

## The Fitness of Juvenile Court

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**ABSTRACT:** Within juvenile courts, ever younger violent offenders are being transferred to adult criminal courts. This article reviews legislation surrounding transfer of jurisdiction and the evaluation of juvenile amenability by a forensic examiner. Specific areas of focus for the evaluation of juvenile offenders are offered in consideration of the pivotal opportunity this area of juvenile justice poses the minor, the courts, and society at large.

**KEYWORDS:** forensic science, juvenile court, transfer of jurisdiction, evaluation of amenability, criminal justice system

Theoretically, and by statute, the purpose of the juvenile court has been to protect society and, simultaneously, the best interests of the minor (1–3). In the establishment of the juvenile court, a presumption was made that rehabilitation of the juvenile delinquent ultimately protects society at large (2). On this foundation of protective rehabilitation, juvenile court proceedings and dispositions are focused and based on the nature and needs of the offender, not on the offense itself. This guiding principle has remained the rule in application with the exception of those cases in which the most serious of violent crimes are committed by the oldest of juveniles (4). In those cases, the question confronting society in general and juvenile court judges in particular, is this: When and why should a juvenile offender be treated as an adult criminal?

### From Juvenile Offender to Adult Criminal

In 1966, Supreme Court Justice Fortas, in his majority decision in *Kent v. United States* (1), established threshold requirements under the Due Process Clause of the Fourteenth Amendment by which a case in the jurisdiction of the juvenile court might be transferred to adult criminal court, thereby giving rise to “amenability hearings.” Currently, there are four mechanisms and provisions in place at the state level which allow for proceeding against alleged juvenile offenders as adults, with those cases being transferred to criminal court. In brief, these include the following: 1) Judicial Waiver: Forty-seven states allow juvenile court judges the discretion to transfer a minor’s case to adult criminal court by “waiving” the juvenile court’s original jurisdiction (5). This generally occurs in response to a petition for such by the prosecution, though some states allow the request to be initiated by the minor and/or his or her parents or guardian. 2) Presumptive Waiver: In 13 states, there is a presumption that certain juveniles should be processed through

the adult criminal court (5). This presumption only applies to juvenile offenders of a certain age alleged to have committed specific offenses (as outlined in the statutes of the given state). These juveniles are automatically waived to criminal court unless the juvenile is able to rebut the presumption and prove they are amenable to rehabilitation through the juvenile court. This effectively shifts the “burden of proof” from the prosecutor to the juvenile. 3) Statutory Exclusion: Thirty-seven states have statutorily excluded certain offenses, generally serious violent crimes, from the jurisdiction of the juvenile court (5). Therefore, a minor who commits a given excluded offense is automatically moved to adult criminal court. And 4) Concurrent Jurisdiction Statutes: Eleven states operate under this legislative provision which is also referred to as *Prosecutorial Discretion* and/or *Direct File* (5). Concurrent Jurisdiction Statutes allow prosecutors the authority or discretion to file certain cases in either juvenile or criminal court. These decisions are not subject to judicial review (or judicial waiver) and in some states are not required to be based on detailed criteria.

“Waiver hearings” (also known as amenability or transfer hearings) are designed to address one issue only: the juvenile offender’s “fit” in juvenile court (6). This determination rests solely on the global issue of the minor’s amenability to rehabilitation via those programs, services, and facilities accessible through juvenile court (7). This evaluation is gravely significant, not only in light of differences in jurisdictional procedure and potential dispositional or sentencing outcomes, but in terms of any future encounters the juvenile may have with the judicial system. In 18 states, once a juvenile has been sentenced in criminal court subsequent to a waiver, any offense(s) committed by that juvenile after the waiver will automatically be processed through criminal court (5). In essence, the minor has permanently lost the opportunity or right to be treated as a juvenile as a result of the waiver.

Due to the rehabilitative versus punitive focus of the juvenile court, all jurisdictional waiver proceedings are, by law, non-adversarial in nature and no adjudication is made as to guilt (2,8). However, in practice, waiver hearings are often highly adversarial because of the potential consequences to the juvenile if tried and sentenced in criminal court. By way of example, in certain states a criminally convicted juvenile faces the death penalty versus a limited number of years of incarceration if deposited in juvenile court (9).

