

Commentary: Nuances of Reverse-Waiver Evaluations of Adolescents in Adult Criminal Court

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Several factors influence a judge's decision to transfer youthful defendants to juvenile court from adult court, including the forensic evaluator's ultimate opinion, the defendant's amenability to treatment, and public safety risk. In this commentary, we examine the constructs that evaluators must assess, as established by *Kent v. United States* (1966). We begin by outlining the legal history that led to the large population of youths currently in the adult criminal justice system nationwide and the negative consequences of their incarceration in adult settings. We consider the unique role of forensic psychologists and psychiatrists as experts in development, with special regard to their ability to assess and inform the court about amenability to treatment and emotional maturity. The determination of amenability to treatment is further explored through a review of the current literature examining the influence of diagnostic labeling on judicial decisions and the treatment response of adolescent offenders who have psychopathy features. We conclude with an update on the recent proposal for juvenile justice reform in the authors' state of New York.

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In their study, "Transferring Juvenile Defendants from Adult to Juvenile Court: How Maryland Forensic Evaluators and Judges Reach Their Decisions," Means *et al.*¹ found that judges' decisions to transfer juveniles to juvenile court from adult court correlate strongly with the forensic evaluators' opinions. This result is reassuring to forensic evaluators who make careful assessments of youths, based on their highly skilled clinical training. In this commentary, we examine the impact of the nationwide expansion of statutory exclusion laws that gave rise to a large population of youths in the adult criminal justice system. We review the negative consequences to youths adjudicated in the adult criminal justice system. We consider how forensic evaluators' assessments of the constructs of amenability to treatment and emotional maturity inform their recommenda-

tions to the court about returning youths to the juvenile system.

The Road to Adult Court

In most states, the juvenile court has original jurisdiction over all youths charged with law violations who are younger than 18 years at the time of the offense, arrest, or referral to court. In Maryland, the oldest age for original juvenile court jurisdiction is 17 years; 12 states set the upper age limit at 15 or 16.² In other words, Maryland along with 36 other states, the District of Columbia, and the Federal Government, have set the age of adult criminal responsibility at 18.³ However, all states have judicial mechanisms in place through which some juvenile offenders may be tried in adult criminal court.⁴

Traditionally, discretionary judicial waiver was the most common transfer mechanism, but beginning in the 1970s, state legislatures enacted laws to move juvenile offenders into adult criminal court on the basis of age and the seriousness of the crime.³ The number of cases judicially waived peaked in 1994, and by 2001, the number of cases judicially waived had returned to approximately the levels of the late 1980s. Part of the decline in judicial waivers can be attributed to a decline in violent crime by juveniles

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during the 1990s⁴ and to the widespread expansion of nonjudicial transfer laws during the 1980s and 1990s that automatically waived juveniles to adult court. These laws were partially in response to fears of a crack-cocaine-fueled generation of superpredators.

As explained by Means *et al.*,¹ Maryland has statutory exclusion laws that give adult criminal courts original jurisdiction over some juveniles, depending on the crime and the age of the youth. Specifically, the crimes include capital offenses for youths 14 and older and murder, person, and weapons offenses for youths 16 and older.⁵ Cases in Maryland may then be transferred from adult court to juvenile court by reverse waiver. Of the 36 states with such nonjudicial waiver provisions at the end of the 2004 legislative session, 22 also had provisions that allowed certain transferred juveniles to petition for a reverse waiver.³

Adverse Impact on Juveniles of Incarceration in Adult Facilities

Traditionally, the juvenile justice system accomplished multiple goals: specifically, protecting adolescent offenders from the stigma and brutality of the criminal justice system and intervening in their lives to remediate their offending behavior. This therapeutic aim was in direct contrast to the punitive goals of the adult criminal justice system. The juvenile justice system recognized that the cognitive and emotional immaturity that makes juveniles less culpable also makes them less able to defend themselves in the justice system, as they are less likely to understand their rights, more likely to waive them, less able to make meaningful and informed decisions to help in their defense, and vulnerable to making statements without a lawyer present, even when they know their rights. The juvenile justice system was created to improve societal outcomes by protecting and rehabilitating juvenile delinquents.

