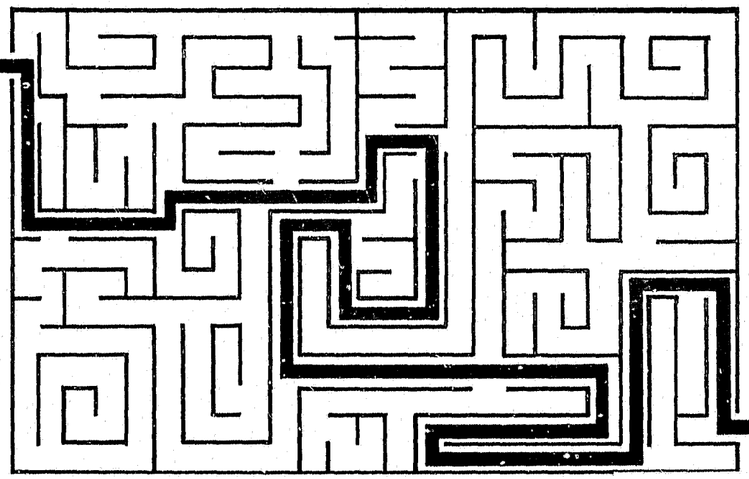
THE DEBATE

WHAT CRITERIA DETERMINE IF A JUVENILE OFFENDER SHOULD BE TRANSFERRED INTO THE ADULT JUSTICE SYSTEM?



SHOULD SERIOUS JUVENILE OFFENDERS BE HANDLED BY A SEPARATE JUVENILE JUSTICE SYSTEM?

INFORMATION BULLETIN 5
JUNE 1983

eration for Community Planning

THE PROBLEM

Juveniles *are* responsible for a significant amount of serious crime; they account for 17 percent of arrests for violent and 39 percent of arrests for serious property offenses in Ohio.

The public, elected officials and our community institutions are rightly concerned about the level and impact of serious crime by juveniles.

However, it may be useful to know that:

- a disproportionate amount of serious crimes are committed by *repeat* juvenile offenders.
- there is no evidence of a pattern of increasingly serious offenses by juveniles who start off involved in relatively less serious acts.
- arrest figures tend to overstate juvenile crime because juveniles often commit crimes in groups and tend to be apprehended more frequently than adults.

Juvenile courts and the Juvenile Justice System were developed in Ohio and across the nation based on the belief that juveniles should be treated differently than adults with regard to prosecution and sentencing for criminal offenses.

Juvenile justice systems across the nation are being criticized for not rehabilitating our youth and not reducing juvenile crime. Social pressures to "get tough" are leading to varied efforts to deal with the serious juvenile offender in the adult, rather than juvenile, justice systems. Questions are being raised as to whether the right approaches are available or used to insure the effective control and treatment of serious juvenile offenders.

A youth who has committed a violent offense is not necessarily violent and the youth who has committed a serious property offense is not necessarily a serious criminal. But effective intervention for both groups is critical for heading off repeated involvement in crime. *Getting tough is not enough.*

ONE RESPONSE:

The Federation for Community Planning has begun the Ohio Serious Juvenile Offender project. One of the Project's activities is to provide public and professional education on public policy issues regarding juvenile justice in Ohio. This booklet is the second report to eminate from the project. More information about the Ohio Serious Juvenile offender project can be found on the back cover.

About the Federation...

The Federation for Community Planning engages in action-oriented research, planning, and community education in health and human services. It works on a variety of different problems in Greater Cleveland and across the State of Ohio. Founded in 1913, the Federation is a non-profit, citizen-led organization that numbers more than 200 health, social service and civic organizations as members.

FEDERATION FOR COMMUNITY PLANNING
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THE DEBATE

Should Serious Juvenile Offenders Be Handled By A Separate Juvenile Justice System?

or

What Criteria Determine If a Juvenile Offender Should Be Transferred Into The Adult Justice System?

THE PARTICIPANTS:

MODERATOR: Mr. Thomas Chema
PRO POSITION: Mr. Joseph White
CONTRA POSITION: Mr. Barry Feld

FEDERATION for COMMUNITY PLANNING
Cleveland, Ohio
March 8, 1983

This debate took place on March 8, 1983 at the 41st Health and Human Services Institute, Stouffer's Inn on the Square, Cleveland, Ohio.

The Institute is an annual one-day event which brings together more than 1,000 volunteers and staff from health and social service agencies, government officials, planners, funders, and civic leaders. It is sponsored by the Federation for Community Planning. In addition to this session, workshop topics included health care, community involvement in education, mental health policy, hunger, and marketing human services.

Frances M. King, vice president of the Federation, chaired the program.

THOMAS V. CHEMA
Attorney at Law

Mr. Chema, partner Arter & Hadden, is Director of the Ohio State Lottery. Mr. Chema is an active member of Judge Burt Griffin's Task Force on Violence in Cleveland and Co-chairs the Sub-Task Force on Juvenile and Domestic Violence.

BARRY C. FELD
University of Minnesota
Minneapolis, Minnesota

Mr. Feld is a Professor of Law at the University of Minnesota. He has been Assistant County Attorney, Criminal Trial Division and Juvenile Division for Hennepin County, Minnepolis, Minnesota.

From 1970 to 1972 he was Project Director of the Center for Advancement of Criminal Justice, Harvard Law School.

Mr. Feld holds a BA in Psychology and PhD in Sociology from the University of Pennsylvania. His Juris Doctor degree is from the University of Minnesota.

His publications include: Law and Society: Sociological Perspectives on Criminal Law (with J. Inverarity and P. Lauderdale) (Little, Brown & Co.) Neutralizing Inmate Violence: Juvenile Offenders in Institutions (Ballinger Publications, Cambridge, Mass.)

