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Jeffrey Fagan

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JUVENILE JUSTICE OR INJUSTICE?

THE DEBATE OVER REFORM

DR. JEFFREY FAGAN*

I want to thank Barbara for raising this morning in her talk the European Commission and its interest in these matters. In December of 1998 the European Commission on Human Rights¹ issued a report on the case of James Bulger in England.² For those of you who do not recall, he was the two-year-old who was kidnapped by two ten-year-olds in a shopping mall and then led onto a railroad track where he was beaten to death by these two kids. Sadly, his lifeless body was subsequently left on the railroad track to be at the mercy of trains and other hazards. The Commission made two statements in a very long report, and

* Dr. Jeffrey Fagan received his Ph.D. in 1975 from the State University of New York at Buffalo.

Dr. Fagan is a Professor of Sociomedical Sciences and Director of the Center for Violence Research and Prevention at the School of Public Health at Columbia University. He is also a Visiting Professor at the Columbia Law School.

For over two decades, Dr. Fagan's research and scholarship has focused on the causes, consequences and control of interpersonal violence. His current research examines the jurisprudence and punishment of adolescent crimes, the effects of legal sanctions on domestic violence, the spatial risks of violence, and the situational contexts of adolescent violence.

Dr. Fagan is a member of the MacArthur Foundation's *Research Network on Adolescent Development and Juvenile Justice*, and the *Violence and Traumatic Stress Review Group* for the National Institute of Mental Health. He is the delegate from the American Society of Criminology to the American Association for the Advancement of Science. He is past Editor of the *Journal of Research in Crime and Delinquency*, and serves on the Editorial Boards of *Criminology*, *Journal of Quantitative Criminology*, and *Journal of Criminal Law and Criminology*.

¹ The European Commission on Human Rights enforces the European Convention. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 25 (1), 213 U.N.T.S. 222 (reprinted in RICHARD B. LILICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS DOCUMENTARY SUPPLEMENT III (1995)).

² See generally Christian Pfeiffer, 23 CRIME & JUST. 255, 312 (1998) (stating that since Jamie Bulger was killed by two ten-year-old boys, relatively liberal attitude toward youth violence had been replaced by support for stricter criminal procedures and harsher sentences).

this case was actually rejected. Specifically, the Commission has rejected the trial and many details of the trial. Furthermore, if they are successful, this case will go back to England for resentencing.³

First, the European Commission said if the age of criminal responsibility is fixed too low, or if there is no age limit at all, then the notion of criminal responsibility becomes meaningless. Second, they rejected the unilateral actions by the Home Secretary, who was the Minister of Justice, to impose punishments that treated as irrelevant the progress and development of the child who is in the care of the state. I certainly think these two statements are very telling and very important for our topic today.

They also went on in what is an important subtext that I will get back to at the end, to insist on a very clear separation of powers with respect to the sentencing discretion of judges. They further chastised the Home Secretary, who was an elected official, stuck his two cents in and essentially doubled, the sentence from the eight years recommended by the trial judge to 15 years, mainly bowing to the public anger arising from the case.⁴ Well, these two findings pretty much summarized the challenges and the controversies and what I think we will see as some of the mistakes that have been made today in the constant struggle, the ongoing struggle over setting the boundaries between juvenile and adult courts. We are now in the midst, probably at the end of a cycle of roughly 25 years of activism, legislative and political, to shift the boundary for adolescent offenders and their eligibility for the adult court.

There has also been a parallel shift in the method of transfer, with discretion being shifted from the judicial branch to the executive branch and also to the legislative branch. In New York State, the legislature basically pulled a coup in 1978 when it

³ See *Regina v. Secretary of state for the Home Department, Ex-parte Venables & Thompson*, 407 A.C. 1 (Eng. C.A.1998) (discussing appeal taken from original decision by Home Secretary); see also Warren Hoge, *Europe Court Faults Trial Of Boy Killers Of Toddler*, N.Y.TIMES, December 17, 1999, at A6 (discussing the ruling made by the European Court of Human Rights).

