenwood, *Criminal Behavior and Court Responses*, *supra* note 67, at 163; Petersilia, *supra* note 68, at 357-58.

76. Greenwood, *Criminal Behavior and Court Responses*, *supra* note 67, at 163.

77. Barbara Boland & James Wilson, *Age, Crime, and Punishment*, 51 Pub. Interest 22, 25 (1978); Barbara Boland, *Fighting Crime: The Problem of Adolescents*, 71 J. Crim. L. & Criminology 94 (1980); Feld, *Delinquent Careers and Criminal Policy*, *supra* note 7, at 205-06; Peter Greenwood, Joan Petersilia & Franklin Zimring, Age, Crime, and Sanctions: The Transition from Juvenile to Adult Court (1980) [hereinafter Age, Crime, and Sanctions].

78. Greenwood, et al., examined dispositions of youths tried as adults in several jurisdictions and found substantial variation in sentencing practices. Age, Crime, and Sanctions, *supra* note 77, at viii; Peter Greenwood, Allan Abrahamse & Franklin Zimring, Factors Affecting Sentence Severity for Young Adult Offenders 12-14 (1984) [hereinafter Factors Affecting Sentence Severity]. In New York City and in Franklin County (Columbus), Ohio, they found that youthful offenders faced a substantially lower chance of being incarcerated than did older offenders, that youthful violent offenders got lighter sentences than older violent offenders, and that for approximately a two-year period after becoming adults, youths were the beneficiaries of informal lenient sentencing policies in adult courts. Factors Affecting Sentence Severity, *supra*, at 12-14.

This "punishment gap" appears in other studies as well. *See supra* note 77; *infra* note 82. Although the seriousness of a juvenile's offense is the primary deter-

lyzing the relationships between waiver offenses and eventual dispositions, Hamparian concludes that "[t]here seems to be a direct correlation between low percentage of personal offenses waived and high proportion of community dispositions (as opposed to incarceration)."[79] Moreover, even within the more serious categories of crimes, age-related patterns of seriousness also affect eventual sentences. Younger offenders are less likely to be armed with guns, to inflict as much injury, or to steal as much property.[80] In short, the differences in sentencing philosophies between the juvenile and adult justice systems continue to work at cross-purposes

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minant of the severity of the adult sentence imposed in Washington, D.C., "youth, at least through the first two years of criminal court jurisdiction, is a perceptible mitigating factor." Confronting Youth Crime, *supra* note 48, at 63 (background statement by Franklin Zimring).

Hamparian's nationwide study of waived youths sentenced as adults found that the majority of juveniles judicially transferred were subsequently fined or placed on probation. Between Two Worlds, *supra* note 8. Even among those confined, 40% had maximum sentences of one year or less. *Id.* at 114. In part, these relatively lenient dispositions reflect the fact that less than one-third of those youths waived judicially were convicted of offenses against the person and that the largest proportion were property offenders, primarily burglars. *Id.* at 106-09.

Heuser's evaluation of the adult sentences received by waived juvenile felony defendants in Oregon shows that the vast majority were property offenders rather than violent offenders, and that as a consequence only 55% of the youths convicted of felonies were incarcerated, while the rest received probation. Heuser, *supra* note 50, at 22-23. Even this rate is inflated by the fact that youths convicted of violent offenses were almost invariably incarcerated. "The incarceration rate is much higher for violent crimes (75.0%) and much lower for property crimes (51.5%)." *Id.* at 23. 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 who are convicted of felonies within juvenile court would receive approximately the same dispositions. *See* Minnesota Dep't of Corrections, Juvenile Release Guidelines 4 (Sept. 1980).

Gillespie and Norman's study of youths waived in Utah between 1967 and 1980 reports that the majority of juveniles who were transferred were not charged with violent offenses, and a majority of those convicted as adults were not imprisoned. L. Kay Gillespie & Michael Norman, *Does Certification Mean Prison: Some Preliminary Findings from Utah*, Juv. & Fam. Ct. J., Fall 1984, at 23, 33-34. In her evaluation of waiver practices, Bortner reports that less than one-third of the transferred juveniles convicted in adult proceedings were sentenced to prison. She concludes that

> a significant number of juveniles remanded to adult court are returned to the community immediately or shortly after conviction. The [possible reasons] include their 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*. . . . [R]emanded juveniles are not being incarcerated uniformly nor for long periods of time.

Bortner, *supra* note 53, at 57 (emphasis in original).

79. Between Two Worlds, *supra* note 8, at 112.

80. Age, Crime, and Sanctions, *supra* note 77, at 5-9; M. Joan McDermott & Michael Hindelang, Juvenile Criminal Behavior in the United States: Its Trends and Patterns (1981).

even when youths make the transition from one system to the other.

The punishment gap—the system's failure to intervene most strongly in the lives of chronic and active criminal offenders—occurs because of qualitative differences in the nature of juveniles' offenses, the differences between the criteria for juvenile court removal and criminal court sentences, and the failure to integrate juvenile and adult criminal records for sentencing purposes.[81] Legislative definition of the criteria for exclusion of offenders from juvenile court can better integrate juvenile removal and adult sentencing practices and reduce the gap in intervention.[82]

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81. Adult criminal courts tend to rely on the seriousness of the present offense and the prior adult criminal history in making sentencing decisions. Their failure to include the juvenile component of the offender's criminal history stems from the confidential nature of juvenile court records, the functional and physical separation of the respective court services staffs, and the sheer bureaucratic ineptitude that makes the maintenance of an integrated system for tracking offenders and compiling complete criminal histories extremely difficult. Age, Crime, and Sanctions, *supra* note 77; Greenwood, *Criminal Behavior and Court Responses*, *supra* note 67, at 54-58; Joan Petersilia, *Juvenile Record Use in Adult Court Proceedings: A Survey of Prosecutors*, 72 J. Crim. L. & Criminology 1746, 1763-68 (1981). In a recent study of the effects of juvenile offense histories on adult sentencing practices, Greenwood reports 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." Factors Affecting Sentence Severity, *supra* note 78, at 36.

In Minnesota, the Minnesota Sentencing Guidelines include a "juvenile component" in the adult criminal history score. *See* Minnesota Sentencing Guidelines Comm'n, Minnesota Sentencing Guidelines & Commentary II.B.4 (rev. ed. 1988), *reprinted in* Minn. Stat. Ann. § 244 app. (West Supp. 1989). Juvenile felony convictions of 16 or 17 year-old youths are included in the adult criminal history score up to a maximum of one point. *Id.* As a result of this limitation and the sentencing guidelines' focus on the seriousness of the present offense, however, an extensive prior record as a juvenile has no independent effect on the first adult sentence. *See id.* at IV (sentencing guidelines grid).

82. Legislation which reduces judicial sentencing discretion by focusing on the most serious offenses or coupling serious present offenses with prior records also increases the likelihood of significant adult sentences for serious young offenders. Hamparian's survey of waived youths reported that the largest group was property offenders, and that the majority of all waived offenders received non-incarcerative dispositions. Between Two Worlds, *supra* note 8, at 106-12. This "punishment gap" has been reported in other studies as well. Age, Crime, and Sanctions, *supra* note 77, at 12-39; Bortner, *supra* note 53, at 56-58; Confronting Youth Crime, *supra* note 48, at 57-64.

It is instructive to compare the sentences of juveniles tried as adults in jurisdictions where they are targeted as serious offenders with the sentences received in more discretionary jurisdictions. 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 adjudications and multiple present felony charges, typically property offenses. Thomas & Bilchik, *supra* note 12, at 470-74. Unlike Hamparian's findings, however, approximately two-thirds of these Florida juveniles were sentenced to substantial terms of imprisonment. *Compare id.* at 473-74 *with* Between Two Worlds, *supra* note 8, at 112-17. Rudman, et al., studied the processing and dispositions of "violent

An incongruity results when youths are waived from juvenile court because they presumably require longer sentences than the juvenile system can provide, but are then placed on probation as adults. An adult sentencing court would be in a better position to respond effectively to chronic juvenile violators if waiver decisions were keyed to offense seriousness and criminal history rather than to amorphous clinical considerations. Focusing on cumulative criminal activity, whether as a juvenile or an adult, may maximize social control of the chronic offender.

III. The Empirical Consequence of Judicial Waiver/Sentencing Decisions: Uneven Exercise and "Justice by Geography"

Although cases of serious but isolated offenses by youths challenge the relative emphases to be placed on the characteristics of the offender or the seriousness of the offense, even less extreme cases raise difficult issues of sentencing policy. The highly variable exercise of judicial sentencing discretion constitutes a critical deficiency of the waiver process. In actual practice, a statewide law of general applicability has very different meanings depending, initially, upon the prosecutor's discretionary decision whether to file a certification motion and, subsequently, upon each judge's application of the vague legislative language to the myriad facts of the specific case. This section of the article examines the highly variable, idiosyncratic results of these exercises of discretion.

Certification for adult prosecution is a rare juvenile court dis-

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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, Eliot Hartstone, Jeffrey Fagan & Melinda Moore, *Violent Youth in Adult Court: Process and Punishment*, 32 Crime & Delinq. 75 (1986) [hereinafter *Violent Youth in Adult Court*]. Of the youths targeted as violent and convicted in criminal courts, over 90% were incarcerated, and their sentences were five times longer than those youths retained in juvenile court. *Id.* at 91-92. They conclude 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 75% of the youths convicted of violent offenses were incarcerated, and that youths committed to prison received average sentences in excess of six years. Heuser, *supra* note 50, at 24, 28-29. Greenwood, et al., compared the sentences of young adult armed robbers and burglars with the sentences of juveniles and older adults to ascertain the prevalence of a "leniency gap." Although not directly comparable to the studies of dispositions of waived juveniles, they report that young adult armed robbers were sentenced as severely as younger and older offenders on the basis of the seriousness of their present offense, but that the effects of prior juvenile records on young adult dispositions were inconsistent across jurisdictions. *See* Factors Affecting Sentence Severity, *supra* note 78, at 52-54; Greenwood *Criminal Behavior and Court Responses*, *supra* note 67, at 172.

position which occurs in only a miniscule fraction of all petitioned delinquency cases. Table 1 summarizes the total numbers and per-

Table 1
Juvenile Delinquency and Adult Certification Petitions Filed

Year =>		1985	1986	1987
TOTAL NUMBER OF DELINQUENCY PETITIONS	N =	22772	23761	25141
	% =	99.4	99.3	99.3
TOTAL NUMBER OF PETITIONS FILED FOR CERTIFICATION AS ADULT	N =	127	142	167
	% =	.6	.6	.7

Source: Minnesota State Planning Agency

centages of delinquency and waiver petitions filed in Minnesota in 1985, 1986, and 1987. The cases of virtually all juveniles charged with delinquency are heard and disposed of in juvenile court; a petition accompanied by a motion for reference for adult prosecution is a very unusual occurrence. Although there is a steady upward trend in the total number of petitions certified for adult prosecution over the years—127, 142, 167—their proportion of the total number of delinquency petitions filed has remained relatively constant at less than 1%.

The data presented in Tables 2-8 are derived from a larger study of juvenile justice administration in Minnesota in 1986.[83] This study uses data collected by the Minnesota Supreme Court's Judicial Information System (SJIS) for delinquency and status offense cases processed in 1986.[84] The data files are housed in the

83. For a more extensive discussion of the data collection and coding protocols see Barry Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. Crim. L. & Criminology 1185, 1209-14 (1989) [hereinafter Feld, *Right to Counsel*].

84. The Minnesota Supreme Court's Judicial Information System (SJIS) compiles statewide statistical data on juvenile delinquency and status petitions filed annually, as well as dependency, neglect, and abuse cases. The data are based on the petitions filed; there is no data base that includes the cases referred to intake, county probation, or juvenile courts that were handled informally. The data collected on a case-specific basis include offense behavior, representation by counsel, court processing information, entries each time a court activity occurs, any continuation or change in the status of a case and types of dispositions. In most counties, this information is obtained from the juvenile courts' own automated computer system and is entered by court administrators in each county who are trained by the state court administrator. Because the juvenile courts themselves rely upon this computerized information for record-keeping, scheduling hearings, maintaining court calendars, and monitoring cases, the information is highly reliable.

National Juvenile Court Data Archive (NJCDA) at the National Center for Juvenile Justice.[85] The sample in this study consists of individual juveniles against whom petitions were filed for delinquency and status offenses. It excludes all juvenile court referrals for abuse, dependency, or neglect, as well as routine traffic violations. Only formally petitioned delinquency and status cases are analyzed; the SJIS does not include data on cases referred to juvenile courts but handled informally.

More commonly, the NJCDA's unit of count is a "case disposed of" by a juvenile court.[86] Unlike Table 1, which reflects the total numbers of petitions filed, the data reported in Tables 2-8 are based on the 17,195 individual juveniles whose cases were formally petitioned in Minnesota's juvenile courts in 1986.[87] The annual data collected by the Minnesota SJIS do not include any family, school, or socioeconomic status variables, or a youth's prior record of offenses, adjudications, or dispositions. Each youth processed in a county's juvenile court, however, receives a unique identifying number which is used for all subsequent purposes. The NJCDA created a youth-based file by merging the 1984, 1985, and 1986 annual data tapes and matching the county/youth identification number across years to reconstruct a juvenile's prior record of petitions, adjudications, and dispositions. Thus, the data reported herein reflect a youth's most current referral to juvenile court as well as all prior petitions, adjudications, and dispositions for at least the preceding two years or more.[88]

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85. The National Juvenile Court Data Archive (NJCDA) is housed at the National Center for Juvenile Justice (NCJJ) which is the research arm of the National Council of Juvenile and Family Court Judges. The Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, has supported the juvenile court data archive for the past decade. Currently, more than 30 states contribute their annual juvenile court data tapes to the NJCDA.

86. The NJCDA unit of count is "cases disposed." Each "case" represents a youth whose case is disposed of by the juvenile court for a new delinquency/status referral. A case is "disposed" when some definite action is taken, whether dismissal, warning, informal counseling or probation, referral to a treatment program, adjudication as a delinquent with some disposition, or transfer to an adult criminal court. Ellen Nimick, Howard Snyder, Dennis Sullivan & Nancy Tierney, Juvenile Court Statistics 1983, at 6 (1987). As a result of multiple referrals, one child may be involved in several "cases" during a calendar year. Moreover, each referral may contain more than one offense or charge. The multiple referrals of an individual child may tend to overstate the numbers of youths handled annually. Multiple charges in one petition may appear to understate the volume of delinquency in a jurisdiction. Because the unit of count is case disposed, one cannot generalize from the NJCDA data either the number of individual youths who are processed by the courts or the number of separate offenses charged to juveniles.

87. Feld, *Right to Counsel*, *supra* note 83, at 1212.

88. The youth identification numbers are unique within a county, but not within the entire state. A youth who has delinquency referrals in several different counties will receive separate identification numbers in each county. Thus, the va-

In this study, the offenses reported by the SJIS were regrouped into six analytical categories.[89] The "felony/minor" offense distinctions provide an indicator of the seriousness of the offense;[90] offenses are also classified as against person, against property, other delinquency, and status. Combining person and property offenses with the felony and minor distinctions produces a six-item offense scale.[91] When a petition alleges more than one offense, the youth is classified on the basis of the most serious charge.[92] This study uses two indicators of the severity of previous

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riable "prior referrals" may be slightly inflated by a juvenile with multiple referrals in several counties, and slightly reduced by juveniles whose prior records consist of only one referral in each of several counties. Such multi-county cases appear to be rare. A cross-tabulation of youths' county of residence with the county of adjudication reveals between 97-99% overlap. Because Minnesota lacks a statewide juvenile information system, a juvenile court at sentencing normally has information regarding only prior referrals in its own county. Thus, the variable "prior referrals" includes the information routinely available to and relied upon by the courts themselves.

89. The National Juvenile Court Data Archive has developed a seventy-eight item coding protocol that recodes the raw offense data provided by the states into a uniform format. This permits delinquency offense data from several different original formats to be recoded for analysis using a single conversion program.

90. The distinctions are also legally relevant for the right to counsel analyses for which the data file was originally created. *Compare, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent defendant must be afforded counsel in felony proceeding) *with* Scott v. Illinois, 440 U.S. 367 (1979) (indigent defendant must be afforded counsel in state court misdemeanor proceeding only if imprisonment is imposed). *See supra* note 83 and accompanying text.

The Minnesota Criminal Code contains three categories of offenses: felony (punishable by more than one year of imprisonment); misdemeanor (punishable by a maximum of 90 days); and gross misdemeanor (an intermediate offense which is neither a felony nor a misdemeanor). *See* Minn. Stat. § 609.02 (2)-(4) (1988). The Minnesota Sentencing Guidelines assign misdemeanors and gross misdemeanors 1/4 and 1/2 points respectively and felonies one point in the computation of an offender's criminal history score. Minnesota Sentencing Guildelines Comm'n, Minnesota Sentencing Guidelines & Commentary II.B.1, II.B.3 (rev. ed. 1988), *reprinted in* Minn. Stat. Ann. § 244 app. (West Supp. 1989). In the present coding schema, gross midemeanors are classified as "minor" offenses to preserve the felony distinction.

91. The "felony offenses against person" generally correspond to the FBI's Uniform Crime Report classification of Part I violent felonies against the person—homicide, rape, robbery, and aggravated assault. "Felony offenses against property" generally include Part I property offenses—burglary, felony theft, and auto theft. "Minor offenses against person" consist primarily of simple assaults, and "minor offenses against property" consist primarily of larceny, shoplifting, or vandalism. "Other delinquency" includes a mixed bag of residual offenses—drug offenses primarily involving possession of marijuana, public order offenses, as well as offenses against the administration of justice, primarily contempt of court or violations of probation or parole. "Status" offenses are the juvenile offenses that are not criminal for adults—runaway, truancy, curfew, ungovernability, and the like. *See generally* FBI, Uniform Crime Reports: 1986, at 331-32 (1987).

92. When a petition contains multiple allegations, there is no way to separate whether they are multiple charges arising out of the same offense transaction or

dispositions: out-of-home placement and secure confinement.[93] Out-of-home placement includes any disposition in which the child is taken from his or her home and placed, for example, in a group home, in foster care, in an in-patient psychiatric or chemical dependency treatment facility, or in a secure institution.[94] Secure confinement is a numerically substantial subset of all out-of-home placement but includes only commitments to the county-level institutions or state training schools.[95]

Although Table 1 indicates that county prosecutors filed a total of 142 certification petitions in 1986, Table 2 shows that only eighty-three individual juveniles actually were certified for adult prosecution. The difference between the two reflects the fact that several separate petitions may be filed against a juvenile in one certification proceeding.[96] In addition, not every juvenile for whom prosecutors seek waiver is ultimately referred for adult prosecution; trial judges do exercise their discretion.[97] While the coding protocols of the SJIS data do not permit comparisons between certified juveniles and those juveniles for whom waiver was sought but denied, they do allow for comparisons between juveniles certified for adult prosecution and those whose cases were disposed of in juvenile courts.

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whether they represent several offenses committed on different occasions which were simply petitioned in the same document.

93. The NJCDA has developed a 22 item conversion program that transforms the state-specific dispositions into a uniform national format. The NJCDA staff speaks directly with the states' data collectors and reporters to determine how specific dispositions or programs should be classified—out-of-home and secure—within the national format.

94. While many inpatient psychiatric or chemical dependency placements are in secure facilities, these commitments are classified as "out-of-home" to distinguish them from more traditional institutional confinement in training schools.

95. In the juvenile justice context, secure confinement is somewhat of a misnomer, because most juvenile training schools and institutions do not rely upon locks, bars, fences, or armed guards to the same degree as do adult maximum security institutions. *Compare, e.g.*, Gresham Sykes, Society of Captives (1958) (maximum security prisons) *with* Barry Feld, Neutralizing Inmate Violence: Juvenile Offenders in Institutions (1977) (juvenile correction institutions).

96. *See, e.g., In re* D.F.B., No. 88-J-0955 (Olmsted County, Minn. Dist. Ct. Apr. 21, 1988) (four delinquency petitions); *In re* T.S.E., 379 N.W.2d 99, 101 (Minn. Ct. App. 1985)(three delinquency petitions).

97. *See, e.g.*, Hennepin County Juvenile Court, Juvenile Court Report: Update 1986, at 3. (Of the 67 motions for certification filed by the county attorney in Hennepin County in 1986, 38 were granted, 12 were denied, and 17 were pending.)

Table 2
Present Offense and Prior Record of Juveniles, 1986

	TOTAL JUVENILES	RETAINED JUVENILES	CERTIFIED JUVENILES
OVERALL			
% =	100.0	99.5	0.5
N ( )	(17195)*	(17112)	(83)
FELONY			
% =	18.4	18.1	69.9
N ( )	(3153)	(3095)	(58)
Felony Offense Against Person			
% =	4.0	3.8	28.9
N ( )	(680)	(656)	(24)
Felony Offense Against Property			
% =	14.4	14.3	41.0
N ( )	(2473)	(2439)	(34)
MISDEMEANOR			
% =	54.4	54.2	22.9
N ( )	(9298)	(9279)	(19)
Minor Offense Against Person			
% =	5.2	5.2	2.4
N ( )	(889)	(887)	(2)
Minor Offense Against Property			
% =	32.3	32.4	8.4
N ( )	(5554)	(5547)	(7)
Other Delinquency			
% =	16.6	16.6	12.0
N ( )	(2855)	(2845)	(10)
STATUS OFFENSE			
% =	27.2	27.2	2.4
N ( )	(4649)	(4647)	(2)
OFFENSE HISTORY			
0 Prior Offenses			
% =	71.9	72.1	33.7
N ( )	(12359)	(12339)	(28)
1 - 2 Prior Offenses			
% =	23.0	22.9	48.2
N ( )	(3962)	(3922)	(40)
3 - 4 Prior Offenses			
% =	3.9	3.8	18.1
N ( )	(669)	(654)	(15)
5+ Prior Offenses			
% =	1.2	1.2	—
N ( )	(205)	(205)	—

* The total numbers of juveniles includes a total of 95 for whom the present offense data is missing. Of the retained juveniles 91 or .5% are missing the present offense, as are 4 or .5% of the certified juveniles.

Table 2 shows that waiver is a highly exceptional juvenile court disposition, occuring in 0.5% of all cases and involving only eighty-three individual juveniles. For the entire state, 18.4% of all juveniles were charged with offenses that would be felonies if committed by adults, 54.4% were charged with minor offenses such as misdemeanors and gross misdemeanors, and 27.2% were charged with non-criminal status offenses. For the entire state, only 4.0% of juveniles were charged with felony offenses against the person, such as assault or robbery, and 14.4% were charged with felony offenses against property, such as burglary. By contrast, a comparison of the certified and retained juveniles reveals 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 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. This is consistent with other research that also reports that serious property offenders, rather than violent juveniles, predominate in the waiver populations.[98]

Thus, the cumulative exercises of prosecutorial and judicial discretion produce a certified population which consists of substantially more serious offenders than the general delinquency population. At the same time, however, more than one-quarter of all certified juveniles are charged with relatively minor offenses. Moreover, vastly more juveniles who were charged with serious offenses were retained by the juvenile system than were waived for adult prosecution. For example, of those youths charged with felony offenses against the person, 656 were retained as juveniles while only 24 were certified as adults.

Table 2 also reports the prior records of retained and certified juveniles. For the state as a whole, 71.9% of all petitioned juveniles appeared in court for their first time, while 23.0% had one or two prior appearances, 3.9% had three or four prior appearances, and only 1.2% had five or more prior referrals. A comparison of the retained and certified juveniles reveals that only about one-third (33.7%) of certified juveniles appeared for the first time, while the vast majority had been referred to court previously. By contrast, nearly three-quarters (72.1%) of the retained juveniles appeared for the first time in juvenile court. Again, it is important to note that the vast majority of juveniles with substantial prior records were tried as juveniles rather than as adults. For example,

98. *See* sources cited *supra* note 78.

