

# Self-Incrimination and Denial in the Juvenile Transfer Evaluation

Richard Barnum, MD

**Clinical evaluation of alleged juvenile delinquents regarding possible transfer to adult court must be conducted before adjudication of the facts of the case. This requirement leads to problems for the juvenile court and for the psychiatric consultant in managing certain potentially incriminating information that the defendant may reveal in the evaluation process. Both explicitly self-incriminating information, and also denial of involvement in the alleged offense, present problems in this regard. Explorations of procedural protections for dealing with explicitly self-incriminating information, and of the clinical and forensic problems in interpreting defendants' denial of culpability in these circumstances, do not yield fully satisfying answers to the problems. The author suggests some procedural compromises, and discusses the dilemma at the boundary of juvenile court jurisdiction that underlies these problems.**

In most parts of the United States, juvenile courts have original delinquency jurisdiction over youth under the age of 17 or 18 who commit unlawful acts. In most jurisdictions statutes provide that certain cases may be transferred or "waived" out of juvenile court, to be handled as adult criminal matters, when certain criteria are met.<sup>1,2</sup> These criteria include threshold considerations, such as the age of the youth and the seriousness of the offense, as well as status criteria specific to the case at hand. These include such considerations as the expected future dangerousness of the youth and his or her amenability to rehabilitation efforts provided within the juvenile justice system.

When the juvenile court was first established, there was great hope about the

capacity of a paternalistic state to salvage antisocial youth and bring them into productive society. Now, about a century later, that hope has dimmed some. Scant resources and the persistence of some forms of youthful conduct problems have left the juvenile system less than completely successful. However, despite its failings, the juvenile justice system retains an identity and mission separate from that of the adult criminal justice system, still focusing on the ideal of rehabilitation.

The development of transfer or waiver mechanisms reflect the states' recognition that the age of the defendant alone is not a sufficient measure by which to judge the appropriateness of any individual case for the juvenile justice system. Youth of the same age vary considerably in terms of their prognosis for rehabilitative intervention, and offenses vary greatly in terms of the dangers they pre-

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Dr. Barnum is director, Boston Juvenile Court Clinic, Boston, MA.

sent to the community. The transfer process is the mechanism by which each juvenile court selects the individual cases it feels are appropriate, and rejects the others by sending them to criminal court.

It is not perfectly clear what the practical consequences of transfer for juvenile defendants are. They probably vary considerably from place to place and among individual cases. In most circumstances transfer has the effect of making the legal proceedings public, and of establishing a new criminal (as opposed to juvenile) record. In terms of outcome, it is reasonable to suggest that some transferred juveniles will receive less adverse dispositions if found guilty in criminal court than they might have expected if found delinquent in juvenile court. Compared with the general pool of adult criminals, they are younger, have shorter criminal (though not necessarily delinquent) records, and may appear more treatable. However, studies of dispositions of juveniles transferred and found guilty of serious crimes suggest that this group faces longer and significantly more adverse dispositions in criminal court than they would in juvenile court.<sup>3-5</sup>

The court, the state, or the defense may ask for clinical evaluation of a youth in these circumstances, regarding issues such as the dangerousness of the youth and his or her amenability to treatment.<sup>6-9</sup> These evaluations can present difficult challenges to forensic child and adolescent psychiatrists in clinical assessment and prognosis. They also present some difficult problems in

areas of managing potentially incriminating information. This article will explore some issues relating to potentially incriminating information, and to interpreting the denial of incriminating information, in a transfer or waiver evaluation.

### **Self-Incrimination in the Preadjudication Evaluation**

Problems in self-incrimination in this type of evaluation stem from the fact that the evaluation is conducted before adjudication. Like evaluation of competency to stand trial and criminal responsibility, evaluation of a juvenile for a transfer hearing must be carried out before any finding of guilt or innocence can be reached. Before 1975, it was common practice to adjudicate a youth delinquent and then consider subsequently whether to transfer the youth to criminal court for a new criminal trial. The United States Supreme Court ruled that this practice was unconstitutional, in that it exposed the youth to double jeopardy (facing trial twice for the same crime).<sup>10</sup> As a result, the determination of whether the case will be tried in juvenile court or in criminal court must be made before the case is actually tried.

Most jurisdictions now conduct a preliminary hearing in juvenile court to determine if the state can produce probable cause to prosecute. If probable cause is found, then a second juvenile hearing is held, specifically to determine whether the youth meets criteria for transfer to criminal court. If expert testimony regarding the youth's dangerousness or amenability to treatment is to be

heard, it will be at this second stage juvenile hearing.

