Doing Adult Time for Juvenile Crime: When the Charge, Not the Conviction, Spells Prison for Kids

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Introduction

In September 1995, a Minnesota jury convicted Donn Behl ("Behl") of second-degree manslaughter.[1] At the time, Behl was a sixteen-year-old without prior offenses.[2] Under Minnesota law, a juvenile convicted of second-degree manslaughter would typically receive a juvenile disposition.[3] Behl's sentence, however, was drastically different: not only did he receive an adult sentence,[4] but "[n]o adult ha[d] received a longer sentence for this offense in recent reported cases."[5]

Although Behl was a juvenile, he was certified under Minnesota's automatic certification statute to stand trial as an adult.[6] This automatic certification statute provides that "[t]he term delinquent child does not include a child alleged to have committed murder in the first degree after becoming 16 years of age, but the term delinquent child *does* include a child alleged to have commit-

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1. *See* State v. Behl, 547 N.W.2d 382, 383 (Minn. Ct. App. 1996) (holding that the district court had properly retained jurisdiction over juvenile for sentencing when indicted by grand jury for first-degree murder, regardless of fact that jury only found him guilty of second-degree manslaughter).

2. *See id.*

3. *See* Juvenile Court Act, MINN. STAT. § 260.126 (1996). A conviction of second-degree manslaughter would qualify Behl for the Extended Jurisdiction Juvenile (EJJ) category. *See infra* note 18 (explaining the EJJ category and how it enables the juvenile court to retain jurisdiction of serious juvenile offenders, with an adult sentence held over the juvenile if the juvenile fails probation or treatment).

4. *See Behl*, 547 N.W.2d at 384 (reporting the district court's sentence of Behl).

5. State v. Behl, 564 N.W.2d 560, 571 n.2 (Minn. 1997) (Keith, C.J., dissenting). In Behl's case, the sentencing court upwardly departed 25% from the adult sentencing guidelines, giving him a 72-month prison sentence instead of the presumptive 58-month sentence for second-degree manslaughter. *See id.*

6. *See id.* (describing how "the state automatically certified Behl as an adult").

ted *attempted* murder in the first degree."[7] Because the prosecutor charged the sixteen-year-old Behl with first-degree murder,[8] Behl was statutorily precluded from being considered a delinquent child[9] and was automatically certified to stand trial as an adult.[10]

After a grand jury indicted Behl on first-degree murder, a trial jury acquitted him of that charge, and instead convicted him of second-degree manslaughter.[11] Due to the silence of the statute regarding the sentencing of juveniles who are ultimately convicted of a lesser charge than first-degree murder,[12] the trial court ruled that Behl could not return to juvenile court for sentencing.[13] The Minnesota Court of Appeals and Supreme Court affirmed the trial court's decision.[14]

Once certified and tried as an adult, a juvenile may be sentenced as an adult. A sentencing court, in its discretion, may upwardly depart from statutory guidelines when determining sentence length.[15] The *Behl* sentencing court found that aggravating circumstances warranted an upward departure,[16] but failed to rec-

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7. MINN. STAT. § 260.015 subd. 5(b) (1996) (emphasis added). This statute is pivotal to this Article and is discussed at greater length in Part I. It is referred to as both a "legislative waiver" and an "automatic certification statute." I will usually refer to it as the automatic certification statute, because under its authority, a juvenile is automatically certified to stand trial as an adult without any further review or hearing. To certify a juvenile means to treat the juvenile as an adult for trial or sentencing purposes. The sentencing of certified juveniles is the focus of this Article.

8. *See Behl*, 564 N.W.2d at 562 (citing MINN. STAT. § 260.015 subd. 5(b) (1996)).

9. *See id.*

10. *See id.*

11. *See* State v. Behl, 547 N.W.2d 382, 383 (Minn. Ct. App. 1996) (stating that the jury found Behl not guilty of first-degree murder, but "guilty of three criminal counts, including second degree manslaughter in violation of Minn. Stat. § 609.205, subd. 1").

12. *See* MINN. STAT. § 260.015 subd. 5(b)(1996). The statute makes no mention of returning juveniles to juvenile court jurisdiction once they have been tried as adults. Of the states that waive juveniles into adult criminal court, only 11 provide a reverse waiver, or transfer-back provision to juvenile court. *See infra* note 39 (citing the statutes that provide a transfer-back in their waiver statutes).

13. *See Behl*, 564 N.W.2d at 562 (describing trial court's decision); *see also Behl*, 547 N.W.2d at 384 (describing trial court's decision).

14. *See Behl*, 547 N.W.2d at 382 (affirming the trial court's sentence); *Behl*, 564 N.W.2d at 560 (affirming the Minnesota Court of Appeals' decision to keep Behl in adult court for sentencing).

15. *See Behl*, 547 N.W.2d at 384 (describing trial court's upward departure in sentencing). If the court finds that "substantial and compelling" aggravating circumstances are present, it may increase a sentence. *Id.* (quoting *State v. Davis*, 540 N.W.2d 88, 91 (Minn. Ct. App. 1995) (citing *State v. Garcia*, 302 N.W.2d 643, 647 (Minn. 1981)).

16. The sentencing court based the upward departure in sentencing Behl on four factors: "(1) Behl entered the victim's bedroom and shot him within his per-

ognize that Behl should not have been sentenced in adult court since he was not convicted of first-degree murder.[17]

This Article highlights the serious sentencing inequities that result when a state's statutory waiver of juvenile jurisdiction contains no reverse waiver or transfer-back provision. As *Behl* demonstrates, two Minnesota juveniles convicted of second-degree manslaughter may receive drastically different sentences. In one scenario, a juvenile charged with and convicted of second-degree manslaughter is monitored and rehabilitated through the juvenile court system until the age of twenty-one.[18] In the other scenario, a juvenile charged with first-degree murder, but convicted of second-degree manslaughter, is incarcerated for six years with hardened adult offenders, and is released from prison at age twenty-two.[19]

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sonal zone of privacy; (2) Behl failed to render or call for help; (3) at trial, Behl tried to blame the shooting on the victim's brother; and (4) Behl stole the victim's truck to avoid capture after the shooting." *Id.* at 386. The court of appeals agreed with this reasoning, but disregarded factor number two in its analysis because the victim had died instantly. *See Behl*, 547 N.W.2d at 386.

17. This Article argues that if a juvenile is certified to stand trial as an adult based on his charges, he should be returned to juvenile court if the jury acquits him of those charges. Behl entered the adult court system via Minnesota's automatic certification statute: "[t]he term delinquent child does not include a child alleged to have committed murder in the first degree after becoming 16 years of age, but the term delinquent child does include a child alleged to have committed attempted murder in the first degree." MINN. STAT. § 260.015 subd. 5(b) (1996); *see also Behl*, 564 N.W.2d at 562 (citing MINN. STAT. § 260.015 subd. 5(b)); *infra* text accompanying notes 34-40 (explaining the different waiver statutes and the impact of automatic certification).

18. *See* MINN. STAT. § 260.126. Extended Juvenile Jurisdiction ("EJJ") is a juvenile classification for serious repeat offenders; it is a legislative attempt to rehabilitate serious repeat juvenile offenders who have committed offenses other than first-degree murder. *See id.* at subd. 6. It applies to juveniles between the ages of 14 and 17 years of age. *See id.* at subd. 1-2. Juveniles are designated EJJ either by the court or at the request of the prosecutor. *See id.* Upon designation, a certification hearing takes place, at which the prosecutor must show by clear and convincing evidence that adjudicating the juvenile EJJ will serve public safety. Once designated EJJ, the juvenile is tried in juvenile court with the same procedural safeguards as an adult, such as the right to a jury trial. *See id.* at subd. 3. The juvenile court judge imposes both a juvenile disposition and an adult sentence. *See id.* at subd. 4. The adult sentence is stayed until the juvenile completes the terms of the disposition. *See id.* at subd. 5. If the juvenile violates the terms of the disposition or commits another offense, the adult sentence is implemented without further ado. *See id.*; *see also* Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1038-51 (1995) [hereinafter Feld, *Violent Youth*] (describing the provisions of EJJ and how it evolved). Feld underscores the fact that first-degree murder is excluded from the EJJ classification, and traces EJJ's genesis in the Minnesota Advisory Task Force, on which he served. *See infra* notes 43-54 and accompanying text (describing the evolution of the Minnesota Advisory Task Force).

19. Behl received this sentence. *See Behl*, 564 N.W.2d at 563 (summarizing the sentencing strategy of the district court).

Part I of this Article introduces the three types of statutory waivers that provide for the certification of juveniles as adults. Part I examines the role of the Minnesota Advisory Task Force in the evolution of Minnesota's legislative waiver statute, the role of the grand jury in the process and relevant case law. Part II provides the facts and holding of *Behl*. Part III analyzes the Minnesota Supreme Court's decision in *Behl* in light of public policy, legislative intent and statutory silence. Part III concludes that the lack of a reverse waiver or transfer-back provision permits Minnesota courts to misapply the legislative waiver when sentencing some juveniles. Part IV proposes that Minnesota's legislative waiver statute be amended to include a transfer-back provision, which would protect juveniles charged with first-degree murder but convicted of lesser offenses, without jeopardizing the jurisdiction of adult courts over juveniles convicted of first-degree murder.[20]

I. Statutory Waivers of Juvenile Court Jurisdiction

Since the creation of the American juvenile justice system,[21] courts and legislatures have struggled when deciding whether to adjudicate serious juvenile offenders in juvenile court[22] or adult court.[23] Although the American justice system once routinely incarcerated children with adults,[24] it now prefers rehabilitation to

20. This amendment would allow courts to check prosecutorial overcharging while still preserving courts' authority to send juveniles convicted of first-degree murder to prison.

21. Illinois established the first juvenile court in the United States in 1899. *See* Mabel Arteaga, *Juvenile Justice With a Future for Juveniles*, 2 CARDOZO WOMEN'S L.J. 215, 216 (1995). "[B]y 1945, every state had its own juvenile justice system." Stacey Sabo, *Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction*, 64 FORDHAM L. REV. 2425, 2430 (1996).

22. *See generally* Arteaga, *supra* note 21 (tracing the origins of the juvenile court in the United States and the evolution of procedural and substantive protections for children in that system). The impetus for this bifurcation was the realization that children, because of their youth and vulnerability, are not always aware of the wrongfulness of their acts. *See id.* at 217. Following the lead of the Illinois court, the rest of the country developed a separate justice system for juveniles with more emphasis on treatment and rehabilitation than on punishment. *See id.* This development saw the birth of *parens patriae*. *See generally* Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978) (examining the beginnings of the doctrine in England). For a brief definition of the *parens patriae* doctrine, see *infra* note 30.

23. *See* Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 483-503 (1987) [hereinafter Feld, *The Juvenile Court*] (discussing the differences between juvenile and criminal proceedings, and explaining the classification of youths as juveniles or adults for adjudication purposes).

