The Future of Juvenile Justice

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Procedure and Practice from a Comparative Perspective

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"For these are all our children. We will all profit by, or pay for, whatever they become."

James Baldwin

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We also thank our publisher, Carolina Academic Press, for supporting the publication of many of the papers presented at the 2014 conference, ensuring that the ideas generated will be available for other scholars as well as the general public.

It is our intent that this timely contribution to the literature will clarify the differences and similarities between and among juvenile justice systems across the globe. We also hope that it will help us better understand our own laws and catalyze reform.

Tamar R. Birckhead
Solange Mouthaan

Introduction

Mark A. Drumbl[*]

This edited collection constellates a number of case-studies. Each case-study unpacks a particular national or regional approach to juvenile justice, either generally or telegraphed towards a specific theme. These erudite contributions build a sum that is larger than their many dynamic parts. They bring to life a number of common threads. These common threads include the role of politics in juvenile justice and the effect of international norms upon national legal landscapes. Another common thread is the gap between law and practice, resulting in disjunctures when it comes to the *de jure* and *de facto* aspects of the administration of the juvenile justice system.

In line with settled international legal aspirations, as articulated by article 1 of the UN Convention on the Rights of the Child (CRC), the authors of this collection adopt eighteen as the transition point from childhood to adulthood. That said, very few national systems embrace eighteen as the baseline age at which criminal responsibility begins to be affixed. Nearly all states set the national age of criminal responsibility lower. Minors can bear criminal responsibility. To be precise: whereas adult criminal responsibility largely begins at the age of eighteen, juvenile criminal responsibility begins earlier; in some national jurisdictions, however, juveniles may be tried as adults in serious cases. All states, however, recognize that there is an age below which criminal responsibility is impossible. Fourteen seems to be a common categorical line; however, this is far from ubiquitous or generalizable. To this end, the bulk of the conversation about juvenile justice involves how to approach and engage the individual in the developmentally kinetic band of adolescence from, roughly, fourteen to seventeen years of age.

Juvenile rights activists have focused their efforts on the Straight 18 position, that is, establishing eighteen as the baseline for the transition to adulthood.

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While this push is intended to protect all those below this bright-line, it also means that the law comes down quite harshly on the person who is eighteen or a few years older. Put differently, the categorical approach may indulge (and infantilize) certain persons under the age of eighteen (a bearable outcome), but may also be rather exigent for persons over the age of eighteen (a less bearable outcome). Neurobiological and neuro-scientific research demonstrates that the brain continues to develop well past the age of eighteen—indeed, up to the age of twenty-five—when it comes to several elements germane to assessing responsibility under the criminal law, notably, impulse control and capacity to fully appreciate the consequences of one's actions.[1] Hence, there may be cause for human rights activists to think long and hard about the limitations of categorical/chronological approaches and instead discuss progressive approaches to assessing coming of age. While law tends to eschew such ambiguity, preferring instead to burrow in the certainty of bright-lines, broader policy goals may be enriched by a supple baseline. Embracing such liminality, however, may also dilute the centrifugal force of international law.

The organizational frame of this collection is precise. The collection begins with two chapters that provide overviews and comparative analyses of multiple countries' juvenile justice systems. The following two chapters offer a granular exposition of an individual country's system. The final two chapters assess different ways in which children are victimized by and within justice systems. A brief conclusion ensues.

Frieder Dünkel opens this volume with a synthesis of recent juvenile justice developments in Europe. He groups these developments around two axes: neo-liberal tendencies (of which he takes England and Wales, France, and the Netherlands as examples) and moderate systems prioritizing diversion (of which he takes Germany and Switzerland as examples). By neo-liberal Dünkel means the punitive approach to youth justice systems. Dünkel concludes that despite the perception that neo-liberality is gaining ground, the comparative reality among European jurisdictions is the contrary. In fact, according to Dünkel, an inchoate European philosophy of juvenile justice is emerging. While this philosophy reclines towards rehabilitative goals, it however is not accompanied by any harmonization among the national ages of criminal responsibility, which vary from 10 (England and Wales, Northern Ireland, and

1. As Dünkel notes in his contribution, in September 2004, the *Association internationale de droit pénale* noted by resolution that the 'state of adolescence can be prolonged into young adulthood (25 years)' and, therefore, specific legislation should be adopted for young adults. Dünkel also notes that the Netherlands recently increased the scope of juvenile justice to the age of 23.

