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The Age of Criminal Responsibility in an Era of Violence: Has Great Britain Set a New International Standard?

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ABSTRACT

With the alarming rise of juvenile crime and violence during the past decade, policymakers across the international community have struggled to develop effective juvenile criminal justice systems apart from the existing systems tailored to adults. The wide variations in methods and philosophies utilized in different states indicate that there is no consensus on the proper treatment of young offenders. Using the recent Bulger *case as a focus, this Note examines two competing paradigms of juvenile justice found within the British juvenile justice system, with particular emphasis on the age of criminal responsibility. After discussing recent developments in Great Britain's juvenile justice system, this Note analyzes minimum international standards of juvenile justice and the impact of the unification of the European Community. This Note concludes that although other states are unlikely to follow Great Britain's lead in punishing the extremely young offender who commits an especially brutal crime, such a system may be necessary to combat the growing problem of crime committed by the very young.*

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I. INTRODUCTION

The rising crime rates[1] in industrial and developing nations have policymakers frantically searching for a solution.[2] During the past decade, juvenile violence has reached new heights, making the development of effective juvenile criminal justice systems a priority on the international agenda.[3] Most states have dealt with the increase in juvenile offenders by incorporating juvenile delinquents into their existing criminal justice structures. This practice of handling juvenile offenders within the existing criminal system, however, has proven ineffective with regard to the rehabilitation of juvenile offenders.[4] Most states believe that juvenile offenders are more likely to be rehabilitated than adult offenders; therefore, a juvenile justice system should embrace the notion of reform. Moreover, assuming that juveniles do not have the same mental capacity to understand the criminality of their actions as adult offenders, the juvenile justice system should provide more lenient sentences than the adult system.[5] However, because the criminal justice systems of most states developed around the adult offender, these systems have failed to address the special issues related to the juvenile offender.

Although many states recognize the problems with assimilating juvenile offenders into adult criminal justice systems, few have found the development of a separate juvenile justice system quick or easy. While many states agree that an adult criminal justice system should not handle juvenile offenders,

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1. The number of juveniles arrested for homicide in the United States increased 162% between 1984 and 1991. Dewey G. Cornell, *Juvenile Homicide: A Growing National Problem*, 11 BEHAVIORAL SCI. L. 389 (1993); *see also Beijing Police Increase Patrols to Combat Rise in "Serious" Crime*, BBC SUMMARY OF WORLD BROADCASTS, Pt. 3 Asia-Pacific (November 10, 1994); *Police Chief Says Crime Rate Has Risen by 9.7% in First 10 Months of 1994*, BBC SUMMARY OF WORLD BROADCASTS, Pt. 2 Central Europe and the Balkans (November 7, 1994); Ron Harris, *Brazil Orders in Military to Combat Crime in Rio: Army Will Try to Stem Crippling Violence and Corruption. Government Admits the Move is Risky*, L.A. TIMES, November 2, 1994, at A1; *U.S. Rates of Violent Crime Rising*, CHI. TRIB., October 31, 1994, at 3.

2. *See generally* RICHARD J. TERRILL, WORLD CRIMINAL JUSTICE SYSTEMS: A SURVEY (1992) (comparative study of world criminal justice systems, organized by country).

3. *See infra* part III. *See generally* MANUEL LOPEZ-REY, GUIDE TO UNITED NATIONS CRIMINAL POLICY (A.E. Bottoms series ed., 1980)

4. *See, e.g.*, LOPEZ-REY, *supra*.

5. *See* J. Neville Turner, *The James Bulger Case: A Challenge to Juvenile Justice Theories*, 68 LAW INST. J. 734, 736-37 (discussing the United Nations Convention on the Rights of the Child and its application in states' juvenile justice systems).

there is no consensus on the proper and most effective treatment of these young offenders.[6] Each state's juvenile justice system provides for different ages of criminal responsibility, different levels of sanctions (imprisonment versus community-based alternatives), and different durations of sanctions for various crimes. Underlying these differences is the issue of whether a juvenile justice system based on a justice model, which has retribution as its primary goal, serves the interests of juveniles and society more effectively than one based on a welfare model, which gives priority to the protection and rehabilitation of juvenile offenders.[7]

Recent events in Great Britain[8] directed the international community's attention to the British juvenile justice system. On November 25, 1993, the Crown Court convicted two eleven-year-old boys for the murder of a two-year-old toddler, James Bulger.[9] The court tried and convicted the two boys as adults because at the time of the murder both boys exceeded Great Britain's age of criminal responsibility, which is ten years old.[10] The conviction of the boys ignited an international debate over the proper treatment of juvenile offenders within the criminal justice system and the age at which a nation's criminal justice system should hold a child fully responsible for his or her criminal actions.

Using the recent *Bulger* case as a backdrop, this Note examines the current British juvenile justice system, with

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6. *See* U.N. DEP'T OF INT'L ECONOMICS & SOCIAL AFFAIRS, SEVENTH U.N. CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, U.N. Doc. A/C.121/22 Rev.1, U.N. Sales No. E.86.IV.1 (1985) (adoption of the Beijing Rules) [hereinafter SEVENTH CONGRESS]. The member states have nevertheless adopted minimum standards for the administration of juvenile justice. By adopting minimum standards requiring a separate juvenile criminal system, the member states recognized that juvenile offenders require special attention in the criminal system. *Id.* at 19. *See infra* part III.A.1.

