

Transfer and Waiver in the Juvenile Justice System

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CHILD WELFARE LEAGUE OF AMERICA

National Center for Program Standards and Development
Juvenile Justice Division



The Child Welfare League of America is the nation's oldest and largest membership-based child welfare organization. We are committed to engaging people everywhere in promoting the well-being of children, youth, and their families, and protecting every child from harm.

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Introduction

The American judicial system and the treatment of juvenile offenders have undergone considerable changes in the past 30 years. Rising levels of juvenile crime, combined with subsequent media reports, have led to increased public fear and a sentiment that the government should be tougher on crime. This notion of “adult time for adult crimes,” in turn, has brought significant changes in the juvenile justice system and its philosophy in dealing with youth, resulting in an increasing numbers of juveniles being tried and sentenced in the adult criminal justice system.

This issue brief seeks to demonstrate the complexity of transfer and waiver laws, as well as their impact on youth transferred to the criminal justice system, while also emphasizing the need for a more comprehensive assessment and consideration of the needs of youth and for the development and provision of appropriate programs, services, and sentencing alternatives.

Chapter 1 presents a brief historical perspective of the juvenile justice system, juvenile sentencing, and current juvenile crime trends. Chapter 2 defines and summarizes the various transfer and waiver laws, policies, and practices prevalent throughout the various justice systems. Chapter 3 debunks the myths and underscores the realities associated with transfer and waiver laws, including their impact on deterrence and recidivism, and disparities in sentencing terms. A myriad of issues are identified in Chapter 4, including placement of juveniles in adult facilities, racial disparity, neurological and developmental research, and juvenile competency. Florida provides the context for Chapter 5’s case study, which highlights two cases that illustrate the complexities of administering trans-

fer and waiver laws, and provides recommendations and alternatives to trying and sentencing youth as adults.

The final chapter details the mission, vision, values, and goals of the Child Welfare League of America (CWLA) Juvenile Justice Division, which form the foundation for achievements of our objective—supporting the development and implementation of legislation, policy, and procedures that would require, prior to the determination of transfer or waiver to the criminal justice system, judicial consideration of a youth's age, previous record and court history, and mental and physical capacity; seriousness and nature of the offense; previous and existing rehabilitative attempts and programs; availability of an appropriate treatment program or facility; and public safety.

This information is intended educate practitioners, administrators, and policymakers about the issues and implications of transfer and waiver laws. It is CWLA's hope that those who read it will join us in advocating for the development and provision of appropriate sentencing alternatives, programs, and services that reduce and eliminate the transfer and waiver of youth to the adult criminal system except under the most severe circumstances.

CHAPTER I

Historical Perspective and Current Trends

At the start of the 19th Century, delinquent, neglected, dependent, and runaway children in the United States were treated the same as criminal offenders (Coalition for Juvenile Justice, 1998; Siegel & Senna, 1997). In the late 19th Century, public opinion began to shift, and to recognize childhood as a distinct and separate phase. Many argued that juveniles were developmentally different than adults and more responsive to rehabilitation efforts, and therefore should not be held criminally responsible for their actions (Hansen, 2001). In 1899, the first juvenile court was established in Illinois, based on the premise that juveniles should receive different treatment than adults. The main principles of the Illinois court were to provide juveniles with individualized treatment in pursuance of the *parens patriae* philosophy, with the state assuming a parental role in looking out for the best interest of the child (Kooy, 2001).

Prior to the establishment of a separate juvenile court system, youths were subject to the same harsh realities and penalties as adults in the criminal justice system. The original objectives for the establishment of a juvenile court were to get children out of adult institutions, to focus more on rehabilitative treatment rather than punishment, and to provide for greater informality and confidentiality in court proceedings, further distancing the juvenile process from the adversarial criminal justice process (Coalition for Juvenile Justice, 1998). By 1925, all states, with the exception of Maine and Wyoming, had established distinct juvenile courts that exercised jurisdiction over offenders under 18 years of age (Hansen, 2001).

Although criticism of the various juvenile justice systems has been common since their inception, numerous issues did not come to a head until the 1960s and 1970s when three major cases concerning the treatment of juvenile offenders were brought before the U.S. Supreme Court. In the first of these, *Kent v. United States* (1966), the Court concluded that juveniles had a right to a hearing before being transferred to criminal court, representation by counsel, access to social service records, and a written statement of the reasons for waiver. In a second landmark decision, *In re Gault* (1967), the Court decided that juveniles also had a Fifth Amendment right against self-incrimination, a right to notice of charges, and a Sixth Amendment right to confront and cross-examine their accusers. Finally, in 1970, with *In re Winship*, the Court added a requirement that all those accused, whether in criminal or juvenile court jurisdiction, be convicted by the standard of “guilt beyond a reasonable doubt.” This requirement includes juveniles who face incarceration as a possible outcome.

Juvenile Crime Rates

During the 1980s and early 1990s, a sharp rise in crime, specifically violent offenses, focused much of the nation’s attention on juvenile delinquents and their treatment within the justice system. Between 1980 and 1994, the rate of juvenile arrests for violent offenses increased 64%, with the number of arrests for murder jumping 99% during this same time period (Butts & Travis, 2002). During this period, dire predictions using inflammatory terms, such as the “coming blood-bath” and a “crime time bomb,” were articulated to suggest that the United States was heading straight into an unstoppable era of youth violence (Butts & Travis, 2002).

The fear of increasing criminal activity from America’s youth intensified in 1995 when John DiIulio, a professor of politics and public affairs at Princeton University, published an article in the *Weekly Standard* predicting the coming of the juvenile *super-predator* (Hansen, 2001). DiIulio predicted that tens of thousands of these juvenile *super-predators* would be roaming the streets and terrorizing innocent citizens by the year 2000. His prediction included the theory that these juvenile predators would rob, rape, maim, and murder for trivial reasons (DiIulio, 1995). States rapidly began to change their policies regarding juvenile

offenders: between 1992 and 1999, all but one state expanded or enacted legislation making it easier for juveniles to be tried as adults (Hansen, 2001).

