

**WHAT DOES A “JUVENILE ADJUDICATION” MEAN IN  
MINNESOTA? SOME NEW ANSWERS AFTER A CENTURY  
OF CHANGE IN JUVENILE COURT**

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## I. INTRODUCTION

The story of the big change in the mission of juvenile court has become familiar.<sup>1</sup> From an institution which presented itself as “saving the child,” it was transformed to one with the agenda of “protecting the public.”<sup>2</sup> Along the way the argument has been made, with mixed success, that if the juvenile court is to be more concerned with incapacitating youthful offenders than with rehabilitating children, due process should be added, more or less up to the standards that adults expect in the courts that process criminal charges against them.<sup>3</sup>

This Article addresses one of the byproducts of the shift in juvenile court philosophy which has occurred in Minnesota and many other states—the debate over whether, and how, adjudications of delinquency should be used to aggravate the adult criminal sentence of the former delinquent who has been

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1. See generally Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691 (1991) [hereinafter *Transformation*] (describing the most recent reforms in juvenile courts at that time); Barry C. Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the “Rehabilitative Ideal,”* 65 MINN. L. REV. 167 (1981) [hereinafter *Dismantling*] (discussing and critiquing legislative reforms in Minnesota enacted in 1980).

2. Compare 1959 Minn. Laws 1275, 1275 (“The purpose of the laws relating to juvenile courts is to secure for each minor under the jurisdiction of the court the care and guidance, preferably in his own home, as will serve the spiritual, emotional, mental, and physical welfare of the minor and the best interests of the state . . .”), with 1999 Minn. Laws 583, 583 (“The purpose of the laws relating to children alleged or adjudicated to be delinquent is to promote the public safety and reduce juvenile delinquency . . .”).

3. See, e.g., John M. Stuart & Philip D. Bush, *It’s Time for Jury Trials in Juvenile Court*, HENNEPIN LAW., Mar.-Apr. 1981, at 8 (advocating for jury trial rights of juvenile defendants); John M. Stuart, *Right to Counsel: The Unkept Promise to Our Juvenile Accused*, BENCH & B. MINN., Aug. 1991, at 27 (advocating that Minnesota should guarantee the right to counsel and other due process rights to juvenile defendants). Since that time, the Minnesota Legislature has responded. See 1994 Minn. Laws ch. 576, § 20 (codified as amended at MINN. STAT. § 260B.163, subd. 4 (1999) (requiring counsel in all delinquency cases where out-of-home placement may be the outcome)).

convicted of an adult offense.<sup>4</sup> The use of adjudications for this purpose in states like Minnesota, which do not provide a jury trial in juvenile court, is a constitutional issue because of the *Blakely* prohibition against adult sentence aggravations based on facts not found by a jury.<sup>5</sup> Moreover, the broadest policy question of juvenile court is at the center of the debate over the legal and social meaning of juvenile adjudications: Do we really believe “kids are different”?

This Article begins with a look at the history of the juvenile courts in Minnesota, and the factors which caused the court’s shift from its original rehabilitative purpose.<sup>6</sup> In particular, the forceful movement toward using juvenile adjudications as a means to protect the general public’s safety is discussed in detail.<sup>7</sup> Following that discussion is an examination of the attempts made nationally by states to consider the rehabilitative purpose on which the juvenile courts were founded, as well as growing public safety concerns over rising violent juvenile crime rates.<sup>8</sup> The section also reviews several important cases and laws in Minnesota that have followed the national trend of allowing juvenile adjudications to be used in determining adult punishments, and yet continuing to deny due process protections to juveniles.<sup>9</sup>

Finally, this Article concludes by noting that defining the appropriate use of juvenile adjudications in adult sentencing has been a challenge for the Minnesota Legislature, which has gone back and forth over the issue.<sup>10</sup> In fact, the 2005 crime bill, H.F. 1,

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4. See Ellen Marrs, “*That Isn’t Fair, Judge*”: *The Costs of Using Prior Juvenile Delinquency Adjudications in Criminal Court Sentencing*, 40 HOUS. L. REV. 1323, 1329 (2004); Joseph B. Sanborn Jr., *Striking Out on the First Pitch in Criminal Court*, 1 BARRY L. REV. 7, 7 (2000).

5. Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1114 (2003); see also *Blakely v. Washington*, 542 U.S. 296 (2004). This issue may be resolved in Minnesota by the pending decision before the Minnesota Supreme Court in *State v. McFee*. No. A05-283, 2005 WL 2009288 (Minn. Ct. App. Oct. 26, 2005) (review granted Oct. 26, 2005). In *McFee*, the district court allowed use of a juvenile criminal history point over an objection based on *Blakely*. *Id.* at \*1. The court of appeals affirmed. *Id.* at \*4.

6. See discussion *infra* Parts II-III.

7. See *infra* Part III.

8. See *infra* Part IV.

9. See *infra* Part V.

10. For example, in *State v. Boehl*, the court determined that a juvenile adjudication was not a prior “criminal-sexual-conduct conviction[.]” for purposes of imposing a ten-year-term of conditional release on an adult. 697 N.W.2d 215,

takes two different approaches.<sup>11</sup> The authors believe that one of these, which mandate the use of Extended Juvenile Jurisdiction adjudications if the juvenile has violated the juvenile disposition order, will provide the best solution in the long run.<sup>12</sup> This option will be shown to be good juvenile justice policy, fair, constitutional, and compatible with modern thought about adolescent development.

## II. THE STATUS OF JUVENILE ADJUDICATIONS IN THE ERA OF THE “REHABILITATIVE MODEL”

The public image of the first juvenile courts was fatherly and benevolent. In fact, the common caricature of the kindly judge hugging the delinquent youth was actually promulgated by a leading juvenile court founder, who envisioned the judge “[s]eated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him . . . .”<sup>13</sup>

It follows that these courts did not envision themselves creating a criminal record for each delinquent that would follow him or her into adulthood. “To get away from the notion that the child is to be dealt with as a criminal; to save it from the brand of criminality, the brand that sticks to it for life; . . . to protect it from the stigma,—this is the work [of the juvenile court].”<sup>14</sup>

Proponents of juvenile court in Minnesota accepted this model of “non-stigmatization.” Both the legislative and judicial branches of government explicitly adopted the view that what happens in

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222 (Minn. Ct. App. 2005). However, the court pointed out that the legislature has included convictions and juvenile adjudications when drafting other provisions of the Minnesota Statutes. *Id.* at 222 (citing MINN. STAT. § 243.166, subd. 1(a)(1) (2004) (requiring registration as a predatory offender if adjudicated delinquent); MINN. STAT. § 609.224, subd. 4(b) (enhancing fifth-degree assault to a felony if adjudicated delinquent); MINN. STAT. § 624.713, subd. 1(b) (precluding legal possession of a firearm if adjudicated delinquent)).

11. *Compare* 2005 Minn. Laws ch. 136, art. 13, § 6 (providing that a drug offender who completes treatment in prison will not be considered for early release if previously “adjudicated delinquent for a violent crime”), *with id.* art. 2, § 21 (“[C]onviction’ includes a conviction of an extended jurisdiction juvenile under sections 260B.130 for a violation of, or an attempt to violate, section 609.342, 609.343, 609.344, or 609.3453, if the adult sentence has been executed.”). This definition is a crucial part of the sex offender chapter of the bill, as it determines which adults with prior juvenile adjudications will be subject to life imprisonment for adult offenses.

12. *See* discussion *infra* Part VI.

13. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909).

