The Court’s Effectiveness in Protecting the Rights of Juveniles in Delinquency Cases

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Abstract

During the 1960s and 1970s, the Supreme Court issued a number of decisions guaranteeing certain procedural rights to juveniles. This article assesses the impact of these decisions on the actual practices of the delinquency jurisdiction of the juvenile court. Studies show that, by and large, the procedural mandates have not been met. A key example is the fact that a significant percentage of juveniles still do not receive effective legal representation.

This article also explores the potential disadvantages to juveniles of no constitutional right to a jury trial in juvenile court, waivers into the adult criminal court system, and diversion programs. Because of the juvenile court’s resistance to reform, a number of juvenile justice scholars are advocating the abolition of its jurisdiction over delinquency cases. The article concludes with various viewpoints on this current controversy.

Historically, the juvenile court system was premised on two fundamental beliefs about young people who violated the law. One was that young people were both cognitively and morally undeveloped so that they should not be considered fully responsible for their offenses. The other was that young offenders were particularly malleable and therefore susceptible to moral and social rehabilitation. Thus, it was the mission of the juvenile court to accomplish the rehabilitation of the juvenile law-breaker and so prevent future criminal behavior. In furtherance of this mission, juvenile court adjudicatory hearings were, in contrast to criminal trials, designed to be informal proceedings grounded in the well-established doctrine of parens patriae, which gave the state authority over the custody and control of children who lacked proper parental care. The crux of the traditional juvenile court hearing was the disposition, or sentencing of the youth, rather than the adjudication, or trial to determine the youth’s innocence or guilt. Therefore, hearings in juvenile court focused less on whether
the juvenile had violated the law on the occasion in question and more on the social and moral condition of the offender and how best to reform his or her deviant behavior. To that end, juvenile court judges had almost unlimited discretion both in adjudicatory practices and in dispositional sanctions.

Beginning with the *In re Gault* decision in 1967, however, the Supreme Court began to impose procedural due process requirements on juvenile court adjudication. These requirements were designed to ensure that juveniles accused of crimes would have an opportunity to contest the allegations meaningfully. Among the procedural rights that *Gault* held were constitutionally necessary in juvenile court delinquency hearings were the right to notice of the charges, the right to counsel, the right to cross-examine the witnesses against the accused, and the privilege against compelled self-incrimination. Later cases expanded the list of mandated procedural guarantees to include the requirement that prosecutors prove delinquency charges beyond a reasonable doubt and the prohibition against subsequent retrial in adult criminal court under the double jeopardy clause of the Fifth Amendment. As a result of these constitutional requirements, adjudication in juvenile court came to more closely resemble ordinary criminal trials. Influenced by the change in attitude by the Supreme Court, states enacted statutes and court rules that went even further than the Supreme Court explicitly required in conforming juvenile court practices and procedures to those of criminal trials. With the notable exception of the absence of jury trial in most jurisdictions, today the prescribed procedures for juvenile court delinquency hearings parallel those for criminal trials of adult defendants.

Nearly three decades have passed since *In re Gault*; it is time to assess the legacy of the due process revolution in the delinquency jurisdiction of the juvenile court. This article will examine the extent to which the procedural due process protections mandated by case law and court rule are actually observed in the day-to-day operations of the juvenile court and their effectiveness in protecting the substantive right of accused juveniles to fair and impartial trials. It will also review two unique features of juvenile court case processing—namely, waiver or transfer to adult criminal court and diversion from the regular court process—and their impact on the rights of the juveniles involved. Finally, this article will explore arguments for and against the abolition of the separate delinquency jurisdiction of the juvenile court.

**Procedural Due Process and the Contemporary Juvenile Court**

The due process revolution initiated by *In re Gault* did radically transform the structural nature of the juvenile courts. However, it is not clear the degree to which this due process revolution has changed the actual day-to-day practices of the parties participating in juvenile court adjudication, many of whom have been overtly hostile to the
imposition of formal procedural due process requirements. Studies of the juvenile courts conducted in the decade following the Gault decision concluded that the procedural reforms of Gault and its progeny have not been effective in guaranteeing young offenders fair trials on the same terms as those accorded to adult defendants. However, the results of these early studies have been questioned on the theory that the far-reaching changes mandated by Gault would inevitably take time to implement fully and that research in the first decade or so after Gault would not accurately reveal the extent of its ultimate success in transforming juvenile court practice.