Ironically, in 1994, the year *before* Dilulio's article was published, juvenile crime rates began to drop, a trend that would continue through 2003. Between 1994 and 2003, the juvenile arrest rate for Violent Crime Index* offenses fell 48%. In 2003, the number of juvenile aggravated assault arrests was lower than in any year since 1989, and arrests for forcible rape were lower than in any year since at least 1980.

Juvenile crime is now down to almost the same level it was in 1980 (Butts & Travis, 2002). It is important to note that overall crime levels have followed a similar pattern of peaking in 1994 and dropping every year up to 2000 (the final year of the Urban Institute study), with important contributions in the overall decrease in crime attributed to juveniles and young adults. Young adults and juveniles (aged 24 and under) were responsible for up to 32% of the total crime increase in 1994, but have since been responsible for 58% of the drop in crime (Butts & Travis, 2002).

Summary

In 1998, Amnesty International reported that more than 200,000 children were being prosecuted each year in the American criminal court system. As a result of adult criminal prosecution, 11,000 children were being held in prisons and other long-term adult correctional facilities in 1995. Of these children, 2,600 were under the age of 16 (*Betraying the Young*, 1998). Despite a 106-year history of recognizing a separate juvenile justice system with unique needs for youth under the age of 18, states have shifted to treating more and more juveniles as fully culpable and competent adults. Rather than receiving much needed services, many of these youth are being placed under the jurisdiction of the criminal system, a system unqualified to effectively treat and rehabilitate juvenile offenders.

* The Violent Crime Index rate translates to approximately one-third of 1% of all juveniles ages 10-17 living in the United States (Snyder, 2005).

CHAPTER 2

Defining Transfer and Waiver Laws

In recent years, a number of states have tried or considered modifying existing transfer and waiver legislation in their respective jurisdictions. To date, most, if not all, of the transfer and waiver laws originally enacted during the “adult time for adult crimes” era remain unchanged.*

All states, as well as the District of Columbia, have legislation that determines how juvenile offenders are handled in their respective jurisdictions. These 51 distinct justice systems can be classified into one of several specific categories to describe which type of decisionmaking system they use: judicial waiver, discretionary waiver, presumptive waiver, mandatory waiver, prosecutory discretion/direct file, statutory exclusion, reverse waiver, once an adult always an adult, and blended sentencing.

Transfer laws are primarily classified based upon where the responsibility for determining the location or jurisdiction of the trial is held (i.e., juvenile or adult criminal court). In some states, a judge decides what court is most appropriate for the trial; in others, the prosecuting attorney has the discretion and authority.

* Relying on available data, research, and resources that may not necessarily capture recent alterations, this chapter provides an overview of the numerous categories of transfer and waiver while acknowledging the ongoing efforts of stakeholders, advocates, researchers, and state legislatures to consider the impact of transfer and waiver and modify existing laws. A complete state-by-state summary of regulations is provided in the appendix of *Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions*, published by the Office of Juvenile Justice and Delinquency Prevention. Copies are available online at <http://www.ojjdp.ncjrs.orgpubs/tryingjuvasadult/appendix.html>.

Regardless of how a case is transferred or waived, once juveniles are sent to the adult criminal system, they lose their legal status as minors and become fully culpable for their behavior (Butts & Harrell, 1998).

Thirteen states do not define the age of criminal responsibility as the generally accepted age of majority (i.e., 18 years). As of 1998, three states set the age of criminal responsibility at 16 years (Connecticut, New York, and North Carolina) and 10 states set the age at 17 years (Georgia, Illinois, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, South Carolina, Texas, and Wisconsin). All states, however, use one or more of the following transfer and waiver provisions.

Judicial Waiver

Judicial waiver is the most common transfer and waiver provision. In 46 states, juvenile court judges bear responsibility for deciding which jurisdiction will hear each individual case. Under judicial waiver laws, all cases with juvenile offenders must originate in the juvenile court (Griffin, 2003). In 1996, approximately 10,000 cases (1.6%) of all formally processed delinquency cases were waived to criminal court using the judicial waiver process (Stahl, Sickmund, Finnegan, Snyder, Poole, & Tierney 1999).

In the states that use judicial waiver, three general subtypes of waiver can be found: discretionary, presumptive, and mandatory. Despite variations in a state's ability to waive cases to adult criminal court, all waived cases must hold to the principles of fairness set forth in *Kent v. United States* (1966), which established the right of juveniles to due process.

Discretionary authority resting with judges provides those judges with flexibility. In addition to a history and collective knowledge in trying juvenile criminal matters, juvenile court judges are required by the Supreme Court ruling in *Kent v. United States* (1966) to consider multiple factors to determine whether to transfer a youth to the adult system. Discretionary authority absent standards, however, can pose problems that may lead to inequalities in the justice system (Levick, 2002).

Although many juvenile court judges still have authority and discretion in deciding jurisdiction over delinquency cases, their role has significantly decreased

since the 1990s. Changes to the transfer and waiver process in many states has taken authority away from judges and placed it into the hands of prosecutors through direct file or by simply excluding certain charges from juvenile court jurisdiction at all (i.e., mandatory waiver, statutory exclusion). Between 1996 and 1997, 25 states made changes to their transfer statutes that took away at least some form of judicial authority (Szymanski & Torbet, 1998).

Discretionary Waiver

Discretionary waiver, also known as “transfer” or “decline,” is the most commonly used version of judicial waiver. It is used in 45 states and authorizes the juvenile court to designate certain cases to adult criminal court (Griffin, 2003). Typically, states using discretionary waiver set a minimum age (e.g., 15), specific offenses (e.g., violent personal offenses), or a serious record of delinquency to determine which cases may be waived into the adult criminal system. Such provisions ensure that proceedings are not taken against very young or minor offenders. Seventeen states, however, allow waiver for any offense in certain age groups (Griffin et al., 1998).

For a case to be waived to criminal court, a hearing must be held at which the parties may present evidence that bears upon the waiver issue. Seven states require an additional investigative report be prepared examining the background and current circumstances of the accused. During the hearing, the burden of proof rests with the prosecution, which generally must make its case by “a preponderance of the evidence,” a lesser standard of proof (Griffin et al., 1998). Only six states hold to the higher burden of proof standard of “clear and convincing evidence” (Griffin & Szymanski, 1998).