14. *Id.* at 109.

juvenile court, stays in juvenile court. The Juvenile Court Act of 1917 provided that no evidence from juvenile court proceedings could be used elsewhere and, in particular, that no juvenile adjudication could ever be treated as a criminal conviction.<sup>15</sup>

The Minnesota Supreme Court agreed. In 1922, it heard a claim that a girl, who had been adjudicated delinquent based on truancy and placed at the County Home School for Girls in Hennepin County, had been denied due process of law.<sup>16</sup> Foreshadowing arguments that would be made by the state of Arizona in *In re Gault*,<sup>17</sup> the Court held that determinations of delinquency did not require due process because it is the “right of the state to step in and save the child.”<sup>18</sup> Moreover, the record of the proceedings would never be able to be “used against the child in any other court.”<sup>19</sup> This view of juvenile court and the containment of its adjudicative records held up in Minnesota, without any substantial questions being raised, for thirty-five years.<sup>20</sup>

In 1957, Minnesota’s first hints of conceivable constitutional questions surrounding collateral use of juvenile adjudications surfaced in an article entitled “Fairness to the Juvenile Offender.”<sup>21</sup> The author hypothesized that “[if] the result of an adjudication of delinquency is substantially the same as a verdict of guilty, the youngster has been cheated of his constitutional rights by false labeling.”<sup>22</sup>

This “false labeling” of the significance of an adjudication was, at the time, just a theoretical problem. In 1959, when the 1917 Juvenile Court Act was rewritten, the requirement that an adjudication not be deemed a “criminal conviction” was maintained,<sup>23</sup> along with the traditional rationale.<sup>24</sup> In fact, the

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15. 1917 Minn. Laws 561, 569-70.

16. *Peterson v. McAuliffe*, 151 Minn. 467, 187 N.W. 226 (1922).

17. 387 U.S. 1 (1967).

18. *Peterson*, 151 Minn. at 469, 187 N.W. at 226.

19. *Id.* at 470, 187 N.W. at 227. *Peterson* followed a Minnesota case, *State ex rel. Olson v. Brown*, which pre-dates the establishment of juvenile courts in Illinois in 1899. 50 Minn. 353, 52 N.W. 935 (1892). In *State ex rel. Olson v. Brown*, the court held that a juvenile sent to reform school by a justice of the peace was not being “punished” and so had no right to a jury trial. *Id.* at 357, 52 N.W. at 936.

20. See, e.g., *State ex rel. White v. Patterson*, 188 Minn. 492, 494, 249 N.W. 187, 188 (1933) (holding that probate court may place delinquent children under guardianship).

21. Monrad G. Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957).

22. *Id.* at 550.

23. The re-codification occurred in 1959. 1959 Minn. Laws 1275, 1296

premise that a juvenile adjudication was not a conviction survived the *Gault* revolution and surfaced again in *McKeiver v. United States*.<sup>25</sup>

The *McKeiver* Court called for a pause, which has lasted thirty-five years, in the *Gault* movement to require states to incorporate adult due process provisions in their juvenile courts. Among others, the argument that “the stigma attached upon delinquency adjudication approximates that resulting from conviction in an adult criminal proceeding” was rejected.<sup>26</sup> Jury trials were not to be required because juvenile court proceedings could not be said to be totally “criminal” in nature.<sup>27</sup> The Court had access to studies that showed states commonly allowed juvenile adjudications to become as well known as adult criminal convictions, but nevertheless clung to the juvenile court founders’ rehabilitative ideology.<sup>28</sup> Thus, the due process drive was stopped, and the stage was set for much broader use of adjudications in various “public safety” provisions without the need to have trials by jury.

### III. THE MOVEMENT TO USE JUVENILE ADJUDICATIONS FOR “PUBLIC SAFETY”

Juvenile courts were founded on the premise that youths who committed crimes in our society were to be given the opportunity for rehabilitation.<sup>29</sup> Changing social and legal norms produced the changes in the way juveniles were treated in the legal system.<sup>30</sup> Previously, under social ideas of the time, children were viewed as miniature adults and this treatment influenced how children were treated by the courts.<sup>31</sup> Initially, a difference was knowingly created in juvenile court whereby a juvenile’s adjudications were not considered with comparable harshness to those with a similar

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(codified as amended at MINN. STAT. § 260B.245 (2004)).

24. Maynard E. Pirsig, *Juvenile Delinquency and Crime: Achievements of the 1959 Minnesota Legislature*, 44 MINN. L. REV. 363, 410 (1960). “A youth is not held responsible for his acts in the criminal law sense but, instead, is subjected to treatment and rehabilitation.” *Id.*

25. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). Justice Blackmun authored the plurality opinion. *Id.*

26. *Id.* at 542, 550.

27. *Id.* at 541.

28. *Id.* at 568 (Douglas, J., dissenting).

29. See Kristin L. Caballero, *Blended Sentencing: A Good Idea for Juvenile Sex Offenders?*, 19 ST. JOHN’S J. LEGAL COMMENT. 379, 384 (2005).

30. *Id.* at 384 n.26; see also *Transformation*, *supra* note 1, at 693-95.

31. Caballero, *supra* note 29, at 383-84; *Transformation*, *supra* note 1, at 693-94.

history of offenses in adult criminal courts.<sup>32</sup> Thus, from their inception until the late 1960s, the juvenile courts followed the progressive, rehabilitative visions on which they were founded.<sup>33</sup> However, changes on the horizon for juvenile court systems were forecasted in two cases decided in that decade.

First, in 1966, the Supreme Court decided *Kent v. United States*.<sup>34</sup> In that case, the Court upheld the waiver of juvenile court jurisdiction of a sixteen year old, and provided guidelines for juvenile court judges to consider in a determination to waive jurisdiction over a juvenile offender.<sup>35</sup> This decision paved the way for courts across the country to allow for waiver of juvenile courts' jurisdiction and to prosecute juvenile offenders in the adult system.<sup>36</sup>

Then, in 1967, the United States Supreme Court handed down their decision in *In re Gault*.<sup>37</sup> The Supreme Court in *Gault* recognized the constitutionality of juvenile courts' creation of different rules regarding the treatment of juvenile offenders.<sup>38</sup> However, the Supreme Court went on to criticize the maintenance of secrecy of the juvenile courts by noting that in reality the secrecy was “more rhetoric than reality.”<sup>39</sup> The court noted that juvenile records were routinely released to various other government agencies and even sometimes to private entities such as potential employers.<sup>40</sup> Ultimately, the *Gault* Court held that juveniles, in proceedings where there was a liberty interest at stake, must have the essentials of due process and fair treatment.<sup>41</sup> While the emphasis on due process and fair treatment rights initially seems positive, it has been posited that this has created the result of shifting the focus of the juvenile court from its traditional emphasis on the rehabilitative needs of the juvenile offenders to their “legal

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32. See Sanborn, *supra* note 4, at 8.

33. Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 969-71 (1995).

34. 383 U.S. 541 (1966).

35. *Id.* at 554, 566-67.

36. Caballero, *supra* note 29, at 387-88.

37. 387 U.S. 1 (1967).

38. *Id.* at 14-15.

39. *Id.* at 24.

40. *Id.* at 24-25.