### *Waiver in Action: From Legislative Intent to Judicial Impact*

Nationally, there are minimal data collected pertaining to the type, number, and nature of juvenile waivers. It is known, however, that the percentage of cases transferred from juvenile court to criminal court via Judicial Waiver between 1985 and 1994 remained constant at 1.4% of all delinquency cases (5). Though the percentage has remained constant, the actual number of waived cases has in-

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creased 71% between 1985 and 1994, rising from 7200 to 12,300 cases (10). Ninety percent (90%) of the cases waived between 1985 and 1994 involved male offenders (10). The alleged offense transitioned from crimes against property to serious crimes against persons, and the percentage of juveniles under the age of 16 being transferred steadily increased (10).

In 1994, for example, 1.5 million juvenile delinquency cases were processed by juvenile courts throughout the nation (10). Of those, 55% (or 855,200) were formally handled or petitioned within the juvenile court. Of those, approximately 1.4% (or 12,300) were waived or transferred to adult criminal court. One-half of the charged offenses were violent crimes and, as compared to young adults, the transferred juveniles were more likely to receive a prison sentence and their sentences were longer.

It is interesting to note that in 1995 (the most recent year for which information is available from the National Juvenile Court Data Archive), a total of 9700 delinquency cases were judicially waived to criminal court (11). This represents a notable decrease from 1994 and can be attributed to two factors. First, despite social fears and media myth, there has been a decrease in serious violent crimes by juveniles (12). Secondly, and perhaps not as positively, there has been an increase in legislation across the nation which has not only expanded the types of crimes which are automatically excluded from juvenile court, but has also lowered the jurisdictional age for criminal court (13,14). Thus, an increased percentage of juveniles is no longer in juvenile court to be judicially waived; they have already been legislatively transferred as a result of their crime and/or age.

The legislative statutes that have resulted in these changes are based predominantly on social fear, rather than on a scientific foundation. To a degree, the fear is justified; for example, in 1995, 60% of all delinquency cases involved children aged 15 or younger and 64% of all person offenses were committed by juveniles 15 and under (11). Through the media, society is bombarded with news about ever-younger juveniles committing crimes grossly inconsistent with the ideal of youthful innocence. While lowering the age limit for jurisdiction may allay the psychic discomfort these juvenile offenders arouse, there is scant research available supporting the efficacy of this legislative action. Historically, those juveniles in the upper range of jurisdiction (regardless of the cut-off) have been a focus of concern for the court. While perhaps not an inappropriate result, continued lowering of the age of juvenile court jurisdiction may ultimately wipe out the category of adolescent offender from juvenile court altogether.

Anecdotally, those juveniles transferred in the last few years have had shorter delinquent careers and fewer prior placements or attempts at rehabilitation (15). Juvenile court is giving up faster on certain juvenile offenders due to a lack of clarity as to what constitutes "delinquent" versus "criminal" (13,15). While the social science community would contend that factoring "crime and age" is insufficient for determination of rehabilitative potential, they have not provided the court (nor the public) with clear, convincing, reliable and sound alternative criteria. As social scientists in general, and forensic examiners in particular, have not outlined sound definitions nor consistent criteria and dimensions of amenability, the job has been done by state legislative bodies (13).

### **Operationally Defining "Amenable Juvenile" Within the Context of "Adolescence"**

Within the legal arena, "juvenile" has been defined by age, with that definition changing over time and varying across localities. In the United States, 38 states define a juvenile as being under age 18;

10 states, age 16; and, three states, age 15 (5). The statutes of 30 states specify that certain juvenile offenders may be waived to adult court at the age of 14 (13). These limits are relatively arbitrary, continue to be legislatively changed, and (as discussed above) are not uniformly based on supportive data from the social science community. The absence of social, educational, psychological, and medical input reflects the lack of consensus within each discipline as to when a child becomes an adolescent, and when an adolescent becomes an adult. Across professional domains it is acknowledged, however, that the developmental period of adolescence is characterized by a high degree of plasticity and "permeability"; which, in itself, precludes a universally applicable "cut-off" for adolescence.

In its efforts to rehabilitate juvenile offenders, the court must not only age-grade responsibility, but determine which minors are amenable for treatment or rehabilitation within the programs available to the juvenile court (2). Within the specific context of waiver hearings, the role of the forensic examiner is to determine, juvenile by juvenile, whether the minor is still a "soft," malleable adolescent or a "hardened," potentially dangerous offender beyond the rehabilitative arm of juvenile court. Specifically, can the cluster of traits, behaviors, and circumstances that resulted in the minor's presence before the court be altered such that he will not pose a future similar risk to himself and society?