JOSEPH L. WHITE
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Mr. White is President of The Academy, Inc., a private not-for-profit company operating as a national center for social research. Among its clients are the U.S. Office of Juvenile Justice and Delinquency Prevention, the U.S. Bureau of Justice Statistics, the National Coalition to Prevent Shoplifting and the Ohio Youth Services Network.

Mr. White was formerly Director of the Ohio Youth Commission and for seven years was a Senior Fellow in Social Policy for the Academy for Contemporary Problems. a national public policy research center. From 1971 to 1974 Mr. White was a Deputy Director of the Ohio Department of Urban Affairs as State Criminal Justice Planning Agency Director.

He received his BA, Juris Doctor and MSW from Ohio State University. He is a Permanent Consultant to the Council of State Governments and a consultant to various state governments and the U.S. Department of Justice.

INTRODUCTION

The Serious Juvenile Offender Project of the Federation for Community Planning has transcribed this debate on the principal topic: Should Serious Juvenile Offenders be Handled by a Separate Juvenile Justice System? to give wider exposure to the issues discussed at the Federation's Health and Human Services Institute in March, 1983. The debate, by two individuals highly regarded and widely known within the field of juvenile justice policy development, also covered the question of "What Criteria Determines if a Juvenile Offender Should be Passed Into the Adult System?" and ancillary issues raised by the community's concern about juvenile crime and ways of curbing it.

The debate issues are in the forefront today because of the general fear of crime, especially youth violence, and the widely held belief, correct or not, that the juvenile justice system is not performing its assigned task. The system, which emerged at the beginning of this century, is based on the principle that children who misbehave are to be treated differently than adults who violate the law. This treatment is to take the form of rehabilitation rather than punishment. The state substitutes itself for the parents by promoting the child's "best interests". The juvenile court procedures by which this intervention is accomplished are theoretically designed to be informal, nonpunitive and concerned with the needs of the offender, rather than society's need to penalize those who offend based on the characteristics of the offense and past behavior.

This system is under attack, as evidenced by the "contra" position taken by one of our debaters, Barry Feld. Those who join Mr. Feld argue that juvenile court jurisdiction should be abolished, at least for serious offenders. The reasons are that:

1. There is no real difference between serious offenders below a certain age, usually eighteen, and above that age. All the elements of the offense are the same.
2. Justice demands that those in similar situations be treated similarly.
3. The juvenile court subjects its clients to abuse because its informality leads to rights violations.
4. The court fails in its mission of rehabilitation.

Those who advocate that the juvenile court continue its assigned mission, a view represented by Joe White, argue that:

1. Most juvenile courts already have the option of transferring serious young offenders to adult courts if they are not amenable to rehabilitation in a youth setting.

2. Youthful offenders are, indeed, different from adult offenders.
3. The court does, in fact, often fulfill its mission.
4. The available alternative the criminal justice system, is just as likely or even more likely to fail.

There are other themes that arose in the course of this debate:

Should the legislature determine the offenses for which juveniles are tried at specified ages in criminal court or should juvenile court decide, on an individual basis, considering factors such as age or amenability?

Can or should juvenile judges predict whether a child is amenable to treatment or will continue to commit crime?

The issues addressed in this debate are those currently facing the court, our communities and those responsible for articulating our criminal justice policy. Their resolution will decide the shape of the court and juvenile justice system of the future.

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THE DEBATE

MR. CHEMA: Those of us concerned with the functions of our justice system have been looking forward with great interest to this afternoon's presentation. Our debate topic is: SHOULD SERIOUS JUVENILE OFFENDERS BE HANDLED BY A SEPARATE JUVENILE SYSTEM? This is a key question for the remainder of this decade.

Last year, some 77,000 persons were arrested in Ohio for violent crimes and serious property offenses. Of this total nearly one-third were juveniles.

Most were 16 or 17 year old boys from major metropolitan areas. Last year's statistics are not aberrational. Clearly, juveniles account for a disproportionate share of violent crimes and serious property offenses.

We have traditionally treated young offenders differently than adults in the United States. The approach to adults is basically punishment and if there are any resources left over, a pass is taken at rehabilitation.

With juveniles, however, the approach is more therapeutic and guidance-oriented. The rule is

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rehabilitation through supervision and providing "another chance" rather than incapacitation or deterrence.

During the last several years, public opinion seems to be shifting away from our more benevolent tradition and demanding that punishment be the rule for juveniles and adults alike. Some states have excluded certain offenses such as murder, from the jurisdiction of their juvenile courts or have lower ages for adult jurisdiction. The courts are more often waiving or binding over juveniles to the adult criminal justice system in some states.

This shift in public attitude cannot be ascribed completely to the demographic changes of the past decade. To a significant degree, the trend is due to a perception that the traditional method is not working. There appear to be more kids getting into trouble--and serious juvenile offenders keep getting in trouble.

WE PUT THESE QUESTIONS TO OUR SPEAKERS:

WHERE IS OHIO IN THE CONTEXT OF THIS NEW ATTITUDE TOWARD JUVENILE OFFENDERS?

ARE THERE CHARACTERISTICS OF JUVENILES THAT MAKE THEM SUBSTANTIVELY DIFFERENT FROM THOSE OVER 18 THAT JUSTIFIES A SEPARATE SYSTEM?

ARE THERE CHARACTERISTICS OF THE OFFENSES COMMITTED BY JUVENILES WHICH COMPEL A SEPARATE SYSTEM?

DOES, IN FACT, THE JUVENILE COURT SYSTEM BEST COPE WITH YOUNG OFFENDERS?