41. *Id.* at 41. These essentials of due process and fair treatment included notification to the juvenile and his or her parents of the right to counsel and appointment of counsel if they were unable to afford their own attorney. *Id.*

guilt.”<sup>42</sup>

Nationwide, the general trend in the past thirty years is toward stronger punishment and sentences for criminals, and away from rehabilitative ideals.<sup>43</sup> Sentencing guidelines were not in use in any jurisdiction at the beginning of the 1970s when *McKeiver* was decided.<sup>44</sup> Since that time, the adoption of determinate or mandatory minimum sentencing guidelines has become widespread at the national level.<sup>45</sup> The use of sentencing guidelines has been seen in juvenile adjudications as well.<sup>46</sup> One commentator has proposed that the use of sentencing guidelines in the juvenile courts is directly contradictory to any stated rehabilitative juvenile purpose; in large part because the State is treating juveniles the same as it is treating adults, simply by using sentencing guidelines for both types of offenders.<sup>47</sup>

Nationally, during the mid 1980s, serious crimes committed by juveniles decreased along with serious crime rates for the rest of the country.<sup>48</sup> However, violent crimes committed by juvenile offenders increased in the late 1980s and into the 1990s.<sup>49</sup> This was due in part to greater access to guns by juveniles and dramatic increases in the homicide rate, especially among urban African-American juveniles.<sup>50</sup> Corresponding with these trends was an increase in public awareness and concern regarding violent juvenile offenders.<sup>51</sup>

#### IV. ATTEMPTS BY STATES TO CONSIDER BOTH JUVENILE COURTS' PURPOSE AND PUBLIC SAFETY CONCERNS

The growth of juvenile court caseloads in the 1960s and 1970s contributed to inadequate and ineffective adjudications of juvenile offenders.<sup>52</sup> This may have lead in part to the negative change in the way many Americans perceive the juvenile court system, giving rise to the belief that there is a problematic increase in juvenile

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42. *Transformation*, *supra* note 1, at 695.

43. *Id.* at 717.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 717-18.

48. Feld, *supra* note 33, at 975.

49. *Id.* at 976-77.

50. *Id.* at 977-78.

51. *Id.*

52. Caballero, *supra* note 29, at 385-86.

crime rates.<sup>53</sup> Statistics show that violent crimes committed by juveniles did rise in the 1980s and early 1990s.<sup>54</sup> These statistics, along with the development of new social science theories on juvenile offenders,<sup>55</sup> and enhanced media attention focused on violent crimes committed by juveniles such as school shootings like those at the Red Lake Indian Reservation this past year, have all combined to foster a negative image of juvenile offenders in the eye of the American public.<sup>56</sup>

Both courts and legislatures have responded to the American public's increased concern with juvenile crime in various ways. States seem to be conscious of the rehabilitative tradition of the juvenile courts, but implementing methods to deal with juvenile offenders has yielded mixed results. States have proceeded to attempt to develop ways to consider both the interests of the juvenile and to address the public's growing concerns with juvenile crime. In the 1980s, courts across the nation began to consider formal measures to use juvenile adjudications in sentencing adults in criminal court proceedings.<sup>57</sup>

These national trends were reflected through a similar experience in Minnesota.<sup>58</sup> The focus in the 1980s began to shift from attempts at rehabilitation of juvenile offenders toward public safety concerns. The argument is, that while some juvenile offenders fall under the stereotypical category of kids making mistakes, the legal system should also be watching out and protecting the public from the “career criminals.”<sup>59</sup> One marked change reflecting this shift in the juvenile courts can be seen in the change in the purpose of the juvenile court statute in Minnesota in the 1980s.<sup>60</sup> When initially enacted, the legislature defined the purpose of the juvenile courts as

to secure for each minor under the jurisdiction of the court the care and guidance . . . as will serve the spiritual, emotional, mental and physical welfare of the minor and the best interests of the state . . . and when the minor is

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53. *Id.* at 389.

54. *Id.*

55. *Id.* One example is the development of the “superpredator theory.” *Id.* at 389-90.

56. *Id.*

57. Sanborn, *supra* note 4, at 11-12.

58. See Feld, *supra* note 33, at 978-79.

59. Feld, *supra* note 5, at 1181-82.

60. *Dismantling*, *supra* note 1, at 192.

removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents.<sup>61</sup>

The purpose clause of the Juvenile Act was changed in 1980 in Minnesota with regard to juvenile offenders who committed crimes to note a purpose “to promote the public safety and reduce juvenile delinquency.”<sup>62</sup> The Juvenile Act noted that this purpose was also to sustain “the integrity of the substantive law prohibiting certain behavior,” and that the juvenile adjudications were further to “develop[] individual responsibility for lawful behavior.”<sup>63</sup> These amendments exemplified the legislative change from a primarily rehabilitative model of juvenile justice to a more punitive system that was aimed at stopping career criminals in the making.<sup>64</sup>

#### V. CONSIDERATION OF JUVENILE RECORDS IN ADULT SENTENCING

Additionally, although controversial, states have increasingly adopted methods to consider a juvenile’s history of offenses in sentencing.<sup>65</sup> Under the traditional conception of the juvenile court, juveniles were not officially considered repeat offenders when they became adults and were thus prosecuted in the criminal court system.<sup>66</sup> However, although adult offenders with juvenile adjudications were not officially recidivists, apparently some criminal courts did consider juvenile records in sentencing adult offenders.<sup>67</sup> This trend of considering juvenile records in adult convictions became more accepted and, in the 1980s, at least thirty-three jurisdictions had accepted the practice.<sup>68</sup> Today the practice is widespread, although states certainly have not been uniform in how juvenile records should be considered in adult sentencing procedures.<sup>69</sup> For example, a juvenile record may impact only certain types of sentencing, such as in criminal cases; others may not consider it in sentencing if there is a possibility of the

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61. *Id.* at 192 n.87 (citing the Juvenile Court Act, 1959 Minn. Laws 1275 (repealed 1980)).

62. MINN. STAT. § 260.011, subd. 2 (1980) (current version at MINN. STAT. § 260.001, subd. 2 (2004)).

63. *Id.*

64. *See Dismantling*, *supra* note 1, at 192; Feld, *supra* note 5, at 1181-82.

65. Sanborn, *supra* note 4, at 11.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 20-21.

application of the death penalty.<sup>70</sup> Additionally, the manner in which states have allowed the practice of consideration of juvenile records in adult sentencing may vary; it may be by statute—either as part of the juvenile court statute or adult court statutes—or else by case law.<sup>71</sup>

Justification for using juvenile adjudications in adult sentencing was considered for a variety of reasons. Public approval for “getting tough on crime” grew as the rates of violent crime among juveniles increased.<sup>72</sup> In addition, arguments were made that courts need a mechanism to differentiate between real first time offenders and actual repeat offenders.<sup>73</sup> Further, the courts do not like the idea that juvenile offenders may get what some have called a “cloak of immunity” from their juvenile criminal pasts when they reach adulthood.<sup>74</sup>

Furthermore, approval of this trend was granted by the federal government when the 1992 Attorney General’s Task Force on Combating Violent Crime appeared to give weight to the idea that it is one thing to forgive the juvenile records of the now law-abiding adult for whom their juvenile adjudication was characterized as a youthful indiscretion, but another for the person for whom juvenile offenses were merely the beginning of a life of crime.<sup>75</sup> This federal approval extended to making the recommendation that state sentencing guidelines be modified to allow juvenile court adjudications to affect adult sentences.<sup>76</sup>

These national trends on juvenile courts can be seen in the changes undergone by Minnesota juvenile courts in the past few decades. Juvenile courts in Minnesota have changed from being the fatherly “child-protective” style courts envisioned by the founders, to more punishing in response to the “get tough on crime” pressures felt in many parts of the country. These changes are particularly notable in the areas of considering juvenile adjudications in adult sentencing, the impact of juvenile adjudications on determining whether someone is a “patterned sex offender,” and by requiring juveniles to register as “predatory sex

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70. *Id.*

71. *See id.* at 17-20.

72. *See id.* at 15-16.

73. *Id.* at 16.

74. *Id.* (citing *Commonwealth v. Smith*, 481 A.2d 1365, 1366 (Pa. Super. Ct. 1984)).

75. *Id.* at 17.

76. *Id.*

offenders.”