Throughout the United States in 2000, more than 14,500 juveniles were incarcerated in adult jail on any given day while awaiting trial and sentencing.⁶ However, only 2,295 juveniles were in state and federal prisons on the last day of 2010 (the latest year for which there are published statistics), as many of the youths who were adjudicated in the criminal justice system were either found not guilty of felony crimes or were not sentenced to prison.⁷ The majority of cases (52%) waived to adult court in 2007 were offenses against property or drug crimes and did not involve offenses against persons. Twelve percent of

juveniles waived to adult court were offenders aged 15 or younger.⁸

Adult jails are not designed to meet the needs of adolescents. In juvenile justice facilities, there are daily classes and structured recreation time. There is little programming specifically targeted toward juveniles in adult facilities. Youths in juvenile detention facilities have reported that staff helped them achieve goals, feel good about themselves, learn skills, and improve their interpersonal relations. In juvenile facilities, counseling is provided by staff as part of their regular duty; in adult prisons, counseling is provided separately and for only a limited time.⁹ The primary rehabilitative objectives of juvenile justice are not found in the adult criminal justice system.

The impacts of sending a juvenile to adult criminal court are irreversible, regardless of the outcome of adjudication. Juvenile offenders need adult influences to help shape their futures and teach the social skills needed to make the transition from adolescent to adult; in prison, juveniles are socialized to the criminal culture of the institution, where toughness and aggression are needed to survive. Evidence indicates that transfer policies do not reduce violent or other criminal behavior and do more harm than good.¹⁰ Juveniles sent to the adult system were almost 30 percent more likely to be re-arrested than those prosecuted in juvenile court. In addition, those prosecuted in the adult system commit new offenses sooner and commit more serious offenses than those in the juvenile system.¹¹ However, other research has shown that transferred adolescents charged with person crimes show lower rates of re-arrest. More research is needed in this area to aid in understanding this finding and the heterogeneity among transferred adolescents.¹²

Juveniles in adult correctional facilities have higher rates of physical and sexual abuse and suicide. Compared with those held in juvenile detention centers, youths held in adult jails are five times more likely to be victims of attempted sexual attacks or rapes, eight times more likely to commit suicide, twice as likely to be beaten by staff, and 50 percent more likely to be attacked with a weapon.⁶ Young people in the general population of prison are vulnerable to attack, but the alternative, locking them up in protective isolation or administrative segregation, also negatively affects their emotional health.¹³

Late adolescence is a time when mental illness often first develops. A 2006 multistate prevalence study found that 45.5 percent of youths in the juvenile justice system had mental illness, excluding diagnoses of conduct disorder and substance use disorders, and up to 70 percent had mental illness if those with conduct disorder and substance use disorders were included.¹⁴ Screening for and treatment of mental disorders among incarcerated youths vary widely from jurisdiction to jurisdiction and are not mandated in most jurisdictions.¹⁵ Juveniles in adult jails typically do not have access to mental health treatments specifically tailored to children.

Even if the juveniles are not directly harmed by the incarceration, there are no guarantees that they will be able to receive age-appropriate education, mental health treatment, or substance abuse treatment or will be taught skills that will help them find a job after incarceration. The problems continue when youths are released from prison. In most states, after being adjudicated as adults, they will always be tried as adults for future charges. As noted by Means *et al.*, Maryland has the once an adult, always an adult provision; in 2004, Maryland was one of 34 states with that provision.³ In addition, even if he is never again charged with a crime, a juvenile's conviction will remain a matter of public record, and he will have to report the conviction in employment applications. He loses the right to vote, serve in the military, and own a firearm. He may also be ineligible for state and federal student loans. These consequences may serve to increase rates of recidivism by limiting the youthful offender's ability to obtain education and employment, which are crucial components of successful community integration.⁹