DOES THE PRESENT SYSTEM BEST PROTECT THE RIGHTS OF YOUNG PEOPLE WHO FALL INTO THE SYSTEM?

THE PRO POSITION: JOE WHITE

We are here today to discuss a very critical question--the challenge of the serious juvenile offender. As it's phrased, it sounds like a dare. Society has been challenged and it is up to society to respond. I suppose that's true. If we perceive a threat, we must react to it. If we feel that the serious juvenile offender threatens society, it is appropriate that we develop options to guarantee public safety.

But what if we look at the issue from a different perspective? If we begin by saying that there are certain advantages and disadvantages of living together in groups; that in exchange for increased survivability, socialization and acculturation, we pay prices measured in terms of increased exposure to alienation, pollution and crime. The challenge might then be viewed in a different light. How can we increase the benefits mentioned as much as possible, while reducing disadvantages?

"Crime, like pollution and alienation, is an inevitable condition which can be ameliorated through thoughtful and purposeful interaction."

I've come here today because I believe that most of you believe as I do--that children and youth, like the rich, really are different than you and me. Their perceptions of reality are different; the motives underlying their behavior are different; their understanding of the consequences of their actions are different; their views of the future (perhaps because they have so much of it to look forward to, or perhaps they have so little to look back on) are different; and the likelihood that destructive behavior can be changed is also different than older people.

I believe these differences are generally accurate perceptions of young people and constitute powerful bases for treating even serious criminal-like behavior by young people differently from those committed by people who have both the benefits and responsibilities of adulthood.

For those of you who may not be fully aware of Ohio's present laws and procedures, let me offer a few of its characteristics: First, the age of majority for most purposes, and certainly the age of criminal responsibility, is 18. We have a juvenile court in every county in the state as well as a criminal court system. The juvenile courts are a division of the Common Pleas bench. In some counties, they are combined with the duties of Domestic Relations or Probate Courts, or, as in Cuyahoga County, it is a separate juvenile court.

At the age of 15, a juvenile charged with a felony and brought to juvenile court may be waived to stand trial as an adult. In order to be waived, there must be a hearing. The court must also establish probable cause to believe that the child committed the act charged; that the act committed would constitute a felony if committed by an adult; that the court finds the juvenile not amenable to treatment as a child and the public safety requires that he/she be tried as an adult. If transferred to the adult system and convicted, the sanctions for adults are available and none of the juvenile sanctions are retained. In the juvenile court, the sanctions available to the juvenile court are, of course, available for those cases, no matter how serious the offense.

In Ohio, since November 1981, a juvenile only can be committed to the State Department of Youth Services if that individual has committed a felony. This is a radical change in Ohio's law and gives Ohio one of the most stringent laws regarding use of state facilities by local juvenile courts.

Another new provision in Ohio law is that once a juvenile is waived for a felony to the criminal court and the individual is convicted and receives the punishment of the adult system--that forever waives the juvenile into the adult system. It's a once-waived/always waived provision.

There are about 75,000 to 100,000 cases a year in Ohio of delinquency filed in Juvenile courts. About 4% to 5% represent serious violent crimes, 30% to 35% serious property crimes. About 200 to 300 youth per year are waived to the criminal courts. The rest are retained within the juvenile system and are handled in one way or another until their 18th birthday, some cases until they are 21.

Comparison with other states would suggest that waivers in Ohio are not overused. Looking at the waivers that take place, none occur in about half the

counties and most of the waivers understandably occur in counties with dense urban populations.

More than one-half of those youths waived to criminal courts have been to juvenile court more than twice. So, between the seriousness of the offense and the persistence of the behavior, it would seem that the need to remove a limited number of juvenile offenders from the juvenile system is being accomplished. The laws of Ohio have remained virtually unchanged in the past half century with respect to waivers. There have been some amendments made from time to time, but none of them radical.

"... even with my criticisms of the current system, I would still conclude that all types of juvenile cases should begin in juvenile court, where the court and not the legislature will decide, on a case-by-case basis, which juveniles should be tried as adults and which should remain in the juvenile system."

So the issue before us, inasmuch as Ohio is concerned, is not whether a new system should be adopted; it is whether an existing system should be abandoned. We must look at the performance of the juvenile system and evaluate it in terms of what we can predictably expect from another system.

There are a number of problems with Ohio's laws, in my opinion. To name one or two--if a juvenile is waived to criminal court there is no way of appealing the waiver order until after the conclusion of the criminal trial. Non-amenability to treatment--one of the criteria to waiver--is an amorphous term and should be better defined.

But even with my criticisms of the current system, I would still conclude that all types of juveniles cases should begin in juvenile court, where the court and not the legislature will decide, on a case-by-case basis, which juveniles should be tried as adults and which should remain in the juvenile system.

All methods proposed to date have advantages and disadvantages. The objective is neither perfection nor unerring justice. We seek what works best for the largest number of cases. The Ohio system, as it currently stands, seems to satisfy that criterion. Many of the issues raised are technical, legal issues which, while important, can be legislatively remedied and monitored by appellate courts.

Let me address two major criticisms of the juvenile justice system: namely the lack of predictability of amenability to treatment and the extent of discretion possessed by juvenile court judges.

The argument is that since we cannot accurately predict who will benefit from treatment, or even what constitutes treatment, we should not attempt to individualize decisions to retain or refer.

I put these questions to you:

HOW ARE WE BETTER OFF IF NO DISTINCTIONS ARE MADE BETWEEN SUCH JUVENILES?

ARE THE DECISIONS ABOUT AMENABILITY TO TREATMENT OR THE THREAT TO PUBLIC SAFETY ANY MORE DIFFICULT TO MAKE THAN THE ULTIMATE DECISIONS OF GUILT OR INNOCENCE?