One problem facing the consultant in this preadjudication evaluation relates to managing information from the evaluation which might prove to be incriminating to the defendant at time of trial. This problem is similar to that facing the evaluator of competency to stand trial or criminal responsibility, where potentially incriminating information may also have been learned before adjudication. However, solutions to the problem that work in those situations do not work in the transfer hearing situation.

In an evaluation of competency to stand trial, the forensic question is limited to issues relating to the defendant's mental capacities at the time of trial. As a result, it is almost always possible to respond adequately to the question without needing to provide disclosures by the defendant specifically relating to the offense in question.<sup>11,12</sup> In criminal responsibility cases, the evaluation needs to generate important information from the defendant specifically relating to the offense, but this information only needs to be shared with the court if the insanity defense is actually employed. Since raising this defense means the defendant acknowledges some involvement in the crime, it is appropriate for incriminating admissions in the clinical evaluation to be shared at this point.

The transfer evaluation is similar to the criminal responsibility evaluation, in that it often needs to attend carefully to the circumstances of the alleged offense, and to include this information as cen-

tral findings in the evaluation. What the youth says he did, what were his thoughts and motivations at the time, and how he now feels about the events, are often essential elements in forming clinical impressions about the youth's prognosis for future dangerous behavior and for responding to treatment. Yet, if a consultant includes statements by the youth about the offense for this purpose in a preadjudication transfer report, the same statements may then incriminate the youth, or become a basis for further investigation and development of new prosecutorial information.

Two kinds of solutions to this possible self-incrimination are possible. The first involves various procedural devices designed to enable the youth's admissions to be used appropriately for the transfer hearing purpose, but to prevent them from being used to incriminate the youth at adjudication of guilt or innocence. Some examples of such devices are the following.

In Massachusetts, statute limits the use to which statements made in a court ordered clinical evaluation can be used. Such statements may only be considered to address issues of the defendant's state of mind; the law specifically forbids their use as evidence regarding guilt or innocence.<sup>13</sup> Less formally, court rules provide that the same judge who hears the transfer hearing will not hear the adjudication hearing either in juvenile or in criminal court. Arizona court rules explicitly permit a court to order psychiatric evaluation for a transfer hearing, but the Arizona Supreme Court<sup>14</sup> has ruled that such involuntary evaluations

must include provisions to ensure that they not be usable at either adjudication or sentencing phases after the transfer hearing is concluded. The California Supreme Court has ruled that when the evaluation is offered by the defense, it must be agreed that the evaluation, and any self-incriminating statements within it, can be used only for the transfer hearing.<sup>15</sup>

Other jurisdictions may adopt similar procedures on a case-by-case basis to prevent a juvenile defendant's disclosures about his involvement in an offense from becoming inappropriately self-incriminatory, or they may elect special procedures such as impounding and "sanitizing" reports (see Case 1 below). Another approach is to focus only on the psychological aspects of the offense, without providing any of the defendant's detailed statements about the offense itself in a report. However, this approach has the disadvantage of offering psychological impressions without a firm basis; either the original statements need to be reportable on cross-examination, or the impressions should not be allowed into evidence.

The second kind of solution to the problem of self-incrimination in a transfer hearing evaluation involves the voluntary offering of incriminatory information by the defendant, understanding the potential risks, but in the hope that doing so will help his case. Such an offering is analogous to a confession, and in jurisdictions where such statements may legally be used as evidence against the youth to prove guilt, they would be functionally identical to a confession to

the police or the court. What kind of warning or informed consent process to require of a juvenile defendant to enable such statements to be usable in court would probably depend on the purposes to which the statements might ultimately be put.<sup>16</sup> The U.S. Supreme Court has made various rulings in cases related to juveniles' capacities to accept Miranda-type warnings and to defendants' rights to silence and to counsel in high-stakes forensic psychiatric examinations.<sup>17,18</sup> These cases do not make a clear statement as to what procedures may be required to enable a juvenile defendant in a transfer hearing to offer his own account of the offense in a psychiatric evaluation for the court. In addressing this question, however, it seems quite likely that a central issue would be the extent to which the youth's disclosures might be used against him in adjudicating guilt or innocence in juvenile court, and more importantly, in the much higher stakes adjudication in criminal court if the youth is transferred.