The Role of the Forensic Examiner

The negative consequences for youths in the adult criminal justice system underscore the gravity of the judge's task during the reverse-waiver hearing. Means *et al.* demonstrated that the forensic evaluator's opinion is one of the most important influences on the judge's decisions regarding reverse waiver. This finding highlights the need for skilled clinicians to perform high-quality evaluations that are developmentally and psychologically informed. Forensic evaluators are in a unique role to provide diagnostic clarification, estimate the potential for success, inform the judicial process, and present needed treat-

ment recommendations. Yet in Maryland the Court Medical Office will no longer conduct transfer-of-jurisdiction evaluations; rather a transition is under way to have the evaluations completed by the Department of Juvenile Services (DJS), at the time of submission of this article (Cleary J, personal communication, May 31, 2012). This change could be a cause for concern if doctorate level mental health clinicians are no longer completing the evaluations.

The landmark U.S. Supreme Court case *Kent v. United States*¹⁶ delineated specific factors to consider in juvenile transfer, including, among others: potential risk to the community (dangerousness and violence risk); the nature and severity of the alleged offense; whether the offense was committed in an aggressive, violent, premeditated, or willful manner; the maturity and character of the juvenile; and amenability to treatment. According to the findings of Means *et al.*, a juvenile's capacity to respond to the recommended treatment has a significant impact on the judicial decision. To assess this capacity, evaluators must first arrive at the correct diagnosis, ascertain whether the youth received the right treatment in the past, and determine which treatment is indicated presently. Such assessments require clinical training, diagnostic acumen, and comprehensive understanding of the current applicable literature.

Psychopathy, Diagnostic Labeling, and Treatment Amenability

A dearth of research has been focused on the impact that mental health and personality disorder diagnoses have on judicial perception and disposition regarding treatment amenability. The question seems to lie in the determination of whether it is ethical to deem juvenile, or perhaps even adult, offenders untreatable. Moreover, limited research has been centered on those youths who are deemed untreatable and consequently are transferred to adult court. With dangerousness and amenability to treatment as important waiver criteria, evidence of psychopathic traits has been used to support transfer of a juvenile to adult court.¹⁷ The presence of psychopathic traits in these high-risk youths is particularly salient, given the proposal to add a callous and unemotional specifier to the diagnosis of conduct disorder in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5).¹⁸

In adult populations, clinicians have recognized a subgroup of offenders who have a diagnosis of psy-

chopathy as being responsible for a disproportionate amount of violence and crime.¹⁹ Furthermore, research has demonstrated that psychopathic adult offenders are more likely to recidivate violently.²⁰ With the growing examination of psychopathy in adult populations, as well as its relationship to violence and recidivism, there is a drive to apply this construct to youths. The extension downward of this construct to juveniles, especially those involved in the juvenile justice system, is a controversial topic, as it has been posited that youths diagnosed with psychopathic traits may be at a risk of facing punitive responses or may not be afforded access to therapeutic resources.^{21,22} Other labels may also be damaging; Murrie *et al.*²³ found that details of antisocial behavior influenced judges' decisions in hypothetical cases more than a psychopathy diagnosis. Other research has demonstrated that the presence of both psychopathic traits and antisocial history results in clinicians' rating youths as violent and predicts rates of recidivism.²⁴

One argument in favor of extending the construct of psychopathy downward to juveniles considers the utility of recognizing subsets of youths who are more likely to recidivate and commit violent crimes. This opinion serves not only to preserve public safety, but also to identify the developmental antecedents of the construct and to apply treatment at points of intervention in which the traits are possibly more amenable to change.¹⁹ Research has demonstrated that adult psychopathy is predictive of violent offending.²⁰ Likewise, youths scoring high on psychopathy measures such as the Psychopathy Checklist-Youth Version were found to engage in more antisocial and aggressive behavior than other youths, in both institutions and the community.²⁵

Ongoing exploration is centered on the extent to which the psychopathy label is prejudicial. Murrie *et al.*²⁶ examined the influence of diagnostic labels, such as psychopathy, conduct disorder, presence or absence of psychopathic traits, and antisocial history on the hypothetical decision-making of 260 juvenile probation officers. The presence of psychopathic traits, with or without antisocial history, increased probation officers' ratings of the youths' propensity, not only to reoffend but also to be a criminal in adulthood. However, the presence of psychopathic traits did not have any impact on the sanctions recommended by the probation officer. These results

further suggest that individuals, trained clinically to understand the construct of psychopathy, also recognize that these traits do not preclude treatment, but highlight a group that instead warrants intervention.