Switzerland) to 18 (Belgium). While high-profile cases like the custodial sanction levied against two English ten-year-olds in the James Bulger murder fill much of the imagined space of juvenile justice, this case is in fact an outlier.[2] The vast majority of youth offending in Europe is, according to Dünkel, dealt with through informal diversionary measures. In fact, aspects of restorative justice have been implemented in a number of countries and many neo-liberal political pushes have met with resistance. In short, then, Dünkel not only reminds us of the diversity of national experiences with juvenile justice, which persist despite the homogenizing effect of supranational and international law, but also that sometimes political discourse about youth exceeds the effects of those politics on the actual administration of juvenile justice. In an interesting aside: commenting on developments in England and Wales, Dünkel notes that the push towards "responsibilisation" includes attributing to parents liability for the conduct of their children. Dünkel expresses reticence at criminalizing such responsibility, but also notes that parental training and involvement is linked to positive preventive effects.

Sayali Himanshu Bapat and Barbara Bennett Woodhouse, in Chapter 2, provide a comparative study of the experiences of three nations with different systems of juvenile justice: the US, India, and Italy. The comparative tinge renders this chapter a wonderful bridge between Dünkel's work and the subsequent national case-studies. Bapat and Woodhouse demonstrate how comparative methodologies may lay fertile groundwork for the development of transnational best practices which, it is hoped, would percolate into hard international agreements. That said, the comparative approach also encourages expositions of bottom-up national experiences as ends in themselves. Bapat and Woodhouse identify considerable vacillation in the US approach to juvenile justice, whereas both India and Italy have maintained a degree of predictability when it comes to rehabilitative commitments. These authors' discussion of juvenile justice in India, which adds a crucial perspective to the overall collection, invokes the crisis of sexual violence that plagues the country. In a horrid gang rape (in December 2012) in a bus in New Delhi that led to the death of the victim, a young student, one of the implicated perpetrators was a boy of seventeen. This boy, moreover, was identified by the victim (before she died) as the "most brutal of all the rapists." He was arrested several days after the assault while trying to flee the city. India has a juvenile justice sys-

2. The 12-year-old accused murderer (by stabbing) of 9-year-old Michael Verkerke is being tried as an adult in the juvenile court system in Michigan USA. *See* CBS/AP, *Mich. playground stabbing victim's last words revealed* (August 7, 2014).

tem that favors rehabilitation, humanism, and clemency. The three year sentence given to this defendant, to be served in a special home, was the maximum permitted under the governing statute.[3] Predictably, many Indians criticized the perceived leniency of the sentence, in particular, given the urgent messaging required to denounce the endemic nature of misogynist violence in the country's public and private spaces.[4] Ensuring justice for victims of gender-based violence, then, calls into question a system of juvenile justice rooted as it is in rehabilitation.[5] The promotion of a culture of respect and human rights triggers internal tensions as to whose rights, exactly, are being promoted. Had the perpetrator been eighteen or older he could have faced the death penalty. Bapat and Woodhouse note that one factor in India that tempers the effects of the call for retribution in the case of juvenile offenders is the domestication of the CRC.[6] These scholars place considerable weight on domestication of the treaty in India, and Italy, as a variable that explains the resistance to the pendulum of politics, as opposed to the situation in the United States, which has not ratified the treaty. While a plausible point, it bears note that the US Supreme Court had relied on the CRC, even if not ratified by the US, in support of its determination that the juvenile death penalty is unconstitutional. Obversely, many CRC signatories have abysmal human rights records when it comes to children. Sometimes treaties matter even if not ratified; sometimes treaties matter not even *if* ratified. Bapat and Woodhouse also chime in eloquently with other contributors to this volume in noting that under-enforcement of the progressive law on the books is a structural problem in India. Poor conditions prevail in homes that house children, officials are inadequately trained, and delays arise in case processing. *De jure* and *de facto* disjunctures persist.

Nicholas Bala's ensuing chapter on juvenile justice in Canada, written in lively and engaging fashion, pulls the reader right into the cauldron of politics. Bala tracks changes in how Canadian lawmakers have approached the juvenile accused. He adroitly stages the history of juvenile justice law in Canada. In

3. *See also* Rama Lakshmi, *Juvenile rapist in 2012 New Delhi assault now paints and cooks at correction home*, *Washington Post* (September 1, 2014) (noting that the juvenile's paintings won a prize at a competition).

4. In 2013, "juveniles were accused in 1,884 rapes, up from 1,175 in 2012 … In New Delhi, the number increased from 63 to 163 during the same period." *Id*.

