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A Critique of Waiver Research: Critical Next Steps in Assessing the Impacts
of Laws for Transferring Juveniles to the Criminal Justice System

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BIOGRAPHICAL SKETCH

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of Laws for Transferring Juveniles to the Criminal Justice System

Abstract

Of the many recent changes in juvenile justice, none are more prominent than waiver laws designed to more easily transfer young offenders to adult courts. These laws create more options to punish youth as if they were adults, leading some to question the need for a separate juvenile justice system. As yet, however, we have little systematic empirical basis for assessing the effectiveness of these laws. To help develop the foundation for such an assessment, this article examines the leading intended and unintended impacts identified by researchers. It then discusses critical research gaps that must be addressed if we are to develop a balanced and empirically informed assessment of the effectiveness of waiver.

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Introduction

The focus and administration of juvenile justice changed dramatically during the past decade. Today, punishment and due process constitute central features of juvenile processing. Waiver of youth to the jurisdiction of adult court, sometimes referred to as the process of transferring or certifying cases to the criminal justice system, has emerged as a powerful symbol of the transformation of juvenile justice (Howell 1996; Singer 1996a).

The rapid proliferation of new laws has led to a dramatic increase in the study of waiver. This focus is understandable: Waiver provides an easily identifiable symbol for debates about the merits of maintaining two distinct juvenile and adult justice systems (Feld 1999). Why, for example, have a separate juvenile justice system if we are going to send youth to adult courts?

Despite the wealth of research, the fact remains that we know relatively little about the true impacts of waiver. Attention to this issue is important because a greater understanding about how exactly waiver laws are used and to what effect can teach us important lessons about juvenile justice. As Fagan and Zimring (2000:3) have emphasized, by examining waiver we can explore the “content and coherence of a theory of juvenile justice.” Just as importantly, we can learn whether this popular justice policy merits further support, or whether it is time to invest in other, more effective responses to juvenile crime.

Taking these observations as a point of departure, this article critiques existing research with an eye towards identifying important issues that must be addressed to advance knowledge and

practice. I begin by discussing the context in which waiver laws gained prominence, and describe different types of waiver and national statistics on the numbers of youth transferred to adult court. I then summarize the results of waiver research and related studies relevant to assessing the likely impacts of this policy. The main point will be to identify the range of impacts relevant to providing a balanced assessment. Having established a foundation on which to place waiver laws and past research into context, I identify critical research gaps that must be addressed if we are to advance our knowledge of the impacts and effectiveness of waiver. To this end, I conclude with suggestions for a research agenda to help achieve this goal.

Background

Concern about Rising Juvenile Crime

“Get tough” approaches in juvenile justice emerged during the 1990s as a response to escalating violent juvenile crime, especially homicide (Torbet, Gable, Hurst, Montgomery, Szymanski, and Thomas 1996). Between 1984 and 1993, for example, the juvenile arrest rate for murder increased from 5 to 14 arrests per 100,000 juveniles (Butts and Travis 2002:2). At the same time, reports about the rise of juvenile “super predators” and a coming demographic “time bomb” intimated that even greater levels of violence could be anticipated (Dilulio 1995; Fox 1996). No one at the time predicted that juvenile violent crime rates would drop almost as fast they had risen (Snyder 2001; Butts and Travis 2002).

The passage of waiver laws, enacted by almost every state, represented the most striking of the “get tough” reforms. Other reforms included sentencing guidelines and graduated sanctions

models; greater information-sharing within and among juvenile justice systems, law enforcement, schools, and child and social service agencies; and reduced confidentiality of court records (Torbet et al. 1996). To a greater extent than these, however, waiver symbolized the no-nonsense approach that policymakers took to address juvenile crime. Their goal was to promote greater accountability and punishment in juvenile justice (General Accounting Office 1995). Indeed, in many states, punishment was either introduced into or made a higher priority in descriptions of the mission of the juvenile justice system (Feld 1995; Mears 1998a).

Types of Waiver

To expand the options for transferring youth to the adult system, legislatures created a diverse, and sometimes bewildering array of waiver statutes (Griffin, Torbet, and Szymanski 1998; Snyder and Sickmund 1999). Broadly, these statutes fall into three categories: judicial waiver, prosecutorial discretion, and statutory exclusion.

Juvenile court judges historically have been allowed to waive -- either at their own discretion or at the request of prosecutors -- certain cases to the adult system through judicial waiver. However, the opportunities for doing so have been greatly expanded by allowing judicial waiver to be applied to younger juveniles charged with less serious offenses. Three types of judicial waiver can be distinguished. The first, discretionary judicial waiver, gives judges the authority to determine whether a given case should be transferred to the adult justice system. By contrast, mandatory judicial waiver requires the transfer of certain cases, assuming certain conditions are met. Presumptive judicial waiver anticipates that cases will be judicially waived unless a compelling argument can be presented why they should not.

