I affirm RESOLVED: In the United States, juveniles charged with violent felonies ought to be treated as adults in the criminal justice system.

The resolution posits that children ought to be treated as adults. This doesn’t imply that they need to be treated as the stereotypical adult; just as we have exceptions and relevant considerations when considering the punishment and prosecution of certain adults, those same considerations could apply to children. The difference is those rules would have to apply in the same way they do to adults and thus in the adult justice system. Thus, the affirmative advocates using the adult criminal justice system for the prosecution of all violent felonies.

I value morality as ought implies a moral obligation

The criterion is preventing the use of substitutional legal fictions. This occurs when we create a role or identity for agents involved in the criminal justice system and use that as a basis for punishment.

This is necessary to achieve morality because…

First, fictions can be utilized to mask and alter existing power relationship preventing them from being questioned and examined. Linda Kelly[[1]](#footnote-1) explains

**The pervasive use of fictions in American jurisprudence certainly is not a new discovery**. n151 Fictions are employed in legal theory to make sense out of nonsensical judgements and laws. n152 Fictions also are a [\*210] device used to justify progress without the denunciation of previous decisions, thereby preserving the integrity of the legal process. 153 The damage of fictions, however, may outweigh any such possible benefits. As Ibrahim Wani explained: **Fiction can be used to escape the duty of reasoned analysis, to perpetuate mythologies upon which the law thrives, to avoid criticism, to mask the true intent and purpose of the communicator, to avoid moral responsibility for decision, to dehumanize the cases perhaps to lessen the burden of decision-making, and, to pursue an agenda, usually political, that is inconsistent with the mainstream of thought and therefore inarticulable and indefensible. n154**

Thus by unmasking and avoiding the use of identity based legal fictions we are able to create an effective ethical system in future. Irrespective of what ethical criteria are utilized the use of legal fictions prevents the evaluation and critique within that metric.

Second, The use of substitutional legal fictions allows the state to substitute agents identity which removes justification from the very nature of punishment. By constructing agents as legal fictions we are able to justify punishment based upon those fictions and constructed identities. Diltz[[2]](#footnote-2) explains.

**The delinquent unites the** multiple **functions and endless justifications** of punishment **in a single body**. **The legal system** operates upon crimes, **establishes the identity of the offender, and subsequently establishes the offender’s eligibility for punishment**, a retributive response to offender’s action. **But**, as Foucault has attempted to establish in his history of the emergence of discipline, **it is for the all-important work on the soul of the offender rather than his body that the prison has come into existence to execute.** What **the prison requires** is **something identified not for** its **past action, but something that is** merely **related to the crime in such a way as to be defined as a dangerous individual, requiring handling and transformation. It is not the monstrosity of the crime that the prison responds to, but the monster itself.** **The crime has passed** and can do no additional harm, **but the monster remains present as a future threat**. The forwardlooking justifications of punishment for deterrence or incapacitation rest upon the possibility of there being a threat who calls for such a response. **The delinquent is this object discipline, bringing together the monster** **and** **the possibility of a rehabilitated subject**:

This means that we no longer punish people for crimes but instead punish people or the biographical narrative and constructed identity. Diltz two explains

**The actual offense is taken off the table, and in its place the biographical narrative of the individual is substituted. A series of non-offenses become the evidence of the criminal before the crime to explain the subsequent real offense.** The psychiatric expert tells us, Foucault states, that “**when they are asked to assess a delinquent, psychiatrists say, ‘After all, if he has stolen, it is basically because he is a thief**,’” (AB 16). **This odd inversion of causality (that the thief was a thief before stealing anything) is troubling because this logic does not,** Foucault insists, **actually explain the crime but rather explains “… the thing itself to be punished that the judicial system must bite on and get hold of”** (AB 16). **It is an explanation of the criminal subject, not the crime. In the end, we find the judge does not condemn an offender for the crime, but for being a criminal** that already existed, **in essence the role of such opinion is “to legitimize, in the form of scientific knowledge, the extension of punitive power to something that is not a breach of the law”** (AB 18), **namely any prior conduct of the “criminal” before the actual crime has been committed.**

This functions to preclude ethical evaluation because ethical responsibilities are contextualized by relationship. Just as a child is due different things from a parent than a random person in San Francisco likewise the state obligations are provided based upon interrelationship. Thus accurate understanding of role and relationship precludes the ability to provide a normatively viable punishment.