Table 3
Present Offense Controlling for Prior Records (1986)

PRIORS =>	0	1 - 2	3 - 4	5+
PRESENT OFFENSE:				
FELONY OFFENSE AGAINST PERSON				
Retained				
% =	3.9	3.6	4.6	1.5
N ( )	(482)	(141)	(30)	(3)
Certified				
% =	32.1	27.5	26.7	—
N ( )	(9)	(11)	(4)	—
FELONY OFFENSE AGAINST PROPERTY				
Retained				
% =	13.3	16.0	17.6	27.3
N ( )	(1639)	(629)	(115)	(56)
Certified				
% =	35.7	42.5	46.7	—
N ( )	(10)	(17)	(7)	—
MINOR OFFENSE AGAINST PERSON				
Retained				
% =	4.9	5.9	6.0	7.3
N ( )	(600)	(233)	(39)	(15)
Certified				
% =	7.1	—	—	—
N ( )	(2)	—	—	—
MINOR OFFENSE AGAINST PROPERTY				
Retained				
% =	33.1	31.0	30.9	22.9
N ( )	(4084)	(1214)	(202)	(47)
Certified				
% =	7.1	7.5	13.3	—
N ( )	(2)	(3)	(2)	—
OTHER DELINQUENCY				
Retained				
% =	16.3	17.5	17.0	19.0
N ( )	(2007)	(688)	(111)	(39)
Certified				
% =	10.7	17.5	—	—
N ( )	(3)	(7)	—	—
STATUS				
Retained				
% =	28.0	25.5	23.4	21.0
N ( )	(3452)	(999)	(153)	(43)
Certified				
% =	3.6	—	6.7	—
N ( )	(1)	—	(1)	—

of those juveniles with three or four prior referrals, 654 were retained as juveniles while only 15 were certified as adults.

Table 3 compares the retained and certified juveniles on the basis of their present offense and prior records simultaneously. Unfortunately, formal offense categories may be too general to capture all of the important qualitative distinctions regarding the seriousness of the present offense (i.e., extent of victimization, presence of a weapon, value taken, etc.). As a result of the relatively small number of certified youths, certified juveniles charged with homicide may be compared within an offense category to retained youths charged only with aggravated assault or armed robbery. The greater homogeneity of offenses among certified and retained juveniles charged with felony offenses against property, such as burglary or auto theft, allows more certain analysis.

While recognizing that there may be some qualitative differences within offense categories, comparing retained and certified juveniles on the basis of their present offense and prior record reveals that far more juveniles charged with similar offenses and with comparable prior records are retained than are certified. Thus, for those juveniles charged with felony offenses against property—the largest proportion of certified juveniles (41.0%, Table 2)—ten youths making their first juvenile court appearance were certified while 1,639 were not. Similarly, for those with one or two prior referrals, seventeen were certified while 629 were retained. At every level of offense, far more juveniles, including many possessing more extensive prior records, were retained than were certified. Thus, while Table 2 indicates some degree of selectivity in identifying the certified population (greater selection of serious property offenders), Table 3 reveals that certified juveniles may be rather similar to retained juveniles. Either great arbitrariness, or factors other than present offense and prior record must account for this sentencing decision.

Table 4 summarizes the age of retained and certified juveniles. As would be expected, certification is reserved almost exclusively for "older" juveniles. While juveniles aged fifteen or under account for 48.8% of the total juvenile court clientele, only one fifteen-year-old juvenile (1.2%) was certified. By contrast, more than three-quarters (77.2%) of certified juveniles were seventeen or eighteen at the time of the waiver proceedings. In short, the potential period of confinement remaining within juvenile court jurisdiction appears to influence substantially the decision to waive a juvenile. Again, however, it is important to note that while fifty-two seventeen-year-old youths were certified, 4,382

Table 4
Waiver and Age of Juvenile

AGE	TOTAL JUVENILES	RETAINED JUVENILES	CERTIFIED JUVENILES
12>			
% =	6.1	6.1	—
N ( )	(1042)	(1042)	—
13			
% =	7.8	7.9	—
N ( )	(1346)	(1346)	—
14			
% =	13.8	13.9	—
N ( )	(2373)	(2373)	—
15			
% =	21.1	21.2	1.2
N ( )	(3636)	(3635)	(1)
16			
% =	22.6	22.6	21.7
N ( )	(3888)	(3870)	(18)
17			
% =	25.8	25.6	62.7
N ( )	(4434)	(4382)	(52)
18			
% =	2.8	2.7	14.5
N ( )	(476)	(464)	(12)

other seventeen-year-olds were retained as juveniles, re-emphasizing the infrequent exercise of the waiver decision.

Although age, present offense, and prior record are among the factors influencing juvenile court sentencing decisions, other variables that affect a youth's disposition include a juvenile's pretrial detention status and any sentences imposed during prior appearances.[99] Table 5 summarizes the detention status and prior dispositions of retained and certified juveniles.

For the entire state, 7.6% of all juveniles received one or more detention hearings.[100] Fewer retained juveniles (7.4%), as

99. *See, e.g.*, Feld, *Right to Counsel*, *supra* note 83, at 1305-11 & Table 47; *see also* Terence Thornberry & R.L. Christenson, *Juvenile Justice Decision Making as a Longitudinal Process*, 63 Soc. Forces 433, 442 (1984); John Henretta, Charles Frazier & Donna Bishop, *The Effects of Prior Case Outcomes on Juvenile Justice Decision-Making*, 65 Soc. Forces 554, 561 (1986) (confirming Thornberry & Christenson's finding that the outcome of current cases is highly dependent on prior dispositions).

100. Feld, *Right to Counsel*, *supra* note 83, at 1252-56 & Table 15.

Table 5
Pretrial Trial Detention Status and Previous Dispositions

	TOTAL JUVENILES	RETAINED JUVENILES	CERTIFIED JUVENILES
DETAINED OVERALL			
% =	7.6	7.4	45.8
N ( )	(1309)	(1271)	(38)
FELONY			
% =	14.9	14.2	55.2
N ( )	(470)	(438)	(32)
Felony Offense Against Person			
% =	24.3	22.9	62.5
N ( )	(165)	(150)	(15)
Felony Offense Against Property			
% =	12.3	11.8	50.0
N ( )	(305)	(288)	(17)
MISDEMEANOR			
% =	6.5	6.5	26.3
N ( )	(606)	(601)	(5)
Minor Offense Against Person			
% =	11.4	11.4	—
N ( )	(101)	(101)	—
Minor Offense Against Property			
% =	6.0	6.0	14.3
N ( )	(332)	(331)	(1)
Other Delinquency			
% =	6.1	5.9	40.0
N ( )	(173)	(169)	(4)
STATUS OFFENSE			
% =	4.8	4.8	—
N ( )	(221)	(221)	—
PRIOR DISPOSITION			
Home Removal			
% =	8.8	8.6	48.2
N ( )	(1505)	(1465)	(40)
Secure Confinement			
% =	5.7	5.6	43.4
N ( )	(985)	(949)	(36)

contrasted with certified juveniles (45.8%), were detained before trial. The seriousness of the present offense and the length of the prior record are among the factors associated with the initial decision to detain.[101] Logically, because certified juveniles, as a group, constitute a somewhat more serious class of offenders than re-

101. *See id.* at 1299-1305 & Table 43.

tained juveniles, a larger proportion of them are detained. A juvenile's pre-trial detention status also has an independent effect on the severity of the subsequent disposition.[102] It is not surprising that a larger proportion of juveniles who ultimately were certified were initially detained. Although previous research indicates that there are no obvious formal rationales for the initial detention decision,[103] apparently similar, albeit unmeasurable, factors influence both the initial detention decision and the later sentencing or waiver decisions. To the extent that the present offenses and prior records of certified juveniles are similar to those of many retained juveniles, how does a court decide to detain a youth? What criteria guide these decisions?

Because a juvenile's "amenability to treatment" is assessed, in part, by his or her reponsiveness to previous intervention, one would expect retained juveniles to have experienced fewer severe sentences than their certified counterparts. In part, a previous disposition reflects the combined effects of age and a prior record: certified juveniles were typically older[104] and with somewhat more extensive delinquency involvements.[105] Recall that only 28.1% of Minnesota's delinquents had one or more prior delinquency referrals. For the entire state, only 8.8% of all juveniles were removed from their homes on their previous appearance, and only 5.7% were confined. Table 5 compares the previous dispositions of retained juveniles to their certified counterparts. Nearly half of the certified juveniles had been removed from their homes (48.2%) or confined (43.4%) as a result of their previous juvenile court appearances. In contrast, of those retained only 8.6% had been removed from their homes and 5.6% had been confined. Thus, a far larger proportion of certified youths than retained juveniles had

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102. *Id.* at 1305-11 & Table 47.

103. *See, e.g.*, Robert Coates, Alden Miller & Lloyd Ohlin, Diversity in a Youth Correctional System 65-67, 101-04 (1978)(current offense, offense history, and prior experience in youth corrections do not appear to be strongly related to the detention decision); Charles Frazier & Donna Bishop, *The Pretrial Detention of Juveniles and Its Impact on Case Dispositions*, 76 J. Crim. L. & Criminology 1132, 1143 (1985)("[N]either legal variables nor sociodemographic characteristics can predict the probability of being detained.").

Research in Minnesota concluded:

> Detention constitutes a highly arbitrary and capricious process of short-term confinement with no tenable or objective rationale. Once it occurs, however, it then increases the likelihood of additional post-adjudication sanctions as well. In operation, detention almost randomly imposes punishment on some juveniles for no obvious reason and then punishes them again for having been punished before.

Feld, *Right to Counsel*, *supra* note 83, at 1338.

104. *See supra* Table 4, p. 34.

105. *See supra* Table 2, p. 30.

previous exposure to juvenile court "rehabilitative" efforts, albeit without apparent success. Significantly, the majority of certified youths had not received intensive intervention prior to their waiver.

The data presented in Tables 2-5 indicate that as a class, certified juveniles differed from their retained counterparts. They were more likely to be older youths, to be charged with more serious offenses, to possess more extensive prior records, to have previously received a severe juvenile disposition, and to be detained pending their certification proceedings. At the same time, however, the proportional comparisons mask the reality that in absolute numerical terms the great majority of juveniles, with seemingly identical offense and prior record characteristics as their certified peers, are retained. Within each offense category, little seems to differentiate the certified juveniles from the larger delinquent population from which they are selected.

The preceding analyses focused on bivariate relationships between selected variables while controlling for the effects of one or more other variables. The next analysis uses ordinary least squares multiple regression procedures to analyze the relationships among a number of independent variables and to assess the relative impact of each independent variable on the dependent variable—certification—while controlling for the effects of other variables. Using regression techniques allows one to estimate and evaluate the strength and significance of the independent contributions of a number of factors to the explanation or prediction of the dependent variable.[106] Multiple regression estimates the relationships between the dependent variable and the independent variables by extracting from each variable the effects of the others. The standardized regression coefficient for each independent variable ("beta") expresses the relationship between each independent variable and the dependent variable, once the effects of the other variables have been taken into account. The relative importance of each independent variable in predicting the dependent variable is determined by the size of the beta, or standardized regression, coefficient. Where two or more independent variables are measured in different units, standardized coefficients provide the only way to compare the relative effect on the dependent variable of each independent variable. Table 6 reports the standardized beta

106. *See generally* Fred Kerlinger & Elazar Pedhazur, Multiple Regression in Behavioral Research (1973); David Kleinbaum & Lawrence Kupper, Applied Regression Analysis and Other Multivariable Methods (1978); Michael Lewis-Beck, Applied Regression: An Introduction (1980).

Table 6
Regression Model of Factors Influencing Certification Decision

INDEPENDENT VARIABLES	STANDARDIZED BETA COEFFICIENT	MULTIPLE R	R^2
PREVIOUS SECURE CONFINEMENT DISPOSITION	.097*	.113	.013
DETENTION	−.082*	.143	.020
AGE	−.073*	.160	.026
PRESENT OFFENSE SEVERITY	.058*	.171	.030
NUMBER OF OFFENSES ALLEGED	−.033*	.174	.031

* $p < .001$

coefficient, the multiple regression correlation coefficient ("R"), and R^2. The R^2 summarizes the amount of variation in the dependent variable that is explained by the independent variables included in the regression equation. The R^2 has the additional virtue of being interpretable as a straightforward percentage. For example, an $R^2=.10$ means that 10% of the variation in the dependent variable is explained by the joint operation of the independent variables.

A forward, stepwise regression equation[107] was computed using SPSS for the dichotomous dependent variable "certified."[108]

107. Norman Nie, C. Hadlai Hull, Jean Jenkins, Karin Steinbrenner & Dale Bent, SPSS: Statistical Package for the Social Sciences (2d ed. 1975). Using standard regression techniques, each variable is added to the regression equation in a separate step after the influence of all other variables has been calculated. The increment in R^2 due to the addition of that variable is taken as the component of variation attributable to that variable. Forward stepwise inclusion enters independent variables only if they meet certain statistical criteria (e.g., $p < .05$); the respective contribution of each variable to the explained variance determines the order of inclusion. *Id.* at 345.

108. Because the dependent variable is a dichotomous, categorical variable rather than interval variable, log linear or logit approaches to multivariate analyses may be preferable to ordinary least squares regression. *See, e.g.*, Lawrence Cohen & James Kluegel, *Determinants of Juvenile Court Dispositions: Ascriptive and Achieved Factors in Two Metropolitan Courts*, 43 Am. Soc. Rev. 162, 164 (1978) (criticizing earlier research on juvenile justice decision-making for using inadequate data analytic techniques). Thornberry reanalyzed the data in his earlier study and concluded that the findings "are remarkably similar to the ones reached in this author's earlier study, even though the earlier work was based on less sophisticated analytic techniques." Terence Thornberry, *Sentencing Disparities in the Juvenile Justice System*, 70 J. Crim. L. & Criminology 164, 170-71 (1979). Because the sam-

The independent variables included the present offense, prior record, and court-process variables.[109] As previously noted, the SJIS data include only court-processing variables and the study cannot control for the influence of other factors that juvenile courts may deem relevant to sentencing such as family status, socioeconomic status, clinical evaluations, school or work involvement, and the like.

Table 6 presents the regression equation for the decision to certify a juvenile for adult prosecution. The first variable entering the equation is a previous secure confinement disposition. A juvenile's pretrial detention status, age, the seriousness of the present offense, and the number of offenses alleged in the certification petition also enter the equation. The bivariate analyses revealed that a substantial proportion of certified juveniles had received previous juvenile court dispositions (Table 5) and had been detained pending their certification hearing. Once the regression model controls for the effect of a previous disposition, there is no additional influence of a prior record of delinquency as such on the decision to certify.[110] Thus, it appears to be previous intervention, not simply a prior record of referrals, that influences the waiver decision.

The regression equation also confirms the bivariate analyses that revealed that certified juveniles tended to be older (Table 4) and charged with more serious offenses (Table 2). The number of offenses alleged in the petition is an additional indicator that the certified juveniles were charged with more serious offenses.[111]

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ple size in this study is very large (N=17,195), the data robust, and the complexity of the data requires multivariate analyses, ordinary least squares regression was used. *See* Kleinbaum & Kupper, *supra* note 106, at 45-46, 137-38.

109. The independent variables and their coding, which effects the signs of the beta coefficients, include: a previous secure confinement disposition (1=yes, 2=no); a previous out-of-home placement (1=yes, 2=no); age (1=12 or younger, through 7=18 years of age); detention (1=no, 2=yes); priors (1=none, through 4=5 or more); present offense (1=felony offense against person, through 6=status); number of offenses at disposition (1=none, through 6=five or more).

110. Other studies have also reported that a prior record, as such, is not as significant a variable in the transfer decision as might be expected. For example, Jeffrey Fagan, Martin Forst, and T. Scott Vivona, *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 Crime & Delinq. 259 (1987), report:

> The surprising finding that prior record did not enter either the local or aggregate models contradicts the widespread assumptions that judges weigh offense history (either length or severity) as a primary criterion for amenability to treatment. But the finding on age of onset as a predictor of transfer suggests that judges may view this factor as a proxy for length of career or prior rehabilitative efforts.

Id. at 276.

111. *See* Feld, *Right to Counsel*, *supra* note 83, at 1280-82 & Table 31. "A sub-

While statistically significant, the beta weights are approximately equal and very modest, indicating that no single factor strongly influences the certification decision.

The most surprising result of the regression equation is how little of the variance in sentencing it explains, only 3.1%. By contrast, for more routine sentencing in juvenile courts,

> [a]ll of the independent variables account for 24.5% of the variance in home removal and 22.4% of the variance in institutionalization. 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 (beta=.357). Similarly, a previous disposition of secure confinement is the most powerful determinant of the present decision to incarcerate a youth (beta=.354).[112]

Although a previous sentence of institutional confinement is the most powerful variable influencing certification, its explanatory power is only about one-quarter of that for the more routine decision to confine a juvenile (beta=.097 versus .354). In short, while the regression equation identifies the seemingly appropriate variables, they do not explain much of the variance in the decision.

There is very little systematic variation among the independent variables that explains those few juveniles who are certified. With so few certifications, no single factor or group of factors explains why or how certified juveniles are selected from the larger universe of juveniles. Again, this interpretation is consistent with the earlier observation that the present offenses and prior records of certified juveniles reveal no obvious differences compared to the records of those retained (Table 3).

Although previous disposition, age, and the seriousness of the present offense bear some relationship to the waiver decision, nearly all of the variance in certifying juveniles cannot be explained. With respect to the large amount of unexplained variation in juvenile court sentencing practices, commentators have observed that "the juvenile justice process is so ungoverned by procedural rules and so haphazard in the attribution of relevance to any particular variables or set of variables that judicial dispositions are very commonly the product of an arbitrary and capricious

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stantially larger proportion of cases involving felony offenses and offenses against the person involve multiple offenses at disposition: 30.4% of felony offenses against the person; 30.2% of felony offenses against property; and 18.0% of minor offenses against the person." *Id.* at 1281. Because most certified juveniles were charged with felony offenses, the presence of multiple charges is as expected.

112. Feld, *Right to Counsel*, *supra* note 83, at 1305-06.

decision-making process."[113] The absence of any explanatory relationship between legal variables and certification may be interpreted as true "individualized justice," where every youth receives a unique disposition tailored to his or her individual needs. An equally plausible interpretation, however, is that no rationale exists in waiver decision-making; that the decision consists of little more than intuition, guesswork, and hope, constrained marginally by the youth's present offense and prior sentence. If such is the case, individualization is simply a euphemism for arbitrary and capricious decision-making. While such a finding with respect to routine decision-making is rather troubling,[114] it is even more disturbing because waiver is the most significant sentencing decision that juvenile court judges make.

Discretionary waiver raises problems in addition to the apparent lack of distinction between those few juveniles who are certified and the vast majority who are retained as juveniles. Similarly situated juveniles in different parts of the state do not share an equal risk of transfer. Tables 7 and 8 summarize urban, suburban and small urban, and rural variations in certification decision-making.[115]

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113. Ineke Marshall & Charles Thomas, *Discretionary Decision-Making and the Juvenile Court*, Juv. & Fam. Ct. J., Aug. 1983, at 47, 57.

114. Feld, *Punishment, Treatment, supra* note 14, at 879-91.

115. The classification of counties as urban, suburban or small urban, and rural depends on the concept of Standardized Metropolitan Statistical Area (SMSA). An SMSA is an integrated economic and social unit with a large population nucleus. An SMSA always includes a central city with a population of 50,000 or greater, and the remainder of the county in which the central city is located. In addition, when the relationships between the central city and contiguous counties meet specified criteria of metropolitan character and integration, an SMSA also includes the contiguous counties and their smaller cities (generally with populations less than 50,000). Thus, an SMSA includes the central cities, the suburban cities, and the remainder of the area within the SMSA counties but outside the suburban cities. Howard Snyder & Ellen Nimick, *City Delinquents and Their Country Cousins: A Description of Juvenile Delinquency in Metropolitan and Nonmetropolitan Areas*, 2 Today's Delinq. 45, 67 (1983).

For purposes of this study, counties were classified as *urban* if they were located within an SMSA, had one or more cities of 100,000 inhabitants, *and* had a county juvenile population aged 10-17 of at least 50,000 youths. Hennepin County (Minneapolis) and Ramsey County (St. Paul) are classified as urban counties.

Counties were classified as *suburban* or *small urban* if they were located within a metropolitan SMSA (suburban) or, if within their own SMSA (small urban), had one or more cities of 25,000 to 100,000 inhabitants, *and* had a county juvenile population aged 10-17 of between 7,500 and 50,000 youths. The suburban counties meeting the SMSA and juvenile population criteria include: Anoka, Dakota, Scott, Washington, and Wright Counties. The small urban counties and their principal cities include: Olmsted (Rochester), St. Louis (Duluth), and Stearns (St. Cloud).

Table 7
Urban, Suburban, and Rural Variations in Waiver by Present Offense and Prior Record, 1986

	URBAN	SUBURBAN	RURAL
TOTAL DELINQUENTS			
% =	36.5	21.4	42.1
N ( )	(6273)	(3681)	(7241)
WAIVED JUVENILES			
% =	42.2	24.1	33.7
N ( )	(35)	(20)	(28)
FELONY			
% =	88.6	60.0	53.6
N ( )	(31)	(12)	(15)
Felony Offense Against Person			
% =	37.1	15.0	28.6
N ( )	(13)	(3)	(8)
Felony Offense Against Property			
% =	51.4	45.0	25.0
N ( )	(18)	(9)	(7)
MISDEMEANOR			
% =	5.7	25.0	42.9
N ( )	(2)	(5)	(12)
Minor Offense Against Person			
% =	—	—	7.1
N ( )	—	—	(2)
Minor Offense Against Property			
% =	2.9	10.0	14.3
N ( )	(1)	(2)	(4)
Other Delinquency			
% =	2.9	15.0	21.4
N ( )	(1)	(3)	(6)
STATUS			
% =	—	10.0	—
N ( )	—	(2)	—
PRIOR RECORDS			
0 Offenses			
% =	37.1	15.0	42.9
N ( )	(13)	(3)	(12)
1 - 2 Offenses			
% =	48.6	55.0	42.9
N ( )	(17)	(11)	(12)
3 - 4 Offenses			
% =	14.3	30.0	14.3
N ( )	(5)	(6)	(4)
5+ Offenses			
% =	—	—	—
N ( )	—	—	—

The first two rows of Table 7 show the geographic location of Minnesota's delinquents and the subset of certified youths. The largest plurality of certified juveniles are in urban counties (42.2%). While rural juveniles account for 42.1% of the total delinquent population, they contribute only 33.7% of the certified juvenile population. In part, this is because rural youths generally commit less serious offenses and have less extensive prior records than do their urban cousins.[116]

An examination of the offenses for which juveniles are certified reveals an interesting geographic pattern. Urban youths are certified almost exclusively for felonious misconduct (88.6%), with the largest proportion involving felony offenses against property, such as burglary (51.4%). The smallest proportion of certified juveniles charged with felony offenses (53.6%) occurred in rural counties. Furthermore, in rural counties, youths charged with felony offenses against the person (28.6%), rather than property, predominate. While only 5.7% of waived urban youths are certified for non-felony charges, 35.0% of waived suburban youths are certified for misdemeanors or status offenses, as are 42.9% of rural youths. 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.[117] Table

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All of the remaining counties in Minnesota were classified as rural because they are located outside of an SMSA, have no principal city of at least 25,000 inhabitants, and have a total juvenile population aged 10-17 of less than 7,500.

116. *Cf.* Feld, *Right to Counsel*, *supra* note 83, at 1215-16 & Table 1; *see also* Snyder & Nimick, *supra* note 115, at 45; Office of Juvenile Justice & Delinquency Prevention, U.S. Dep't of Justice, OJJDP Update on Statistics: The Juvenile Court's Response to Violent Crime 1 (Jan. 1989) ("Violent offense referrals were more common in large urban counties: the violent offense referral rate in large counties was three times the rate in small counties and 31 percent greater than that in medium-sized counties.").

117. A study of geographic variations in certification practices in Minnesota conducted a decade earlier yielded similar findings. Supreme Court Juvenile Justice Study Comm'n, Report to the Minnesota Supreme Court 61-78 (Nov. 1976) (on file with *Law & Inequality*); *see* Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 552 (summarizing the findings of the Supreme Court's Study Commission).

> [T]he Commission found pronounced differences in certification practices in urban and rural counties throughout Minnesota. According to the study, the reference or certification process is used for three different purposes or objectives:
>
> > In Hennepin County certifications are requested for youths who, in the judgment of the office of the county attorney, represent substantial threats to the public safety or cannot be effectively handled with the resources currently available through the juvenile court process. This purpose or objective is consistent with legislative intent in enacting the enabling statute. A second purpose for which certification is utilized in a number of courts is to attempt to insure that the offender will be subject to correctional or rehabilitative efforts beyond his 18th birthday.

7 also reports on the prior records of certified juveniles in the various geographic locales. While 62.9% of urban juveniles and 85.0% of suburban youths had one or more prior delinquency referrals, only 57.1% of rural youths had a prior referral. Thus, rural youths were certified on the basis of less serious present offenses and with less extensive prior records.