### Case 1

A recent Alaska case illustrates the legal principles involved and some of the special procedures that may be used to protect against self-incrimination.<sup>19</sup>

An almost 17-year-old boy was arraigned with another juvenile for robbery and murder. The state asked for transfer. The court ordered the youth to submit to psychiatric examination for the purpose of gaining insight into his amenability to treatment. The defense objected, claiming that to take part in an involuntary evaluation in this high

stakes context would amount to forced self-incrimination. The court overruled the objection, but devised elaborate procedures to ensure that any statements the youth might make about the offense could not be used to incriminate him. These included complete use immunity; explicit authorization for his attorney to be present at the evaluation interviews; forbidding the consultants from discussing the evaluation with the prosecution; the submission of an initial sealed report; review of this report by the defense; hearing of any defense objections to potentially self-incriminatory statements by a different judge from the judge conducting the hearing; and finally thereby the creation of a "sanitized" report for the use of the court and the prosecution.

The youth was ultimately transferred to criminal court, with the trial court relying in part on the findings of the psychiatric examination to determine that he was not amenable to treatment. Defense appealed, on the basis of the original objection that the trial court did not have the power to compel a youth to take part in a transfer evaluation at all, even in spite of all the precautions taken against self-incrimination. The Alaska Supreme Court found that the special procedures had indeed successfully protected the youth against making explicitly self-incriminatory statements about the offense itself. However, it also found that the youth's other statements in the evaluation, although not explicitly self-incriminatory, did contribute to his jeopardy of being transferred to criminal court jurisdiction. Applying the U.S. Supreme Court's reasoning in *Estelle v.*

*Smith*,<sup>18</sup> the court considered this jeopardy to be adversarial enough and of high enough stakes that ordering the youth to take part in the evaluation was functionally equivalent to forced self-incrimination, despite that fact that the evaluation did not result in any explicitly self-incriminatory statements.

The report of the case makes clear that the defendant's attorney was present during the evaluation, but does not make clear whether the defendant, with or without his attorney's advice, was entitled not to answer questions. If he was not entitled to refuse to answer, then the value and purpose of his attorney's presence at the evaluation is somewhat unclear. If he was indeed entitled to refuse to answer questions, then it is not clear how the court determined that his statements were "forced," even though the evaluation may have been ordered by the trial court.

This case sets the strictest standard for protecting juvenile defendants against self-incrimination in a transfer hearing evaluation, by prohibiting involuntary evaluations altogether. Some other jurisdictions, such as Massachusetts and Ohio, in practice permit the juvenile not to submit to evaluation, even if the evaluation is ordered by the court. The impact of this case on the practice of court-ordered evaluation of juvenile defendants for transfer in other jurisdictions has yet to be seen.

### **Dealing with Denial of Involvement in the Offense**

Problems managing potentially self-incriminating information generated in

a transfer evaluation do not seem to yield to simple solutions. But what if defendants simply deny involvement in the alleged offense? Understanding and responding to the defendant's denial of involvement in the alleged offense is the second major challenge confronting the consultant in the preadjudication transfer evaluation.

Recognizing, confronting, and evaluating denial are problems in any amenability to treatment evaluation. They are more familiar problems in the amenability to treatment evaluations of adjudicated defendants conducted before disposition, to aid courts in understanding potential mental health needs and prognosis for treatment efforts as part of the sentencing process.<sup>20</sup> In the delinquency area these problems are best documented in the area of clinical evaluation of adolescent sexual offenders, where denial of responsibility for offenses is especially prevalent and presents special problems for evaluating prognosis for different kinds of treatment in different settings.<sup>21,22</sup> Some writers in this area have attempted to categorize forms of denial, to describe methods for evaluating it clinically with tests and interviews, and to explore its prognostic significance for success in treatment.<sup>23-28</sup>

The necessary preadjudication status of the transfer evaluation makes evaluating denial even more difficult and complex than it is in a postadjudicatory amenability to treatment evaluation. In a postadjudication evaluation the evaluator will have the benefits of the court's determination of the facts of the case. This determination may not always be

the whole truth of the matter, and may sometimes indeed be quite misleading, given the complex negotiations regarding evidence, fact-finding, and pleading that sometimes characterize the courts' procedures. Nonetheless, it is much more information about the facts than is often available undisputed before adjudication, and the evaluator can sometimes use it to confront and break through the defendant's denial. Furthermore, the defendant may reasonably be expected to be more forthcoming about the facts of the case after it has been adjudicated than before. At this stage the stakes in making an admission are usually lower, and it may in some cases then be in the defendant's interest to make a full admission, to appear a more suitable candidate for treatment.