7. *See generally* LOPEZ-REY, *supra* note 3. *See infra* text accompanying notes 25-26 (distinguishing the two models).

8. Throughout England's history, the country has been referred to as England, Great Britain, and the United Kingdom. In 1706, England and Wales united with Scotland, and this alliance was named Great Britain. In 1922, when the southern counties of Ireland formed the Irish Free State, the name of Great Britain changed again to the United Kingdom of Great Britain and Northern Ireland. TERRILL, *supra* note 2, at 1. This Note refers to Great Britain and the laws of Great Britain even though specific statutes are not applicable to Scotland and are applicable to Northern Ireland. The reader should be aware that while all the statutes addressed in this Note are applicable to England and Wales, the specific application of the laws in Scotland and Northern Ireland is not addressed.

9. William E. Schmidt, *2 British Boys, Both 11, Guilty of Murdering Toddler*, N.Y. TIMES, November 25, 1993, at A3. For an outline of the British court system, see *infra* Appendix I.

10. *Id.*

particular emphasis on the age of criminal responsibility. In Part II, this Note discusses the debate over the justice and welfare models of juvenile justice in Great Britain in the context of the *Bulger* case and reviews the recent developments in Great Britain's juvenile justice system. In Part III, this Note analyzes the international and European Community debate over juvenile justice systems. The minimum international standards of juvenile justice promulgated by the United Nations are compared to Great Britain's juvenile justice system. Part III also discusses the differences between European states' juvenile offender laws in light of the unification of the European Community. For comparative purposes, France's juvenile justice system is contrasted with that of Great Britain.

This Note concludes that the young age of criminal responsibility adopted by the British juvenile justice system is not likely to become an international standard in the near future. Although the British system allows for the necessary punishment of an extremely young offender who commits an especially brutal crime, other states are not ready to lower the age of criminal responsibility in their juvenile justice systems. However, if violent crime among the very young continues to rise, states may soon find that punishment of the very young, but brutal, criminal is necessary to combat this problem.

II. THE DEBATE OVER JUVENILE JUSTICE IN GREAT BRITAIN

A. *Historical Background of the Debate*

Before 1906, the laws of Great Britain did not distinguish between juvenile and adult criminals.[11] Both commentators and the public criticized the system as incredibly harsh because British courts tried and sentenced children as adults, regardless of the offense committed.[12] Furthermore, under Great Britain's

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11. TERRILL, *supra* note 2, at 78. *See also* PATRICK WILSON, CHILDREN WHO KILL (1973) (general study of the development of the treatment of young offenders in Great Britain). This treatment even extended to the death penalty. When a court found a child guilty of murder, the child's position was no different from that of an adult: the court pronounced a sentence of death. *Id.* at 13-14.

12. *See* WILSON, *supra*, at 13-14. The United States also treated young offenders as adults during most of the 19th century, to the point of being willing to impose the death penalty on such offenders. One scholar documented twenty-six executions in the United States between 1642 and 1899 for crimes committed by persons under the age of sixteen. Victor L. Streib, *Death Penalty for Children:*

pre-1906 criminal justice system, juvenile offenders were incarcerated in adult criminal facilities,[13] which were not conducive to the rehabilitation of the child.[14] Rather than reforming the child, imprisonment in adult institutions actually increased the possibility that the child would violate the law again upon release.[15]

During the first half of the nineteenth century, juvenile justice reform movements had failed to capture the support of the British Parliament.[16] The Youthful Offenders Act of 1854 (1854 Act) represented the first effort in Great Britain to differentiate juveniles from adults in the criminal system.[17] However, the 1854 Act merely created reformatory schools, which confined only some child criminals after their conviction; other juveniles still served time in adult prisons.[18] Although the development of reformatory schools signaled the beginning of the separation of juvenile and adult offenders, the 1854 Act failed to provide separate punishment schemes for the juvenile offender, and the adult court system continued to try all juvenile cases.[19] Consequently, the 1854 Act failed to create any real separation between child and adult criminals because the court system still treated them the same.

In response to the realization that children needed to be treated differently than adults in the criminal justice system, the British Parliament enacted the Children's Act in 1908, which created the first juvenile court system in Great Britain.[20] The Act mandated that the newly created juvenile courts adjudicate all offenses (with the exception of murder) committed by children between seven and sixteen years of age.[21] The juvenile courts also had jurisdiction over all issues of care involving children

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The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen, 36 OKLA. L. REV. 613, 619 tbl. 1 (1983).

13. TERRILL, *supra* note 2, at 77-78.
14. *Id.* at 78.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* These first "juvenile courts," and even the courts of the current British juvenile justice system, are not separate tribunals like juvenile courts in the United States. The British juvenile court is simply a special sitting of the Magistrates' Court to hear only juvenile matters. *Id.* *See also* Juvenile Delinquency Act, 18 U.S.C. § 5031 (1988). For an explanation of how the juvenile courts fit within the British court system, see *infra* Appendix I.
21. TERRILL, *supra* note 2, at 78. Children who committed murder were still tried in the adult criminal courts. *Id.*

younger than fourteen years of age.[22] Because Great Britain's first juvenile courts remained a part of the adult court system, however, the Children's Act did not actually advance the goal of separation. Although the first efforts to differentiate juvenile and adult offenders were not very effective, Parliament did recognize that the needs of young offenders differed from those of adult offenders.[23] Thus, even the initial attempts to create a British juvenile justice system were based on the theory that the young are more malleable than adults and are more likely to respond positively to individual rehabilitative treatment, even after committing serious offenses.[24] Thus, in 1908 the Children's Act marked the first step in a trend in Great Britain toward removing juvenile offenders from the adult adjudication and penal systems in order to address their special needs.[25]