Prosecutorial discretion describes approaches, such as direct file, that give prosecutors the authority to determine whether a youth will be tried in juvenile or adult court. Under direct file provisions, prosecutors can choose the jurisdiction they believe will be most responsive to their handling of a particular case.

Statutory exclusion provisions require that entire categories of offenses be tried in adult court, thus removing the waiver decision from judges and prosecutors. However, as some researchers have argued, prosecutors determine what charges are officially filed and thus determine whether a case in fact is excludable (Sanborn 1994). As Feld (2000) has written:

Because offense categories are necessarily crude and imprecise indicators of the “real” seriousness of any particular offense, prosecutors inevitably exercise enormous sentencing discretion when they decide whether to charge a youth with an excluded offense rather than a lesser included offense, or to select the forum in a direct-file jurisdiction. (Pp. 117-118)

Many states have also enacted reverse waiver and “once an adult, always an adult” provisions. Under reverse waiver, an offense begins in adult court, but specific mechanisms allow the case to be transferred back to the juvenile justice system. “Once an adult, always an adult” provisions apply to juveniles already tried or convicted as adults and involve the permanent termination of juvenile court jurisdiction.

A range of factors can determine when and how each of these waiver provisions are implemented, including the type of offense, a youth’s prior record, and minimum age criteria. In general, most states allow for at least one or more of these different waiver options. As of 1997, for example, 46 states had discretionary judicial waiver, 14 had mandatory judicial waiver, 15 had presumptive judicial waiver, 15 allowed for prosecutorial direct file, 28 statutory exclusion, 23 reverse waiver, and 31 had “once an adult, always an adult” provisions (Griffin et al. 1998:2).

The Prevalence of Waiver

On the face of it, concern about waiver may seem to be misplaced: Annually, only about one percent of all formally processed delinquency cases are judicially waived (Snyder and Sickmund 1999). In 1999, the most recent year for which national data are available, juvenile courts waived fewer than half of one percent (7,528) of the close to 1.7 million delinquency cases referred to juvenile courts that year (Stahl, Finnegan, and Kang 2002).

But these cases only represent judicial waivers. We have no national data that capture the numbers of youth waived to adult court through prosecutorial discretion and legislative exclusion (Sickmund 2000). Some evidence suggests that at least as many, if not more, youth are sent into the criminal justice system via these non-judicial mechanisms. For example, Florida waived close to 7,000 cases to adult courts in 1995; the bulk of these cases were transferred via prosecutorial direct file (Butts and Harrell 1998; Bilchik 1999). In that same year, 9,700 delinquency cases were judicially waived nationally (Sickmund et al. 1998). Florida's non-judicial waivers alone thus almost matched the nation's total number of judicial waivers.

Some evidence suggests that increases in the use of non-judicial waiver mechanisms can be offset by declines in the use of judicial waiver (Snyder, Sickmund, Poe-Yamagata 2000). Yet the likely aggregate impact of the full set of different waiver options might reasonably be anticipated to double or more the total number of judicial waivers, if only because the many different options through which waiver now can be initiated. In 1999, that would have meant the transfer of approximately 15,000 youth to the criminal justice system.

Of course, not all transferred youth will be incarcerated. Data from the Bureau of Justice

Statistics suggest that the number of juveniles age 17 and under in State and Federal prisons recently decreased. From 1990 to 1995, the number increased from 3,600 to 5,309, but then declined to 3,147 in 2001 (Beck, Karberg, and Harrison 2002:6). These data do not, however, distinguish youth who were transferred to adult court from those who were incarcerated as adults -- in some states, for example, youth who are age 17 are adults by statute.

Incarceration is, of course, but one possible outcome of waiver. Yet we also lack national statistics on the number of transferred juveniles who are placed on probation, intensive supervision, or are diverted to alternative, non-incarcerative settings. We do not know how many youth begin their sentences in the juvenile justice system and, under “blended sentencing” statutes, complete them in the adult justice system (Torbet et al. 1996). Nor, finally, do we know how many youth are placed in juvenile residential facilities or probation as a result of prosecutors using the threat of waiver to plea bargain “down” to these lesser dispositions.

Criminologists sometimes refer to the “dark figure of crime” to refer to those offenses that official statistics fail to capture. Similarly, official statistics on the use of waiver fail to document all instances in which waiver, or the threat of waiver, is used. It is therefore appropriate to say that the “dark figure of waiver” not only exists but may be quite large.