Third, the use legal fictions turns agents who would otherwise constitute criminals into mere objects or perpetuators of crimes. By using a fiction one transforms the actually individual and instead creates a identity separate into which the criminal falls. Criminal thus fits into predefined and created categories. Diltz three explains the implication.

**The judge** **is** **thus able to see the offender not as a subject** **characterized** **by** free **agency**, **responsible for a** specific criminal **offense**, **but as a** determinate **object** characterized by need for the penitentiary technique. “**Magistrates and jurors no longer face a legal subject**,” Foucault writes, “**but an object: the object of a technology and knowledge of rectification, readaptation**, reinsertion, **and correction. In short, the function of the expert opinion is to double the author of the crime, whether responsible or not, with a delinquent who is the object of a specific technology**” (AB 21). This is the precisely the condition of possibility that connects the juridical discourse and the penitentiary discourse described in *Discipline and Punish*. **Legal subjects responsible for a specific transgression call for punishment in a purely retributive sense, in relation only to the criminal action. But delinquents, as a class of dangerous persons, must be handled differently, as the object of the penitentiary technique.**

By turning agents into mere objects we do harm to those other agents thus destroying their own moral status. Ethical evaluation predicated on interrelation thus becomes impossible because we fail to recognize the moral interrelationship between agents.

I contend that the juvenile system utilizes substitutional legal fictions rendering it antithetical to normative principles.

CONTENTION ONE:

The juvenile system uses the logic of Parens Patriae which is a legal fiction used to justify and condone state action.

SUBPOINT A:

The logic inherent in Parens Patriae is based upon a legal fiction of treatment. Coleman and Solomon[[3]](#footnote-3) explain

**If treatment is to justify** either civil intervention in the absence of criminal conviction or vastly **broadened discretionary power** within the criminal sanction, **a clear understanding of the concept of treatment is crucial. Surprisingly, the literature dealing with parens patriae has been virtually silent on this fundamental issue.** Clearly linked with medicine, the concept of treatment is defined as the “management in the application of remedies; medical or surgical application or service.” In the debate about whether psychiatric interventions should properly be designated as treatments, the controversy hinges on whether one considers emotional problems to be true diseases or emotional response to problems of living. The denomination of mental problems as diseases and psychiatric interventions as treatment is unfortunate. But **a** far more **compelling distinction between bona fide treatment and parens partiae treatment is the element of volition. Both medical ethics and the law clearly differentiate between treatment and battery. The distinction regards issues of effectiveness, side effects, skillfulness, and intent. The crucial point is whether voluntary consent precedes the physician’s actions. Without consent, that would by all medical standards be considered treatment becomes unlawful activity. Thus, the psychiatry practiced as parens patriae intervention upon patients who do not consent to it cannot qualify as bona fide treatment. The careless acceptance of these interventions as treatment has led not only to the waiving of due process guarantees, but also to nonrecognition of the punitive quality of all parens patriae controls.**

This renders the concept of Parens Patriae a legal fiction. Coleman and Soloman 2 explain

We have seen that **the concept of parens patriae treatment is a semantic fiction since this treatment lacks the consent that is the sine qua non of bona fide treatment.** Is state ordered “help” thus inherently punishment? In light of the elements of punishment as discussed above, **no valid distinction exists between parens patriae treatment and legal punishment. Pain, suffering, loss, and disability can be inflicted by the legal agent of punishment and can also result from bona fide treatment.** But in bona fide treatment they are a side-effect of procedures undertaken opt lure or alleviate an illness, whereas in parens patriae treatment they are inflicted because of some act or omission. **Although in parents patriae treatment the agent has legitimate authority to intervene, the intervention is nonetheless coercive, whereas the agent of bona fide treatment intervenes only with the consent of the patient.**

SUBPOINT B:

The juvenile system by using this logic to identify punishment as a form of treatment and reform further entrenches the fictitious nature of the treatment. Coleman and Soloman 3 explain,