### **Determining "Amenability": The Forensic Focus**

A difficulty inherent in conducting forensic transfer evaluations is the absence of a clear definition and standard of amenability (15). This is compounded by the surprising absence of reported research and only minimal theoretical literature pertaining to evaluations for juvenile waiver or amenability. While empirical guidelines and protocols may not yet exist, the relevant statutes in each state (which arose from Kent (1)) outline specific criteria to be assessed and addressed in an amenability evaluation (13).

In general, across states, there are three major areas of focus in an evaluation of a juvenile's "fitness" for juvenile court (15). These include: 1) the minor's amenability to treatment; 2) the sophistication and maturity of the juvenile offender; and, 3) the level of risk for future violence posed by the minor and, therefore, the degree of danger he or she poses to him- or herself and society at large.

In determining "amenability," the forensic examiner must avoid the limited focus of amenability to psychological treatment. While that is certainly a component of "amenability," the court is asking for an evaluation of the juvenile's general amenability to rehabilitation. This would, therefore, require assessment of the minor's educational status, strengths and limitations; vocational experience, skills, aptitudes and potential; and social/interpersonal skills and abilities, to include their historical receptivity to authority and structure. In addition to determining the minor's personality structure and functioning (to include identification of any clinical psychopathology), a general assessment of the minor's intelligence along with neurological screening provides relevant data for the court's use in deciding the juvenile's amenability to rehabilitation.

### **Evaluative Focus Refined**

While fitness or amenability hearings are explicitly not to determine or adjudicate the juvenile's guilt, there is a presumption (16) that the juvenile did, in fact, commit the crime as alleged. Therefore, in approaching each criteria of the given jurisdiction, the forensic examiner must evaluate the minor from a foundation of

presumed participation and guilt. The evaluative focus then becomes: Given the alleged facts of the crime and upon determining the nature and quality of the minor's participation in such, is the juvenile offender amenable to and fit for juvenile court?

In California, a state which utilizes judicial and presumptive waivers, certain juvenile offenders (as a result of their age and alleged crime) are presumed to be "unfit" for juvenile court (7). The juvenile may, however, attempt to rebut that presumption at a "fitness hearing" and, if successful, remain in the juvenile court's jurisdiction. To do so, the juvenile must demonstrate through the results of a forensic evaluation (and/or probation officer's report) that they are "fit" by a preponderance of the evidence (17) on each and every of five, non-weighted criteria (18).

#### *The Degree of Criminal Sophistication Exhibited by the Minor*

On this criterion the examiner is to evaluate the juvenile's "criminal mentality" as evidenced in the instant offense. Does the minor's behavior (as supported by psychological assessment) suggest the presence of an ingrained antisocial personality, the emergence of such, or is the "sophistication" suggested by the crime itself actually reflective of an external, transitory combination of factors? What was the nature and extent of the minor's mental and physical preparation for the offense? Was the crime premeditated? Did the juvenile act alone or with others? Did the minor participate freely or under duress? Was the victim targeted known or unknown, random, or accidental? Were weapons used in commission of the crime; if so, what type and for what intended purpose? What was the nature of the juvenile's behavior and reaction immediately after the offense? Does the minor demonstrate remorse for his or her behavior versus self-pity at having been arrested and detained? Is the minor callous and defiant or shut-down in defensive "shock"? What, if any, is the nature and extent of the offender's concern for the victim(s)?

Along with "criminal mentality," determining sophistication requires ascertaining whether the juvenile in question demonstrates commitment to a "criminal lifestyle." Do the minor's parents/caretakers or other family member(s) have a history of antisocial behavior and/or criminal activity? Does the minor have a history of substance abuse; if so, what drugs, with what frequency, and under what circumstances? Does the juvenile have any gang affiliation? If yes: was the motivation to join for protection, perceived social status, or ethnic and/or racial identification and affiliation? Does the minor have leadership status within the gang? As the commission of an act of serious violence or criminality is not automatically correlative with entrenched criminal sophistication or lifestyle, it is important to determine whether the minor's involvement in the offense was in response to situational stresses and pressures, a reaction to unique opportunity, or to meet basic psychological needs.