In a vignette study, Chauhan *et al.*²⁷ explored the perceptions of 83 judges of traits of juveniles with psychopathy. The results demonstrated that juvenile offenders with psychopathic traits were judged as more dangerous than those without. Although judges tended to give longer sentences to juveniles with psychopathic traits, they did not regard these youths as any less amenable to treatment, nor was this group deemed more appropriate for transfer to adult court than offenders without these traits. These results suggest that forensic evaluators can use the report as a tool to combat doubts about amenability to treatment as well as judicial cynicism. Intensive treatment may be the vehicle of change needed to reduce future violence and antisocial behavior.

On the other hand, outcomes of research by Jones and Cauffman²⁸ suggested that psychopathic traits in juveniles have a pejorative influence on legal proceedings. This survey of 100 southeastern U.S. judges indicated that the presence of psychopathy alone resulted in higher perceptions of dangerousness and more restrictive sanctions or placement and predicted less treatment amenability. Consequently, forensic examiners should be exceedingly cautious regarding what circumstances warrant the introduction of these labels and assessment tools and be clear in their explanation of the presence of such traits. These findings further underscore the need for forensic examiner's reports to expound on the limitations of the extension of psychopathy, such as the lack of information about the longer term stability of the disorder in youths, while also asserting evidence that supports the positive influence that treatment can have on decreasing risk of future violence.²⁹

Psychopathy used to be viewed as untreatable, but the current literature argues that offenders with these traits are certainly amenable to therapeutic intervention.²⁹ In addition, prior misconceptions that treatment makes psychopaths worse are based primarily on one retrospective quasi-experimental study of a radical treatment program.³⁰ Individuals with psychopathic traits may be challenging to manage in treatment, but with adequate and consistent intervention, they are just as capable of behavior modification as others.²⁹

The clinical evaluation of juvenile offenders is critical in guiding appropriate disposition determinations, particularly when assessing amenability to treatment, one of the critical factors Means *et al.* deemed influential in juvenile transfer decisions. To date, there has been no study that identified a diagnostic category or group that is incorrigible. Even the most serious and violent offenders, particularly those with diagnoses of psychopathic traits, are treatable and may be the group most in need of intervention to decrease future violence and recidivism. Given the effects of labeling in the judicial setting, it is essential that forensic evaluators recognize the necessity of taking the approach of rehabilitation rather than incapacitation. If a youth is identified as having psychopathic traits, evaluators should execute explicit clarification that this term cannot be likened to poor treatment outcomes or immediately equated with dangerousness. Diagnosis can help in identifying individuals, including those classified as having psychopathic traits, as high risk, certainly not hopeless, and perhaps most in need of treatment.

Emotional Maturity

The data from Means *et al.* predate *Roper v. Simmons*,³¹ in which the U.S. Supreme Court held the death penalty unconstitutional as applied to juveniles. The timing of the study and the decision in *Roper* may explain why defendants' emotional maturity correlated less with the judges' decisions but more with the evaluators' opinions. However, courts are increasingly aware that the brains of adolescents are immature and different from the brains of adults. John Matthew Fabian³² examined the findings in *Roper v. Simmons* as they apply to juvenile transfer and waiver proceedings. In *Roper*, the Court reasoned that juveniles are less criminally culpable than adults because they lack maturity, they are more vulnerable to peer influence, and their character is not as well formed as that of adults. Fabian wrote:

When considering the holding in *Roper* [waiver evaluation] examiners must assess psychological and emotional functioning and neuropsychological function and dysfunction, including IQ, language and verbal abilities, ADHD and executive functioning, substance abuse disorders, and the contexts and patterns of [youths'] criminality when assessing these domains [Ref. 32, p 749].