A our previous discussion of the concept of treatment indicated, **bona fide treatment requires a consenting patient; anything forced on an individual through the authority of the state as a result of unacceptable behavior is properly regarded as punishment.** Under this analysis the right to treatment immediately presents basic contradictions. **The treatment is said to be the quid pro quo of the deprivation of freedom, but since the treatment is coercive it is not really treatment at all, but punishment. Thus if words were used more honestly, the “right to treatment” would be the “right to punishment,”** the individual’s right to be punished by the state for being mentally disturbed. However, we know of no mental patients or their advocates who have demanded that the state honor their right to be punished. **Consequently the treatment to which incarcerated person are said to have a right Is at best a legal fiction. The other half of the right to treatment is the concept of a right.** According to the oxford English dictionary**, a right is “[a] legal, equitable, or moral title or claim** to the possession of property or authority, the enjoyment of privileges or immunities…” **The key concept is the freedom to enjoy certain things**, such as speech, **and** the freedom to **be spared certain things**, such as unreasonable search and seizure. **It makes no sense whatever to label as a right anything forced on an individual, and we see no reason to allow coercive psychiatric treatment to be an exception. If both the terms “right” and “treatment” in the phrase “right to treatment” involve the deceptive use of language, there may be something gained by seeking gout the real meaning of this legal doctrine.** **If**, as we have attempted to show, **forced treatment Is correctly termed punishment, a more honest term for the right to treatment is justification for treatment. This** **label discloses the state’s effort to rationalize, and to cast in the light of benevolence, its continuing punishment and control of deviants who might be difficult to process within the criminal justice system. The depiction of forced treatment as a right obfuscates the reality that the right to treatment Is a justification for punishment.**

The reforms within the system fail to rectify this problem as the systematic nature of the problem itself perpetuates the concern. Coleman and Soloman 4 explain

The state’s benevolence has been questioned in recent years. **Case law indicates that the courts are abandoning their hands-off attitude, and have begun to realize that due process protections are important,** **even** **in** allegedly therapeutic or **rehabilitative interventions**. Civil commitment statues are being revised by state legislatures to reflect greater concern for civil liberties. **Prison therapy and indeterminate sentencing are increasingly recognized as** potentially powerful **tools of control, rather** **than** as instruments of **rehabilitation**. **Benevolent intent is no longer** **a**n acceptable **justification** **for the wholesale denial of due process for juveniles.** **In addition** to this emphasis on constitutional rights, **recent judicial decisions have developed a new doctrine, the “right to treatment,”** regarded by many as a welcome development. In short, psychiatry and the law are gradually reflecting a greater awareness of the individual freedoms at stake in parens patriae interventions. **Have these limitations on the therapeutic sanction arisen from a re-evaluation of the actual basis of Parens Patriae? We think not, for the fundamental premise is still accepted *that there is a valid distinction between criminal punishment and the state ordered “treatment”.*** The thesis presented here is that both psychiatry and the law have yet to confront the inherent and irreconcilable differences between bona fide treatment and state sanctioned parens patriae intervention. **Until this fundamental confrontation takes place, civil rights reforms, although necessary in and of themselves, only blunt our sensitivity while we proceed to replace old forms of benevolent control with new ones**. For reasons discussed below, this exchange may be far more ominous than is generally recognized. Our aim is to question the very roots of parens patriae, **and the analysis of language is a crucial element in achieving this end. Any effort by one individual to influence another is profoundly affected by what both parties believe to be the purpose of the effort**; furthermore, **this common understanding depends as much on the *words chosen* as on the practices themselves. Thus, despite recent judicial and legislative recognition of the civil rights questions inherent in parens patriae interventions, these interventions continue to be considered as benevolent treatment.** In questioning this assumption and providing a alternative framework, we will first analyze, though language, the assumption underlying state-sanctioned psychiatric “treatment.” Historic examples of control viewed as benevolence, considered together with current developments of that view, provide broad perspective within which to view the future dangers of the therapeutic sanction.

CONTENTION TWO:

The concept of childhood as utilized in the juvenile system is itself a legal fiction. Jordan Titus[[4]](#footnote-4) explains,

