The Standards' Recommendations on Dispositions: A Panel Discussion

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Professor Stanley Fisher, Moderator: Good evening. I'd like to welcome you all here. Of all of the volumes of the Juvenile Justice Standards Project, I suppose the most controversial are those dealing with the disposition stage. They have elicited a good deal of critical comment, even though they haven't yet been published, and many of the comments and criticisms have apparently been on the basis of speculation and rumor as to what the Standards actually say. We have with us tonight to discuss these Standards two persons who have a great deal of expertise in this field. The first, on my left, is Judge Howard Levine of the Family Court in Schenectady, New York, who has been in that position for the past seven years. Before that, for some ten years he was District Attorney in Schenectady. On my right is Professor Fred Cohen, Professor of Law at the School of Criminal Justice at the State University of New York at Albany. Professor Cohen is the Editor-in-Chief of the Criminal Law Bulletin and was the reporter responsible for the Juvenile Justice Standards Project volume on Dispositional Procedures, which is one of the four volumes that are most relevant to the dispositional stage. Our format tonight is first to ask Judge Levine and then Professor Cohen to give their views of the major changes that they see being proposed in these volumes and to give a summary evaluation of those changes. After that we will continue our discussion and at appropriate times entertain questions from the floor. Judge Levine—

* This discussion took place at Boston University School of Law on May 6, 1977.
JUDGE HOWARD LEVINE: Perhaps the best way to start is from my orientation and experience and talk about the only juvenile justice statute that I have any great familiarity with—the New York statute.\(^1\) The New York statute is, I would say, a mixed statute. It's not exclusively a medical model, it's not exclusively a punitive model, it's a mixed-up model. It includes jurisdiction over both "delinquents"—youngsters under the age of sixteen who did an act that if committed by an adult would constitute a crime—and persons in need of supervision, the so-called status offenders, or ungovernable juveniles. The statute is treatment-oriented; a juvenile must be shown both to have committed an offense and to be in need of supervision, treatment, or confinement. Unless both these elements are pleaded and proven the petition—the accusatory instrument—is dismissed. In terms of procedures, the New York statute is not too different from what Professor Cohen has proposed in his volume on Dispositional Procedures. There is a two-step process. There is a fact-finding hearing, which deals with whether the act was committed—or whether the conduct alleged in the petition was done—by the juvenile, proved beyond a reasonable doubt under constitutional standards. Then, there is a separate dispositional hearing, which can be a full plenary hearing with witnesses called to the stand, testifying under oath, cross-examined, and so forth. Similarly to the proposals by Professor Cohen, there is a difference in admissibility of evidence at the two stages. In the fact-finding hearing only competent as well as material and relevant evidence may be introduced, \(i.e.,\) no hearsay. At the dispositional hearing, the evidentiary requirements only relate to materiality and relevancy so that hearsay by way of written reports may also be introduced. I might admit very frankly to you that, in my seven years on the bench in a community of about 180,000, with a core inner city, I probably deal with 200 to 300 juveniles in both categories a year, so that in the seven years I've been around, I've probably dealt with somewhere between 1,500 and 2,000 kids in one or both of those two categories. In all those years I would say I could count on the fingers certainly of two hands the number of times there has been a full, completely contested dispositional hearing.

The dispositional part of the New York statute also represents a kind of mixed bag. It is determinate, in large part, in that the original disposition—whether it be probation or placement—is for a definite period. For placement it's eighteen months; for probation it's a period of two years for a delinquent and a year for a status offender. The agencies, however, have the right to apply for extensions of either placement or probation. Such extensions may go to the juvenile's eighteenth birthday.

Recently, a new statute was enacted in response to a growing concern over serious violent crimes by juveniles in the State of New York. This statute, the Juvenile Justice Reform Act of 1976,\(^2\) introduces an element

\(^1\) N.Y. Fam. Ct. Act § 711 et seq. (McKinney 1975).
\(^2\) 1976 N.Y. Laws ch. 878 (McKinney).
of just deserts and thus, for the first time, really brings in the issue of proportionality. It provides that, in cases involving seven categories of the most serious kinds of crimes against the person, the court, after a full diagnostic workup of the child, can determine that a juvenile offender is in need of a special restrictive placement in the form of control for a period of five years, including institutionalization in a secure facility for one year and residential placement for two years. This is not entirely a proportionality scheme since various criteria determine whether such a restrictive placement is necessary. These include an evaluation of the youngster involved and the seriousness of the act committed.

That's essentially the background that I come from. Within the general categories of disposition, there's a wide range of things we can do—probation, referral for various kinds of services within the community, day treatment. In terms of custodial changes, the possibilities range from foster homes to group homes, to small or large residential facilities, to work camps or training schools. Also, interestingly, in the New York system it's again a mixed bag in that there is a public correctional, if we want to use the word correctional, framework for placement and supervision of juveniles run by the Division for Youth (DFY), a state agency. Also, there's a very large framework of private voluntary agencies who accept placements under these eighteen-month dispositions.

I've got to confess to you that I have not got a very firm grasp on the Juvenile Standards; I've only seen them for two weeks. As Professor Fisher just indicated, they haven't been in print that long, though I've tried very diligently to read the material over, analyze it, and to draw some conclusions from it. Nevertheless, I'll do my best to give you my impressions and to try to point out some of the issues and differences involved. In reading it over, I got the distinct impression that this is the most ideological proposed standards or code that I have ever seen. Comparing it to model codes, such as the Model Penal Code, the Restatements, and so forth, there is no question in my mind that the draftsmen and the commission itself came from a very definite philosophical and ideological perspective. As far as I know, this was not so with any previous restatement or model code—including the Model Penal Code, which, in general, I thought was an attempt to simplify and cull the very best in state statutory and case law and to put it together in a generalized statute. I'd like to try to identify for you what I consider to be some of these philosophical and ideological presuppositions, because I think they are very important and because I am not entirely sure that the Standards, either in the text or the commentaries, provide a complete, full and fair debate over these basic presuppositions. So here is my attempt to identify them.

The first basic assumption, I think, in the Standards is that the juvenile justice system is viewed as essentially an integral part of the entire criminal justice system. This is explicitly stated in the Introduction to the Juvenile Delinquency and Sanctions volume. It's very easy to see what
effect this assumption has had on the proposed Standards. In general, the project incorporates most of the substantive purposes and provisions of the Model Penal Code. In addition, the very plentiful research that has been done in evaluating the criminal justice system has been applied by analogy to the juvenile justice system in the Standards. As you will see, that has very, very far-reaching effects. Once one makes that assumption that this is all part of one bag, so to speak, it's very logical to say that findings concerning the shortcomings and defects of the adult criminal justice system can be applied by analogy to the juvenile justice system, and thereafter a whole set of decisions flows. It is noteworthy that the commentary very freely acknowledges that, because of the dearth of research and data on juvenile justice, they did in fact borrow very much from the studies of the adult criminal justice system.