5. In this case, however, Lakshmi reports that "[d]espite his apparent progress toward rehabilitation, the teen has never admitted to the rape" although "he seems to be charming officials with his conduct and cuisine." *Id*.

6. To be sure, this treaty is not a firewall: as the authors note, new proposed legislation in India would classify children aged sixteen or above who commit serious offenses separately.

2003, the Youth Criminal Justice Act came into force. Prior to this federal legislation, Canada's approach to youth justice, albeit federally legislated, also remained discretionary in nature. This led to a situation in which Canada—surprisingly—had one of the highest worldwide rates of court intervention and the imposition of custody for juvenile offenders. Canada's second stage, then, was generated with the 2003 Act. This legislation (setting the age of limited criminal responsibility at twelve) restricted custodial sanctions and limited juridical settings while promoting diversion and community-based remedies. As a result, juvenile custodial rates dropped, though they still remained comparatively elevated. In 2012, the Act was amended at the behest of conservative political pressures. These pressures were personified by the caricature of out of control youth. The amendments, however, proved to be more bark than bite and, hence, have not changed the base-line approaches to youth justice. Bala's work therefore gestures towards the potential pantomime of politics. While Canadian law-makers sought to placate voters through the rhetoric of law reform inspired by conservative law and order discourse—the proverbial neoliberality of "let's get tough on juvenile crime" language—in actuality the legislation adopted pursuant to this discourse has proven resilient to these pressures and, thereby, persists in its congeniality toward the welfare of juvenile offenders. This resilience remains despite a spike in adult incarceration rates following other neo-liberal criminal justice reforms. In this sense, Bala's findings in the case of Canada resonate with Dünkel's in the case of Europe. What is more, in Canada the constitutionalization of juvenile justice through curial intervention has tempered the ability of legislators to revert to harsh sanction in the case of juveniles or neglect their special interests. That said, Bala flags unresolved concerns in the Canadian juvenile justice system, notably, the position of minority and Aboriginal youth.

Claudia Cesari offers a fine-grained analysis of juvenile criminal proceedings in Italy. She leads us through the history of juvenile justice reform in Italy and unpacks the dual roles of the legislature and the judiciary. Cesari notes how the Constitutional Court, unsurprisingly perhaps, over time constitutionalized the pre-World War II juvenile justice system. She outlines how the Constitutional Court recognized the particular needs of juveniles, that they be treated differently than adults, and that they have a greater demand to be supported and reeducated (thereby coming to promote resocialization as a penological goal). These findings harmonize with Dünkel's overall survey of the pan-European experience and also synergistically with Bala's regarding the ability of courts to temper politics through firm constitutional gatekeeping. Among the tools that the Court deployed to further these goals was the requirement

of a specialized judge for minors, a reluctance to have automatic measures and instead favor individualization, and relegating custodial sentences to extreme cases. In this regard, Cesari reminds us that one of the reasons that national legal systems may be so dynamic in the case of juvenile justice is that the courts, mandated to implement grand constitutional principles, may tangle with the legislature or, even if the relationship is amicable, may come to sculpt the law as on the books. Undoubtedly, such entanglements become increasingly common the more that political subunits in a federal state exercise autonomy.

The United States Supreme Court, as Tamar Birckhead reminds us in her contribution to this collection, has been active in recent years to preclude, through application of the Eighth Amendment, the juvenile death penalty as well as the sentence of life in prison without parole for juveniles (both for homicide and non-homicide crimes). Yet, as Birckhead notes, harsh sentences have not been purged from the juvenile justice system. In a pioneering project, Birckhead—focusing on the United States but ranging globally—documents how solitary confinement persists as a sentence. Thousands of youth, she notes, are held in isolation on any given day world-wide; approximately one-third of all countries employ the practice or legally condone its use. Ironically, even youth responsible for minor misconduct, and youth still only in the pre-trial phase, end up in solitary confinement. The persistence of solitary confinement in the case of youth is particularly aching in light of the condemnation this practice has received from various constituencies. Psychologists and mental health workers have documented the cruelty of this practice. The International Criminal Tribunal for Rwanda, tasked with prosecuting adult (and high-ranking) officials responsible for the 1994 Rwandan genocide, had refused to transfer cases to Rwanda because of national Rwandese law that replaced the repealed death penalty with the sentence of life in prison with "special conditions" (i.e., solitary confinement).[7] According to Birckhead, the practice of solitary confine-