Although the history of children is replete with controversy (cf. Ariès, 1960/1962; deMause, 1974; Hunt, 1970; Pollock, 1983; Shahar, 1990/1992), **scholars agree that childhood was differently regarded in the past.** **Stimulated by** the **work** of historians such as Ariès and originating **within constructionist and interpretive perspectives in sociology** (Berger & Luckmann, 1966), **the term *childhood* has become an analytical one, used as con- ceptual classification open to variation rather than a simple biological descriptor. An emerging paradigm recognizes the socially constructed character of childhood** (James, Jenks, & Prout, 1998; Jenks, 1996; Prout & James, 1990). **Various configurations of dis- courses on children offer coexisting and yet conflicting ideologies. Discourses, considered as reflexive and social practices of acting on the world, “systematically form the objects of which they speak**” (Foucault, 1972, p. 49). A **powerful discourse can constitute a “régime of truth**” (Foucault, 1980, p. 131), **framing what we think and say about children and how we treat them. The modern view that children are inherently and essentially different in their nature from adults has followed from two competing strands of discourse incorporating contrasting images of children.**

This alteration and constructed identity effects the actions we take for them rendering it a substitutional legal fiction. Additionally the status quo transfer apparatus of the juvenile system further constructs identities for individuals. Titus 2 explains

**The way we define children incorporates assumptions about how we ought to treat them. A** **discourse that romanticizes childhood assumes not only that children are** inherently **good, but also that their malleability makes them susceptible to influence** and vulnerable to corruption, necessitating their protection. **Alternatively, adopting a view of the child as wicked** and sinful **suggests that children should be carefully controlled**, disciplined, and restrained to train them. Researchers have begun to detail how **the variable social construct of childhood both helps constitute the legal order and is a social product of that social institution** (Ainsworth, 1991; Empey, 1979; Feld, 1999). **Throughout the course of the last century, the legal boundary of childhood has shifted** between these two dichotomous images as “youthful offenders have been transformed from innocent children to hardened adult criminals” (Scott, 2002, pp. 114-115). **The juvenile justice system, likewise, has shifted** from “child saving” to “public accountability” (Sealander, 2003, p. 19) **while attempting to reconcile the dissonance created by the “competing images of when a child is a criminal and the criminal is a child”** (Feld, 1999, p. 6). Juvenile transfer provisions reflect this “cul- tural and legal reformation of the social construction of ‘youth’ from innocent, immature, and dependent children to responsible, autonomous, and mature offenders” (Feld, 2000, p. 129). A sacrificial crisis arises when the presumed innocent and vulnerable nature of the juvenile offender is “iconologically irreconcilable” with that of the seriousness of violent criminality (Jenks, 1996, p. 125). For Girard (1972/1977), the sacrificial crisis is defined as “a crisis affecting the cultural order. **This cultural order is nothing more than a regulated system of distinctions in which the differences among individuals are used to establish their ‘identity’ and their mutual relationships”** (p. 49). **The crisis is resolved when the offender is expelled** **from** **the juvenile** justice **system** for being insufficiently child-like (James & Jenks, 1996; Jenks, 1996), **declared to be not a child and denied the** social **protections** **associated** **with the** **juvenile court**. An intercourt transfer permits the minor to be “charged, held, released on bail, prosecuted, sentenced, and incarcerated in the same manner as an adult” (Alaska Statute, 2004a). As demonstrated below, **such transfer also serves as an institution- alized means of constructing the juvenile as scapegoat.**

1. Linda Kelly[Associate Professor and Immigration Clinic Instructor, Saint Thomas University School of Law;]. Defying Membership: the evolving role of immigration jurisprudence. 1998. University of Cincinnati law review. [↑](#footnote-ref-1)
2. Andrew Thomas Dilts, Collegiate Assistant Professor, Social Sciences Collegiate Division, Harper-Schmidt Fellow, Society of Fellows in the Liberal Arts at University of Chicago. “Foucault and Felon Disenfranchisement.” Prepared for presentation at the Annual Meeting of the Midwest Political Science Association Chicago, Illinois, April 20-23, 2006. [↑](#footnote-ref-2)
3. Lee Coleman and Trudy Solomon. [Practicin psyhatrist in California. Doctoral candidate in social physchology at UC Berkeley]. “Parens Patriae ‘Treatment’: Legal punishment in disguise.” 3 Hastings. Const. L.Q. 345 (1975-1976) [↑](#footnote-ref-3)
4. Jordan J. Titus [Jordan J. Titus is an associate professor of sociology at the University of Alaska Fair- banks. Her research focuses on legal constructions of childhood and children’s rights.] “Juvenile Transfers as Ritual Sacrifice: Legally Constructing the Child Scapegoat” Youth Violence and Juvenile Justice, Vol. 3 No. 2, April 2005 [↑](#footnote-ref-4)