RECOGNIZING THAT BAD DECISIONS ARE MADE BY JUDGES IN EITHER SYSTEM, AREN'T THEY NEVERTHELESS THE KINDS OF DECISIONS WE ELECT AND HIRE JUDGES TO MAKE?

I submit to you that while there are serious problems in the application of such tests, we don't require a major system overhaul--one which shifts thousands of current juvenile court cases into the criminal system.

The other issue, closely linked, is that of discretion. Discretion, according to the Supreme Court, must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. Therefore, it must be understood that decisions made by persons with the power of discretion may vary according to circumstances.

Discretion, as a statutory grant of power, does not seek predicted uniformity; it seeks justice within the context of time, space and individual circumstances.

"ARE THE DECISIONS ABOUT AMENABILITY TO TREATMENT OR THE THREAT TO PUBLIC SAFETY ANY MORE DIFFICULT TO MAKE THAN THE ULTIMATE DECISIONS OF GUILT OR INNOCENCE?"

The increased presence of defense counsel in juvenile courts and the correlative use of appellate review is an appropriate way of protecting arbitrary and capricious action. It is certainly preferable to eliminating the discretion.

Many of you might recall recently reading in the papers about a case in Florida in which a 6 year old child was brought to juvenile court because the child had assaulted another 6 year old. Under Florida law, the court has no discretion but to grant judicial waiver whenever the defendant requests it. The cagey defender moved for waiver of his 6 year old client to criminal court and the court had to grant it. The case of course, was thrown out by the criminal court.

Maybe it should have been thrown out by the juvenile court, but the fact is that lack of discretion led to an absurd result and I think our laws deserve better than that.

In closing, I would like to pose a final question to you. To abandon our current system in favor of trying all serious juvenile offenders in criminal court should result in a significant improvement in outcomes, one that advances society by better containing the problem. What is that improvement?

Thank you.

MR. CHEMA: Now taking the contra position is Barry Feld. Professor Feld does not view the problems of juvenile justice purely from an academic perspective. He routinely serves as a prosecutor in Minnesota, where he deals directly with juvenile and adult offenders. This, in connection with his significant contribution to the Juvenile Justice Standards Project, makes him a perfect counterpoint to the presentation made by Joe White.

THE CONTRA POSITION: BARRY FELD

We are dealing with the problem of what I call the "Two Percent", referred to as the 3,500 people in the entire City of New York who account for most of their problems. We're dealing with conflicting sentencing

"All questions of these sentencing policies are raised by the couple of hundred kids who are typically near the upper age limits of juvenile court jurisdiction, 16 or 17 year olds."

policies between the juvenile court, which is concerned with individualized, rehabilitative, offender - oriented treatment and criminal courts, which are much more offense and punishment oriented. All questions of these sentencing policies are raised by the couple of hundred kids who are typically near the upper age limits of juvenile court jurisdiction, 16 or 17 year olds. They're typically kids who have been through the system before--they're almost invariably recidivists. They are the youths we are discovering to be responsible for a very significant amount of delinquency and serious crime as well.

Now there are basically three alternative ways that a legal system can respond to this 1% or 2% of the youth population involved in frequent serious delinquencies.

The maximum age of juvenile court jurisdiction could be lowered, which would sweep 16 and 17 year olds into adult courts, which is a very wrong-headed, overly broad, blunt, crude way of dealing with a couple hundred kids.

The sanctioning power of juvenile courts can be increased by giving juvenile courts the authority to lock up particular individuals for longer periods of

time than currently available within the system. Increasing the sanctioning power of the juvenile courts is a bad idea, because the juvenile courts are procedurally inadequate to provide the safeguards which are necessary prerequisites. Sanctions in the juvenile court betray the fundamental rehabilitative premise on which the juvenile courts were created.

What we're left with is the notion of transferring these youths from the juvenile system to the adult system, and there are basically two alternative ways to do it.

The juvenile court judge holding a hearing and deciding whether a particular youth is amenable to treatment or is dangerous is, in fact the way that 47 states deal with deciding which juveniles are to be treated as adults.

There is an alternative way, which I call "legislative exclusion". The legislature simply says there are certain offenses or certain combinations of present offenses and prior records which send a chronic juvenile offender to adult court. This presents an alternative way of asking: Who are the bad actors? In which system should they be handled? And for what purpose?

What I'm going to suggest--and I have the great virtue of being a bandwagon of one--is that the way the 47

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States do it is wrong, misleading and systematically discriminatory. We can accomplish much more fair, objective and just results and more capably handle them than the way we presently do it.

The way we handle it now, in Ohio, in Minnesota, and most of the other states, is to ask a juvenile court judge to take a look at a kid--is this youth amenable to treatment or is this kid dangerous? the juvenile court judge puts on his glasses and eyeballs the kid and looks at the kid's record, listens to some experts, looks at the social history and the police reports and everything else, and then concludes--yes or no, the kid is amenable to treatment, or the kid is dangerous, or public safety would be served by retaining the kid in the juvenile court system.

What's made this a particularly interesting issue for me is just asking the questions: CAN A JUVENILE COURT JUDGE REALLY TELL IF A KID IS AMENABLE TO TREATMENT OR DANGEROUS? For me this has brought about a critique of the entire juvenile justice system. IS IT REALLY POSSIBLE TO SAY THAT ANYONE IS AMENABLE TO TREATMENT? ARE THERE REALLY COERCIVE INTERVENTION TREATMENT PROGRAMS WHICH CAN BRING ABOUT SYSTEMATIC BEHAVIORAL

IMPROVEMENTS FOR SERIOUS YOUTH OFFENDERS? And if there are in fact effective treatments--we're talking about locking people up in order to rewire them and make their minds right--if there are some programs which will make some people better--do we have ways to identify which of them are better and which aren't?