Nevertheless, more recent studies of the juvenile court confirm the findings of the earlier ones. Empirical and evaluative research, as well as survey research, indicate that the system today has failed to deliver the procedural justice promised by Gault. For example, in a 1994 survey of 100 juvenile court judges, lawyers, and probation officers, a majority of the interviewed respondents, including nearly half of the juvenile court judges, described judicial conduct that they believed sometimes compromised the abilities of the juvenile defendants to get a fair trial. This conduct included forcing unprepared parties to proceed with trial or a guilty plea, interrupting the lawyers’ witness examinations with their own questions, and cutting off the lawyers’ questioning. Two-thirds of the surveyed court workers noted that juvenile court judges often had knowledge before trial of the accused juvenile’s prior criminal record and of the recommended disposition from the probation officer, and a majority of the respondents thought that this knowledge created a bias in the judge against the juvenile.

Despite the requirement that guilt be proven beyond a reasonable doubt, almost half of the respondents maintained that juvenile court judges found juveniles guilty even when the evidence did not meet that standard. More than a third of the surveyed participants felt that juvenile court judges admitted evidence that should have been excluded under the rules of evidence. Many respondents observed that juvenile court hearings were conducted too quickly, that the atmosphere was not serious enough, and that the treatment orientation of juvenile court personnel—including judges, prosecutors, and defense counsel—interfered with the accused juvenile’s ability to have a fair trial. Sanborn’s study, acknowledging that adult defendants do not always receive mandated procedural justice, nonetheless concluded that the procedural deficiencies of the juvenile court system were worse than those of the adult system.

The Unfulfilled Promise of the Right to Counsel

The procedural mandate in Gault which held the greatest potential to change the nature of the traditional juvenile court process was the accused juvenile’s right to the assistance of defense counsel to safeguard his or her legal interests. In spite of this clear constitutional guarantee, however, the right to counsel remains underrealized. Numerous local studies across the nation show large percentages of juveniles, particularly those in nonmetropolitan juvenile court systems, waiving their right to counsel. For example, a 1988 survey of rates of representation in six states found that a surprisingly large percentage of juveniles go unrepresented by counsel. In three of the states surveyed, 53% or fewer of all juveniles charged with crimes were represented by counsel. A major national study encompassing urban, suburban, and rural court systems found that, in one-third of these systems, some significant proportion of juvenile defendants waive their right to counsel. And, despite evidence suggesting that juveniles are generally less able than adults to understand and effectively exercise their constitutional rights, juvenile court judicial inquiries into the adequacies of the waiver process were frequently less thorough than comparable inquiries in the adult criminal system, or were absent altogether.

Juveniles who are not represented by counsel are not likely to exercise their other
procedural rights effectively. They are severely hampered in their ability to contest the charges against them, to challenge their detention, and to propose alternatives to the dispositions advocated by the prosecution. As the Supreme Court has noted, "The right to representation by counsel is not a formality. . . . It is of the essence of justice." Given the importance of the right to representation, it is difficult to justify allowing juveniles to waive this right under any circumstances, even indulging in the questionable assumption that they do so voluntarily and intelligently.

Even when juveniles do have lawyers to represent them, the quality of the advocacy they receive is too often deplorable. For example, a study of the New York juvenile courts commissioned by the state bar criticized almost every aspect of the representation received in juvenile court, concluding that only 4% of the lawyers in juvenile court provided effective assistance of counsel to their clients. Similarly, the 1994 Sanborn study found that the vast majority of juvenile court personnel thought that defense counsel often failed to display an appropriately adversarial stance to zealously represent their clients, adopting instead a more compliant, guardianlike role. Many of the interviewees expressed skepticism about the quality of legal defense available to juveniles, finding public defenders too overworked and private lawyers too inexperienced to provide effective assistance of counsel. Privately retained counsel came in for particularly harsh criticism: they were accused of paying too much attention to the opinions of the clients’ parents, not taking the juvenile proceedings seriously, and not fighting for their clients’ interests. Sanborn concluded that the parens patriae ideology, which still prevails in juvenile court, contributes to an atmosphere that makes it difficult for young offenders to receive effective assistance of counsel.