Presumptive Waiver

In discretionary waiver, the burden of proof rests with the prosecution. The presumptive waiver, used in 15 states, shifts this burden to the minor. The presumptive waiver process designates a category of offenses for which waiver to criminal court is deemed appropriate (Griffin, 2003). In these states, when juveniles meet specified criteria, they must be sent to the criminal system unless it can be adequately demonstrated that transfer is not appropriate. In four states, the juvenile in question must not only bear the burden of proof, but must also present “clear

and convincing evidence” that such a waiver is not justified (Griffin, 1998). State criteria for presumptive waiver fall into three basic categories (Griffin, 2003):

- **Offense-Based.** In Alaska, juveniles of any age charged with certain violent felonies are presumed to be “unamenable to treatment” and therefore subject to be waived into the adult criminal system.
- **Age-Based.** In some states, even when an offense would not otherwise be considered serious enough for the application of presumptive waiver, older offenders may still be singled out for such waiver. Many states set their age criteria at 14 or 15 years of age for waiver with any charge, meaning that juveniles may be waived to the adult criminal system solely based on age criteria and not based upon the seriousness of the offense.
- **Record-Based.** Some states determine waiver based upon the juvenile’s history of prior offenses. In Colorado, a serious prior record can automatically trigger presumptive waiver.

Mandatory Waiver

Fifteen states provide for mandatory waiver in cases that meet specific age, offense, or other criteria. In such states, the proceedings are initiated in the juvenile court, which generally holds some type of hearing to ensure the mandatory criteria apply and then issues an order for transfer and any other necessary order such as pretrial detention (Griffin et al., 1998). Once it has been confirmed that the case meets statutory requirements, it must be transferred to the criminal court system. In some states, such as Indiana and South Carolina, once the juvenile court determines that the case meets specific juvenile record criteria, it may leave probable cause determination to the criminal court (Griffin et al., 1998).

Prosecutory Discretion/Direct File

Fifteen states define a category of cases in which the prosecutor has the discretion to determine where to file the case. In these circumstances, both juvenile and criminal courts have the jurisdiction to hear the case (Griffin et al., 1998). This type of prosecutorial discretion carries no requirement for judicial review and the case need not meet the due process requirements established by *Kent* (Snyder,

Sickmund, & Poe-Yamagata, 2000). Typically, the minimum level of offense seriousness necessary to trigger direct file in these cases is lower than that required for mandatory or presumptive waiver (Griffin, 2003). In Arkansas, for example, direct file is authorized for a large range of offenses, including charges such as soliciting a minor to join a street gang. The state trusts the prosecutors to make the appropriate filing decisions (Griffin et al., 1998). Prosecutors are often viewed as more neutral and balanced than judges (who may be seen as soft on crime) and legislators (who may be trying to maintain an image of being tough on crime). Prosecutors, however, may be under pressure to appear tough on crime with the additional burden of lacking experience in and knowledge of dealing with juveniles (Levick, 2002).

Statutory Exclusion/Legislative Waiver

Twenty-eight states have statutes that remove certain categories of offenses entirely from juvenile court jurisdiction. These jurisdictions define particular crimes for which juvenile offenders are automatically excluded from juvenile court jurisdiction. What makes this waiver type unique is that these juveniles are proceeded against in the criminal court as they would have been were they an adult when they committed the crime. These laws, established by state legislatures may preclude the important considerations in individual cases set forth in *Kent v. United States*. The construct and passage of such legislation without training or knowledge of the specific needs and development of youth may result in laws detrimental to many juveniles in the state (Levick, 2002). For example, in Mississippi, a broad statutory exclusion law sends all 17-year-olds accused of a felony into the adult criminal court system (Griffin et al., 1998).

Reverse Waiver

Many states that provide for statutory exclusion or prosecutory discretion/direct file also include reverse waiver, a method for juveniles to contest their transfer to the criminal court system. Laws in 24 states allow certain categories of offenders to be transferred down to the juvenile court system once their cases have been initiated in the criminal system (Levick, 2002). Of the 35 states with prosecutory

discretion/direct file or statutory exclusion, 21 also have some form of reverse waiver provision (Griffin et al., 1998). This ensures that the criminal court has the opportunity to determine if such handling is appropriate on an individual case basis.

This is not to say reverse waiver provisions are problem free. Youth seeking reverse waiver may have limited economic and legal resources. They will have to file a petition within a limited timeframe and will then have the burden of proof to show by “clear and convincing” evidence that they should be transferred back to the juvenile court. Juveniles may find it extremely difficult to take on the government in determining the appropriate venue for trial. This is particularly true for those who lack adequate counsel, a significant problem for children from poor families (Hubner & Wolfson, 2002).

Once an Adult, Always an Adult

Thirty-one states have enacted a special automatic transfer mechanism for juveniles who, once prosecuted as adults, will automatically be tried in the criminal justice system upon commission of any new offense (Griffin et al., 1998). In most cases, this type of exclusion from the juvenile system occurs only after the juvenile has been previously convicted in the criminal court. In some states, however, a conviction in criminal court is not required. For example, juveniles in California who have been determined unfit for juvenile court in a hearing and transferred to the adult criminal system are sent to criminal court for all subsequent offenses. Such processes are based on the premise that the youth was transferred to the criminal court, not based upon guilt or innocence, but rather upon a decision that he or she was unfit for the juvenile system (Griffin, 2003). Likewise, Mississippi requires no conviction on the first adult-prosecuted case if the second accused offense is a felony (Griffin, 2003).

Blended Sentencing

Fifteen states give the juvenile court the power to impose criminal sanctions for juveniles convicted of certain serious crimes. These laws resemble transfer and waiver provisions in that they define a specific group of juveniles who may be treated as adults (Griffin, 2003). Categories include juveniles accused of murder,

person offenses, and weapon offenses (Griffin, 2003). The most common form of blended sentencing is sometimes known as “inclusive” blended sentencing. It allows the juvenile court judge to impose juvenile and adult sanctions. In many cases, the criminal sanction will be imposed only if the juvenile violates the provisions of the sentence or commits a new offense. The adult conviction is used to encourage the juvenile to cooperate and to prevent repeat offending (Griffin, 2003). New Mexico, however, has an “exclusive” blended sentencing provision that allows the juvenile court to impose an immediately effective criminal sanction, rather than a juvenile sanction (Griffin, 2003).