24. *See* Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31

incarceration.[25] Some children are too young to know their acts are wrong, while others are conditioned by their family or environment to believe that criminal acts are harmless or even necessary.[26] The dual court system exists because policy-makers believe that juveniles are emotionally and developmentally different from adults and therefore have different disposition needs.[27]

The age of the juvenile offender and the seriousness of his[28] offense historically have been the criteria used to make disposition decisions.[29] As state legislators draft delinquency statutes, tension develops between the *parens patriae*[30] obligation to protect the

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UCLA L. REV. 503, 509-13 (1984) (describing the outgrowth of the American juvenile justice system from the common law).

25. The presumption that children are too young to understand the wrongfulness of their acts initiated the common law infancy defense. *See id.* This legal defense eventually gave rise to the present juvenile court system at the end of the nineteenth century. *See* Arteaga, *supra* note 21, at 216.

26. Arteaga's article gives the example of "Johnny," a 13-year-old boy whose mother is a drug addict, whose father is a pimp, and whose notion of "the right thing" is stealing and being rough with women. *See* Arteaga, *supra* note 21, at 215.

27. *See* Barry C. Feld, *Criminalizing Juvenile Justice: Rules for Procedure for the Juvenile Court*, 69 MINN. L. REV. 141 (1984) [hereinafter Feld, *Criminalizing*]. The word "disposition" is used instead of "sentence" when referring to juveniles. A disposition may involve an assignment to a group home, residential treatment center or community service program. It may also include chemical-dependency treatment.

28. This Article uses the pronoun "he" when referring to juveniles in general because of the preponderance of male juvenile offenders. However, every provision and condition of this topic equally applies to females and males.

29. *See* Feld, *Violent Youth*, *supra* note 18, at 1052. Various criminal experts, legal practitioners, scholars and criminologists have different opinions on the criteria for when the juvenile should be tried in adult court. Minnesota Attorney General, Hubert H. Humphrey III, for example, advocated that all juveniles 16 years of age or older go to adult court if charged with offenses carrying prison sentences. *See id.* (citing a Statement of Attorney General Humphrey on the 1993 Criminal Justice Initiatives: Gang Violence and Juvenile Justice Proposals 3 (Jan. 13, 1993)). At one time, Professor Feld advocated that the offense should determine which court should try the juvenile, but 17 years later he found the empirical results disturbing. *See* Feld, *Violent Youth*, *supra* note 18, at 1051 (referring to opinions he wrote in *Reference of Juvenile Offenders for Adult Prosecutions: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515, 551-54 (1978)). Some critics warn that making the offense the determining factor will cause the court to lose discretion in adjudicating juveniles, resulting in substantially higher numbers of juveniles in adult criminal court. *See id.* (citing Franklin E. Zimring, *The Treatment of Hard Cases in American Juvenile Justice: In Defense of Discretionary Waiver*, NOTRE DAME J.L. ETHICS & PUB. POL'Y 267, 273 (1991)).

30. "*Parens patriae*" generally refers to the "role of state as sovereign and guardian of persons under legal disability," such as infants and those with a mental disability. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). The court under the doctrine of *parens patriae*, while concerned with the "best interests" of the child, was initially completely free from imposed procedural protections. *See* Arteaga, *supra* note 21, at 217. The adjudication of juveniles was entirely within the discre-

best interests of children and the need to respond to the public's concern that juvenile crime is out of control.[31] As the public perceives juvenile gun use and gang involvement to be increasing,[32] the trend in most juvenile courts has been to focus on the offense charged when determining jurisdiction.[33]

States may waive juvenile court jurisdiction over juveniles legislatively,[34] judicially[35] or prosecutorially.[36] Minnesota exercises legislative waiver via Minnesota Statute 260.015 subdivision

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tion of the court, and it was not until *Kent v. United States*, 383 U.S. 541 (1966), that the Supreme Court held that juveniles have certain constitutionally-protected procedural due process rights.

31. *See* Feld, *Violent Youth*, *supra* note 18, at 977, 982-86 (describing the public's inaccurate perception of juvenile crime patterns and the contribution mass media made to this perception).

32. *See id.* at 983 (analyzing public perception resulting from Minnesota newspaper and television coverage portraying random gun and gang-related violence perpetrated by youthful offenders).

33. *See* Arteaga, *supra* note 21, at 219 (asserting that the trend in modern juvenile courts is "to focus on public safety, punishment and individualized accountability in addition to the best interests of the child") (citing Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Punishment, Treatment and the Differences It Makes*, 68 B.U. L. REV. 821, 842 (1988)). If true, this approach seems to take a turn from the rehabilitative direction juvenile courts have followed since the end of the nineteenth century. It signals a return to a pre-twentieth century attitude where juveniles over the age of 14 were presumed to have the capacity to commit criminal acts and to be punished for them.

34. *See* Sabo, *supra* note 21, at 2425-28 (providing a detailed explanation (and complete listing) of the three types of statutory waivers that certify juveniles to stand trial as adults); *see also* Feld, *The Juvenile Court*, *supra* note 23, at 488 (giving an extensive background and analysis of waivers that can automatically certify a serious juvenile offender to adult court jurisdiction).

35. *See* Feld, *The Juvenile Court*, *supra* note 23, at 488. Judicial waiver gives the judge discretion to decide jurisdiction after a hearing where the state and the defendant present their arguments regarding the juvenile's amenability to juvenile court disposition. Where judicial waiver is in force, statutes list criteria to be considered when certifying juveniles as adults. Florida's judicial waiver statute, for example, requires the court to consider the nature of the offense, its seriousness, community welfare, the victim (person or property), the juvenile's sophistication, maturity, and previous history, the effect of treatment on the juvenile versus the public's safety and the likelihood of the juvenile's rehabilitation. *See* FLA. STAT. ANN. § 39.052(2)(c) (West Supp. 1996). According to Sabo, forty-seven states and the District of Columbia have judicial waiver statutes. *See* Sabo, *supra* note 21, at 2427 n.18 (listing the statutes with judicial waiver provisions).

36. Prosecutorial waiver vests exclusive discretion with the prosecutor when both adult and juvenile courts have jurisdiction over the juvenile. Nine states and the District of Columbia give prosecutors discretion to waive juveniles into adult criminal court: Arkansas, Colorado, District of Columbia, Florida, Georgia, Louisiana, Michigan, Nebraska, Vermont and Wyoming. *See* Sabo, *supra* note 21, at 2439 & n.105 (listing the 10 relevant statutes). The prosecutor chooses in which court to charge the juvenile based on the juvenile's age and offense(s). *See id.* at 2426. Where prosecutorial waiver exists, and either court can have jurisdiction, the prosecutor may make the final decision. *See id.*

5(b).[37] Legislative waivers statutorily exclude juveniles from juvenile court jurisdiction by virtue of their age or because they are charged with a certain offense(s).[38] Of the thirty-eight legislative waiver states, only eleven have transfer-back provisions.[39] Minnesota is not one of them. While initially it may seem that making the charged offense(s) determinative of jurisdiction is a simple and logical alternative, this approach can be imprecise and overbroad.[40] Without a transfer-back provision, an offense-determinative waiver risks that juveniles will be sent to prison as a result of prosecutorial overcharging.

A. The Minnesota Advisory Task Force

In 1992, the Minnesota Legislature sought to simplify the issue of juvenile-offender jurisdiction and to remove various discretionary aspects of the certification process.[41] Prior to that time, the certification process had been confusing and subject to unguided judicial discretion.[42] Specifically, the Legislature directed

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37. See *supra* note 17 for the language of the Minnesota legislative waiver statute. *See* Sabo, *supra* note 21 at 2443 n.135 (listing the 37 state statutes that have legislative waivers). *See also* OR. REV. STAT. ANN. § 419C.364 (1995) (permitting the criminal court judge, in certain circumstances, to order all proceedings involving the juvenile waived to criminal court without any juvenile court proceedings).

38. Because legislative waiver, which is also called offense exclusion, removes a youth from juvenile jurisdiction based on the charge(s), it reflects a retribution-based criminal justice system rather than a rehabilitation-based one. *See generally* Feld, *The Juvenile Court*, *supra* note 23, at 488 (giving an extensive background on juvenile court waivers, and a history of the evolution of juvenile court in the United States); *see also* Sabo, *supra* note 21, at 2427-28, 2443-45 (introducing and defining legislative waivers). *See, e.g.*, *supra* note 17 (quoting Minnesota's legislative waiver statute).

39. *See* DEL. CODE ANN. tit. 10, § 1011(A)-(B) (Supp. 1994); GA. CODE ANN. § 15-11-5(B)(2)(B) (1994); KY. REV. STAT. ANN. § 640.010(3) (Michie/Bobbs-Merrill 1990 & Supp. 1994); MISS. CODE ANN. § 43-21-157(8) (Supp. 1995); NEV. REV. STAT. ANN. § 62.080(3) (Michie Supp. 1995); N.H. REV. STAT. ANN. § 169-B:25 (1994 & Supp. 1995); N.Y. CRIM. PROC. LAW §§ 190.71, 210.43 (McKinney 1993); OKLA. STAT. ANN. tit. 10, § 7306-1.1(E) (West Supp. 1996); 42 PA. CONS. STAT. ANN. tit. 33, § 6322(a) (1982 & Supp. 1995); VT. STAT. ANN. tit. 33, § 5505(a)-(b) (1991); WIS. STAT. ANN. § 970.032 (West Supp. 1995).

40. *See* Zimring, *supra* note 29, at 273-74 (explaining that most legislatures consider overbreadth in offense classifications necessary to provide for the worst juvenile cases). Zimring maintains, however, that limiting the court to offenses and prior records when deciding jurisdiction for juveniles will "multipl[y] several times over the number of juvenile offenders transferred to adult court." *Id.*

41. *See* ADVISORY TASK FORCE ON THE JUVENILE JUSTICE SYSTEM, MINNESOTA SUPREME COURT FINAL REPORT 26-27 (1994) [hereinafter TASK FORCE REPORT] (detailing recommendations for simplifying the certification process, in addition to recommendations on other areas of the juvenile justice system).