Since that first step, Great Britain's juvenile justice system has vacillated between two paradigms—the justice model and the welfare model. The welfare model advocates a juvenile justice system with the ultimate goals of protecting and rehabilitating juvenile offenders.[26] In contrast, the justice model advocates a juvenile justice system which demands that young offenders receive just punishment for their crimes against society.[27] This debate has led to the enactment of the Children and Young Persons Acts of 1933, 1963, and 1969 and the Criminal Justice

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22. *Id.* The jurisdiction of the juvenile court included the disposition of children found begging, children living with unfit parents, and children considered beyond parental control. *Id.*

23. No policymakers or commentators have expressly defined the "special needs" of children in a criminal justice system. However, these "special needs" seem to include a more nurturing environment or an environment that is conducive to a child's emotional and physical growth, while fostering a sense of self-worth.

24. *See* TERRILL, *supra* note 2, at 77. The United States also recognizes that juvenile offenders can be rehabilitated. *See, e.g.*, United States v. Hill, 538 F.2d 1072 (1976) (stating that the purpose of the United States juvenile delinquency system is to rehabilitate, rather than to punish, and to reduce the stigma of a criminal conviction).

25. TERRILL, *supra* note 2, at 77-78. Having recognized the different needs of children, the state also began to expand its intervention in children's lives to non-criminal issues. Such intervention included state involvement with children from single-parent homes, as well as involvement with orphans and victims of child abuse. *Id.*

26. *Id. See generally* ANDREW RUTHERFORD, CRIMINAL JUSTICE AND THE PURSUIT OF DECENCY (1933) (arguing that humane values must be at the heart of any criminal justice system).

27. TERRILL, *supra* note 2, at 79. *See generally* Caroline Ball, *Young Offenders and the Youth Court*, 1992 CRIM. L. REV. 277.

Acts of 1982, 1988, and 1992,[28] which reflect the dispute between the two schools of thought.[29] Certain provisions in each Act reflect the influence of the welfare model, while others reflect the influence of the justice model. Commentators note that these competing views have left the British juvenile justice system with a "schizophrenic" personality.[30]

The rising crime rate among juveniles over the past several decades and the high rate of juvenile recidivism have fueled the debate over the justice and welfare models.[31] Despite the escalating crime rate in Great Britain, some commentators continue to criticize the current juvenile system as unduly harsh and ineffective.[32] One of the most controversial aspects of Great Britain's criminal justice system is the relatively young age at which the system deems an individual criminally responsible for his or her actions.[33] The debate over the age of criminal responsibility reached a climax with the recent conviction of two eleven-year-old boys for the brutal murder of James Bulger, a two-year-old toddler.[34] The case heightened the debate in Great

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28. These Acts provide for the current juvenile criminal justice system of Great Britain and are discussed in great detail throughout the Note. *See infra* part II.C.-D. and accompanying notes.

29. TERRILL, *supra* note 2, at 79. *See generally* Ball, *supra* note 27, at 277.

30. *See* Jenny McEwan, *Legislation: The Criminal Justice Act—Justice, Welfare or Confusion?*, 46 MOD. L. REV. 178, 184, 186-91 (1983). *See generally* ALAN NORRIE, CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW (1993) (providing a general discussion on the duality and contradictions in criminal law). The dual nature of criminal law arises from notions of just punishment and the realization that crime is both a political and a social phenomenon. Consequently, most criminal justice systems reflect both the justice and welfare models. *Id.*

31. TERRILL, *supra* note 2, at 79. *See also Young Offenders*, THE ECONOMIST, May 7, 1994, at 65.

32. *See generally* J.H. Godsland & N.G. Fielding, *Persons Convicted of Grave Crimes: The 1933 Children and Young Persons Act (§ 53) and its Effect Upon Children's Rights*, 24 HOW. J. CRIM. JUST. 282 (1985). However, one study conducted by the Dutch Ministry of Justice seems to suggest that Great Britain's system of juvenile justice has lowered crime rates among young persons. The study reports that England has considerably lower rates for violent offenses among young offenders than the Netherlands, Spain, Portugal, or Switzerland. *Juvenile Offenses Lower Than Many Countries in Western Europe*, GUARDIAN (London), July 6, 1994, at 2.

33. Great Britain has the lowest age of criminal responsibility (age ten) of any European state with the exception of Scotland, where the age of criminality is eight. *Horrifying Precedents*, IRISH TIMES (Dublin), November 25, 1993, at 9. *See generally* TERRILL, *supra* note 2.

34. The case shocked readers around the world. Bill Schiller, *Evil Freaks of Nature Get Life for Murdering Tot*, TORONTO STAR, November 25, 1993, at A1; Malcom Holland, *Gruesome Find on St. Valentine's Day Left Nation Stunned*, S. CHINA MORNING POST (Hong Kong), November 25, 1993, at 20.

Britain over whether the welfare or justice model more effectively combats juvenile violent crime, particularly among the very young.