The comprehensive study recently completed under the auspices of the American Bar Association’s Juvenile Justice Center likewise is strongly critical of the quality of representation received by many juvenile defendants. This study indicated that, despite the good intentions and dedication of most juvenile defenders, their ability to represent their clients effectively was often drastically undermined by huge caseloads, which made it difficult to find time to meet and consult with their clients, conduct factual investigations of the cases, prepare pretrial briefs and motions, and develop dispositional alternatives to secure confinement. Training of juvenile defenders was seriously inadequate: half of the surveyed defenders’ offices provided no training for newly hired lawyers, more than three quarters had no budget for ongoing training programs, and nearly half lacked even a training manual for lawyers practicing in juvenile court. The overall atmosphere of the juvenile court, or what the study termed the “courthouse culture,” discouraged aggressive advocacy on the part of juvenile defenders. Vigorous defense advocacy was “not widespread, or even very common.” The study concluded that, although some juveniles do receive high-quality legal representation, many currently do not have access to effective legal representation in the juvenile court system.

**The Limits of the Due Process Revolution—Jury Trial**

The Supreme Court in the *Gault* case expressed skepticism that the ostensible benefits of the traditional juvenile court system justified denial to juveniles of the basic procedural due process rights accorded to adult defendants. Nevertheless, the Court pulled back from enforcing complete procedural parity between the adult and juvenile systems in *McKeiver v. Pennsylvania* holding that juveniles charged with crimes were not entitled to jury trials. Although several states do permit jury trials in juvenile court, a large majority have opted to deny juveniles that right.

Denial of the right to trial by jury hurts juveniles accused of crime in several ways. First and foremost, juries acquit more readily than do judges, so juveniles are more likely to be convicted than if they could opt for...
There are a number of reasons juries are more likely to acquit than judges. Judges, particularly in high-volume courts such as juvenile court, hear hundreds, even thousands, of cases a year, compared with the one or two that jurors hear during their service. Having to sit on so many cases, judges may become less careful in weighing the evidence and more cynical in evaluating the credibility of the juveniles who appear before them. This is all the more likely when they know before trial of the juvenile’s prior record, have heard the motion to suppress a confession, or have read the probation officer’s report on the juvenile’s social background.

In addition, the parties in a jury trial have an opportunity to exclude jurors whose personal biases may prevent them from fairly trying the case. Jurors undergo voir dire examination, in which the litigants may probe to determine whether any juror’s attitudes, experiences, or beliefs might adversely affect the way in which he or she would hear the case. No comparable opportunity exists to inquire into potential bias or prejudice by the judge in a bench trial.

Denial of the right to jury trial disadvantages juveniles even after the fact-finding stage. In a jury trial, jurors must be explicitly instructed in the law to be applied in the case by the trial judge through written jury instructions. Any error of law can be later reviewed by an appellate court. However, when a judge sits without a jury, she need not expressly articulate her understanding of the law; therefore, the appellate court has no way of determining whether the juvenile court judge misunderstood or misapplied the law to the juvenile’s detriment. Thus, depriving juveniles of jury trial puts them at a double disadvantage compared with adult defendants: they are more likely to be convicted at trial and are less likely to be able to demonstrate an error of law on appeal. Even those juveniles who do not go to trial suffer from their inability to request a jury trial. As many commentators have pointed out, most defendants—adult and juvenile alike—do not go to trial. Instead, they plead guilty. In the course of plea bargaining, the possibility that a defendant will elect to exercise the constitutional right to a jury trial is a potent bargaining chip, often the only one the accused has.