Although blended sentencing programs may appear to be a positive alternative to transfer and waiver, issues exist with their use. The exclusive approach, for example, may actually increase the possibility of a juvenile receiving an expanded sanction in place of juvenile penalties (Griffin, 2003). Even in inclusive states, blended sentencing provisions can be problematic for youth. For example, Montana has no age limit for imposing blended provisions, leaving very young defendants facing the possibility of adult sanctions. In Ohio, blended provisions can be used for juveniles as young as age 10 (Griffin, 2003).

CHAPTER 3

Transfer and Waiver Laws: Myth vs. Reality

Since the initial wave of “get tough on crime” measures were initiated in the 1980s, the number of juveniles being tried as adults has increased rapidly. Between 1985 and 1994, judicial transfers in the United States increased 71%, although the number of delinquency cases increased just 41% (Redding, 1999). In Pennsylvania, the increase in cases was even more drastic than that in the U.S. overall. Between 1986 and 1994, Pennsylvania saw an 84% increase in the number of juvenile cases waived to the adult criminal system, while the number of juvenile arrests for violent offenses increased only 32% (Snyder et al., 2000). This increase appears to be directly related to a change in waiver criteria (Snyder et al., 2000). The growing number of juveniles being transferred has led to increased research and attention into several issues brought forth by the use of transfer and waiver provisions.

Deterrence and Recidivism

One of the main arguments for transfer and waiver provisions (and for harsher treatment of juvenile offenders) is the idea of deterrence. Deterrence, a main premise of the criminal justice system, is not the established standard for juvenile system intervention, which prescribes treatment and rehabilitation while balancing the safety of the community. Under a deterrence model, punishing criminals is believed to prevent delinquent activity and stop offenders from reoffending, once they have been released, out of fear/concern of further punishment.

Studies have shown, however, that juvenile transfer and waiver provisions neither work as a deterrent to crime nor reduce recidivism. Researchers in Idaho

conducted a time series study for five years after the state introduced automatic transfer provisions in 1981. In the five years following the legislation, the state experienced 13% increase in arrests for juvenile violent offenses, not a decrease as might be expected (Redding, 1999). Similar results were obtained in a six-year time series study in New York State. The New York study concluded that the widespread use of automatic transfer for violent juvenile offenders had no deterrent effect, despite intensive media efforts to inform juveniles of the new procedures (Redding, 1999).

A study submitted to the Florida Department of Juvenile Justice examined youth transferred to the criminal system in 1995 and 1996 and compared them to similar matched offenders who were retained in the juvenile system. The study found that transferred youth had significantly poorer outcomes compared to youth in the juvenile justice system. Transferred youth reoffended more quickly and were arrested for felonies more often than comparable youth in the juvenile system. Youth who were sentenced in the blended program did better than youth sentenced to other jails, although they still had higher rates of recidivism when compared to those with juvenile sanctions (Lanza-Kaduce, Frazier, Lane, & Bishop, 2002). Only property felons were less likely to reoffend when they were subjected to criminal sanctions (Lanza-Kaduce et al., 2002).

One possible explanation for this pattern of recidivism among juveniles sentenced using adult sanctions is that juveniles who are transferred to criminal court feel a greater sense of injustice, which results in defiant behavior through reoffending (Winner et al., 1997). Juveniles sentenced in the criminal system are limited in their ability to obtain employment and other life opportunities. Once released, this lack of community reintegration may lead them to reoffend (Redding, 1999).

Bishop and Frazier (1998) took a qualitative approach to their study of Florida's incarcerated juveniles. They interviewed 100 youth incarcerated in adult prison or a state "maximum risk" juvenile detention facility to determine how they viewed the facilities and programs available to them. Although only one of 50 youth in the juvenile facilities stated that they had been learning new ways to commit crimes, 40% of the youth in prison reported learning new criminal behavior (Schiraldi & Ziedenberg, 2000a). In addition, the youth in juvenile

facilities were typically able to recognize the rehabilitative efforts in place and responded favorably to the staff and their overall experience. The transferred youth in prison, however, reported that guards and staff were indifferent and hostile, treating them as if they were a lost cause. The study found that of the juveniles who said they were not going to reoffend when they exited the program, 90% cited good juvenile justice programming and services as the reason for their rehabilitation (Schiraldi & Ziedenberg, 2000a).

Sentencing Juveniles

Many juveniles transferred to the criminal court system receive longer prison sentences than adults who commit similar crimes. For example, juveniles in the criminal system convicted of murder or nonnegligent manslaughter are sentenced to an average of 287 months in prison, while adults 18 or older are, on average, sentenced to 258 months (Sickmund & Snyder, 1999), a difference of 29 months or 2.4 years. In cases of rape, juveniles were sentenced to an average of 200 months in prison versus 149 months for adults, an average of 51 months, or 4.24 years more than their adult counterparts (Sickmund & Snyder, 1999). Juveniles were found to receive longer sentences in 11 of the 16 separate categories studied, with only one category, larceny and motor vehicle theft, resulting in equal average sentences for both juvenile and adult offenders (Sickmund & Snyder, 1999). Thus, juveniles, though developmentally different and more vulnerable than adult inmates, are receiving harsher punishments than those over the age of 18, who are fully developed in the areas of reasoning and impulse control.

CHAPTER 4

Effectiveness of Transfer and Waiver

When examining the use of transfer and waiver for juvenile delinquents, the implications of sentencing juveniles as adults should not be overlooked. A large majority of juveniles sentenced in the criminal court system are not serious violent offenders. More than half of the cases waived to criminal court in 1999 were for nonviolent offenses: only 34% involved person offenses, 40% involved property offenses, 16% involved drug offenses, and 11% were public order offenses (Puzzanchera, Stahl, & Finnegan, 2003). These youth will reenter their communities in a relatively short time. Rehabilitative efforts and individualized programming available in the juvenile system will work to prevent these youth from reoffending.

Juveniles Incarcerated in Adult Facilities

The Juvenile Justice and Delinquency Prevention Act's "sight and sound" provision prohibits youth under the jurisdiction of the juvenile court from being held within "sight or sound" of adult inmates. In accordance with the "sight and sound" provision, juveniles under the jurisdiction of the juvenile court but detained in adult facilities prior to trial and conviction are not to be housed in cells adjoining adult prisoners; share dining halls, recreation areas, or any other common spaces with adults; or be placed in any circumstances that could expose them to threats or abuse from adult offenders.