A second assumption is a basic distrust toward correctional agencies of every variety. This is expressed repeatedly within the Standards. Most of the empirical support for this attitude again flows from research in the adult system, the prison system and other adult correctional systems. One consequence of this distrust is to take the decision to release a juvenile from a custodial sanction (I'm now using the term of the Standards Project—custodial sanction) away from agencies. This is contrary to common practice. For example, in New York, if a child has been placed for eighteen months with the Division for Youth, and if the Division for Youth decides after six months that the child is ready to return to the community in an after-care, parole, or other situation, that decision is honored. No longer is such agency discretion permitted under the Standards Project. It also follows from this distrust of agency discretion that, when we deal with community supervision, very little discretion is left to the supervising agency. Thus, the Standards say that the dispositional order by the judge should very carefully and explicitly set forth all of the conditions of behavior required of the youngster while under community supervision and provide that this order can't be varied without another court order. Furthermore, any conditions imposed by an agency against a youngster must be designed merely to facilitate supervision and to prevent the youngster from committing another criminal act. They must not be designed to modify personality. Thus, a very limited role is assigned to a supervising agency.

The same thing is true when the child receives a custodial sanction. In such cases, if other services appear to be needed for the child other than being taken care of in an institutional or other custodial situation away from his family, the child has the right to refuse such services and this

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4 Dispositions pt. 5.1.
does not affect the length of time the child remains in the institution.\(^5\)
The child has an absolute right to refuse any other services.

This is contrary to the whole concept of aftercare which is central, I think, to most juvenile justice systems. According to this concept, after a child has been placed, there ought to be a period of time after the child is released from placement to go home, to go into the community again, where there ought to be supervision—a way to gently bring the child back into the community—before full freedom. This again is discouraged and very much limited. It has certainly been taken out of the hands of the agency and left as a secondary decision by the judge to be made at the time of original disposition. In other words, the judge must predict at that point whether to include aftercare in his original dispositional order. He or she will decide in the original dispositional order when the child should be released within the whole period of control. He can avoid this decision entirely so that the child remains in custodial sanctions throughout the period of disposition or, if the judge really wants to work at it, he can make an order saying that the child remains in the institution for a period of time, or in custody for a period of time, and then a certain length of time under supervision thereafter. But the discretion is out of the hands of the agency; the judge has to take a positive step to put aftercare into the disposition and has to predict at the time of original disposition the appropriate time that release and aftercare should be accomplished.

The third fundamental assumption of the Standards is essentially a complete and undifferentiated distrust of all forms of nonparental custody. In other words, the Standards are in virtually unalterable opposition to the conclusion that a child should be removed from its parents and placed in some other kind of custodial arrangement. This presumption is so strong that the Standards do not adequately articulate the scope of custodial sanctions. The only distinction at all made under the Standards is between secure and nonsecure custodial sanctions. Secure, I assume, means a physically restrictive institution. The variations in nonsecure custody are not dealt with in any way or used for any different results so that, in terms of custodial sanctions, lumped together would be nonrestrictive, large, state correctional institutions; private voluntary agencies offering various kinds of specialized rehabilitative services; group homes; foster homes operated by voluntary agencies; local departments of social services; and so forth. The Standards explicitly adopt a presumption against using the custodial sanctions.\(^6\) And through a scheme of proportionality they also limit their use in the sense that, for the very most serious crimes, carrying penalties for an adult from twenty years to death or life imprisonment, the maximum custodial sanction would be a period of two years. The Standards essentially set forth five classes of crimes, three felony classes and two misdemeanor classes, and there is a propor-

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\(^5\) Id. pt. 4.2.

\(^6\) Id. pt. 3.3(B).
tionately lower maximum limit to the permissible period of control within each class.⁷

Fourth, there is generally a distrust expressed against any kind of exercise of discretion by the various instrumentalities within the entire juvenile justice system. Now I’m saying that includes the agencies, correctional authorities, probation officers and even the judge. Pursuant to that basic distrust, the Standards include a great deal of due process requirements—and this is in Professor Cohen’s bailiwick—principally in terms of full adversary hearings, right to counsel, and so forth. In addition, there are requirements that the court must state its reasons for any particular disposition, must give its reasons in terms of choosing between alternative placements so that there could be full court review on the record. Basically, I agree with all these procedural requirements.

The next point, and perhaps the most interesting of all of the underlying assumptions of the Standards, is the basic distrust of the behavioral sciences expressed in these Standards. Again, this is based upon the experience of the research with adult criminals and the correctional system for adults. These volumes are very much turned off by all of the behavioral sciences and their ability to contribute meaningfully within the juvenile justice system. And so, the very basic decisions for the judge to make on disposition, namely the category of sanction—whether it be reprimand—a slap on the hand—or conditional freedom—such as suspended sentence, probation, or a change in custody—must be made without reference to the kind of evaluative material that I commonly get in a dispositional hearing. The threshold and certainly the most crucial question—whether the child stays home, gets a slap on the wrist, or remains in the community under supervision—or is removed and placed out of the home according to the Standards—should be answered only with reference to the seriousness of the offense and the age and prior record of the youngster involved.⁸ Only after that kind of decision is made—which, again, as far as I’m concerned, is really the crucial decision—can the judge turn to evaluative materials from the behavioral sciences to determine and select programs within the categories appropriate for the needs and desires of the child.⁹ Over and over again there is the discouragement of using evaluative material from the social sciences. They are called subjective, predictive, and so forth, and repeatedly discouraged.

Lastly, there are some basic assumptions made about children. I guess we’re essentially dealing with adolescents. The assumption, I think, that is made is that children are sort of mini-adults. They are incomplete adults; in a footnote to the introduction to the Dispositions volume, Professor Cohen is quoted as follows:

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⁷ Sanctions pts. 5.2, 6.2.
⁸ Dispositions pt. 2.1.
⁹ Id. pt. 2.2.
Juveniles may be viewed as incomplete adults, lacking in full moral and experiential development, extended unique jural status in other contexts, and deserving of the social moratorium extended by this and all other societies of which I am aware. Thus, removal of the treatment rationale does not destroy the rationale for a separate system or for the utilization of an ameliorative approach; it does, however, require a different rationale.\textsuperscript{10}

This assumption—that the only essential basis for differentiating treatment between adults and juveniles is that juveniles have not yet reached adulthood and thus are not quite responsible individuals—again affects a great deal of what is done within the Standards.