A. *The Minnesota Sentencing Guidelines Allow Consideration of a Juvenile Record in Adult Sentencing*

On May 1, 1980, the Minnesota Sentencing Guidelines (“Guidelines”) became effective.<sup>77</sup> The Guidelines were implemented in Minnesota in part to make punishment for felony offenses more uniform and proportional.<sup>78</sup> Under the Guidelines, a criminal history is comprised of four items: an offender’s “(1) prior felony record, (2) custody status at the time of the offense, (3) prior misdemeanor and gross misdemeanor record, and (4) prior juvenile record for young adult felons.”<sup>79</sup> Pursuant to the Guidelines, an adult offender is “assigned one point for every two offenses committed and prosecuted as a juvenile that are felonies under Minnesota law.”<sup>80</sup> However, the juvenile court’s findings must be based either on an admission by the juvenile or found after a trial.<sup>81</sup>

Additionally, offenses for which points are received must “represent[] a separate behavioral incident or involve[] separate victims.”<sup>82</sup> The offender must also have committed the offense after the age of fourteen, and must not yet be twenty-five when the felony was committed for which the offender is being sentenced.<sup>83</sup> Finally, the Guidelines provide that in most circumstances an adult offender being sentenced will be able to receive only one point for a juvenile record.<sup>84</sup> The application of these guidelines has been upheld by Minnesota courts.

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77. Richard S. Frase, *Sentencing Reform in Minnesota, Ten Years After: Reflections on Dale G. Parent’s Structuring Criminal Sentences: The Evolution of Minnesota’s Sentencing Guidelines*, 75 MINN. L. REV. 727, 727 (1991).

78. *Id.*

79. MINN. SENTENCING GUIDELINES, § II, subd. B (2005).

80. *Id.* § II, subd. B(4).

81. *Id.* § II, subd. B(4)(a).

82. *Id.* § II, subd. B(4)(b).

83. *Id.* § II, subd. B(4)(c)-(d).

84. *Id.* § II, subd. B(4)(e).

*B. Minnesota Cases Allow Consideration of a Juvenile Record in Adult Sentencing*

On January 28, 1983, two decisions were handed down by the Minnesota Supreme Court which considered an adult offender's juvenile record in sentencing. In *Jackson v. State*,<sup>85</sup> the court determined whether a dispositional and durational departure was justified under the facts of the case.<sup>86</sup> Although the court in *Jackson* did not specifically consider the application of points from the offender's juvenile record in computing his criminal history, the court concluded “that the trial court had grounds for a dispositional departure, given the defendant's long juvenile record and his prior failures in treatment programs.”<sup>87</sup>

On that same day, the Minnesota Supreme Court also decided *State v. Torgerson*.<sup>88</sup> In 1982, Torgerson was convicted of aggravated robbery after he and another person robbed a gas station and used a knife in commission of the offense.<sup>89</sup> However, previously on April 10, 1978, Torgerson was adjudicated delinquent in juvenile court after admitting to two burglaries, one theft, and three aggravated forgeries.<sup>90</sup> In *Torgerson*, the issue was directly regarding the use of the defendant's juvenile record in determining his criminal history score for sentencing purposes.<sup>91</sup> The supreme court in *Torgerson* held that when a trial court computes the criminal history score of an offender who is not yet twenty-one at the time he committed the felony, a trial court can assign only one point total for the defendant's prior juvenile adjudications if he had two adjudications for offenses that would have been felonies if committed by an adult, provided that the adjudications related to offenses occurring after the defendant's sixteenth birthday.<sup>92</sup> In so holding, the supreme court reviewed the Minnesota Sentencing

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85. 329 N.W.2d 66, 66 (Minn. 1983). The court noted that this case involved a petitioner who had committed his crime after May 1, 1980 when the Sentencing Guidelines became effective, unlike most of its appeals at that time which involved petitioners seeking retroactive application of the Guidelines. *Id.* at 66.

86. *Id.*

87. *Id.* at 67.

88. 329 N.W.2d 63 (Minn. 1983).

89. *Id.* at 64.

90. *Id.*

91. *Id.*

92. *Id.* at 65. Under the current sentencing guidelines, prior juvenile adjudications, if they would have been felonies if committed by an adult, can be used in calculating a defendant's criminal history if the offenses occurred after the defendant's fourteenth birthday. MINN. SENTENCING GUIDELINES § II.B.4.c (2005).

Guidelines and the comments.<sup>93</sup> After reviewing the comments, the court noted that the “apparent intent” of the guidelines was to “allow use of a . . . juvenile record in determining his criminal history score only if the defendant has twice been through the juvenile court system and twice been adjudicated delinquent on the basis of felony-type behavior.”<sup>94</sup>

Later that same year, in April 1983, the Minnesota Supreme Court decided the case of *State v. Peterson*.<sup>95</sup> In that case, the supreme court determined that the trial court correctly assigned the defendant one point for his juvenile record for the purposes of determining his presumptive sentence after being convicted of simple robbery.<sup>96</sup> The court noted the confusion on the issue was due to the fact that in the defendant’s juvenile adjudications the juvenile court referee did not specify that the defendant was being “adjudicated delinquent.”<sup>97</sup> The defendant argued that his juvenile record should not count for the purposes of computing his criminal history under the Guidelines.<sup>98</sup> The court held this was not a valid argument as the defendant had been “adjudicated” for an earlier offense, such that the delinquent adjudication also applied retroactively to the four prior offenses committed by the defendant.<sup>99</sup>

The court revisited the issue again in 1988 in *State v. Little*.<sup>100</sup> When Little was seventeen years old he was serving time at the Anoka County Juvenile Center.<sup>101</sup> During his sentence, on February 25, 1987, after an altercation with staff, Little was confined to a “strip room” which was used for isolation with only a mattress in it.<sup>102</sup> Little had a cigarette and matches in his pocket, and after smoking the cigarette, Little began lighting the matches and tossing them over his shoulder.<sup>103</sup> After a time, Little realized the

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93. *Torgerson*, 329 N.W.2d at 65.

94. *Id.*

95. 331 N.W.2d 483 (Minn. 1983).

96. *Id.* at 484.

97. *Id.* at 485. There was no argument regarding the characterization of the offender’s crimes. *Id.* The court noted that Peterson “clearly engaged in and admitted engaging in repeated felony-type behavior after he became 16 years old.” *Id.*

98. *Id.*

99. *Id.*

100. 423 N.W.2d 722 (Minn. 1988).

101. *Id.* at 722-23.

102. *Id.* at 723.

103. *Id.*

mattress was on fire and began calling for assistance.<sup>104</sup> After a delay, the staff finally responded to Little’s cries for help, but by that time the fire had grown beyond control.<sup>105</sup> The incident resulted in between \$40,000 and \$50,000 worth of damage to the facility; three inmates had to be rescued after being trapped by the fire, with one of those inmates sustaining second-degree burns.<sup>106</sup> For this incident, Little was certified as an adult and pled guilty to arson in the first-degree.<sup>107</sup> In determining Little’s sentence based on the sentencing guidelines, the trial court determined his criminal history points based on two prior juvenile court adjudications before his sixteenth birthday.<sup>108</sup>

Little appealed, arguing that the Guidelines provision allowing the use of a prior juvenile adjudication in adult sentencing was contrary to the purposes of the Minnesota Juvenile Court Act.<sup>109</sup> The court held that the use of juvenile adjudications to compute adult criminal history points as provided for by the Guidelines was not contrary to the Juvenile Court Act which expressly stated that juvenile adjudications could be used to determine adult sentencing.<sup>110</sup>

Additionally, Little argued that a majority of jurisdictions have held that juvenile adjudications cannot be used to enhance criminal convictions in habitual offender proceedings.<sup>111</sup> The supreme court stated there was no merit to this argument, and cited evidence that the opposite was in fact true.<sup>112</sup>

The court went on to note that the Guidelines limit the use and impact prior juvenile adjudications can have on adult sentencing.<sup>113</sup> The court stated that the legislature has noted the difference between juveniles whose crimes may be characterized as youthful indiscretions and those that become career criminals upon reaching adulthood.<sup>114</sup> The court noted “the system punishes

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104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* One adjudication was for receipt of stolen property and the other was for burglary in the second-degree. *Id.*

109. *Id.* The Juvenile Court Act is codified at Chapter 260 of Minnesota Statutes.