The geographical disparities in certification are even more apparent when a youth's prior juvenile court dispositions are examined. Recall from Table 6 that a previous secure confinement disposition was the most powerful variable explaining the certification decision. Table 5 reported that 48.2% of all certified juveniles previously had been removed from their homes and 43.4% of certified juveniles had been institutionalized. Table 8 presents the previous sentences imposed upon certified youths in the different geographic locales. Both suburban and urban certified juveniles had received extensive prior juvenile court intervention in the form of removal from their homes or institutional confinement. By contrast, certified rural youths had experienced far less previous intervention. Only 28.6% had been exposed to any out-of-home treatment program, including only 25.0% who had been institutionalized previously. To the extent that a prior disposition provides a surrogate for a record of prior referrals, it is apparent that certified rural youths are substantially less criminally involved than are their urban counterparts.

> Thus youths who are approaching their 18th birthday at the time of their offense may be certified because some juvenile court judges feel that a youth committed to the Commission of Corrections as a juvenile "automatically" will be released from state jurisdiction when he turns 18. A third purpose for which certification is utilized is to allow the imposition of a sanction such as a fine or short jail sentence upon juveniles who committed relatively minor offenses and who, it is felt, are not in need of probation or other treatments available through the juvenile court.

The discretion afforded by this typical waiver statute thus lends itself to a variety of applications, which, in turn, can lead to inequities. For example, analysis of waiver decisions in a sample of counties throughout Minnesota showed that urban offenders considered for certification had generally committed more serious offenses and had more extensive prior records than their rural counterparts. In addition to more recorded offenses, certified urban youths had records extending over a longer period of time and more appearances on delinquency petitions than did rural youths. Yet, despite the substantially greater seriousness of the present offense and the longer and more extensive prior records of urban youths, rural youngsters were much more likely to be certified for adult prosecution.

Id.

Table 8
Previous Dispositions of Urban, Suburban, and Rural Certified Juveniles

	URBAN	SUBURBAN	RURAL
HOME REMOVAL			
% =	48.6	75.0	28.6
N ( )	(17)	(15)	(8)
SECURE CONFINEMENT			
% =	45.7	65.0	25.0
N ( )	(16)	(13)	(7)

These urban/rural disparities are perhaps understandable in terms of the relative tolerance with which various communities view deviant behavior. Because crime, especially serious crime, is heavily concentrated in urban areas, urban courts are provided with a frame of reference and perspective for responding to serious offenders not available to courts in rural counties, which appear to deal with qualitatively less serious delinquency problems.

These urban/rural disparities emerge under a statute intended to be applied uniformly throughout the state. They suggest that the waiver statute provides for little more than a subjective exercise of discretion, the antithesis of a rule of law. A statute explicitly providing for different treatment of youths solely on the basis of urban/rural distinctions, however, would likely violate equal protection.[118] The discretion afforded by a broad, general statute permits the same violation to occur de facto. Rural juveniles are subjected to adult criminal prosecutions more readily than are urban juveniles, despite their less serious present offenses or prior sentences.[119]

118. In Long v. Robinson, 316 F. Supp. 22 (D. Md. 1970), *aff'd*, 436 F.2d 1116 (4th Cir. 1971), the federal district court invalidated a Maryland statute that set a statewide juvenile court age limit of 18 but that restricted the juvenile age limit to 16 in Baltimore City. As the court noted, this statutory scheme created two classes of 16- and 17-year-olds: "those who reside outside of Baltimore City and/or who although residing in Baltimore City are not arrested within city limits; and those who whether or not residing within the limits of Baltimore City are arrested therein." *Id.* at 26. While recognizing that geographic distinctions do not necessarily offend equal protection, the court was unable to find a psychological, physical, sociological, or other rational basis for distinguishing between 16- and 17-year-olds arrested in Baltimore City and those arrested thoughout the rest of the state. The court invalidated the Baltimore City exception as "arbitrary, unreasonably discriminatory, and not related to any legitimate State objective." *Id.* at 28. *But see* Francis v. State, 459 F. Supp. 163 (D. Md. 1978) (upholding territorial distinctions that serve a reasonable state interest), *aff'd*, 605 F.2d 747 (4th Cir. 1979).

119. Ironically, Minnesota's Adult Sentencing Guidelines were adopted, at least in part, to eliminate the effects of geographic variations on adult sentencing deci-

The empirical reality, revealed by statistical analysis, is that judges cannot evenhandedly administer these discretionary statutes. Within a single jurisdiction, judges interpret and apply waiver statutes inconsistently from county to county and from court to court.[120] Other analyses of waiver corroborate these more recent Minnesota findings and provide substantial evidence that judicial waiver practices are inherently arbitrary, capricious, and discriminatory.[121]

IV. Waiver in Minnesota: A Decade of Experience From *Dahl* to *D.F.B.* (David F. Brom)

Judicial waiver practices pose two primary and interrelated problems—the highly discretionary, idiosyncratic nature of this individualized sentencing decision, and the lack of integration between the criteria for removal of offenders from juvenile court and the sentencing practices in adult criminal courts. The source of both problems is individualized judicial sentencing discretion. A juvenile court judge who attempts to make a clinical determination of a youth's dangerousness or amenability to treatment must do so even though little evidence exists of treatments to which some serious offenders consistently respond, or of valid indicators that permit accurate individualized identification of those who might respond to intervention. Through indeterminate waiver decisions, juvenile courts exercise extraordinarily broad discretion that exacerbates the potential for abuse and discrimination. The presence of organizational or political considerations, resulting at times in waivers for less serious offenses, further aggravates the "lack of fit" between juvenile and adult criminal sentencing practices. Although the routine administration of waiver statutes poses a variety of problems, discretionary sentencing practices undergo their most severe tests when confronting serious but isolated of-

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sions. *See* Minnesota Sentencing Guidelines Comm'n, Report to the Legislature 5 (1980) ("We discovered some regional differences in sentencing. A slightly lower proportion of person offenders was committed from metropolitan areas than from non-metropolitan areas.").

120. Intrastate geographic variations in waiver statutes are not unique to Minnesota. *See, e.g.*, Leonard Edwards, *The Case for Abolishing Fitness Hearings in Juvenile Court*, 17 Santa Clara L. Rev. 595, 610-13 (1977) (county by county disparity in California); Heuser, *supra* note 50, at 30 (1985) (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 8, at 147-98 (county by county disparity within states in Northeast Region, North Central Region, Southeast Region, South Central Region, and West Region).

121. Between Two Worlds, *supra* note 8, at 102-05.

fenders—apparently ordinary youths with no prior delinquency or treatment who suddenly commit heinous crimes.

A. The Legislative Response to In re Dahl

In *In re Dahl*,[122] the Minnesota Supreme Court confronted some of the procedural and substantive problems inherent in the juvenile waiver process. Dahl, seventeen years old at the time of the alleged offense and eighteen years old at the time delinquency and certification proceedings were initiated, murdered another youth with several shotgun blasts after taking him to a remote area of northern Minnesota. Despite Dahl's virtues[123] and his lack of previous contacts with the juvenile justice system,[124] he was certified to stand trial as an adult on the grounds that he was both unamenable to treatment and a threat to the public safety. The reasons given for certifying Dahl were his age, the seriousness of his alleged offense, and the concern that he could not be adequately treated within the three years remaining under juvenile court jurisdiction.[125] The record upon which the state's certification motion was granted contained neither psychological or psychiatric information nor negative information regarding the juvenile's background apart from the alleged homicide.[126] The case, as presented to the Minnesota Supreme Court, thus raised the relatively narrow issue whether a juvenile's age and the seriousness of the alleged offense standing alone satisfied the statutory requirements of nonamenability or dangerousness.

The *Dahl* court explicitly held that "the existing statutory framework does not authorize referral based on the specific crime charged. . . . [T]his court did not intend the application of the *Hogan* factors to result in the referral of a juvenile solely because of

122. 278 N.W.2d 316 (Minn. 1979).

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

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

125. *Id.* at 318. The juvenile court's conclusion that Dahl could only receive three years of treatment as a juvenile, i.e., until age 21, was based on Minn. Stat. § 260.181(4)(1978). Subsequent amendments to that statute reduced the maximum age of juvenile court jurisdiction over youths from 21 to 19 years of age. *See* Minn. Stat. § 260.181(4) (1988); *see also infra* notes 268-271 and accompanying text.

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

the alleged offense."[127] The court went on to say that the offense charged was obviously "*among* the relevant factors to be considered"[128] and "[t]he record must contain *direct evidence* that the juvenile endangers the public safety for the statutory reference standard to be satisfied."[129] The case was thus remanded to the trial court, which, in order to certify the youth, had to include in the record direct evidence, apart from the offense charged, that the juvenile was not amenable to treatment or presented a threat to the public safety.

The case, as decided, simply addressed the narrow issue of what factual record is necessary to support a judicial determination of nonamenability or dangerousness; the court concluded that proof of age and *seriousness* of the crime alone were insufficient without additional direct evidence. In dicta, however, the court expressed serious concerns about the adequacy of the transfer legislation and clearly indicated to the legislature that the waiver criteria were in need of modification and greater specificity.[130]

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127. *Id.* at 321. In the earlier case of State v. Hogan, 297 Minn. 430, 212 N.W.2d 664 (1973), the Minnesota Supreme Court had 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 *Hogan* court said that the following factors should be considered to determine whether the public safety would be threatened by retaining juvenile court jurisdiction:

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

Id. at 438, 212 N.W.2d at 669-70 (1973). The *Hogan* and *Kent* criteria were incorporated into Rule 32.05(2) of the Minnesota Rules of Procedure for Juvenile Courts. *See* Feld, *Criminalizing Juvenile Justice*, *supra* note 8, at 266-72.

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

128. *Dahl* 278 N.W.2d at 321 (emphasis in original) (citing State v. Hogan, 297 Minn. 430, 212 N.W.2d 664 (1978)).

129. *Id.* (emphasis added).

130. *Id.* at 318. In 1983, the Minnesota Supreme Court promulgated rules of procedure for juvenile courts that included a variety of factors that courts should consider in making waiver decisions. These factors, drawn from *Hogan*, 297 Minn. at 438, 212 N.W.2d at 669-70, and Kent v. United States, 383 U.S. 541, 566-67 app. (1966), include:

> (a) The seriousness of the offense in terms of community protection,
>
> (b) the circumstances surrounding the offense,

The court, sensitive that judicial determinations of amenability or dangerousness produced decisions that were potentially erroneous and prejudicial to juveniles and to public safety, concluded that "[a] re-evaluation of the existing certification process may be in order."[131]

The sentencing conflicts posed by isolated but very serious offenders such as Dahl and Brom dramatically highlight the conceptual inadequacy of judicial determinations of amenability or dangerousness. Although the commission of one serious offense is not reliable evidence for predicting either future offenses or amenability to treatment, the seriousness of the offense may overwhelm any judge's effort to give individualized consideration to the offender. These youths pose a fundamental conflict between the primary rehabilitative mission of juvenile courts and the waiver inquiry and the retributivist impulses occasioned by highly visible serious crimes. Couching these broad policy issues in indi-

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(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. Cts. 32.05(2); *see also* Feld, *Criminalizing Juvenile Justice*, *supra* note 8, at 266-72, concluding that

> [t]he catalogue of miscellaneous factors promulgated by the Minnesota Supreme Court provides neither a "central guiding principle" nor much practical guidance to 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.

Id. at 272.

131. *Dahl*, 278 N.W.2d 316, 319 (Minn. 1979). 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.

vidualized subjective or clinical terms—amenability or dangerousness—disserves their rational resolution.

In 1980, as a result of the *Dahl* decision, the Minnesota legislature revised the state's juvenile code and significantly amended a number of interrelated provisions involving certification.[132] The legislature repudiated the theory that the purposes of Minnesota's juvenile courts were exclusively benevolent and rehabilitative. For youths charged with crimes, the purposes of the juvenile code now include maintaining the integrity of the substantive criminal law and developing individual responsibility.[133] The amendment marked a fundamental philosophical departure from the previous emphasis of rehabilitative purposes and a movement toward purposes explicitly emphasizing punishment and social control.

The amended legislation also mandated a probable cause hearing on the alleged offense to provide a basis for the certification motion.[134] Although the legislature retained, without change, the basic waiver criteria of nonamenability to treatment or dangerousness,[135] it placed the burden of proof in waiver proceedings on the prosecution to establish by "clear and convincing evidence"

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132. Those legislative changes are examined extensively in Feld, *Dismantling the "Rehabilitative Ideal," supra* note 7, at 192-239.

133. The previous purpose of the law was to secure "for each minor . . . the care and guidance, preferably in his own home, as will serve the . . . welfare of the minor and the best interests of the state. . . ." Juvenile Court Act, ch. 685, § 1, 1959 Minn. Laws 1275 (repealed 1980).

Under the new legislation, the exclusively benevolent and rehabilitative purpose of the juvenile court remains only for children "alleged or adjudicated neglected or dependent." Minn. Stat. § 260.011(2)(a) (1988) (effective Aug. 1, 1980). For those charged with delinquency, however,

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

Id. § 260.011(2)(c).

134. Minn. Stat. § 260.125(2)(d) (1988); *see* Feld, *Dismantling the "Rehabilitative Ideal," supra* note 7, at 203-05.

135. Section 260.125 provides:

> [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).

that juvenile court jurisdiction should be waived.[136]

The legislature, responding to the supreme court's directive in *Dahl* and purporting to give greater guidance and direction to juvenile court judges administering the waiver provisions, added a third subdivision to the certification statute.[137] The added subdivi-

136. *Id.*; Feld, *Dismantling the "Rehabilitative Ideal," supra* note 7, at 205-07.

137. The legislature adopted an offense matrix that establishes a prima facie case for certification under the amenability and dangerousness provisions when various combinations of a youth's present offense and/or prior record are present. Under the amended statute, the prosecution can establish a prima facie case of both nonamenability and dangerousness simply by proving that the juvenile is at least 16 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* Feld, *Dismantling the "Rehabilitative Ideal," supra* note 7, at 194-95, 195 n.96. Minn. Stat. § 260.125(3)(1980) provides:

> A prima facie case that the public safety is not served or that the child is not suitable for treatment shall have been established if the child was at least 16 years of age at the time of the alleged offense and:
>
> (1) Is alleged by delinquency petition to have committed an aggravated felony against the person and (a) in committing the offense, the child acted with particular cruelty or disregard for the life or safety of another; or (b) the offense involved a high degree of sophistication or planning by the juvenile; or
>
> (2) Is alleged by delinquency petition to have committed murder in the first degree; or
>
> (3) Is alleged by delinquency petition (a) to have committed the delinquent act of escape from confinement to a state juvenile correctional facility and (b) to have committed an offense as part of, or subsequent to, escape from custody that would be a felony listed in section 609.11, subdivision 9, if committed by an adult; or
>
> (4) Has been found by the court, pursuant to an admission in court or after trial to have committed an offense within the preceding 24 months which would be a felony if committed by an adult, and is alleged by delinquency petition to have committed murder in the second or third degree, manslaughter in the first degree, criminal sexual conduct in the first degree or assault in the first degree; or
>
> (5) Has been found by the court, pursuant to an admission in court or after trial, to have committed two offenses, not in the same behavioral incident, within the preceding 24 months which would be felonies if committed by an adult, and is alleged by delinquency petition to have committed manslaughter in the second degree, kidnapping, criminal sexual conduct in the second degree, arson in the first degree, aggravated robbery, or assault in the second degree; or
>
> (6) Has been found by the court, pursuant to an admission in court or after trial, to have committed two offenses, not in the same behavioral incident, within the preceding 24 months, one or both of which would be the felony of burglary of a dwelling if committed by an adult, and the child is alleged by the delinquency petition to have committed another burglary of a dwelling. . . .
>
> (7) Has previously been found by the court, pursuant to an admission in court or after trial, to have committed three offenses, none in the same behavioral incident, within the preceding 24 months which would be felonies if committed by an adult and is alleged by delinquency petition to have committed any felony other than those described in clause (2), (4), or (5); or
>
> (8) Is alleged by delinquency petition to have committed an aggra-

sion enables the prosecution to establish a "prima facie" case for certification under the nonamenability and dangerousness provisions when various combinations of a youth's present offense and prior record are proved.[138] For example, the prosecution can prove a prima facie case for certification by charging a sixteen-year-old, who possesses a specified prior record, with certain types of serious offenses. While still retaining the "nonamenability" or "dangerousness" criteria, the legislature provided the prosecutor with an indirect method to prove those ultimate facts in addition to proof by direct evidence. The Minnesota legislature's adoption of offense criteria to structure judicial sentencing discretion is typical of recent legislative changes in waiver statutes throughout the nation.[139]

Legislative amendments of the waiver statutes to establish a "prima facie" case for transfer based on the present offense or prior record affect the allocation of the burdens of production and persuasion.[140] As an earlier article concluded,

> 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. Once a party has established its prima facie case, the burden of producing evidence is shifted to the opposing party to rebut the presumptive facts. Thus, the factual presumption created by a prima facie case stands unless and until rebutted by placing contrary evidence on the record. If substantial, countervailing evidence is presented, then the matter is to be determined by the trier of fact on the basis of the entire record and not by reference to the prima facie case. . . . Functionally, then, the procedural operation of a prima facie case is equivalent to a presumption in civil actions. . . .[141]

This analysis of the effects of a "prima facie" case as creating a rebuttable presumption for certification has been endorsed by the Minnesota courts in several subsequent waiver decisions.[142]

> vated felony against the person . . . in furtherance of criminal activity by an organized gang.

Minn. Stat. § 260.125(3) (1988).

138. Minn. Stat. § 260.125(3) (1988); *see* Feld, *Dismantling the "Rehabilitative Ideal,"* *supra* note 7, at 207-14.

139. Feld, *Principle of Offense*, *supra* note 6, at 504-11.

140. Feld, *Dismantling the "Rehabilitative Ideal,"* *supra* note 7, at 207-14.

141. *Id.* at 209-10.

142. *See, e.g.*, *In re* J.F.K., 316 N.W.2d 563 (Minn. 1982) (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 (Minn. 1981) (unrebutted prima facie case authorizes reference on both grounds of nonamenability and dangerousness); *In re* K.J.K., 357 N.W.2d 117 (Minn. Ct. App. 1984) (where prima facie case not established, court must consider totality of circumstances).

That article also suggested that

> where the defendant has introduced substantial evidence of his amenability to treatment and nondangerousness and has rebutted the prima facie case, the case should be decided under the discretionary waiver provisions of subdivision two rather than under subdivision three. If the waiver decision is made under subdivision two, proof of age and present offense alone may not carry the state's burden of persuasion. . . .[143]

Again, that analysis has been confirmed by a number of appellate opinions that conclude that once the juvenile has rebutted the prima facie case with "significant evidence," then the prosecution

> has the burden of proof, by "clear and convincing" evidence, that the child is not suitable for treatment or that the public safety is not served under the provisions of the laws relating to juvenile courts. *In evaluating evidence under the clear and convincing standard, the court must consider the totality of the circumstances.* . . . In this case . . . the State established a prima facie case but the defense introduced substantial evidence rebutting the prima facie case. It was thus up to the juvenile court to decide whether the State had met its burden of proof by clear and convincing evidence on the basis of the entire record and not by reference to the prima facie case.[144]

The article concluded that adoption of a legislative "prima facie" certification case based on age and the seriousness of the offense would not effectively overrule the holding of *Dahl*.

> [J]uvenile court judges will continue to decide on a discretionary basis if a youth is amenable to treatment or not dangerous despite the absence of clinical tests or objective, validated indicators that accurately predict such traits.
>
> In the final analysis, the problem lies not with the operative significance of the prima facie case language on the burden of proof, but with asking judges questions that they are unequipped to answer and then attempting to control judicial discretion when the judges' answers go awry. This is the problem that resurfaced in *Dahl*, which the legislature not only failed to address, but has now compounded.[145]

The legislature's decision to create a rebuttable presumption for certification based on age and offense was probably the least satisfactory procedural strategy to solve the problems raised by the exercise of judicial discretion regarding an isolated but serious

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143. Feld, *Dismantling the "Rehabilitative Ideal," supra* note 7, at 212.

144. *In re* S.R.L., 400 N.W.2d. 382, 384 (Minn. Ct. App. 1987) (emphasis added) (citations omitted); *accord J.F.K.*, 316 N.W.2d at 564 (citing Feld, *Dismantling the "Rehabilitative Ideal," supra* note 7).

145. Feld, *Dismantling the "Rehabilitative Ideal," supra* note 7, at 214. Whether the legislature effectively overruled *Dahl* remains a source of judicial controversy. *Compare S.R.L.*, 400 N.W.2d at 384 (amendments and supreme court's reasoning in *J.F.K.* implicitly overrule *Dahl*) *with In re* J.L.B., 435 N.W.2d 595, 601-04 (Minn. Ct. App. 1989) (Crippen, J., dissenting) (continuing vitality of *Dahl*).

young offender. The legislature could have redefined juvenile court jurisdiction simply to exclude from juvenile courts youths with certain combinations of present offense and prior record.[146] Or the legislature could have placed the burdens of production and persuasion on the juvenile charged with serious offenses rather than having it remain at all times with the prosecution.[147] The legislature considered both of those alternatives and rejected them in favor of the "rebuttable presumption," or prima facie case, approach.[148] Because it failed to address effectively the sentencing contradictions inherent in the statute, it was only a matter of time until the problems identified in *Dahl* reappeared.

B. The Three Variations of In re D.F.B.

Prior to February 18, 1988, there were no obvious indications that sixteen-year-old David F. Brom was a seriously disturbed youth or a potential mass murderer.[149] He was a high school sophomore, a B+ student, and regarded by his teachers as pleasant and cooperative.[150] Although he appeared to his teachers and classmates to be a happy person, according to the clinicians who testi-

146. Legislative waiver results in "automatic" certification of certain youths to adult criminal court based on the offenses alleged. *See* Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 573-78, 617-18. This option is nondiscretionary—there is simply no occasion for a judicial waiver hearing. The virtues of legislative waiver include objectivity, consistency, economy, equality, and ease of administration. *Id.*; *see* Feld, *Principle of Offense*, *supra* note 6, at 494-99.

147. *See* Feld, *Dismantling the "Rehabilitative Ideal,"* *supra* note 7, at 215.

> Placing the burden of persuasion on a youth to prove amenability and nondangerousness would emphasize the policies of social defense and public safety in light of the uncertainty of the issues being determined. In many cases, a court cannot reliably determine whether a youth is amenable or dangerous. In these ambiguous cases the decision whether or not to waive is determined by which party bears the burden of persuasion. The legislative policies that justify creating a rebuttable presumption also justify placing the burden of persuasion on the juvenile rather than on the state.

Id.

148. *See, e.g.*, Minn. S.F. 2149, 71st Leg. (1980) (burden of proof on juvenile to prove reasonable likelihood of rehabilitation); Minn. S.F. 644, 70th Leg. (1977) (excluding from juvenile court jurisdictions youths 15 or older charged with felony offenses). The history of the legislation's change from automatic exclusion, to burden on the juvenile, to rebuttable presumption may be traced in Minnesota County Attorneys' Ass'n, Minnesota County Attorneys' Legislative Report (Feb. 18, 1980); *id.* (March 4, 1980); *id.* (March 17, 1980). *See generally* Feld, *Dismantling "Rehabilitative Ideal,"* *supra* note 7, at 192-97, 205-22.

149. A detailed journalistic account of the Brom case may be found in Tom Krattenmaker, *The Rochester Ax Murders*, Star Tribune, July 17, 1988, Sunday Magazine, at 6.

150. A counselor at Brom's high school testified, "David's attendance was excellent, his grades were good, his relationship with his teachers seemed very good. So there was nothing that would show that [there might be problems in the Brom household]." Reference Hearing Transcript at 270, *In re* D.F.B., No. 88-J-0955 (Olm-

fied at his waiver hearing, he was the victim of a progressive depression[151] that emerged over a period of several years and which left him suicidal[152] and ultimately caused him to slay his fa-

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sted County, Minn. Dist. Ct. Apr. 21, 1988) (testimony of Michael Larson, Lourdes High School Counselor).

Brom's Spanish teacher testified, "David was an above average student. He got B's in my class. . . . He was pleasant, quiet, but we got along well." *Id.* at 231 (testimony of Celeste Heidelberger).

Brom's religion and home room teacher testified, "My relationship with David—first of all, I liked him very well and I think probably he felt the same way. His reactions in class were he was usually joking, usually laughing. He would say something clever and I would respond to it. . . . Yes, he was [a] cooperative [student]." *Id.* at 280 (testimony of Helen Restovich).

Dr. Carl Malmquist, the court-appointed psychiatrist who evaluated David Brom for the reference hearing, described him as "a somewhat gangly boy, of 5'10" 130 pounds, quite deferential, polite, compliant, and smiling. He was not muscular but appeared rather shy and withdrawn in some ways, yet he talked volubly and readily." Dr. Carl Malmquist, Psychiatric Evaluation Report at 1, *In re* D.F.B., No. 88-J-0955 (Olmsted County, Minn. Dist. Ct. Apr. 21, 1988) [hereinafter Malmquist Report] (report dated March 18, 1988).