Essentially, this viewpoint eliminates a rehabilitative rationale entirely. The word "rehabilitation" does not appear as a purpose or anything else in the Standards, which is rather unique. Even the Model Penal Code included rehabilitation as one of its basic purposes.\textsuperscript{11} Once again, the rationale must be that, because juveniles are just a little bit less responsible than adults, the adult research is applicable so long as it is discounted somewhat by acknowledging from time to time the uniqueness of children and their different stage of development. However, the principle modifications from the adult field appearing in the Standards are in some esoteric fact situations. For example, in addition to the general defense of coercion or duress, there’s a special defense of parental coercion for juveniles accused of an act of delinquency.\textsuperscript{12} In seven years on the bench, I have yet to hear a case in which such a defense would be relevant. However, this appears to me to be the principal kind of situation where there is some acknowledgment of differences, fundamental differences, between children and adults. After you get done with that, there are a number of vague generalities that are used for decision making—words used such as "seriousness of the offense," "culpability" and the child’s "sense of justice." These are the kinds of basic words that are to be applied to differentiate among dispositions. It is kind of interesting, I think, that only a difference in degree of responsibility between an adult and a child is recognized. Further, it’s crucial that there is no reference in the commentaries to any of the experts in child development. I would have thought that at least somebody would have read Eric Erikson, for example. He’s not cited. The only experts in child development I saw cited were Goldstein, Freud and Solnit.\textsuperscript{13} But, I must say, the use of their book was improper as support for the concept that custodial sanctions of all varieties are a very drastic sanction for adolescents. This book is primarily talking about child development, and at a much earlier stage than fourteen-, fifteen-, sixteen- and seventeen-year-olds, which is essentially what we’re talking about within these Standards.

\textsuperscript{10} Dispositions, Commentary, pt. 1.I, at 19 n.5, \textit{quoting} Cohen, \textit{Position Paper (juvenile Justice Standards Project, no. 18, 1974)}.

\textsuperscript{11} American Law Institute, Model Penal Code § 1.02(2)(b) (Proposed Official Draft 1962).

\textsuperscript{12} Sanctions pt. 3.4(B).

\textsuperscript{13} J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1973).
The Standards are rigid in terms of their basic adherence to the theory of proportionality, the heavy prejudice against custodial sanctions, and the undifferentiation among custodial changes. Frankly, these are a number of the things that I feel a judge would not be very easy to live with, in terms of attempting to come to a just conclusion and one that is good for the child as well as society. Let me point out a few anomalies for you. I will do it by trying to bring in my own personal experience with some very innovative rehabilitation projects in my own county. One of the things, clearly, that we see in many kids is that their offense is the product of a very pathological home situation, although not straight abuse. We had a very active campaign to recruit foster parents who were willing to take children into their homes, give them some structure, give them some affection, give them some model as to what a normal family life is like. The vast majority of these children don’t fit in those upper categories of serious crimes in which one is authorized under the Standards to change custody for a period of a year to two years, but fall below that. Indeed, foster parents recruited from the community are not terribly interested in taking in murderers. Now let’s suppose one of these youngsters committed a misdemeanor. Under the Standards the maximum custodial change would be three months. A less serious misdemeanor would be two months.\(^\text{14}\) Now I hope you can visualize what will happen here. We've very carefully tried to recruit foster parents who are going to give love, affection, attention—all the things this child has never had before. The child has a period of adjustment to start with, a very awkward, painful period of adjustment. After several months, things begin to smooth out when, all of a sudden, “Sorry, the three months are up. You've got to go back to your parents.” What's most startling is that there doesn't seem to be anything that indicates that the child can competently waive his rights to go home even if he or his foster parents so desire. So we'd have to tell the foster parents, essentially: “I know you've worked very hard on this child, I know you're beginning to get somewhat attached and he's getting attached to you, but you see this is a custodial sanction that he had and there is a heavy presumption in law against this kind of punishment. So, I'm sorry, he's got to leave.” The same thing is true with private, voluntary agencies that we select for placement for particular needs; I have in mind one particular agency that has the most gifted child psychiatrist that I have ever seen. He's a saintly man, he does wonders with kids. Under the Standards, any youngster sent to that agency would have an absolute right to refuse the services of the psychiatrist,\(^\text{15}\) no matter how disturbed, resentful, or fearful he may be, because he doesn't understand what the whole concept of therapy is. On the other hand, if the child agrees to see the psychiatrist and things do go well and a rapport is developed, without any reference to clinical factors, this child must be released at the end of what may be a very short period of placement.

\(^{14}\) Sanctions pts. 6.2(A) & (B).

\(^{15}\) Dispositions pt. 4.2.
I don't understand this concept of justice. I see proportionate sentencing as essentially an invitation for plea bargaining. I don't see how counsel assigned to a child, ethically under the Standards, could do anything else but try as hard as he could to plea bargain, reduce charges, minimize dispositions, and so forth. Children have difficulty enough in understanding what goes on in a juvenile court without plea bargaining on five separate classes of offenses. I don't think all this will help that sense of justice. I guess I've said enough for the moment. I certainly ought to let Fred have a chance.

Professor Fred Cohen: Well, first let me thank you for having me here and second let me recognize, I hope without any embarrassment, a friend of mine who is in the audience. Sandy Fox, a professor at Boston College Law School, who has contributed as much to juvenile law as most—certainly more than I—and the best casebook in the field. Feel free to help me, Sandy.

I won't go on as long, and I'm certainly not as organized, as Judge Levine because his summary is, I think, essentially fair. I'm not, however, necessarily saying that I agree with all of his conclusions. Some of the points made need further explanation. Where the Standards say that, in a sense, juvenile justice is viewed as a part of the larger criminal justice system, I think that's accurate. But it has to be said that the Standards Project is focusing on crimes committed by young people, not the kind of social welfare cases that come through by the label of PINS or neglect. So we are talking about crimes by young people. I'll go further than Judge Levine: the Standards reflect not only a basic distrust of correctional agencies, but a combination of contempt and cynicism that grows out of research in the juvenile field as well as the adult field.