Even were one to assume that self-adjusting mechanisms keep constant the small percentage of delinquency cases waived to adult court, it bears emphasizing that fewer than 10 percent of all delinquency cases in a given year result in residential placement, which can include training schools, camps, ranches, drug treatment or private placement facilities or group homes (Sickmund 2000:8). In 1999, for example, 163,708 of the 1,673,042 delinquency cases referred to juvenile courts led to placements in residential settings (Stahl, Finnegan, and Kang 2002). Thus, although 1 percent may seem relative small, it represents a non-trivial number of cases

compared with delinquency cases that result in residential placement. More importantly, this figure largely ignores the broader impact that waiver almost certainly has.

The Impacts of Waiver

In evaluating waiver policies, we want ideally to take account of both their intended and unintended impacts. We otherwise risk giving undue weight to one outcome to the exclusion of others, or we fail to recognize that achievement of a particular intended goal may be off-set by unintended impacts. In a context where little guidance exists about which impacts should be weighted the most, a systematic approach to identifying all potential impacts, whether measured or not, becomes especially important (Mears 2000). For policymakers, this information can yield insight into the long-term feasibility and effectiveness of waiver. For researchers, it can facilitate a more balanced approach to empirical evaluations of waiver policies.

Below, I identify the intended and unintended impacts of waiver, as suggested by recent research and reviews of the literature. Much of this research documents different facts about the processing, conviction, sentencing, and recidivism rates associated with particular types of waiver, and includes related analyses of the correlates associated with these different dimensions. A comprehensive listing of these disparate findings is neither possible nor relevant here (see, however, Howell 1996; Feld 1999; Butts and Mitchell 2000; Fagan and Zimring 2000; Myers 2001). Rather, what is relevant from a policy perspective are the overarching patterns. These patterns include the many critical facts that we do not know or have only suggestive knowledge about but that nonetheless may be critical for improving juvenile crime and justice policy.

Intended Impacts

Conventional wisdom states that policymakers created different mechanisms for waiving juvenile offenders to adult court because they felt that waiver would result in more certain and severe sanctions (Butts and Mitchell 2000:193). However, waiver historically has been used to target two groups: (1) Youth who are “beyond rehabilitation” and whose presence in the juvenile justice system might undermine the system’s integrity, and (2) youth who have committed offenses so terrible as to require the greater punishment available in the criminal justice system (Sanborn 1994:264). From this perspective, waiver is effective if it removes certain undesirable youth from the juvenile justice system, irrespective of whether it results in greater punishment. At the same time, many states appear to have expected significant deterrent effects of waiver laws. Evidence concerning each of these impacts is summarized below.

The Use of Waiver for Serious and Violent Offenders

In contrast to the stipulated goals in many statutes, waiver frequently is used for less serious property and drug offenders (Butts and Mitchell 2000; Myers 2001). However, Howell’s (1996:21) review of judicial waiver studies found that “on average, 42 percent of waived juveniles were serious property offenders and 47 percent were violent offenders.” These findings suggest that judicial waiver generally is reserved for serious offenses, including both property and violent crimes, and thus for youth who may be viewed as being “beyond rehabilitation.” Howell’s (1996) review also found that these percentages varied greatly across jurisdictions. In some, waiver cases consisted primarily of serious and violent offenders, while

in others they consisted primarily of less serious offenders. Few studies have systematically examined non-judicial waivers; among those that have, similar patterns and variation have been identified (e.g., Bishop, Frazier, and Henretta 1989; Singer 1996b).

Greater Punishment

Despite the stated goal of many waiver policies to increase punishment, studies of waiver show that transfer to adult court can result in less tough punishments, including dismissals, than would have occurred in juvenile court (Butts and Mitchell 2000; Myers 2001). Howell's (1996:49) review documented, however, that "virtually every study has found that serious and violent juvenile offenders receive longer sentences in criminal court than in juvenile court." Explanations for the lesser punishment vary. Criminal courts may view youthful offenders as less culpable than adult offenders, while juvenile courts may view these same offenders as "young adults." Regardless of the reason, existing research suggests that waiver may be effective in producing greater punishment than would occur in juvenile court, but only for the most serious juvenile offenders, and may yield less severe punishment for less serious offenders.

Preservation of the Juvenile Justice System and Its Capacity to Rehabilitate Youth

Whether waiver works effectively to preserve the juvenile justice system remains an open question (Sanborn 1994). The recent debates about abolishing juvenile justice suggest some warrant to believe that waiver policies have been effective since no states to date have eliminated their juvenile justice systems. In the absence of these policies, it is possible that many state

legislatures might have felt compelled to merge their juvenile and criminal justice systems, with emphasis given to the largely punishment and non-rehabilitative orientations of the latter (Hirschi and Gottfredson 1993). Few studies have systematically examined this possibility or shown whether the removal of certain youth who are putatively “beyond rehabilitation” preserves the ability of the juvenile justice system to better provide treatment to youth under its jurisdiction (Sanborn 1994).