151. [H]e became progressively depressed and feeling life was not worth living going on this way. But his solution was to try to be happy and thinking that he could make everybody else happy. And this is how everybody got fooled. All the friends and people who knew him, and the peer group in the school, because they either saw him as a fool or a clown or a boy always jumping around or saying witty or entertaining things whereas, in fact, he was really a deeply depressed boy who from this past year, from last June on, was entertaining either suicide and at that point thoughts of homicide start to enter as well, from September on . . . .

Transcript at 186 (testimony of Dr. Carl Malmquist).

152. Dr. Malmquist testified:

Q: Were there any suicide attempts that you were aware of?

A: First one that he mentioned to me was at the completion of ninth grade in June of 1987 and the second one was at the end of the summer in September, 1987.

Id. at 194-95.

In his report, Dr. Malmquist provided additional details of Brom's attempted suicide:

David then elaborated that he had made two suicide attempts earlier in the year which he had not told his parents about. . . . The first attempt was shortly after the conclusion of the academic year in June, 1987. Their home was near a forest area and he tried to hang himself in a tree with a rope noose. He tied the noose on a tree branch that was about 15-20 feet off the ground and was hanging there with the rope around his neck when he got the feeling that he did not want to die. He is not clear on details of how he got out of the noose but believes that he was not extended so far that he could not reach up and grab the sides of the tree arm by his arms and pull himself up again which was the way he was able to get out of the noose. Later that summer, shortly before the commencement of the school year, he stated he took an overdose of four to five pills. These were pills that a girl he knew took for a "sleeping disorder." He got sick and threw up at that time and his parents thought he had the flu. David stated he was also serious about committing suicide at that time and disappointed in the outcome.

Malmquist Report at 6.

ther, mother, and younger sister and brother with an axe.[153]

153. Brom's depression, according to the clinicians, centered on his conflicted relationship with his family, particularly his father. Malmquist Report at 11-12. These conflicts intensified after Brom's parents ejected his older brother, Joe, from the home because he adopted a "punk" style of dress. Apparently, Bernard and Paulette Brom imposed even stricter discipline on their other children to ensure that they would not follow Joe's pattern. *Id.* at 4-5. Although David Brom's family was comfortably middle-class economically, the family regimine was somewhat atypical. Transcript at 153-54 (testimony of Annick Perrault) (describing her interactions with the Brom family when she was a dinner guest). David's parents subjected him to a strict curfew, required him to perform many household chores, and slapped or grounded him if he failed to do them promptly or satisfactorily. The clinicians testified that Brom wanted to be a dutiful son but found it impossible to please his father; as a result he developed an exaggerated fear of being punished.

> [E]vents which happened to him, while unpleasant, had become greatly magnified in his own thinking. They had become overwhelming and seen as impossible to deal with. Hence, he described episodes where his father would slap him, usually only once at a time (although on rare occasions two-three times in succession), and with an open hand. David never described his father hitting him with a fist nor ever receiving any beatings. Yet to David the nature of the anticipation of being slapped in such a manner by his father was experienced as something he came to dread. It was experienced as one of the things he could not deal with, and from which he needed desperately to escape. . . . On these occasions, he would feel "terrified." . . . The striking thing is David's overreaction and sensitivity, his inability to deal with his father, and the persistent fear which did not leave.

Malmquist Report at 2-3.

David was unable to discuss his feelings with his father. *Id.* at 3 ("his father and he rarely talked at all . . . ."). David did not seek help with his fears from any teachers, counselors, or other adults because his parents were widely-respected in the community.

> In appearance the Broms were pillar-of-society material. Dad was an engineer at the IBM plant. Mom had run a preschool program at church, but had quit a couple of years before to spend more time with her own kids. She sewed at home . . . . Bernard, Paulette, Dave and the two younger kids attended mass every Sunday at Pax Christi Catholic Church. The parents were parish leaders and ardent participants in a variety of church activities. They hosted meetings at their house, and Bernard put his home computer to work for the parish. . . . The Broms were eulogized as a beautiful family. "Leaders of the church and very well-respected," the pastor called them. "There was not a clue that something was wrong," a neighbor woman said.

Krattenmaker, *supra* note 149, at 7.

David told the clinicians that adults would neither believe nor appreciate the seriousness of his problems. Transcript at 196-97 (testimony of Dr. Carl Malmquist). Although Brom "defended psychologically," according to the experts, by pretending to be and attempting to make other people happy, maintaining this role became increasingly difficult as his depression deepened. *Id.* at 194 (testimony of Dr. Carl Malmquist). Thoughts of suicide, he reported, mingled with thoughts of killing his family. Malmquist Report at 11.

Brom shared his suicidal and homicidal thoughts with some young friends, albeit disguised in the form of a collective fantasy.

> [H]e said that this summer he wanted to go to Florida. He wanted to take the van and he said he wanted to kill his parents. . . . He said that he wanted to take a couple of other girls with him, but he didn't tell me who . . . . [H]e told me that he was going to kill them, too, but I didn't know if . . . . I really didn't believe him when he told me. I

The case of David F. Brom, *In re D.F.B.*, squarely posed the

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> mean I didn't think—It's not like you hear something like that every day. I didn't know what to think.

Transcript at 119-20 (testimony of Lynda Lund, a 15-year-old classmate of Brom).

In one version, he would kill his family, steal the family van and money, and drive to Florida, where the three juveniles would "live it up" until their funds were exhausted, at which point Brom would kill himself. One friend testified:

> A friend and me and Dave, we had a sort of vacation planned which seemed more like a story that we would add things into it to make it more exciting, add into the plot. Like saying [an ongoing] story. But not written. Just a conversation piece that we would have . . . . It involved me, Angie and Dave going to Florida this summer and how we would live off the money we would have and just get an apartment and have fun. . . . We had to get a car to get down there and he said that the way we could do that was for him to get rid of his parents so that we could have the car. [He would] kill his family and call in to IBM and tell them that there had been a death in the family and so Mr. Brom would be taking off a few weeks and so therefore, no one would be looking for him. . . . I just thought it was a way to make the plot more exciting in our conversations. Like saying when I grow up I want to do this. Just making a story line and making everything more dramatic. But it wasn't like a big plan. It wasn't planned to happen February 18. . . . The whole thing was pretty much to live it up before—and Dave said he wanted to die—and me and Angie didn't want to die. Just when we talked to each other we always said when he does that, we'll just leave because we didn't want that. But it was still just a part of the story for me and Angie.

Id. at 135-37 (testimony of Annick Perrault, a 16-year-old classmate of Brom).

Another described a similar fantasy:

> We were gonna take off to Florida or something and just live there. . . . [H]e was going to kill his family and then get money out of the bank and then we were gonna take the van and he was gonna come pick me up and we were just gonna leave.

Id. at 165 (testimony of Angela Endrizzi, a 15-year-old classmate of Brom).

Another variation of the fantasy also involved the death of Brom's family followed by an excursion to California.

> [S]omehow a trip to California came into effect and we just, you know, we were trying to think of how we were going to get money and stuff and he mentioned his mom had a cash card, you know, if he knocked his parents off he could get that and, you know, it would fund our trip. . . . Well, he like said that he'd get his mom and his brother and sister in the morning and then wait until his dad came home from work. And he'd like be behind his bedroom door when his dad came in the room, he'd get him then.

Id. at 174-75 (testimony of Chadric Hines, a 15-year-old classmate of Brom).

Various students, including Brom, also participated in writing a so-called "hit list," which included unpopular teachers as well as parents. A classmate of Brom's testified, "There was a hit list. Names of people he was gonna kill. . . . Some kids, some teachers. I can't remember exactly, but I think Mr. Nigon [math teacher] was on it. I think. That was a joke. Everybody had stuff on the hit list." *Id.* at 207-08 (testimony of Jennifer Cranston, a 15-year-old classmate of Brom). Despite the violent images of these casual conversations, however, none of Brom's peers regarded them as cause for concern.

On the evening of February 17, 1988, according to the clinicans who interviewed him, Brom's father threatened to take away David's extensive record collection unless David's attitude changed. Malmquist Report at 5. Bernard Brom then pushed David who fell backwards onto a table. Fearful that he would be struck again, David Brom fled the room. *Id.* Later that evening, Brom called one of the

difficult sentencing conflicts between an emphasis on the rehabilitative potential of the offender and the seriousness of the offense. Other than the four brutal homicides alleged in the petition, the

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friends with whom he shared the Florida-trip fantasy and asked her if she would skip school with him the next day if he killed his family that night. Transcript at 164 (testimony of Angela Endrizzi).

Brom returned to his bedroom and listened to records. After brooding about his situation for hours, according to the experts, at about 3:00 a.m. he went to the garage and got a long-handled axe. Malmquist Report at 13. Armed with the axe and a steak knife, he went into the bedroom where his parents were sleeping. Although he could not remember hitting anyone, he recalled that there was screaming and that he also cried and screamed.

> He recalled going to his parents' bedroom and opening the door. Their lights were out, and he recalled standing in the doorway with the axe. "When I think about it, I get kind of sick. What I remember is gross. I walk into my parents' room and they are asleep. I have the axe. There is a lot of screaming in there; I am screaming and they are. I was scared; I don't remember hitting anyone. I could hear the screaming though, and it went on and on. Then I remember being in my room and packing things like blankets. All the lights were on and I had to go into each room. My brother was in his bedroom and my mother and sister in the hall, and there was blood everywhere."
>
> I asked specifically if he could remember hitting anyone with the axe, and he could not nor could he remember entering any of the rooms specifically, but he remembered vividly hearing the constant screaming. The screaming was not only that of the victims, but he remembers himself screaming and believes he was crying at the time, as well. He does not know why he was screaming, but he remembered it was not particularly any words, although he remembered screaming at the top of his voice.

Id.

He also confided to a friend whom he called immediately after the slaying:

> [H]e went into his parents' room. And his mom started screaming and he went over to his dad and hit him in the head and knocked him over. And his dad tried to get up and so he hit him again. . . .[with a]n axe. And he said that he had hit his dad several times because his dad kept trying to get up. And he walked out of the room and he didn't tell me what order after that, but he said that he got his mom and when he went into Rick's room, Rick screamed and so Dave screamed back. And he didn't say anything about hitting Rick. And he went out into the hall again and Diane was standing over her mom, just staring, and Diane screamed and so Dave, again, screamed back. And he didn't say anything about hitting Diane.

Transcript at 142-43 (testimony of Annick Perrault).

Bernard Brom received 22 axe wounds; Paulette Brom, 19; Diane Brom, 8; and Ricky Brom, 9. *Id.* at 60, 64, 69, 72 (testimony of Dr. Kathryn Berg, Deputy Olmsted County Coroner). While in his room packing a duffel bag, he told the clinican evaluating him, he heard the sound of dripping blood. Malmquist Report at 14. The first investigating officer on the scene testified, "We had never seen so much carnage in such a small area. I think we were both in a state of shock." Transcript at 18 (testimony of Deputy Michael Braley).

After the slayings, Brom called a friend at 3:30 a.m. but hung up when her father answered. Malmquist Report at 14. Sometime thereafter, Brom drove the family van to a bank, withdrew money with his mother's cash card, and then purchased some cigarettes and snacks at a local supermarket. *Id.* He then drove to an area overlooking a friend's house so that he could see her when she left for school. When she did not appear, he drove to school, only then realizing that the

sixteen-year-old Brom had no prior history of illegal behavior, drug abuse, or aggressive behavior.[154] He was diagnosed as suffering from a major depressive disorder, but one that would likely respond to treatment.[155]

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clock in the van was incorrect. He returned to watch for his friend, and when she again failed to appear, he returned to school. *Id.* at 17.

When he found his friend at school, he asked her to skip school with him, a not unusual request.

> I said, "So are we skipping school?" and he goes, "Yeah, you need a break." And so I was all happy and thinking that, "Okay, sure. Whatever." . . . I asked him if he had the car today, and he said, "Yeah." And I said, "Why? Did you have to work?" because usually when he worked he got to drive the car to school and he said, "No. I can get anything I want now. My parents are dead." . . . I didn't know if this was a way to make the cutting school more exciting, if we were going to add something into [the story] and make it exciting. And I said, "So, you did it?" and he said, "yep," and that's when we reached the car, the van.

Transcript at 139-40 (testimony of Annick Perrault).

After driving to a nearby park, and then withdrawing more money at a bank, they went to his friend's house where she attempted to shave the sides of Brom's head. Malmquist Report at 17. After going to a K-Mart to obtain a razor, they returned to her home where she completed the "punk" haircut—"[h]e wanted the sides taken off and a design in the back with lines." Transcript at 144-45 (testimony of Annick Perrault). When her mother returned home unexpectedly, Brom hid in her closet. *Id.* at 146-47.

After his friend returned to school, Brom went to another high school where he met some friends for lunch. *Id.* at 120-22 (testimony of Lynda Lund). Brom then enlisted still another friend to dye his hair. After one unsuccessful attempt, Brom returned to his own home alone to try once again to dye his hair. Malmquist Report at 17. He then returned a bookbag to a friend, acknowledged that he was in "deep trouble," and told his friend that he intended to sleep under a bridge and then walk to the Twin Cities in the morning. Transcript at 149 (testimony of Annick Perrault). Brom spent the night after the murders in a culvert near his home and was taken into custody the following morning at the Rochester post office. *Id.* at 114-15 (testimony of Officer Timothy Heroff).

154. The trial court's undisputed finding of fact was that "the Child has no history of illegal behavior, drug abuse, or aggressive behavior except for the incident alleged in this petition." *In re* D.F.B., No. 88-J-0955, Findings of Fact, Conclusions of Law and Order at 1 (Olmsted County, Minn. Dist. Ct. Apr. 21, 1988).

155. Judge Ring reported that

> Dr. Carl Malmquist, a psychiatrist with years of experience in criminal cases, examined the child. His report ran to 23 pages in an attempt to explain this child. In the end, his diagnosis was "major depressive episode." Dr. Malmquist testifed that the child could be treated. He was reluctant to say how long it would take. He could not guarantee that the child could be treated in two-and-a-half years, but he did not say that the child could not be successfully treated in that time. The prosecution needed to prove that he could not be treated by clear and convincing evidence and needed testimony like that to carry that burden of proof. Dr. Gilbertson, on the other hand, said that two-and-a-half years would normally be a relatively long time for such treatment because it usually takes only a few weeks or months.

Id., Memorandum at 3-4. On the basis of the testimony and report, Judge Ring found that "[t]he child has been diagnosed as having a major depressive disorder and it has not been shown that he cannot be successfully treated by his 19th birthday." *Id.*, Findings of Fact, Conclusions of Law and Order at 2.

1. The Trial Court: Applying the Law to the Facts

Judge Gerard Ring, who presided over the Brom reference hearing, believed initially that the outcome of the proceeding was a foregone conclusion. "I had assumed at the outset that we were going through the motions with this reference hearing, and that there really was little likelihood that the accused in a case like this would remain in juvenile court."[156] Judge Ring clearly recognized the fundamental differences in sentencing policies between juvenile and criminal proceedings; he also knew that in a waiver hearing, "[w]hether a child can be treated or is a threat to public safety must be determined by looking at the child, so the offense is relevant only as it tells us something about the child."[157]

After a four day waiver hearing less than two months after the offense, Judge Ring denied the prosecutor's motion to transfer Brom for prosecution as an adult. Although the legislature had amended the waiver statute in response to *Dahl*,[158] Judge Ring correctly concluded that the net effect of the amendments was to make transfer more, rather than less, difficult.[159] In Judge Ring's opinion, the central focus of a reference proceeding remained the juvenile's treatability or threat to the public; he concluded that the prosecution had failed to carry its burden of proving either Brom's nonamenability or dangerousness.

> This is one place where the burden of proof becomes significant. I do not believe the child could prove suitability for treatment if the burden were placed on him. However, the prosecution has been unable to prove the contrary. Each of the experts when asked said that it is possible to complete the treatment in the time available; certainly no one said he could not. Since the evidence cannot be said to be clear and convincing proof that he cannot be treated, the petitioner has failed to carry the burden of proof on this issue.[160]

Ultimately, the decision in *D.F.B.* hinged quite properly on who bore the burden of proof on subjective and clinical issues—amenability and dangerousness. The political and community outrage

156. *Id.*, Memorandum at 1.

157. *Id.* at 2.

158. *See supra* notes 132-148 and accompanying text.

159. *In re* D.F.B., No. 88-J-0955, Memorandum at 9-11 (Olmsted County, Minn. Dist. Ct. Apr. 21, 1988) ("The net result of the 1980 amendments has been to make it more difficult to refer children to adult court rather than easier as may have been intended. . . . [I]n my judgment the 1980 amendments did not change the burden of proof, they only raised the degree of proof required. Instead of making it easier and more likely that children would be referred to adult court, the statute has had the opposite effect."). *See generally* Feld, *Dismantling the "Rehabilitative Ideal," supra* note 7.

160. *In re* D.F.B., No. 88-J-0955, Memorandum at 17 (Olmsted County, Minn. Dist. Ct. Apr. 21, 1988).

that followed Judge Ring's decision[161] is in microcosm analogous to the public reactions to the acquittal of other "guilty" defendant's whose cases included psychiatric defenses and who received intense media attention.[162]

Judge Ring's decision to retain Brom as a juvenile was based upon an analysis of statutory criteria and the various factors in Rule 32,[163] considered individually and collectively under the "totality of the circumstances." Although he viewed the ultimate result in the case as undesirable, Judge Ring felt compelled by the statutory language not to transfer Brom for prosecution as an adult.

> It does not make sense that any person, if convicted of the crimes alleged in this case, should serve a sentence of less than three years. However, the Legislature has not vested absolute discretion in me as a trial judge to decide this issue based on what my own feeling of justice should be. Rather, I am compelled to decide the case based upon the law as it exists at this time. I cannot modify that law, and if there is change to be made in a fundamental principal [*sic*] of law such as what constitutes a prima facie case, that change should be made by the Supreme Court and not by me. That phrase has a well-understood meaning which has existed for many years. Changing the meaning of that phrase should not be undertaken lightly as it may well have consequences in many other areas of the law.[164]

Under the statute as written and previously interpreted, the logic of Judge Ring's decision was impeccable. The prosecution's proof of a prima facie case created a rebuttable presumption for

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161. Judge Ring's decision, issued on April 22, 1988, "caused an uproar in Rochester. . . ." Krattenmaker, *supra* note 149, at 12.

162. The acquittal of John Hinckley by reason of insanity for his attempted assassination of President Ronald Reagan ultimately hinged on the prosecution's inability to affirmatively prove Hinckley's sanity beyond a reasonable doubt and provoked intense public outrage. *See generally* Peter Low, John Jeffries & Richard Bonnie, The Trial of John W. Hinckley, Jr.: A Case Study in the Insanity Defense (1986). Professors Low, Jeffries, and Bonnie note:

> One much-debated feature of the insanity defense after the *Hinckley* verdict has been on whom the burden of proof should be placed. Allocation of the burden of proof may play an important role in close cases. It determines which side—prosecution or defense—will lose if the jury finds itself unable to determine (with whatever degree of certainty the law may specify) whether the defendant was or was not legally insane.

Id. at 132.

In the aftermath of the Hinckley case, most states and the federal government now require the defendant to bear the burden of proof and the risk of non-persuasion. *Id.*; *see, e.g.*, 18 U.S.C. § 20 (1982); Minn. Stat. § 611.025 (1988).

163. *See* Minn. R.P. Juv. Cts. 32.05; *supra* note 130.

164. *In re* D.F.B., No. 88-J-0955, Memorandum at 19 (Olmsted County, Minn. Dist. Ct. Apr. 21, 1988).

transfer.[165] Once that presumption is rebutted or where it does not arise, the issues of amenability and dangerousness must be decided on the "totality of circumstances" based upon the whole record and not just by reference to the offense criteria or the rebuttable presumption.[166] Throughout the proceedings, the burden of proof by "clear and convincing evidence" remains with the prosecution to demonstrate either that the juvenile is not amena-

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165. In Minnesota, it is well-established that creation of a statutory presumption or prima facie case serves only to shift the burden of going forward with the evidence. . . . The party in whose favor the presumption runs can establish that presumption and rest. The other party then must go forward with evidence to rebut that presumption. *If evidence is introduced which rebuts the presumption, then that presumption disappears and the burden of proof remains with whichever party would normally have to carry it.*

Id. at 9 (emphasis added) (citation omitted).

In *In re* Givens, 307 N.W.2d 489 (Minn. 1981), the supreme court ruled on the procedural effect of an unrebutted prima facie case.

> [T]he state can establish a prima facie case of unamenability and dangerousness simply by proving that at the time of the alleged murder, the juvenile was at least 16 along with one or more additional facts. . . . In this case, the state established a prima facie case by showing that appellant was charged with first-degree murder and he was at least 16 at the time of the alleged murder. . . . Appellant did not introduce any significant evidence bearing on the issue of amenability or dangerousness. *Thus, this is a case in which reference was based on the state's establishing an unrebutted prima facie case. The statute clearly authorizes reference in such a situation, and we affirm the reference order.*

Id. at 490 (emphasis added).

166. *In re* D.F.B., No. 88-J-0955, Memorandum at 9 (Olmsted County, Minn. Dist. Ct. Apr. 21, 1988).

> In the present case, the prosecution could have introduced evidence that the child was at least 16 years of age and charged with first degree murder and rested. If the child had not offered any evidence in rebuttal, that could have been a sufficient basis to refer the child to adult court for trial. However, *the child did introduce evidence to the contrary and did rebut the prima facie case. Having done so, the burden of proof remained with the prosecution to prove the elements necessary for referral to the adult court and pursuant to the 1980 amendments that burden now is by clear and convincing evidence.*

Id. (emphasis added).

In *In re* J.F.K., 316 N.W.2d 563 (Minn. 1982), the supreme court ruled that where rebuttal evidence is introduced in response to a prima facie case, the issues of amenability and dangerousness must be decided based on the whole record.

> In this case the state established a prima facie case but the defense introduced substantial evidence rebutting the prima facie case. It was thus up to the juvenile court to decide whether the state had met its burden of proof by clear and convincing evidence *on the basis of the entire record and not by reference to the prima facie case.*

Id. at 564 (emphasis added); *accord In re* D.R.D., 415 N.W.2d 419, 422 (Minn. Ct. App. 1987) ("Where . . . there is no prima facie case, the court must consider the totality of circumstances, including eleven factors set out in the juvenile court rules. . . ."); *In re* S.R.L., 400 N.W.2d 382, 384 (Minn. Ct. App. 1987); *In re* K.J.K., 357 N.W.2d 117 (Minn. Ct. App. 1984) (where alleged offense does not create a prima facie case for waiver, court must consider totality of the circumstances).

ble to treatment or constitutes a threat to public safety.[167] Trial judges are vested with broad discretion when making waiver/sentencing decisions.[168] A decision to refer or to retain a juvenile may not be overturned on appeal unless it is "clearly erroneous" so as to constitute an abuse of discretion.[169] On the basis of the whole record and with "the focus on the child," Judge Ring concluded that the prosecution failed to prove by clear and convincing evidence either that Brom was not amenable to treatment or that he threatened public safety.[170]

The reference hearing record, including the testimony of two clinicians, supported Judge Ring's conclusions that the prosecution had failed to carry its burden by "clear and convincing evidence"

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167. *See S.R.L.*, 400 N.W.2d at 384 (once defense rebuts prima facie case, prosecution then has burden of proof by clear and convincing evidence under the totality of the circumstances); *K.J.K.*, 357 N.W.2d at 119; *In re* Haaland, 346 N.W.2d 190, 193 (Minn. Ct. App. 1984) (state must prove clearly and convincingly that juvenile is either not amenable to treatment *or* a threat to public safety before court can waive for adult prosecution).

168. *See In re* Hartung, 304 N.W.2d 621, 624 (Minn. 1981) ("juvenile court has broad discretion in determining whether either of the statutory prerequisites to reference exists"); *In re* K.P.H., 289 N.W.2d 722, 724 (Minn. 1980); *In re* J.B.M., 263 N.W.2d 74, 76 (Minn. 1978); *In re* R.J.C., 419 N.W.2d 636, 637 (Minn. Ct. App. 1988) ("considerable latitude"); *In re* D.R.D., 415 N.W.2d 419, 422 (Minn. Ct. App. 1987) ("wide latitude"); *In re* J.A.R., 408 N.W.2d 692, 694 (Minn. Ct. App. 1987) ("broad discretion"); *In re* T.R.C., 398 N.W.2d 662, 664 (Minn. Ct. App. 1987) ("considerable latitude"); *In re* K.J.K., 357 N.W.2d 117, 119 (Minn. Ct. App. 1984); *In re* Haaland, 346 N.W.2d 190, 193 (Minn. Ct. App. 1984) ("vested with broad discretion").