This basic distrust—I'll accept that term for nonfamilial dispositions—grows out of a larger kind of approach that we took in the Standards. We approached this task with—I hope this doesn't sound too pious—a real sense of the limitations of the enterprise, that is, what it is that a Juvenile Justice Standards Project could do. We were selecting among a lot of alternatives, none of which were particularly attractive. Among the least attractive alternatives to me was to continue a system that is architectured, I think, on a false theory of rehabilitation, benevolent purpose, or therapy. I see that as being wrong in theory and harmful in outcome. The only reason for an indeterminate sentence or disposition is to somehow give effect to a rehabilitative ideal, it seems to me; and to the extent that you attack the rehabilitative ideal—as Judge Levine correctly points out we did—the indeterminate-type sentence has to suffer. It's probably also true that there's a general distrust for discretion. We weren't so foolish as to try to abolish discretion, but we did try to hem it in, in order to make the best decisions possible about where it was to remain and how it was to be used.

I also think we made the correct assumption about kids. I think that the part of the juvenile justice system that we've been discussing—
delinquency—is built on an edifice that begins with the view of the child as somehow pathological. I know what juvenile means, but I’m not sure what delinquency was intended to mean. I believe that it means something in the realm of individual pathology. At least, that appears to have been the rationale underlying the creation of the juvenile court in 1899: “My court is a clinic,” judges would be heard to say. There was a notion that something was wrong with a kid who committed an act that would be criminal if done by an adult, and from that assumption all the rest of it flows.

You [Judge Levine] don’t distinguish between serious and nonserious offenses for dispositional purposes, and I think that’s fundamentally wrong—I think that’s fundamentally wrong in the abstract sense of the word justice and in the way many kids experience the system. New York is one case, and Massachusetts is a special case, with its deinstitutionalization—but, looked at nationally, a high percentage of kids who have done relatively minor things are institutionalized along with older kids who commit more serious offenses. Now something’s wrong with a system that places status offenders together with kids that commit serious offenses and has them do the same amount of time if not more. And I believe that something is equally wrong when a youngster who commits a relatively minor offense receives a disposition indistinguishable from a youngster who commits the most serious of offenses. Gerry Wheeler’s study, conducted first in Ohio and then nationally, suggested that the prototypical kid who serves the most time is a relatively young—thirteen years old—male, white, status offender.16 A system that allows that kind of a result must be changed.

In the Standards, the effort was to pursue a sense of justice and balance, with proportionality used as a principle of limitation. The idea wasn’t to hit the kids hard, but to recognize the unique status of youth as an ameliorative factor—to see kids as mini-adults and not as presumptively incompetent. The basic principle, then, for dispositions is a form of diminished or partial responsibility and not a presumption of “sickness” or of a need for treatment.

We were not beginning with a clean slate, and we certainly were not going to come out with Standards that abolish the juvenile court. What we wanted to preserve about the juvenile court was a unique status in law for kids, a sense that the best we could do would be to reduce the harm, as lofty as that sounds, that the present system, in the main, inflicts on kids. One way to examine the same question—I hope without being too redundant—is to ask whether an adjudication of delinquency marks an appropriate time to suddenly take a kid into the arms of the community and provide all the good help that nobody provided before. If it does,

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then many of the Standards go out the window. Let me emphasize that it is the design of the system that I am addressing and to a lesser extent how it operates. Operationally, there are a number of filtering devices that can be made to operate so that only the most serious cases reach the formal adjudication and disposition stage. As far as design goes, to repeat my point, the Standards reject the notion that a desire to help—the rehabilitative ideal—should underpin the nature and duration of an available sanction. I think the present system with its rehabilitative ideal has created far more harm than good. I don't know that the system has produced much in the way of community protection, either. I know that we haven't produced much in the way of positive treatment outcomes. There's a lot you will want to ask me. Is this an ostrich-like approach? What if we come along with effective treatment? These are all fair questions. Do the Standards accommodate themselves to such possibilities?

Just a final word or two and then I hope to take some questions. We started out with a very profound sense of limitation of what a standards-setting project can accomplish. One of the arguments that I used to have with some of the judges, Lindsay Arthur in particular, was my view that the only information that the judge should have at the point where he sets the nature and duration of the disposition is the age and name of the kid, the details about the offense that he might not have had, given the evidentiary limits of adjudication, and prior record. And that's all. To many judges, that was outrageous. Why was that outrageous? This is the way the argument goes: "You mean I can't know if this kid comes from a broken home, or that his mother's a prostitute and his father is an alcoholic, or that he comes from a neighborhood where you're lucky if you can survive for more than twenty-four hours? You mean I can't know that?" Well, I think it's a fair question for me to ask in return, "What are you going to do with it? Information is good only if you can use it for something. Now what are you going to do with all that? Are you going to bring the juvenile court staff in and clean up the neighborhood? Are you going to somehow reallocate wealth or move power around in the community so that this won't happen in the future?" No, obviously you're not. Which way does that information cut? It seems to me, and I think the information theorists back me up, the more you know about a kid in this situation, the more likely it is you're going to find some way to explain his behavior, not excuse it. This in turn creates a need to do something for, which I read as "to," that kid. One response is, "But maybe we can save this one kid." Well, that's where the basic distrust of individualized treatment comes into the Standards. We created a voluntary premise to treatment—offer him school, offer him vocational services, but do it within the limits of a sanction that is roughly equivalent to the seriousness of the offense. Now you have a sense, I suppose, of where I'm coming from and where Judge Levine is coming from. Why don't I back off with that brief statement and open it up to whatever format you all have.

**Professor Fisher:** I have something I want to ask Fred at this point.
What is your response, Fred, to the hypothetical of the boy or girl who is put in custody for a maximum of twelve months, let's say, and after four or five months the home situation is changed and the kid is doing well? There is a less rigorous disposition available that the agency thinks the child would prosper in, let's say a halfway house instead of secure detention. Is there power under the Standards—I take it the agency has no power—to change that child from secure custody to nonsecure custody? Does the court have power and should it be necessary to go back to court if it does?

**Professor Cohen:** I don't believe that the court can alter that disposition as you stated it in the hypothetical. Let me try to explain why. This is an example of where your guts pull you one way and your sense of what the model has to be pulls you another. Now the strictest way to apply a deserts or proportionality approach is to say something to the effect that nothing that a judge—or anyone—can learn after a reasoned, adversary-type disposition has been arrived at can affect the seriousness of the offense or the culpability of the offender. That surely follows in logic. And, if the offense and the culpability of the kid were both worth twelve months at the beginning, then they're not worth less at any point along the continuum. That's a strict deserts approach. There are at least two caveats in the Standards. One is a good time reduction, which was thrown in for institutional management purposes. It's not too much of a flaw on the model, as it only provides for a maximum reduction of five percent by the correctional agency. The other is to alter an inequitable disposition.