Reduced Recidivism (Specific Deterrence)

Implicit in most waiver laws that emphasize punishment is the notion that waiver will deter sanctioned youth from future crime. On this score, existing research is decidedly mixed: Some studies identify lower recidivism rates, some higher, and some find no difference (Howell 1996; Butts and Mitchell 2000; Myers 2001). The idea that waiver can actually result in greater rates of recidivism constitutes a particular concern since such an outcome clearly suggests a problem with waiver. Few researchers have identified why recidivism may be higher, but some studies provide suggestive evidence. For example, Bishop and Frazier (2000) have documented that youth processed in the adult system view the waiver experience as punitive, uncaring, and unfair, whereas youth processed in the juvenile justice system typically feel that various court actors care about and are fair in their treatment of them. These perceptions of unfairness might potentially contribute to increased recidivism (Sherman 1993). It also is possible that experiences in adult prisons, including poorer adjustment and a greater risk of victimization than would occur in juvenile facilities, may affect subsequent criminal behavior (McShane and Williams 1989; Maitland and Sluder 1998).

Reduced Delinquency (General Deterrence)

The few studies of the general deterrent effects of waiver suggest that at an ecological level (e.g., city or state) there is little if any effect (Howell 1996; Butts and Mitchell 2000). These studies examine the impacts of waiver on juvenile crime rates before and after enactment of waiver legislation, using other states or jurisdictions as a point of comparison (see, e.g., Singer and McDowall 1988; Jensen and Metsger 1994).

On logical grounds, it is difficult to imagine that waiver could reasonably be expected to result in general deterrence. How many youth in the general population are aware of what the juvenile and criminal justice systems do? We know that waiver policies are used in different ways in different counties, which presumably would dilute any potential general deterrent effect, at least at a state level. Moreover, any youthful offender experienced in the actual operations of these systems might well view waiver as a means by which to obtain lesser sanctions (Mears 1998b). In turn, their contact with other youthful offenders might result in reduced, not greater, general deterrence. How? If these youth teach their peers that waiver actually provides an “escape” hatch through which lesser sanctions can be obtained, the peers may be more likely to engage in criminal behavior than they would have engaged in if waiver laws did not exist.

Unintended Impacts

When a policy results in unintended impacts, these can be important if they offset the achievement of intended impacts. This issue is doubly relevant in the context of waiver. First, waiver has not been shown to achieve many of the goals for which it was designed, and in some

cases the opposite has occurred (e.g., lesser punishment, greater recidivism). Second, it appears to have generated many negative unintended impacts. Below, I focus on the latter, identifying unintended impacts that have been documented or suggested by existing research and that are relevant to providing a more complete assessment of the full impacts of waiver laws. Included in this discussion are several critical issues, such as the inconsistent meaning and use of waiver. These might be termed implementation issues (Mears 1998a), but I refer to them here as impacts because they directly affect the ability of waiver policies to achieve intended outcomes.

The Inconsistent Meaning and Use of Waiver

Research shows that the meaning and use of waiver can vary dramatically among jurisdictions (Bortner 1986; Howell 1996; Singer 1996a; Feld 1999). This variation in turn most likely undermines the ability of waiver to achieve any particular impacts (e.g., greater punishment). Sanborn (1994), for example, has documented that in the three court settings he studied, waiver was viewed by court actors in quite different ways. In the rural and suburban court settings, probation officers played a more prominent role in the waiver process. There also was greater agreement among court actors about the appropriate use of waiver (e.g., belief that waiver was appropriate to remove youth who were “beyond rehabilitation” and “threatened to contaminate others’ chances of rehabilitation” -- Sanborn 1994:275). By contrast, court actors in the urban setting viewed the use of waiver differently from one another and there was much less trust among them, creating power struggles over how cases were handled.

The results of such differences, also documented for blended sentencing laws (e.g., Mears 1998b) and the implementation of juvenile justice reforms in general (e.g., Bazemore, Dicker,

and Nyhan 1994), may likely account for the variation researchers have observed across jurisdictions in the composition and processing of waiver cases. Such variation may dilute the chances that the intended impacts of waiver can be achieved. As importantly, it largely undermines the legitimacy of waiver by creating a form of “justice by geography” (Feld 1991), where waiver to adult court depends almost entirely on where a youth commits an offense.

