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JUVENILE JUSTICE OR INJUSTICE?

THE DEBATE OVER REFORM

VICTOR STREIB*

Allow me to speak about my topic in brief form. The subject is the broad topic of children who kill. That means people under age 18 who kill, and sadly enough, that is down to toddlers. Mostly we are dealing with teenagers in the middle teen years. It is a key principle that is involved. First of all, we have heard about children's rights and thinking about children who are refugees in Kosovo. We think also about adults who commit horrible crimes, even homicide. Now we must somehow focus on this image of a child who kills people, arguably our worst crime. That always seems to cause kind of a disconnect for most of us. I have spent my entire career working in this field, and every time I say it, it just does not sound like it could exist.

We also need to think about the quality of life in America among a people in fear of our own children. When we walk down the street and see some kids coming toward us, and instinctively we cross over so that we will not have to pass by our own children. I live and work in a village of 5,000 people. There are

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In the practice of law, Dean Streib has served as appellate counsel in such cases as *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (overturning death sentence for 15 year-old boy); *Allen v. Florida*, 636 So.2d 494 (1994) (overturning death sentence for 15 year-old boy); and *Cooper v. Indiana*, 540 N.E.2d 1216 (1989) (overturning death sentence for 15 year-old girl). The overriding goal of his professional work is to find means of reducing violent crime, particularly committed by and against children.

only two law schools in this country that are located in villages. Ours is Ada, Ohio, population 5,000. NYU is in a village as well. A different kind of village to be sure. As you walk around in those two villages, you might have a different sense of whether you are afraid of your children or not. I hope we can change what we do so that my children will not have to be giving the same speech in 20 years, to their children or their children's children. I hope we can pass on something better than what we received.

I want to talk a bit about how children kill and why they kill. However, I am following Jeffrey Fagan, and I am not naïve enough to do that. It is like the guy who was asked to give a talk about floods. His basement was flooded a little bit and wanted to come tell people about floods. The moderator then said, "There's another speaker who goes just before you."

"Oh, who's that?"

"Somebody named Noah."

Well, I will not talk much about children who kill. Read Dr. Fagan's books. My concern is about juvenile arrests for homicide, which had been going up remarkably, as they were nationally for adults, and in the last few years have gone back down. Almost all of that rise and fall is tied closely to gun homicides. The non-gun homicides have been really flat for all these years. If we would just take the guns out of our children's hands, then the curve will go in that direction. I no longer debate this, and I am no longer tolerant of or, even civil to those who think my children should have guns in their lockers at school. To hell with them! I have had enough of that argument.

I think there is also an issue about whether children are more violent today than they used to be. Again, I am not the expert, but it seems to me that children have always been violent. When I had a problem after school at age 15, I would punch it out with somebody. I always got whapped, and I would have a bloody nose and sometimes a sore hand. Now when kids have problems, they go out and shoot each other. So the lethality of their instrumentalities simply changes the result.

Another problem I have had in representing young people who kill, certainly young males, is their need to be the tough guy. I think of all the times that I have asked them to at least appear remorseful in court. They are so determined not to look weak or sensitive or any of that sort of thing that they would just look at

the jury, and say "I'd kill you in a minute" because that is how they think they can survive. This frightens us even more than their crimes.

Finally, I think it is important to note that we raise our children in a country that worships violence. Many have said that we have a love affair with violence, and then many others have said no, we married it. We raise our children in a world in which violence is revered. We are a culture of professional football and professional wrestling, not watercolors and ballet. That is the country in which we are raising our children. They grow up exactly as we mean for them to.

On the topic of legal system alternatives, I have the same problem with Noah. I followed Marty Guggenheim and Judge Corriero, the "Noah's" of this topic. I am not going to talk about the legal system in great length. I do have concerns about the juvenile justice system, because it is not designed to handle kids who kill. It was never intended to do so when it was invented 100 years ago, and it has never done it well.

However, as Judge Corriero said, we delivered the children, nothing else but the children, to the adult court system. As if that agency has been so successful in stopping the killing. Now we have adult court judges who are dealing with 13, 14 and 15 year-olds. I am always reminded at that point of George Stinny, who was executed in South Carolina for a crime committed at age 14.¹ He was still only 14 when he died. He was electrocuted in the electric chair, and the problem was that it was a grown-up's chair. They had this little kid sitting in daddy's chair with his feet and hands dangling. Of course the straps and the electrodes to bind him were also built for an adult. I have a skinny 15 year-old boy at home, I have seen him put on my coats, and they do not fit him. It took us a while to kill young George, but we finally got the straps pulled small enough to do the job. That is what we are doing when we put kids in the adult system. We are putting them in daddy's chair. We are putting them someplace that they do not belong and do not fit, but we are pretending that they are adults. As Marty Guggenheim has said, nobody believes that they are. I have asked prosecutors, "If they're adults, do you want

¹ See VICTOR P. STREIB, *DEATH PENALTY FOR JUVENILES* 107-110 (Bloomington In.: Indiana University Press) (1987) (providing detailed description of *Stinny* case).

them to drive? Do you want them to vote? Do you want them to drink?"

"Oh, no. They're too young. They're immature."