Transfer of Juveniles to the Adult Criminal Justice System

From its inception, the juvenile court system recognized that some incorrigible juvenile offenders might not respond to the rehabilitative dispositions utilized by the juvenile court. Juvenile court judges have generally had the discretionary power to waive juvenile court jurisdiction over such cases, thereby transferring them to the adult criminal court system. This practice, seldom used in the past, has increased dramatically in the past two decades.

Once reserved for the “worst” juveniles—those with lengthy records charged with the most serious offenses—waiver is being used more and more frequently to transfer juveniles who are accused of committing lesser offenses or who have little or no prior record. Numerous studies show that property offenders outnumber violent offenders among juveniles transferred into the adult system. Furthermore, as many as 25% of waived juveniles are first-time offenders.

In addition to discretionary judicial waivers, some jurisdictions now allow for prosecutorial waivers in which the prosecutors themselves have the power to send certain youths directly to adult court without a judicial hearing on the issue. The decision to exercise this option is unreviewable and final. In contrast, a judicial waiver in which the judge decides to waive juvenile court jurisdiction can, at least in theory, be appealed. As a practical matter, however, the judge’s ruling is final, since an appeal can seldom be heard before the offender “ages out” of the juvenile court system.

In recent years, many jurisdictions have passed mandatory waiver statutes that require the automatic transfer of certain juveniles into the adult system. Typically,
these mandatory legislative waivers apply to youths charged with serious or violent felonies. In some states, these waivers automatically transfer accused juveniles over a certain age to adult court.

One of the reasons for enacting mandatory waiver provisions was a belief that certain juveniles felt free to commit serious offenses in the knowledge that they would face only the relatively lenient sanctions of the juvenile court. Automatic waiver for serious offenses, it was hoped, would deter such offenders from committing the crimes in the first place. However, in the late 1980s, the first major empirical studies to test this proposition found no change in the rate of serious juvenile offending in the years following the adoption of automatic waiver statutes. This finding suggests that the prosecution of juveniles as adults has little if any deterrent effect on criminal behavior.\textsuperscript{36}

Waiver procedures mandated by statutes have greatly contributed to the escalation in the rate of juvenile transfers. For example, the number of juveniles tried as adults in Cook County, Illinois, more than tripled after Illinois enacted an automatic transfer provision for certain serious offenses.\textsuperscript{37} The number of juveniles transferred as a result of mandatory waiver statutes is likely to continue to increase. Political pressure to get tough on crime—often triggered by a highly publicized criminal act or episode—tends to encourage legislators to expand the list of crimes subject to mandatory waiver.\textsuperscript{38}

Although the increasing waiver of juveniles into the adult criminal justice system is premised on a desire to get tough with young offenders, it is not clear whether juveniles tried as adults do, in fact, receive more severe sanctions than they would have if retained in the juvenile system. Several studies have determined that juveniles sentenced as adults receive lesser sentences than actual adult offenders with comparable records and offenses.\textsuperscript{39} Some researchers have even concluded that offenders waived into the adult system not infrequently receive lighter sanctions than they would have received had they remained in juvenile court.\textsuperscript{40} One explanation for this surprising finding is that, because a growing proportion of transferred juveniles are property offenders, they are the kind of offenders who typically get probationary or short jail sentences in adult court. For example, one 1989 study found that the percentage of transferred juveniles receiving probation as the sanction in adult court rose from 40\% in 1980 to 62\% in 1988 as a result of the increasing number of transferred juvenile property offenders.\textsuperscript{41} In addition, conviction is more difficult in adult court, so that a greater proportion of cases transferred to adult court are dismissed or end in acquittals.\textsuperscript{42} (For more information about waivers, see the articles by Snyder and by Greenwood in this journal issue.)

**Diversion as an Alternative to Formal Delinquency Proceedings**

The juvenile court’s procedures have become increasingly formal in the decades since the *Gault* decision. As a result, a renewed interest has developed in the use of diversion as a way to provide an informal alternative to formal criminal processing of cases involving relatively minor misbehavior by youths.