Plea Bargaining to More Serious Outcomes (“Unofficial” Use of Waiver)

Plea bargaining constitutes the primary mechanism through which most cases in juvenile or adult court are handled (Dougherty 1988; Sanborn 1993; Champion 1996). Yet few studies of waiver, especially of prosecutorial direct file and legislative exclusion, examine this issue, what might be called the “unofficial” use of waiver. Those that do typically focus on cases actually waived, or “official” waivers (Howell 1996; Fagan and Zimring 2000). As studies of blended sentencing laws show (Mears 2000), however, plea bargaining may result in stipulations to juvenile court sanctions even if no waiver “officially” occurs or therefore is recorded. For example, the threat of waiver by prosecutors may be sufficient to motivate youth to accept a plea to a juvenile court sanction.

Given both the widespread practice of plea bargaining and the potential for waiver to result in tougher sanctions, it would be surprising if plea bargained juvenile court sanctions were not the primary impact of waiver. Indeed, the fact that “official” waiver frequently is used for less serious property and drug offenders suggests that “unofficial” waiver is also used with these and similar types of offenders. The actual impact of waiver thus may extend far beyond the cases officially recorded in administrative databases. Whether the impact results in less or more severe

punishments remains unknown.

Net-Widening

As with plea bargaining, few researchers have examined the extent to which net-widening results from waiver laws. Since waiver typically is contemplated for the more serious, chronic, and violent offenders, the issue may seem moot -- if not waived to adult court, then surely these youth would likely be sanctioned in the juvenile justice system. However, many waiver statutes specify general categories of offenses, which are “necessarily crude and imprecise indicators of the ‘real’ seriousness of any particular offense” (Feld 2000:117). Zimring (1998:494) has emphasized, for example, that “[assaults and robberies] account for 94 percent of all youth violence arrests.” Many of these cases may be eligible for waiver even though their seriousness might not warrant more than a counsel-and-release sanction from juvenile court.

Applied to such cases, net-widening becomes a very real possibility. Mears and Field (2000), for example, described a policy in one large urban jurisdiction in which prosecutors automatically sought judicial waiver to adult court in all cases that were eligible. Such a policy creates considerable room for net-widening, if only through plea bargains to lesser sanctions. Consequently, one of the primary impacts of waiver may lie less with actual cases sent to adult court than with the sanctioning of cases that in the past might have resulted in dismissal.

Limited Competency and Unfair or Harmful Sanctions

Not all states require clinical evaluations concerning the legal criteria for seeking waiver to

adult court. In those that do, evaluations serve to determine if a particular youth is a “danger to others” and to assess his or her “amenability to treatment” (Grisso 2000:325). In the latter instance, the standard involves assessing not only the youth’s amenability and but whether his or her conduct can be “modified within the resources available to the juvenile court” (p. 326).

Given the centrality of these two dimensions to decisions to seek waiver, or to file charges that would allow waiver to occur, it is remarkable that, according to one recent review, “no studies have examined the nature and quality of waiver evaluations as they are performed in everyday practice” (Grisso 2000:331). We thus know little about who conducts waiver evaluations or how the evaluations are conducted. Moreover, until recently there were no clear standards for such evaluations. The lack of research in this area becomes more remarkable when we consider that a considerable body of literature has developed that documents the limited competency of many, though certainly not all, youthful offenders referred to the juvenile and criminal justice system (Bonnie and Grisso 2000:86-93; Steinberg and Cauffman 2000).

Limited competency need not vitiate the legitimacy of waiver. However, when waiver occurs in cases where youth have a limited ability to understand or appreciate the consequences of their decisions and the proceedings in which they are a part, unfair sanctions may result. These in turn may prove harmful to the youth, especially if an undetected mental disorder, which can affect competency, goes untreated by the criminal justice system.

Disparity in the Use of Waiver

Disparity can be defined in many ways (Pope and Feyerherm 1995), but a conventional view is that it occurs when similar cases are treated differently. Disparity is present when, for

example, black youth are waived more frequently to adult court than white youth who have committed similar offenses and have similar prior records. The problems with disparity may seem obvious, but bear emphasizing. Disparity can indicate bias or discrimination, both of which are illegal. As importantly, when people come to view the justice system as unfairly targeting some groups more than others, it reduces the perceived legitimacy of the system.