Now the question of what works--whether there are any penal programs that make a difference--counsels extreme caution to any claim that a program is going to make people better. The literature on evaluations of correctional programs has become very extensive in the past decade and a thoughtful summary conclusion is that with few exceptions, nothing much works. So, on the one hand we're asking judges to tell us if a kid is going to get better when, in fact, we can't really say if anyone will with any degree of certainty.

The problem we deal with in this context is the problem we deal with whenever the law and social sciences try to get together. It's very much the same kind of problem we have when we get the shrinks on the stand in the criminal insanity defense, and one shrink says the guy is a fruitcake and the other shrink says he knew exactly what he was doing. What you've got is a bunch of presumed experts looking at their own subjective assessments of the subjective data on which they are relying and coming to some sort of conclusion--all you've got is a swearing contest. That's the problem

"There are ... problems associated with asking a juvenile court judge to predict whether or not a particular youth is dangerous."

with asking a juvenile court judge to answer the question: Is this youth amenable to treatment?

There are even more problems associated with asking a juvenile court judge to predict whether or not a particular youth is dangerous. We have extensive literature dealing with predicting who is dangerous. The only inescapable conclusion is that we cannot predict dangerousness with any degree of accuracy. Whenever we try to predict dangerousness we'll be over-predicting by anywhere from 3 to 20 times.

The way we make predictions in juvenile court is to ask clinicians to gain insight into the total individual and then tell us the probability that this individual will offend again.

There is an alternative way of making predictions which relies exclusively on statistical tables. Life insurance companies make these sorts of actuarial decisions everyday. Now, when we get down to real, hard decision-making contests, statistical actuarial tables are invariably, and with no exceptions, superior ways of making predicted judgements over clinical insights.

The only problem we're left with in predicting dangerousness is to ask what characteristics correlate with whatever it is we mean by dangerousness, i.e., recidivism, violence, future crime or what have you. Being male, being black, being poor, being a chronic criminal--all correlate in various ways with the probability of future criminal behavior. We don't want to use sex, race or socio-economic status, so what we are left with is the conclusion that the best way to determine if a youth will probably commit crimes in the future is to ask: "Who has already committed crimes in the past?"

Let me suggest what the legislature can do. They can make some value choices. They can debate in public about the quantity and quality of youthful deviants which society will tolerate before the adult courts impose more serious sentences. That's what we're talking about--the ways in which we will decide who gets locked up.

Now it seems to me that there are only a couple of things the legislature can ask. They can redefine juvenile court jurisdiction. They can state that there are certain crimes of such seriousness that we need to incarcerate for longer than 3 years, i.e., monstrous murders, mass murders. For crimes like that--automatic adulthood.

Are there certain offenders who need this sort of long-term incarceration? The answer to that is very simple: 5 times a felony conviction in juvenile court--the 6th time you're an adult for purposes of felony prosecution.

There is another problem. Whatever became of judges' discretion? Whenever we give anyone discretion in this society, certain things invariably follow, not the least of which is discrimination. In my mind, there is an inevitable and inescapable relationship between discretion and discrimination.

When we look at what happens around the country we find some very interesting things happening when we give judges virtually standardless guidelines with unreviewable discretion. Rural youths are much more likely to be transferred to criminal court than urban youths for comparable kinds of offenses. We find there is enormous variation from state to state under the same statutes in the type of youths who were placed in adult courts. Justice by geography. When one is tried as an adult, with all the consequences that follow, or as a juvenile, much depends on where the trial was decided.

Skin color is likely to determine trial as an adult. Blacks constituted 39% of youths who were tried as adults nationwide. More than 50% of youths tried as adults in 11 states were black. Now, we do not know whether they were tried as adults because their crimes were more extensive or whether it was because they

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were black. There are studies that look at transfer decisions by race which conclude that if you are black, you'd better not pick on white folks because that's a real good avenue to the adult criminal courts.

Beyond the problem of discrimination in discretionary decisions is that it is virtually impossible for lawyers. Most lawyers don't have much experience in juvenile proceedings. Most don't know what to do when they start seeing police reports coming in, social service reports, hearsay evidence of what a school teacher allegedly overheard the kid say in the hallway, a probation officer coming in. They are confronted with whether the kid did commit the crime and the kid's entire life. There are no controlling variables when a judge is deciding whether or not a youth is amenable to treatment. Because every decision is individualized, we end up with a system in which there is no way for appellate courts to control what goes on.

Now I would like to propose a simple solution to a very complex problem, recognizing all of the inevitable problems which arise from proposing simple solutions. I would like to suggest that at least one solution outright repudiates the notion of individualization, therapy, rehabilitation and the like.

Let's do justice and let's do justice by treating similarly situated offenders similarly. Its a proposition which follows from a basic commitment to a notion of equality. Two people who do the same thing should be treated approximately the same way.

"Let's do justice and let's do justice by treating similarly situated offenders similarly."

It doesn't seem to me that this is a radical sort of proposition, although it is in the context of juvenile justice. So let me suggest that deciding which youths should be handled in the adult courts should be answered by asking the question: "Is there a minimum need for confinement which is substantially greater than the maximum sanctions available in juvenile court?" "Are there certain offenses or are there certain offense histories that carry with them the realistic probability of three or more years of confinement?" "Are there certain bad things which deserve condemnation; i.e., mass murderers like Charles Manson and the like?" "Are there chronic offenders whose persistence is such that they need to be taken out of circulation?"