The Juvenile Justice and Delinquency Prevention Act of 1974\textsuperscript{43} increased the amount of federal funding available for the development of local diversion programs. While the details of their administration differ across locales, most diversion programs are community-based programs operated by nonprofit organizations and by juvenile court probation and other governmental agencies. They provide social services and supervision to at-risk youths without the stigma of their being adjudicated as a delinquent.\textsuperscript{44} They encourage compliance on the part of the targeted youths with the implicit threat that uncooperative youths might be formally referred to the juvenile court for more intrusive means of control.

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Diversion programs have the potential to be a cost-effective response to problems of minor offending by youths because they
avoid the considerable costs of court resources and counsel required by formal adjudication. Cost savings occur, however, only when the diversion program is handling cases that otherwise would have been processed in formal delinquency hearings. Considerable evidence suggests that diversion actually operates to “widen the net” of social control. In the absence of the diversion program, many diverted youths would not have been subject to juvenile court processing at all.45 In any event, the very strengths of diversion—informality, flexibility, and absence of constraints due to lack of judicial review—raise pressing questions of accountability and potential for arbitrariness and abuse.

**Is a Separate Juvenile Court Still Justified?**

Much has changed in juvenile court procedures and practice in the 30 years since the Supreme Court observed that the young offender receives “the worst of both worlds: he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”46 Nevertheless, as described above, juveniles accused of crime still do not receive the same caliber of procedural justice as do adult defendants. Some juvenile court scholars are skeptical about whether a separate juvenile court system can ever achieve procedural justice equivalent to that of the adult court system. For example, Barry Feld concludes, “After more than two decades of constitutional and legislative reform, juvenile courts continue to deflect, co-opt, ignore, or absorb ameliorative tinkering with minimal institutional change.”47 Because of this intractability of the juvenile court to meaningful reform, Feld and others advocate the abolition of juvenile court delinquency jurisdiction and replacement by a unified criminal court system for all age defendants.47,48

To the extent that the procedural deficiencies of the juvenile court are a product of a paternalistic *parens patriae* ideology that continues to affect the behavior of lawyers and judges in juvenile court, the abolition of a separate juvenile court delinquency jurisdiction would help to eliminate these shortcomings. In particular, lawyers practicing in a unified criminal court system would be less likely to adopt the nonadversarial guardianship role in representing young clients, since they would no longer have the supporting rationale that the prosecution was, after all, “just” a juvenile court case. Similarly, the right to jury trial in a unified criminal court system would prevent the kind of perfunctory trials that are all too common in juvenile court.49 In a jury trial, the accused would be found guilty only when the evidence showed
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guilt of the offense charged and not because the judge recognized the accused as a repeat offender\textsuperscript{11} or thought that the accused could benefit from the disposition proposed by the state.\textsuperscript{49}

Although the creation of a unified criminal court system would have significant procedural advantages for young offenders, it would not be without its costs. Particularly for violent crimes, sentences meted out in the adult system are generally longer than in the juvenile system so that a unified criminal court system might expose certain young offenders to more severe sanctions than those faced in a separate juvenile court system. Those who advocate the creation of a unified criminal court system have consequently urged that youth and immaturity be considered a mitigating factor in sentencing.\textsuperscript{6,37} In the current get-tough political climate, it is by no means certain that such mitigation would occur.

A less tangible, but no less real, negative consequence of abolishing the delinquency jurisdiction of the juvenile court would be the loss of its perceived symbolic import. Because the juvenile court was based on the idea that juvenile offenders were uniquely salvageable, the abolition of juvenile court might be seen as a recognition that society no longer believes it can save juveniles or, indeed, that they are even worth saving. If the abolition of the delinquency jurisdiction of the juvenile court were to be seen as a sign of despair, then the potential benefits of a unified criminal court system would be unlikely to be realized.

\textbf{Conclusion}

The future of the juvenile court is uncertain, given its continued procedural shortcomings, and it is unclear whether reform or abolition offers the greatest hope of finally accomplishing the procedural justice promised by \textit{Gault}. What is clear is that achieving procedural justice for juveniles means taking seriously the challenges of providing fair processes and adequate resources for adjudicating criminal charges and of developing dispositional practices that serve the needs of offenders and of society at large. In the end, this means rethinking the nature, not only of the juvenile justice system, but also of the criminal justice system as a whole.

