

# Law and Psychiatry

## Juveniles Standing Trial: Waiver to Adult Court

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*This guest column by Dr. Schetky provides an overview of legal and psychiatric issues related to allowing juvenile defendants to stand trial as adults (referred to here as "waiver") and offers a commentary concerning the effectiveness of the waiver concept.*

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Prior to the creation of the first juvenile court, most children who committed crimes in the colonial United States were prosecuted as adults in the tradition of English law. Common law of that period held that children under the age of 7 were presumed incapable of committing a crime (the defense of "infancy"). Children between the ages of 7 and 14 were presumed responsible for their acts, but the court had to show beyond a reasonable doubt that they could distinguish between "good and evil." Beyond this age, they were treated as adults.<sup>1</sup>

The first juvenile court in the United States was established in Chicago in 1899; other states soon followed. The early juvenile courts stressed benevolence, decriminalization, and diversion but did not provide youths with any special rights. The court aspired to determine the causes of delinquency and find treatment that might get a wayward youth back on track. The language of the juvenile court reflected a softer stance than that taken with adults (e.g., using a concept of "adjudication" for accused juvenile offenders rather than "trial").

During the 20th century, several landmark cases afforded new rights to juveniles facing criminal proceedings. *Kent v. US* (1966) granted juveniles the right to a hearing before being tried as adults (a "waiver" hearing).<sup>2</sup> *In re Gault* (1967) gave juveniles facing criminal charges due process rights similar to those of an adult but stopped short of permitting the right to a jury trial, transcript, or appellate review.<sup>3</sup> Another significant case was *In re Winship* (1970), which raised the burden of proof needed to convict from a preponderance of the evidence (just over 50% certainty) to the adult standard of beyond reasonable doubt.<sup>4</sup>

A rise in youth violence in the 1980s, disillusionment with the ability of the juvenile court to deal with violent juvenile offenders, and a get-tough-on-crime social atmosphere led to an increase in the number of juveniles being "waived" or bound over to adult courts—which are able to hand out harsher and longer sentences than juvenile courts. Although juveniles continue to commit a disproportionate number of property and violent crimes, the arrest rate for juvenile offenders for most crimes declined measurably between 1994 (a peak year) and 2000.<sup>5</sup> However, the number of waivers for trial as an adult continues to rise. The number of juveniles in adult jails also increased by 366% between 1983 and 1998, and the number admitted to state prisons doubled between 1985 and 1997<sup>6</sup> (note that these numbers are not adjusted for population growth).

### Legal Issues

Adolescents are cognitively and emotionally less mature than adults. Recent neuroanatomical studies demonstrate that the adolescent brain is still developing and is structurally different from the adult brain, particularly in regions associated with motivation, impulsivity, and addiction. These differences may account for greater impulsivity, risk taking, aggression, difficulty with decision-making, and vulnerability for addiction in teenagers.<sup>7</sup> Emerging research on developmental changes and neurocircuitry in adolescents raises the provocative issue of whether or not adolescents should ever be held as culpable as adults for their actions.

Laws regarding juvenile waiver to adult status vary from state to state and in the federal jurisdictions, presenting a confusing array of types and wording:

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- “Judicial/discretionary” waiver is one in which the decision to transfer the case to adult court is made by the juvenile court. It is the most common form of waiver.
- “Mandatory” waiver is one in which some states automatically waive accused youths based on their age or a particular crime (e.g., homicide).
- “Statutory” waiver involves automatic waiver based upon the youth’s offense or prior record; age is not an issue.
- “Presumptive” waiver requires that the juvenile defendant show convincingly why he should *not* be waived.
- “Direct file” waiver gives the prosecutor the option to file the case either in juvenile or adult criminal court.
- “Reverse” waiver refers to a case that is initially filed in adult court and then transferred to juvenile court.
- “Once an adult always an adult” waiver requires that if a youth has ever been tried as an adult, he or she must be tried as an adult in the future.

The trend in most states over the past two decades has been to make it easier to waive juveniles to adult court, as indicated by the following developments.

- 11 states have lowered age limits for waiver.
- 10 states have expanded the list of crimes eligible for waiver.
- 9 states have established presumptive waiver (see above).
- 18 states have “once an adult always an adult” provisions (see above).
- The Wisconsin juvenile court recently joined New Hampshire in excluding all 17 year olds from the juvenile court.
- New Mexico allows juvenile court judges to impose criminal sanctions on juveniles.
- Minnesota has experimented with blended sentences, which give judges the option of imposing the threat of criminal sanctions in addition to juvenile ones if the juvenile reoffends.

## Who Gets Waived?

It is estimated that about 14,500 youths in the United States are housed in adult correctional facilities on any given day. Of these, about 9,100 are housed in local jails and 5,400 in adult prisons.<sup>6</sup> As might be expected, youths who are waived tend to be those who are thought to pose serious risk to the public, have injured someone with a weapon or committed heinous crimes, and those with long juvenile records. Several studies suggest racial

inequities in the use of waiver, with African American and Latino youths being disproportionately waived.<sup>8</sup>

## The Forensic Psychiatry Examination for Waiver

Prior to doing any forensic examination, it is important to know what the legal issue is and what questions the court wishes to have addressed. In waiver evaluations, these issues typically concern the seriousness of the alleged crime and the risks posed by the youth, characteristics of the juvenile, specific needs of the juvenile, amenability to treatment or rehabilitation, and disposition alternatives.