110. *Id.*

111. *Id.* at 723-24.

112. *Id.* at 724.

113. *Id.*

114. *Id.*

only those offenders who have abused the juvenile court's leniency and then does so only within the confines and safeguards supplied by the Minnesota Sentencing Guidelines."<sup>115</sup>

*C. Minnesota Allows Juvenile Adjudications to Count Towards Identification of a "Patterned Sex Offender"*

Evidence of Minnesota's changing ideas towards juvenile adjudications can also be found in the willingness of courts and the legislature to allow juvenile adjudications to count towards someone being judicially characterized for sentencing purposes as a "patterned sex offender."<sup>116</sup>

*D. Minnesota Requires Qualified Juveniles to Register as "Predatory Sex Offenders"*

Currently, all states in the United States require some type of registration and/or community notification of predatory sex offenders.<sup>117</sup> In 1991, Minnesota passed the "Predatory Offender Registration Act."<sup>118</sup> In 1994, the Minnesota Legislature re-evaluated the act and decided to expand the law to juveniles who are "petitioned for" or "adjudicated delinquent" of certain crimes.<sup>119</sup> The legislature debated in 1999 regarding community notification where the sex offender is a juvenile.<sup>120</sup> Although some legislators strongly asserted that the interest in "public safety" overrode the privacy interests of juvenile offenders, the measure failed to pass.<sup>121</sup>

*1. In re Welfare of C.D.N.*<sup>122</sup>

In 1997, the Minnesota Court of Appeals heard the case *In re Welfare of C.D.N.*<sup>123</sup> Originally two cases, they were consolidated on

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115. *Id.*

116. MINN. STAT. § 609.108, subd. 4 (2004).

117. Wayne A. Logan, *Jacob's Legacy: Sex Offender Registration and Community Notification Laws, Practice, and Procedure in Minnesota*, 29 WM. MITCHELL L. REV. 1287, 1289 (2003).

118. *Id.* at 1293. Minnesota's predatory sex offender statute is codified in Minnesota Statutes section 243.166.

119. Logan, *supra* note 117, at 1293.

120. *Id.* at 1309.

121. *Id.*

122. 559 N.W.2d 431, 432 (Minn. Ct. App. 1997).

123. *Id.*

appeal.<sup>124</sup> Both cases raised the issue of whether, for a juvenile who is adjudicated delinquent for the commission of criminal sexual acts, the subsequent mandatory requirement to register as a predatory sex offender is a violation of due process.<sup>125</sup> The juveniles argued that their due process rights were violated because juvenile courts do not provide juveniles with the right to a jury trial.<sup>126</sup> The court noted that prior cases in Minnesota have held that registration as a sex offender is considered a non-punitive measure because it “serves the regulatory purpose of assisting police investigations.”<sup>127</sup> The fact that the statute was also applicable to juveniles did not change this non-punitive characterization.<sup>128</sup> The court also found that the sex-offender registration statute kept the juvenile proceedings confidential because the registration data was only given to police.<sup>129</sup> The court further found that the statute did not restrict juvenile offenders’ access to employment or education and did not affect their freedom to travel.<sup>130</sup>

The juveniles also argued the requirement that they register as sex offenders was contrary to the purpose of the juvenile court as a rehabilitative system.<sup>131</sup> The court noted that in other cases, such as the application of juvenile adjudications to enhance adult criminal history scores, no violation of due process was found even though there was no right to a jury trial.<sup>132</sup> The court further found the statute requiring juveniles adjudicated delinquent for criminal sexual conduct to register as predatory sex offenders was unambiguous and therefore “the letter of the law shall not be

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124. *Id.*

125. *Id.* Defendant C.D.N. was eleven years old when she allegedly sexually abused a four year old child. *Id.* C.D.N. was adjudicated delinquent after entering an admission to a charge of second-degree criminal sexual conduct pursuant to Minnesota Statutes section 609.343, subd. 1(a) (1996). *Id.* In the second case, the appellant, seventeen year old A.R.L., entered an admission on the charges he engaged in sexual intercourse with a fourteen-year-old girl. *Id.* A.R.L. was also adjudicated delinquent. *Id.*

126. *Id.* at 433.

127. *Id.* (citing *State v. Manning*, 532 N.W.2d 244, 248-49 (Minn. Ct. App. 1995)).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 434.

132. *Id.* (citing *State v. Little*, 423 N.W.2d 722, 724-25 (Minn. Ct. App. 1988)). See *supra* Part V.B. for a discussion of the *Little* decision.

disregarded under the pretext of pursuing the spirit.”<sup>133</sup> The court firmly emphasized this point by stating, “[t]o repeat, registration does not substantially interfere with the rehabilitation of adjudicated juveniles because it is non-punitive and, therefore, the registration statute is not inconsistent with the rehabilitative purpose of the juvenile court system.”<sup>134</sup>

While the *C.D.N.* court upheld the decision to require juveniles adjudicated delinquent for criminal sexual conduct without the right to a jury trial to register as predatory sex offenders as not violating the defendants’ due process rights, it was critical of the statute.<sup>135</sup> The *C.D.N.* court noted decisions by both the U.S. Supreme Court and the Minnesota Supreme Court, which held that juvenile proceedings are not required to provide the right to a jury trial.<sup>136</sup> The court also pointed out that the Minnesota Legislature had recognized the importance of due process rights protected by a jury trial in the creation of extended juvenile jurisdiction (EJJ) prosecutions, which it acknowledged as being able to balance the right to a jury trial with potential adult penalties.<sup>137</sup> In rejecting the appellants’ proposed remedies to provide constitutional protections to juvenile sex offenders, the court noted that this was an area best left to the legislature.<sup>138</sup> The court stated:

Although we acknowledge the importance of the right to a jury trial, the deficiencies of the juvenile system, as a matter of constitutional law, are not fundamentally unfair. Nevertheless, we respectfully invite the legislature to review the prudence of requiring all juveniles adjudicated for criminal sexual conduct to register as predatory sexual offenders.<sup>139</sup>

## 2. *State v. Lilleskov*<sup>140</sup>

In 2003, the Minnesota Court of Appeals addressed the issue of whether the 1994 statutory amendments, which required juveniles to register as predatory sexual offenders when adjudicated

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133. *Id.*

134. *Id.*

135. *Id.* at 434-35.

136. *Id.*

137. *Id.* at 434.

138. *Id.*

139. *Id.* at 435.