B. *The* Bulger *Case*

1. The Facts

On February 14, 1993, the corpse of a two-year-old boy, James Bulger, was discovered on railway tracks in Liverpool, England.[35] James Bulger's body had been savagely beaten and left on the tracks where it had been sliced in half by a passing train.[36] Dismay turned to disbelief when the police questioned two ten-year-old boys and charged them with the kidnapping and murder of James Bulger.[37] The people of Liverpool and the international community could not believe that boys of such a young age could commit this brutal murder. Yet the investigation of the murder left no doubt as to the identity of the killers.[38] A video camera captured Robert Thompson and John Venables[39] luring Bulger away from his mother in a local shopping mall.[40] The two boys then dragged the toddler two and one-half miles across Liverpool to isolated railroad tracks,[41] where Thompson and Venables literally tortured Bulger to death.[42] Bulger suffered at least thirty blows, including two injuries to his head and twenty to his body. The boys used a two-pound iron bar and approximately twenty-seven bricks to inflict the injuries. Bulger was left on the train tracks, where a train later sliced his body in half.[43]

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35. Holland, *supra*, at 20.

36. *Id.*

37. *Id.* At the age of ten, both boys had reached the age of criminal responsibility in Great Britain. They were the youngest to face a murder trial in Great Britain in this century. *Id.*

38. *See* Steven Glover, *A Story Devoid of Mercy and Hope*, EVENING STANDARD (London), November 25, 1993, at 18.

39. Robert Thompson and John Venables were known as Child A and Child B throughout the trial. Only after the court handed down the conviction and sentence did the judge release their names to the press. *See Locked Up at 11*, MINNEAPOLIS STAR TRIBUNE, November 25, 1993, at 1A; Richard Meares, *Two Boys Found Guilty of Murdering Toddler in Northern England*, Reuter Library Reports, Nov. 24, 1993, *available in* LEXIS, Nexis Library, Non-US File.

40. *Locked Up at 11*, *supra*.

41. *Id. See also* Glover, *supra* note 38.

42. Glover, *supra* note 38.

43. *Id.*

2. The Verdict and the Sentence

A twenty-four day trial revealed the details of the brutal murder.[44] Justice Morland presided over the trial held in the Crown Court.[45] The jury, consisting of nine men and three women,[46] deliberated for five and one-half hours before determining that both Thompson and Venables were guilty of the abduction and murder of Bulger.[47] Justice Morland then sentenced Thompson and Venables to be detained at Her Majesty's Pleasure,[48] an indeterminate sentence that may mean life in prison.[49]

The brutal murder of James Bulger intensified the debate over juvenile justice in Great Britain, specifically with regard to whether Great Britain should hold young children criminally responsible for brutal acts such as murder. Public opinion in Great Britain after the *Bulger* case supports this idea, but some commentators claim that Great Britain's system does not provide adequate protection for young offenders who may not understand the consequences of their actions.[50] The debate in Great Britain ultimately raises the issue of whether a juvenile justice system based on the justice model is more effective than one based on the welfare model.

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44. *Id.*

45. *Id.* The court moved the trial from Liverpool to Preston in order to avoid mob violence, which broke out when the two boys were first arrested. Meares, *supra* note 39.

The Crown Courts have exclusive jurisdiction over all major criminal cases, including juvenile murder cases. TERRILL, *supra* note 2, at 28. *See also infra* Appendix I (explaining the structure of the British court system).

46. Glover, *supra* note 38.

47. Meares, *supra* note 39. However, the jury failed to reach a verdict on another charge that accused Thompson and Venables of trying unsuccessfully to abduct another toddler before they abducted James Bulger. Schmidt, *supra* note 9.

48. Her Majesty's Pleasure is a sentence for an indefinite term automatically issued when a child or young person is convicted of murder. *See* Schmidt, *supra* note 9, at A3. *See also infra* part II.C.3. and note 152.

49. *See* John Edwards, *Evil, Brutal and Cunning*, DAILY MAIL (London), November 25, 1993, at 1.

50. *See* Margaret Lowrie, *Why Do Children Kill Other Children*, (Cable News Network television broadcast, November 24, 1993) (transcript *available in* LEXIS, News Library, Curnws File). Many commentators argued that children as young as Thompson and Venables do not understand the concept of death and, therefore, cannot fully understand the implications of their actions. *Id. See also* John Passmore, *Relief in the City Shamed by Two of Its Children*, EVENING STANDARD (London), November 25, 1993, at 3 (reporting the remarks of Albie Conner, a forty-nine-year-old layperson, who said: "It was the only verdict wasn't it? I mean at 10 years old the little bastards knew right from wrong.").

The juvenile justice system that held Robert Thompson and John Venables criminally liable as adults for the brutal murder of James Bulger has undergone numerous modifications over the past several decades. Although policymakers in Great Britain have tinkered with the provisions in both the Criminal Justice Acts and the Children and Young Persons Acts, legislators and commentators still cannot agree on a system of juvenile justice.[51] The Children and Young Persons Acts of 1933, 1963, and 1969, and the Criminal Justice Acts of 1982, 1988, and 1991, are the most significant statutory enactments addressing Great Britain's administration of its juvenile criminal system. Yet many commentators contend that even with these amendments to the Acts, Great Britain is no closer to an acceptable solution to juvenile crime than it was sixty years ago.