42. *See id.* (explaining that the then-current prima facie system was "confusing and unworkable" and that the courts' discretion needed guidance).

the Minnesota Supreme Court to create an Advisory Task Force on the Juvenile Justice System ("Task Force").[43] The mission of the Task Force was, *inter alia*, to establish a clear guide for judges in certifying juvenile offenders as adults.[44] In 1994, the Task Force made its final recommendations. The Task Force recommended that public safety play a major role in certification[45] and proposed reducing the criteria to determine the threat to public safety from eleven factors to five.[46]

While members of the Task Force were concerned that determining jurisdiction of juveniles by offense(s) would be dangerously over-broad,[47] they recognized that older, serious offenders would be more appropriate for adult court adjudication.[48] Ultimately, the Task Force recommended that for the purpose of certification, juveniles should be divided into two groups: Presumptively Certifiable[49] and Serious Youthful Offender ("SYO"). The

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43. *See* 1992 Minn. Laws 571, art. 7 § 13; *see also* Feld, *Violent Youth*, *supra* note 18, at 986 & n.90 (outlining the Task Force's objectives and the legislators' differing priorities, from "getting tough" to expanding juvenile procedural protections). The Task Force, chaired by Minnesota Supreme Court Justice Sandra Gardebring, was composed of 27 people who were private citizens, community leaders, judges, attorneys, legislators, law professors, law enforcement personnel, corrections officials, probation officers and state agency staff. *See* Symposium, *Juvenile Justice Report, Minnesota Supreme Court Advisory Task Force on the Juvenile Justice System: Final Report*, 29 WM. MITCHELL L. REV. 595, 598 (1994) [hereinafter Symposium]; *see also* TASK FORCE REPORT, *supra* note 41, at iii.

44. *See* Symposium, *supra* note 43, at 597. The Task Force was charged with making recommendations concerning:

> 1) The juvenile certification process; 2) the retention of juvenile delinquency adjudication records and their use in subsequent adult proceedings; 3) the feasibility of a system of statewide juvenile guidelines; 4) the effectiveness of various juvenile justice system approaches, including behavior modification and treatment; 5) the extension to juveniles of a non-waivable right to counsel and a right to a jury trial; [and] 6) the need for secure juvenile facilities in the state.

Id.

45. *See id.* (proposing that the risk to public safety be the key factor in certifying serious juvenile offenders).

46. The five factors that the Task Force recommended judges should use to determine the juvenile's threat to public safety were: "1) seriousness of the present offense; 2) culpability of the juvenile; 3) prior record of delinquency; 4) prior program history; and 5) disposition options." *Id.*

47. *See* Feld, *Violent Youth*, *supra* note 18, at 1052-53 (describing the tension between the legislature's desire to be seen as being tough on crime and the Task Force's reluctance to incarcerate juveniles who could be successfully rehabilitated).

48. *See id.*

49. *See* TASK FORCE REPORT, *supra* note 41, at 29-30 (outlining the recommendations for a change in the certification of juveniles as adults). The Task Force recommended that under the presumptive certification system, if the juvenile is "16 or 17 years old at the time of the offense" and the offense could result in a "presumptive commitment to prison under the Minnesota Sentencing Guidelines," the burden of proof that the juvenile should remain in juvenile court shifts to and

Task Force recommended that if a court found a juvenile presumptively certifiable pursuant to a felony charge,[50] the burden of proof would shift to the juvenile to show why he should remain under juvenile court jurisdiction.[51] If the juvenile convinced the court that he should remain under juvenile jurisdiction, he would be designated SYO and permitted to remain under juvenile court jurisdiction.[52] If the juvenile failed to convince the court that he should remain under juvenile jurisdiction, he would be certified to adult court jurisdiction for trial and sentencing.[53] These two classifications ultimately became Extended Jurisdiction Juvenile ("EJJ") and the legislative waiver statute.[54]

It is important to note that the Task Force recommended that a juvenile designated SYO be allowed to transfer-back to regular juvenile status if acquitted of the original SYO charge and con-

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remains with the defense. *Id.; see also* Feld, *Violent Youth*, *supra* note 18, at 1024; Symposium, *supra* note 43, at 600.

Under Minnesota Sentencing Guidelines, presumptive commit-to-prison offenses were "murder in the first, second, or third degree; assault in the first, second, or third degree; burglary; kidnapping; false imprisonment; manslaughter in the first or second degree; aggravated robbery; simple robbery; criminal sexual conduct; . . . escape from custody; arson in the first, second, or third degree; drive-by shooting; . . . a felony [drug offense]; or any attempt to commit any of these offenses." MINN. STAT. § 609.11(9) (1996); *see also* TASK FORCE REPORT, *supra* note 41, at 27 n.92.

50. *See* TASK FORCE REPORT, *supra* note 41, at 36 (outlining the recommendations for the SYO category); Feld, *Violent Youth*, *supra* note 18, at 1024 (describing the SYO category); *see also* Symposium, *supra* note 43, at 602-03 (explaining that the SYO category was designed for older, serious, repeat offenders). The SYO would remain under the jurisdiction of the juvenile court but would receive a stayed adult sentence. *See id.* If the SYO committed a new offense or violated his probation, the adult sentence would be imposed. *See id.*

51. *See* Symposium, *supra* note 43, at 601 (proposing that under the new presumptive certification standard, the juvenile should "show by clear and convincing evidence that [he] is suitable for treatment within the juvenile system consistent with public safety," or should be retained in juvenile court under the SYO category).

52. The Task Force recommended that the designation of SYO remain effective until the juvenile attained 23 years of age. *See id.* at 604. The juvenile designated a SYO would receive an adult sentence that would be stayed pending successful completion of therapy, treatment or probation. *See id.* If the juvenile was newly charged after turning the age of majority, he would be tried as an adult for that new charge, and the SYO adult sentence could be imposed concurrently. *See id.*

53. *See* TASK FORCE REPORT, *supra* note 41, at 27-28 (including a flow chart to illustrate the Task Force's recommended certification process).

54. *See* MINN. STAT. §§ 260.011-.301 (1996). The SYO category was the precursor to the EJJ statute. *See generally* MINN. STAT. § 260.126 (1996) (outlining the EJJ requirements). The legislature changed the name from "Serious Youthful Offender" to "Extended Jurisdiction Juvenile" to make it a less glamorous label and therefore less appealing to youths. *See* Patricia L. Baden, *Senate OK's Juvenile Crime Bill; Violent Youths Could Get Adult Penalties*, STAR TRIB. (Minneapolis), Apr. 30, 1994, at 1B, (quoting Senator Jane Ranum, the Senate bill's sponsor).

victed of a lesser one.[55] By including a transfer-back provision within the SYO category, the Task Force demonstrated its intent to protect juveniles from prosecutorial overcharging.[56] It recognized that if juveniles were to be categorized pursuant to charges, there needed to be a mechanism to offer jurisdictional recovery if the juveniles were acquitted of the charges.

To appreciate the legislative intent of the final Minnesota juvenile court statute,[57] one must examine and understand the intent of the Task Force's Presumptively Certifiable and SYO recommendations.[58] As one examines Minnesota's legislative waiver statute and EJJ designation, one must recognize that both grew out of the Task Force's recommendations.[59]

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55. *See* TASK FORCE REPORT, *supra* note 41, at 36. Concerning the SYO category, the Task Force Report stated: "[i]f it is later determined that the offense at plea or conviction is less serious than originally charged, the designation would be removed and the juvenile returned to regular juvenile status for disposition." *Id.* Barry Feld notes that the language of the Task Force's recommendation to allow juveniles to reclaim "regular juvenile status became known as the 'bounce back' provision." Feld, *Violent Youth*, *supra* note 18, at 1043 n.330.

56. *See* Feld, *Violent Youth*, *supra* note 18, at 1043 & n.330 (stating that Feld's experience as a former prosecutor made him aware of the "potentials for abuse of prosecutorial overcharging"). Overcharging has long been part of the prosecutorial system; it gives both sides room to plea bargain and negotiate. *See* Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do it, How Can We Find Out, and Why Should We Care?*, 78 CALIF. L. REV. 539, 626-28 (1990) (comparing the French and American systems, and reporting that American plea bargaining has been attacked for encouraging prosecutors to overcharge); *see also* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, *in* THIRTEENTH ANNUAL REVIEW OF CRIMINAL PROCEDURE: UNITED STATES SUPREME COURT AND COURTS OF APPEALS 1982-1983, 72 GEO. L.J. 185, 217 & n.183 (1983) (conceding that the charging decision often reflects financial and tactical considerations, which have little to do with the defendant's alleged crime). Arenella states that the rule that the conviction cannot supersede the original charge encourages prosecutors to overcharge initially. *See id.* at 217 n.183.

57. *See* MINN. STAT. §§ 260.011-.301 (1996).

58. If the presumptive certification recommendation led to the final automatic certification statute, the purpose and intent of the former sheds light on the purpose and intent of the latter. Likewise, the reasons for protection against prosecutorial overcharging within the SYO category apply to the final EJJ category and legislative waiver statute. *See supra* note 50 (demonstrating that the SYO category was the precursor for the current EJJ category).

59. Without the Task Force's recommendations, it is unlikely that the Minnesota Legislature would have known how to improve the old certification statute. The Legislature probably would not have developed the EJJ designation without the Task Force's findings and experience. The final statutes incorporated much of the Task Force's recommendations, and those recommendations reflect public policy. Therefore a close examination of the Task Force Report gives insight into legislative intent.

B. The Evolution of Minnesota's Legislative Waiver Statute

The Task Force recommended the creation of Presumptively Certifiable[60] and SYO categories for juvenile offenders.[61] Neither recommendation mentioned a legislative waiver or an automatic certification statute; hence, no transfer-back provision was discussed. Prior to the enactment of Minnesota's legislative waiver,[62] juvenile courts had broad discretion in deciding whether a juvenile offender should be certified to adult court.[63] The Task Force sought to guide and limit this judicial discretion by introducing a framework to replace the prior system.[64]

When the Task Force's recommendations were drafted into bills, political reaction was mixed.[65] Legislators agreed that the certification system should be simplified but disagreed on the

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60. *See* TASK FORCE REPORT, *supra* note 41, at 5-6 (outlining the recommendations for the Certification Process).

61. *See id.* at 7-8, 32-37 (outlining the reasons and recommendations for the SYO category).

62. *See* MINN. STAT. § 260.015 subd. 5(b) (West 1996). Note that if the charge is *attempted* first-degree murder, the juvenile is considered a delinquent child for purposes of adjudication. *See id.*

63. Until the 1994 Juvenile Crime Act, the two criteria that courts used to determine juvenile certification were (1) probable cause that the child committed the offense and (2) clear and convincing evidence that the child was not amenable to treatment. *See* MINN. STAT. § 260.125 subd. 2(d)(1)-(2) (1992). The juvenile court considered the following factors in certifying a juvenile for adult court jurisdiction:

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

MINN. R. JUV. P. 32.05 subd. 2, *in* MINNESOTA RULES OF COURT (West 1993).

64. *See* Symposium, *supra* note 43, at 628-29 (stating that "the Task Force heard testimony that indicated that the [then-] current prima facie system [was] confusing and unworkable").