The sight and sound provision does not apply when juveniles are held under the jurisdiction of the criminal court system. As a result, many juveniles who are transferred to the criminal system are incarcerated with adult inmates (Poe-

Yamagata & Jones, 2000). In 1995, more than 11,000 youth were being held in adult prison facilities or other long-term adult correctional facilities. Of these 11,000 youth, 2,600 were under the age of 16 (*Betraying the Young*, 1998). In 1997, 7,400 of the new admissions to adult facilities involved juveniles under the age of 18 (Poe-Yamagata & Jones, 2000). Being detained within the adult prison population has serious implications for youth: they are 7.7 times more likely to commit suicide and five times more likely to be raped than those who are put into juvenile detention facilities (Hansen, 2001).

Incarcerating juveniles with adult populations is also not in accord with the International Covenant of Civil and Political Rights, signed by the United States in 1992. Article 10 of the Covenant explicitly states that incarcerated juveniles must be detained separate from the adult prison population. When the United States signed on to the Covenant, however, it reserved the right not to implement certain provisions included to protect the human rights of children (*Betraying the Young*, 1998). Though there may be changes resulting from the 2005 U.S. Supreme Court ruling in *Roper V. Simmons* holding the juvenile death penalty unconstitutional, under the terms of the current agreement, the U.S. reserves the right not to implement constraints in two areas pertaining to juveniles (Office of the High Commissioner for Human Rights, 2002).

- The U.S. reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including punishment for crimes committed by persons below 18 years of age.
- The U.S. reserves the right, in exceptional circumstances, to treat juveniles as adults.

Many organizations do not condone the practice of housing juveniles in adult facilities. For example, the American Correctional Association's (ACA) official position states that juveniles, due to their distinct developmental needs, should be kept separate from incarcerated, adult populations. ACA further believes that juveniles should be given high priority for individualized care and rehabilitative services (American Correctional Association, 2002).

Juveniles incarcerated with adult populations may reenter the community more damaged than when they entered the adult system. Exposure to prison vio-

lence and adult criminals requires a certain level of adjustment if the youth is to get along and survive prison. Most juveniles will exit adult prison and reenter society having been deleteriously impacted by their experiences while incarcerated. Juvenile programs aimed at rehabilitation help to ensure that juveniles reenter society with the best chance of turning their life around. This approach benefits both the individual youth and the community.

Racial Disparities in Transfer and Waiver

Multiple studies on juvenile transfer, waiver, and sentencing have found an overrepresentation of youth of color impacted by such laws. The Office of Juvenile Justice and Delinquency Prevention's examination of three states found that African American and Latino youth make up a disproportionate number of the juvenile offenders who receive extended jurisdiction designations or are subjected to criminal sanctions (Torbet, Griffin, Hurst, & MacKenzie, 2000). Additionally, African American youth were overrepresented in transferred cases dealing with drug and public order charges. Although African American juveniles accounted for 64% of all felony drug arrests and 68% of all public order offenses, they represented 76% of the transferred cases in both categories (Juszkiewicz, 2000).

Racial discrepancies in the system do not only come in the form of transfer provisions, but also are found in the sentencing and housing of juvenile offenders. Of the juveniles of color facing adult charges, African American youth were more likely than white youth to be held pretrial in adult facilities, and Latino youth were more likely to be held in juvenile facilities (Juszkiewicz, 2000). Poe-Yamagata and Jones (1998) found that:

- White youth are less likely to be incarcerated when compared with youth of color charged with similar offenses.
- Latino youth are three times more likely and African American youth are six times more likely to be incarcerated than white youth with similar backgrounds.
- Of the 7,400 new admissions to adult prisons of juveniles under the age of 18, three out of four were youth of color.
- In 1993, the average lengths of confinement for African American youth (61 days) and Latino youth (112 days) were more than those of white youth.

Youth of color are clearly disproportionately impacted by the wide variety of transfer and waiver provisions. For example, the legislative waiver passed in Illinois in 1989 automatically transferring to criminal court any youth 15 years or older charged with selling drugs within 1,000 feet of a school or a housing project has had a disproportionate impact on minority youth. Despite the fact that white youth ages 12 to 17 years are more than one-third as likely to have sold drugs as African American youth, Illinois has seen youth of color sentenced as adults in much larger numbers than white youth. More specifically, 61% of all juvenile drug arrests in Illinois were in Chicago (Cook County) (Ziedenberg, n.d.). Of these arrests, 99.2% of the youth automatically transferred under the law were youth of color (Ziedenberg, n.d.). Because of the dense city population and close proximity of schools and housing projects, youth living in Chicago were more likely to be caught selling drugs near a school or housing project. Schools and housing projects in suburban areas are much further apart. Consequently, youth living in the suburbs arrested for selling drugs were often less likely to be within 1,000 feet of a school or housing project. In recognition of the unintentional impact of this law, the Illinois legislature did amend the statute to include a reverse waiver provision allowing judicial discretion based upon the age of the youth, previous criminal history, and consideration for involvement of a deadly weapon involved in the crime (Hubner & Wolfson, 2002).

Neurological and Developmental Implications

Laws in the U.S. acknowledge developmental differences between adults and juveniles in many areas. Many age restrictions are based upon standards of normative competence, which involve cognitive abilities to understand emotions and impulse control (Brink, 2004). Based on the premise that juveniles have not reached a proper level of maturity and decisionmaking capabilities, age restrictions exist for purchasing and drinking alcohol, smoking, voting, working, and making personal medical decisions. In dealing with crime and punishment, however, juveniles are treated less and less as a distinct subgroup of American society.