⁴ See Phillip Johnston, *Judge Reviews Length of Bulger Killers' Sentence*, THE DAILY TELEGRAPH (LONDON), Mar. 14, 2000, at 1 (noting that "Mr. Justice Morland, the trial judge, recommended a tariff of eight years. Lord Taylor, then Chief Justice, increased this to 10 years and Michael Howard, the former Home Secretary, raised it to 15 years.").

passed the Juvenile Offender Law,⁵ which basically took decisions out of the hands of everybody except the police. Specifically, whoever addresses the threshold questions, for example, what degree of robbery was committed and what degree of assault was committed, could basically write a charge to insure that the offending kid would wind up in the adult court. So there was a bit of a coup going on against the judges, and I think we will return to that theme because it has important consequences. Every state in the United States since 1990 has undertaken some measure of change with respect to either the age at which youths are eligible for the adult court, the mechanism by which they would go to the adult court, and who makes that decision and on what grounds. Basically, involving the jurisprudence of the whole thing.

David Tanenhaus has written a history of the juvenile court in Chicago and the juvenile court generally in the United States.⁶ Tanenhaus points out that with respect to the question of expulsion, there have always been expulsions from the day the court was conceived, about 100 years ago. These expulsions reflected no real coherent theory about which kid should stay in the juvenile court and which kids are juveniles and which kids are beyond redemption and so on.

Tanenhaus points out very clearly that the expulsion patterns in Chicago in the early juvenile courts reflected some of the same considerations that drive policy debates today. Kids that committed very heinous crimes were obviously very clearly and systematically expelled. Kids who had several different bites of the apple, who had been to the juvenile court several times, were also expelled. Kids who committed specific offenses that at any moment in time historically had captured the attention of politicians; those kids were also expelled. Equally important, expulsion in this context means transfer to the adult court and

⁵ See 1978 N.Y.LAWS, chs. 478, 481; N.Y. PENAL LAW § 30.00 (2) (McKinney 1998) [hereinafter Juvenile Offender Law].

⁶ See David S. Tanenhaus, *Policing the Child; Juvenile Justice in Chicago, 1870-1925* (1977) (unpublished Ph.D. dissertation, University of Chicago) (on file with author) (detailing how first juvenile court was founded in Chicago, Illinois in 1899 by group of reformers including Lucy Flower, Jane Addams and Julia Lathrop reacting to widespread deprivation and abuse suffered by children in adult criminal justice system). See generally Thomas F. Geraghty & Steven A. Drizin, *Foreword—The Debate Over the Future of Juvenile Courts: Can We Reach Consensus?*, 88 J. CRIM.L & CRIMINOLOGY 1, 2 (1997) (summarizing history of first juvenile court in United States).

exposure to all of the punishments therein. The expulsions in the early juvenile court remained largely in the hands of the judges. The judges pursued these patterns of expulsions largely because of a survival fight that they felt for the legitimacy and credibility of this new institution.

Well, it seems that this fight is still going on 100 years later. We see now the very strong shift of expulsion, of the discretion for expulsion to legislators, through statutory exclusion, and also the shift of the discretion for expulsion to prosecutors through direct file statutes, for example, which were very prominent in states such as Florida and Michigan.⁷ The goals are fairly certain, quite clear: certainty of punishment, greater length of punishment, and perhaps harsher conditions of punishment. Indeed, as we hear over and over, the mantra, of course, is "adult time for adult crime."

There are two sets of concerns here. The first being consequentialist, and I will turn to that in a second, but there is also something that is a bit more conceptual. All of these actions were taken with respect to, without any action or without any theory of what a juvenile court should be, why it was formed and how it should operate, and who is eligible for it. These actions were taken without any articulated principle for the allocation of harm. Specifically, between what might happen to a juvenile who is transferred versus what happened to the victim of the juvenile's crime versus what the public sees generally in terms of its returns, either from retributive justice for the greater punishment or the possibility of redemption for the kid.

Perhaps most important, something we probably would do in no other arena outside of criminal justice, we have undertaken these actions with no thought whatsoever to the consequences or the efficacy of the punishments involved or of the larger policy and what happens to kids following criminalization. We must ask not only what happens to them individually, but what happens to them when they return to the communities, as the Judge suggests, what happens to the public at large. Do we

⁷ See generally Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281, 284 (1991) (outlining how under direct file regime concurrent jurisdiction is given to juvenile and criminal courts and it is prosecutor's charging decision that determines in which forum case will be heard).

benefit or do we perhaps suffer from those policies? Finally, there is no consideration jurisprudentially over the dimensions of all this. How should we go about doing this? What are the broader implications of saying to prosecutors, "You now have the judge's authority"? Additionally, what does that say about an independent judiciary and what does that say about the future of some of our courts?