C. *The Welfare Model Reflected in Great Britain's Juvenile Justice System: The Children and Young Persons Acts of 1933, 1963, and 1969*

The enactment of the various Children and Young Persons Acts (Act or Acts) facilitated the development of a comprehensive, separate juvenile justice system in Great Britain.[52] First, the Acts raised the age of criminal responsibility, which is the age at which a person becomes subject to the full penalties provided by the criminal law. Second, the Acts established a hierarchy of criminal capacity, which is the age at which a child is deemed capable of committing a crime and, thus, becomes criminally responsible. Finally, the Children and Young Persons Acts specifically provided for the punishment of juveniles who commit certain grave crimes.

The Children and Young Persons Act of 1933 (1933 Act) formally placed a duty on the juvenile courts to give first priority to the welfare of the juvenile.[53] Section 44 of the 1933 Act mandates that all courts dealing with children and young persons

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51. Many commentators who advocate the welfare model are social workers. *See* TERRILL, *supra* note 2, at 79. The British Parliament is divided. Michael Howard, the British Home Secretary, has vigorously advocated the justice model since he came to office. The justice model also garners the support of much of the Tory Party. However, some Tories, as well as the Labour and Liberal Democratic Parties, support more of a welfare model. Neil Darbyshire, *What a Week that was for Harassed Home Secretary: Another Day, Another Crisis in the Life of Tories' Law and Disorder Plan*, DAILY TELEGRAPH (London), Sept. 30, 1994, at 8. *See generally Young Offenders*, *supra* note 31.

52. *See* TERRILL, *supra* note 2, at 78-79.

53. The Children and Young Persons Act of 1933 was seen as "child care" legislation because it addressed the child criminal's welfare as well as his or her accountability to the justice system.

"shall have regard to the welfare of the child."[54] Because the courts should punish young offenders only when it serves the offender's best interests, the juvenile courts cannot mete out punishment for the sole purpose of retribution.[55] Thus, the courts are required to consider the best interests of the child even when convicting and sentencing for a serious crime.

1. The Age of Criminal Responsibility

The British Parliament used the Children and Young Persons Acts to raise the age of criminal responsibility. At common law, the age of criminal responsibility was seven.[56] The 1933 Act raised the age of criminal responsibility to eight years of age.[57] The Children and Young Persons Act of 1963 (1963 Act) subsequently raised the age of criminal responsibility to ten.[58]

2. The Categories of Criminal Capacity

Because Parliament believed that the age of ten was still a relatively low age to become criminally responsible, the Children and Young Persons Acts, as interpreted through British case law, also established categories of criminal capacity.[59] The categories provide that, depending on the age of the offender, the prosecution may be required to satisfy a heightened burden of proof before certain child offenders can be found criminally responsible. The British courts define three categories of criminal capacity: children under the age of ten who cannot be held criminally responsible; children between the ages of ten and fourteen for whom the prosecution must meet a heightened burden of proof before they can be held criminally responsible;

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54. Children and Young Persons Act, 1933, 23 Geo. 5, ch. 12, § 44 (Eng.) [hereinafter 1933 CYPA].

55. *See generally* Glanville L. Williams, *The Criminal Responsibility of Children*, 1954 CRIM. L. REV. 493, 495.

56. *See* WILSON, *supra* note 11, at 12.

57. 1933 CYPA § 50.

58. Children and Young Persons Act, 1963, ch. 37, § 6 (Eng.) [hereinafter 1963 CYPA]. There was a feeling in Great Britain that the age of eight was too young to hold a child criminally responsible. However, the Ingleby Committee pointed out that while the correct age of criminal responsibility is difficult to determine, it certainly is higher than eight. The Ingleby Committee suggested raising the minimum age of criminal responsibility from ten to twelve. *See* J.C. SMITH & BRIAN HOGAN, CRIMINAL LAW 189 n.7 (7th ed. 1992).

59. Great Britain has one of the lowest ages of criminal responsibility of any state. *See supra* note 33 and *infra* note 296.

and children between the ages of fourteen and eighteen for whom the prosecution bears no additional burden of proof.

a. Children Under the Age of Ten

The first category of child offenders, those under the age of ten, cannot be held criminally responsible.[60] There is a conclusive presumption that the child is *doli incapax*.[61] Thus, when a child is under the age of ten, that child is entirely exempt from criminal responsibility under all circumstances.[62] Even if there is uncontested evidence that a child under the age of ten committed a criminal act with the appropriate criminal intent, or *mens rea*,[63] a court cannot convict the child if he or she has not attained the age of ten at the time of the criminal act.[64] This rule is not merely a procedural bar.[65] The effect of the rule is that a child under the age of ten cannot commit a crime, even if the act itself is criminal.[66]

Walters v. Lunt provides an example of how a child under the age of ten cannot commit a crime.[67] In *Walters*, the police charged a husband and wife with knowingly receiving a stolen tricycle. However, their seven-year-old son had stolen the tricycle. The court held that the parents must be acquitted because the child was under the age of criminal responsibility; therefore, the child could not commit the crime of theft, even though the child did steal the tricycle. Therefore, the court could not convict the parents of knowingly receiving a stolen tricycle.[68]

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60. SMITH & HOGAN, *supra* note 58, at 188-89.

61. *Id.*

62. *Id.* at 188.

63. *Mens rea* is defined as criminal intent or a guilty or wrongful purpose. BLACK'S LAW DICTIONARY 985 (6th ed. 1990).