Important cognitive development occurs between the ages of 12 through 18. During this time, youth are less able to represent the future adequately, resulting in limited impulse control (Brink, 2004). The prefrontal cortex (the region of the brain that controls the cognitive abilities and allows us to prioritize thoughts and

images, anticipate consequences, and control impulses) is the last area of the brain to fully develop (Ortiz, 2004). Advances in magnetic resonance imaging (MRI) have enabled scientists to safely scan the brains of children and track their development over time. Scientists have determined that adolescents cannot reason as well as adults due to the time period of brain development, and that a biological age of maturity would occur around age 21 or 22 (Ortiz, 2004). This evidence demonstrates scientifically that juveniles have not reached a proper level of maturity and reasoning to justify treating them as adults. Youth are not mini-adults who think, reason, and understand as adults, but rather are extremely impressionable to events in their lives, which also makes them more likely to be rehabilitated when given the appropriate treatment programs.

Juvenile Competency

The John D. and Catherine T. MacArthur Foundation (2002) funded a study to examine issues of competency for juveniles standing trial. The Foundation surveyed two major groups of youth: those who were detained in adult jail or juvenile detention facilities and those of similar age, gender, ethnicity, and social class residing in the community. The study found that individuals who were detained in the juvenile justice system, on average, scored lower on intelligence tests than the demographically comparable samples from the community. Approximately two-thirds of the detained juveniles ages 15 and under had an IQ score that was associated with a significant risk of being found incompetent to stand trial. Based upon the criteria of mentally ill offenders, approximately 33% of 11- to 13-year-olds and approximately 20% of 14- to 15-year-olds were found to be as impaired in capacities relevant to competency as are seriously mentally ill adults who may be considered incompetent to stand trial (Grisso, Steinberg, Cauffman, Scott, Graham, Lexcen, Reppucci, & Schwartz, 2003).

Families and Juvenile Justice

Family can play a major role in youth involvement in the juvenile justice system. On the one hand, family history and involvement may influence a child by increasing the risk of criminal activity. On the other, it can impact how a youth behaves and is treated once in the justice system.

A study at the University of Missouri–Columbia found that children with

parents who have been incarcerated are more likely to be at risk for substance abuse, low academic performance, and behavior problems in and out of school (Dannerbeck, 2003). In addition to these at-risk behaviors, children of incarcerated parents demonstrated an earlier onset of delinquent behaviors, resulting in a higher proportion of prior delinquency referrals. In one study, 54% of children with incarcerated parents had their first referral at age 12, compared to only 36% of those with nonincarcerated parents (Dannerbeck, 2003). Children of incarcerated parents also had a greater record of referrals for assault (Dannerbeck, 2003).

Families also play a large role in the life of a child once he or she enters the justice system. According to a survey of attorneys by the Office of Juvenile Justice and Delinquency Prevention, younger children often have parents who are more concerned with their welfare and more involved with the proceedings (Torbet et al., 2000). Such parental involvement can help to keep a defendant's hopes alive. As children age, they may exhaust their family's support capabilities and consequently must take on the system on their own. Children without parental involvement may have difficulties obtaining the support they need to qualify for programs such as obtaining a GED, and may find their access to important life opportunities hindered. Additionally, children with little or no parental support have difficulty making bail and cannot obtain work permits or enter into contracts without their parents as cosigners (Torbet et al., 2000).

Youth in the justice system need to have an advocate acting on their behalf. Whether that advocate is a parent, role model, social worker, or a Court Appointed Special Advocate (CASA), he or she can work in the youth's behalf and help the youth and the family navigate the justice system, increasing the chances of fair treatment and rehabilitation once the youth reenters society.

DiIulio, who coined the term *super-predator*, wrote a follow up article for the *New York Times* in July 1996 expressing his belief that, despite his fear of increasing juvenile delinquency and predictions of a grim future where juvenile crime is rampant, sentencing juveniles as adults was the wrong answer. "We need not choose between putting juvenile offenders in adult jails and indiscriminately releasing criminals to the street. We can and should choose real reform" (DiIulio, 1996). DiIulio acknowledged that most juvenile predators begin as severely at-risk children who need to be rescued before they ever reach the justice system in the

first place. These youth deserve guidance from positive, supportive, and appropriate adults, not the opportunity to be influenced by adults in prison (DiIulio, 1996).

Understanding of the Adult Criminal System

The Office of Juvenile Justice and Delinquency Prevention conducted a qualitative study of three states (Minnesota, New Mexico, and Wisconsin) that adopted transfer and waiver provisions to determine what impact the reforms had on each state. Probation officers and public defenders interviewed for the study reported fears over the decisionmaking competency of many of the juveniles with whom they had worked. The findings suggest that defendants up to 17 years of age do not understand the significance of being tried as adults. In fact, several respondents reported that, given a choice, many minors would prefer a felony criminal conviction with adult probation to a juvenile court's delinquency adjudication with placement in a residential facility (Torbet et al., 2000). The 17-year-olds did not seem to understand the implications of a felony record for their futures and may have been more concerned with being able to get back to their friends (Torbet et al., 2000). Many respondents also felt that juveniles did not understand the difference between juvenile and adult probation and the fact that once in the adult probation system, their probation officer had the power to revoke probation and place them in prison without a hearing (Torbet et al., 2000).

Youth entering the justice system without adequate legal counsel, family representation, or other advocates on their behalf may be blindly entering a system they cannot be expected to understand at such a young age. In particular, juveniles entering the criminal system may lack an adequate understanding of what it means to have an adult conviction. Legal counsel must understand the unique needs of juveniles and work to ensure that their clients fully understand how the criminal system works.

Summary

Current trends and research increasingly reveal that transfer and waiver provisions do not inherently aid in decreasing juvenile crime rates. Juveniles who are

transferred to the adult criminal system have poorer outcomes than comparable youth sentenced in the juvenile court system. Juveniles may be sent into adult prisons and held in the general adult population, putting them at risk for injury. Youth are also being held for longer terms than their adult counterparts charged with similar crimes, while minority youth are disproportionately detained, transferred, and waived to the adult system. In addition, juvenile competency and cognitive development may be a larger influencing factor in delinquency issues than previously believed. Slower brain development, lack of impulse control, and misunderstanding of the criminal system all have serious implications that may help explain why harsher punishments are not necessarily accomplishing the intended outcomes of deterring delinquent behavior and may strengthen the argument for maintaining the integrity of a separate juvenile justice system. A comprehensive assessment of juveniles' competence to stand trial and of their intellectual functioning should guide the determination of the court's proceedings and effective sentencing.