Before accepting a referral for a waiver examination, the clinician should consider his or her qualifications. Does he or she have sufficient training and experience in adolescent psychiatry or psychology and enough knowledge about the legal system and relevant juvenile issues? Adult psychiatrists who wish to perform these evaluations should have at least some training and experience in adolescent psychiatry and preferably substantial exposure to child psychiatry. This is especially important given the trend toward younger and younger persons committing violent crimes. Developmental issues and disorders common to childhood may be mitigating factors; one must be competent to assess them and determine potentially effective interventions. Psychiatrists without child and adolescent expertise who may be pressed into doing these evaluations (e.g., in underserved locations) would be wise to seek consultation from more experienced colleagues.

There should be no significant conflicts of interest that may affect the objectivity of the evaluation task (such as a prior treatment relationship with the youth or members of the family). The clinician should be aware of countertransference issues that might taint objectivity, such as rescue fantasies or feelings related to having been a crime victim oneself. It is important to remember that the purpose of the forensic examination is not to help the examinee, but rather to help the court render an objective opinion on the relevant legal issue. As with any forensic evaluation, one should review available discovery material such as prior evaluations, police records, and school records.

It is important to take a detailed trauma history and to explore common concomitants such as substance abuse. The prevalence of mental disorders among youths in the juvenile justice system is considerably higher than in the general population. They typically also present with comorbid disorders and/or developmental problems. Histories of trauma abound and posttraumatic stress disorder (PTSD) is common. PTSD in these youths is often

related to victimization, witnessing crime, or even committing crimes.

Inexperienced clinicians should seek supervision or further training before carrying out waiver examinations. For a more complete discussion of these evaluations, the reader is referred to Scott.<sup>9</sup>

### **Assessing Dangerousness and Risk of Recidivism**

Assessment of dangerousness requires familiarity with factors that affect the evaluatee's level of risk, such as prior history of violence, exposure to violence, diagnosis, victimization, impulsivity, increased arousal, access to weapons, family role models, capacity for empathy, presence of cognitive impairment, mental illness, substance abuse, alienation, and conduct disorders (see Schetky<sup>10</sup>). Beneficial influences should also be weighed (e.g., engagement in school and with family, both of which are associated with better prognosis).

The most worrisome youths are generally those with a callous, unemotional interpersonal style, restricted behavioral repertoires, high levels of defiance, predisposition to externalizing ("acting out") behaviors, high indices of impulsivity, early onset of delinquency, and lack of internal conflict over their antisocial or asocial behavior. More positive mitigating factors include low intelligence, developmental delay, crimes committed in self-defense, history of being abused, mental illness, response to medication, and peer coercion.

Amenability to treatment or rehabilitation should be considered in waiver examinations. However, as noted by Scott,<sup>9</sup> states' statutory definitions of amenability are often vague. Many youths facing prosecution will agree to treatment but will not follow through. Some useful topics to consider are diagnoses, prior treatment record and compliance, motivation for treatment, willingness to accept responsibility for their crimes, and effectiveness of available treatments. Treatment recommendations should be geared to underlying psychiatric disorders and substance abuse using evidence-based data. One should also consider educational needs; many juvenile offenders have learning disabilities or attention deficit disorder. Many adult correctional facilities are not equipped to deal with the specialized needs of juveniles, even though they are federally mandated to provide adolescents with regular and special education services.

### **Problems with Waiver**

One reason juveniles are waived to adult court is the ability to give them much longer sentences for serious

crimes. Interestingly, among those convicted of weapons offenses or murder, transfers received longer prison terms than adults convicted of the same crimes.<sup>11</sup> Although youths who are waived usually receive longer sentences than they would as juveniles, they often serve only a portion of them. What happens to them upon release? Two studies suggest that not only do they have a higher rate of recidivism, but that recidivism occurs more rapidly than in controls who remain in the juvenile justice system.<sup>12, 13</sup>

Research suggests that waiver has few advantages either to society or to the defendant. On a practical level, housing juveniles in adult facilities may sometimes cost more than placing youths in a juvenile correctional facility. While it was once thought that transferring older youths to adult prisons would lead to more staff time with youths in juvenile facilities, the effect of increasing waivers has actually been adverse for other juveniles, because decreases in adolescent populations have led to less funding for juvenile facilities.<sup>14</sup> Furthermore, adult facilities have been ill prepared to deal with the special needs of juveniles and their staff often lack training and experience in dealing with this age group.