#### *Whether the Minor Can Be Rehabilitated Prior to the Expiration of the Juvenile Court's Jurisdiction*

This dimension calls for both quantitative and qualitative analyses by the examiner. If the juvenile is "soft" and can be rehabilitated, there must be enough time to do so prior to the juvenile aging-out of the court's jurisdiction. (In California, a juvenile can be held until age 25 (19).) There is a prevailing myth that the more serious and violent the crime, the longer time required for rehabilitation. This is in direct contrast with data from the California Youth Authority which indicate that recidivism actually increases with length of stay, independent of the severity of the crime (14). Length of time available for jurisdictional control is irrelevant alone; it must be considered in context with identified treatment/rehabilita-

tive needs and those factors suggesting rehabilitative potential or amenability.

Qualitatively, it is important to evaluate those factors that might accelerate rehabilitation and decrease the likelihood of recidivism once released. Average to above-average reading skills and academic functioning suggest a positive prognosis for rehabilitation; approximately 80% of minors within California's juvenile justice system read below grade level (14). If reading and learning skills are limited, what is the probable etiology; are the deficits amenable to intervention; if so, by what type of treatment program, and in what estimated length of time? Has the juvenile held a job? This by itself, regardless of the type of employment, suggests the positive presence of some degree of responsibility, conformity, commitment, and prosociality (especially in the presence of gang affiliation). In fact, employment has been correlated not only with prevention of delinquency, but with reduced recidivism as well (20). Has the minor ever been fired from a job; if so, how often and under what circumstances? The minor's family may support or detract from rehabilitative efforts and outcome, during and subsequent to placement. As such, assessing general and individual family stability may suggest a positive resource in maximizing and maintaining treatment effect.

#### *The Minor's Previous Delinquent History*

In addition to looking at the nature and frequency of prior delinquent behavior, assessing what transpired in the juvenile's life between offenses might reveal important information pertaining to amenability. Are there identifiable intrapsychic and/or environmental triggers antecedent to offending? Has there been an escalation in the gravity and complexity of the offenses committed by the minor? As there is a negative correlation between delayed onset of delinquent behavior and long-term offending into adulthood, the age of the juvenile when delinquency began is an important predictive variable.

#### *Success of Previous Attempts by the Juvenile Court to Rehabilitate the Minor*

This criterion requires evaluation of the minor's performance in prior dispositional placements (if any), as well as of the environment to which the minor was returned including any subsequent services. To what types of programs, services and placements has the minor been remanded by the court? Do the prior rehabilitative efforts appear, albeit retrospectively, to have been appropriate and reasoned treatment/placement choices? What was the minor's behavior while in placement? Does the juvenile have a history of attempted or achieved run-aways from open and/or closed facilities? If the minor has failed in placement, why? Though the minor failed, was there evidence of progress? Did the family support and/or participate in the rehabilitation program?

While the minor may have succeeded in being placed, the success of that placement is dependent to large degree on how or if it is sustained once completed. What is the nature of the environment to which the minor returned? Is it characterized by chronic disorganization, violence, rejection, substance abuse, and/or poverty? Are there any supportive, prosocial role-models or mentors the minor might rely on in the home or community?

#### *The Circumstances and Gravity of the Offense Alleged in the Petition to Have Been Committed by the Minor*

This is the most difficult criterion for juveniles to overcome as all of the statutorily included offenses that result in a presumption

of unfitness or unamenability are serious and grave (3). In 1985, through Edsel P. (21), the California Appellate Court determined it was inappropriate to find a juvenile unfit based on the seriousness of the offense alone. In keeping with the offender versus offense-based focus of the juvenile court, a determination of amenability on this criterion must be based on the minor's participation in the offense versus the nature of the crime itself. As a result of the presumption of guilt (16), and to avoid a determination of "unfitness," the juvenile must produce evidence of mitigating or extenuating circumstances (22) that soften the apparent gravity of their role and participation. In other words, was the minor's participation in the offense as grave or serious as one would initially assume or conclude on the charge(s) alone?

In considering this criterion, an assessment of the minor's mental state at the time of committing the offense should be made. Was the juvenile compromised by the presence of any psychiatric, neurological, and/or cognitive disorders or impairments? Was the minor suffering from any known medical conditions or taking any prescription medication? Was he or she under the influence of drugs or alcohol? Was there evidence of anything interfering in the juvenile's ability to control violent impulses? Was the offense impulsive and without premeditation in the absence of an impulse control disorder? Was the minor cognizant of the wrongfulness of his or her actions?