7. In the Munyakazi case (May 28, 2008), an ICTR Trial Chamber identified *inter alia* the applicable sentence of life imprisonment in isolation without appropriate safeguards as a barrier to transferring the case to Rwanda. In October of that same year, the ICTR Appeals Chamber affirmed that ruling. Rwanda subsequently modified its criminal legislation to preclude this sentence in the case of such transfers. For this and a number of other reasons, the ICTR approved for the first time (on June 28, 2011) the transfer of a case to Rwanda. In that case (*Uwinkindi*), the ICTR specifically held at para. 51 that "the current penalty structure of Rwanda is adequate as required by the jurisprudence of the Tribunal as it no longer allows for imposition of the death penalty or life imprisonment with solitary confinement." On April 10, 2012, in the case of *Babar Ahmad and Others v. UK*, the European Court of Human Rights took a more nuanced approach. It held that solitary confinement violates the European Convention on Human Rights if it involves complete

ment of youth traces to the goals of protecting the minors from adults (or from each other), to isolating them when they are seen as threats, to secure medical treatment, and at times because their youth is paradoxically taken to be an aggravating rather than mitigating factor. Birckhead's research nonetheless demonstrates that deployment of solitary confinement to protect minors may, in light of their developmental sensitivities, simply lead them down the path of recidivism (and commission of more serious offenses) upon release.

Birckhead's work also gestures towards how criminal and immigration law have amalgamated to create a distinctively punitive apparatus with its own practices that, in turn, may be deleterious to the best interests of children.[8] Other observers have explored this "crimmigration" phenomenon more generally,[9] and Birckhead's work now joins with this constituency. One response, perhaps, is for international law to more rigorously recognize the need to develop specific instruments to protect minors in the immigration, refugee, and asylum contexts. Relying on international law oriented towards the criminal context to protect this category of youth, while understandable, also problematically defines the issue as one of criminal justice rather than protection of migrants. More immediately, however, Birckhead's research could become a powerful tool in court-based challenges to the solitary confinement of minors, notably in the US, through the portal of the Eighth Amendment's prohibition of cruel and unusual treatment.

Cesari's discussion of the Italian national system nonetheless pivots the discussion back to the theme of the salience of the legislative role in shaping juvenile justice policy. Cesari notes that, in 1988, Italy adopted a new law for juvenile criminal proceedings (as amended over time) which emphasized di-

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sensory deprivation and total social isolation; moreover, even in cases of relative isolation, solitary confinement cannot be imposed indefinitely. This litigation involved the extradition to the USA (from the UK) of six terrorist suspects who, if ultimately convicted, would have risked imprisonment in a "Supermax" prison in Colorado where prolonged solitary confinement could have been imposed. The Court identified principles (procedural and substantive) to guide the imposition of solitary confinement. It nevertheless held that, in the context of the specific facts of the case, the conditions at this "Supermax" prison would not amount to ill-treatment in violation of the Convention.

8. The situation of Omar Khadr, a minor associated with al-Qaeda deemed responsible for throwing a grenade in Afghanistan that killed a US service member, demonstrates how national security interests may generate another kind of shadow incapacitation systems—in this case Guantánamo—for persons categorized as unlawful combatants.

9. *See, e.g.*, César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. Rev. 1457, Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. Rev. 1705 (2011).

version methods, specialization of staff involved in administering the system, social services within the juvenile justice framework, minimum harm, personality assessment, and preclusion of *partie civile* damages claims against the juvenile perpetrator. Cesari links these national developments to two important trends, which, paradoxically, may be in tension. The first trend is the push toward adversarialism in the criminal justice systems of many states that has diluted the erstwhile centrality of inquisitorial criminal justice systems. The second trend is the integration of international legal instruments that approach the child as a rights-holder and, hence, imbue the child with specific entitlements in all interactions with regulators, in particular the criminal justice system, which is seen as serving multiple (and ambitious) goals of justice for victims, security of society, and the welfare of the juvenile perpetrator. The Italian reforms, Cesari notes, were mindful of international non-binding (or soft law) instruments, notably, the UN Minimum Rules on the Administration of Juvenile Justice (Beijing Rules). I have elsewhere noted the great influence of non-binding principles (for example the Cape Town Principles and the Paris Commitments and related Paris Principles) on law- and policy-making in the case of children associated with armed forces or armed groups.[10] Evidently, a similar effect arises in the case of juvenile justice generally which suggests the pluralization of the corpus of international legal norms, at least when it comes to derivation and effect, further indicating that the discipline might revisit its somewhat formalistic doctrine of sources. To be sure, international treaties—hard law in the firmest sense—should never be overlooked. The Canadian Supreme Court, for example, had relied upon the CRC in its jurisprudence regarding juvenile justice. Still, gaps between law and practice persist. Cesari notes in the Italian case that, despite the admonitions of the formal law, in practice custody is disproportionately used.