65. *See infra* notes 67-68 and accompanying text (describing the differences between the House and Senate versions of the juvenile justice reform bills).

proper extent of the simplification.[66] House members proposed that three or more offenses should automatically certify juveniles as adults;[67] Senate members proposed that no offenses should automatically certify juveniles.[68]

In an attempt to keep juvenile offenders in juvenile court as long as possible, yet appease the "get tough on crime" legislators,[69] the House and Senate ultimately compromised.[70] The resulting statute automatically certifies as adults those juveniles who are sixteen-years-old or older and are charged with first-degree murder.[71] Thus, Minnesota's legislative waiver statute to automatically certify juveniles was created.[72]

Under current Minnesota law, only a first-degree murder charge, followed by an indictment, automatically certifies a juvenile as an adult.[73] If the murder charge is reduced to a lesser conviction, there is no transfer-back provision to juvenile court.[74] The

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66. Simplification of the then-current certification process was the reason behind the formation of the Task Force and the response to a legislative mandate. *See generally* TASK FORCE REPORT, *supra* note 41 (making recommendations concerning the juvenile justice system).

67. The House version of the bill, as amended on March 14, 1994, proposed that charges of first-degree murder, intentional second-degree murder and first-degree criminal sexual conduct automatically certify youths 16 years or older to adult court. *See* MINN. H.F. 2074, 78th Leg., § 10 (1994).

68. *See* MINN. S.F. 1845, 78th Leg., § 11 (1994). Although this bill listed no excluding offenses which would automatically certify a juvenile as an adult, another bill from the same session proposed that offenses similar to those in the House bill be included. *See* MINN. S.F. 2164, 78th Leg., § 4 (1994).

69. *Hearings on H.F. 2074 before the Judiciary Conference Comm.*, 78th Leg., (Apr. 21, 1994) (transcribed by and on file with the author) (statement of Representative Phil Carruthers) ("I think we'd have a problem if we didn't come back with some automatic certification provisions. I think we'd have a major problem trying to come back to the House on that.").

70. *See* Feld, *Violent Youth*, *supra* note 18, at 1055 (explaining how the legislature arrived at a "package deal" that incorporated the Task Force's recommendations and the first-degree murder offense as a means to certify automatically a juvenile to adult court jurisdiction).

71. *See* MINN. STAT. § 260.015 subd. 5 (1996); *see also supra* note 17 (quoting the statute).

72. *See* MINN. STAT. § 260.015 subd. 5 (1996).

73. *See* Feld, *Violent Youth*, *supra* note 18, at 1056. A first-degree murder indictment of a juvenile 16 years old or older gives the adult criminal court jurisdiction to try that juvenile. *See id.* The fact that only one offense, first-degree murder, can automatically certify a juvenile as an adult testifies to the legislature's high priority in keeping juveniles under the jurisdiction of the juvenile justice system.

74. "Conviction" is not even part of the statute's language. *See* MINN. STAT. §§ 260.011-.015. The Task Force's SYO proposal included a transfer-back option: "If it is later determined that the offense at plea or *conviction* is not a presumptive commit to prison offense, the [SYO] designation would be removed and the juvenile returned to regular juvenile status for disposition." TASK FORCE REPORT, *su-*

Minnesota legislative waiver statute is silent about which jurisdiction prevails for sentencing if the jury convicts the juvenile of a lesser offense than the first-degree murder charge.[75]

C. The Role of the Grand Jury: Indictment

"[A] grand jury would indict a ham sandwich if asked to do so by a prosecutor."[76] Grand juries see only one side: "You have roughly twenty citizens, who only hear the state's evidence, and whose job it is to decide if there's enough probable cause to warrant a trial. The defense isn't even present."[77]

The purpose of a grand jury hearing is to determine, through the investigation of evidence and witnesses, whether a crime has been committed,[78] and whether criminal proceedings should commence against an individual.[79] A grand jury, by virtue of its investigative function, is relatively free from the strict procedural safeguards that a trial jury must follow.[80] The grand jury acts as a shield between the prosecutor and the court, and is designed to prevent the weakest cases from going to trial and wasting the court's time.[81]

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pra note 41 (emphasis added) (outlining the "bounce-back" or transfer-back provision in the SYO category); *see also* Symposium, *supra* note 43, at 602-03 (enumerating elements of the SYO, including the transfer-back option).

75. *See* MINN. STAT. §§ 260.011-.015.

76. TOM WOLFE, BONFIRE OF THE VANITIES 603 (1987) (quoting former Chief Judge Sol Wachtler of the New York Court of Appeals).

77. Interview with Jeffrey Rasmussen, Disposition Advisor for Hennepin County Public Defender, in Minneapolis, Minn. (Sept. 18, 1997) (notes from conversation on file with author).

78. *See* U.S. v. Calandra, 414 U.S. 338, 344 (1974) (holding that a witness summoned to appear and testify before a grand jury may not refuse to answer questions on the grounds that the evidence was obtained from an unlawful search and seizure). The grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." U.S. v. Stone, 429 F.2d 138, 140 (2d Cir. 1970).

79. *See Calandra*, 414 U.S. at 343-44. In determining whether criminal proceedings should be instituted against a person, or whether a crime has been committed, the grand jury hearing focuses on the offense, not the guilt or innocence of the accused. *See id.*

80. *See* Robert M. Paule, *The Pervasion of the Historic Function of the Grand Jury in Minnesota*, 7 LAW & INEQ. J. 299, 307 (1989) (describing the duties of juries in Minnesota).

81. *See* Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 290 (1995). Leipold analyzes the grand jury system and suggests that it does not work as a valid screening function. *See id.* at 294. "[I]t has become nearly an article of faith among both grand jury critics and defenders that the grand jury is a 'rubber stamp' for the prosecution." *Id.* at 269. Leipold writes that the grand jury is a weak screen because the jurors are unqualified to answer the question which is the foundation of the grand jury: is there

In grand jury proceedings, the prosecution is allowed to present any evidence in its possession. The prosecutor is not required to disclose any evidence that might exonerate the accused, even if that evidence is substantial.[82] Grand juries are prevented from hearing conflicting facts, yet are expected to apply a legal standard to the facts as presented.[83]

Grand jury advocates point out that it is the job of the trial jury, not the grand jury, to protect the innocent accused.[84] While this may be true for adult defendants, it is no protection for the defendant who is a juvenile certified as an adult.[85] Without a transfer-back provision in the legislative waiver statute, a Minnesota juvenile certified as an adult after a grand jury indictment can be sentenced to an adult prison for an offense that otherwise would have placed him under the supervision of the juvenile court.

D. Statutory Law in Other States

Minnesota is not alone in lacking a transfer-back provision in its legislative waiver statute.[86] In fact, only eleven of the thirty-eight states with legislative waivers have explicit transfer-back

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probable cause to believe that the suspect committed the specified crime? *See id.* at 294. Not only are the jurors non-lawyers without experience in weighing legal evidence, but they are expected to weigh that evidence after the only lawyer in the room, the prosecutor, has told them it has merit. *See id.*

82. *See* U.S. v. Williams, 504 U.S. 36 (1992) (holding that a district court may not dismiss an otherwise valid indictment on the ground that the government failed to disclose to the jury "substantial exculpatory evidence" in its possession).

83. *See generally* Leipold, *supra* note 81, at 297 (commenting on the magnitude of a grand juror's responsibilities). In addition, if a grand jury refuses to indict, the prosecutor can simply seek an indictment from a new grand jury, using the same evidence. *See id.* at 297 n.174.

84. *See id.* at 311. While this is an attractive position to take in light of the more complicated alternatives, the author points out that the "do nothing" solution inaccurately promotes the notion that the innocently overcharged are only temporarily harmed. *See id.* Leipold argues that the harm is not temporary because many defendants who lack information or are vulnerable will enter guilty pleas out of fear of uncertainty rather than let their chances play out at trial. *See id.*

In the case of a juvenile being automatically certified to adult court as a result of a grand jury indictment, the potential weaknesses in the system are even more harmful. Where there is no provision for a return or transfer-back to the jurisdiction of the juvenile court if the juvenile is acquitted on the greater offense, the grand jury indictment creates an unequal result. A youth convicted of second-degree manslaughter, a crime that would normally come under the jurisdiction of juvenile court, is given the maximum adult sentence because the grand jury indicted him on first-degree murder.

85. The question concerning a juvenile who is certified through a grand jury to adult court is not whether he will get a fair trial (as incredibly important as that is), but whether he should be retained by the adult system if the charge is later reduced.

86. *See* Sabo, *supra* note 21.

provisions.[87] In most states, the only option for transferring the juvenile from adult court back to juvenile court exists pre-trial.[88]

Just as waiver statutes reflect each state's juvenile crime policies and thus are as varied as each state's policies, so too are transfer-back provisions.[89] Three examples of states with differing transfer-back options are Wisconsin, Mississippi and West Virginia. The Wisconsin statute lists the following three conditions under which a juvenile can return to juvenile court: 1) if there is a lack of adequate treatment in adult prison; 2) if the transfer would not mitigate the seriousness of the offense; and 3) if the transfer would not lead other children to commit the same offense.[90] The Mississippi statute provides that the juvenile may be returned to "youth" court if he was not convicted of the certifying offense.[91]

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87. *See supra* note 39 (listing 11 states' legislative waiver statutes containing transfer-back provisions); *see, e.g.*, OR. REV. STAT. § 419C.361 (1996). This Oregon statute provides that if the person "is found guilty of any lesser included offense that is not itself a waivable offense, the trial court shall not sentence the defendant therein, but the trial court shall order a pre-sentence report to be made in the case [and], shall set forth in a memorandum such observations as the court may make" regarding the case. *Id.* The trial court then shall return the case to the juvenile court in order "that the juvenile court make disposition in the case based upon the guilty finding in the court of waiver." *Id.*

88. *See, e.g.*, OKLA. STAT. ANN. tit. 10, § 7306-1.1(E) (1996) (stating that "[t]he accused person shall file a motion for certification as a child before the start of the criminal preliminary hearing"); N.H. REV. STAT. ANN. § 169-B:25 (1994 & Supp. 1995) (stating that "the superior court shall determine, after hearing, whether such person shall be treated as a juvenile under the provisions . . . or whether the case shall be disposed of according to regular criminal procedures"); DEL. CODE ANN. tit. 10, § 1011(a)-(b) (Supp. 1994) (stating that when the Superior Court has jurisdiction over a child defendant, "the Court may transfer the case to the Family Court for trial and disposition if, in the opinion of the Court, the interests of justice would be best served by such transfer").

89. Statutory law regulates sentencing policy. *See* State v. Behl, 564 N.W.2d 560 (Minn. 1997). The Minnesota Supreme Court, in adjudicating the matter of sentencing jurisdiction, centered its analysis entirely on the statutory language. *See id.* at 566 (reasoning that silence in the Minnesota statutes prohibits a return to juvenile jurisdiction for sentencing).

90. *See* WIS. STAT. ANN. § 970.032 (West Supp. 1996). Wisconsin's statute provides:

> [T]he [adult] court shall retain jurisdiction unless the child proves by a preponderance of the evidence all of the following: (a) that, if convicted, the child could not receive adequate treatment in the criminal justice system. (b) That transferring jurisdiction to the court assigned to exercise jurisdiction under chapters 48 and 938 would not depreciate the seriousness of the offense. (c) That retaining jurisdiction is not necessary to deter the child or other children from committing the violation of which the child is accused under the circumstances . . . .