Howell's (1996:51) review of waiver research documented that minority youth are "often disproportionately selected for transfer, conviction, and incarceration in adult prisons." In many studies, the effect of race/ethnicity drops out after factors such as offense severity are controlled for statistically. But recent assessments of this issue suggest that such snap-shot approaches are methodologically limited in their ability to capture racial/ethnic differences in processing, including waiver (Podkopacz and Feld 1995; Pope and Feyerherm 1995; Feld 1999). For example, there may be biases that are not readily apparent at any one stage of processing but that accumulate into larger differences at later stages. There also may be indirect effects of race/ethnicity, as well as interactions between race/ethnicity and certain legal factors, such as prior record, that contribute to a disproportionate use of waiver among minorities (Bortner, Zatz, and Hawkins 2000). Few site-specific studies systematically assess these different possibilities, but they nonetheless are critical to assessing the extent to which waiver policies disproportionately affect certain populations.

Lengthy Pre-Trial Detention, Often in Adult Jail Facilities

Waiver potentially entails a greater amount of processing than traditional juvenile court proceedings because of due process requirements and the likelihood of additional proceedings

subsequent to the waiver decision. In addition, youth awaiting waiver proceedings may be held in pre-trial detention facilities along with adults, even though their case ultimately may not be transferred to the criminal justice system. As a result, they face a greater risk of victimization, especially if they are held in adult jails (Howell 1996; Smith 1998).

Both the extent to which waived youth remain in pre-trial detention for longer periods of time than their counterparts in the juvenile justice system and the extent to which they are more frequently held in adult jails and victimized as a result of waiver remain largely unknown. For example, waived youth may be more likely to post bail, jurisdictions may rely on adult jail facilities even in the absence of waiver, and youth in juvenile facilities may also be victimized. Nonetheless, the potential for lengthier confinement and greater rates of victimization clearly exists and suggests the need for any balanced assessment of the impacts of waiver to examine these dimensions.

Increased Likelihood of Victimization among Youth Incarcerated in Adult Prisons

Although policymakers contemplated that waiver laws would result in tougher punishment, few presumably anticipated that the punishment would include increased victimization. Nonetheless, studies show that youth in adult prisons are more likely to be victimized and to experience more difficult transitions to incarceration (McShane and Williams 1989; Howell 1996; Maitland and Sluder 1998). The greater victimization itself is an undesirable outcome. At the same time, its potentially negative impact on prison control and successful transitions back into society represent additional concerns that have been largely unaddressed by waiver research.

Perceptions and Experiences of Unfair Processing: Effects on Longer-Term Outcomes

A small handful of studies have examined the perceptions and experiences of youth waived to adult court jurisdiction. They suggest that youth transferred to adult court have quite different views and experiences. Youth in adult prisons typically view the experience of criminal justice processing as confusing, adversarial, and seemingly unconcerned about their best interests. By contrast, youth eligible for waiver but processed in the juvenile justice system typically view court processing as understandable, fair, and focused on their best interests (Bishop and Frazier 2000; see also Forst, Fagan, and Vivona 1989). This issue is critical because, as noted earlier, if the process of sanctioning, including both the waiver process and adult processing, is perceived to be procedurally or substantively unfair, the likelihood increases that it will cause an increase in future offending and other outcomes, such as mental health and employment (Sherman 1993).

Critical Knowledge Gaps: Next Steps in Creating Policy-Relevant Information

Increased and Better Information of Intended and Unintended Impacts

As the discussion above reveals, there are many dimensions of waiver that require much greater assessment if we are to determine the full impacts of this crime and justice policy. To summarize, we need greater understanding and assessment of intended impacts, including:

- targeting of serious and violent offenders
- greater punishment
- preservation of the juvenile justice system and its capacity to rehabilitate youth

- reduced recidivism (specific deterrence)
- reduced delinquency (general deterrence).

We also need more in-depth, systematic accounts of the unintended impacts of waiver, including but not restricted to:

- the inconsistent meaning and use of waiver across jurisdictions
- plea bargaining to juvenile sanctions through the “unofficial” use of waiver
- net-widening through plea bargaining and sanctioning of lesser offenders
- limited competency of juvenile defendants and thus unfair or harmful sanctions
- disparity in the use of waiver
- lengthy pre-trial detention and victimization in adult jail facilities
- increased likelihood of victimization among youth incarcerated in adult prisons
- perceptions and experiences of unfair processing and negative impacts on recidivism.

New research studies and evaluations are unlikely to yield additional knowledge, over and above the current body of largely descriptive studies, unless they are more closely coupled with information about the full range of possible impacts. Without this information, they also are unlikely to produce knowledge about how to improve the design and implementation of waiver to achieve intended impacts and minimize unintended ones. In addition, there are several additional issues, discussed below, that both policymakers and researchers must address if they are to help waiver laws to become consistent and effective.