Let me turn very quickly to the question about what do we know about all this. This is a policy, likewise this is also a struggle that has been going on for 100 years, but a policy nonetheless that has really taken some steam in the last 25 and even greater steam and is moving full speed ahead in the last ten. Despite a roughly 47 percent decline in juvenile crime, certainly juvenile homicides and a roughly commensurate decline in all other juvenile crime, over the last five years.⁸ The statutory language in the three bills specifically, one bill in the Senate, one bill in the House, one bill coming out of the White House, with respect to changes in juvenile crime suggest that juvenile crime is going up and the perceived menace continues to increase. So there still is this repeated drumbeat continually reducing the scope of jurisdiction of the court, but it has all gone on without any clear light as far as understanding the consequences.

There have been three studies. Including, one in the state of Florida, using different designs, different sampling and measurement conditions, different approaches to doing experimental research, but all three reached the same conclusion. In Florida, using a case control or a matching design, kids who were sent to the adult court, when matched against kids who were retained in the juvenile court, were re-arrested quicker and for harsher crimes.⁹ In a study comparing kids in New York with New Jersey, again using a matched cases design,

⁸ Greg Krikorkian, *Juvenile Justice System: A Success Story Under Fire; Law: Faced With Trend Toward Trying Adults, Backers of Special Courts Point to Their Legacy of Innovation*, L.A. TIMES, July 7, 1999, at A1 (noting that juvenile crime has been in decline for most of the decade); Craig Whitlock, *Juvenile Violent Crime Declines 16 Percent in Md.*, WASHINGTON POST, Sept. 23, 1999, at B1 (noting national trend of decline in juvenile crime rate).

⁹ See Donna M. Bishop et al., *The Transfer to Criminal Court; Does it Make a Difference*, 42 CRIME & DELINQ. 171, 183 (1996) (concluding that contrary to intentions of Florida legislators, transferred youth displayed significantly higher rate of recidivism in shorter time following incarceration than similarly situated youths who were not transferred).

which is one that I conducted, where we looked at kids who were in Brooklyn and Queens Juvenile Courts and adult Criminal Courts in New York City respectively, who were juvenile offenders. We also looked at comparable kids similarly situated in New Jersey, and found exactly the same thing. Kids treated in the adult courts were re-arrested faster, more often, and for more serious crimes.¹⁰ In Minneapolis a study was done by Barry Feld, who is very much a proponent of transfer, and also a proponent of abolition of the Juvenile Court. Similarly, Feld's data weighed kids in a Minneapolis County Juvenile Court with kids who were retained in the adult court.¹¹ He finds, once again, that the kids who were retained in the adult court were re-arrested faster, more often, and for more severe crimes. Why does this continue to happen? What does this say to us about adolescence itself and the relationship of adolescence to the laws that we are trying to pass? We have in some research, some writing, and probably in the printed version of these comments several suggestions. I would personally like to suggest three things.

The Judge raised the question of how C made decisions, his ability to resist impulses, and to resist peer pressure. He opens up the specter of developmental psychology and what developmental psychology has to tell us about adolescence and about the question of adolescence with respect to potential change or the stability of behavior over time and for the predictions of dangerousness and so on. The question here, however, is why do kids turn out worse.

Well, let me suggest three things that happen to them in the adult court. One of the studies that we have also done is to look

¹⁰ See JEFFREY FAGAN, SEPARATING THE MEN FROM THE BOYS: THE COMPARATIVE ADVANTAGE OF JUVENILE VERSUS CRIMINAL COURT SANCTIONS ON RECIDIVISM AMONG ADOLESCENT OFFENDERS, IN A SOURCE BOOK; SERIOUS, VIOLENT, CHRONIC JUVENILE OFFENDERS 245 (James C. Howell et al. Eds, 1995) (arriving at same conclusion in study of transfer cases in New York Versus non-transfer cases for similarly situated juveniles in New Jersey). *But see* Shannon F. McLatchey, *Juvenile Crime and Punishment: An Analysis of the "Get Tough" Approach*, 10 J. LAW & PUB. POL'Y 401, 414 (1999) (noting that juveniles are treated less severely in adult courts).