One thought is that, because nobody knows a lot about sentencing or dispositional principles, there ought to be an appellate-type mechanism that would begin over time to fashion a body of principles based on claims that the disposition given at the outset, although not illegal, is out of line with dispositions given in the same jurisdiction in other cases that are not easily distinguishable. Those are the two areas where a reduction in time actually served is possible. It must be remembered that the dispositions for even the most serious offenses are quite short. Thus, as I read the Standards, the answer to your hypothetical would have to be that the judge could not reduce the sentence.

**Judge Levine:** I agree with that in terms of the language of the statute. I guess that really points out my problem with the Standards. If a child's sense of justice is as crucial a consideration as it appears, I find it difficult to see how the situation posed would contribute to that sense of justice. The child works very hard, takes steps to modify his behavior and outlook and yet, on a rigorous just deserts theory, he must remain institutionalized. I find that very difficult to accept.

**Professor Cohen:** Part of the problem that you posed goes to another question. The problem as it's stated reads in very conclusionary and very
heart-rending terms, as though all these matters are self-evident. Now there is a loving mother where before there was a brutal home situation. The kid has now turned the corner after four or five months. What that actually translates into is our clinicians, diagnosticians, or California Youth Authority-type of juvenile parole boards making predictions about future behavior, because it’s not the diagnosis per se that we’re interested in. When you start getting into that business you’re making judgments about future criminality and future adjustments. Certainly, the first ten cab drivers that you happen to ask will predict as well as the experts.

**Judge Levine:** Intuitively, you would say this youngster is ready to get back on the street, get back in the community. Instead, the Standards say, “Sorry, you’ve got to stay in another year and a half.”

**Professor Cohen:** O.K., but that’s going to be relatively few people.

**Judge Levine:** Not necessarily, Fred.

**Professor Cohen:** As you were saying, in your 1,500 cases you’ve seen very few serious ones, and the Standards haven’t done anything very serious with the serious ones.

**Judge Levine:** You mean two years is a maximum, and we’re not really talking about too many of those anyway; we are talking about the youngster staying in for a very short additional period.

**Professor Cohen:** I think the Division for Youth has seen maybe six kids since the Juvenile Justice Reform Act came into operation in January of this year. They have only allocated, I think, slightly over a hundred beds for the whole state of New York for all murderers, rapists and kidnappers. They quietly suggest that if they see twenty it will exceed their expectations. So one way to look at what the Standards are trying to do is to see how they affect the kid at the top of the scale in terms of seriousness of the offense. I think juvenile violence has been blown way out of proportion in terms of actual numbers. Even where the numbers seem high, it appears that a small group of juveniles are responsible for multiple offenses. Actually, it seems that crimes against the elderly in New York City went down, and still we have this cry in New York to provide for waiver in offenses involving elderly victims. Maybe another serious question concerning the Standards is how do they affect those kids at the bottom who, on a national scale, were receiving the most inequitable correctional response within the juvenile justice system. I believe they will come out far better. At least that was a prominent thought behind the Standards.

**Professor Fisher:** There seems to be some kind of a trend, a slow trend, in this country toward deinstitutionalization and toward a system of community-based alternatives. What kind of impact do you think the Standards would have on a state like Massachusetts, which has closed the large institutions and which puts very few kids in secure custody?

**Professor Cohen:** On that angle I don’t think the Standards would have very much appeal to Massachusetts. I think the Standards on Corrections Administration, a volume that you have yet to see, addresses
some of these basic premises. In addition, the Massachusetts experience, if we understand it well enough, could lead to additional momentum toward deinstitutionalization. Last week I heard that the number of kids nationally in confinement is going up and that the number of kids receiving services within the Division for Youth Services in Massachusetts has doubled since the institutions were closed. That in itself represents some serious problems. The wholesale creation of mini-institutions that go by different names and an increase in coercive services concern me greatly. There's a vast child care business out there. We all exist because we've got these agencies and courts and budgets. As the birth rate goes down, we're going to see a great deal more lobbying, especially by the private agencies, to keep these kids coming in.

Professor Fisher: Wouldn't these Standards actually have the effect of putting more kids in secure confinement? If you adopted these Standards in Massachusetts, every juvenile court judge would have the power to send kids to secure confinement for two years or one year or six months, which power those judges don't now have. The only power the judges now have is to commit delinquents to the Department of Youth Services. The DYS can and sometimes does parole them the next day.

Professor Cohen: We took this position: that the battle for deinstitutionalization politically couldn't be fought around the Standards we're discussing tonight. It had to be fought around Standards that spoke directly to the question of how many institutions, if any, there should be. And the ABA, that is, the working committees, simply didn't buy the idea of total deinstitutionalization. I think the farthest we got was that no institution should exceed a rated capacity of twenty kids. I'm not sure how they solved the question whether you can have twenty kids in satellite institutions on the same grounds sharing a common kitchen. I can say this: I know that many people connected with the project, at least the reporters, support the notion of deinstitutionalization. Not the closing of all institutions, but the notion of a severe reduction in both the duration of confinement and the availability of secure confinement institutions. One of the things about New York that always tends to mess up a discussion like this is that juvenile court jurisdiction ends at age sixteen, making it the lowest cutoff point of any state in the country. You see, we either sentence our seventeen and eighteen year olds as youthful offenders or send them to Attica. These Standards would not permit that. The Standards do provide for limited waiver, remember, waiver for class one offenses. The idea is not that the kids are going to be helped, but that the problem is so serious that one of the only decisions you can make is to put them into the adult system. What we've attempted to do stands or falls on the premise that proportionality in dispositions is the most attractive alternative available and the one that reduces coercion. If we're wrong,

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these three, or at least two of the volumes, fall. I'm not sure about the Dispositional Procedures volume.

**JUDGE LEVINE:** I have no problem with the due process aspects inasmuch as they express a preference for a least restrictive alternative. I think a good judge probably takes that attitude. Well, I've got a few other things to say but I really think we should hear from the audience.