Soulier and Scott go even further when describing the scope of a psychiatrist's role in assisting juvenile courts:

Child psychiatrists who conduct these [waiver] evaluations should be experts in development and be capable of explaining these processes to the court in relation to the demands of juvenile justice. Additionally, psychiatrists involved in this type of work should remain current on relevant research trends, serve as legislative advocates when appropriate, and more generally, maintain an active voice on behalf of this vulnerable population [Ref. 33, p 324].

Amenability to treatment, risk to public safety, and emotional maturity—the three variables most strongly related to the evaluators' recommendations in Means *et al.*—are dynamic factors that are intertwined with a youth's developmentally mediated capabilities, including information processing, decision-making skills, impulse control, empathy, and judgment. Consequently, the assessment of these variables requires skilled forensic evaluators.

New York Youth Court Act: From a Relic to the Vanguard

While Means *et al.* consider factors that affect whether youths in Maryland remain in adult court or are given a reverse waiver to juvenile court, it is important to note that most criminal prosecutions involving youths younger than 18 occur in the group of 12 states (Maryland is not included) that limit the delinquency jurisdiction of their juvenile courts so as to exclude all 17-year-olds, and in some states all 16-year-olds, accused of crimes. (Connecticut recently raised the upper age of original juvenile court jurisdiction from 15 to 17 years).³⁴ In contrast to Maryland, the authors' state of New York is one of only two states (North Carolina is the other) to set the age of adult criminal responsibility at 16 years. Therefore, 16- and 17-year-old youths in New York are handled in adult criminal court routinely rather than as exceptions.³⁴ Every year, as many as 50,000 youths aged 16 and 17 are arrested in New York and prosecuted in adult criminal courts, nearly all for minor crimes.³⁵

In February 2012, Judge Jonathan Lippman, Chief Judge of the State of New York and Chief Judge of the Court of Appeals, called for a change in the way New York responds to 16- and 17-year-olds accused of nonviolent crimes. He called the New York State statute, "a relic, the product of disagreement in the Legislature when the Family Court was created in 1962" (Ref. 35, p 3). Fifty years later, he proposed the Youth Court Act, which would raise the age of criminal jurisdiction from 16 to 18 for nonviolent offenses in New York and create special

youth courts in which 16- and 17-year-olds would receive developmentally sensitive dispositions:

The Youth Court would combine the best features of the family court and the criminal courts. It would offer the kinds of alternative options available in Family Court: an adjustment process would be utilized, where a youth would be placed under probation supervision in lieu of a court proceeding. If a case was not adjusted, it would be assigned to the Youth Court, where a specially-trained judge would handle the case essentially in accordance with the existing Criminal Procedure Law—which in many regards will provide greater procedural protections than the Family Court would. If an adjudication of guilt resulted, Family Court protocols would then apply. For example: the adjudication would not be deemed a criminal conviction resulting in a criminal record; the broader dispositional options available in Family Court and the principle of “least restrictive alternative available” would govern; and court record sealing provisions would be modeled on the Family Court Act. Most importantly, enhanced services and alternative-to-incarceration community programs would be available as part of the case disposition [Ref. 35, p 4].

Judge Lippman explained that New York implemented pilot adolescent diversion courts across the state in January 2012. Judges in the Adolescent Diversion Program receive training in topics such as adolescent brain development, trauma, substance abuse, mental health, co-occurring disorders, education, and family matters. They also have access to expanded dispositional options, including community service and short-term social service interventions, such as sessions devoted to conflict resolution, civic responsibility, and vocational and educational goal setting.³⁶ Judge Lippman’s proposal represents a long-overdue and carefully crafted solution to a broken system in New York.

Conclusions

The determination of which youthful defendants should be given reverse waivers to juvenile court is complicated. Given the numerous negative consequences of having youths in the adult criminal justice system and the longstanding impact of judicial decisions on the lives of these individuals, forensic evaluators must carefully assess them for rehabilitation, emotional maturity, and risk to public safety, so as to limit the number of defendants in the adult criminal courts who could be better served by the juvenile justice system.

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