In the preadjudication transfer evaluation, similarly definitive information about the facts of the case will often not be available. Even when police and witness statements are available, and when the prosecution has presented a case sufficient for a finding of probable cause, the evaluator will often not be aware of the evidence and arguments for the defense. Indeed, these may not yet have been developed, or may be kept from the evaluator to keep them from the prosecution until the time of trial. Moreover, as noted above, the defendant may face some realistic high-stakes negative consequences if he admits in the evaluation to involvement in the alleged offense, despite efforts to prevent such admissions from becoming available as evidence against him. As a result of these differences, the evaluator in a transfer

setting may be dealing with a defendant who totally denies involvement in the offense. The evaluator may have little basis for knowing what this denial may mean about the defendant and about the case.

In this context, it is useful to consider the possible dynamics and motives that may be involved in a juvenile defendant's denial. At the transfer stage, denial of involvement in an offense can be of four basic types, referred to as strategic, avoidant, repressive, and genuine.

*Strategic* denial refers to the process by which a defendant consciously and deliberately decides that his interests will best be served in the trial process by denying involvement in the offense. He is perfectly aware of having been involved, but has made a deliberate choice as part of his defense plan that he will deny it. *Avoidant* denial refers to a more characterological process of preferring not to acknowledge involvement in a broad range of negative behavior, relying on processes such as deflection of one's own and others' attention to other concerns, especially to the faults of others. In this process the defendant's awareness of involvement is available to him in response to careful attention, though he tends to avoid paying this sort of attention to his own responsibilities. *Repressive* denial refers to a defendant having genuinely lost awareness of involvement, either in the context of a general tendency to dissociate, or in a more limited and specific defense against pain associated with memory of the offense. *Genuine* denial refers to the defendant

denying involvement in the offense because he was not in fact involved.

When a juvenile defendant facing transfer denies involvement in the offense in an interview with a forensic mental health consultant, it may be of critical importance to know which type of denial he is using. However, because the evaluation is conducted before the facts are adjudicated, it is usually difficult, if not impossible, to make this determination.

If the determination could be made, it would enable the consultant to know many important things about the youth's functioning, both in general and in relation to the offense.

First, if the consultant could actually be sure that the youth's denial is genuine, then he would know both that the youth is honest in his reporting (an important character issue) and that he was not involved in the offense in question. Entirely aside from the issues of legal stakes in the matter, knowing that the youth was not involved in the offense can be central in reaching conclusions about the youth's diagnosis and prognosis, especially when there are no other clinical indications of difficulty.

Second, if the consultant could be sure that the denial is repressive, then it might be possible to draw certain conclusions about the youth's personality organization. For example, repressive denial suggests the likely presence of psychological conflict, and thus some potential for development of existing capacities for prosocial orientation. If the consultant were able to confirm these suggestions by finding other evidence of prosocial ca-

pacities and of internal conflict (especially of anxiety), these findings might indicate a relatively good prognosis for rehabilitative treatment in the juvenile system.

Third, if the consultant could be certain that the denial was avoidant, then different conclusions about the youth's personality organization would be reasonable. In this case, the denial itself would offer less evidence of the sort of internal conflict noted above. Instead, it would suggest a broader characterological tendency to deflect attention from internal awareness in favor of noticing the problems and faults of others. If this tendency were present throughout the defendant's personality functioning, then the consultant might be less optimistic about the youth's capacity for rapid change and increase in prosocial orientation.

If it could be certain that the defendant's denial was strategic, then the consultant might draw different conclusions. He could understand at least that the defendant, though involved in the offense, has the capacity to maintain a potentially appropriate (if false) stance in a complex social situation. What this might mean in terms of the youth's diagnosis and prognosis is unclear. However, it would at least be clear that the denial could not be taken as evidence either of true lack of involvement, or of generalized avoidance of responsibility, or of the presence of internal conflict.