**PROFESSOR SANFORD FOX:** I thought until the last minute that Judge Levine was trying to tell us that traditional ideology was some kind of disease. The traditional system has an ideology too. It's not a question of the existence of an ideology making, for some, reason to reject the proposals that the Standards make. It's a question of how far does one ideology carry you in the direction that you want to go as compared with another one. I think that one of the issues in which this came up most pointedly was the question of releasing the child from some sort of control because he had turned out to be a better kid than he was thought to be when he was before the court, or because his home situation had turned around or had turned out to be a more secure, safe and nourishing place than before. Well, in order to adopt the position that you would release control upon the occurrence of those events, you must take the position that you would have opposed the control had those conditions originally existed. That is, the reason why the child was sent away was because there was something about his personality that was rubbing the wrong way, socially rubbing the wrong way, and, if he could turn that around, okay, we'll let him out; or that the reason he was sent away was because the probation investigation turned out to show too many skeletons in his closet, and, once the family had cleaned up those skeletons, we'll let the kid out. Now neither of those rationales is very popular, and deservedly so, because a major purpose, I think, of the whole Standards Project was to make the entire enterprise more honest. Thus, if you are going to take a child out of somewhere because there are a lot of skeletons in the home closet, then you should go to the neglect and abuse crew and allege and prove all the things about the family pathology that legal doctrine admits as a justification for taking the child. But, just because the child pinched a ride on a trolley car, there is something unjust in saying, "Nobody should be sent away for pinching a ride on a trolley car, but you, my boy, have a difficult mother and therefore you ought to go away until she straightens out." There is something repulsive about that. And it's one of the efforts of the Project to try to prevent that from occurring.

Of course, you are perfectly right that the whole set of Standards as you describe them will be very difficult for you and other judges to live with. It is distinctly an effort to take discretion away from judges and professionals. The Model Penal Code has exactly the same problem. It proposes to deal with disparities in sentences by making the legislature control maximum sentences and by giving no discretion to the judges. Corrections people and judges around the country scream bloody murder. There is a continuing battle between those who would like to move
discretion—not out of the universe, but back into the legislature—and those who want to keep it where it presently is.

**Judge Levine:** Although it is very difficult to remember all of the deep and fruitful things you've said, let me try and respond. Going back to your point about ideology, it seems to me that this is a very purist ideology, and that's what bothers me. I don't buy the theory that one ideology applies to every situation. That doesn't mean that I reject every ideology or idea, because then I'd have to reject everything, every theory. But, when such an absolutist ideology is adopted, adherence to that ideology can ultimately become more important than what is good for the individual at a given moment. We saw that in the hypothetical posed before. That is where I begin to differ. I reject absolutes, and this is an absolutist ideology. When I hear that word it's as much of a red flag for me as some of the words you have referred to which are also ad hominems and thus inherently objectionable. You are saying that it's objectionable that a child should be taken out of a custodial arrangement coercively against the child's will not because of its fault but because of the parent's fault, or because of skeletons in the closet. But that's as much of an ad hominem as purist ideology is for me. All I can tell you is that, if you saw one of these cases in its immediacy, in which the parent is rejecting the child and the child really knows it shouldn't stay home, you would agree that there ought to be a parting of the ways for a period of time. I don't place many kids, but when I do, neither the child nor the law guardian complains. To sacrifice that kind of thing in order to have doctrinal purity, to avoid the abuses essentially established in the criminal justice system which has had all the rigidity you're talking about, seems to me to be unjust and foolish. You are injuring children by this, and that frankly is something that, as you've indicated, I would have a great deal of difficulty living with. The fascination of this field, and I've been involved in the criminal justice system for ten years, is the children, their capacity for growth, their capacity for change, their sense of fairness and even their honesty. It is a fascinating and creative field. That's why—and I'm sure I'm giving you a Lindsay Arthur approach to this—if you take that away, it will lose a great deal of its flavor for me.

Now let me postulate a theory. In terms of the public's tolerance for deviant, antisocial behavior of children, the concept of diminished responsibility will never be sufficient. The system has to be based both upon a concern for children and upon the differences in the capacity for rehabilitation and growth between children and adults. One thing that was not pointed out in my curriculum vitae here is that I was elected twice as district attorney and once as a family court judge. Recently, I have also been intimately involved in the political negotiations and happenings in New York on the whole problem of the violent juvenile. You cannot justify to the community, nor maybe even philosophically, a two-year maximum period of control for a fifteen year old who commits a serious, violent act that shocks the community, solely on the basis of a concept of
diminished responsibility. My greatest fear is that what will happen under the Standards, whether they are good or bad, is that, as soon as you give the legislature, the enlightened legislature, the discretion to fix proportionate punishments, there will be a continual gradual erosion of the periods of punishment and the waiver to the adult system simply through politics. We see this in New York. Frankly, the only thing holding out in New York is a few of us who are talking about the potential of children and the damage to children. As soon as you talk just deserts, you have a great deal of difficulty in saying that a fifteen-year-old rapist gets a just desert out of a two-year sentence. And then it's a fourteen year old. And then it's a thirteen year old. There just isn't enough content, substance, or morality in diminished responsibility to hold children separate from adults.

**PROFESSOR COHEN:** I hope I'm not hitting below the belt, but you've been gracious enough to allow your court to be heavily studied, and a couple of our students recently did a study of your court. If I've got it straight, holding all the variables constant, the item that was most predictive of a severe disposition was the court's perception of the intactness of the family. However we define the seriousness of the disposition, the item that was most predictive of a severe disposition in the first instance was the probation officer's assessment, and then the court's validation of the intactness of the home. This certainly raises again the question, is this the type of information to use to make judgments that result in the lengthening of a disposition?

**JUDGE LEVINE:** Fred, that's undifferentiated analysis. I am glad to have your students over and learn—we learned a great deal about ourselves from it. But I don't think that, in terms of sense of justice for the child, he feels that placement in a foster home is as coercive a sanction as you're implying. Don't you think you have to address yourselves in a code, or in a standard, to the environment of the child? There's nothing in here whatsoever dealing with the environment of the child or changing that environment. We're not just talking about pathology, we should also be talking about environment.

**PROFESSOR COHEN:** Let me just turn this thing around. Where you see symmetry in the Standards, I see a lack of symmetry, and that's one of the problems. The Standards are not relentlessly ideological. In fact, if you look at the dispositional procedure sections where it is stated what information is essential to the disposition, you will also find that there's a subsection that talks about the social situation as relevant and therefore admissible information. It's not clear whether the judge must accept it. The information may be relevant. That's a decision that is left with the court. Now that's a point where the symmetry of the just deserts model

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21 Id. pt. 2.3(B).
breaks down. And that doesn’t represent pursuit of ideology. That repre-
sented the hard-nosed debate between four former presidents of the
ABA and people like Justine Wise Polier. That did represent compromise.

JUDGE LEVINE: That’s true, except it’s not quite as clear as you indicate,
because in Linda Singer’s volume on Dispositions the crucial decision, the
bottom line decision really—does the child stay home, does he stay in the
community—is restricted basically to the information that is essential
information rather than the relevant information that is used only to
differentiate among programs within the categories of sanctions.22

PROFESSOR FISHER: I’m not sure that the Standards are as clear as the
commentary, and the commentary, in different volumes and in different
places in the same volume, often is discrepant. In the Dispositions volume,
it says in section 3.3(E)(1), regarding the imposition of nonsecure custody,
that

no court should sentence a juvenile to reside in a nonsecure residence
unless . . . the court finds that any less severe disposition would be
grossly inadequate to the needs of the juvenile and that such needs
can be met by placing the juvenile in a particular nonsecure resi-
dence.