Id.

91. *See* MISS. CODE ANN. § 43-21-157(8) (Supp. 1996) (stating "when the youth has committed an act which is in original circuit court jurisdiction . . . the jurisdiction of the youth court over the youth is forever terminated, except that such jurisdiction is not forever terminated . . . if a child who . . . is in the original jurisdic-

The West Virginia statute allows the juvenile to appeal the transfer to adult court even *after conviction for the offense that led to transfer*.[92]

Other states that permit some limited return-to-juvenile-court jurisdiction are Florida,[93] Nevada[94] and Michigan.[95] In *Ortez v. Brousseau*,[96] the Florida District Court of Appeals allowed a juvenile to return to juvenile court because he was not convicted of the felony that would have waived him into adult court.[97] Nevada's statute allows a return to juvenile jurisdiction under "exceptional circumstances."[98] Michigan's automatic waiver stat-

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tion of the circuit court *is not convicted*") (emphasis added).

92. *See* W. VA. CODE § 49-5-10(j) (Supp. 1996) (providing that "A juvenile who has been transferred to criminal jurisdiction . . . shall have the right to either directly appeal an order of transfer to the supreme court of appeals or to appeal such order of transfer following a *conviction of the offense of transfer*") (emphasis added).

93. *See* Parr v. State, 415 So.2d 1353 (Fla. App. 1982) (holding that a juvenile charged in adult court may move to be transferred before adjudication takes place and must be granted the motion if he has not committed two delinquent acts, one of which is a felony); I.H. v. State, 405 So.2d 450 (Fla. App. 1981) (holding that failure to file information against juvenile in adult court did not divest juvenile court of jurisdiction); Ortez v. Brousseau, 403 So.2d 549 (Fla. App. 1981) (granting defendant's petition for a return to juvenile court because he had not committed the requisite felony to bring him under adult court jurisdiction); Carter v. State, 382 So.2d 871 (Fla. App. 1980) (warning that motions to return a defendant to juvenile jurisdiction will be heard, but they must be made before the completed process of adult jury trial).

94. NEV. REV. STAT. ANN. § 62.080 Subd. 4 (Michie 1996). Nevada's statute reads:

> If a child has been certified for criminal proceedings as an adult . . . and his case has been transferred out of the juvenile court, original jurisdiction of his person for that case rests with the court to which the case has been transferred and the child may petition for transfer back to the juvenile court only upon a showing of *exceptional circumstances*.

Id. (emphasis added). The statute also requires the juvenile court judge to determine whether the exceptional circumstances warrant accepting jurisdiction. *See id.*

95. *See* MICH. COMP. LAWS § 769.1(3) (West 1996). Once a guilty plea or conviction is reached, the circuit judge must conduct a hearing to determine whether the best interests of the juvenile and the public would be served by placing the offender in a juvenile facility or adult prison. *See id.* Only under the automatic certification statute is this disposition hearing required. *See* People v. Veling, 504 N.W.2d 456, 463 n.19 (Mich. 1993).

96. 403 So.2d 450 (Fla. App. 1981).

97. *See id.* at 549.

98. *See, e.g.*, Robert E. v. Justice Court of Reno, 664 P.2d 957 (Nev. 1983) (holding that while a court cannot go beyond a statute in determining legislative intent, it may interpret an ambiguous statute in light of public policy indicative of legislative intent). Nevada's statute was challenged in the Nevada Supreme Court on grounds of ambiguity. *See id.* The supreme court held that if a statute could be interpreted in two or more different ways by reasonably well-informed persons, it should be construed in line with what reason and public policy indicated the legislature intended. *See id.* at 959 (quoting Cannon v. Taylor, 486 P.2d 493, 495 (Nev. 1971) (citing Madison Met. Sewer Dist. v. Dep't' of Natural Resources, 216 N.W.2d

ute allows a prosecutor to try a juvenile in adult court if the juvenile is charged with one of nine enumerated offenses,[99] but requires the circuit judge to conduct a sentencing hearing after adjudication.[100]

E. Surrounding Case Law

The case law on the transfer-back issue is as varied as the statutory law,[101] and cases involving disputes over which court should have jurisdiction over a juvenile vary in their claims. For example, in *Partlow v. United States*,[102] there were multiple charges, some of which were certifying offenses, and others that were not. The juvenile in *Partlow* was tried as an adult, but when the certifying offenses were dropped mid-trial, he asked to be transferred back to juvenile court.[103] The District of Columbia Court of Appeals ruled that the defendant should stay in adult court pending adjudication of all charges of the original complaint.[104] In *Michigan v. Veling*,[105] the juvenile defendant, waived to adult court by Michigan's prosecutorial waiver statute,[106] was

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533, 535 (Wis. 1974)).

99. MICH. COMP. LAWS § 750.83. The enumerated offenses are: assault with intent to murder, *see id.* § 750.83; assault with intent to commit armed robbery, *see id.* § 750.89; attempted murder, *see id.* § 750.91; first-degree murder, *see id.* § 750.316; second-degree murder, *see id.* § 750.317; first-degree criminal sexual conduct, *see id.* § 750.520b; armed robbery, *see id.* § 750.529; delivery of a controlled substance, *see id.* § 333.7401; and possession of a controlled substance, *see id.* § 333.7403.

100. *See id.* §§ 750.83-529. In Michigan, the circuit court judge is required to provide the defendant with a hearing after the trial. The hearing determines whether the juvenile should be sentenced in adult court or juvenile court.

101. Statutory law regulates sentencing policy. *See* State v. Behl, 564 N.W.2d 560 (Minn. 1997). The Minnesota Supreme Court, in adjudicating the matter of sentencing jurisdiction, centered its analysis entirely on the statutory language. *See id.* at 566 (reasoning that silence in the Minnesota statute prohibits a return to juvenile jurisdiction for sentencing); *supra* text accompanying notes 21-33 (providing a brief history of juvenile court and the ensuing tension between the policy to rehabilitate juveniles and the policy to punish serious older juvenile offenders). Adult criminal courts are very reluctant to give up sentencing authority over certified juveniles between the ages of 15 and 18 who are charged with felony level offenses. *See id.*

102. 673 A.2d 642 (D.C. 1996).

103. *See id.* at 644. "Appellant moved to have his case transferred back to the Family Division arguing that since he was no longer 'charged' with a certifying offense, the Criminal Division no longer had jurisdiction over his case." *Id.* The court based its decision on *Lucas v. United States*, 522 A.2d 876 (D.C. 1987). *Lucas* held that the court that began trial proceedings should see them through to their conclusion and any transfer back should depend on the final conviction. *See id.*

104. *See Partlow*, 673 A.2d at 642.

105. 504 N.W.2d 456 (Mich. 1993).

106. *See id.* (relating that Veling was indicted for assault with intent to commit

ultimately convicted of a non-certifying offense. He moved for juvenile sentencing,[107] but the circuit court judge denied the motion. On appeal, the Michigan Supreme Court held that the circuit court judge violated the statute by not granting a sentencing hearing.[108]

Other cases reflect still more views. In Tennessee, the court held that the right to a transfer-back hearing is sufficiently fundamental to be considered a matter of due process in the context of juvenile justice.[109] The Delaware Supreme Court held that the purpose of the transfer-back statute is "to provide juveniles with a judicial counterweight to any perceived prosecutorial charging excess,"[110] and the reverse waiver was to eliminate the potential for arbitrary or capricious charging decisions that could result in unequal treatment.[111]

II. The Facts and Minnesota Supreme Court's Decision in *State v. Behl*

On January 20, 1995, sixteen-year-old Behl sawed off the barrel of his father's twelve-gauge shotgun and took it to his friend Ryan Postier's ("Postier") house in Pine Island, Minnesota.[112] Behl owed money to Postier's older brother, Brad, who had agreed to accept the shotgun in lieu of payment.[113] Later that day in his basement bedroom, Brad died from a single gunshot wound to his head.[114] Behl and Postier were the only witnesses to the shooting.[115] Subsequent to the shooting, Behl and Postier fled the scene in the dead man's truck.[116] After skidding into a ditch, the boys continued on foot, discarding the shotgun along the way.[117] Later

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murder, an enumerated offense, and sent to adult court).

107. *See id.* at 458. Following the indictment for assault with intent to commit murder, Veling was convicted of assault with intent to do great bodily harm, which is not a certifying offense. *See id.*

108. *See id.* at 458 n.5 (referring to Michigan, where the circuit court is required to provide the defendant with a hearing to determine which court should have jurisdiction over sentencing).

109. *See* State v. Hale, 833 S.W.2d 65 (Tenn. 1992) (holding that in Tennessee, indictment prior to a transfer hearing is a procedural defect that can be waived by the juvenile).

110. Marine v. Delaware, 505 U.S. 1247 (1992) (holding in part that the statutory scheme doesn't deny the defendant equal protection).

111. *See id.*

112. *See* State v. Behl, 564 N.W.2d 560, 562 (Minn. 1997).

113. *See* letter from Donn H. Behl Sr., father of Donn Behl, to Paula Brummel (Dec. 5, 1997) (on file with author).

114. *See Behl*, 564 N.W.2d at 562.

115. *See id.*

116. *See id.*

117. *See id.*

that afternoon, a sheriff's deputy found Behl and Postier and returned each to their homes.[118] That evening, after the police discovered Brad's body and questioned both boys, Behl confessed to the shooting.[119]

A grand jury indicted Behl on six criminal counts, including first-degree murder.[120] Although Behl had no prior offenses,[121] under Minnesota's legislative waiver statute[122] the first-degree murder indictment and his age (16) automatically certified him to stand trial as an adult.[123] At trial, the jury found Behl not guilty of first-degree murder,[124] but guilty of second-degree manslaughter, possession of a short-barreled shotgun and theft of a motor vehicle.[125]

Because Behl was found not guilty of first-degree murder (the charge that had automatically certified him to stand trial as an adult), he requested to be returned to juvenile court.[126] Behl requested the transfer to obtain a hearing to determine whether the juvenile or adult court would sentence him.[127] Because Minnesota's legislative waiver statute is silent regarding the ability of a juvenile to return to juvenile jurisdiction once certified as an adult,[128] the court denied Behl's request.[129] The sentencing judge

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118. *See id.* at 563.

119. *See id.*

120. *See id.* at 562. It is common for prosecutors to charge the most serious offense possible knowing they will need room to plea-bargain down. *See supra* note 56 (providing former prosecutors' experiences with overcharging); *see also supra* Part I.C (discussing the strengths and weaknesses of the grand jury indictment system).

121. *See* Telephone interview with Thomas Gorman, Attorney for Donn Behl, in Minneapolis, Minn. (Sept. 27, 1997) [hereinafter Gorman interview].