In conducting evaluations of juvenile defendants who deny involvement in an offense in the transfer setting, it would certainly be useful to know what form

of denial a youth may be using. Unfortunately, in most cases it is probably impossible to do with any certainty. Often evidence about the crime seems compelling enough to indicate that in all likelihood the defendant was involved, and clinical interviews or psychological testing<sup>24, 27, 28</sup> may indicate the presence of certain personality characteristics suggestive of either avoidant or of repressive denial. Such a combination of findings may lead the consultant to conclude that the defendant's denial of involvement in fact represents either avoidant or repressive denial, and to draw further conclusions about the youth's dangerousness and/or amenability to treatment on that basis. However, these conclusions must always be seen as of questionable validity. Even if the evidence for involvement seems overwhelming, the youth's specific denial of this offense may be deliberate and strategic, and not any manifestation of the personality traits suggested elsewhere in the evaluation.

### Solutions

The consultant conducting a transfer evaluation for the court or prosecution can manage both potential self-incrimination and the defendant denying involvement in the offense in either of two ways. For purposes of maximum clarity and validity in the evaluation, the most satisfying approach is for the defendant, having been appropriately warned, to acknowledge his involvement in the offense and talk openly about it with the evaluator. The consultant may then develop a complete picture of the offense



and of the defendant's involvement in it. He can include these important factors in forming impressions of the youth's risk for future dangerousness and potential for rehabilitation. (Of course, this approach is not available to innocent defendants. The defendant who truly was not involved in the offense, and who denies involvement genuinely, runs the risk of having his denial misinterpreted as character pathology.)

In the ambiguous circumstances of the transfer evaluation, the only other clear way to deal with the problems of potential self-incrimination and of evaluating denial is for evaluator, defendant, and defense attorney to agree at the outset of the evaluation that the circumstances of the offense will be off limits to the evaluation. Such an agreement will unfortunately leave the clinical evaluation without data that may be crucial to developing an accurate understanding of the essential issues in the transfer evaluation. However, it will keep the evaluation from becoming confused by the difficult and scientifically questionable process of trying to guess what the basis of the youth's denial is, and what significance that form of denial has for the youth's prognosis for dangerousness and rehabilitation. It limits the data base of the evaluation to other areas of clinical history and social and emotional functioning. In some cases, especially involving a major offense where the facts are in dispute, the data available in these areas may simply not be sufficient to draw valid conclusions. However, it is probably preferable to leave the court wishing that more information were

available than to confuse or mislead the court with information and conclusions based on necessarily speculative interpretation of the defendant's quality of denial.

### Case 2

This 16-year-old youth was charged with burglary and murder, stemming from a single event. At his arraignment he was referred for brief screening of his competency to stand trial and of his criminal responsibility, and was committed on the basis of that screening for inpatient evaluation of criminal responsibility. A transfer hearing was also requested. There was no explicit statutory authority to order evaluation for the transfer hearing itself, but the court let it be known informally that it was interested in the clinical data for the purposes of the transfer hearing as well as for criminal responsibility. Knowing that clinical data would be used at the transfer hearing, the evaluation began with explication of that fact and of its implications for the purpose of the evaluation, including the importance of gaining clinical impressions about the youth's potential responsiveness to treatment efforts.

Regarding the problem of reporting on self-incriminating statements, a procedural compromise was reached that involved writing two reports of the evaluation. One would address issues of criminal responsibility, to include the youth's communications about the offenses in question. The other would address the transfer issues of dangerousness and amenability to treatment, and

would not include the youth's statements about the alleged offenses. The youth's statements about the offense in the criminal responsibility report were to be protected from improper disclosure by the standard court procedures involving the impounding of criminal responsibility reports until and unless the issue is raised at the adjudication phase by the defense.<sup>29</sup>

The defendant's statements about the break-in were quite explicit, but he claimed amnesia for events after entering the house, including any actions which might have contributed to the death of the victim. Because of the youth's past experiences of physical and psychological trauma and current problems with drug abuse, the evaluator did not feel that a definitive opinion could be offered about the nature of the amnesia, or about its possible relevance to the questions of dangerousness or amenability to treatment. As a result, leaving this information out of the transfer hearing report did not seem to cause major problems of thoroughness or validity, and did appear likely to protect the youth from possible self-incrimination.

It is worth noting that when the evaluator was called to testify at the transfer hearing, the report in the possession of the defense, the court, and the prosecution was actually the criminal responsibility report, not the transfer report. It was not clear how the expected procedural protection had gone awry, but it was clear that it had been arranged with insufficient care to detail to be effective.