While this edited collection focuses on the youth as perpetrator, Michele Simonato's contribution (Chapter 6) singularly examines the youth as victim. Simonato orients his analysis towards the cross-border trafficking of minors in the European Union. Minors represent roughly 15% of identified victims of human trafficking in Europe. Many trafficked youth come from two EU member states: Romania and Bulgaria. The largest group of trafficked youth is adolescent girls, exploited in the commercial sex market, but trafficking for domestic help also is prevalent. Simonato's work lucidly presents the complex web of regulation that endeavors to address this phenomenon within the European

10. Mark A. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (OUP, 2012).

Union. Simonato therefore rounds out the discussion by examining the relationship between juvenile victims and the justice system. Cross-border human trafficking increasingly is seen as a concern fitting for transnational criminal law, with resultant attempts to negotiate agreements and protocols to prohibit it. If cast in this light, then, punitive approaches would emerge as desirable for perpetrators of such conduct and, ultimately, the prohibition could pass into the content of international criminal law. In this regard, it might be worthwhile to learn from the experiences of the Trust Fund for Victims created by the Rome Statute of the International Criminal Court, which provides reparations (largely allocated collectively) to victims of war crimes, crimes against humanity, and genocide. Instead of seeing victims of such crimes merely as witnesses in a prosecutor's criminal case, it might be empowering to see them as claimants entitled to obtain reparative relief from their traffickers, those who exploit them, states who condone trafficking, or simply from funds generated by the international community. While restorative practices may benefit juvenile perpetrators, such practices may also benefit juvenile victims. In the case of international crimes, to be sure, very tricky questions arise when the victims themselves may victimize others: what do to, for example, with the minor who trafficks others, the trafficked minor who subsequently as an adult trafficks others, or the trafficked minor who then commits criminal acts against third parties?

Rehabilitation, moreover, might not always be successfully predicated upon approaching the trafficked minor as bereft of any agency. On this note, Simonato notes that the majority of trafficked youth "decide to leave home on their own"; while only very few are abducted. Simonato finds this "surprising," but I suspect it is surprising only because it conflicts with the internationally circulated image of trafficked youth as helpless, brutalized, dependent, and coerced. I have written elsewhere about the prevalence of similar imagery in the context of child soldiers, and how this imagery occludes the reality that large numbers of child soldiers enlist and exercise some (and at times considerable) degree of volition in that regard.[11] While these realizations are not proffered to condone these odious practices, nor to understate that at times volition is triggered through deception, the data should not be overlooked or wished away either. In fact, a forthright appraisal of why juveniles end up in such situations is crucial to planning their rehabilitation and identifying what measures would actually help deter the practice in the first place.

11. *Id.*

In conclusion: for the juvenile justice activist, progress may come to be seen as actualized when the juvenile defendant receives increasing layers of protection. However, adding protection to the juvenile defendant may, in turn, create other human rights inequities. For one, it means that a victim of crime faces a markedly different situation if his or her aggressor is a juvenile. It bears mention that many victims of juvenile crime are themselves juveniles who also have entitlements to the best interests of the child and also have claims to special status related to their age. Rendering the justiciability of a serious injury contingent on the age of the perpetrator is certainly understandable but, as the contingency becomes increasingly acute, the result may be victim frustration. As Cesari notes, Italy's choice to weaken the victim's role in juvenile justice, while at first blush seen as another "victory" for human rights, may occasion such frustration and also threaten victim-offender reconciliation, which is key to reconciliation and reintegration. Second, as has been pointedly noted in the international law context, the corpus of juvenile rights sits on an uneasy relationship between protecting youth and empowering youth. Presumptions of emaciated capacity and agency in the context of committing antisocial acts interfaces queasily at times with presumptions of agency and capacity when it comes to juvenile input in medical treatment, reproductive rights, emancipation, freedom of expression, and family custody determinations. Too much protectionism may in fact imperil the development of a vibrant culture of juvenile rights, may depart from how youth actually see themselves, may impair social reintegration, and ultimately may preserve (rather than upend) gerontocracy.

In sum, this collection provides a compelling *tour-de-force* of national practices related to juvenile justice while also offering a sturdy pivot to engage with tricky questions about how best to secure children's rights.

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