CHAPTER 5

Florida: A Case Study

In 1995, 7,000 juvenile cases in Florida were transferred to the criminal system, although not all were tried. This closely rivals the 8,100 juveniles who were sentenced to juvenile residential facilities at the same time in the state (Bishop, Frazier, Lanza-Kaduce, & White, 1999). It is also extremely close to the 9,700 cases waived by judges nationwide (Butts & Harrell, 1998). Florida is also the location of two highly publicized and controversial cases of transfer and waiver that have had a significant effect on juvenile justice practices in the United States.

Lionel Tate

One of the most prominent cases of a juvenile being charged as an adult in Florida was that of Lionel Tate. Through prosecutorial discretion, Tate was charged with first-degree murder for killing 6-year-old Tiffany Eunick. Tate was just 12 years old at the time of the incident. After turning down a plea arrangement for second-degree murder that would have placed him in a juvenile facility for three years to be followed by 10 years probation, Tate was proceeded against in criminal court. The defense argued that Tate was imitating wrestling moves he had seen on television, and that he did not mean to harm the young girl. Partially due to the medical reports that indicated repeated violent blows that ultimately caused Eunick's death, Tate was convicted on the first-degree murder charge and sentenced to life in prison without parole, a mandatory sentence under Florida law (Handlin, 2000).

Despite statements from attorneys on both sides that life in prison was an inappropriate punishment for the 12-year-old, the judge in the case was unwilling to overturn the conviction. The judge based his decision on respecting the jury's discretion and his inability to act as a legislator from behind the bench, adding that to overrule the decision would have required him to rule that evidence did not support the guilty verdict (Handlin, 2000). Tate is believed to be the youngest person in the United States to be sentenced to life in prison without parole, prompting a nationwide controversy over the ruling and propelling the case into the appeals court (Lionel Tate Released, 2004).

In December 2003, Florida's Fourth District Court of Appeals announced it would grant Tate a retrial because his competency had not been evaluated prior to the conviction (Teen Serving Life Jubilant over Retrial, 2003). After already serving three years in prison, Tate was released from prison on bond and accepted a plea agreement identical to the initial one he had turned down three years earlier.

Anthony Laster

Another Florida case that made national headlines was that of Anthony Laster of West Palm Beach, Florida. Laster was a 15-year-old boy with an IQ of 58 who was described as having the mind of a 5-year-old. Several days after the death of his mother, Laster complained of being hungry and asked a classmate to give him lunch money. When the boy declined, Laster reached into the victim's pocket and took two dollars (Schiraldi & Ziedenberg, 2000a). Due to the school's "zero tolerance" policy, "school officials had to report the incident to the police even though Laster had no previous record and the incident did not involve a weapon" (Twohey, 1999). The prosecutor decided to file three felony counts in the criminal court: strong-arm robbery, extortion, and petty theft. Laster faced the possibility of a prison sentence of 30 years to life (Twohey, 1999).

Laster spent three weeks in a detention facility before bond was set at \$5,000 on Christmas Eve. Because his family was unable to raise \$500 in bail money, Laster spent the next four weeks, including his first Christmas after the death of his mother, in county jail (Twohey, 1999). The prosecutor defended the charges in the local press, describing Laster as a "schoolyard bully" and a "mugger" and arguing that the case should be treated as if the actions fostered and promoted

school violence (Twohey, 1999). The case was dropped only after the CBS News Magazine “60 Minutes” began to investigate the incident.

Florida’s Transfer and Waiver History

By the end of the 1980s, most of Florida’s transfer cases were direct file through prosecutorial discretion. In 1994, the Florida State Legislature expanded the state’s transfer rules through three major provisions (Bishop, Lanza-Kaduce, Frazier, Lane, & White, 2001):

- Florida extended prosecutorial direct file by permitting prosecutors to file direct charges against 14- and 15-year-old defendants charged with one of 14 specifically defined felony offenses.
- Florida required prosecutors to file direct charges in criminal court against any child who had already been adjudicated delinquent on at least three separate occasions and had been ordered to residential placements on three separate occasions.
- Florida enacted a presumptive judicial waiver for juveniles with three previous delinquency adjudications for felonies, one or more of which involved violence against a person or the use or possession of a firearm. Under Florida’s presumptive waiver, a prosecutor is required to request a waiver and the judge is required to grant it unless the judge provides written reasons to support the juvenile court processing the case.

In addition, Florida allows misdemeanors to be prosecuted in the criminal court if the juvenile involved is at least 16 years old and has a sufficiently serious previous record of delinquent activity (Griffin, 2003).

The extensive use of juvenile transfer provisions has made Florida ideal for a case study of the effects of these provisions. Beginning in 1995, the Office of Juvenile Justice and Delinquency Prevention funded a multifaceted study into the transfer of juveniles to the adult criminal system in Florida. The study sought to assess the impact of state transfer provisions, including the effectiveness of transfer as a crime prevention tool. Preliminary data released in 2001 demonstrated that the reforms made to the juvenile transfer and waiver provisions in 1994 had little impact on the types of youth who were transferred (Bishop et al., 2001).

Florida's Current Status

Currently, Florida leads the nation in the transfer of children into the criminal system, with a quarter of its transfer cases involving first-time, low-level offenders (Schiraldi & Ziedenberg, 2000a). Florida has enacted various legislative acts that facilitate such transfers of juveniles to the criminal system. In 2000, for example, Florida legislators passed a measure to allow 16- and 17-year-old youth to be sentenced to life in prison for the use of a handgun in a crime (Hansen, 2001). Despite Florida's efforts to place harsher punishments on juvenile offenders, doubt remains as to the effectiveness of those punishments.

According to the Florida Department of Juvenile Justice, Florida still tries more juveniles as adults than most states (Key Juvenile Crime Trends and Conditions, 2004). The most recent data available for Florida show that both juvenile crime rates and transfer rates are currently declining in the state. In fiscal year 1995-96, Florida peaked at 5,350 juveniles tried as adults, but reported a decline in fiscal year 1990-00 to 3,297 (Key Juvenile Crime Trends and Conditions, 2002). Though recent data indicate declines, assessing the intersection between the impact of transfer of youth to the criminal system and the decline of juvenile crime rates is difficult due to a wide array of factors.