### **Defense Consultation**

The consultant working directly with a defense attorney faces issues somewhat

more complex than those addressed in evaluations performed for the court or the prosecution. In the role of defense consultant, the evaluator can promise complete confidentiality. In this circumstance, it is generally contrary to the defendant's interest to deny the truth, because the attorney will need to know the facts and the defendant's real feelings about them in order to know how to prepare a case. If, for example, the defendant can present himself as acknowledging responsibility, as not dangerous, and as contrite and motivated for treatment, then the attorney may want to present the case in that light, acknowledging responsibility in the hope of avoiding transfer. If the defendant is honest with the consultant in acknowledging responsibility in a dangerous offense for which he has no contrition and that he seems likely to repeat, then the attorney will likely pursue a different line of defense. This will presumably include strategic denial or an explicit agreement not to address the offense in any further evaluation, such as one ordered by the court. In such a situation the consultation is relatively simple, complicated only by the problem of how to deal with the absence of a clinical result offering forthright owning up and contrition.

In many circumstances of defense consultation, however, the problem will be complicated by the fact that the privilege of confidentiality will not seem to matter to the defendant. The same problems arise of apparent denial, and of interpreting that denial. One might assume that at least strategic denial is not

involved, since there is no need to deny in this confidential situation. However, it is common enough for defendants to lie to their attorneys, and to the attorney's consultants. Therefore, one is left with the same puzzles about understanding how much attention to pay to the defendant's denial, and how to interpret it, that one faces in the court-ordered or prosecutor's evaluation.

One defense strategy that some criminal attorneys with little juvenile court experience sometimes use is to maintain complete denial of involvement in the offense, and make noninvolvement the basis for the defense against transfer. Such a focus on acts rather than status is familiar in the adult criminal justice arena, but in some juvenile courts goes against the paternalistic juvenile court tradition and is irritating and counter-productive. This is especially so when the evidence of guilt is compelling and thus the denial looks a character problem with likely negative prognostic significance.

### Case 3

This 16-year-old youth was charged along with two adult codefendants with the deliberate and premeditated shooting to death of an adult victim in the context of a dispute related to drug dealing. The defendant, his family, and counsel maintained throughout the transfer hearing process that the boy was innocent, a victim of mistaken identity. Separate psychiatric evaluations were conducted by consultants for the court and for the defense.

The court's consultant noted in re-

ports and testimony that the youth and his family denied involvement in the offense and in most other problems as well. There was no previous court record, and no history of explicit mental health symptoms or treatment for the boy was reported. The youth acknowledged some problems with school conduct and attendance, some fighting with peers outside school, and a long history of family discord and poor supervision and discipline. He did not see these as problems and did not describe or demonstrate any dysphoria, other than irritability when frustrated.

The court's consultant did not offer an opinion on the issue of dangerousness, and suggested that treatment efforts might be directed toward the youth's poor capacity for tolerating dysphoria without irritability and aggressiveness, but that such treatment could be expected to take years to have beneficial impact and was of questionable prognosis.

Based on the youth's denial of the offense, the defense consultant offered the opinion that the youth was not dangerous and was a good treatment candidate. This impression was consistent with the basic defense strategy of maintaining innocence, but was accorded little weight by the court.

The court transferred the youth to criminal court for adjudication. Among the supporting findings was that the youth's denial was an indication of a poor prognosis for treatment.

### Discussion

This exploration of solutions to problems dealing with self-incriminating in-

formation and its denial in a juvenile transfer evaluation yields no completely satisfying answers. The basic problems remain: How can a clinical consultant develop a complete and valid understanding of a youth's potential for danger or for rehabilitation when some of the information most important to forming these opinions may be unavailable? How can a court insist on making offense information available for evaluation of dangerousness and amenability to treatment if this information can be used to incriminate the defendant?

The problem is rooted in the fundamental differences between juvenile and criminal court.<sup>30</sup> The task of the transfer evaluation process is to determine by which of these legal systems the case will be addressed. This determination needs to be made before the facts of the case are decided. Each of these two systems has different procedures and fundamental purposes in adjudicating the facts of the case, and especially in dealing with a defendant once an adjudication is made. The purpose of adjudication and disposition in juvenile court is to determine that a defendant is in a certain status (delinquency) that entitles him to rehabilitative treatment provided by the state on his behalf and that of society, and entitles the state to provide it, coercively if necessary. The purpose of adjudication and disposition in the criminal justice system is to determine that a defendant has willfully and autonomously acted against the basic rules of society, placing himself in direct opposition to society at large, and justifying the state in applying punishment and

incapacitating control. Even where local conditions in either system make this fundamental difference less noticeable, it usually remains true that the same offense tried in adult criminal court will be processed in a more formally adversarial manner, over a longer period of time, with longer term and more seriously aversive potential consequences for the defendant, than would be the case in juvenile court.