7. See, for example, Springer, C.E. Rehabilitating the juvenile court. \textit{Notre Dame Journal of Law, Ethics and Public Policy} (1991) 5:397–420. Judge Springer is sharply critical over what he calls “Gaultamania,” which he defines as the criminalization and overformalization of the juvenile court. The cause of “Gaultamania,” as he sees it, is the appointment of counsel to contest the charges against juveniles, who, he notes, are mostly guilty in any event. See also Bogen, D.O. Beating the rap in the juvenile court. \textit{Juvenile and Family Court Journal} (1980) 31:19, criticizing defense lawyers who are more intent on securing acquittals than on cooperating with the court in rehabilitation efforts.
9. Feld, B.C. Violent youth and public policy: A case study of juvenile justice law reform. *Minnesota Law Review* (1995) 79:965–1128. Professor Feld, without doubt the most prolific legal scholar of the juvenile justice system, concludes that many young offenders today “do not receive even the limited procedural justice that *Gault* envisioned. . . . [M]ost states do not provide youths with either procedural safeguards equivalent to those of adult criminal defendants or with special procedures that more adequately protect them from their own immaturity.”

10. Sanborn, J.B. Remnants of *parens patriae* in the adjudicatory hearing: Is a fair trial possible in juvenile court? *Crime & Delinquency* (1994) 40:599–615. This study surveyed the judges, lawyers, and probation officers of one urban, one suburban, and one rural juvenile court system within the same state.

11. See note no. 10, Sanborn, p. 604. Sanborn observed that most of the respondents who felt that judges applied reduced standards for conviction in juvenile court also believed that they did so from a desire to “help the children.”


13. U.S. General Accounting Office. Report to the Committee on the Judiciary, U.S. Senate, and the Committee on Economic Opportunity, U.S. House of Representatives. *Juvenile justice: Representation rates varied as did counsel’s impact on court outcomes*. GAO/GGD-95-139. Washington, DC: GAO, 1995, pp. 14–15 (government-sponsored survey of 15 selected states finding varying rates of representation, with rural youths less likely to have counsel than urban youths—for example, in Pennsylvania rural offenders were twice as likely to be unrepresented as urban offenders, and Nebraska’s rural offenders were four times more likely to be unrepresented than its urban offenders); Clarke, S.H., and Koch, G.G. Juvenile court: Therapy or crime control, and do lawyers make a difference? *Law and Society Review* (1980) 14:263–308 (finding 22.3% of juveniles in Winston-Salem and 45.8% in Charlotte, North Carolina, represented by lawyers); see note no. 8, Bortner (finding 41.8% represented in an urban midwestern county); Feld, B.C. Justice by geography: Urban, suburban, and rural variations in juvenile justice administration. *Journal of Criminal Law and Criminology* (1991) 82:156–210 (finding 45.3% represented in Minnesota, with rural juveniles far less likely to have counsel than urban offenders); Aday, D.P. Court structure, defense attorney use, and juvenile court decisions. *Sociological Quarterly* (1986) 27:107–19 (finding 26.2% and 38.7% represented in two southeast juvenile courts); see also note no. 8, Walter and Ostrander (finding 32% represented in a large northern city). But see note no. 10, Sanborn, p. 603 (finding that, in the three juvenile court systems he studied, nearly all juvenile defendants were represented by counsel).


15. See note no. 14, Feld, *In re Gault* revisited, p. 401. The exact percentages were as follows: 52.7% in Nebraska, 47.7% in Minnesota, and 37.5% in North Dakota.


19. For these reasons, the juvenile court standards proposed by the Institute of Judicial Administration, American Bar Association recommended that the right to counsel for juveniles be nonwaivable. Institute of Judicial Administration, American Bar Association. *Juvenile justice standards: Pretrial court proceedings*. Cambridge, MA: Ballinger, 1980, Standard 6.1(a). The recent ABA-sponsored study of juvenile court practices and procedures echoed this recommendation. See also note no. 16, Puritz, Burrell, Schwartz, et al., p. 69.