169. *See In re* Hartung, 304 N.W.2d 621, 624 (Minn. 1981) ("findings will not be disturbed on appeal unless 'clearly erroneous' "); *In re* Clipper, 293 N.W.2d 43 (Minn. 1980) ("district court did not clearly err in its findings or abuse its discretion"); *In re* Roybal, 289 N.W.2d 165, 166 (Minn. 1980); *In re* I.Q.S., 309 Minn. 78, 86-87, 244 N.W.2d 30, 38 (1976); *In re* S.E.M., 421 N.W.2d 369, 370 (Minn. Ct. App. 1988); *In re* R.J.C., 419 N.W.2d 636, 638 (Minn. Ct. App. 1988); *In re* D.R.D., 415 N.W.2d 419, 422 (Minn. Ct. App. 1987) (" 'clearly erroneous' so as to constitute an abuse of discretion"); *In re* J.A.R., 408 N.W.2d 692, 694 (Minn. Ct. App. 1987) (reverse only if decision "based on clearly erroneous findings"); *In re* T.R.C., 398 N.W.2d 662, 664 (Minn. Ct. App. 1987) ("clearly erroneous so as to constitute an abuse of discretion"); *In re* R.W.B., 376 N.W.2d 263, 265 (Minn. Ct. App. 1985) ("clearly erroneous"); *In re* D.M., 373 N.W.2d 845, 849 (Minn. Ct. App. 1985) (" 'clearly erroneous' so as to constitute an abuse of discretion"); *In re* K.J.K., 357 N.W.2d 117, 119 (Minn. Ct. App. 1984); *In re* J.R.D., 342 N.W.2d 162, 166 (Minn. Ct. App. 1984) ("On review, the trial court's findings will not be disturbed absent a showing that they are 'clearly erroneous' so as to constitute an abuse of discretion.").

170. *In re* D.F.B., No. 88-J-0955, Memorandum at 17 (Olmsted County, Minn. Dist. Ct. Apr. 21, 1988) ("Since the evidence cannot be said to be clear and convincing proof that he cannot be treated, the petitioner [prosecutor] has failed to carry the burden of proof on this issue."). Based on his findings of fact, *supra* notes 154-155 and accompanying text, Judge Ring's conclusion of law was that "the petitioner has failed to establish 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 law relating to the juvenile courts." *Id.*, Findings of Fact, Conclusions of Law and Order at 2.

to prove that Brom was not amenable to treatment or was dangerous.[171] Dr. Carl Malmquist, a psychiatrist appointed by the court to evaluate Brom, testified that David's depression would require long-term treatment.[172] Dr. Malmquist was asked specifically whether he could assure the court that Brom could be successfully treated within the juvenile justice system before Brom's nineteenth birthday.[173] While Dr. Malmquist could not guarantee a

171. Previous decisions emphasized the need for psychological data to support a finding that a juvenile is or is not suitable for treatment. *In re* Dahl, 278 N.W.2d 316, 319 (Minn. 1979); *In re* D.M., 373 N.W.2d 845, 850 (Minn. Ct. App. 1985) (there must be psychological data supporting the juvenile court's conclusion); *In re* R.D.W., 407 N.W.2d 113, 117 (Minn. Ct. App. 1987) (conclusion that a juvenile is unsuitable for treatment "must be based on psychological data or a history of misconduct as well as the juvenile's age, level of maturity, and the seriousness of the offense").

Judge Ring's finding that the prosecution had failed to prove that Brom could not be treated was based on the reports and testimony of three clinicians—Dr. Carl Malmquist, Dr. R. Owen Nelson, and Dr. James Gilbertson.

Dr. Malmquist's testimony, bolstered by a 23-page report, *see supra* note 150, concluded that Brom suffered from a "major depressive episode," but that "the child could be treated" and that he could not say that "the child could not be successfully treated" within the two-and-a-half years remaining under juvenile court jurisdiction. *In re* D.F.B., No. 88-J-0955, Memorandum at 3-4, 12, 17 (Olmsted County, Minn. Dist. Ct. Apr. 21, 1988). Dr. Malmquist emphasized that Brom needed long-term treatment, but "declined to say what period of time that would be, saying that you can never tell ahead of time how long treatment like this will take." *Id.* at 16-17.

Dr. Gilbertson testified that "two-and-a-half years would normally be a relatively long time for such treatment because it usually takes only a few weeks or months," *id.* at 4, and that "two-and-a-half years would be considered quite a long time for [treating] a problem such as we have here." *Id.* at 17.

Dr. Owen's psychometric assessments, relied upon by both clinicians in their evaluations of Brom, did not express an opinion as to the amount of time that treatment would take. *Id.* at 17.

172. I think somebody with the degree of depression David has had and which we know culminated in the acts that are a fact and his suicidal tendencies, you need some long-term treatment focused on his depressed state, which there are tendencies that he's had towards self-destruction as well as outbursts of violence this way and I think that's the kind of thing that would need addressing. . . . I couldn't [tell how long treatment would take], except I would say that I would presume it would take some time. The reason I can't ahead of time is that you can never tell ahead of time how long treatment like this is going to take and you have to monitor it just like with any other kind of medical condition. David was severely depressed, there's no doubt in my mind about that and in fact my concern about him at this point is David has always been a compliant boy, he doesn't know what to do with his agression. It might seem paradoxical in view of the acts that have occurred, but that's exactly what I mean. And a whole reconstruction is needed in terms of how he deals with this problem within himself and the world, and something went awry there very deeply. That's where the problem is now. And so the concerns I'd have would be as much suicide as anything else now.

Transcript at 198-99 (testimony of Dr. Carl Malmquist).

173. *Id.* at 202-03.

successful therapeutic intervention within that time, neither could he assert that such an intervention would not be successful.[174]

In contrast to Dr. Malmquist's somewhat guarded prognosis, Dr. James Gilbertson, who testified as an expert witness on Brom's behalf at the reference hearing, suggested several treatment programs that he believed would be appropriate for and successful with Brom.[175] Dr. Gilbertson did not interview Brom personally, but based his opinion solely on the reports submitted by Malmquist and a psychometrician.[176]

> Q. Imagine that you are to treat an individual who is a teenage boy about 16 years of age who has committed such an act of explosive violence, who has no prior criminal history and no prior legal problems, no history of violence, who is seen as engaging and likeable and who does well in school, who has severe conflicts at home and who has been diagnosed as having a major depressive episode. First of all, is it possible to treat such an individual?
>
> A. Yes.[177]
>
> Q. So is the personality trait situation which we are discussing in our example treatable and able to be changed?

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174. I'd have some real reservations if I was being asked to carry out the treatment, and I'm putting your question in those terms, that I could assure myself as well as David if he was my patient as well as the court that at 19 I could step back and say I'm totally assured in this matter to the degree of medical certainty, for example, that I don't have to worry about suicide or homicide for anybody. I say that on the basis that this is a whole unfolding personality which has emerged by 16 that needs reworking. David doesn't know what to do with his aggression. He smiles and is a nice kid, everybody likes him. That comes through in all the voluminous reports that everybody who has talked about David says. And he is likable. The problem is that he doesn't know what to do when other people or events in his life aren't likable and they're difficult, and that's the difficulty he ran into. He didn't know what to do about it. So is it possible by 19? Yeah, it's possible, but if I was going to weigh my bets on it I'd say I wouldn't be comfortable if somebody could say at 19 no matter what you do we're done. That kind of either/all proposition for me would put me in a bind as a psychiatrist.

Id. at 203-04.

In his written report, Dr. Malmquist also expressed

> some serious reservations given my perspective on the boy's problems as a psychiatrist, whether he is going to be able to receive appropriate treatment and control to resolve the multiple problems he has been struggling with over many years by the time he reaches 19 years. Part of the answer to this question is related to what we mean by treatment. . . .

Malmquist Report at 23.

175. Transcript at 300-02 (testimony of Dr. James Gilbertson).

176. *Id.* at 290-91. One can only speculate as to why the defense clinical expert did not actually interview Brom. Perhaps it involved a defense strategy to avoid probing questions as to the factual premises upon which the expert opinion was based or an effort to avoid factual inconsistencies between the experts which could be exploited by the prosecution on cross examination.

177. *Id.* at 295.

A. Given the diagnosis that Dr. Malmquist puts forward of a major depressive reaction or disorder, these typically are quite treatable, quite amenable to change.[178]

Dr. Gilbertson was also asked whether Brom could be treated within less than three years, the time remaining within juvenile court jurisdiction, and testified that successful treatment was likely within that time.[179]

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178. *Id.* at 297. Dr. Gilbertson went on to describe the type of treatment that Brom's disorder required:

> Q. What kind of treatment would be used to change this personality?
> A. Mind you, there are two facets to the personality we're talking about. One is the major depressive features which causes the negative thinking, the poor self esteem, the tendency to think that there are no other options other than to end his life or perhaps the life of others. And then there's this other feature, the over controlled part which gives the fuel, if you will, that is the triggering aspect of the depression. So if we're talking how does one treat that combination, first of all, depression is quite a treatable disorder, either through medication which often times is prescribed or through verbal psychotherapies or counseling, either individual or on a group basis. . . .
>
> As far as the over controlled individual, . . . [o]ne of the things that we have to look at first is does the individual have some requisite skills to begin the process of therapy? Are they bright? Are they intelligent? Do they have verbal facility? Can they talk and label things? Can they form relationships with individuals? Is there a previous history of success in major institutions, school or church or family or other kinds of things? Given that, a good premorbid or pretrauma or preoffense history, there's a stronger likelihood that they'll respond to treatment.
>
> The matter, as I see it with Mr. Brom, is that he was extremely over controlled, he collected injustices right and left. He saved up all the pressures and humiliations, real or imagined, experienced at his father or his family's hands. He had no way to bleed them off. He wouldn't share these with other individuals. He perhaps had a superficial relationship with some girlfriends, but it was only superficial and did not serve the process of venting or providing a catharsis or relief from his difficulties. He was not assertive in the family situation. He could not approach his father. He designed ways to avoid his father, to leave his father's presence, would not talk to his father in any fashion about the difficulties. So all of these things grew, simmered, increased in pressure and combined with his own personality, probably started the downslide into the depressive state Dr. Malmquist sets forward.
>
> What would be needed with Mr. Brom is to teach him to come forward, to be more assertive, to learn to label his feelings, not to retreat from people if they hurt him, but to come up to them and share with them what they've done to him to help establish a dialogue on what hurts him or what doesn't hurt him, not to save them up quietly, not to retreat into rock music, not to avoid or evade, but to come forward. That could be done either individually [or] in a group process, and as I say, in combination with medication if it was deemed necessary by a physician to help calm his mood or reduce some of his fearfulness. I understand in reading Dr. Malmquist's report that he is an individual who is overly sensitive to things, becomes overly frightened of things that most people would not and sometimes calmative medication is helpful in the overall treatment plan.

Id. at 297-300.

179. That's always a factor of the disorder and secondarily the program that the individual is in. I might say, however, that with . . . major de-

> Q. *So do you think an individual could successfully be treated in two-and-a-half years?*
> A. *Yes, given cooperativeness, given aggressiveness and intensity of programming. Very definitely.*[180]

Dr. Gilbertson conceded, on cross-examination, that the success of a treatment program depended on the cooperation of the patient.[181] On redirect, however, he opined there were no indications that Brom was averse to therapeutic intervention.[182] Finally, Brom's attorney asked Dr. Gilbertson whether Brom could be treated successfully within the time remaining under juvenile court jurisdiction, a period of two-and-a-half years. He responded:

> *Given the diagnosis of major depressive disorder and even with the over controlled nature, two-and-a-half years of availability of aggressive treatment is a luxury. To have sanctioned treatment for two-and-a-half years for most treatment folk is a luxury. Typically most depressive disorders are treated in a far shorter time. Most of them within ten days to two weeks in a hospital with follow-up. Some, four or five months if they're fairly untractable depressions that aren't yielding well to the combination of medication and talking therapies, if you will. Two-and-a-half years is quite a long time given the working di-*

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pressive disorder as the working diagnosis, that typically that is a disorder that can be treated fairly rapidly as treatment programs are discussed. Depression typically is a discreet event. It has a beginning and an ending. For some it's longer, for some it's shorter. For some it ends in suicide. For some it may end in another cataclysmic event. In some cases it spontaneously remits or goes away. For some they get treatment, either medication or counseling and it goes away. If there's one good thing about depression, it's that it does have an ending, an end point. Certainly in this case the goal would be to intervene agressively and to end the depression and to end the feelings of being trapped or that nothing counts and there is no way out. And I think that could be accomplished in an aggressive program that would follow an individual over the length of time at least available in this case.

Id. at 304-06.

180. *Id.* at 305-06 (emphasis added).

181. *Id.* at 307-09.

182. Q. Dr. Gilbertson, you were asked about whether or not the ability of the individual to accept his problem and to cooperate with treatment is an important factor. In reviewing Dr. Malmquist's report do you see anything in there that would indicate that David Brom is not—would not be cooperative or would not accept what his situation is?
A. I did not see in Dr. Malmquist's report that he was adverse to treatment or that he even knew what treatment meant or what he'd have to go about doing. I think Dr. Malmquist saw a young man who was naive, I guess would be the word, and just was certainly taken aback by what he had done, but probably had little notion, if I could read between the lines, of what to do about this, how this could be prevented. And given the fact that he has never been in counseling or treatment, I would expect him to be that non-knowledgeable about it. But I didn't read anything in Dr. Malmquist's report that's saying he was adverse against treatment, had taken a position not to change or in any way was oppositional toward treatment.

Id. at 313-14.

agnosis we have here.[183]

Judge Ring also concluded, despite the extraordinary violence of Brom's crimes, that Brom did not pose a threat to public safety.[184] Again, the testimony of Dr. Gilbertson supported this finding.

> Obviously, Mr. Brom was not an antisocial predatory type who fought and aggressed and lost his cool or exploded day after

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183. *Id.* at 314-15 (emphasis added).

The disagreement between Drs. Malmquist and Gilbertson over Brom's prognosis continues after the trial. In later correspondence, Dr. Malmquist notes:

> I should point out something that was never clarified in the courtroom and should have been. I was never called back to expand on my impressions of the opinion that David could be treated in such a short time by Dr. G. . . . In my opinion, Dr. G was viewing the depressive episode of David as an isolated phenomenon—something that would not recur—and therefore we could really forget about it. This viewpoint is more valid if we are talking about mild types of upsets—the typical brief depressions many adolescents (as well as humans have). In fact, serious depressions like David had are not self-limiting, and in fact if he is manic-depressive in the future, they are very likely to recur and be cyclic.
>
> Such cases always give me trouble as a psychiatrist because it is never clear to me what orientation a court or the attorneys are using when they talk about "amenability to treatment." Some use this in terms of the treatment a juvenile correctional facility dispenses; others think in terms of simply putting the juvenile on some medication and letting biochemistry do its work; then there are the other myriad approaches from discipline, work camps, etc. . . . [W]hen someone on the witness stand simply is asked: Are there treatment facilities that can treat this juvenile in 2 1/2 years? Answer: Yes. But, things never get beyond that formality. I was determined not to slip into that naive yes or no approach. I was also mindful in my answers that in the areas of civil commitment, no specific time limits are put on the duration of the commitment although periodic hearings regarding progress may rightfully be held. The reason is that *no one can tell ahead of time what the course of a treatment outcome will be.*

Letter from Dr. Carl Malmquist (July 10, 1989) (emphasis added) (copy on file with *Law & Inequality*).

184. In determining that Brom did not pose a threat to other members of the community, Judge Ring relied on the testimony of clinicians.

> [Dr. Malmquist] found this child to be a quiet, compliant boy suffering from depression and did not see him as a significant threat to the community. Dr. Gilbertson said it [threat to the community] would be a factor only if untreated.

In re D.F.B., No. 88-J-0955, Memorandum at 12 (Olmsted County, Minn. Dist. Ct. Apr. 21, 1988).

Judge Ring further concluded that even though Minnesota does not have a secure juvenile treatment facility, that would not be a factor in evaluating Brom's threat to public safety.

> It does not appear to me that secure facilities is a major issue in this case. There is nothing about the child which has been presented to me which suggests a need for high security. He has been described by everyone as being polite, compliant, obedient, etc. . . . None of those who knew him and testified in court expressed major fear so long as he can be observed, counseled, etc. Again, this issue turns on whether he can be treated.

Id. at 14-15.

> day, month after month. There did not appear to be intermittent explosive features to him, which often times you can see with this disorder. *It appeared to be an explosive situation within the context of this family, an intimate grouping of individuals of which he was a member, with the pressures building up over time with the young man seeing at least no other option available. Re-offending for Mr. Brom, again, the prediction would be it would have to take those same concatenation of events. He'd have to be in an intimate grouping. He'd have to be in there long enough to feel bonded. He'd have to feel that there was no way to deal with the authority present. He would have to feel put down, rebuked, criticized, uncared for. Whether this was real or imagined, those series of events would have to all be occurring. And again, he'd have to be untreated. Namely, he'd still have this steel cap, if you will. What is so unusual in this case is the context of the acting out, the intimate grouping, if you will. It's the thing that makes it the wholesale tragedy that it is. He is not at risk to the general public. Untreated and were he not to change, the risk would probably be in the intimate grouping he would find himself later on in his life.*[185]

Viewing the record of the waiver hearing objectively, there was ample evidence to support Judge Ring's decision. Consequently, his findings of fact could not be clearly erroneous or an abuse of discretion.[186] Indeed, neither the court of appeals' nor the supreme court's opinions that reversed his decision said that Judge Ring's findings of fact were "clearly erroneous" or an "abuse of discretion,"[187] the sole criteria for overturning trial court factual determinations.[188] The higher courts, therefore, had to construct an acceptable alternative rationale for a legally correct but politically unacceptable decision.

2. Minnesota Court of Appeals: Reconciling a Legislative Contradiction

Judge Huspeni, writing for the Minnesota Court of Appeals, initially assessed the effects of the 1980 legislative amendments

185. Transcript at 315-16 (testimony of Dr. James Gilbertson) (emphasis added).

186. The general rule in reference cases is that findings will not be disturbed on appeal absent a showing that they are clearly erroneous so as to constitute an abuse of discretion. *See* cases cited *supra* note 169.

187. *In re* D.F.B., 430 N.W.2d 475, 480-82 (Minn. Ct. App. 1988) ("We nonetheless accept as not clearly erroneous the trial court's determination that the prima facie case was rebutted. . . . We cannot criticize the trial court's application of section 260.125, subd. 3 and *Dahl* to the facts as it found them."); *In re* D.F.B., 433 N.W.2d 79, 82 (Minn. 1988).

188. *See supra* note 186 and cases cited *supra* note 169. The usual standard used to review findings of fact is whether the trial court erred in ordering or denying reference under the "clearly erroneous" abuse-of-discretion test. *See infra* notes 230-243 and accompanying text.

permitting the prosecution to establish a "prima facie case" for waiver based on a juvenile's age and offense.[189] The prosecution had argued that once it established a prima facie case for waiver, the burden of persuasion shifted to Brom to demonstrate affirmatively that he should be retained as a juvenile.[190] The court rejected this novel, burden-shifting interpretation of the effect of a "prima facie case" as "unsound" and concluded that "the burden of persuasion remains at all times upon the state."[191]

The court then considered whether Brom had rebutted effectively the prosecution's prima facie case by introducing "significant evidence" or "substantial evidence."[192] The court reasoned that the requirement of "significant" rebuttal evidence was intended "to impose upon a juvenile offender, against whom a prima facie case for reference had been established, a burden to go forward with a *quantum of evidence greater than that which would be required to rebut a prima facie case in other civil matters*."[193] Thus, while the prosecutor retained the ultimate burden of persuasion, proof of a prima facie case shifted the burden of *production* to defendant and required the introduction of more rebuttal evidence

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189. *In re* D.F.B., 430 N.W.2d 475, 477 (Minn. Ct. App. 1988).

190. *Id.* at 478-79. In its brief, appellant contended that the amendments allowing the prosecution to establish a "prima facie case" for waiver and subsequent cases interpreting those changes shifted the burden of persuasion to the defendant.

> Consistent with legislative intent in response to *Dahl*, the language in *Givens*, *J.F.K.*, and Minn. R. Pro. Juv. Cts., Rule 32.05, the prima facie case *shifts the burden of proof to the juvenile to establish by significant evidence that he is amenable to treatment and that public safety is served by retaining him in the juvenile court system.*
>
> The Appellate Court adopted this meaning in [*In re D.M.*]: "The State may prove its case for reference either by clear and convincing evidence of non-amenability to treatment or dangerousness pursuant to Minnesota Statutes § 260.125, Subd. 2 (1986) or by proof of an offense establishing a prima facie case under Minnesota Statutes § 260.125, Subd. 3 (1984). *The effect of the prima facie finding is that the burden shifts to the juvenile to establish that he is amenable to treatment and that the public safety is served by retaining him in the juvenile court system.*"

Appellant's Brief & Appendix at 30-31, *In re* D.F.B., 430 N.W.2d 475 (Minn. Ct. App. 1988) (emphasis added).

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

192. *Id.* at 479. Minn. R.P. Juv. Cts. 32.05(2) requires a juvenile to rebut the prima facie case by "significant evidence." In *In re* J.F.K., 316 N.W.2d 563 (Minn. 1982), and in *In re* S.R.L., 400 N.W.2d 382 (Minn. Ct. App. 1987), the courts held that rebuttal of a prima facie case required the defendant to produce "substantial evidence." *J.F.K.*, 316 N.W.2d at 564; *S.R.L.*, 400 N.W.2d at 384.

193. *D.F.B.*, 430 N.W.2d at 479 (emphasis added).

than would be required simply to create a disputed issue of fact.[194] After reviewing some of the rebuttal evidence introduced by Brom, the court concluded that Judge Ring's finding that Brom had rebutted the "prima facie" case was not clearly erroneous.[195]

The court of appeals agreed with Judge Ring's analysis that upon rebuttal of the prima facie case, the waiver decision reverted to the trial judge's sound discretion under the "totality of the circumstances,"[196] with the burden of persuasion remaining with the prosecution.[197] Appellate courts repeatedly have emphasized the broad discretion that trial judges enjoy in making this type of sentencing decision.[198] Judge Ring's opinion included an extended discussion of the non-exclusive list of factors that the rules of procedure and previous decisions required him to consider under the "totality of the circumstances."[199] Although Judge Ring regarded the factual question as a close one, he ultimately concluded that the prosecution had failed to meet its heavy burden of persuasion.[200] And, again, the court of appeals agreed with Judge Ring's analysis, noting that "[i]f our search for legislative intent is limited to the amendatory language of section 260.125, subd. 3, we inevitably will be compelled to reach the conclusion reached by the trial court."[201] In short, the appeals court concluded that the trial

194. *Id.* The Minnesota Supreme Court repudiated the court of appeals' contention that a greater quantum of rebuttal evidence was required in waiver cases than in any other civil matter. *See infra* note 224 and accompanying text. The court of appeals subsequently acknowledged that the evidence required to rebut a prima facie case for waiver is the same as in any other civil matter. *See In re* J.L.B., 435 N.W.2d 595, 598 (Minn. Ct. App. 1989) (" 'Significant evidence' is the same as substantial evidence, and the quantum of evidence required to rebut a prima facie case in a reference hearing is the same as in other civil matters.").

195. *In re* D.F.B., 430 N.W.2d 475, 480-81 (Minn. Ct. App. 1988).

196. *Id.* at 481; *see supra* notes 165-170 and accompanying text.

197. *See, e.g., In re* S.R.L., 400 N.W.2d 382, 384 (Minn. Ct. App. 1987) (Once the prima facie case was rebutted, "[i]t was thus up to the juvenile court to decide whether the State had met its burden of proof by clear and convincing evidence on the basis of the entire record and not by reference to the prima facie case.").

198. *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.").

199. *See In re* D.F.B., No. 88-J-0955, Memorandum at 11-18 (Olmsted County, Minn. Dist. Ct. Apr. 21, 1988).

200. *See supra* note 170 and accompanying text.

201. *In re* D.F.B., 430 N.W.2d 475, 482 (Minn. Ct. App. 1988). The court of appeals quoted with approval Judge Ring's analysis that the net effect of the 1980 amendments was to make juvenile court waiver more difficult, rather than easier. The court went on to note:

In addition, if we are permitted to look only to the amendatory lan-

court's application of section 260.125, subd. 3 and *Dahl* to the facts as it found them was correct. Thus, Judge Ring correctly interpreted and applied the waiver statute and the evidence supported his decision.