I don’t know how a judge could decide whether or not a kid could be put
in a nonsecure residence unless he knew the kid’s needs, which means he
must have the social information. If the judge doesn’t have the social
information until after he decides the “category,” then the question is:
What is the “category”? Is it just “custody,” or is it “secure custody” or
“nonsecure”? Dispositions 3.3(E)(2)(b) says that no court can sentence a
juvenile to a secure facility unless it finds that “such confinement is
necessary to prevent the juvenile from causing injury to the personal or
substantial property interests of another.” Now I don’t understand how a
judge could decide that secure confinement was necessary to keep a kid
from being a danger to the public unless the judge again knew something
about how the kid had responded in other placements, whether the kid
was psychotic, whether the kid was dangerous, and so on. So again it
seems that before the judge can decide to impose secure custody—or, as
we have seen, nonsecure custody—the judge has to have the social report.
This may be just a discrepancy between your volume and Singer’s volume,
Fred, or there may be some unclarity here.

There’s one other point. Although we keep talking about the Standards
as embodying just deserts and proportionality and rejecting rehabilita-
tion, we haven’t mentioned the fact that the Standards give a right to
services.23 A child in a placement—even in a custodial placement—has a
right not only to the services that any child who is not admitted to an
institution would have, like education (including, I take it, special educa-
tion), but has a right to whatever services are necessary for normal growth

22 Dispositions pts. 2.1, 2.2.
23 Id. pt. 4.1.
and development. Now that covers everything. And, if a kid isn’t getting those services, the remedy is either to reduce the disposition or to discharge the kid from custody.\textsuperscript{24} That sounds very much like a right to treatment to me, and it seems quite far from proportionality and just deserts if, for example, you’re going to take a rapist who’s in for two years and release him because he hasn’t got a good vocational educational program or good treatment for his learning disability. That’s not proportionality.

**Professor Cohen:** I think what they had in mind there was the following: once a decision has been reached that a certain offense, based on the culpability, is worth X, and if that X means that the state now has custody of the child, then the state in effect becomes a parent substitute, and the right to services is maybe an inartful way of talking about what parents or guardians, judged by some kind of normative standard, would or should provide this kid. In other words, we’re viewing the loss of liberty as the sanction, with the state not being able to impose additional sanctions and having a positive obligation during the time that it holds the kid to provide opportunities for growth and development. It’s a struggle to find appropriate language when you are trying to reject the language of therapy and treatment, and this is the language that was hit upon. But that, as I can best recall it, was the thought—now whether, when you rethink it, it washes, I’m not sure.

**Judge Levine:** I don’t see the right to services as being inconsistent with the just deserts proportionate sentencing theory. In other words, if we take the most rigorous of the criminal law codes, there’s nothing inconsistent with providing services. I think we would all agree that services ought to be provided. The Standards provide what criminal law theorists would like to see in the adult criminal law system: the preservation of individual dignity or autonomy even within the correctional system by means of services of a very concrete nature within the institutions. I think this active work is essentially the fantasy of criminologists and criminal law professors as to what they would like to see in the criminal law system. In terms of interpreting the extent of the right to service, again I come from my practical, political background and also in part from my knowledge of appellate judges. I think the terminology used here is pretty clear: all publicly funded services to which nonadjudicated juveniles have access should be made available to adjudicated juveniles. I guess that means educational services, vocational training, food, clothing—basic things that kids get in a community. If it means anything more than that, then you’re really going to have confusion because some communities have great mental health services, for example, while others don’t. Which community are you going to use as the benchmark for what should be provided to a homogeneous mass of kids in an institution, coming from various parts of the state? And then there is this interesting

\textsuperscript{24} Id. pt. 4.1(D).
sentence: “In addition, juveniles, adjudicated delinquents, should have access to all services necessary for their normal growth and development.” That could mean almost an unlimited amount of services—a private psychiatrist for each child, special educational services. Obviously the public is not going to bear the burden of that, and the judges know that the public is not going to bear the burden of that. Who is going to determine what is needed for a normal child’s growth and development? It is a difficult question and I don’t think we should look at this confidently. It’s possible that, by virtue of this language, agencies are going to be ordered by judges to provide expensive services beyond budgets or that children are going to be discharged *en masse* for not getting expensive services.

**Professor Cohen:** You see where the logic of that, let’s say, correct political or empirical view of the world takes you. If within a proportionality scheme the public won’t stand for it, the legislature won’t provide the services, how can you continue to support a system that rests on the foundation of providing services, called treatment?

**Judge Levine:** That’s true, and my retort to that, Fred, is what rationale for the system will more likely produce public support for services—I don’t want to use that word “treatment”—and what rationale will support tolerance? My basic point is that proportionality, just deserts and diminished responsibility, as a rationale for this distinction, is not enough to hold the whole game together.

**Professor Cohen:** I think that’s one of the most serious problems confronting supporters of proportionality in the juvenile and the adult field. Michael Wald of Stanford, who worked with the Project, put what you’re saying in some more detail. Let me try to rephrase it. He said that treatment is a sham. The treatment resources don’t exist and treatment theory is in shambles. But, he argues, they’re very valuable shams and very valuable pieties. Then he goes on to ask, if you cleanse the system of the pieties and the rhetoric, who will work in that system, who wants to be a juvenile counselor or therapist if the goal of rehabilitation is eliminated? Once you let these atavistic judges and legislators loose with determinacy and break the bonds with the notion that “we want to help,” who knows where that will take you? I put that as a very serious kind of objection to proportionality. I have some answers for that; I don’t know if this is the right moment to mention them, but I think while these Standards are being reviewed by the ABA—now they are in a tentative draft form—that it’s important to discuss these questions. This is the kind of input we need and this is the kind of debate that juvenile justice really hasn’t had. So far, it’s been the social welfare workers getting up and wringing their hands, talking about wanting to help kids and living next door to an institution

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25 *Id.* pt. 4.1.

26 Associate Professor of Law, Stanford Law School; Reporter, Institute of Judicial Administration & American Bar Association, Joint Commission on Juvenile Justice Standards, Standards Relating to Abuse and Neglect (tent. ed. 1977).
where kids are being punched in the stomach as treatment. The debate is on and I still want to hear the case. I don't hear it convincingly; though I do hear the politics of it. It's the camouflage theory as opposed to the candor theory. One of our objectives in these volumes is to bring candor to the system, to call it what it is. Mike Wald is saying, "No, don't call it what it is because it's a very valuable camouflage."