Because the transfer procedure determines which of these systems will apply, and which basic assumptions, purposes, procedures, and potential outcomes, the defendant and counsel are faced with fundamental and unavoidable choices about how to participate in this procedure. Should they proceed as though under the conditions of the juvenile court, or under those of the criminal court? Specifically, should the defendant disclose specific information about his involvement in the alleged offense, hoping to show contrition and rehabilitative potential? Or should he avoid risking self-incrimination in higher stakes criminal adjudication proceedings by denying involvement or explicitly avoiding the subject?

This dilemma has no solution that satisfies the various goals of valid evaluation, advocacy for services, and protection against incrimination. Choosing in favor of openness and disclosure may maximize evaluation validity and increase access to services, but necessarily also increases the risk of incrimination. Protection against self-incrimination may increase the defendant's chances for a favorable adjudication ultimately, but

necessarily interferes with the completeness and validity of an evaluation, and thus with access to services in a paternalistic juvenile system.

The choice required of the defense in the juvenile transfer situation is a kind of bet. Two factors appear likely to contribute to how this bet is made. One involves the defendant's chances of being retained, and the impact that disclosure of involvement in the offense might have on those chances. The other involves the strength of the state's case, and the likelihood of conviction in criminal court if information about the defendant's involvement is not disclosed. If the state appears to have a very strong case, the defense may have little to lose by disclosing in terms of increasing the already high risk of conviction. It may therefore choose to disclose in the transfer process, in hope of maximizing the chances of being retained. If the state's case is weaker, the defense will likely then focus on the issue of whether disclosure seems likely to increase the chance of being retained to a level where the potential benefits of disclosure may seem worth the increased risk of conviction that might ensue from disclosure if the case is ultimately transferred.

There is no satisfying way to hedge this bet. The defense must cast its lot either with the juvenile court, with disclosure, or, by denying or avoiding the issue, with the more adversarial expectations of the criminal court. The compelling differences in orientation regarding offenders and offenses between these two courts make it impossible to devise a strategy which adequately serves the

needs of both. It is fitting that the process determining which of these arenas will hear the case should present such a dilemma, inasmuch as the determination represents a fundamental social and legal choice about which set of basic assumptions should apply to the legal approach to the case.

### Summary

Determining whether the adjudication of a juvenile charged with a serious crime will occur in juvenile court or in criminal court is the highest stakes issue courts face in dealing with juvenile offenders. Psychiatrists consulting to courts in such matters are asked to present opinions about the dangerousness and amenability to treatment of juvenile defendants. They are more likely to be able to provide these opinions if they have access to complete information about the defendant, including knowing what the defendant's actual involvement was in the alleged offense. It is possible to devise careful ways to avoid the defendant being incriminated at adjudication by disclosing this information in a psychiatric examination in the transfer hearing context. However, it is not clear how well these protections can actually be expected to work, and it is probably naive to believe that they can protect defendants reliably against any risk of self-incrimination.

As a result, psychiatrists evaluating juveniles in transfer hearings must often form opinions without knowing what the youth's actual involvement was in the alleged offense. If the youth does not acknowledge involvement, the consult-

ant faces the impossible task of interpreting this denial. Other clinical information may be available to suggest that the youth uses denial in characteristic ways. However, it is an unacceptable leap to conclude on that basis that the youth's nondisclosure regarding the specific offense is a manifestation of this characteristic form of denial. It is especially unacceptable to conclude on that basis that the youth in fact was or was not involved in the alleged offense, or to form further conclusions about his dangerousness and amenability to treatment on the basis of that conclusion. As a result, however, the consultant may not be able to form very reliable opinions, and the consultation will be frustrating for all concerned.

It is finally up to the defendant and his counsel whether to disclose involvement in the alleged offense in the context of the transfer hearing evaluation. This decision represents a bet on the part of the defense about the strength of the prosecution's case and about the youth's likelihood of being transferred. It is a choice that can not be avoided, and that determines whether the evaluation will proceed under the paternalistic assumptions of the juvenile court or under the adversarial ones of the criminal court.