In looking at the circumstances of the juvenile's participation, what level of free will was manifest in the minor's behavior? Did the juvenile act of his or her own volition, or was he or she coerced, threatened or in any way forced to commit the crime? Beyond the question of premeditation of the crime, what efforts were taken to minimize not only detection after the crime, but personal risk during the offense? What did the minor hope to gain by committing the crime and what efforts were made to maximize that intended gain?

Though society is loathe to "blame the victim," was the instant offense in any way precipitated by the victim? Did the victim, intentionally or unintentionally, provoke the offense? Did the crime occur during the course of interpersonal conflict with the offender? Did the victim contribute to the escalation of the conflict or exacerbate the volatility of the situation? Did the juvenile feel in imminent danger, whether real or imagined?

In considering gravity, was the degree and type of violence "appropriate" to the crime, or excessive? Was there gratuitous violence; if yes, was it for pleasure, from dissociative panic, or stemming from a psychotic disorder? Was there torture and mental cruelty inherent in or added to the act of violence? Does the minor have a history of violence; if so, is there a pattern to victim selection?

In addressing the five criteria of fitness or amenability, a great deal of information can be found in the reports from law enforcement and probation, victim statements, medical records, and academic records. Rather than relying on documents alone, when feasible, the forensic examiner should interview the juvenile's family, probation officer, therapist, doctor, teacher, employer, and counselors at prior placements. At the end of the evaluation process, the forensic examiner must be able to present the court with an opinion as to the minor's fitness or amenability on each criterion. If the forensic examiner concludes that the juvenile is amenable to rehabilitation, he or she may then identify all treatment needs and offer specific recommendations as to what type of program would be most effective for the given minor.

### The Juvenile Court's Amenability to Rehabilitate

The juvenile court's ability to meet its legislatively identified rehabilitative mission has been questioned, if not attacked, since the

mid-1960's (2,23). The judicial system itself has raised significant concerns regarding the legal and social consequences of failure by the juvenile court to effectively rehabilitate. In the United States Supreme Court's *In re Gault* 1967 decision (24), the Court commented: "In fact, some courts have recently indicated that appropriate treatment is essential to the validity of juvenile custody, and therefore that a juvenile may challenge the validity of his custody on the ground that he is not in fact receiving any special treatment" (p. 23). In his 1968 *Hazel* decision (25), Chief Judge Bazelon raised the question of the constitutionality of transferring a treatable juvenile to criminal court on the basis that the state does not have necessary treatment programs.

As these two decisions reflect, pragmatic concern about the rehabilitative ideal of the juvenile court has been accentuated by observation of grossly insufficient and inadequate treatment resources. There is a shocking absence of sound research evaluating the efficacy of existing treatment programs at reducing recidivism (15,26). The social sciences have failed to provide the court with reliable and useful information regarding what type of program effectively treats what type of problem and in what amount of time. This void of information, integral to the daily application of rehabilitative efforts, is foundational to the believed failure of the juvenile court.

Blame and responsibility for failed rehabilitation efforts have shifted from the social sciences and court to the juvenile. This is clearly demonstrated in the pattern of legislative change that increasingly narrows the range of juveniles and offenses considered acceptable and appropriate for juvenile court. Through professional inactivity and passive reactivity, the social sciences have allowed the ambivalence of the judicial system to combine with the unchecked fear and distrust of society, resulting in the dangerous blanket assumption that those juveniles who commit the most violent of crimes are the least amenable to rehabilitation. The true and real problem may not be that certain juveniles are beyond rehabilitation, but that the court has not been given the tools to fulfill its mission. Perhaps the time has come for the question of "fitness" to be applied to the social sciences in general, and forensic examiners in particular.

In summary, evaluating a juvenile on the criteria for amenability for the juvenile court is a critical professional and social responsibility for the forensic evaluator, specifically because every minor who can be rehabilitated at this level saves not only the given minor but society as a whole. The key and challenge for the examiner, the court, and social scientists in general is to identify how juvenile offenders, regardless of the crime, can be guided to and instilled with prosocial attitudes and behaviors.

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