140. 658 N.W.2d 904 (Minn. Ct. App. 2003).

for certain acts, applied retroactively to a juvenile who committed a criminal sexual act prior to the amendments.<sup>141</sup> The court of appeals reviewed the purpose of the statute as being a useful tool to assist with law enforcement investigations.<sup>142</sup> However, the court of appeals held that because prospective application was not expressly provided, and because the 1994 amendments merely broadened the scope of the statute to include juvenile offenders, the statute could be applied retroactively.<sup>143</sup>

3. *In re Welfare of J.R.Z.*<sup>144</sup>

J.R.Z. was a juvenile with a history of severe problems.<sup>145</sup> In 1998, when he was less than ten years old, he put his two week old stepsister inside a freezer, almost killing her; she was revived by emergency medical assistance.<sup>146</sup> J.R.Z. was then placed in a residential treatment facility where in 2000, after being charged for engaging in sexual conduct with another child, he pled guilty to fifth-degree criminal sexual conduct and was adjudicated delinquent.<sup>147</sup> J.R.Z. remained at the facility and in 2001 was again charged with criminal sexual conduct, this time for sexual contact with an eight-year-old girl.<sup>148</sup> J.R.Z. admitted to the charges of third-degree criminal sexual conduct and was again adjudicated delinquent, which required him to register as a predatory sex offender pursuant to statutory law.<sup>149</sup> The court, noting the non-punitive nature of the sex offender registration requirement and the plain language of the statute, stated it was applicable to J.R.Z. even though he was only eleven years old.<sup>150</sup> Additionally, the nature of the criminal acts for which J.R.Z. was adjudicated delinquent were of the nature specified in the statute so as to require his *lifetime* registration as a predatory sex offender.<sup>151</sup> The court was not oblivious to this unusual result but still held: “We conclude that the plain language of the registration statute

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141. *Id.* at 905.

142. *Id.* at 908.

143. *Id.*

144. 648 N.W.2d 241 (Minn. Ct. App. 2002).

145. *See id.* at 243-44.

146. *Id.* at 243.

147. *Id.* at 243-44.

148. *Id.* at 244.

149. *Id.*

150. *Id.* at 248.

151. *Id.*

compels [J.R.Z.'s] lifetime sex-offender registration. This may . . . be a harsh result. But harsh or not, the decision concerning the reach of the statute rests with the legislature."<sup>152</sup>

Thus, while the Minnesota courts have upheld the use of juvenile adjudications for adult sentencing and other purposes, they have also continued to note the lack of constitutional safeguards and the production of harsh results, and have suggested time and again that the Minnesota Legislature review these statutes.

## VI. MINNESOTA'S SECOND THOUGHTS ABOUT CRIMINALIZING JUVENILE COURT

Just as the tide of due process requirements turned in *McKeiver*, creating opportunities to label juveniles with criminal tags to carry into adult life without the expense of a jury trial, eventually the "public safety" movement in Minnesota juvenile court history reached its limit as well. This can be seen in the development of the EJJ concept, in the legislature's rejections of community notification proposals for juvenile sex offenders, and in Minnesota's embrace of the adolescent brain development studies, which send the message: *juveniles ARE different*.

### A. *The "EJJ" as an Alternative to Offense-Based Certification*

By enacting provisions for EJJ in 1994, the Minnesota Legislature continued to walk down both of the diverging juvenile justice paths.<sup>153</sup> On one hand, that year's juvenile justice bill provided for "automatic certification" or "offense exclusion" for certain juvenile offenses.<sup>154</sup> On the other hand, only First Degree Murder, if allegedly perpetrated by a juvenile aged sixteen or seventeen, was excluded from the definition of "delinquent child."<sup>155</sup> Even attempted First Degree Murder by those older teenagers was retained in juvenile court.<sup>156</sup>

For other youths charged with felonies, the Minnesota Legislature enacted a system of two types of certification to adult court: presumptive and non-presumptive.<sup>157</sup> This approach allowed

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152. *Id.*

153. *See* 1994 Minn. Laws, ch. 576, § 14 (codified as amended at MINN. STAT. § 260B.130 (2004)).

154. *See* MINN. STAT. § 260B.007, subd. 6(b).

155. *Id.*

156. *Id.*

157. *See id.* § 260B.125.

for the possibility of adult criminal sanctions for serious juvenile offenses, but it retained discretion in the juvenile court judge, who might still decide to keep the alleged offender in juvenile court.<sup>158</sup>

The most striking innovation in this piece of legislation, however, was the creation of what is now widely known as “blended sentencing,” the option to designate an alleged young offender as an EJJ.<sup>159</sup> This process allows the juvenile court to maintain jurisdiction over an individual until age twenty-one, rather than giving jurisdiction up at nineteen.<sup>160</sup> During this period, the individual is treated as both a juvenile *and* an adult by the court’s imposition of both a juvenile disposition and a stayed adult sentence, which may be executed if the juvenile disposition order is violated.<sup>161</sup>

It took an extraordinary political struggle in the legislature to create this complex, sophisticated compromise to the problem of serious juvenile crime.<sup>162</sup> The development of EJJ marked at least a pause in the national trend of increased certification and offense inclusion. As the leading commentator put it: “Importantly, as other states contract the scope of juvenile court jurisdiction, the Minnesota Legislature expanded it. Rather than weakening the role of the juvenile court, the new Minnesota laws strengthen it.”<sup>163</sup> This accomplishment is especially remarkable because four previous juvenile justice reform task forces had been unable to pass

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158. Compare with offense exclusion strategies in other states, discussed in *Dismantling*, *supra* note 1, at 185-88. See also Kathryn A. Santelmann & Kara Rafferty, *Juvenile Law Developments—“One Last Chance”: Applying Adult Standards to Extended Jurisdiction Juvenile Proceedings—State v. B.Y.*, 30 WM. MITCHELL L. REV. 427 (2003) (discussing in detail Minnesota’s Extended Juvenile Jurisdiction laws).

159. MINN. STAT. § 260B.193, subd. 5(c).

160. *Id.* subd. 5(a), (b).

161. *Id.* § 260B.130, subds. 4, 5.

162. See Feld, *supra* note 33 (discussing the history, amendments, and court decisions in response to Minnesota’s new juvenile jurisdiction laws); see also Patricia Tobert et al., JUVENILES FACING CRIMINAL SANCTIONS: THREE STATES THAT CHANGED THE RULES, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (2000), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/181203.pdf> (discussing programs implemented in Minnesota, New Mexico, and Wisconsin that have altered jurisdictional and sentencing laws for certain juvenile offenders). The “blended sentence” concept had been tried in a few cases in Hennepin County Juvenile Court prior to the 1994 law under the name “stayed certification”—that is, the court would certify a juvenile to adult court but stay the order based on certain conditions. The practice was not explicitly authorized by statute until the 1994 law was enacted. *Id.* at 27.

163. Feld, *supra* note 33, at 967.

their recommendations through the legislature.<sup>164</sup>

How did the EJJ bill succeed politically where other juvenile reform bills had failed? At least three factors helped the EJJ bill prevail. First, the Supreme Court took ownership of the proposals by appointing the Task Force; early in the process, a popular Justice with outstanding political skills was elected Chair.<sup>165</sup> Second, the juvenile justice reform recommendations were built on the Minnesota Sentencing Guidelines in that various categorizations of young offenders were based on whether their cases would or would not have led to presumed prison sentences had they been adults.<sup>166</sup> Thus, the recommendations had a foundation in the Minnesota criminal justice system with a fifteen-year track record of success. Third, the blended sentencing proposals appealed to a common-sense understanding that adolescent crime should be understood as occurring along a spectrum and should not be mechanically answered with black-and-white rules. As Barry Feld put it: "The Task Force recognized that one fundamental deficiency of all waiver legislation is its binary quality, either juvenile or adult, even though adolescence is a developmental continuum requiring a continuum of controls."<sup>167</sup>

In short, EJJ was a compromise, which helped it succeed in the political marketplace, where it was vigorously marketed. The Task Force members invested time in focus groups, public hearings around the state, meetings with editorial boards, lobbying, and legislative hearings in the Minnesota House and Senate.<sup>168</sup>

One area of concern that suffered in the compromise was policy on the use of juvenile adjudications in adult criminal court.<sup>169</sup> Greater use of these adjudications was, by implication, a necessary part of the EJJ package. The message to prosecutors was this: You concede that the serious juvenile offenders can have "one last chance" to complete a juvenile disposition; if they make it, fine, but if not, you can really go after them.<sup>170</sup> The EJJ reforms actually

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164. *Id.* at 987-97.