**Judge Levine:** There is a reality to it all. Because if you went to a training school, and the next day you went to a prison, you would see a real distinction.

**Professor Fox:** There is a piece of experience available. The California statute that goes into effect in July is an example of what happens if you turn the legislature loose. And what do you end up with? With a California law that says that for burglary the judge can sentence you to four, or five, or six years (or three, or four, or five years); and for second-degree murder, probably five, six, or seven years. Now that is simply not the expectation that people have when you let the legislature and the politicians loose.

**Judge Levine:** All I can tell you is what I've seen now in juvenile justice in New York, where they want to reduce the age of responsibility to fourteen and waiver to fourteen, and to provide special classification for offenses against the elderly. This old-age offender bill, which passed in two different varieties, imposes criminal liability, full adult criminal liability, for a violent crime against persons aged sixty-two and over. I don't really know what happened in California, but I would have to say that it would not happen, from what I can see, in New York, in terms of having a rational and humane system of proportional sentencing.

**Professor Cohen:** When I read that old-age offender bill recently introduced in New York, I wrote a comment on it which said this is ridiculous—if you're going to isolate out for special treatment kids who commit crimes against the aged, and send them into the adult system, what are you doing about cripples and pregnant females? One of our astute legislators said, that's right, as Professor Cohen said, what we have done has been too narrow. So that is the mood, what I wrote in an ironic tone was taken seriously.

**Professor Fox:** Suppose what you suggested really happens, that there is political virtue in voting in extreme penalties for offenses against pregnant cripples?

**Professor Cohen:** Well, I assume that it is going to make some difference. In this case, it means being sent into the adult system.

**Professor Fisher:** Isn't there also a big difference between your example from California, where they are fixing a minimum and maximum range, and these Standards, where there is just a maximum?

**Professor Fox:** That is a presumptive statute. There is no minimum or maximum. The judge must pick the middle number. Unless it turns out to be one of the nicest burglaries he has ever seen, in which case he can give the lower number, or if it is one of the worst burglaries, then he can give the higher number.
JUDGE LEVINE: What happens with plea bargaining in California?

PROFESSOR COHEN: It becomes offense bargaining. You are buying into offense bargaining rather than straight sentence bargaining. Isn't Maine an even closer example? Those sentences are pretty stern, and they have abolished parole, although they are liberal in terms of good time. That will be the first real state to study—it's as close to determinate sentencing as we have.

I was going to express something personal. Maybe I'll put it as a question: Don't you find it strange to be in bed with some of the folks that we find ourselves in bed with on determinacy? I do, and I don't like it. All of a sudden, psychiatrists—I may not like how they work but they're generally decent people, you can chat with them—and the liberals share a bed, and I for one don't like it.

JUDGE LEVINE: I think that should give you pause.

PROFESSOR COHEN: Well, I said that in a spirit of trying to be candid and trying to indicate the lack of certainty behind this approach to determinacy.

PROFESSOR FOX: The same thing was true when indeterminate sentences came in. That had support, and properly so, from both sides of the spectrum. Everyone knew it was going to make for easier control, more room in prisons and an opportunity to be humane.

QUESTION: A few weeks ago, The New York Times came out with an article about teenage narcotics dealers in New York, where the narcotics laws are very severe for adult offenders. The adults have been recruiting juveniles to do most of the visible dealing on the streets since juveniles are not subject to the same kinds of penalties as adults. Does the sharp distinction between adult criminal offenders and juvenile criminal offenders encourage conscious, calculated criminal activity by juveniles who know that they are not going to suffer significant punishment? As you said, the most severe punishment provided for in the Standards is two years.

PROFESSOR COHEN: Well, I think that kind of thing goes on, although I don't know the extent of it. I think perhaps it's always gone on. Anytime you've got an assumption of diminished responsibility and a sentence that is not as severe as that which an adult can suffer, you are going to have people who think it through and make that decision. But I don't think there is anything we are doing with the Standards that encourages that. This is simply the present system. The average amount of time spent in a training school now, nationally (including PINS), is either 8.6 months or 8.7 months, depending on which study you read.27 So, even under the present system, you are not talking about lots of time being spent in confinement. I don't think there is anything that we are doing that encourages or discourages this activity. You would have to move in the direction of broader waiver, which we were unwilling to do.

JUDGE LEVINE: A couple of things. I think one amusing aspect is that

27 See Dispositional Procedures, supra note 20, at 9 n.28.
what really brought that about is the Rockefeller drug law, which takes discretion totally away from the judges, prosecutors and cops. Once the pinch is made for this offense, there can be no reduction, and it must go to trial. The severity of the determinate sentences for adults has produced this outgrowth in the kids, which I think is an amusing point when you talk about taking discretion out of the system.

Second, it is a terrible dilemma with these kinds of kids. They come from terribly deprived backgrounds—ravaged homes and neighborhoods. What do you do? I don’t know how much deterrence there would be if we were to increase the penalties, for example. But one aspect of it is—at least where you have a system that is semi-deterrent, like New York—that somebody has the opportunity to work with the child, to observe him, and to see what can be done with him. The other alternative, which Fred mentioned, is waiver for the problem of the most heinous, totally premeditated crimes. I think transfer decisions—waiver—are the most arbitrary, capricious and discriminatory of all decisions. The kids who get waived to the adult system are black, Puerto Rican, poor inner-city kids. If that is the answer that the Standards offer to prevent public indignation, then I cannot support them.

Professor Cohen: I agree, it is no answer. There is a waiver volume. It was fought—I fought it—but we lost to people who said we simply must be able to decide that “this kid is not amenable to treatment.” We lost it to the treatment people. I would not have had waiver at all.

Judge Levine: Neither would I, but then you have trouble with the two-year maximum sentences.

Professor Cohen: That was part of the bargaining. And I am afraid that too many bargains have been made already. You have already pointed out discrepancies that result from different committees meeting in different cities around the country. It was too massive a project. It was cut up too fine—there are some twenty-five volumes. This type of decision was made before we came on board. You are asked to write a volume on Dispositional Procedures and you look at the ABA minimum standards and there is a single volume on sentencing, along with procedures. Having accepted, you do it, and you live with the fact that you did it. But it is going to be difficult in some ways to use.

Professor Fisher: I am informed that our time really has run out, though I am sure that, if there are other questions, the panelists would be happy to field them afterward. I would like to thank Judge Levine and Professor Cohen very much for participating this evening, and to thank you all for coming.