Similar to many other jurisdictions, Florida is considering changes to its transfer and waiver policies and practices. For example, a bill in 2004 would have modified the age at which a juvenile offender could be prosecuted and sentenced to death. (Coalition for Juvenile Justice, 2005) Although the bill was not passed, the effort indicates recognition of the need for change in the state.

CHAPTER 6

CWLA's Position and Next Steps

This issue brief illustrates the issues and debate surrounding the use of transfer and waiver provisions. Despite evidence that sentencing juveniles as adults places them at increased risk of assault, rape, and suicide; denies them the treatment and rehabilitation programs provided through juvenile sanctions; and does not impact juvenile crime and recidivism, youth are increasingly being tried and sentenced as adults.

Studies indicate that youth sentenced to adult facilities are at increased risk for physical and sexual assault, as well as a greater probability of reoffending upon their release from prison. Not only do these youth face the possibility of assault and abuse by adult offenders, but juveniles are, on average, sentenced to longer prison terms than their adult counterparts for similar offenses.

Additional contributing factors may increase the probability of a child entering the justice system or work as a disadvantage once they are there. Juveniles sentenced to harsher punishments lag behind adults in their neurological development of impulse control and understanding and discerning consequences. In addition, they may not have an adequate understanding of the implications of transfer/waiver and subsequent entry into the criminal court and probation systems. These youth need and deserve access to the treatment and individualized programming that may only be available through the juvenile justice system.

The Child Welfare League of America (CWLA) envisions a national climate in which the well-being and optimal development of all children, youth, and families is a top priority. CWLA's *National Framework, Making Children a National Priority: A Framework for Community Action* (Morgan, Spears & Kaplan, 2003)

affirms its commitment to support families, communities, agencies, and policy-makers in improving the lives of America's children. To ensure children's survival and promote their healthy development, CWLA has identified five universal needs of children: the basics, such as food, clothing, shelter and education; nurturing relationships; opportunities to succeed; safety from harm; and healing when harm has already occurred. CWLA is committed to addressing these needs as it strives to positively affect outcomes for children, youth, and families.

CWLA's Juvenile Justice Division, established in July 2000 through a grant from the John D. and Catherine T. MacArthur Foundation, embraces the universal needs described in the *Framework* and uses its guiding principles to frame efforts for helping all youth develop to their full potential and prevent entry into the juvenile justice system. The division's objectives include 1) educating CWLA members as well as other child- and family-serving organizations and systems on the connections between child welfare and juvenile justice and the need for an integrated approach to programs and services, 2) a reduction in juvenile delinquency nationwide, and 3) a reduction in the reliance on incarceration for accused or adjudicated delinquent youth. As it works to meet these objectives, the Juvenile Justice Division will continue to assist in framing the national agenda in behalf of all youth. The division has assumed a strong position of leadership and advocacy for reducing the number of youth transferred and waived to the criminal justice system and the development and provision of appropriate programs, services, and sentencing alternatives that adequately consider the safety and protection of the community.

The reduction of transfer and waiver is possible, but it will occur only if we collectively commit to the comprehensive and strategically planned development of appropriate and effective policies, programs, practices, services, and sentencing alternatives. These efforts must ensure the safety of the community through youth accountability while also providing the necessary provisions for rehabilitation. In this way, we will achieve more positive outcomes that produce contributing and productive members of society.

CWLA's position is that children and youth should remain under the jurisdiction of the juvenile court and out of adult prison facilities whenever possible. Acknowledging the impact of serious juvenile offenses on victims and their fam-

ilies, CWLA supports the use of transfer provisions that upholds judicial waiver and/or prosecutorial discretionary waiver in accordance with the U.S. Supreme Court's ruling in *Kent v. United States* (1966), and only as a last remedy when the nature of the offense, the presenting charges, and the offender's history present such a danger that the community requires a disposition only available in the criminal system. In jurisdictions that allow for prosecutorial discretionary authority, a criminal court judge should review the previously indicated factors and determine the appropriateness of sentencing the offender as an adult in criminal court. CWLA also supports reverse waiver provisions that grant criminal court judges authority to remand cases back to the juvenile court, regardless of how the case came to the criminal court (e.g., direct file, exclusion, or even waiver).

The standard established in *Kent v. United States* (1966) imposes the necessary comprehensive review of multiple and often complex factors for transfer and waiver proceedings. Such a review should include a youth's social history and address multiple factors, including family, academic, substance abuse, and maltreatment issues, among other pertinent matters unique to each youth. The examination of such relevant matters is warranted in determining whether to transfer/waive a juvenile to adult court and should inform sentencing and treatment determinations.

Given the juvenile justice system's long history of addressing delinquency matters by holding youth accountable while protecting society and providing individualized intervention measures, the juvenile court is the ideal venue to provide opportunities and access to individualized and specialized rehabilitative treatment and programs designed to meet the developmental needs of juvenile offenders. Neurological development research indicating disparities in the brain development and decisionmaking capacity of juveniles and adults challenges the notion that juveniles who commit criminal offenses are competent to stand trial and subsequently be sentenced as adults.

In instances in which a juvenile court judge deems the criminal court to be the appropriate venue for jurisdiction over a juvenile offender and determines that a juvenile must be sentenced or incarcerated as an adult, programming and facilities must pay specific attention to the unique needs of the juvenile and should maintain sight and sound separation from adult inmates.

Special attention needs to be focused on delinquency prevention to keep juveniles from entering either justice system. By appropriating sufficient resources for delinquency prevention programs, communities will be safer, lives will be positively impacted, and the endless cycle of populating cost-prohibitive adult prisons will abate.

Once juveniles do enter the justice system, proper integration and coordination between juvenile justice, child welfare, and other youth- and family-serving systems should be ensured. These systems should share information regarding the juvenile in question and work together in providing proper treatment to rehabilitate juveniles so that they can successfully reenter society.

CWLA and its Juvenile Justice Division encourage the continued efforts of researchers studying transfer and waiver and support additional research development. Further areas of research may include disproportionate impact on minority populations, the application of transfer and waiver across various demographic groups (e.g., girls), and the relationship of socioeconomic status to the application of transfer and waiver. We challenge all citizens to engage in a dialogue to spread awareness of the issues facing the juvenile justice community and to participate in framing the agenda as we work toward realizing our mission and goals.

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