"What we are discovering is that there are 3% to 6% of youths who get embarked on delinquent careers; and once they've been through the system five or more times, the probability of future criminality stablizes at a fairly high level."

On the basis of extensive research now developing on career criminals, most of the people who are committing serious crimes are very much the same people who are also committing lots of crimes. By focusing primarily on persistent chronic offenders, we will also be able to sweep into that same net many of the serious offenders.

What we are discovering is that there are 3% to 6% of youths who get embarked on delinquent careers; and once they've been through the system five or more times, the probability of future criminality stabilizes at a fairly high level. Research in Philadelphia found that chronic offenders, 6% of the delinquent population, accounted for over half of the delinquencies, over one-half of the violent offenses, almost three-quarters of the armed robberies and nearly all of the homicides. At every point along the way there are some of these people who are dropping out, but by targeting the chronic offenders, we're going to identify most of the serious offenders.

People get older one day at a time, and the chronic offenders happen to start as juveniles and as they get older, they become adult offenders. When they move

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from the juvenile court to the adult court system, they somehow fall through that cracks and for a couple of years after serious young offenders move into the adult system, they start over again as adults.

We find that instead of maximizing our intervention with serious offenders, we tend to under-intervene. One of the things that Joe's own study finds is that over-half of the kids who were kicked out of juvenile court because they were not amenable to treatment or were dangerous were then placed on probation or given a fine. We've kicking these kids out because they are too bad for the juvenile system--and all of a sudden nothing happens to them as adults.

REBUTTAL: JOE WHITE

I don't know what to say, since Barry is so agreeable to my position. It goes back to the issue of values, how society wishes to organize itself, and the degree to which it wishes to extend to public officials discretion over other people's lives. I've tried to state as best I can that in a system where older offenders are viewed as the most serious cases coming before the court, the likelihood is that within the limitations of juvenile court sanctions, the appropri-

ate sanction will be applied. When comparing a 16 year old with adult offenders in a court which has been hearing cases against 25 and 35 year olds all day long, appropriate sanctions seem less likely. Whether you believe in confinement or treatment as the ultimate goal, it will more likely happen in juvenile court for 15, 16, or 17 year olds in Ohio.

I am in complete agreement with many of the things that Barry said, particularly about the importance of persistence or chronicity as a determinant of future behavior. I think that everything else that people have tried to use as predicators have fallen by the wayside. If someone comes to court twice, they are more likely to come back the third time. If they come five times they are more likely to come the sixth time. When they go to criminal court, they are in for the first time, as the adult criminal system views this offender.

We began this debate with the understanding that both of us would concede that certain juveniles, because of their behavior, either current or past, should be treated in the adult system as opposed to the juvenile system. It was never an either/or situation so far as this debate was concerned; but the issue of offering longer sentences by transferring juveniles (ajudicated delinquent) into adult facilities as a way of perpetuating juvenile court jurisdiction is a mistake to me. I think Barry would also agree with that. If someone does need longer sentencing, then it shouldn't be a power of the juvenile court, it ought to be a power of the criminal court.

REBUTTAL: BARRY FELD

"If we are going to make decisions about incarceration ... I suggest that present offense and prior record are the most just and reliable bases for making that decision."

To pick up where I left off earlier--to affirm the proposition that most juveniles and adults don't need to be incarcerated. We grossly over-incarcerate in this country and we do it very badly. If we are going to make decisions about incarceration, is there some just basis on which those decisions can be made? I suggest that present offense and prior record are the most just and reliable bases for making that decision. Is there some minimum age at which youths will be defined by legislatures as adults? Joe has suggested that children are different, their perceptions are different, their motivations, understanding, view of the future, mental abilities are different. I would agree to that extent, but I have yet to see any convincing evidence that demonstrates any difference between an armed robbery by an 18 year old and an armed robbery by a 17 year old or a rape by a 16 year

old. If there are differences, the question remains: "To what extent should a legal system be structured to account for those differences?"

I am convinced that most of the so-called differences we perceive in children may be a product of what we have done to children throughout the 20th century, by making them irresponsible, locking them up in schools, locking them out of the market place, and in every way making them incapable of functioning like people.

But that is beyond the scope of the discussion. I submit back in the good olds days of common law we had infancy mens-rea defense that said 0 to 7 you are irrebuttably irresponsible. Between 7 and 14 the state has to show you know right from wrong and above 14 you are an adult. I submit that by the time youths are 14 or 15 they know right from wrong in the classic criminal law sense and that is really the only kind of awareness that a legal system can take into account.

It can't account for all the other aspects of immaturity, irresponsibility, etc. because those aren't just age related. I have prosecuted lots of extraordinarily irresponsible 26 year olds who were juveniles in every respect except by the calendar.

Let me come back to my critique of the juvenile justice system itself. I am saying that the juvenile court as an institution should not be given the power to incarcerate for extended periods of time.

"I am saying that the juvenile court as an institution should not be given the power to incarcerate for extended periods of time."

The answer to me seems obvious. It is a procedurally second-rate, inadequate, kangaroo court as the Supreme Court characterized it. It does not do justice, and in the name of individualization, it inflicts greater harm than when we explicitly acknowledge we are punishing.

If you look at the reality of what goes on in juvenile corrections; if you go back to the beginning of the juvenile court in Rothman's Conscience of Convenience; if you look at the most recent evaluations of juvenile corrections which includes my book Neutralizing Inmate Violence: Juvenile Offenders in Institutions; you discover that juvenile institutions are at least as barbaric as adult facilities.