Understaffed facilities often resort to inappropriate use of restraints to manage mentally ill children. Staff may be poorly trained to handle this population and respond to them punitively. Harsh treatment and exposure to antisocial role models is likely to render these youths more violent and vindictive. It is tempting to believe that society is made safer by keeping hardened juvenile offenders off the street. Unfortunately, it is also easy to forget about them and their needs once they are behind walls. Data from the Bureau of Justice Assistance indicate that juveniles are five times more likely to be sexually abused and 50% more likely to be assaulted with a weapon in an adult correctional facility than in a juvenile one<sup>6</sup> (p. 8). Youths are also subjected to harsher punitive practices by adult correctional staff, including solitary confinement, a known correlate of suicide. Youths are eight times more likely to commit suicide in prison than in a youth correctional facility.<sup>6</sup>

A Bureau of Justice Assistance survey of 181 adult facilities found that only 13% of prisons maintained separate facilities for juvenile offenders<sup>6</sup> (p. 43). The problems of mingling the two populations are obvious and include impulsive youths inciting adults and adult victimization of juveniles. On the other hand, isolation results in less access to institutional programs and services.

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## Commentary

The correctional system is rapidly becoming a mental health system for the poor and minorities, who for numerous reasons have not been able to obtain treatment within the community. Adult correctional facilities vary greatly in the extent of rehabilitation services they offer. There may be only one psychiatrist for thousands of mentally ill inmates; his or her time is usually spread thinly between medication management and practicing "Band-Aid" psychiatry. Some state prisons offer a decent array of educational, substance abuse, mental health, recreational, and vocational services. In contrast, private, for-profit prisons often cut these services to a bare minimum.<sup>15</sup> One must weigh these factors when considering the psychiatric and educational needs of particular youths who are being assessed for waiver.

Ethical dilemmas abound for clinicians who perform waiver evaluations:

- Does a recommendation for waiver amount to writing off a youth and causing a recapitulation of his abusive childhood?
- How do we balance the need to help the youth with the need to protect society?
- How do we weigh short-term results against long-term needs?
- Can we justify continued use of waivers in the face of the apparently continuing decline in juvenile arrests in most crime categories (juvenile female violent crime is one major exception)?

We are left with the paradox that we seem to be sending our most worrisome juvenile offenders into an adult system which, in turn, reinforces their antisocial behavior and attitudes and may render them more violent.

This disturbing situation is a strong argument for providing more prevention and early-intervention services to at-risk youths and their families. We need more funding for interventions such as multisystemic family therapy, which has shown good results with this population,<sup>16</sup> and for substance abuse treatment programs and innovations such as youth drug courts. We need programs designed for female juvenile offenders, whose ranks are growing and whose needs differ from those of male juvenile offenders. Finally, we must develop better juvenile correctional programs that can accommodate

the management and treatment needs of high-risk juvenile offenders and that will attract qualified adolescent psychiatrists and psychologists to staff them.

## References

1. Malmquist CP. Overview of juvenile law. In: Schetky DH, Benedek EP, eds. Principles and practice of child and adolescent forensic psychiatry. Washington, DC: American Psychiatric Publishing; 2002:259–66.
2. *Kent v. United States* 383 US 541 (1966)
3. *In re Gault* 387 US 1 (1967)
4. *In re Winship* 397 US 358 (1970)
5. Snyder HN. Juvenile arrests 2000. US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, November, 2002.
6. Bureau of Justice Assistance (BJA). Juveniles in adult prisons: A national assessment. Washington, DC: US Department of Justice; 2000.
7. Chambers A, Taylor J, Ptenza M. Developmental neurocircuitry of motivation in adolescence: A critical period of addiction vulnerability. *Am J Psychiatry* 2003;160:1041–52.
8. Office of Juvenile Justice and Delinquency Prevention. Race as a factor in Juvenile Arrests. US Department of Justice: Juvenile Justice Bulletin, April, 2003.
9. Scott C. Juvenile waivers to adult court. In: Schetky DH, Benedek EP, eds. Principles and practice of child and adolescent forensic psychiatry. Washington, DC: American Psychiatric Publishing; 2002:289–96.
10. Schetky DH. Risk assessment of youth violence. In: Schetky DH, Benedek EP, eds. Principles and practice of child and adolescent forensic psychiatry. Washington, DC: American Psychiatric Publishing; 2002:231–46.
11. Sickmund M. Juveniles in court. US Department of Justice: National Report Series; 2003.
12. Fagan J. Separating the men from the boys: The comparative advantage of juvenile versus criminal court sanctions on recidivism among adolescent felony offenders. In: Howell J, Krisberg B, Hawkins JD, et al., eds. A sourcebook: Serious violent and chronic juvenile offenders. Thousand Oaks, CA: Sage Publications; 1995:238–60.
13. Bishop D, Frazier C, Lanza-Kaduce L, et al. The transfer of juveniles to criminal court: Does it make a difference? *Crime and Delinquency* 1996;42:171–91.
14. Office of Juvenile Justice and Delinquency Prevention. Juveniles facing criminal sanctions: Three states that changed the rules. US Department of Justice: Juvenile Justice Bulletin; April, 2000.
15. Bates E. Private prisons. *The Nation* Jan 5, 1998:11–8.
16. Bourduin CM, Henggeler SW. A multisystemic approach to the treatment of serious delinquent behavior. In: McMahon RJ, Peters RDV, eds. Behavior disorders of adolescence: Research, intervention, and policy in clinical and school settings. New York: Plenum; 1990: 63–80.