¹¹ See Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 722-25 (1991) (arguing that children should be tried in adult court); *see also* Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 909-915 (1988); Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 274 (1984); Barry C. Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal"*, 65 MINN. L. REV. 167, 242 (1980).

very carefully at what happens to kids who are transferred, what are their correctional experiences—those who don't go to Judge Corriero's court, relative to kids who remain in the juvenile court. Notably, there have been some very clear findings there, as well. Kids who are punished as adults are far more likely to be physically assaulted, far more likely to be sexually assaulted, and far more likely to spend the critical developmental periods of socialization when they make the transition from adolescence to adulthood in the company of adults.¹² Furthermore, this is not a random sample of adults. They are in the company of cons, younger ones who, themselves, at the ages of 16, 18, 20 to 25 are at the peak of their violent and offending rates. As a result, without exposure to a very broad set of adult influences, but with very fixed exposure to a set of criminogenic influences, you can imagine that during a developmental transition how these kids will turn out.

The second proposition is a very simple one. Given the levels of violence that kids experience in adult institutions and what we understand about developmental psychology and the consequences of violent victimization, it is logical to conclude that such traumatic exposure would lead them to become violent in and of themselves later on. The respective mechanisms vary. There is traumatization and we are actually looking now at levels of post-traumatic stress disorder, a syndrome that people suffer under combat conditions, among juveniles who have been punished in these two regimes, but again, it is a fairly straightforward proposition that kids exposed to high levels of violence will turn out to be themselves more violent.

The third proposition is also a very simple, straightforward economic one. These kids come out of an institution with a felony conviction record. Employers certainly have the right to ask whether or not they have had a felony conviction record. After all, they do come out with such records and these do constitute very serious barriers to employment.

We have done some other research looking at very large panels

¹² See generally Barry Krisberg & James F. Austin, *Reinventing Juvenile Justice*, 176-77 (1993) (discussing how juveniles who are held in adult facilities are often sexually and physically abused by adult inmates and staff); Catherine R. Guttman, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L.L. REV. 507, 509 (1995) (discussing maturity level of children in adult courts).

of data and we have a good understanding that the suppressive effects of a criminal conviction on subsequent work involvement, earnings and job stability over a ten-year period are very serious and very negative. Furthermore, they compound and build over time. Hence, there is a very serious deficit, a social deficit, which excludes them from the world of work and all the normalizing, socializing, and controlling influences of the world of work. As a result, these kids wind up basically sentenced to a life outside of work. People do survive by other means, however, and those decisions become perfectly rational economic decisions.

These problems, contradictions, and mistakes in the policy raise some questions because it contrasts with still a very strong public urge to change policy. It raises a set of questions about, first of all, how should we set the boundaries. Second, what sets of principles or theories should we invoke? Finally, is there a behavioral threshold at which we can no longer anticipate that kids are amenable or redeemable, as Judge Corriero would say? We have a pretty good understanding from research that most kids desist from their criminal activity by the time they hit 18, 19, 20 years old. However, is there a pattern of both developmental markers and criminal behavior, which suggests that we're not likely to see those kinds of changes? No, there is not. We can not really set those thresholds with any confident way of making a prediction, and so we wind up making over-predictions and the consequences of the over-predictions are fairly clear.

Second, let us assume that we do have a regime. Can we conditionally set the threshold based on expectations that behavioral change is forthcoming in response to the treatment? Treatments are very wide, treatments occur on a very broad continuum of quality and efficacy. It is very hard to make such predictions. We certainly have a very good idea those good programs; work and bad programs do not. We also have a pretty good idea that some bad programs actually do more harms than good. Accordingly, one of the things we probably want to think about in setting these boundaries is to think about the externalities to the legal system that bear on how we view the efficacy of law and how we view the validity and the impact of law.