64. SMITH & HOGAN, *supra* note 58, at 189.

65. A child is not merely immune from prosecution for any crime committed while under the age of ten, but is considered not to have committed a crime at all. Thus, if another person over the age of ten induced a child under the age of ten to commit a crime, the older person is the one found to have committed the principal crime because the law views the younger person as not having committed the act. *Id.*

66. *Id.*

67. Walters v. Lunt, [1951] 2 All E.R. 645.

68. *Id. See also* Marsh v. Loader, [1863] 14 C.B.N.S. 555. The definition of legal guilt is the willful commission of an act in violation of the law. However, a court may excuse willful commission of a crime if the person committing the crime has a defect. The court may consider the age of a child such a defect. *Id.* at 556.

b. Children Between the Ages of Ten and Fourteen

Although a child between the ages of ten and fourteen can be held criminally responsible for his actions, the prosecution must satisfy a heightened burden of proof before a court will convict a child in this second category.[69] This heightened burden of proof serves as one of the safeguards built into the juvenile justice system, although it is not codified in the Children and Young Persons Acts. The British courts recognize a rebuttable presumption that children between the ages of ten and fourteen cannot distinguish between right and wrong and, thus, are incapable of committing a crime.[70] To overcome this presumption, the prosecution must prove not only that the child committed a criminal act with the required *mens rea*, but also that the child committed the criminal act with "mischievous discretion."[71] Mischievous discretion is defined as a child's ability to understand the difference between right and wrong.[72]

In *Rex v. Gorrie*,[73] the Central Criminal Court provided a modern test for mischievous discretion. Gorrie, a thirteen-year-old boy, was charged with manslaughter after a fellow student died from an infection, which he received from a slight injury inflicted by Gorrie's penknife.[74] The court instructed the jury that the prosecution bore the burden of showing that when the boy injured his classmate, he knew his actions were gravely and seriously wrong.[75] First, the jury considered whether Gorrie had the appropriate criminal intent for manslaughter—whether Gorrie intentionally stabbed the other boy with his penknife.[76] Second, the jury considered whether the teenager also had the requisite mischievous discretion—whether Gorrie knew that stabbing his schoolmate was gravely wrong.[77] The jury acquitted Gorrie because the stabbing occurred during horseplay, and Gorrie had no idea that his actions were grossly wrong.

Although the heightened burden of proof ensures that a court can convict only those children between the ages of ten and fourteen having the appropriate *mens rea* and mischievous discretion, the prosecution has many ways to rebut the

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69. SMITH & HOGAN, *supra* note 58, at 189.
70. *Id.*
71. *Id.*
72. *Id.* at nn.12-13.
73. Rex v. Gorrie, [1919] 83 J.P. 136 (1918).
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*

presumption of incapacity. The prosecution may submit evidence of the child's behavior, both before and after the crime, to show that the child possessed the requisite *mens rea*.[78] Fleeing the scene of the crime, however, is not sufficient evidence to rebut the presumption.[79] Likewise, the mere fact that a crime has been committed is not sufficient to rebut the presumption of incapacity.[80]

The prosecution may also submit evidence of the defendant's background, education, emotional development, and previous convictions if the court finds such evidence relevant.[81] The fact that the child committed an act that any normal child of the defendant's age would know is wrong is not sufficient to rebut the presumption of incapacity.[82] The prosecution must also establish that the defendant is normal for his or her age and personally knew the act was wrong.[83] The court has broad discretion to admit evidence that it determines to be relevant.

A court may conclude that all the evidence taken together establishes mischievous discretion. In *J.M. v. Runeckles*, the criminal appeals division of the Queen's Bench held that the prosecution successfully rebutted the presumption of incapacity by presenting a series of factors. In *Runeckles*, a thirteen-year-old girl attacked and stabbed another girl with a broken milk bottle.[84] The prosecution offered evidence of the type of act she committed, the fact that the defendant fled the scene and hid from the police, and the content and handwriting of her statement in which she described the incident.[85] The court concluded that all of the evidence taken together tended to establish that the girl was of normal intelligence and appreciated the seriousness of her actions; therefore, she had the requisite mischievous discretion.[86]

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78. SMITH & HOGAN, *supra* note 58, at 190.

79. *Id.*

80. *See* Queen v. Smith, [1845] 1 C.L.C. 260 (malicious intent cannot be presumed from mere commission of a criminal act); Rex v. Kershaw, [1902] 28 T.L.R. 357, 358 (commission of a crime itself is not evidence of a guilty state of mind).

81. *See* R v. B, R v. A, [1979] 3 All E.R. 460 (a court may permit the prosecution to introduce any evidence to rebut the presumption of incapacity of intent as long as the court finds it relevant to the issue of the child's capacity to know good from evil).

82. JBH and JH (Minors) v. O'Connell [1981] Crim. L. Rep. 632, IPH v. Chief Constable of South Wales, [1987] Crim. L. Rep. 42.

83. SMITH & HOGAN, *supra* note 58, at 189-90.

84. [1984] 79 Cr. App. 255 (Q.B. Div'l Ct.).

85. *Id.* at 260.