Even though the court of appeals agreed with every step of Judge Ring's analysis, it concluded, as a matter of law, that Judge Ring was wrong and that Brom must be tried as an adult.[202] Judge Ring's error, according to the court of appeals, was in following the statutory language as written and the cases interpreting it. Rather, Judge Huspeni asserted that "broader consideration of the 1980 amendments to Chapter 260 is not only warranted but is required," and that such a "broader consideration" would lead irrevocably to the conclusion that Brom must stand trial as an adult.[203]

Judge Huspeni noted that in addition to amending the waiver provisions, the legislature had also modifed the purpose clause of the Minnesota juvenile code.[204] The amended purpose clause provided the court with a means to "gloss" the specific language of the waiver statute.[205] While the exclusively benevolent and rehabilitative purpose of the juvenile court remains for children "alleged or adjudicated in need of protection or services,"[206] for juveniles charged with crimes, "[t]he purpose of the laws relating to children alleged . . . to be delinquent is to *promote the public safety . . . by maintaining the integrity of the substantive law prohibiting certain behavior and by developing individual responsibility for lawful behavior*."[207]

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guage of section 260.125, subd. 3, and to the language of Rule 32.05, we will be compelled to echo the trial court's determination regarding the continued viability of *Dahl*; that upon rebuttal of the state's prima facie case *Dahl* is still good law, and that in the absence of supporting psychological data or history of misconduct, the child's age, the serious nature of the offense charged, social adjustment and maturity level are insufficient to support a finding that D.F.B. could not be successfully treated within the juvenile court system.

Id. at 482.

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

203. *Id.*

204. *Id.*; *see* Minn. Stat. § 260.011(2) (1988); *see also supra* notes 132-133 and accompanying text. *See generally* Feld, *Dismantling the "Rehabilitative Ideal," supra* note 7, at 197-203; Feld, *Punishment, Treatment, supra* note 14, at 841-47.

205. Using the purpose clause to "gloss" the waiver statute is a common practice. "Courts have also avoided invalidating [waiver] statutes on vagueness grounds by finding that the general purpose statement of the enabling legislation creating the juvenile court provided sufficient statutory guidance. The general purpose clauses, however, typically provide scant guidance for decisionmakers. . . ." Feld, *Reference of Juvenile Offenders, supra* note 5, at 550; *see also id.* nn.105-106.

206. Minn. Stat. § 260.011(2)(a) (1988).

207. *Id.* § 260.011(2)(c) (emphasis added).

According to the court of appeals, "[i]f the words 'maintaining the integrity of the substantive law prohibiting certain behavior' are to have any meaning," then trial judges must look beyond the characteristics of the child in analyzing the "totality of the circumstances," even though that alone is the legislative mandate.[208] Thus, Judge Ring's error of law, according to the court of appeals, was his failure to use the broad, general, and contradictory language of the purpose clause as an aid in construing the specific and unambiguous language of the waiver statute.

The court of appeals was clearly aware of the public outcry that followed Judge Ring's decision to retain Brom as a juvenile. Within the constraints of its appellate function, it sought to reverse his unpalatable ruling by shifting the emphasis in waiver proceedings from the treatability of the offender to the seriousness of the offense.

> We are convinced that the legislature intended the language of section 260.011 to ensure that the criminal justice system would not be permitted to provide an excessively minimal response to an *offense* which had a major impact upon society. The brutal murders of these four family members has had a major impact on society. Retention of the alleged murderer within the criminal justice system for less than three years would constitute an excessively minimal response.
>
> We conclude that the legislature intended to protect the strong and legitimate interest of the public in a fair response by the criminal justice system to a heinous crime. There can be no doubt that the *offenses* here are heinous and that the only fair response of the criminal justice system, as a matter of law, must be referral. *The state's interest in the integrity of the substantive law, under the facts of this case, overcomes any consideration, however weighty, given by the trial court to the absence of anti-social or violent behavior in D.F.B.'s past.*[209]

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

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208. *In re* D.F.B., 430 N.W.2d 475, 482 (Minn. Ct. App. 1988). The court was "persuaded by the language of section 260.011 that the trial court, upon rebuttal of the prima facie case, must not be hobbled by the statutorily weakened analysis of *Dahl* and of Rule 32.05, subd. 2, especially subd. 2(h) (the record and previous history of the child), as the trial court here so clearly believed itself to be." *Id.*

209. *Id.* at 482-83 (emphasis added). More likely, Judge Huspeni's references to the "criminal justice system" in the first quoted paragraph should have been to the "juvenile justice system," i.e., "[r]etention . . . within the *[juvenile] justice system* for less than three years. . ." and "the *[juvenile] justice system* would not be permitted to provide an excessively minimal response to an *offense* which had major impact upon society." *See id.* The reference instead to the "criminal justice system" provides a Freudian revelation of the court of appeals' preoccupation with the offense.

In order to assure that Judge Ring's continuing exercise of judicial sentencing discretion would not frustrate its newly-found legislative intent to subordinate the offender to the offense, the court of appeals ruled that Brom must be tried as an adult, as a matter of law, without remanding the case to the trial judge for reconsideration.[210] With its exclusive emphasis on the seriousness of the offense, the court justified its action by asserting that Judge Ring would have reached the same conclusion as they did in any event.[211]

The court of appeals clearly shared the public's perception that Brom's crimes were extraordinarily serious and that retaining him as a juvenile with a maximum sentence of less than three years would constitute an excessively minimal response to those offenses. Yet, even the 1980 legislative amendments of the waiver statute retained the central focus on the characteristics of the offender. The seriousness of the offense, however violent, is relevant to the waiver inquiry only as far as it reflects a youth's amenability to treatment or threat to public safety.

Notwithstanding the court of appeals' preoccupation with the seriousness of the offense, the court failed to elaborate on the relationship between the general language of the purpose clause and the specific provisions of the waiver statute except in bald, unilluminating, and conclusory terms.[212] Moreover, the court quoted selectively and disingenuously from the legislative amendments of the purpose clause, because the very next sentence contradicted the rationale of its decision. Following the language that the court quoted, the amended purpose clause continues, "This purpose should be pursued through means that are fair and just, *that recognize the unique characteristics and needs of children, and that give children access to opportunities for personal and social growth.*"[213] If the amended purpose clause provides a basis for glossing the waiver statute, then providing a treatable youngster with "access to opportunities for personal and social growth" is consistent with Judge Ring's finding that the prosecution failed to

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210. *Id.* at 483.

211. *Id.* The court of appeals noted:

> We have considered returning this matter to the trial court for further consideration on the basis of our analysis of section 260.011. We conclude, however, that such is unnecessary. We have no doubt that upon reconsideration and application of section 260.011 to the facts of this case, the trial court unquestionably would reach the decision we have reached.

Id.

212. *See id.* at 482-83.

213. Minn. Stat. § 260.011(2)(c) (1988) (emphasis added).

show that Brom was not amenable to treatment. Perhaps this omission explains why the court of appeals precluded Judge Ring's review of the case following its statutory reinterpretation.

The court of appeals decision is straightforward—as a matter of law, the extraordinary seriousness of Brom's offenses requires his prosecution as an adult. If the court correctly interpreted the law, then the legislature reached that end in an extraordinarily convoluted and indirect manner. The credibility of the court's analysis is further eroded when one recalls that the legislature was presented with an explicit opportunity to exclude certain serious offenses from the juvenile court's jurisdiction entirely and declined to do so.[214] Contrarily, the statute continued to vest in juvenile court judges the discretion to make individualized determinations of amenability and dangerousness.

Not only is the court of appeals' logic hardly compelling, its use of the juvenile code's purpose clause to justify its result raises more problems than it resolves.[215] The fundamental justification for denying jury trials in delinquency proceedings[216] and, more basically, for maintaining a juvenile justice system separate from the

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

215. In addition to the court of appeals' reading a punitive purpose into the Minnesota juvenile code, the Minnesota Department of Corrections uses administratively adopted determinate sentencing guidelines based on the seriousness of the present offense and the length of the prior record to establish a juvenile's length of confinement. *See* Minnesota Dep't of Corrections, Juvenile Release Guidelines 3-5 (Sept. 1980). *See generally* Feld, *Punishment, Treatment, supra* note 14, at 871-74. Apparently, some of Minnesota's juvenile court judges also use determinate sentencing guidelines to decide whether and for how long a youth should be confined. *See, e.g., In re* D.S.F., 416 N.W.2d 772 (Minn. Ct. App. 1987). In *D.S.F.*, Judge Crippen noted that

> [the] determinate sentence of incarceration imposed by the trial court was prompted by unpublished sentencing guidelines, based singularly on the offense committed, and not by spontaneous exercise of discretion by the presiding judge. . . . [Where the sentence is based upon the type of offense committed,] we are dealing . . . with a criminal justice sentence, not a juvenile court disposition aimed at doing what is best for the individual. The juvenile has been ordered incarcerated for a definite term as part of a predetermined sentencing practice.

Id. at 779-80.

216. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971). "Although Minnesota's new punitive purpose clause marks a fundamental philosophical departure from its previously rehabilitative orientation, the legislature did not provide for jury trials in juvenile proceedings." Feld, *Punishment, Treatment, supra* note 14, at 844. *See generally* Feld, *Dismantling the "Rehabilitative Ideal," supra* note 7, at 197-203. Moreover, in *In re* K.A.A., 410 N.W.2d 836 (Minn. 1987), the Minnesota Supreme Court held that a juvenile could not voluntarily waive jurisdiction in order to obtain a jury trial in an adult criminal proceeding. "The legislature could, and apparently did, conclude that allowing a juvenile to waive juvenile court jurisdiction for some perceived short-term benefit ignores the best interests of the State in addressing juvenile problems as well as the overall interests of the juvenile." *Id.* at 840.

adult criminal system, is that punishment for offenses and treatment of offenders are fundamentally different and inconsistent societal responses to crime.[217] Many of the other procedural differences between juvenile and adult criminal proceedings, including the routine absence of lawyers, are based on a similar punishment versus treatment distinction.[218]

The court of appeals attempted to perform a traditional appellate function in reviewing legislation. Because the legislature tried to accomplish mutually exclusive purposes, the statute was conceptually flawed and practically inapplicable. Despite the court's analytical failures, it attempted to make sense of the legislative contradictions. To the extent that its opinion emphasized the principle of the offense, the court was introducing a judicial reform—moving juvenile court waiver decisions toward a more rational, less discretionary standard focused on the offense. Thus,

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217. *See, e.g.*, Martin Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 Vand. L. Rev. 791 (1982). Gardner argues that "[u]nlike the criminal law, juvenile justice responds to the status of children in need, treating them for what they are rather than punishing them for what they have done." *Id.* at 791. *See generally* Feld, *Punishment, Treatment, supra* note 14, at 822-25.

218. *See* Feld, *Criminalizing Juvenile Justice*, *supra* note 8, at 273-74, which concludes:

> Despite the criminalization of the juvenile court, it remains nearly as true today as two decades ago that "the child receives the worst of both worlds: that [the child] gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." This article has identified a number of instances in which the procedural safeguards afforded to juvenile offenders are not comparable either formally or functionally to those provided to adult criminal defendants. . . .
>
> The court's policy choices also reflect a basic philosophical ambivalence about the continued role of the juvenile court. As juvenile courts become increasingly criminalized and converge with their adult counterparts, there may be little reason to maintain a separate juvenile criminal court whose sole distinguishing characteristics is its persisting procedural deficiencies.

Id. (quoting Kent v. United States, 383 U.S. 541, 556 (1966)).

Further, the routine absence of lawyers in delinquency proceedings, despite *Gault's* promise of representation, calls into question the basic legitimacy of the juvenile court's adjudicative process. The United States Supreme Court in *In re* Gault, 387 U.S. 1 (1967), held that juvenile offenders were constitutionally entitled to the assistance of counsel in juvenile delinquency proceedings because "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." *Id.* at 36.

Gault's promise of counsel remains unrealized in many jurisdictions, including Minnesota. *See* Barry Feld, *In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 Crime & Delinq. 393 (1988) [hereinafter Feld, *In re Gault Revisited*] (In half of the six states surveyed only 37.5%, 47.7% [Minnesota], and 52.7% of the juveniles were represented); Feld, *Right to Counsel*, *supra* note 83, at 1220 (Table 3) (In 1986, only 45.3% of Minnesota's delinquents were represented by counsel.).

the court of appeals' result-oriented activist strategy to salvage the Brom case had far broader ramifications for juvenile justice administration in Minnesota than it recognized or acknowledged.

3. Minnesota Supreme Court: *De Novo* Review

The Minnesota Supreme Court granted Brom's petition for review "for the limited purpose of substituting our opinion . . . for that of the court of appeals."[219] Although the court agreed with the ultimate result reached by the court of appeals, it offered an alternative, factual rather than legal, rationale for the decision of the lower court.[220]

Like the courts before it, the Minnesota Supreme Court's analysis began with *Dahl* and the post-*Dahl* legislative amendments. Chief Justice Amdahl opined that *Dahl* decided that the purpose of a waiver hearing is to consider "all of the relevant factors—not just age or seriousness of the offense—to determine if the statutory test of reference has been met."[221] The court also reviewed the 1980 amendments of the purpose clause and the waiver statute, noting that Brom, a sixteen-year-old charged with first degree murder, fit the prima facie case criteria.[222]

The Minnesota Supreme Court agreed with Judge Ring that once the juvenile had rebutted the prima facie case,

> then the role for the juvenile court is to decide on the basis of the entire record, *without reference to the prima facie case*, whether the state has met its burden of proving by clear and convincing evidence that the juvenile is unamenable to treatment in the juvenile court system consistent with the public safety.[223]

Moreover, the court repudiated the court of appeals' assertion that the requirement of "significant" rebuttal evidence imposed a

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219. *In re* D.F.B., 433 N.W.2d 79, 80 (Minn. 1988).

220. *Id.* at 80-82.

221. *Id.* at 80; *see also* Feld, *Dismantling the "Rehabilitative Ideal," supra* note 7, which noted that

> the offense charged was obviously "among the relevant factors to be considered" and "the record must contain direct evidence that the juvenile endangers the public safety for the statutory reference standard to be satisfied." The case was thus remanded to the certifying court, which, in order to recertify, had to include in the record evidence that the juvenile was not suitable to treatment or presented a threat to the public safety.
>
> The case, as decided, simply resolved the narrow issue of what factual record is necessary to support a judicial determination of nonamenability to treatment or dangerousness and concluded that proof of age and seriousness of the crime alone are insufficient.

Id. at 190-91 (quoting *In re* Dahl, 278 N.W.2d 316, 321 (Minn. 1979)).

222. *D.F.B.*, 433 N.W.2d at 81.

223. *Id.* (emphasis added).

greater evidentiary burden than would be required to rebut a presumption in other civil matters.[224] The court agreed with Judge Ring that the evidence introduced by Brom, bearing both on amenability to treatment and the threat to public safety, was sufficient to rebut the prima facie case.[225]

The sole issue in the case, then, was whether the state had met its burden of proving by "clear and convincing" evidence, on the basis of the entire record, that Brom either was not amenable to treatment or was a threat to public safety.[226] Rather than adopting the court of appeals' strategy of using the purpose clause

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224. *Compare In re* D.F.B., 430 N.W.2d 475, 479 (Minn. Ct. App. 1988) *with In re* D.F.B., 433 N.W.2d 79, 81 (Minn. 1988). The supreme court stated:

> We used the word "substantial" evidence in *J.F.K.*, and the word "significant" in *Givens*. *We regard the words to be interchangeable. Furthermore, it was our intent that the quantum of evidence connoted by these terms is that which is required to rebut a prima facie case in other civil matters.*

D.F.B., 433 N.W.2d at 81 (emphasis added) (citing Feld, *Dismantling the "Rehabilitative Ideal," supra* note 7, at 209-10); *see supra* notes 192-194.

225. According to the supreme court,

> [t]he issue then becomes whether it can be said that the state met its burden of proof without regard to the presumption. In our view, once the district court concludes that the juvenile has rebutted the presumption, then the district court has to analyze the entire record, using the same basic multi-factor analysis discussed in *Dahl*, to see if it may be said that the state has proved by clear and convincing evidence that the juvenile is unamenable to treatment in the juvenile court system consistent with public safety.

Id.

226. Significantly, the legislature required the prosecutor to prove a case for waiver by the "clear and convincing evidence" standard of proof rather than by the less stringent "preponderance of the evidence" standard.

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

Feld, *Dismantling the "Rehabilitative Ideal," supra* note 7, at 206 (emphasis added). Affirming this analysis of the allocation of burdens of proof, appellate courts have reiterated that transfer of even serious offenders is the exception, not the rule. *See, e.g.*, Ice v. Commonwealth, 667 S.W.2d 671, 681 (Ky.), *cert. denied*, 469 U.S. 860 (1984); *In re* L.C., 184 N.J. Super. 569, 573, 446 A.2d 1233, 1235 (1982); *see also In re* J.L.B., 435 N.W.2d 595, 601-02 (Minn. Ct. App. 1989) (Crippen, J., dissenting).

to gloss the waiver statute, the Minnesota Supreme Court simply substituted its view of the facts for those of the trial judge.

> Employing the multi-factor analysis in this case—which is what the trial court in *Dahl* was directed to do on remand—would justify a reference decision in this case even if the legislature's 1980 amendment of the purpose section was without significance. While we agree with the court of appeals' conclusion that the amendment of the purpose section makes it easier to conclude that reference is justified in this case, we do not agree with the implication that reference is justified any time a juvenile commits a heinous offense. Rather, reference in this case is justified because—bearing in mind the legislature's revised statement of purpose and looking at all the factors listed in R. 32.05, including the offense with which D.F.B. is charged, the manner in which he committed the offense, the *interests* of *society* in the *outcome* of this case, the testimony of Dr. Malmquist *suggesting* that treatment of D.F.B. *might be* unsuccessful, and the *weakness* of Dr. Gilbertson's testimony—the state met its burden of proving by clear and convincing evidence that D.F.B. is unamenable to treatment in the juvenile court system consistent with the public safety.[227]

By supplanting the fact-finder's view of the evidence with its own, the supreme court decided as a question of fact, not as a matter of law, the ultimate issue of whether Brom should be tried as an adult.

Having substituted its version of the facts for those of the trial judge, the supreme court found it unnecessary to remand the case for further consideration.[228] Rather, it said that because "the trial court wanted to refer the juvenile if the court could do so," under its revised assessment of the facts, the supreme court was "in effect deciding the case as the district court had wanted to decide it."[229]

Although the supreme court conceded that the trial court interpreted and applied the waiver statute correctly, it disagreed with the results of Judge Ring's exercise of judicial sentencing discretion. At no point in its opinion did the supreme court state that Judge Ring's factual findings were "clearly erroneous" or an "abuse of discretion." Rather, it simply disregarded its appellate function in reviewing lower courts' findings of facts and used a different strategy than that employed by the court of appeals to reach the politically "correct" result.

It is elementary hornbook law that appellate courts must de-

227. *D.F.B.*, 433 N.W.2d at 81-82 (emphasis added).
228. *Id.* at 82.
229. *Id.*

fer to findings of fact made by trial courts.[230] "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."[231] Appellate courts reiterate that a factual finding by a trial court may be overturned on appeal only if it is "clearly erroneous."[232]

A trial court's findings of fact can be set aside as "clearly erroneous" only if the reviewing court on the entire evidence is firmly convinced that a mistake was made.[233] In order to conclude that a trial court's findings are clearly erroneous, the appellate court must find them to be manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.[234] Although the scope of appellate review of judicial findings of fact may be broader than that applied to findings made by a

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230. *See, e.g.*, John Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 Wash. U.L.Q. 409 (1981) (decrying appellate courts' failure to accord trial courts' findings of fact the respect and deference envisioned by the clearly erroneous rule); Charles Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751 (1957); Comment, *An Analysis of the Application of the Clearly Erroneous Standard of Rule 52(a) to Findings of Fact in Federal Nonjury Cases*, 53 Miss. L.J. 473 (1983); Note, *Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule Been Clearly Erroneous?*, 52 St. John's L. Rev. 68 (1977).

Courts have emphasized the deference that appellate courts must show to fact-finding by the trial courts. *See, e.g.*, Amadeo v. Zant, 108 S. Ct. 1771, 1777 (1988) ("clearly erroneous standard of review is a deferential one"); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534 n.8 (1979) ("great value" of appellate deference); Commissioner v. Duberstein, 363 U.S. 278, 289 (1960) ("primary weight" must be given to conclusions of trier of fact).

231. Minn. R. Civ. P. 52.01; *see also* Fed. R. Civ. P. 52(a).

232. *See, e.g.*, Anderson v. Bessemer City, 470 U.S. 564 (1985).

Trial court judges have also decried the tendency of appellate courts to review evidentiary records expansively. Judge John F. Nangle, Chief Judge of the United States District Court for the Eastern District of Missouri, wrote,

> The appellate courts have failed increasingly to accord to the trial court's findings of fact the respect and deference envisioned by the Clearly Erroneous Rule. Although purporting to pay homage to the Clearly Erroneous Rule, appellate courts have become less reticent to substitute their view of the evidence for that of the trial court to "do justice."

Nangle, *supra* note 230, at 410.

233. *See* United States v. United States Gypsum Co., 333 U.S. 364 (1948), where the Court held that "[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Id.* at 395; *accord* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 74 n.19 (1978).

234. *See, e.g.*, Hubbard v. United Press Int'l, 330 N.W.2d 428, 441 (Minn. 1983); Olson v. Blue Cross & Blue Shield, 269 N.W.2d 697, 700 (Minn. 1978); Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975); Johnson v. Miera, 424 N.W.2d 800, 804 (Minn. Ct. App. 1988).

jury,[235] the courts have also emphasized the exceptionally broad sentencing discretion enjoyed by trial judges.[236]

In proceedings to a court without a jury, the trial court has the primary responsibility of determining factual issues, and appellate courts necessarily defer to the trial court's sound judgment and discretion. Where the findings are based on oral testimony, appellate courts cannot judge the credibility or demeanor of the witness.[237] The function of an appellate court is not to examine the evidence as if trying the matter *de novo*, but rather to determine whether the record of the evidence, taken as a whole, sustained the trial court's findings.[238] The appellate court's role is to

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235. *See, e.g.*, *In re* Estate of Balafas 293 Minn. 94, 96, 198 N.W.2d. 260, 261 (1972).

236. *See, e.g.*, State v. Garcia, 302 N.W.2d 643, 647 (Minn. 1981) (trial court has discretion to depart from sentencing guidelines); State v. Horoshak, 415 N.W.2d 404, 409 (Minn. Ct. App. 1987) (trial court has broad discretion). Indeed, because the sentencing focus in juvenile proceedings is theoretically on the offender, not the offense, the judge's scope of discretion is even broader. *See* Feld, *Punishment, Treatment, supra* note 14, at 880 ("juvenile courts enjoy greater discretion than do their adjudicatory counterparts at the adult criminal level because of the presumed need . . . to look beyond the present offense").

237. *See, e.g.*, Tamarac Inn, Inc. v. City of Long Lake, 310 N.W.2d 474, 477 (Minn. 1981); Berry v. Goetz, 348 N.W.2d 376, 378 (Minn. Ct. App. 1984). Although some appellate courts have used a broader scope of review where the trial court's findings are based on physical or documentary evidence rather than credibility determinations, the Supreme Court has not approved a different scope of review under Rule 52(a). *See* Anderson v. Bessemer City, 470 U.S. 564, 574-75 (1985) (stressing the special deference accorded determinations regarding the credibility of witnesses); Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982). The Court has, however, emphasized even greater deference to fact-finding based on demeanor evidence, "for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Bessemer City*, 470 U.S. at 575.

Minnesota courts have emphasized that resolving conflicting testimony is the exclusive function of the fact-finder because it has the opportunity to observe the witnesses' demeanors and weigh their credibility. *See, e.g.*, State v. Anderson, 379 N.W.2d 70, 77 (Minn. 1985); State v. Lloyd, 345 N.W.2d 240, 245 (Minn. 1984).

238. Elaborating on the meaning of the "clearly erroneous" standard, the United States Supreme Court in Anderson v. Bessemer City, stated:

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*."

Bessemer City, 470 U.S. at 573 (quoting Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969)).