165. *Id.* at 997. The chair was Justice Sandra S. Gardebring, a former Commissioner in the cabinet of Governor Rudy Perpich. One of the authors was a member of this Task Force, as well as two task forces that did not manage to pass any legislation, and was able to observe Justice Gardebring's skilled political leadership first-hand.

166. *Id.* at 1027-28.

167. *Id.* at 1038.

168. *Id.* at 997-1005.

169. *Id.* at 1057-67.

170. See Santelmann & Rafferty, *supra* note 158, at 431-32.

made the punishments of young adult offenders more serious.<sup>171</sup>

*B. Community Notification of Juvenile Sex Offenders Fails in the Legislature*

The passage of the 1994 bill, however, established a zone of special treatment mandated for serious young offenders, extending in many cases until their twenty-first birthday. The legislature’s sometimes explicit, sometimes tacit, acceptance of this principle led to a series of decisions to reject proposals to carry out community notification procedures based on juvenile adjudications for sex crimes.

The late 1990s was a period of great legislative activity in expanding access to information about sex offenders living in communities across the country. Most common were the enactment of registration statutes and the creation of community notification through “Megan’s Law” provisions.<sup>172</sup> The main difference between these approaches, which accounts for the adoption of registration requirements for juveniles in Minnesota and the rejection of juvenile community notification, is that *registration* information is exclusively for access by law enforcement, while—as the name implies—*community notification* goes to the public.<sup>173</sup>

In 1999, a bill was introduced in the Minnesota Senate that would have provided for “community notification of the release of certain high risk juvenile sex offenders.”<sup>174</sup> The bill followed adult sex offender community notification practices in its focus on individuals who were about to be released from secure institutions, and, through a screening process, had been selected as likely to re-offend. Nevertheless, the bill failed to pass out of the Crime Prevention Committee for several reasons:

- lack of a screening tool for juveniles;

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171. For example, EJJ convictions would count like adult felony convictions. Ordinary juvenile adjudications would be allowed to count as “criminal history” for a longer period, and criminal histories would start with offenses committed at age fourteen, rather than sixteen. Feld, *supra* note 33, at 1057-66.

172. In Minnesota, the registration law is Minnesota Statutes section 243.166; the community notification law is Minnesota Statutes section 244.052.

173. See generally Timothy E. Wind, *The Quandary of Megan’s Law: When the Child Sex Offender Is a Child*, 37 J. MARSHALL L. REV. 73 (2003); Stacey Hiller, Note, *The Problem with Juvenile Sex Offender Registration: The Detrimental Effects of Public Disclosure*, 7 B.U. PUB. INT. L.J. 271 (1998).

174. S.F. 1531, 1999 Leg., 81st Sess. (Minn. 1999).

- concern for the juvenile offenders' families;
- fear that the public labeling of offenders would do more harm than good; and
- absence of the due process protections that exist in the adult system.<sup>175</sup>

A very similar bill was introduced in 2000, and, again, did not pass.<sup>176</sup>

In 2001, a simpler bill was proposed, which would have mandated community notification of the release of adjudicated juvenile sex offenders who had been committed to the Commissioner of Corrections and were being released only because they had become too old to stay in the juvenile system.<sup>177</sup> This bill did not pass out of committee. In 2005, the same bill was introduced again, and yet again did not clear the Crime Prevention Committee;<sup>178</sup> however, a high-profile case led to the passage of many other stringent sex offender provisions proposed in H.F. 1, the 2005 crime bill.<sup>179</sup>

In short, the legislature, in a period when there has been great public concern about sex crimes, has declined in four separate years to pass a bill extending community notification procedures to sex offenders who were adjudicated delinquent rather than being convicted of crimes in adult court.

### C. *Roper and the Adolescent Brain*

Nationally, proponents of the view that a juvenile crime is not just like an adult crime were bolstered by *Roper v. Simmons*, which held that it would be cruel and unusual punishment to execute an offender for a murder committed at age seventeen.<sup>180</sup> Meanwhile, in Minnesota and elsewhere, criminal justice professionals of all sorts began to show tremendous interest in the emerging science of adolescent brain development.<sup>181</sup> Both these phenomena aid the

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175. One of the authors of this Article attended the Committee hearing, March 19, 1999, and testified in opposition to the bill.

176. S.F. 2486, 2000 Leg., 81st Sess. (Minn. 2000).

177. S.F. 12, 2001 Leg., 82nd Sess. (Minn. 2001).

178. S.F. 9, 2005 Leg., 84th Sess. (Minn. 2005).

179. See 2005 Minn. Laws, ch. 136, art. 2 (increasing penalties for certain sexual offenses).

180. 543 U.S. 551 (2005).

181. See Joel V. Oberstar, Elise M. Anderson & Jonathan B. Jensen, *Cognitive and Moral Development, and Mental Illness: Important Considerations for the Juvenile Justice System*, 32 WM. MITCHELL L. REV. 1051 (2006); Gar, Baird, & Otto,

argument that juvenile offenders *are* different from adult criminals, and its corollary, that society should think differently about a juvenile adjudication and an adult criminal conviction.

Christopher Simmons, age seventeen, committed a horrible crime in Missouri.<sup>182</sup> As a high school junior he decided that he wanted to kidnap a stranger and kill her by throwing her off a bridge.<sup>183</sup> With the help of two younger friends he committed this crime and, in a trial held after he had turned eighteen, he was convicted of capital murder.<sup>184</sup>

The Supreme Court determined that he should not be executed because of an evolving national consensus that juveniles should be regarded as “categorically less culpable than the average criminal.”<sup>185</sup> The Court explained that there are three main differences between juvenile and adult offenders: lack of maturity, susceptibility to influence, and the fact that “the character of a juvenile is not as well formed as that of an adult.”<sup>186</sup> This ruling corresponds with recent scientific findings on adolescent development. One influential study has made the following findings:

Youths in early and mid-adolescence generally are neurologically immature. Their brains are “unstable”; they have not yet attained their adult neurological potential to respond effectively to situations that require careful or reasoned decisions and they may be more inclined than adults to act impulsively. . . . [R]ecent neurological research reveals that psychological immaturity in adolescents . . . likely has a basis in biology.<sup>187</sup>

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Adolescent Brain Development, Lecture at the Hennepin County Medical Center Symposium (May 7, 2004); The Adolescent Brain: Helping Prosecutors Address Psychiatric Evaluations and Competency Challenges, Address at the Columbia University Symposium (Sep. 29, 2003); David Knutson, Direct Examination of Brain Development Experts, Address at the Public Defender Annual Conference (Nov. 20, 2004); Laurence Steinberg, Less Guilty by Reason of Adolescence: A Developmental Perspective on Adolescence and the Law, Invited Master Lecture Before the Society for Research in Child Development, Tampa, Florida (Apr. 26, 2003).

182. *Roper*, 543 U.S. at 556.

183. *Id.*

184. *Id.* at 557-58.

185. *Id.* at 567 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)).

186. *Id.* at 569-70.

187. Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 813 (2005). The facts of *Little*, *supra*

Thus, when the Minnesota Legislature met in the spring of 2005 to decide how juvenile adjudications should or should not be considered in the sentencing of young-adult offenders, the background was different from the early 1990s, when the trend was to treat every juvenile adjudication as an adult conviction in the name of “public safety.” Legal, psychological, and medical ideas were on the table, which might be taken up in the legislative process, to support a more nuanced approach to the use of juvenile adjudications. There was room for legislators to agree with neurologists and with the U.S. Supreme Court that the consequences of a juvenile offense did not have to be quite the same as if the prior crime had been perpetrated by an adult.