If you look at the whole raft of right-to-treatment cases in the 1970s in which Federal District Courts condemn shackling, tear gassing, staff beatings, solitary confinement, locking kids in dungeons, permitting kids to be raped, then it is important to ask: "What is the benevolent tradition of juvenile courts?"

And once you start asking about benevolent traditions of juvenile courts while you have decisons based on offenses--like the new Ohio legislation that consigns felons for terms of years to these facilities--then you really have to ask: "Do we really need juvenile courts?"

THE QUESTIONS:

MR. CHEMA: Gentlemen, you seem to be advocating use of waiver for juveniles. Mr. White advocated allowing the judge to use discretion.

Mr. Feld said the judge must have specific guidelines for the waiver to help him be more fair.

MR. WHITE: I acknowledge that there are some juveniles who ought to be tried in criminal court.

DO EITHER OF YOU FEEL THAT JUVENILES SHOULD NOT UNDER ANY CIRCUMSTANCES BE WAIVED OVER TO THE ADULT OR CRIMINAL COURT?

MR. FELD: I would add the caveat that the only two states that until recently did not have any mechanisms for waiver are also states that have a maximum age for juvenile court jurisdiction of 16. If you eliminate the safety value, the only way I can answer the questions would be if you have a juvenile court jurisdiction where the maximum age is no more than 12.

MR. WHITE: There are four states, not two, with the age of 16, and three of them have waiver--Connecticut, North Carolina, and Vermont. Vermont has used the waiver mechanism since 1981.

DEVIANCE THEORY SUGGEST THE LABEL OF "JUVENILE DELINQUENT" IS THE FUNCTION OF THE LABELER RATHER THAN A CHARACTERISTIC OF THE DEVIANT. THEY CITE STUDIES WHERE COMMUNITIES "MAKE UP" OR "CREATE" DELINQUENTS WHERE THERE WERE NONE.

Can you comment on this function in light of the proposal to have the existance of a separate juvenile court system.

MR. WHITE: I don't know if the labeling theory is particularly significant when you are dealing with serious criminal offenses. When you are talking about the kinds of cases that we are talking about--murder, manslaughter, aggravated assault, rape, robbery--you are dealing in an area of concern that people have with kids who run away from home being labeled as delinquent. That kind of labeling is not existent with these types of offenders.

DOES IT REALLY MAKE ANY DIFFERENCE IN THE END WHERE ONE IS TRIED? IS IT THE REALLY IMPORTANT QUESTION—WHERE PEOPLE GET TREATMENT?

MR. WHITE: It is important where they are tried. One of the things that was pointed out earlier was that many juveniles who are tried in criminal court frequently do not get confined because they are viewed as young, tender, unsophisticated or inexperienced when compared with other criminal defendants. In juvenile court they are more likely to get confined because they are viewed as in "the deep end of delinqency." If confinement is an objective, it would seem to me that the forum is just as important as the resources within corrections.

MR. FELD: I think it is not only important to ask where people get tried, but how people get tried and if they are tried fairly. If you are talking about incarceration as a juvenile or an adult and the incarceration is inevitably experienced by the recipient as punitive, then you have to talk about fair trials which leads to the question of a jury trial. The fundamental shortfall of the juvenile justice process is that it is this trial process that is incapable of producing fair and just results.

MR. WHITE: The issue of juries in juvenile courts is one that has been around for a while and the Supreme Court has held that jury trials in juvenile court are not necessary. In spite of that, a number of states, after McKeiver vs. Pennsylvania, passed laws creating the possibility of juries in juvenile courts. Today, there are 16 states, not including Ohio, where juries are permitted. I certainly would not object to jury trials in this state.

ASSUMING OVER-REPRESENTATION OF JUVENILES WHO HAVE LEARNING DISABILITIES IN THE JUVENILE COURT SYSTEM, SHOULD WE BE CONCERNED THAT THESE YOUTHS HAVE NEVER BEEN IDENTIFIED OR MORE APPROPRIATELY REMEDIATED IN THEIR PUBLIC SCHOOLS, WHICH HAS LED TO EXTENSIVE PERSONAL FAILURE AND FRUSTRATION? WHAT DO YOU FEEL IS THE ROLE OF THE JUVENILE COURT IN IDENTIFYING OR SERVING THESE YOUTHS AND IF WE ELIMINATE THE JUVENILE COURT STRUCTURE, DO WE ELIMINATE ANOTHER OPPORTUNITY FOR REMEDIATION?

MR. WHITE: I think it is a terrible way to address learning disabilities.

MR. FELD: One of the problems of the juvenile courts is that we have tried to make it a court for all purposes and while kids end up in juvenile court,

they might have learning disabilities, lousy homes or crummy schools, they are there because they have committed crimes.

It is one thing to talk about the role of the courts, and another when you talk about dispositions. It seems to be irresponsible not to ask questions like this about learning disabilities or counseling the person. But none of what we are doing has anything to do with why we are bringing them into court in the first place.

IS THERE ANY EMPIRICAL EVIDENCE TO SUGGEST THAT THE CRIMINAL COURT SYSTEM AS IT CURRENTLY EXISTS OPERATES BETTER THAN THE JUVENILE COURT SYSTEM OPERATES?

MR. FELD: That obviously is a most serious question. Juvenile courts by and large tend to give the same quality of justice as the lower municipal courts, police courts and all of the other sort of kangaroo courts which we run adults through. The disposition can be fairly comparable.

What we really have is a catastrophe of social control in this country, both at the juvenile level and the adult level. You are dealing with breakdown of community and social structures. To expect a legal institution to solve many of these social structural problems is a fool's errand.