A Coherent Rationale for Waiver

Judicial waiver was, until recently, the primary mechanism through which certain young

offenders could be processed in the criminal justice system (Dawson 2000). Politically, waiver served as a “safety valve for the juvenile courts, a way to provide for punitive treatment of adolescents but still preserve the programs and policies of the juvenile court” (Fagan and Zimring 2000:2).

The emergence of different waiver options has created, however, a great deal of confusion about what exactly waiver is supposed to do and how it is supposed to do it. One recent review of research identified, for example, few instances of “a coherent legal rationale underlying waiver processes in any particular court” (Harris, Welsh, and Butler 2000:405). A review of court appeals of juvenile waivers reinforces this view (Clausel and Bonnie 2000). Not only are waiver statutes highly variable across states, but the use of waiver and the reasons for employing it, are equally variable (Hamparian, Estep, Muntean, Priestino, Swisher, Wallace, and White 1982; Sanborn 1994; Feld 1999). In practice, for example, waiver appears to be differentially employed across racial/ethnic groups, males and females, and serious and less serious offenses, depending on the jurisdiction (Bortner, Zatz, and Hawkins 2000; Harris et al. 2000).

Critical questions about the rationale for waiver remain largely unanswered (Sanborn 1994). Is waiver needed because it helps remove youth who are “beyond rehabilitation” to avoid unnecessarily drawing resources away from youth who would benefit from available rehabilitative programming? If this is the justification, is it based on empirical information about the extent to which specific youth are “beyond rehabilitation” or the resources available in the juvenile justice system? What foundation is there for consistently identifying whether a youth is “amenable to treatment” (Grisso 2000)? If greater punishment is the underlying rationale, can waiver reasonably be expected to achieve this outcome? If not, why not employ blended sentencing approaches (Dawson 2000)? Is waiver needed primarily because even if

rehabilitation or greater punishment is available in the juvenile justice system the retention of certain youthful offenders there may undermine its political viability?

Answers to each question suggest quite different standards for waiver (e.g., the availability of punishment and resources in the juvenile justice system, an offender's amenability to treatment, the political impact of retaining certain youth in the juvenile justice system). These standards in turn suggest radically different criteria for assessing the effectiveness of waiver. Did a particular waiver law, for example, result in greater punishment or general deterrence, or did it help preserve the juvenile justice system?

Policymakers and practitioners need to develop a clearly articulated, logical, and theoretically grounded rationale for waiver, as well as a process for ensuring that this rationale is consistently expressed in practice. Otherwise, we will continue to expend considerable legislative and courtroom activity on an effort that may be far more inefficient and ineffective than doing nothing, or on an effort that with marginal tinkering could be considerably more efficient and effective than doing "business as usual."

Systems-Level Responses to Waiver

Dawson (2000:79) recently observed that the abundance of diverse waiver options "makes it difficult to assess the relative importance of judicial waiver today as a mechanism for sorting criminal from juvenile cases." He might well have noted that these options make it difficult to assess any of the types of waiver, whether judicial or non-judicial. The specific challenge raised by the many options lies in the fact that court sanctions occur within the context of a broader system, one that can be self-correcting, with changes in one part off-set by changes in another.

Moreover, the effects of waiver laws may be enhanced or inhibited by the near simultaneous enactment in many jurisdictions of blended sentencing laws and other juvenile justice reforms (Mears 1998b).

The question thus arises: What is the true impact of waiver laws on overall processing? Not much, according to Snyder, Sickmund, and Poe-Yamagata (2000). They studied Pennsylvania's transition in 1996 from employing judicial waiver to relying on legislative exclusion of youth age 15 and older charged with certain offenses or previously adjudicated for an excluded offense. The researchers found that many cases were transferred back to juvenile court through a decertification process or that in many instances prosecutors decided not to prosecute. Under the new law, the numbers, types, and outcomes of juvenile cases retained in adult court greatly resembled those under the previous system of judicial waiver. The difference was that a large number of younger offenders were initially processed through the adult system, and the process for achieving the same outcomes became considerably more complicated.

Similar patterns quite likely could be documented in almost all states that have enacted new waiver policies. Most in-depth studies of juvenile courts and systems document the integrated and inter-dependent nature of how cases are handled (e.g., Bortner 1986). Yet we know little about the precise ways in which juvenile justice systems have responded to waiver laws. Consider Florida, which witnessed a tremendous spike in waivers to adult court in the early 1990s, and was a subject of considerable study. In recent years, the use of prosecutorial direct files there has dropped precipitously, declining from 6,643 to 2,617 between 1996 and 2001, a more than 60 percent drop in a five year period (Florida Department of Juvenile Justice 2002). The lack of studies on systems-level responses to sentencing policies means that we have little foundation to understand such changes or to anticipate them.