### References

1. Flicker B: Prosecuting juveniles as adults: a symptom of a crisis in the juvenile courts. In *Major Issues in Juvenile Justice Information and Training: Readings in Public Policy*. Edited by Hall J. Columbus, Ohio, Academy of Contemporary Problems, 1981
2. Strasburger LH: The juvenile transfer hearing and the forensic psychiatrist. In *Juvenile Psychiatry and the Law*. Edited by Rosner R, Schwartz H. New York, Plenum, 1989
3. Schwartz J: The youth offender: transfer to the adult court and subsequent sentencing. *Crim Just J* 6:281-313, 1983
4. Rudman C, Hartstone E, Fagan J, Moore M: Violent youth in adult court: process and punishment. *Crime and Delinquency* 32:75-96, 1986
5. Eigen J: Punishing youth homicide offenders in Philadelphia. *J Crim Law Criminol* 72:1072-93, 1981
6. Mulvey EP: Judging amenability to treatment in juvenile offenders, in *Children, Mental Health, and the Law*. Edited by Reppucci ND. Beverly Hills, Sage Publications, 1984
7. Benedek E: Waiver of juveniles to adult court. In *Emerging Issues in Psychiatry and the Law*. Edited by Schetky D, Benedek E. New York, Brunner/Mazel, 1985
8. Barnum R: Clinical evaluation of juvenile delinquents facing transfer to adult court. *J Am Acad Child Adol Psychiatry* 26:922-5, 1987
9. Quinn K: Waiver of juveniles to adult court and the prediction of dangerousness. *Am Acad Psychiatry Law Newslett* 13:33-4, 1988
10. *Breed v. Jones*, 421 U.S. 519 (1975)
11. Melton GB, Petrila J, Poythress NG, Slobogin C: *Psychological Evaluations for the Courts* (chap 4). New York, Guilford Press, 1987
12. Grisso T: *Competency to Stand Trial Evaluations: A Manual for Practice*. Sarasota, Florida, Professional Resource Exchange, 1988
13. Mass. Gen. Laws ch. 233 § 23B (West 1986)
14. *In re Appeal in Pima County, Juvenile Action*, 679 P 2nd 92, (Ariz. 1984)
15. *Ramona R. v. Superior Court*, 693 P. 2nd 789, (Cal. 1985)
16. Barnum R, Silverberg J, Nied D: Patient warnings in court-ordered evaluations of children and families. *Bull Am Acad Psychiatry Law* 15:283-300, 1987
17. *Fare v. Micheal C.*, 442 U.S. 707 (1979)
18. *Estelle v. Smith*, 451 US 454, 101 S. Ct. 1866 (1981)
19. *R. H. v. State*, 777 P. 2nd 204, (Alaska 1989)
20. Halleck SL, Applebaum P, Rapoport J, Dix GE: *Report of the Task Force on the Role of Psychiatry in the Sentencing Process*. Washington, DC, American Psychiatric Association, 1984
21. Groth AN: The adolescent sexual offender and his prey. *Int J Offender Therapy Comp Criminol* 21:249-54, 1977

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22. Saunders EB, Awad GA: Assessment, management, and treatment planning for male adolescent sexual offenders. *Am J Orthopsychiat* 58:571-9, 1988
23. Martin RD: Cross-validation of the Jesness Inventory with delinquents and nondelinquents. *J Consulting Clin Psychol* 49:10-4, 1981
24. Mitchell J: Types of neutralization and types of delinquency. *J Youth Adolescence* 12:307-18, 1983
25. French DD: Distortion and lying as defense processes in the adolescent child molester. *J Offender Counseling, Serv and Rehab* 13:27-37, 1988
26. Kahn TJ: Treatment of the adolescent sexual offender. *Child and Adol Soc Work J* 5:135-48, 1988
27. Wasylw OE, Grossman LS, Haywood TW, Cavanaugh JL, Jr: The detection of malingering in criminal forensic groups: MMPI validity scales. *J Pers Assess* 52:321-33, 1988
28. Grossman LS, Cavanaugh JL, Jr: Do sex offenders minimize psychiatric symptoms? *J Forensic Sci* 34:881-6, 1989
29. *Blaisdell v. Commonwealth*, 364 N.E. 2d 191 (Mass. 1977)
30. Barnum R: The development of responsibility: implications for juvenile justice. In *From Children to Citizens: The Role of the Juvenile Court*. Edited by Hartmann F. New York, Springer-Verlag, 1987