122. *See supra* note 17 (quoting Minnesota's automatic certification statute).

123. *See* State v. Behl, 564 N.W.2d 560, at 562 (Minn. 1997).

124. *See* State v. Behl, 547 N.W.2d 383 (Minn. Ct. App. 1996).

125. The jury found Behl guilty of the following charges: manslaughter in the second degree, MINN. STAT. § 609.205(1); theft of a motor vehicle, *see id.* § 609.52 subd. 2(17); and possession of a short-barreled shotgun, *see id.* § 609.67 subd. 2. *See also* State v. Behl, 547 N.W.2d at 383. When the Minnesota Supreme Court reviewed Behl's sentence, it determined that the possession of a shotgun charge was not part of the same behavioral incident as the first-degree murder. As a result, it held that the district court did not have jurisdiction to adjudicate that charge. *See Behl*, 564 N.W.2d at 569.

126. *See Behl*, 547 N.W.2d at 384. "Behl moved the trial court to return his case to the jurisdiction of the juvenile court for sentencing and for a downward sentencing departure based on the presentence investigation report." *Id.*

127. *See id.*

128. *See supra* note 17 (quoting Minnesota's automatic certification statute that has no provision for the juvenile to transfer-back to juvenile jurisdiction if convicted of lesser charges).

129. *See Behl*, 547 N.W.2d at 382 (holding that district court jurisdiction over

gave Behl a sentence fourteen months longer than the presumptive adult sentence for first-degree manslaughter.[130]

Behl appealed the trial court's sentence. On appeal, the Minnesota Court of Appeals held that because the statute did not mention a transfer-back provision, Behl should be sentenced in adult court.[131] Behl then appealed to the Minnesota Supreme Court, which in a four to three decision affirmed the court of appeals' ruling.[132] The supreme court opinion addressed two main issues: silence in the waiver statute about reversals of jurisdiction, and the defendant's constitutional rights.[133]

A. The Supreme Court Decision

1. Statutory Silence

The Minnesota Supreme Court first addressed the jurisdictional question as framed by the statute:[134] "it is undisputed that the automatic certification statute is silent on the issue of disposition following a conviction for a crime other than first-degree murder. We must, therefore, start our analysis by considering the significance of this silence."[135] In writing the court's majority opinion, Justice Tomljanovich interpreted the silence of the statute to mean

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Behl was properly attained through grand jury indictment and should properly remain with district court even though the jury had found Behl guilty of a lesser included offense).

130. *See id.* The pre-sentence investigation report recommended that Behl receive the presumptive sentence for each offense. *See id.* This would have resulted in 58 months for the manslaughter conviction and 12 months and one day for the offense of possession of a short-barreled shotgun. *See id.* Instead, the court sentenced Behl to 12 months and one day, plus 72 months, to be served concurrently. *See id.* His sentence for manslaughter was 25% longer than the recommended (presumptive) sentence for that offense. *See id.* The court justified its upward departure in light of four factors. *See supra* note 16 and accompanying text. Behl's attorney stated:

> All kinds of people who knew Donny came to his pre-sentence hearing to testify that he was basically a good kid. Teachers, counselors, someone from his church; there was a lot of testimony to support that he only get the minimum presumptive adult sentence. I don't understand why the court gave him a fourteen month upward departure.

Gorman interview, *supra* note 121; *see also supra* note 4 and accompanying text (showing that Behl's sentence was harsher than those received by many adults).

131. *See Behl*, 547 N.W.2d at 385 (holding that since the legislature chose not to include a transfer-back feature in the statute, the court ought not fabricate one).

132. *See* State v. Behl, 564 N.W.2d 560, 560 (Minn. 1997).

133. *See id.*

134. *See id.* at 564. The court began its analysis by determining whether the district court had jurisdiction to sentence juveniles under the certification statute. *See id.*

135. *Id.*

that the drafters did not intend to allow certified juveniles to return to juvenile court.[136] For support, Justice Tomljanovich cited an analogous statute from Oregon[137] that provides a transfer-back option; the supreme court concluded that the lack of similar transfer-back language in the Minnesota statute prohibited such an option.[138]

The Court also looked to the explicit sentencing provisions in Minnesota's EJJ statute,[139] which was incorporated in the same legislative bill as the certification statute.[140] The EJJ statute is explicit about the sentencing structure for juveniles who come under its rubric and allows the juvenile a method to challenge EJJ.[141] The court concluded, however, if the same legislature that pro-

136. *See id.* at 564-67 (explaining that the statutory omission of a transfer-back provision is more likely to be intentional and unambiguous than inadvertent and ambiguous).

137. *See Behl*, 564 N.W.2d at 565-66. The majority opinion stated:

> the trial court shall not sentence the defendant therein, but . . . shall order a pre-sentence report to be made in the case, shall set forth in a memorandum such observations as the court may make regarding the case and shall then return the case to the juvenile court in order that the juvenile court make disposition in the case based upon the guilty finding in the court of waiver.

Id. (citing OR. REV. STAT. § 419C.361 (1995)).

138. *See id.* "The fact that Oregon's legislature included within the statute a specific clause providing for a return to juvenile court of an automatically certified juvenile actually indicates that a lack of similar language in the Minnesota statute prohibits such a return." *Id.* The court of appeals had relied upon similar logic when it stated that, "[w]hile we believe that the option of a hearing could enhance protection of the 'best interest' of some juvenile offenders, our legislature has not included this feature in our statute, and it is not our function to amend it." *Behl*, 547 N.W.2d at 385.

139. *See Behl* 564 N.W.2d at 566 (citing MINN. STAT. § 260.015 (1994)).

140. The House proposed a bill:

> providing for adult court jurisdiction over juveniles alleged to have committed first degree murder after age 16; providing for presumptive certification to adult court for juveniles over age 16 alleged to have committed other prison-level felonies or any felony while using a firearm; [and] authorizing the court or the prosecutor to designate a juvenile an extended jurisdiction juvenile.

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

The Senate bill did not contain an automatic certification provision, but proposed "providing for presumptive certification to adult court for juveniles alleged to have committed prison-level felonies . . . extending juvenile court jurisdiction to age 23 for serious youthful offenders; [and] limiting certification to adult court to felony offenses." MINN. S.F. 1845, 78th Leg., (1994).

141. The EJJ statute outlines dispositions for juveniles found guilty, and those later convicted of an offense after trial. *See* MINN. STAT. § 260.126 subd. 4 (1996). Additionally, the EJJ statute provides guidelines for the execution of the adult sentence when the juvenile violates his stayed sentence conditions. *See id.* at subd. 5. In this subdivision, the statute provides for notification to the juvenile as well as options for the juvenile to challenge the reasons for revoking stay of execution. *Id.*

vided so explicitly for juvenile adjudication in the EJJ statute had wanted a transfer-back provision in the certification statute, it would have explicitly included one.[142]

2. Constitutional Issues

Behl demanded his return to juvenile court jurisdiction as a constitutional right, arguing the violation of his procedural and substantive due process rights.[143] In response to Behl's first claim that his procedural due process rights had been violated, the court responded that such a claim could succeed only if the loss of a protectable liberty or property interest were established.[144] Behl failed to convince the court that his adjudication in juvenile court was a protectable right or interest, since he had never been under its jurisdiction.[145]

In response to Behl's second claim that his substantive due process rights had been violated, the court articulated the standard of judicial scrutiny for legislative enactments when no fundamental right is at stake.[146] The court asserted that the statute was a "reasonable means to a permissive object,"[147] and that adjudication in juvenile court is not a fundamental right.[148] Applying a

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142. *See Behl*, 564 N.W.2d at 566.

> Likewise, the explicit sentencing provisions in the EJJ statute, which was part of the same bill as Minnesota Statute section 260.015, indicate that the legislature's silence on the issue was intentional and unambiguous . . . . Had the legislature intended the district court to adjudicate such defendants as juveniles, it is probable the legislature would have done as it did with the EJJ statute and explicitly provided for an adjudication.

Id.

While the EJJ statute was drafted during the same legislative session as the automatic certification statute, they did not evolve from the same sources. The EJJ category grew out of the Task Force Report, and the legislative waiver, or automatic certification statute, did not; it was a modification of the pre-existing certification statute.

143. *See Behl*, 547 N.W.2d at 384. One of the issues on appeal was whether the district court violated Behl's constitutional rights by retaining jurisdiction for sentencing. *See id.*

144. *See Behl*, 564 N.W.2d at 566.

145. *See id.* at 567 (concluding on the procedural due process issue, that until the juvenile court has asserted its jurisdiction over a person, it does not possess a protectable interest). In Behl's case, he was never under the juvenile court jurisdiction, so he never "lost" its jurisdiction. *See id.*

146. *See id.*

147. *See id.* at 567 (citing Contos v. Herbst, 278 N.W.2d 732, 741 (Minn. 1979) (stating that substantive due process requires that statutes not be arbitrary or capricious)).

148. *See id.* (holding that no person, regardless of age, has a fundamental right to juvenile adjudication). By establishing rational basis as the level of judicial

rational basis standard of scrutiny, the court concluded that trying juveniles charged with first-degree murder as adults is a reasonable means to the permissive object of adjudicating the most serious offenders.[149]

Behl's third constitutional challenge concerned equal protection.[150] Behl asserted that because sentencing two juveniles convicted of the same offense to radically different penalties is not rationally related to any legitimate government interest, such disparate sentencing violated his constitutional right to equal protection.[151] In addressing Behl's argument, the court acknowledged that the only reason he received a harsher sentence than another juvenile convicted of second-degree manslaughter was because he had been indicted for first-degree murder.[152] The court readily acknowledged that Behl did not commit the offense for which he was indicted.[153] While the court admitted that the state failed to argue successfully the rational basis on which to justify this disparate treatment,[154] it attributed the rational basis for the disparate sentencing to the indictment process and the grand jury's finding of

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scrutiny that should be applied to the statute, the court easily upheld the lower court's decision.

149. *See id.* at 566. The court acknowledged that, in at least one case, the Minnesota Court of Appeals had justified using offenses to certify juveniles to adult court. *See id.* (citing In re Welfare of L.J.S. and J.T.K., 539 N.W.2d 408, 412-13 (Minn. Ct. App. 1995)). The court also cited a Delaware case, Marine v. State, 607 A.2d 1185, 1207 (Del. 1992), that held that the statutory scheme distinguishing offenses does not involve a fundamental right, and an Illinois case, *People v. Jiles*, 251 N.E.2d 529, 531 (Ill. 1969), that held that the creation of a juvenile court system is not a constitutional requirement. *See id.* at 567. "As a result," the *Behl* court stated, "we conclude that such a finding is at least a rational basis upon which to expose a juvenile who is within two years of becoming a legal adult to the more harsh sentences imposed in district court." *Behl*, 564 N.W.2d at 569.