86. *Id. See also Kershaw*, [1902] 18 T.L.R. at 357-58 (a jury found a thirteen-year-old boy guilty of manslaughter and found mischievous discretion

Even with these avenues open to the prosecution, however, other cases illustrate that proving younger children possess mischievous discretion is especially difficult.[87]

c. Children Between the Ages of Fourteen and Eighteen

The third category of criminal responsibility applies to children between the ages of fourteen and eighteen. Because the system assumes that children of this age understand the consequences of their actions, a juvenile over the age of fourteen is not entitled to a presumption of incapacity. Instead, the law presumes such juveniles are fully responsible for their criminal actions.[88] The prosecution need only prove the usual *actus reus* and *mens rea* required to prove criminal responsibility in the case of an adult offender.[89] Thus, a child over the age of fourteen is presumed to be "responsible for his actions entirely as if he were forty."[90]

3. The Punishment of Juveniles Guilty of "Grave Crimes"

Since the passage of the 1961 Criminal Justice Act, Section 53 of the Children and Young Persons Act of 1933 provides for the punishment of juveniles who commit certain "grave crimes."[91] The British Parliament initially enacted Section 53 to protect society from a small number of dangerous juveniles, while providing a more humane solution to the crime than the death penalty.[92] In its original form, Section 53 provided that if a child is convicted of murder, attempted murder, manslaughter, or wounding with the intent to do grievous bodily harm, and the court determines that no other punishment would be suitable, the court could sentence the offender to be detained for a specified

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from evidence of the nature of the crime as well as the defendant's statements to the authorities).

87. SMITH & HOGAN, *supra* note 58, at 190. The Ingleby Committee, however, recommended the abolishment of the presumption that a child between the ages of ten and fourteen is incapable of committing a crime. Some commentators argue that the presumption causes an anomalous result to the extent that the more warped a child's moral development, the safer he is from treatment under the law. *Id.* The Ingleby Committee also studied evidence that the courts have difficulty in applying the presumption and therefore require different levels of proof, leading to an inconsistent application of the law. The Committee's recommendation has not yet been implemented. *Id.*

88. SMITH & HOGAN, *supra* note 58, at 191.

89. *Id.*

90. *See* Queen v. Smith, [1845] 1 C.L.C. 260.

91. 1933 CYPA § 53.

92. 1933 CYPA § 53(1). *See* Godsland & Fielding, *supra* note 32, at 286.

period; the court was not permitted to sentence the child to death.[93] The Criminal Justice Act of 1961, however, increased the scope of offenses punishable under Section 53(2) of the Children and Young Persons Act of 1933 to include all offenses for which an adult convicted on indictment could be sentenced to imprisonment for at least fourteen years.[94] In addition to setting the punishment for grave crimes, Section 53 also provides that juveniles charged with offenses covered by its provisions may be tried in the Crown Court—a court that tries adult offenders—instead of the juvenile court.[95]

Section 53 provides that the Crown Court may sentence young offenders to custody indefinitely if they are convicted of "grave crimes."[96] There are two types of grave crimes: (1) murder, and (2) those indictable offenses for which an adult may be sentenced to imprisonment for fourteen years or more.[97] If a young offender is convicted of either of these types of crimes, the Crown Court will sentence the offender pursuant to Section 53.[98]

Section 53 distinguishes offenders between the ages of ten and eighteen who are convicted of murder from offenders between the ages of fourteen and seventeen who are convicted of an indictable offense. The first part of Section 53 states that a

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93. Godsland & Fielding, *supra* note 32, at 286. The substance of the original Section 53, currently is found at 1933 CYPA § 53(2).

94. The Criminal Justice Act of 1961 amended Section 53 of the Children and Young Persons Act of 1933 to include: "any offence punishable in the case of an adult with imprisonment for fourteen years or more, not being an offence the sentence for which is fixed by law." Criminal Justice Act, 1961, 9 & 10 Eliz. 2, ch. 39, § 2(1) (Eng.).

95. *See infra* Appendix I.

96. Godsland & Fielding, *supra* note 32, at 282.

97. *Id.* at 283.

98. Great Britain's Juvenile Court has original jurisdiction over all criminal offenses committed by persons under the age of seventeen, with the exception of murder. TERRILL, *supra* note 2, at 80. The Crown Court has exclusive jurisdiction over all proceedings on indictment, including serious crimes committed by adults and homicide committed by both adults and children. *Id.* at 29. *See* Supreme Court Act 1981, § 1(1) (Eng.). However, the Juvenile Court may transfer a criminal case to the Crown Court. Generally, such a transfer is made:

> (1) [i]f a young person is charged with a serious crime and the court is of the opinion that he should be found guilty, the court may take the position that the offender should be sentenced to a long term of detention, *which only a Crown court has the power to impose*; [or] (2) [i]f a young person is charged in conjunction with an adult for an indictable offense, the juvenile court may transfer the case to a Crown court in the interest of justice.