The Minnesota Supreme Court has also emphasized judicial restraint in appellate review. "We cannot retry the facts, but must take the view of the evidence most favorable to the state and must assume that the jury believed the state's witnesses and disbelieved any contradictory evidence." State v. Merrill, 274 N.W.2d 99, 111 (Minn. 1978).

evaluate the evidence supporting the trial court's decision to determine if it is legally sufficient, not to decide whether the reviewing court would have reached a different result.[239] In making this evaluation, the evidence is evaluated in the light most favorable to the trial court's findings.[240]

The issue for an appellate court is not whether the evidence could reasonably support findings contrary to those made by the trial court, but rather whether the trial court's findings are supported by the record. Even though the appellate court might have found the facts differently if it had decided the case in the first instance, the issue on review is whether the trial judge's findings are manifestly contrary to or not reasonably supported by the evidence as a whole. Where there is a conflict of evidence, appellate courts will not disturb those findings unless manifestly contrary to the evidence as a whole.[241] Where reasonable minds could differ, the

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239. *E.g.*, Hilton v. Nelson, 283 N.W.2d 877, 881 (Minn. 1979) (where trial court's factual findings are reasonably supported by the evidence, they are not clearly erroneous); *accord* Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985), where the Court stated that

> [i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Id. The dilemma, for appellate review, occurs because

> whenever there are two versions of the facts, or two interpretations of undisputed facts, the trial court and then the appellate court must choose which version or interpretation to believe. In making the choice, a court is necessarily convinced of the correctness of the chosen view and is necessarily, therefore, convinced that the opposing view is erroneous. Being convinced that a view is erroneous, however, is not the same as being convinced that a view is clearly erroneous. A court may be convinced of the correctness of its view and at the same time concede the merit of the opposing view.

Nangle, *supra* note 230, at 416.

240. *E.g.*, Theisen's, Inc. v. Red Owl Stores, 309 Minn. 60, 66, 243 N.W.2d 145, 149 (1976); Caroga Realty Co. v. Tapper, 274 Minn. 164, 169, 143 N.W.2d 215, 220 (1966). In State v. Mytych, 292 Minn. 248, 194 N.W.2d 276 (1972), the court emphasized that the resolution of credibility issues between expert witnesses is uniquely a trial court function:

> This court's responsibility is not that of trying the facts again but of making a rigorous review of the record to determine whether the evidence, direct and circumstantial, viewed most favorably to support a finding of guilt, was sufficient to permit the trial court to reach its conclusion.

Id. at 252, 194 N.W.2d at 279.

241. In *Bessemer City*, the Court stated:

> [W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

findings of the trial court should not be disturbed.

Courts have advanced a variety of rationales for appellate deference to trial court fact-finding, including judicial functional specialization and restricting the trial of cases to one proceeding.[242] Broadening the scope of appellate review demeans the role of trial judges, decreases and postpones the finality of decision-making, and dissipates scarce judicial resources.[243]

Applying these elementary principles of appellate review to the Minnesota Supreme Court's decision in *D.F.B.* reveals that Chief Justice Amdahl's substitution of his view of the facts for those of Judge Ring was "clearly erroneous" both in fact and as a matter of allocation of judicial roles. The court's entire analysis of the facts is presented in the previously quoted paragraph,[244] which

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470 U.S. at 575.

In Amadeo v. Zant, 108 S. Ct. 1771 (1988), the Court reaffirmed this position.

> Although there is significant evidence in the record to support the findings of fact favored by the Court of Appeals, there is also significant evidence in the record to support the District Court's contrary conclusion. . . . We frequently have emphasized that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."

Id. at 1778 (quoting *Bessemer City*, 470 U.S. at 574).

242. The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. . . . [T]he trial on the merits should be "the 'main event'. . . rather than a 'tryout on the road.' "

Bessemer City, 470 U.S. at 574-75 (quoting Wainwright v. Sykes 433 U.S. 72, 90 (1977)).

243. Professor Charles Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751 (1957), noted the deleterious consequences of expansive appellate review.

> The principal consequences of broadening appellate review are two. Such a course impairs the confidence of litigants and the public in the decisions of the trial courts, and it multiplies the number of appeals. . . . We may be sure that the broadened scope of appellate review we have seen will mean an increase in the number of appeals. . . . It is literally marvelous that, at a time when the entire profession is seeking ways to minimize congestion and delay in the courts, we should set on a course which inevitably must increase congestion and delay. . . . It is hard to believe that there has been any great public dissatisfaction with the restricted appellate review which was traditional in this country.

Id. at 779-80.

244. *See supra* text accompanying note 227.

simply adverts to the general substantive factors listed in the rules and then concludes that "the state met its burden of proving by clear and convincing evidence that D.F.B. is unamenable to treatment in the juvenile court system. . . ."[245]

Applying the normal principles of appellate review demonstrates the fundamental error of the court's decision in *D.F.B.* Initially, there is the deference that appellate courts must pay to trial courts' findings of fact. Moreover, the decision in *D.F.B.* was based substantially on oral testimony by witnesses and on a dispute between experts on the likelihood of Brom's being successfully treated within three years. Where the record reasonably can support either result, it is inappropriate for an appellate court to substitute its view of the correct outcome for the equally apt result of the original finder of fact. The court's action is especially troublesome where the state bears the burden of proof by more than the civil "preponderance" of the evidence standard.[246] Although the supreme court may properly disagree with the trial court's find-

245. *In re* D.F.B., 433 N.W.2d 79, 82 (Minn. 1988). The court also observed that Dr. Malmquist suggested that Brom's treatment "might be unsuccessful" and characterized Dr. Gilbertson's testimony as "weak." Although Dr. Malmquist did not testify that Brom definitely could be treated successfully in the time remaining as a juvenile, contrary to the court's characterization, his testimony hardly established by "clear and convincing evidence" that Brom could not be treated. Dr. Malmquist simply could not predict to a degree of clinical certainty the amount of time required or the ultimate success of treatment. *See supra* notes 173-174 and accompanying text.

Although the court may characterize Dr. Gilbertson's testimony in any manner that it chooses to do so, any fair-minded review of the record does not reveal it to be *weak* on the ultimate legal issue of Brom's treatability as a juvenile. *See supra* notes 175-183 and accompanying text.

Quite the contrary, while recognizing the inherent limitations of clinical prognoses, Dr. Gilbertson's testimony clearly and unequivocably supported Brom's position that he was treatable as a juvenile. If Dr. Gilbertson's views were inconsistent with the testimony of Dr. Malmquist, then it created a credibility issue that was uniquely within the purview of the fact-finder to resolve. Because the prosecution had the burden of proving that Brom was not treatable by "clear and convincing evidence"—a heavier burden than the civil "preponderance of the evidence" standard—Chief Justice Amdahl's factual determination is especially difficult to explain. One can only conclude that he reached this result in a conclusory, result-oriented fashion for reasons not based on the evidentiary record.

246. *See supra* note 136 and accompanying text. Moreover, the supreme court has emphasized that waiver is a very limited exception to the otherwise exclusive jurisdiction of juvenile courts. Thus, in *In re* K.A.A., 410 N.W.2d 836 (Minn. 1987), the court held that a juvenile had no right to waive juvenile court jurisdiction in order to obtain a jury trial as an incident of an adult criminal prosecution.

> The legislature's clearly expressed intent is to provide only a limited exception to the otherwise exclusive jurisdiction of the juvenile court. The exception in the statute permitting a reference to district court is limited and circumscribed, and is to be granted only after the court has made findings following the hearing provided in the statute.

Id. at 839.

ings of fact and especially with the result, in order to conclude that those findings were so "clearly erroneous" as to be an "abuse of discretion," more than simple disagreement is necessary. Nowhere in its opinion does the supreme court assert that Judge Ring's finding, that the state had failed to carry its heavy burden of proof, was clearly erroneous. Nor does the court say that Judge Ring's conclusion that the state had failed to establish its case was manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole. Obviously, it could not. As defined by the legislature, the ultimate issue was a subjective, clinical, and discretionary factual question for which there was ample evidentiary support.

Because the ultimate statutory factual issue focused on characteristics of the offender, i.e., whether Brom was treatable as a juvenile, it would be difficult for a judge's determination ever to be "clearly erroneous" or an "abuse of discretion." No matter which way he or she ruled, the determination would be within the judge's discretion if a modicum of evidence supported that result. The rationale for discretionary sentencing is that the trial judge is in the best position to tailor the legal standards to the characteristics of the offender. Within the range of legally authorized alternatives, such a discretionary decision is in practical effect neither appealable nor reviewable.

The Minnesota Supreme Court has repeatedly affirmed the highly discretionary and subjective nature of waiver/sentencing decisions, emphasizing only the factual record necessary to sustain any decision to waive or retain.[247] In part, the court's emphasis on the sufficiency of the record to support a discretionary waiver decision reflects the legislative mandate that the primary focus of juvenile delinquency and waiver proceedings is on the offender rather than the offense.[248]

The supreme court in *D.F.B.* confronted the problem posed by the legislature's continued emphasis on the characteristics of the offender coupled with trial courts' virtually unrestricted discretion to make waiver decisions. The problem became critical when a conscientious trial judge followed the legislature's mandate in an extraordinarily difficult and troubling case. *D.F.B.* laid bare

247. Thus, *Dahl* simply represented the minimum evidentiary record necessary to sustain a waiver decision—one that required more than simply proof of age and offense. *See supra* notes 126-130 and accompanying text.

248. *See, e.g., In re* K.A.A., 410 N.W.2d 836 (Minn. 1987). The court has held consistently that a juvenile cannot be referred solely because of the alleged offense. *See, e.g., In re* K.P.H., 289 N.W.2d 722, 725 (Minn. 1980) (citing *In re* Dahl, 278 N.W.2d 316 (Minn. 1979)); *In re* R.D.W., 407 N.W.2d 113, 117 (Minn. Ct. App. 1987).

the fundamental sentencing tension between the principle of individualized justice and the principle of offense. Unfortunately, the supreme court's resolution of *D.F.B.* undermined the integrity of the trial process and did violence to its own appellate function. Although the court may be satisfied that it reached "the right result," it did so by misrepresenting the trial court factual record and the legal issues before it.

In reaching its result, the supreme court may have concluded that it was preferrable for one case—*D.F.B.*—to be decided "wrongly," i.e. contrary to the offender-oriented legislative mandate, in order to avoid a precedent, such as that of the court of appeals, that would create more problems for juveniles and for the administration of the waiver process. Assuring that Brom was tried as an adult would provide juvenile courts with the political elbow room to continue exercising sentencing discretion for more routine cases. Thus, the court's strategy supports discretionary, offender-oriented sentencing over retributive, offense-based sentencing albeit at David Brom's expense. As a matter of sentencing policy, the court may have concluded that, despite substantial individual variations, the indeterminacy of discretionary sentencing is likely to result in shorter sentences for most offenders, even though occasional highly visible or career offenders may receive disproportionately severe sentences. This trade-off between discretionary leniency for most juveniles, coupled with severity for a few, is consistent with the view of the waiver process as a "symbolic gesture" which requires occasional "sacrificial lambs" as a strategy for maintaining juvenile court jurisdiction over the vast majority of youths and deflecting more fundamental critiques of juvenile justice administration.[249]

Unfortunately, the Minnesota Supreme Court's result-oriented activism alleviated the political pressure on the legislature to confront the sentencing policy contradictions inherent in the statute and to declare explicitly the policy of the state.[250] So long

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249. *See supra* note 53 and accompanying text.

250. Following the Minnesota Court of Appeals' decision in *D.F.B.*, a state legislator involved with the 1980 amendments to the juvenile waiver law stated that "he felt that the appeals court decision is 'accurate in assessing what the legislative intent was.'" Star Tribune, Oct. 19, 1988, at 4B, col. 1. He concluded that if the court's decision "strips district court judges of discretion in referring juveniles . . . I have no problem with that." *Id.*

On other occasions, the supreme court has been more sensitive to the legislature's prerogatives in defining juvenile court jurisdiction. Thus, in *In re* K.A.A., 410 N.W.2d 836 (Minn. 1987), the court attempted to implement

> the legislature's perception of the public policy of the state. . . . Should the legislature conclude that the public policy of this state no longer requires the same degree of exclusivity of jurisdiction now lodged in

as the legislature can rely on appellate courts to obfuscate clear legislative language and misrepresent the contents of a trial record, elected representatives have no incentive to make difficult criminal policy decisions. When the policy choice is fundamental and irreconcilable, however, such as the choice between *offenders* and *offenses* as the basis for sentencing decisions, the legislature has the sole responsibility to choose. When appellate courts announce public policy in such an area, their decisions inevitably reflect *ad hoc* political or other extraneous considerations which detract both from their judicial role and the allocation of responsibilities between the legislative and judicial branches. Moreover, as the Brom case evidences, even after individual cases have been decided, the underlying contradictions inherent in the law persist and affect the deciding of subsequent cases as well.

C. In re J.L.B.: *Waiver of the Serious but Isolated Juvenile Offender After* Dahl *and* D.F.B.

Approximately two months after the supreme court decided *D.F.B.*, the Minnesota Court of Appeals considered yet another case involving a serious offense by an otherwise unexceptional youth, *In re J.L.B.*[251] J.L.B., who was seventeen at the time of his offense but nineteen by the time his case was decided, allegedly murdered or aided the suicide of his girlfriend, R.C., who was six and one-half months pregnant at the time of her death.[252] Like Dahl and Brom before him, J.L.B. apparently had no prior delinquency involvements or previous treatment as a juvenile.[253]

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the juvenile courts, it, of course, is free, by amendment to the statute, to make provisions [for juveniles to opt out of the juvenile system]. . . . The ultimate decision involves difficult social policy choices particularly within the province of the legislature.

Id. at 840.

251. 435 N.W.2d 595 (Minn. Ct. App. 1989).

One week prior to its *J.L.B.* decision, the court of appeals affirmed the referral of another youth who participated in a gang assault that led to the death of its victim. *In re* T.L.C., 435 N.W.2d 581 (Minn. Ct. App. 1989). *T.L.C.* was a more "typical" waiver case: a juvenile with a poor academic record, excessive absences, and persistent behavioral problems in school, *id.* at 582; at least two years of active involvement in a juvenile gang in Milwaukee prior to moving to Minneapolis, *id.*; a prior conviction for participating in a gang assault and robbery of another victim, *id.*; and psychological resistance to acknowledging his culpability or expressing remorse for his present offense. *Id.* T.L.C. was one of three youths who attacked another youth at school and "sat on the victim's head while the primary attacker dropped onto the victim's abdomen with his knee from a standing position" causing internal injuries and death. *Id.* The court of appeals affirmed the trial court's waiver decision as not clearly erroneous or an abuse of discretion. *Id.* at 584.

252. *J.L.B.*, 435 N.W.2d at 596.

253. *Id.* at 602. Judge Crippen, dissenting, noted:

The evidence shows that appellant's current offense, if it occurred, is

Although J.L.B.'s offenses created a prima facie case for waiver, sufficient evidence of his suitability for treatment as a juvenile was introduced to rebut the presumption for waiver.[254] As indicated above, once the prima facie case was rebutted, the decision to waive was discretionary under the "totality of the circumstances."

A somewhat chastened court of appeals acknowledged the continuing vitality of *Dahl* after *D.F.B.*—proof of age and offense alone is not a sufficient basis to justify transfer.[255] The trial record included testimony by friends of both J.L.B. and the victim, and expert testimony of a psychiatrist and psychologists who evaluated him. They concluded that J.L.B. did not have a mental illness and was not a danger to society.[256] The trial court decided to waive J.L.B. on the ground that retaining him as a juvenile would constitute a threat to public safety.[257] In the face of an ambiguous record, the court of appeals affirmed the trial court's waiver decision on the grounds that it was not clearly erroneous or an abuse of its "broad discretion."[258]

Although *J.L.B.* presents a seemingly straightforward waiver case—an older juvenile charged with a very serious offense—even after *D.F.B.*'s clarification, the Minnesota Court of Appeals could not agree on either its rationale or result. While the majority voted to affirm the waiver, Judge Crippen disagreed in a strong dissent.[259] Judge Crippen noted that *Dahl* and *D.F.B.* require the

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> an isolated delinquent act in the life of an intelligent high school youth who is active in extracurricular sports activities, cycling, reading and personal hobbies, and whose worst performance problem has been the absence of academic achievements to the high level of his ability.

Id. (Crippen, J., dissenting).

254. *Id.* at 598.

255. *Id.* at 599. The court of appeals stated:

> In determining if the statutory test for reference has been met, the court must consider all of the relevant circumstances and not just age or seriousness of the offense. . . . Because evidence of the offense alone is not sufficient to justify reference, it is necessary to examine non-offense related factors. We recognize the continued validity of the multifactor analysis enunciated in [*Dahl*].

Id. (citations omitted).

Despite its obligatory homage to *Dahl* and *D.F.B.*, however, the court of appeals appears unwilling to relinquish the commitment to offense-based decision-making it put forth in its version of *D.F.B.* *See* text accompanying *supra* note 209. After quoting from the supreme court's decision, *see* text accompanying *supra* note 227, the court concluded "We believe *Dahl* has been modified in accordance with the above statement." *J.L.B.*, 435 N.W.2d at 599.

256. *Id.* at 597.

257. *Id.* at 599. "Although J.L.B.'s experts stated that they did not believe J.L.B. to be dangerous, the trial court believed that J.L.B. managed to conceal dangerous aspects of his personality from the experts." *Id.*

258. *Id.* at 599.

259. *Id.* at 600-04 (Crippen, J., dissenting).

state to prove a juvenile's threat to public safety with evidence other than simply the youth's age and the present offense, which is all that the trial court relied on in *J.L.B.*[260] Indeed, the trial judge asserted "[i]n any homicide case . . . the criminal justice system must respond strongly and punitively.' "[261] Although the trial judge's opinion that certain offenses deserve adult prosecution may reflect a proper social policy, Judge Crippen noted that the predominance of the offense is not the policy declared by the legislature which retains its primary focus on the offender.[262]

Looking beyond the offense with which J.L.B. was charged, Judge Crippen found the record devoid of evidence that he was dangerous or a threat to public safety.[263] He also found that the state had failed to prove by clear and convincing evidence that

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260. *Id.* at 600. Judge Crippen presented the trial court's decision which he contended directly contradicted the rulings in *Dahl* and *D.F.B.*:

> The trial court concluded: This court remains of the opinion that *proof that the juvenile defendant is a dangerous person is no longer required. Regardless of whether the juvenile is likely to commit future crimes, the public safety is not served unless, in the absence of such mitigating facts as would justify retention of juvenile jurisdiction, serious criminal behavior is effectively punished with 'just desserts [sic].' The public safety further requires that Court decisions be consistent with a generally held impression by the public that serious criminal activity will surely result in serious punishment.*

Id. (emphasis added).

261. *Id.*

262. Judge Crippen's review of the 1980 amendments of the waiver statute concluded: "This amendment demonstrates the legislature's apparent ratification of the policies underlying the juvenile court system and the proposition that reference should be the exception and not the rule." *Id.* at 601 (citing Feld, *Dismantling the "Rehabilitative Ideal," supra* note 7, at 206).

263. Judge Crippen noted:

> Looking beyond the current offense, the record here includes remarkably meager evidence, if any at all, that appellant is personally dangerous. The record contains evidence on the dangerousness of appellant's conduct in the course of his alleged unlawful conduct, together with a remark before the incident about being able to kill someone or killing the young woman who later committed suicide. Appellant lied when questioned about the offense; if this is considered as unrelated to the offense, there is no evidence it is germane to dangerousness. Otherwise, the record is simply void of evidence that appellant endangers the public safety. Undisputed expert testimony indicates that appellant is not an aggressive or a dangerous person. According to the court-appointed psychologist, testing suggests that appellant's level of emotional control is about normal.
>
> Observing an inference of dangerousness solely from appellant's offense, the trial court in its memorandum expressed a belief that appellant "likely" had "managed to conceal part of his personality from the experts, the dangerous underside . . . that must have risen to the surface and influenced his behavior" when the alleged offense occurred. This conclusion is openly shaped by the offense and is not supported by the evidence.

Id.

J.L.B. was unsuitable for treatment.[264] In short, Judge Crippen concluded, the trial judge waived J.L.B. on the basis of his age and the seriousness of his offense in contravention of *Dahl*.

Judge Crippen concluded his opinion with an examination of the "state of current Minnesota reference law."[265] While noting the amended purpose clause and the prima facie case strategy, he concluded that the waiver decision generally remains one of judicial discretion under the "totality of the circumstances" and that

> reference remains the exception and not the rule . . . . [I]t is significant that the 1980 Minnesota Legislature openly rejected the notion that certain offenses are cause per se for reference, choosing instead to adopt a rebuttable prima facie inference. . . . It must be observed, in sum, that the juvenile court act provides for significant obstacles to reference, both in terms of procedures and standards. . . . It is evident that the legislature defers to the body of opinion, sometimes disputed, that incarcerating young people in adult prisons for long terms is not a worthwhile correctional policy, especially when this practice includes young people who are not clearly dangerous or whose condition does not otherwise invite adult imprisonment.[266]

Judge Crippen asserted that fidelity to the legislative mandate required reversal of the trial court's decision to waive J.L.B.

Like the supreme court in *Dahl* a decade earlier, Judge Crippen invited the legislature "to grapple with the issue of corrections policy for young offenders."[267] According to Judge Crippen, the imperative to waive serious but isolated young offenders arises because juvenile court judges lack the necessary tools to control such youths as juveniles for a substantial period of time. Prior to 1975, when the jurisdictional limits were reduced to twenty-one, Minnesota's Youth Conservation Commission retained jurisdiction over young offenders until they attained the age of twenty-five.[268] In 1982, the maximum age of juvenile court dispositional authority was reduced further from twenty-one to nineteen.[269] To the extent that the number of years remaining within juvenile court jurisdiction is one of the primary factors influencing judicial waiver decisions,[270] the reduction in the maximum age of disposition in-

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264. *Id.* at 602.

265. *Id.*

266. *Id.* at 602-03 (citing Feld, *Reference of Juvenile Offenders*, *supra* note 5; Feld, *Principle of Offense*, *supra* note 6, at 520-28).

267. *Id.* at 603.

268. *Id.*

269. *Id.* The problem of "older" juveniles and the jurisdictional limitations on juvenile courts has arisen in other cases. *See, e.g., In re* C.A.N., 370 N.W.2d 438 (Minn. Ct. App. 1985).

270. *See supra* note 60 and accompanying text.

creases the pressure upon judges confronting youths charged with serious offenses to transfer them to criminal courts where longer sentences are available.[271]

In lieu of increasing the sentencing authority of juvenile courts, Judge Crippen asserted that if offense-based waiver is to be the law of the state, then only the legislature can provide for it. He correctly recognized that it is the legislature's responsibility to formulate sentencing policy and that, as long as it avoids that responsibility, juvenile courts will continue asking unanswerable questions.[272]

> [I]f purely offense-based reference is appropriate, if *Dahl* is to be ignored, the legislature must so determine. With that decision, and grappling with conflicting views on sentencing of young offenders, the legislature should decide whether a young defendant, especially in a case of a serious but isolated crime, should be sentenced in adult court to a different term and a different facility than other defendants.[273]

Judge Crippen cautioned, however, that legislatively endorsing offense-based sentencing in juvenile courts, either for purposes of waiver or for juvenile dispositions, contradicts the "therapeutic" nature of juvenile courts that justifies the uses of many procedures which are less adequate than those required for the criminal process.[274]

In Judge Crippen's opinion, the fundamental sentencing policy issue that the legislature avoided in the aftermath of *Dahl* re-

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271. According to Judge Crippen, legislatively increasing the dispositional authority of juvenile court would alleviate considerably the pressures to waive. "If an adequate alternative is developed for serious young offenders, the judiciary will be duly freed from the absurd choices it now faces in dealing with those who are not habitually delinquent but who have committed a serious offense." *In re* J.L.B., 435 N.W.2d 595, 604 (Minn. Ct. App. 1989) (Crippen, J., dissenting).

272. *Id.* at 603-04. *See generally* Feld, *Reference of Juvenile Offenders*, *supra* note 5.

273. *J.L.B.*, 435 N.W.2d at 604.

274. *Id.*

> Finally, it should be observed that there are constitutional questions looming in the wake of loose permission for references based solely on the circumstances of an offense and the age of an offender. First, offense-based references enlarge the predominance of a punishment standard in determining juvenile court dispositions, and the weight of the demand that persons before this court have further procedural safeguards, including the right to trial by jury.