22. See note no. 16, Puritz, Burrell, Schwartz, et al., pp. 41, 51. For example, one lawyer noted that, in her 16 years of juvenile court practice, she could count on one hand the number of trials she had conducted.


24. States permitting juveniles to elect jury trials include Alaska, Colorado, Kansas (for felonies only), Michigan, Minnesota (for extended jurisdiction cases), Montana, New Mexico, Oklahoma, Tennessee, Texas, West Virginia, Wisconsin, and Wyoming.


27. Terminology used for this practice varies from jurisdiction to jurisdiction, including such terms as transfer, bindover, certification, remand, and declination, as well as waiver.


29. For an exhaustive treatment of both the historical practice and contemporary developments in judicial waiver of juvenile court jurisdiction, see Feld, B.C. *The juvenile court meets the principle of the offense: Legislative changes in juvenile waiver statutes*. *Journal of Criminal Law and Criminology* (1987) 78:471–533. For a compendium of the state statutes controlling the use of judicial waiver, see note no. 28, Fritsch and Hemmens, pp. 24–28.


32. See note no. 30, Bishop and Frazier, p. 296. For other studies finding that many waived juveniles lacked significant prior criminal records, see note no. 31, Bortner, and Osbin and Rode.

33. For an unfavorable evaluation of prosecutorial waiver, see note no. 30, Bishop and Frazier. For a more positive assessment of this practice, see McCarthy, F.B. *The serious offender and juvenile court reform: The case for prosecutorial waiver of juvenile court jurisdiction*. *St. Louis University Law Journal* (1994) 38:629–71.

34. See *Cox v. United States*, 473 F.2d 334 (4th Cir.), cert. denied 414 U.S. 869 (1973) (holding that prosecutorial decision to charge a juvenile in adult court was not subject to appellate review).

35. See note no. 28, Fritsch and Hemmens, pp. 29–31 (canvassing state statutes providing for automatic waiver of juvenile court jurisdiction).


40. See, for example, Kinder, K., Veneziano, C., Fichter, M., et al. A comparison of the dispositions of juvenile offenders certified as adults with juvenile offenders not certified. *Juvenile and Family Court Journal* (1995) 46:37–41. This study examined a sample of juvenile defendants in St. Louis, Missouri, in 1993. After controlling for factors such as age, race, seriousness of the offense, and prior record, this study found that a juvenile was more than three times more likely to be incarcerated in juvenile court than in adult court (6.3% of juveniles waived into adult court were incarcerated, 20.7% of those remaining in juvenile court were sentenced to confinement).

41. See note no. 30, Champion. Other surveys have produced similar statistics. See, for example, note no. 31, Bortner; see also Greenwood, P. Differences in criminal behavior and court responses among juvenile and young adult defendants. In *Crime and justice: An annual review of research*. Vol. 7. M. Tonry and N. Morris, eds. Chicago: University of Chicago Press, 1986; Hamparian, D.M., Estep, L.K., Muntean, S.M., et al. *Youth in adult courts: Between two worlds*. Washington, DC: Office of Juvenile Justice and Delinquency Prevention, 1982; note no. 31, Gillespie and Norman. But see note no. 31, Houghtalin and Mays, finding that juveniles tried as adults in New Mexico receive longer sentences than they would have in juvenile court. This result is consistent with their determination that waiver in New Mexico is infrequently used and largely confined to serious violent offenders. In this regard, waiver practice in New Mexico would appear to fly in the face of the national trend toward more expansive and liberal use of the waiver procedure.

42. See note no. 40, Kinder, Veneziano, Fichter, et al., pp. 39–41, noting that 36% of cases transferred to adult court had been taken under advisement, and an additional 29.7% were in pending status, and that most of these cases would ultimately be dismissed. In contrast, nearly all of the cases retained in juvenile court had been fully adjudicated, with 26% dismissed.


49. See note no. 10, Sanborn, p. 613, noting that jury trials would discourage “sloppy performances by judges and defense attorneys perpetrated within a private, laissez-faire atmosphere” of juvenile court bench trials.