150. *See Behl*, 564 N.W.2d at 568. The Minnesota Supreme Court does not cite to precedent on this issue; however, it is significant to note that the United States Supreme Court and the District of Columbia Court of Appeals have held that there is no fundamental right to receive a sentence equal to that received by a person convicted of the same offense. *See* United States v. Batchelder, 442 U.S. 114 (1979) (applying rational basis review to an equal protection challenge of a statute that assigned different prison sentences to two individuals who committed the same offense); *see also* United States v. Cohen, 733 F.2d 128 (D.C. Cir. 1984).

151. *See Behl*, 564 N.W.2d at 568.

152. *See id.*

153. *See id.* at 569. The trial court jury found Behl not guilty of first-degree murder, but guilty of second-degree manslaughter. *See id.* at 560.

154. *See id.* "Although the state failed at oral argument to assert a rational basis upon which to base this different treatment, we conclude that the grand jury's finding of probable cause necessary to automatically certify a juvenile provides such a basis." *Id.* The supreme court justified its rational basis review on a grand jury indictment—a process already discussed for its inherent one-sidedness. *See supra* notes 76-83 and accompanying text.

probable cause.[155] Because no fundamental right was at stake, and no suspect class existed,[156] the court justified a completely deferential standard of analysis.[157] It concluded that while it would have been preferable to have a transfer-back option for Behl,[158] it was nevertheless rational to impose an adult sentence upon a sixteen-year-old whose conduct was grave enough to invoke a first-degree murder indictment.[159] Responding to Behl's challenges that sentencing him in adult court was unconstitutional, the supreme court held that Minnesota statutes are presumed constitutional and should only be challenged when absolutely necessary.[160]

Chief Justice Keith dissented from the opinion on three grounds.[161] First, he asserted that the opinion had misinterpreted the legislative intent and statutory silence in ways that conflicted with "simple but fundamental notions of fairness."[162] Justice Keith stated that when a youth, "alleged" to have committed first-degree murder, is excluded from juvenile court jurisdiction, that same youth should be returned to juvenile jurisdiction when the allegation disappears.[163] Second, he accused the majority of failing to apply the well-established rule of lenity by interpreting the statute's ambiguity to the disadvantage of the accused.[164] Third, he

155. *See id.* at 569 (noting that the conditions for automatic certification include a grand jury indictment for first-degree murder).

156. *See id.* at 568. "Facial distinctions based on age and charged offenses do not create suspect classifications." *Id.* (quoting United States v. Bland, 472 F.2d 1329, 1336-37 (D.C. Cir. 1972)).

157. *See Behl*, 564 N.W.2d at 569.

158. *See id.* at 568 (stating that while a specific legislative provision for defendants like Behl might be preferable, the failure of such a provision is not arbitrary and capricious).

159. *See id.* (referring to Behl as a juvenile "over the age of 16"); *see also id.* at 569 (emphasizing that a 16 year-old juvenile is within two years of becoming a legal adult).

160. *See id.* at 566 (quoting *In re* Haggerty, 448 N.W.2d 363, 364 (Minn. 1989)). The opinion further stated: "to challenge successfully the constitutional validity of a statute, the challenger bears the very heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional." *Id.* (quoting State v. Merrill, 450 N.W.2d 318, 321 (Minn. 1990)).

161. *See id.* at 570-72.

162. *See id.* at 570. Chief Justice Keith wrote: "If . . . the statute is silent and we must identify the legislature's intent, then I see no reason to prefer the more punitive result over a juvenile disposition." *Id.* at 571.

163. *See id.* (agreeing that although it was reasonable to remove a child from juvenile court based on a serious allegation, the jurisdiction of the adult court should have been terminated when the jury rejected the allegation).

164. *See id.* The rule of lenity states that, in criminal cases, a law with the purpose of punishment must be construed strictly and interpreted with a very critical mind. *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY, 655-56 (2d ed. 1995). If there is any ambiguity in the statute, the court must interpret the stat-

criticized the majority for concluding that because Oregon's certification statute and Minnesota's EJJ statute both had transfer-back provisions, the lack of one in Minnesota's certification statute was intentional.[165]

III. Analysis

The issue in *Behl* was not whether Donn Behl should be tried as an adult.[166] The issue was whether he should have received the adult sentence for second-degree manslaughter after the first-degree murder charge became a conviction for a lesser offense.[167] The Minnesota Supreme Court's decision to affirm the adult sentence of Behl for a conviction of second-degree manslaughter was unjust for several reasons. First, it interpreted the ambiguities of this statute to the disadvantage of the accused.[168] Second, the court failed to recognize that the statute in question violates the

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ute so the individual is not unfairly penalized. *See id.* The *Behl* dissent asserted that for any ambiguities concerning the scope of the automatic certification statute, the legislative intent and past interpretive practices should be followed, and that the jurisdiction of the juvenile court should prevail. *See Behl*, 564 N.W.2d at 571 n.3 (Keith, C.J., dissenting) (citing United States v. R.L.C., 503 U.S. 291, 305-08 (1992) (holding that the "venerable" rule of lenity is relevant when statutory language, structure, legislative history and underlying policies are inconclusive)).

165. *See Behl*, 564 N.W.2d at 570. It is illogical to conclude that the Minnesota Legislature intended adult courts to retain jurisdiction over juveniles acquitted of the certifying offense simply because Oregon provides for a transfer-back to juvenile court. In fact, most states neglect to provide for situations like Behl's. *See supra* Part I.D (examining the differences between state juvenile justice statutes).

The *Behl* dissent found it puzzling that the Minnesota Supreme Court referred to the EJJ statute in its reasoning. *See Behl*, 564 N.W.2d at 570. It accused the majority of completely misunderstanding the statute, asserting that the EJJ system has no avenue for a return to juvenile court as the majority contends. *See id.* On the contrary, the EJJ provisions allow a juvenile to remain under juvenile jurisdiction with an adult sentence hanging over his head. The EJJ statute does not discuss or relate to district court sentencing jurisdiction in automatic certification cases. *See id.*

166. Although Behl's father claimed that his son is innocent in a letter to the author, fairness of his trial was not the issue on appeal. The issue on appeal, before both the Minnesota Court of Appeals and the Minnesota Supreme Court, was whether Behl should have received an adult sentence for second-degree manslaughter. *See id.* at 561; *Behl*, 547 N.W.2d at 384 (identifying sentencing as the central issue in both cases).

167. *See* Feld, *Violent Youth*, *supra* note 18, at 286 n.398 (citing commentary to the rule on automatic certification, which states that once in adult court, the proceedings remain there). What is unclear from this commentary is whether proceedings include sentencing.

168. *See supra* text accompanying notes 135-139 (referring to court's interpretation of statutory silence and its holding based on that interpretation). In the case of criminal statutes where the freedom of an accused person is at stake, courts have long recognized the interpretive rule of lenity which says ambiguous statutes must be interpreted in a light most favorable to the accused. *See supra* note 164 and accompanying text (explaining the rule of lenity).

Minnesota Constitution because of vagueness. Third, the court's decision negated both the policy upon which the juvenile court system was founded and the legislative intent of the automatic certification statute.[169] Finally, it violated Behl's guarantee of equal protection of the laws, a guarantee that requires the state to treat all similarly situated persons alike.[170] Today, under the *Behl* holding, two sixteen-year-old first-time offenders can both be convicted of second-degree manslaughter, but receive drastically different sentences.

A. Statutory Silence and the Canons of Interpretation

The absence of a statutory transfer-back provision was more likely the result of legislative oversight than legislative intent. The *Behl* holding concludes that because the legislature did not include a transfer-back provision in its certification statute, it intended certified juveniles to go to prison even for juvenile-level convictions. When the Minnesota Legislature examined such issues as presumptive certification, automatic certification and *prima facia* certification, it is not unthinkable that they simply overlooked a transfer-back provision. Literature analyzing the evolution of the juvenile justice system is replete with complex issues comparing and contrasting the rehabilitation and sentencing of juveniles with the rights of the public to be safe and crime-free.[171] Prior to the enactment of the statute, House and Senate committees debated politically charged issues such as the age boundaries for certification, and which felonies, if any, ought to be included in a waiver statute. As legislators debated which juveniles should be tried as adults and which should remain under juvenile jurisdiction, it would not be surprising if they overlooked a transfer-back provision.[172] The resultant statutory silence may simply have been accidental.

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169. *See supra* Part I.B (giving background of the juvenile court system and the evolution of the automatic certification statute).

170. *See supra* notes 150-159 and accompanying text (citing Behl's equal protection challenge and the argument the court used to refute the challenge).

171. *See, e.g.*, Feld, *Violent Youth*, *supra* note 18, at 966-67 (reviewing the juvenile court system in Minnesota and the impact of the Minnesota Juvenile Justice Task Force); *see also* Arteaga, *supra* note 21, at 216 (analyzing the various forms of juvenile court systems throughout the United States).

172. Tape recordings and transcripts of judicial committee hearings from February 28, 1994, show that the following issues were the most pressing: which offenses, if any, should automatically certify a juvenile; what age the juvenile should be; what role public safety should play in the certification process; and what rights the juvenile should have to a jury or counsel. *See* HEARINGS ON MINN. H.F. 2074 BEFORE THE JUDICIARY CONFERENCE COMM., 78th Leg., (Feb. 28, & Mar. 2, 1994)

The *Behl* holding consciously disregarded the rule of lenity. The rule of lenity dictates that where a criminal statute is ambiguous, it must be interpreted in the light most favorable to the criminal defendant.[173] The court misapplied the rule of lenity by holding that because the statute did not expressly contain a transfer-back provision, Behl could not return to juvenile court jurisdiction. The supreme court held that a lack of transfer-back language was intentional,[174] and thus interpreted the statute's silence in the light most punitive to Behl.

Another canon of statutory interpretation that the supreme court misused is *expressio unius*, meaning the expression of one thing can exclude another; because something was excluded from a list, it is not part of the list.[175] The defense cited an Oregon certification statute which allows juveniles to return to juvenile court for a sentencing hearing. The Oregon statute is similar to Minnesota's certification statute except in the return provision. The court held that "a lack of similar language in the Minnesota statute prohibits such a return."[176] The court concluded that had the Minnesota legislature intended a transfer-back provision, it would have imitated Oregon. One only has to look at the state to state differences in juvenile certification statutes to appreciate the confusion surrounding the issue.[177] The Minnesota Supreme Court likewise asserted that because the Minnesota legislature enacted the explicitly detailed EJJ statute and certification statute at the same time, any omissions in the automatic certification statute must have been intentional.[178] The court misapplied *expressio unius* when it concluded that because Oregon's waiver statute had a transfer-back provision,[179] absence of the same provision in Minnesota's statute was intentional; because the EJJ statute was so

(transcribed by and on file with the author).

173. *See supra* note 164 (explaining the rule of lenity).