Id.; *see also In re* D.S.F., 416 N.W.2d 772, 777 (Minn. Ct. App. 1987) (Crippen, J., dissenting) (decrying use of offense-based sentencing practices in juvenile courts without criminal procedural safeguards). *See generally* Feld, *Principle of Offense*, *supra* note 6, at 504-11 (strong nationwide trend toward adopting offense-based waiver legislation); Feld, *Punishment, Treatment*, *supra* note 14, at 851-79 (increased emphasis on offense-based sentencing within juvenile courts); Feld, *Criminalizing Juvenile Justice*, *supra* note 8, at 167-79 (procedural deficiencies of juvenile courts that are increasingly punitive).

mains—the choice between sentences based on considerations of the offender and those of the offense.[275] Judge Crippen's proposed solution is to increase the sentencing authority of juvenile courts in order to avoid waiving serious but isolated young offenders for adult prosecution.[276] Some commentators dispute the wisdom of expanding the sanctioning power of a juvenile court which is procedurally inadequate to its present adjudicative role,[277] and propose, instead, that serious offenses should be dealt with exclusively in criminal courts.[278] Ultimately, however, these sentencing policy disputes can be addressed only by the legislature.

V. Conclusion: Suggestions for the Legislature

The case of David F. Brom, *In re D.F.B.*, dramatically illustrates the fundamental tension in sentencing policies between an emphasis on the characteristics of the offender and a consideration of the seriousness of the offense. If one believes in the "rehabilitative ideal"—the premise that juvenile courts exist to serve the "best interests" of the young offender—then David Brom is a likely candidate for successful therapeutic intervention and should appropriately be tried as a juvenile rather than as an adult. In a

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275. *J.L.B.*, 435 N.W.2d at 604.

276. *Id.* at 603-04.

277. *See, e.g.*, Zimring, *supra* note 46, who surveys alternative sentencing policies toward serious young offenders and rejects proposals to increase the punishment and incapacitative powers of juvenile courts.

> Increasing the punishment power of juvenile courts also puts substantial pressure on their usual procedures for fact-finding. The informality, nonentitlement to trial by jury, and discretionary character of the juvenile justice system have been defended from constitutional attack on the grounds that the primary mission of the juvenile court is not to punish but to serve the young people who appear before it. This defense of the system troubles many who regard the disposition of juvenile cases as being motivated, at least in part, by the traditional purposes of punishment. The lack of traditional legal safeguards in juvenile courts becomes far more questionable when the court "designates" its clients as "felons" and then locks them away for periods of time that can only be ascribed to retributive, incapacitative, and deterrent agendas. *The processes of contemporary juvenile justice are too frail to be associated with drastic sanctions; a substantial argument can be made that the coupling of severe sanctions with procedural informality is unconstitutional.*

Id. at 197 (emphasis added).

On the procedural deficiencies of the juvenile court, see Feld, *Criminalizing Juvenile Justice*, *supra* note 8, at 167-272; Feld, *In re Gault Revisited*, *supra* note 218, at 401 (in half the states surveyed, a majority of juveniles appeared in delinquency proceedings without counsel); Feld, *Right to Counsel*, *supra* note 83, at 1217-23 (routine denial of counsel in delinquency proceedings in most counties in Minnesota).

278. *See* Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 612-16; Feld, *Principle of Offense*, *supra* note 6, at 519-33.

case like Brom's, however, emphasizing the treatment needs of the offender simultaneously deprecates the seriousness of the crimes he allegedly committed.

Under the prevailing offender-oriented waiver legislation, a juvenile court judge is required to make an individualized assessment of a youth's "amenability to treatment" or "dangerousness," even though such an inquiry poses inherently unanswerable questions.[279] Despite the *Dahl*-inspired amendments, the Minnesota legislature retained its basic commitment to individualized, offender-oriented waiver determinations. Pursuant to that legislative mandate, Judge Gerard Ring did exactly what the legislature and previous court opinions instructed—indeed required—him to do. He conducted an extensive hearing on Brom's "amenability" or "dangerousness." He concluded that despite the extraordinary seriousness of Brom's crimes, the prosecution had failed to establish by "clear and convincing evidence" that Brom could not be treated successfully or that he posed a threat to the community. In short, after considering all of the non-exclusive factors identified by statute, court rules, and prior opinions, Judge Ring exercised his sentencing discretion, in a very close case, in favor of the offender rather than the offense.

Unfortunately for Judge Ring, he took his judicial obligation to follow the law, as defined by the legislature, too seriously. As a result of his exercise of discretion, two appellate courts found it necessary to overrule him—one as a matter of law and the second as a question of fact. The court of appeals' decision to reverse Judge Ring, as a matter of law, had scant support in the statute on its face or as previously interpreted. The opinion potentially raised more problems than it purported to resolve.[280] The court of appeals' opinion did, however, have the virtue of being consistent with the role of appellate courts to interpret the law and to apply it to the facts found by the trial court. By contrast, the Minnesota Supreme Court simply substituted its construction of the facts for those of the trial judge who actually heard the matter. In so doing, the supreme court violated its appellate functions and disregarded the factual record of the proceeding.[281] In both instances, the courts' actions were compelled by their perceptions of the seriousness of the offense, its impact on the community, and the political and public outrage that followed Judge Ring's decision. Although the courts' concern about an inadequate response to a serious

279. *See* Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 613.

280. *See supra* notes 215-218 and accompanying text.

281. *See supra* notes 227-250 and accompanying text.

crime is certainly understandable, their elevation of the principle of the offense over consideration of the offender reflects politically motivated judicial activism rather than fealty to the legislative mandate.

D.F.B. illustrates one set of problems associated with judicial waiver practices. What should be the relative emphasis on the offender or the offense in the context of the youth who commits a serious but isolated offense? How can appellate courts control trial court sentencing discretion under a broad legislative mandate that lacks any meaningful substantive standards?

Once waiver is viewed as a sentencing decision, the lack of objective substantive guidelines remits the transfer decision to every judge in every county in the state with highly variable and unpredictable outcomes. There are two crucial consequences of the exercise of discretion under such circumstances. First, there does not appear to be much, if any, basis by which to distinguish the few juveniles who are waived from the vast majority of similarly-situated offenders who are retained. As gauged by their present offenses, prior records, and previous sentences, waived juveniles, as a group, constitute a more serious class of offenders than the vast bulk of youths who are retained (Table 2). This statistic, however, obscures the very important reality that far more juveniles charged with similar offenses and with similar prior records are retained as juveniles than are waived as adults (Table 3). Multivariate analyses identify very few statistically significant variables and those few variables explain very little of the variance in this very crucial sentencing decision, only 3.1% (Table 6). Statistically, waiver decision-making appears to be almost random. Legally, such randomness constitutes arbitrary and capricious decision-making.

The second empirical reality of waiver decision-making is that venue is as important as the charged offense for purposes of determining adulthood. In the urban counties the administration of the waiver statute appears to be consistent with the legislation. By contrast, a much greater percentage of rural youths are waived to criminal courts for much less serious offenses and with less extensive prior juvenile court interventions. Although waived rural juveniles may appear to be sophisticated relative to other rural juveniles, they are less serious offenders than their urban or suburban cousins. This "justice by geography" emerges under a law of general applicability and raises very troubling questions about the even-handed administration of justice with respect to the most important sentencing decision made by juvenile courts.

In light of the continuing problems posed both by the serious but isolated offender—*Dahl*, *D.F.B.*, *J.B.L.*—and the exercise of waiver discretion in general, it is time for the legislature to address the underlying sentencing premises of the transfer legislation. It is uniquely the legislature's obligation to address issues of sentencing policy and public safety. It is irresponsible simply to declare a vague, amorphous, indeed contradictory policy, and then stand by as courts continue to flounder in the morass created by the lack of legislative guidance.

Throughout, this article has identified two primary and interrelated problems posed by judicial waiver practices: the highly discretionary idiosyncratic nature of this individualized sentencing decision, and the lack of integration between the criteria for removal of offenders from the juvenile court and the sentencing practices in adult criminal courts. Both problems stem from individualized judicial sentencing discretion.

On the basis of the available social science research about the development of delinquent careers, discretionary waiver practices, and juvenile and adult court sentencing practices, it appears that either of two alternatives are preferable to continuing the present practice. Both strategies use offense criteria—seriousness and persistence—to structure the waiver determination. One approach—presumption/burden shifting—uses offense criteria to create a presumption for waiver *and* shifts the burden of proof to the juvenile to affirmatively demonstrate why he or she should be retained as a juvenile, i.e., is amenable to treatment and poses no threat to the public. This approach is used in California.[282] In the face of the inherent uncertainty of clinical evaluations, placing the burden of production and the risk of nonpersuasion on youths charged with serious offenses is preferable to placing those burdens on the state.[283] As Judge Ring noted in his opinion, the ultimate outcome of the case hinged on who bore the burden of persuasion—had the

282. *See* Cal. Welf. & Inst. Code § 707(c) (West Supp. 1989).

283. Shifting the burdens of proof and persuasion to the juvenile gives greater effect to the legislative policies that were reflected in the now-discredited prima facie case or presumption strategy.

> Placing the burden of persuasion on a youth to prove amenability and nondangerousness would emphasize the policies of social defense and public safety in light of the uncertainty of the issues being determined. In many cases, a court cannot reliably determine whether a youth is amenable or dangerous. In these ambiguous cases the decision whether or not to waive is determined by which party bears the burden of persuasion. The legislative policies that justify creating a rebuttable presumption also justify placing the burden of persuasion on the juvenile rather than on the state.

Feld, *Dismantling The "Rehabilitative Ideal,"* *supra* note 7, at 215.

risk of nonpersuasion rested with Brom, Ring would have certified him.[284] The second strategy, legislative waiver, excludes certain categories of offenses from juvenile court jurisdiction. Offense exclusion, a form of mandatory sentencing, provides a rational, nondiscretionary, and easily administered method for deciding which youths should be prosecuted as adults.[285] A legislative waiver system excludes from the jurisdiction of the juvenile court those relatively few juveniles whose commission of serious offenses and persistent delinquent activity mandate adult prosecution.

By focusing on the seriousness and/or persistence of a youth's delinquent career, either by presumption/burden-shifting or exclusion, a legislature can differentiate between the hard-core offenders and the vast majority of youths properly handled within the juvenile court. By stressing the more objective factors—the present offense and prior record—rather than subjective, impressionistic clinical factors, juveniles can be differentiated on bases that avoid many of the dangers of discretion and discrimination inherent in unstructured judicial sorting. Focusing on offenses would also reduce the "justice by geography" that occurs under a discretionary regime.

Ultimately, the legislature must make value judgments about the specific combinations of present offenses and prior records that warrant shifting the risk of non-persuasion or automatically exluding juveniles. Although persistence is the most reliable basis for differentiating chronic offenders from their less sophisticated counterparts, the seriousness of a youth's misconduct may not always allow the luxury of extensive recidivism. The primary justification for waiver advanced in this article is the need for minimum terms of confinement that are in excess of the maximum terms available within the juvenile court, i.e., sentences in excess of about three years. Effectively, this means focusing on the most serious offenses against the person committed by older juveniles who also have a prior record of offending. Legislative definition of the criteria for burden-shifting or exclusion can better integrate sentencing practices and secure social defense when youths make the transition from juvenile to adult courts.

Age. The empirical data reviewed in this article suggest that waiver is almost exclusively the province of juveniles aged sixteen or older (Table 4).[286] A juvenile's age in relation to the maximum

284. *See supra* text accompanying note 160.

285. *See* Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 613; Feld, *Delinquent Careers and Criminal Policy*, *supra* note 7, at 208-10.

286. In an earlier empirical study of waiver in Minnesota, nearly ninety percent of the youths from whom adult reference was sought were six-

age of juvenile court jurisdiction is also a primary variable affecting waiver in other studies as well.[287] Sixteen, therefore, should be the minimum age for presumptive or automatic adult prosecution for most offenses. For those youths less than sixteen years of age, at least three years of juvenile court jurisdiction remain.

Present Offense. Although most waived juveniles are charged with felony conduct (Tables 2-3), the bulk of them are charged with felony offenses against property, such as burglary. Under the Minnesota Sentencing Guidelines, youths charged with felony property offenses, even with the maximum juvenile criminal history score, are unlikely to be sentenced to prison.[288] Thus, for purposes of emphasizing current seriousness, the legislature should shift the burden or exclude only those youths, aged sixteen or older, charged with felony offenses against the person of severity level VIII-X,[289] because it is only for those offenses that the sentencing guidelines would result consistently in longer terms of adult confinement than could be imposed within the juvenile court. Consistently with the sentencing guidelines "just deserts" emphasis, focusing exclusively on those charged with the most serious felony offenses against the person would better integrate the juvenile waiver and adult sentencing practices to avoid the "punishment gap" and reduce the geographic disparities currently associated with waiver.[290]

Prior Record. A record of persistence provides the best evi-

> teen or older and more than seventy percent were seventeen or eighteen at the time of their reference hearing. This heavy weighting toward the older end of the juvenile client spectrum is consistent with studies of waiver practices in other jurisdictions.

Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 574.

287. *See supra* note 60 and accompanying text.

288. Minnesota Sentencing Guidelines Comm'n, Minnesota Sentencing Guidelines & Commentary IV (rev. ed. 1988), *reprinted in* Minn. Stat. Ann. § 244 app. (West Supp. 1989). Most of the research on waiver reports that the majority of transferred youths are not charged with serious offenses against the person and consequently receive probationary sentences as adults. *See supra* notes 77-80 and accompanying text.

289. Severity level VIII-X offenses—the most serious offenses under the Minnesota Sentencing Guidelines—include murder, first degree criminal sexual conduct, first degree assault, and aggravated robbery. Minnesota Sentencing Guidelines Comm'n, Minnesota Sentencing Guidelines & Commentary IV (rev. ed. 1988), *reprinted in* Minn. Stat. § 244 app. (West Supp. 1989).

290. The IJA-ABA Standards Relating to Transfer Between Courts emphasize the seriousness of the present offense *and* the prior record as the sole basis for waiver: "Waiver is appropriate only when the juvenile is accused of a serious class one juvenile offense [such as murder, rape, and armed robbery], has demonstrated a propensity for violent acts against other persons and, on the basis of personal background, appears unlikely to benefit from any disposition available to the juvenile court." Institute of Judicial Admin.-ABA Joint Comm'n on Juvenile Justice Standards, Standards Relating to Transfer Between Courts 37 (1980).

dence of a juvenile's commitment to a delinquent career. For all but the most serious offenses, a significant prior record should be required to identify the persistent juvenile offenders who ultimately pose a serious threat to the community.[291] Evidence of repeated youthful misconduct should be considered for sentencing purposes, even if the current offense is not a serious felony against the person. Again, however, it is important to emphasize the relationship between criteria for juvenile divestiture and for adult incarceration. Against the backdrop of the sentencing guidelines, only a substantial criminal history score will result in the incarceration of a felony property offender for a longer term than that available to juvenile courts and it is only under these circumstances that waiver should occur. The legislature must work backwards from what the probable adult sentence would be for the particular offense or offender.

The legislature should also reconsider the sentencing guidelines' limitation of the juvenile component of the adult criminal history score. By limiting juvenile felony convictions to a maximum of one point, the guidelines may contribute to the "punishment gap."[292] Extensive reliance on a juvenile's prior convictions

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291. The IJA-ABA Standards Relating to Transfer Between Courts emphasize a "prior record of adjudicated delinquency involving the infliction or threat of significant bodily injury" for all but the most serious offenses. The Standards' rationale for requiring prior adjudications is that

> [t]he presumption in favor of juvenile court jurisdiction is strong. Only juveniles who pose genuine threats to community safety should be waived and exposed to the greater sanctions of the criminal court. A prior record of violent acts is evidence of that threat. Prior records of property offenses, minor violent offenses, or alleged but unproven serious violent offenses do not evidence that threat.

Id. at 39.

292. An earlier article questioned the wisdom of disregarding a juvenile's entire juvenile record.

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

Feld, *Dismantling the "Rehabilitative Ideal," supra* note 7, at 236-37.

During the 1989 Minnesota legislative session, a bill was introduced to modify the way in which juvenile points are computed in the sentencing guidelines and to eliminate the one-point maximum limit placed on juvenile offender's criminal history score. *See* Minn. H.F. 726, 76th Leg. (1989).

to enhance subsequent adult sentences, however, strongly implicates the quality of routine procedural justice in juvenile courts, because many juveniles' prior convictions were obtained without the assistance of counsel.[293]

Serious But Isolated Young Offenders. What if Dahl, Brom, or J.B.L. were fifteen or fourteen years of age, and charged with the same crimes? Should they be treated as juveniles or as adults? The killing of another human being without justification or excuse is the most serious offense in the criminal code,[294] and treating juveniles who commit murder as a separate class of extraordinarily serious offenders seems appropriate.[295] Regardless of the youthfulness of the perpetrator, these most serious crimes challenge the offender-oriented premises of the juvenile court. Absent some other defense, youths fourteen years of age or older who "know right from wrong" are criminally responsible.[296] Whether

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293. *See* Feld, *Right to Counsel*, *supra* note 83, at 1335-37. Many unrepresented juveniles, including those charged with felony offenses, are routinely adjudicated delinquent and removed from their homes or incarcerated. Although including a juvenile's prior record of delinquency in the adult sentencing schema is a rational sentencing policy, "both juvenile and adult sentencing authorities must confront the reality of the quality of adjudications in juvenile courts." *Id.* at 1336. Both federal and state cases have condemned the enhancement of a defendant's current sentence on the basis of prior convictions where the defendant was unrepresented. *See, e.g.*, Baldasar v. Illinois, 446 U.S. 222 (1980); United States v. Tucker, 404 U.S. 443 (1972); Burgett v. Texas, 389 U.S. 109 (1967); State v. Edmison, 379 N.W.2d 85 (Minn. 1985); State v. Norstrom, 331 N.W.2d 901 (Minn. 1983).

> If juvenile adjudications are to be used to enhance sentences for juveniles as juveniles or as adults, then a mechanism must be developed to assure that only constitutionally obtained prior convictions are considered. . . . Anything less [than automatic mandatory appointment of counsel in all cases] will subject a juvenile or young adult's sentence to direct or collateral attack, produce additional appeals, and impose a wasteful and time-consuming burden on the prosecution to establish the validity of prior convictions.

Feld, *Right to Counsel*, *supra* note 83, at 1336-37.

294. The authorized penalties for murder are significantly greater than those for any other offense, ranging from 25 years to life imprisonment—murder in the first degree, Minn. Stat. § 609.185 (1988) (life imprisonment); murder in the second degree, *id.* § 609.19 (40 years); murder in the third degree, *id.* § 609.195 (25 years). Under the Minnesota Sentencing Guidelines, conviction for intentional homicide carries a presumptive sentence of 216 months. Minnesota Sentencing Guidelines Comm'n, Minnesota Sentencing Guidelines & Commentary IV (rev. ed. 1988), *reprinted in* Minn. Stat. Ann. § 244 app. (West Supp. 1989).

295. Many jurisdictions treat murder as a special class and even states employing judicial waiver may legislatively exclude juvenile murderers. *See* Feld, *Principle of Offense*, *supra* note 6, at 504-11.

296. Minn. Stat. § 609.05 (1988); *see, e.g.*, Feld, *Punishment, Treatment*, *supra* note 14, which notes:

> Psychological research concerning legal socialization indicates that young people move through developmental stages of cognitive functioning with respect to legal reasoning, internalization of social and legal expectations, and ethical decisionmaking. This developmental se-

those young juveniles charged with the most serious crimes should be tried as adults requires the legislature to make an explicit value choice between an emphasis on the offender and on the offense, and about the quantity and quality of youthful deviance that will be tolerated before the more punitive responses of the criminal law are invoked. These issues of public policy and safety should be debated and decided openly in the political arena by democratically elected legislators rather than behind closed doors on an idiosyncratic basis by individual judges.[297]

The case of David Brom is a tragedy for everyone associated

> quence and the changes in cognitive processes are strikingly parallel to the imputations of responsibility associated with the common-law infancy defense. Developmental psychology research indicates that individuals acquire most of the legal and moral values and reasoning capacity that will guide their behavior through later life by the age of fourteen.
>
> If a youth fourteen years of age or older knows "right from wrong," that is, possesses the requisite mens rea, then the courts may find the juvenile as criminally responsible as any adult offender facing the same charges. In the mens rea-as-capacity formulation, if one is criminally responsible for making blameworthy choices, then one deserves the same punishment as any other criminal actor making comparable choices.

Id. at 898-99.

The only limitation on the criminal responsibility of young juveniles may be with respect to eligibility for the death penalty. The Supreme Court in Thompson v. Oklahoma, 108 S. Ct. 2687 (1988), considered whether the execution of an offender for a heinous murder committed when he was 15 years old violated the eighth amendment prohibition on "cruel and unusual punishments." A plurality of the *Thompson* Court emphasized the youthfulness of the offender as a mitigating factor at sentencing and concluded that "[t]here is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults." *Id.* at 2698. Even though Thompson was found to be responsible for his crime, the Court concluded that he could not be punished as severely as an adult, simply because of his age. "[T]he Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." *Id.*

In Stanford v. Kentucky, 109 S. Ct. 2969 (1989), a plurality of the Court upheld the death penalty for capital crimes committed by juveniles who were 16 and 17. The plurality noted that "the common law set the rebuttable presumption of incapacity to commit felonies . . . at the age of 14." *Id.* at 2971. The *Stanford* dissent did not dispute that young juveniles could be criminally responsible, but only whether their culpability was sufficiently blameworthy to warrant the imposition of capital punishment. *Id.* at 2989-90 (Brennan, J., dissenting). "Juveniles very generally lack that degree of blameworthiness that is, in my view, a constitutional prerequisite for the imposition of capital punishment. . . ." *Id.* at 2992.

297. During the 1989 Minnesota legislative session, several bills excluding from juvenile court jurisdiction any youth aged 14 or older charged with murder or manslaughter were introduced. *See* Minn. H.F. 3, 76th Leg. (1989); Minn. H.F. 82, 76th Leg. (1989); Minn. S.F. 90, 76th Leg. (1989). Unfortunately, the political impetus to frontally consider the relative emphasis on the offense and the offender was aborted by the appellate courts' activism in *D.F.B.* *See supra* note 250 and accompanying text.

with it.[298] It also demonstrates the inherent unworkability of Minnesota's legislative response to serious but isolated young offenders. After more than a decade, it is abundantly clear that Minnesota's judicial waiver legislation is fundamentally flawed, not only in its implementation but in its basic assumptions. Until the legislature confronts the inherent sentencing contradiction in the law, it will perpetuate the inconsistent and discriminatory applications of judicial sentencing discretion, contribute to invidious "justice by geography" for the most severe sanction available in juvenile courts, promote *ad hoc* judicial activism by appellate courts attempting to constrain "inappropriate" exercises of discretion, and leave unresolved the most important sentencing policy issue in juvenile justice. Continued legislative default disserves juvenile and appellate courts, youthful offenders and the public, and paves the way for yet another recurrence of the inevitable problems posed by cases like *Dahl*, *D.F.B.*, and *J.B.L.*

298. As a result of the Minnesota Supreme Court's decision that Brom should be tried as an adult, an Olmsted County Grand Jury indicted him on four counts of first degree murder. Brom was arraigned on January 25, 1989, his bail was set at $500,000, and he was remanded to the Olmsted County Jail. Star Tribune, Jan. 26, 1989, at 13A, col. 2. The selection of jurors for his trial began on September 18, 1989. Star Tribune, Sept. 19, 1989, at 3B, col. 3. On September 20, 1989, Brom's attorney filed notice of intent to raise an insanity defense. Under Minnesota procedure, an insanity defense entails a bifurcated hearing in which the jury first decides whether the defendant committed the crime and then decides in a separate proceeding whether the defendant lacked criminal responsibility. Minn. R. Crim. P. 20.02. The jury was empanelled on September 26, 1989. Star Tribune, Sept. 27, 1989, at 1B, col. 1. The guilt phase of Brom's trial required four days of testimony, following which the jury returned a verdict of guilty on October 3, 1989, Brom's 18th birthday. Star Tribune, Oct. 4, 1989, at 1A, col. 1. After the determination of guilt, Brom and the prosecution introduced evidence bearing on his mental illness. The Olmsted County jury of seven men and five women deliberated for 22 hours over three days before deciding on October 15, 1989, that Brom was sane at the time he murdered his family. Star Tribune, Oct. 16, 1989, at 1A, col. 1. Under the applicable Minnesota law, a conviction of first degree murder carries an automatic sentence of life in prison with parole eligibility after a minimum of 17 1/2 years. On October 16, 1989, Olmsted County Judge Ancy Morse repeated her concerns that Minnesota's M'Naghten standard of criminal insanity was rigid and narrow as applied to a "mentally ill boy driven to despair by a pathetically sick mind." Star Tribune, Oct. 17, 1989, at 1A, col. 1. Despite the "emotional agony" she experienced, Judge Morse sentenced Brom to three consecutive life sentences, meaning that he must serve a minimum of 52 1/2 years before he would be eligible for parole consideration. *Id.* The sentence imposed was more than twenty times longer than that which he could have received had he been tried as a juvenile.