MR. WHITE, DO YOU BELIEVE THAT JUVENILE JUDGES CAN PREDICT DANGEROUSNESS SUFFICIENTLY TO ALLOW THEM TO USE IT AS AN APPROPRIATE CRITERIA IN DISPOSITIONS OF JUVENILES?

MR. WHITE: They don't have to prove dangerousness. The criteria are slightly different than that. Judges have to find that the person is 15; that there is probable cause to believe that the person did what was charged; that the person is not amenable to treatment as a juvenile; and that the person is a threat to public safety. If a person comes to juvenile court time and again--I recently saw a sheet on a kid that had 25 priors in juvenile court. I don't know why he was there for the 15th time let alone for the 25th. We sometimes have to say that there is nothing more we are able to offer a child and the efforts of this court simply are not to be used for that purpose.

I don't think juvenile courts can predict dangerousness. I don't think the law should ask them to.

WHILE I ACKNOWLEDGE THAT NO ONE HUMAN BEING HAS INFINITE POWERS OF PREDICTION, DOESN'T MR. FELD BELIEVE THAT PSYCHOLOGISTS AND PSYCHIATRISTS CAN AND DO HAVE PROFESSIONAL ABILITY BEYOND THOSE NOT SO TRAINED, i.e. JUDGES, JURIES, NEWS MEDIA, ETC.?

MR. FELD: I am teaching in my criminal law courses that there is no such thing as insanity in the APA diagnostic manual as such. What we discover is clinicians have much greater insight into human functions and the way peoples' minds operate than newspaper media, writers and law professors or other people who have not had this special training.

While psychiatrists do lots of very useful things, when we start talking about the tail ends of the normal distribution--the 1% or 2%--I am not sure that they add a whole lot except the jargon to what most bright lay people can see.

CAN USE OF DISCRETION INCORPORATE SAFEGUARDS AGAINST DISCRIMINATION OR THE INPUT OF DISCRIMINATION?

MR. WHITE: No. I think you either accept discretion and recognize that people are going to disagree with the outcome. They may have suspicions, either real or imagined about judicial bias. I accept the standard as suggested by the Supreme Court: what you are trying to do when you review the use of discretion is to ensure that it has not been used in an arbitrary manner.

MR. CHEMA: Thank you both very much.

DEFINITIONS

Adult A person 18 years of age or older at time of offense or a juvenile bound over to the criminal court by juvenile court.

Juvenile A person under the age of 18 at the time of the offense.

Uniform Crime Report Definitions

Violent Offenses Includes aggravated robbery, aggravated assault, rape, robbery, murder and non-negligent manslaughter.

Serious Property Offenses Includes burglary, arson, larceny, and motor vehicle theft.

Examples of Felony Offenses Under the Ohio Revised Code

Felony Any offense that is punishable by a prison sentence of more than one year. Classes of felonies are listed below.

Special Felony Includes aggravated murder and murder.

Felony I Includes rape, aggravated robbery (weapon), kidnapping, aggravated arson (occupied structure), aggravated burglary, voluntary manslaughter, abortion manslaughter.

Felony II Includes robbery (no weapon), child stealing, burglary, taking firearms on aircrafts, felonious assault, kidnapping (victim not hurt), arson (for hire).

Felony III Includes safecracking, bribery, perjury, aggravated riot while an inmate in a detention facility, negligent homicide, aggravated vehicular homicide, abduction, extortion, criminal usury, sexual battery, corruption of a minor, promoting prostitution (person under 13), arson (over $150 or a public building), inciting to violence.

Felony IV Includes aggravated assault, carrying concealed weapon, forgery, breaking and entering, vandalism, vehicular homicide, promoting prostitution, child stealing by child's parent, corrupting sports, possessing criminal tools, aiding a felon, bookmaking, aggravated riot with four or more others, disseminating obscene material, theft ($150 or more), vehicle theft, escape.

Ohio Serious Juvenile Offender Project

Serious Offenders Includes juveniles adjudicated delinquent for violent or repeated serious property offenses.

The goal of the Ohio Serious Juvenile Offender Project is to reduce future serious criminal activity. The Project is working to increase the range and effectiveness of control and treatment program options in Ohio for serious juvenile offenders. This group is defined as juveniles adjudicated for violent or repeated serious property crimes. Effective intervention may represent a major opportunity to prevent a life-long criminal career—while at the same time assuring the safety of the community.

The Juvenile Justice System must reexamine its approaches to dealing with serious juvenile offenders. Some states have changed correctional programming, increased community-based care or adopted a continuum of care including both institutional and aftercare services. A review of Ohio programs indicates that there are only a few efforts to deal systematically more effectively with the care and treatment of serious juvenile offenders. Moreover, few programs nationwide are being assessed to measure the effects.

This project will address the lack of alternative programming for serious juvenile offenders in Ohio through an integrated program of public and professional education, applied research, and program development and technical assistance.

- The **public and professional education program** will provide information on programming alternatives, trends and data on the scope of the problem through direct contact, workshops, publications and a clearinghouse function. It will focus exclusively upon violent and repeat serious property offenders. The audiences will include statewide professional and citizen organizations, the juvenile justice system, planners, legislators, the media, and public and private service providers.
- The **applied research program** will consist of needed baseline studies to provide information on how serious juvenile offenders are handled by the Ohio juvenile courts and the Department of Youth Services; what programming and options are available; and what approaches are used in other states to control and treat serious juvenile offenders.
- The **program development and technical assistance program** will provide resources to juvenile courts, state agencies, and community-based organizations, upon request, to assist in the development of new or alternative services for youth involved in serious juvenile crime. These services can include community-based, institutional or aftercare programs. The resources will be provided through consultation, written materials and linkages to qualified persons—statewide and nationwide.

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