The Utility of Waiver as a Symbol of Juvenile Justice Trends

One of the primary reasons that waiver has garnered considerable policy and research attention appears to be because it symbolizes debates about abolishing the juvenile court and, more generally, trends in juvenile justice. But to what extent does the study of waiver teach us anything about these debates or trends?

Scholars such as Barry Feld (2000) have argued convincingly that enactment of new and different waiver laws indicates a shift in juvenile justice from “individualized justice to just deserts, from offender to offense, from amenability to treatment to public safety, and from immature delinquent to responsible criminal” (p. 128-129). The broader cultural and legal shift is one of no longer seeing youth as “innocent, immature, and dependent children,” but instead viewing them as “responsible, autonomous, and mature offenders” (Feld 2000:129). Even a cursory review of many reforms in juvenile justice, such as offense-based sentencing guidelines and the reduced confidentiality of juvenile records, appears to support this view.

Yet the passage of waiver laws can also symbolize an endorsement of the juvenile justice system rather than support for its abolishment. It can, for example, signify a belief in the need to retain the integrity of this system by ensuring that the small number of extremely serious, violent, and unrehabilitatable youth (if such can be determined) are removed. Critics argue that transfer of youth to adult court necessarily undermines the integrity of the juvenile justice system. Others counter that it does not. Sanborn (1994:267), for example, has noted that such “challenges are unfair because they hold juvenile court accountable for the failures of criminal court and society.” Each view can be supported anecdotally or on logical or theoretical grounds,

but empirical studies documenting which view has more support remain few and far between.

At the same time, there have been many changes in juvenile justice that run counter to the “get tough” trend suggested by an analysis of waiver laws (Butts and Mears 2001; Mears 2002). Two of the most prominent examples are the development of graduated sanctions models that explicitly argue for balancing punishment and rehabilitation, and the emergence of specialized juvenile court models (e.g., drug, gun, mental health, and teen courts) (Guarino-Ghezzi and Loughran 1996; Butts and Harrell 1998). How exactly does waiver symbolize these trends? It might be argued that graduated sanctions models and specialized court models serve primarily to appear child-friendly while “in reality” emphasizing punishment. But such determinations should be made empirically, not rhetorically (Zimring and Fagan 2000:417).

In short, many recent reforms, such as waiver, reduced confidentiality of court records, and greater information-sharing among court and non-court systems, suggest a trend towards greater punitiveness. But whether that actually has resulted remains largely unknown, and there are many other reforms, such as those cited above, that suggest different, more child-focused trends.

Conclusion

During the past decade, almost every state enacted new waiver policies enhancing the options for transferring juvenile offenders to the criminal justice system. These policies represent a dramatic departure from the previous practice of giving judges the sole discretion to determine whether a youth should be waived to the jurisdiction of the adult court. As a result of these changes, many researchers conducted studies of waiver, the bulk of which examined the composition of waiver cases in specific jurisdictions. Their results suggest several broad patterns

that should concern policymakers: Waiver laws frequently are not used as designed, they have not on the whole achieved their intended effects, and they have been documented to result in many negative unintended effects.

Unfortunately, without systematic information about the full range of impacts, researchers are not well-positioned to provide general assessments about the effectiveness of waiver policies. The risk at present is that anyone can select a particular impact and use it to support his or her view. Clearly, the broad-based assessment points to a policy that appears to serve primarily as a political symbol of “getting tough” on juvenile crime. In some jurisdictions, intended impacts, such as greater punishment and reduced recidivism may have been achieved. Yet even in such cases, policymakers might well be concerned about potentially off-setting unintended impacts, such as net-widening and disparity in how waiver is applied to certain groups, such as racial/ethnic minorities. They also might be concerned that the primary use of waiver may be to plea bargain cases to juvenile court sanctions. This “unofficial” use of waiver is not reflected in the vast majority of studies that examine cases transferred to adult court. At the same time, it is important to emphasize that waiver may be quite effective in certain jurisdictions, depending on what impacts are most relevant in specific court and justice systems.

In addition to more systematically assessing the intended and unintended impacts of waiver policies, two critical challenges confront those who wish to place waiver policies on a more solid foundation. The first consists of developing a more coherent rationale for waiver, and then ensuring that this rationale is implemented consistently. The second consists of developing a greater understanding about how exactly systems-level responses and adjustments may affect the implementation and impacts of waiver. For researchers, there is an additional challenge: If we are to provide a balanced and empirically informed assessment of juvenile justice trends, it is

critical to establish, rather than assume, that waiver policies accurately reflect these trends. To date, many scholarly reviews treat this relationship as a given. Although it may be true, many recent initiatives in juvenile justice, such as specialized courts, suggest otherwise.

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