#### VII. CONCLUSION: EXTENDING THE TIME FOR DECISIONS ON THE YOUNG OFFENDER

Minnesota’s juvenile courts celebrated their centennial anniversary in 2005. This is a time to think about where the juvenile justice enterprise is going in its second century; but as the legislature convened in January, it was far from certain that the members would come to a new understanding of the meaning of juvenile adjudications.

It seemed especially unlikely to see this change come in the thinking about responses to repeat sex offenders. The kidnapping and murder of Dru Sjodin in the Fargo-Moorhead area led to a pointed re-visitation of sex crime statutes, which had just recently been amended in the “Katie Poirier Law.” The 2004 session, which ended without resolution of the differences between House and Senate, saw the House pass provisions for life sentences for Criminal Sexual Conduct in the First, Second, Third, and Fourth Degree.<sup>188</sup>

The Senate, somewhat more restrained, adopted some sixty-year sentences, but created an indeterminate life sentence for anyone convicted of a “second or subsequent sex offense.”<sup>189</sup> This raises the question of how an offender becomes a “second offender,” and the answer, in the 2004 Senate bill, is that the individual gets this status if he or she “has already been convicted *or adjudicated delinquent* for another sex offense in a separate

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Part V.B, illustrate the point.

188. H.B. 2028, 83rd Leg. Sess., Reg. Sess. (Minn. 2004).

189. S.B. 1863, 83rd Leg. Sess., Reg. Sess. (Minn. 2004).

behavioral incident. . . .”<sup>190</sup> The adoption of this provision could have greatly increased juvenile court litigation, since any juvenile sex offense—unwanted fondling on the band bus trip; seventeen-year-old male with a fourteen-year-old girlfriend, etc.—would have had the potential to be the first step on a two-step journey to life in prison.

As the 2005 public safety bill moved through the House, it became clear that very serious responses to sex crimes had heavy support. The version which cleared the floor in late April, and proceeded to the Senate for conference committee purposes, included, depending on the circumstances, the following: twenty years-to-life indeterminate sentences; life without parole; fines up to \$35,000; special “predatory offender” drivers’ licenses and vehicle plates; and court-ordered castration.<sup>191</sup> Previous juvenile adjudications were now part of the mix, in that offenders could be sentenced to twenty years-to-life if convicted of Criminal Sexual Conduct in the First, Second, Third or Fourth Degree as a “subsequent” if the offender had already been “adjudicated delinquent” for one felony- or two non-felony-level sex offenses.<sup>192</sup>

Across the street, the Senate bill limited life sentences to offenders with either two prior offenses, or one prior offense with aggravated circumstances.<sup>193</sup> A big step occurred, however, in the definition of a prior “conviction”: a juvenile offense would only count if it was a felony sex offense “conviction” pursuant to the extended juvenile jurisdiction law, Minnesota Statutes section 260B.130.<sup>194</sup> This variation on the definition both narrows the past juvenile offense pool to the most serious cases, and responds to due process advocates, inasmuch as the EJJ offenders had a right to a jury trial.<sup>195</sup>

One problem remaining with this approach is that EJJ adjudications would have counted as “priors” even where the juvenile successfully completed the juvenile court disposition order. These young offenders, in other words, would have done what the juvenile judge required, stayed in juvenile court, and still

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190. *Id.* art. 1, § 8 (emphasis added). The House avoided this problem by providing life sentences for the first adult offense—the juvenile history being considered irrelevant.

191. H.B. 1, 84th Leg. Sess., Reg. Sess. (Minn. 2005).

192. *Id.*

193. *Id.* “Non-felony” offenses would include, for example, indecent exposure.

194. S.B. 2273, 84th Leg. Sess., Reg. Sess. (Minn. 2005).

195. *Id.*

would have received “subsequent offense” treatment later on.

By the end of the legislative session, this problem, too, was resolved creatively. The final language enacted provides that a “conviction” includes an EJJ adjudication for Criminal Sexual Conduct in the First, Second, Third or Fourth Degree, and the new Criminal Sexual Predatory Conduct *if* “the adult sentence has been executed.”<sup>196</sup> To put it bluntly, this treatment gives the EJJ offender up to age twenty-one to become either a rehabilitated juvenile or an adult criminal, and the chosen path is to be reflected in positive or negative consideration of the juvenile offense if the individual commits a new sex crime as an adult. This result, as noted, provides for due process, solves the *Blakely/McFee* problem, and delays the decision on the meaning of the adjudication until the offender is twenty-one.<sup>197</sup> Even where the offender violates the disposition order, the adult sentence is executed only about half the time, because the juvenile judge has the ability to revise conditions of probation.<sup>198</sup> Moreover, if the EJJ adjudication was for an offense other than a felony sex crime, as in eighty-four percent of the cases, it does not trigger the repeat-offender provision of the new adult sex offender sentencing law.<sup>199</sup> The serious juvenile sex offender who becomes an EJJ, in other words, has considerable opportunity to mature beyond the adolescent development issues noted in *Roper* and the brain development studies to avoid having the adjudication count in adult court.

The “executed adult sentence” standard for considering EJJ adjudications in the sentencing of adult sex offenders is a big step forward from previous proposals to count any juvenile adjudication the same as a criminal conviction. It builds on Minnesota’s previous nationally recognized blended sentencing and the Minnesota Sentencing Guidelines. Other areas of the law, which treat an adjudication the same as a conviction should be reconsidered in this light.

On the other hand, this new balance between competing

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196. MINN. STAT. § 260.161 (1994).

197. 2005 Minn. Laws ch. 136, art. 2, § 21, subd. 1(b).

198. Of course, fairly often if there is a new adult offense, it will occur at the age of eighteen, nineteen, or twenty, vitiating the EJJ treatment and also carrying its own consequences. See EMILY F. SHAPIRO, INST. ON CRIMINAL JUSTICE, EXTENDED JURISDICTION (EJJ) OFFENDERS: A STUDY OF REVOCATIONS 3-5 (2001) (finding that in 1999-2000 there were 151 revoked EJJ’s, of whom half were revoked for committing a new crime).

199. *Id.* at 5.

interests in evaluating an adjudication was demonstrated in only this one, albeit very important, legislative determination. There are places in the same new law where an adjudication is treated just like a conviction. In the provision for conditional release of nonviolent controlled substance offenders, for example, a previous delinquency adjudication for a “violent crime” precludes early release even if the offender has successfully completed treatment in prison.<sup>200</sup>

Because juvenile law continues to serve constituencies who have conflicting ideas of its purpose, it is hard to talk about “progress.” For instance, if a heinous, high-profile sex crime is committed by a twenty-two year old who has a former EJJ sex offense; the political process will entertain many proposals for the reinstatement of this kind of adjudication in subsequent sentencings.<sup>201</sup> At least for the moment, though, the 2005 legislature has taken a meaningful, courageous step toward the re-emerging idea that a juvenile crime should not carry the same social meaning as the same offence committed by an adult.

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200. *See id.* at 21. Only 6.5% of the revoked EJJ offenders had been adjudicated for sex crimes, that is, ten people out of the two-year sample of 151. *Id.*

201. 2005 Minn. Laws ch. 136, art. 13, § 6, subd. 2(6). The list of “violent crimes” is in Minnesota Statutes section 609.1095 and is rather extensive. For example, a juvenile who is adjudicated for Second Degree Manslaughter for negligently killing someone in a hunting accident would, as an eventual imprisoned young adult drug offender, be barred from early eligibility for conditional release.