The third question is whether there are developmental

markers that, independent of a crime, allow us to predict which adolescent offenders are likely to desist. For example, C had some difficulty resisting peer pressure. Are we confident that if C developed the ability to resist peer pressure his friends still wouldn't have dragged him into the car? We like to think so and it is very tempting to want to buy into developmental psychology as a very strong scientific basis for thinking about law and to make the kinds of precise boundary markers that the Judge called for. However, the science is not quite there yet. I think they are very powerful metaphorical ideas. I think there are dimensions that ought to be considered. They should be part of a package of factors, perhaps even a vector, to put it in epidemiological terms. That would suggest that some kids are ready, are on the threshold of behavioral change and desistance, while others may not be. However, we need to think carefully, scientifically and systematically about what those markers are.

In the current state of affairs, we have an array of statutes and procedures that reflect several tensions and several complications in thinking about setting a boundary. One is the problem of proportionality of punishment. On the one hand, the juvenile court has a very limited punishment window. That is one of the reasons, one of the motivating factors that led legislatures to take their actions. Very serious crimes by juveniles often demand more punishment than the juvenile court can afford.

One of the problems in the broad reach of statutes today, however, is that the statutes go well beyond the threshold of seriousness. Subsequently, most of the statutes today, born on a crisis of juvenile violence, tend to very broadly encompass a broad range of juvenile crimes. Therefore, we think that burglars, for example, should be exposed to this great punishment regime, when in fact they pose a very low risk.

The second challenge is the prediction of dangerousness. We have already talked about that. The empirical basis for predictions is really quite weak. If in fact our boundaries are set on the basis of a prediction, when we don't have the science to make those predictions, that ought not be the basis on which we make those boundary shifts.

Third is the assumption of culpability. Consistent with the emphasis on punishment generally, all of the new laws suggest

that there are lower thresholds for blameworthiness than might have existed in the past. Moreover, the laws assume that there is in fact a bright line distinction of culpability, that there is some point at which a specific act or a specific pattern of acts suggests that redemption is not forthcoming. Well, in reality, culpability exists on a continuum and is really quite variable, but the conception of culpability is built into the statutes that we see today, despite its many underlying dimensions. Culpability, of course, is not just a moral question. It is also a question of developmental soundness, developmental thresholds, including things such as impulsiveness, social cognition, risk preferences, and also reasoning and judgment capacities.

There is variation in the interests of decision makers. We know that, for example, different types of regimes will produce different transfer rates. A regime where judges make decisions might produce 200 transfers in one year with 2,000 transfers in a state where the legislatures have made those decisions. So we have to take those varying interests into account. There are a number of different dimensions. We have been trying to think through several different dimensions on which a scientifically informed and humanely informed transfer policy can be constructed.

The first is the dominance of unprincipled policy preferences in transfer. To illustrate by principle, we mean the absence of theory, the absence of a jurisprudential standard. We mean without a theory of the juvenile court and without a theory of adolescence. The second is what we call the inevitability of hard youth welfare choices into transfer decision making. That means specifically, what kinds of harms are we willing to tolerate, and what is the balance of risk and harm. We wind up taking a position that basically says, above all, "do no harm." It is very important to see that within a principled system, in fact, when we make a hard choice for punishment we are also making a hard choice for disfiguring punishments, especially those that have long-lasting consequences. The third is complex outcomes produced by mixed systems of transfer decision making. We refer there to different patterns of different systems within states and variations in those complexities. This is clearly illustrated by the aforementioned 2,000 versus 200 example.

I would like to note that we should to be very careful about

developmental psychology, which is a very tempting siren for thinking about the future of how to set transfer policy. But in fact we urge very strongly that it should be metaphorical perhaps, and not taken too literally until the science catches up with the ambitions of its users. There are really two themes that we want to leave you with. One is the virtue of regulatory perspective. All of the transferred mechanisms, patterns, and decisions that have gone on in the last 25 years have gone on without a great deal of scrutiny and without a great deal of regulation. Regulation can take many forms. For example, one form of regulation would be just simply a systematic pattern of observation, analysis, assessment, and research. None such exists now and we call for that type of regulation.

Finally, where we set the boundary between juvenile and adult court depends very much on what happens in the adult court. Unfortunately, there are not many Judge Corrieros. The adult courts tend to treat cases in a bit of a machine-like fashion with a going rate. Certainly, there has been a great deal of research on what decision making is like in the adult court. Thus, until we have an understanding of what the likely consequences are on the other side of the bridge, we need to think carefully about who it is that we are sending over that bridge. Thank you.