174. *See* State v. Behl, 547 N.W.2d 382, 385 (Minn. Ct. App. 1996).

175. *See* BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

176. State v. Behl, 564 N.W.2d 560, 565-66 (Minn. 1997).

177. *See supra* notes 35 & 37 (citing the judicial and legislative waiver statutes respectively).

178. *See supra* notes 134-142 and accompanying text (showing the Minnesota Supreme Court's reasoning that statutory silence equals legislative intent).

179. *See* OR. REV. STAT. § 419C.361 (1995). Because Oregon and Minnesota statutes were passed by different Legislatures, it is imprudent to compare their provisions as if they derived from the same legislative body. Comparing Minnesota's EJJ statute to Minnesota's automatic certification statute is also ill-advised. While both statutes concerned juvenile crime, they addressed different problems, proposed different remedies and evolved from different backgrounds. The EJJ statute came directly from the Task Force's SYO category, whereas the automatic certification statute evolved from existing certification statutes and legislative policy.

detailed, the companion waiver statute must be as detailed as the drafters had intended.[180] Statutes are as diverse as the legislatures that create them; legislatures are as diverse as the legislators who compose them; and legislators reflect the fears, concerns and desires of very diverse constituents. As has been demonstrated, waiver statutes among the fifty states are very diverse,[181] and bills that are introduced in one format are often passed in a very different format. Concluding that the Minnesota statute did not intend certified juveniles to transfer-back to juvenile court because it did not imitate the Oregon or EJJ statutes is like reasoning that an apple does not contain seeds because it does not look like an orange or a tangerine.

B. Minnesota's Legislative Waiver Violates the Minnesota Constitution

When the language of a statute is ambiguous, legislative intent may be used as a guide to decipher statutory meaning,[182] but when a statute is so ambiguous that "men of common intelligence must guess at its meaning and differ as to its application,"[183] that statute necessarily violates the Minnesota constitution.[184] The supreme court should have questioned the constitutionality of the legislative waiver statute where application of its ambiguous meaning could lead to such different results for a juvenile: incarceration in adult prison or rehabilitation through the juvenile jus-

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180. *See Behl*, 564 N.W.2d at 566; *see also supra* note 142 and accompanying text (quoting the majority opinion's conclusion that if the Minnesota legislature had wanted a transfer-back option, they would have included one).

181. *See supra* notes 35 & 37. There does not appear to be any uniformity among states regarding waiver statutes, or whether those waivers have transfer-back provisions.

182. *See* MINN. STAT. § 645.16 (1996). Minnesota's statute provides:

> When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit. When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters: (1) The occasion and necessity for the law; (2) The circumstances under which it was enacted; (3) The mischief to be remedied; (4) The object to be attained; (5) The former law, if any, including other laws upon the same or similar subjects; (6) The consequences of a particular interpretation; (7) The contemporaneous legislative history; and (8) Legislative and administrative interpretations of the statute.

Id.

183. MINN. CONST. art. VII § 8. "A criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Id.*

184. *See id.*

tice system. Because the statute requires the court to "guess at its meaning and differ as to its application," it "violates the first essential of due process of law."[185]

C. *The Opinion Offends Public Policy and Negates Legislative Intent*

The existence of a separate justice system for juveniles testifies to society's desire to adjudicate juveniles differently than adults.[186] Minnesota legislators enacted the EJJ category in response to this desire, allowing serious offenders to remain under the watchful eye of the juvenile court until they are twenty-one years old.[187] The same legislators enacted the legislative waiver statute to include only one offense: first-degree murder.[188] The intent of the Minnesota legislature, demonstrated by the EJJ statute and the legislative waiver statute was to retain juveniles in juvenile court unless they are chronic, serious, older or unrehabilitative offenders.

Donn Behl was not a chronic offender; this crime was his first offense. The jury convicted him of second-degree manslaughter, a crime that is considered not as serious as murder, but more serious than justifiable homicide.[189] "[M]anslaughter is a crime which is separate and distinct from, rather than merely a degree of, the crime of murder."[190] While Behl's crime was serious, Minnesota's statute for manslaughter in the second-degree contains language of "risk," "negligence," and "chance."[191] Having an element of risk or recklessness is characteristic to criminal negligence, and clearly Behl is guilty of risky behavior. However, risky juvenile behavior,

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185. MINN. CONST. art. VII § 8.

186. *See supra* notes 21-27 and accompanying text (outlining the societal reasons for the creation of a separate justice system for juveniles). The two justice systems exist because society recognizes the need to treat juveniles differently from adults. Most juveniles are considered amenable to treatment because of their youth. Only first-degree murder has been recognized as serious enough to certify a juvenile to be tried as an adult. A juvenile is not to be tried as an adult if first-degree murder was only "attempted." *See supra* note 38 (quoting the automatic certification statute and highlighting the second half of the sentence excluding attempted first-degree murder).

187. *See supra* note 18 (describing the elements of the EJJ statute).

188. *See supra* Part I.B (discussing the creation of the legislative waiver statute).

189. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 7.9 (2d. ed. 1986) (defining the classification of manslaughter). "[M]anslaughter constitutes a sort of catch-all category which includes homicides which are not bad enough to be murder but which are too bad to be no crime whatever." *Id.*

190. *Id.*

191. *See* MINN. STAT. § 609.205(1) (1996).

even criminally negligent juvenile behavior, is exactly why we have a juvenile justice system. Society acknowledges that juveniles take risks, that some are downright reckless, and sometimes death results. Society, nevertheless, rejected the notion that we should unequivocally incarcerate juveniles when their risky behavior accidentally results in death. Society prefers to teach juveniles how to control, change or stop their risky behavior. The Minnesota Supreme Court failed the juvenile justice system by ignoring the premises on which it exists: we know juveniles are going to make mistakes and we choose to rehabilitate them if possible, rather than incarcerate them as adults. The supreme court failed to offer Behl the opportunity to learn from his mistake and chose instead to leave him incarcerated in adult prison.

D. Different Sentences for the Same Offense

Consider the following: Two sixteen year old juveniles (A and B) receive convictions for second-degree manslaughter. The sentencing court gives juvenile "A" a seventy-two month prison sentence, but designates juvenile "B" EJJ, imposing treatment and probation until he is twenty-one.[192] The inequity in their sentences is not because of their age, prior offense record or threat to society. The inequity is the direct result of the prosecutorial charging system and a grand jury indictment.

The Minnesota Supreme Court argued that it is rational to impose an adult sentence upon a sixteen-year-old whose conduct is grave enough to result in a first-degree murder indictment.[193] The court correctly states that there is no fundamental right to receive the same sentence as another individual charged with the same crime, therefore, an equal protection argument is unlikely to prevail.[194] Nevertheless, as the dissent points out, the court's interpretation conflicts with "simple but fundamental notions of fairness"[195] and should not have prevailed.

192. *See id.* § 260.015 subd. 5(b); *see also supra* note 18 and accompanying text (describing the EJJ statute).

193. *See supra* notes 152-159 and accompanying text (explaining the court's justification for applying a rational basis review to Behl's equal protection claims and thereby rejecting them).

194. *See Behl*, 547 N.W.2d at 382; *see also supra* note 147 (citing precedent for this assertion).

195. *See id.*

IV. Proposal for a Solution

This Article proposes a deceptively simple solution to a tragically unjust statutory oversight: amend the automatic certification statute to include a transfer-back provision for juveniles like Behl.[196] A statutory provision for a transfer-back to juvenile court for a sentencing hearing would eliminate a sentencing injustice as the one found in *Behl*.

Such a transfer-back provision could be narrowly tailored so that a juvenile acquitted of first-degree murder receives a sentencing hearing to determine whether the juvenile should be returned to juvenile court or retained in adult court for sentencing. Criteria for making such a determination could be the juvenile's age, amenability to rehabilitation and prior offenses. If the court then determined that the juvenile should be transferred to juvenile jurisdiction, the transfer-back provision could stipulate that the juvenile be automatically designated EJJ status. The court could then stay the adult sentence until the juvenile completed his disposition or turned twenty-one. This provision would protect the juvenile's equal protection rights, prevent unequal sentencing of similarly situated juveniles, and would place a check on potential abuse of the prosecutorial and indictment systems. It would also preserve society's interest in punishing serious juvenile offenders.

Minnesota Statute § 260.015 subd. 5(b) (1996) should be amended as follows:

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Subd. 5(b) is amended to read:

> No person described in § 260.015 Subd. 5(b) who is convicted as an adult shall thereafter be subject to the jurisdiction of the juvenile court provided, however, that <u>any person described in Subd. 5(b) who is acquitted of first-degree murder, but is convicted of a lesser included offense, shall be subject, after a hearing, to juvenile court jurisdiction for disposition and for subsequent unlawful conduct other than that governed by Subd. 5(b).</u>

This amendment would clearly tell courts what to do with juveniles charged with first-degree murder, but convicted of a lesser charge. It would save the judicial branch from crossing over into legislative territory. The amendment would, most importantly, eliminate the possibility of a juvenile going to prison because of

196. The proposal is not a new one. *See* Feld, *supra* note 23, at 617, subd. 3. Professor Feld proposed such an amendment in his article.

prosecutorial overcharging and would honor the purpose of the juvenile justice system.

Conclusion

If states draft legislative waiver statutes for juveniles charged with felony-level offenses, states should also provide for a return to juvenile jurisdiction if that charge is removed. The basis for this assertion rests on the public policy that led to the creation of the juvenile justice system,[197] and the equal protection guarantee of the United States Constitution. If the charge of an enumerated offense properly and legally brings a juvenile under the jurisdiction of the adult court, it follows that jurisdiction should be reevaluated when that charge is no longer active. The opportunity for a transfer-back to juvenile court should be offered in a sentencing hearing.

There has always been tension between the public policy of adjudicating juveniles separately from adults, and the policy to punish the older, most serious juvenile offenders as adults. This Article does not take issue with Minnesota's EJJ statute or automatic cerfication statute. This Article does argue, however, that the Minnesota Legislature neglected to incorporate an important safety valve in its certification statute. This oversight caused a sixteen-year-old boy to go to adult prison for five years for a first-offense conviction of second-degree manslaughter. If the Minnesota courts are to prevent other juveniles going to adult prison for similar convictions, this oversight must be corrected. Such a serious sentencing injustice must not be repeated.

The legislators who drafted the bills for the EJJ and legislative waiver statute should now amend the automatic certification statute. In a time when the public is pleading for an end to serious juvenile crime, a legislator may invoke harsh criticism from a public that perceives her or him to be "soft on crime." Nevertheless, sentencing a juvenile to adult prison for second-degree manslaughter contradicts public policy and legislative intent. To be consistent with juvenile justice policy and notions of fair sentencing, Minnesota Statute 260.015 subd. 5(b) must be amended to include an explicit transfer-back provision.

197. *See supra* notes 21-27 and accompanying text (explaining the evolution of the juvenile justice system).