The adult system, I think, is not the best place. I think theoretically there is an interesting discussion about an intermediate system. I think it is theoretical; I do not see it happening. The prevention and reaction alternatives are the ones that I like to play on. A large part of my theme is that what we have said today misses the point. Getting to teenagers after they kill somebody is much too late. Getting them after they've been raped and abused and raised in the communities which we provide for them is much too late.

When I began to represent young kids, almost always I would find out that they had younger brothers who idolized their older brothers. I had an older brother whom I idolized as well, but who thankfully did not lead me into crime. I see the young boys coming along who duplicate the behavior of the older ones. This has to be our focus, not on punishing the last offender, but on saving the next victim. That will be the theme of what I want to leave you with.²

The correction of the violent teenager who has already committed homicide is very difficult to do. Some programs are successful, but they are very expensive, and very intensive. In any event, the homicide has already been committed, so we are arriving on the scene after the harm has already been inflicted. The threat of long term imprisonment for juveniles is not something they focus upon. I think, as Marty said, adolescents are much more short term and not long term in their perceptions.

I have been involved in representing several kids who have been sentenced to life without chance of parole, a 13 year-old and 14 year-old near Seattle, Washington. I have spent most of my career fighting the juvenile death penalty, and I would have thought it was a victory to get "only life." Then I began to think about telling the 13 year-old that he will never get out of prison. Not surprisingly, he told me, "I would rather die." I am not sure that is the alternative that makes a lot of sense.

² See, e.g., Victor L. Streib, *The Efficacy of Harsh Punishments for Teenage Violence*, 31 VAL. U. L. REV. 427 (1987) (providing more extensive explanation of my views on this theme); Victor L. Streib, *Sentencing Juvenile Murderers: Punish the Last Offender or Save the Next Victim?*, 26 U. TOL. L. REV. 765 (1995) (discussing idea of rehabilitation).

With the juvenile death penalty, I guess I am on record as having opposed it for some period of time.³ It is the major reason, as Professor Woodhouse would tell you, that we have not ratified the U.N. Convention on the Rights of the Child.⁴ We would have to give up the right to kill our children in the name of justice. It makes you wonder.

My recommendation would be to choose prevention over reaction, to try to stop the killing rather than react to the killers. I would also suggest that we no longer tolerate political leaders who keep calling for the death of our children and for the incarceration of our children. I want to tell them, "No, my children are more important than you are. You got it wrong. Get out of office. We need other leaders."

I would also suggest that harsh punishments for the serious crime that the kids get involved in is really not the point. By the time the blood is on the floor, it is too late for this kid. We need to begin to do more to prevent this from happening in the neighborhoods, and not simply go to the legislature and figure out another way to jack up the punishment or to change the statutory scheme. We need to get involved in their lives much earlier in positive ways.

We need fewer prisons and more schools. We need fewer executioners and more enablers. We need people who will reach out to help children rather than looking for yet more ways to punish them. I spent most of my research working with families who have lost somebody to homicide, and given my research interests, usually they have lost a child. Very often their daughter was raped and murdered by someone. I interview them, I talk with them, and I work with them over many, many years. I try to comprehend their pain and how we could fix that. I conclude that their daughter was raped and killed, and that is certainly a hole in their lives that cannot be fixed. I have a 15 year-old daughter at home. I have some vague sense of what such a crime would mean, but really not a clue, because she has never had anything like that happen to her. I can not really

³ See, e.g., Victor L. Streib, *Moratorium on the Death Penalty for Juveniles*, 61 LAW & CONTEMP. PROBS. 55 (1998); Victor L. Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under the Age of Eighteen*, 36 OKLA. L. REV. 613 (1983).

⁴ Convention, *supra* note 2.

pretend I would understand it. The pain the families of the victims have is enormous.

In my mind, one of the more disgusting things is that our prosecutors go to these families and say, "I can fix this for you. I'll take care of this. I'll get the guy who did that. It will all be better." I talk with those families' years after and I say, "Is it better? This person went to prison or this person was executed. Does this fix it?"

No, it is not better. What they wanted was their little girl back. The system could not deliver that. Even worse, it pretended that what they needed was to have us wreak horrible punishments on a few more wretched teenagers, and they would feel better. There is a kind of gut level satisfaction. "Yeah, I'm glad we got him." But then they go home and their daughter's room is still empty. So, it wasn't what they needed. It's wrong of us to tell them that that's what they want or what they need.

We must rein in this sort of punish, punish, punish attitude, and realize that is not what the victims really need. However, they are angry, and rightly so. I have a 15 year-old daughter. If my daughter were raped and killed, would you come to me to ask what should happen to the offender? I would be a raving maniac. I hope, however, that you would not operate our legal system based upon the uttering of a raving maniac. I hope you would console me, I hope you would take care of me, but please, do not listen to me. I would be off the wall, probably for the rest of my life. Do not come to me to lead a victims rights movement to talk about what should happen. I would certainly be a madman.

I think we need to turn to other families, perhaps to my family, that have not lost their children to homicide. We should put our chips, we will put Jeff Fagan's research, and we will put the kind of effort that we can provide into saving your daughter. Our goals should be that your daughter will never be killed. Hopefully, my daughter will never be killed because of what we do. That we can fix. If you can save my daughter's life, that's good. If my daughter is killed, you cannot bring her back. My focus is not on punishing the last offender. That is mistaken. We must save the next victim. Thank you.