TERRILL, *supra* note 2, at 81 (emphasis added). Magistrates' Courts Act, 1980, § 24(1)(a), (1)(b) (as amended by the Criminal Justice Act of 1991 § 68, sched. 8, para. 6(1)(a) [hereinafter Magistrates' Courts Act].

person found guilty of murder, committed while that person was between the ages of ten and eighteen, will be sentenced to detention during Her Majesty's Pleasure.[99] The duration of the term of imprisonment is indeterminate, in such a place and under such conditions as the Home Secretary may direct.[100] The imposition of the sentence is automatic upon a verdict of guilty on an indictment for murder, and a judge has no discretion to impose a lower sentence because of mitigating factors. Thus, all children between the ages of ten and eighteen are sentenced to detention at Her Majesty's Pleasure upon a conviction of murder.[101]

The second part of Section 53 provides that the punishment for all juvenile offenders between the ages of fourteen and seventeen, who are convicted of an indictable offense punishable in the case of an adult by a term of imprisonment of fourteen years or more, is detention in such a place and under such conditions as the Home Secretary may direct.[102] Such indictable offenses include attempted murder, manslaughter, rape, wounding with intent to do grievous bodily harm, and robbery.[103] Juveniles under the age of fourteen come within the scope of Section 53 only when they are tried on indictment. However, for juveniles under fourteen, the only indictable offenses besides murder are crimes for which the juvenile is charged jointly with an adult.[104] Regardless of the juvenile offender's age, a court may order detention under Section 53 only if it determines that no other sentence is suitable.[105] The period of detention, which may be for life, must be specified in the sentence and cannot exceed the maximum term of imprisonment for which the offense is punishable in the case of an adult.[106]

Although Section 53 seems extremely harsh, most juvenile offenders cannot or will not be tried and convicted under this section. If a juvenile is under the age of fourteen, Section 53 applies only if the juvenile is charged with murder or charged

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99. 1933 CYPA § 53(1).

100. *Id.* § 53(2). The Home Secretary is the British Minister responsible for, *inter alia*, the administration of the criminal justice system.

101. *See supra* part II.C.2.a. (discussing the legal incapacity of children under the age of ten to commit crimes).

102. 1933 CPYA § 53(2).

103. *See* Godsland & Fielding, *supra* note 32, at 283-84.

104. *Id.* at 289.

105. 1933 CYPA § 53(2). Children who commit such indictable offenses may also be sentenced by a juvenile court to a term in a young offenders institution and to community service. *See infra* part III.F.

106. 1933 CYPA § 53(2).

jointly with an adult.[107] Thus, Section 53 applies to few juveniles under the age of fourteen. Additionally, Section 53 is restricted in its application to juveniles over the age of fourteen. Section 53 applies to such juveniles only when they have committed murder or an indictable offense punishable by imprisonment for fourteen years or more, such as manslaughter, robbery, or rape.[108] Even these juveniles, however, will only be sentenced under Section 53 if no other punishment is suitable.[109] Therefore, the harshness of Section 53 is tempered by its limited applicability.

Despite its narrow scope, Section 53 is probably the most controversial provision in the Children and Young Persons Acts, if not in the British juvenile justice system as a whole. First, commentators criticize the Crown Court's recent application of Section 53 as following the justice model, thereby departing from the stated goal of the Children and Young Persons Acts to serve the special needs of juvenile offenders by adhering to the welfare model.[110] Because the courts rarely used Section 53 before the mid-1960s, this criticism focuses on the courts use of the provision since that time.[111] Moreover, commentators also note that the increased use of this Section to sentence juveniles reflects purely retributive sentencing and the increasing dominance of the justice model in the reasoning of the courts.

Second, commentators criticize the 1961 Criminal Justice Act's amendment to Section 53, which extends its coverage to "grave crimes" committed by a juvenile aged fourteen or older.[112] This extension includes all offenses that could lead to a sentence of imprisonment for fourteen years or more if committed by an adult. The amendment expands the scope of Section 53 to cover a wide range of offenses in addition to murder and manslaughter, including robbery, arson, and serious sexual offenses.[113] This amendment also links the juvenile system with the adult criminal

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107. 1933 CYPA §§ 53(1), (2). *See supra* note 98 (regarding juveniles charged jointly with adults); Godsland & Fielding, *supra* note 32, at 284. However, commentators criticize the harshness of Section 53 for including offenders under the age of fourteen simply because they are charged jointly with an adult. Given the welfare goal of the juvenile system, a juvenile charged jointly with an adult should not be held more culpable than when acting alone. *Id.* at 289-90. This perverse result illustrates yet another problem arising from the merger of the adult and juvenile sentencing schemes.

108. 1933 CYPA § 53(2).

109. Magistrates' Courts Act § 24(1).

110. *See generally* Godsland & Fielding, *supra* note 32.

111. *Id.* at 284-96.

112. *Id.* at 286-87. Prior to the 1961 Criminal Justice Act, Section 53 only applied to children convicted of murder, manslaughter, or wounding with the intent to do grievous bodily harm. *See supra* text accompanying notes 93-94.

113. *Id.*

system, contravening the Children and Young Persons Acts goal of creating a separate system of juvenile justice.[114] Additionally, the amendment ensures that any increase in the courts' power to impose sentences of fourteen years or more for other adult offenses would also apply to young offenders.[115] Thus, because Section 53 joins the adult and juvenile sentencing schemes, commentators suggest that Section 53 has a greater chance of being used by the juvenile courts as a means of punishment beyond the Section's aim of rehabilitating juvenile offenders.[116]

Given the Children and Young Persons Acts stated goal of providing for the welfare of juvenile offenders, criticism of the courts retributive application of the law led Parliament to enact the Children and Young Persons Act of 1969 (1969 Act).[117] The stated intention of the 1969 Act was to reduce the number of criminal proceedings that could be initiated against children. This Act was supposed to be the rebirth and ultimate triumph of the welfare model in the British juvenile justice system.[118] However, the main provisions of the Act that reflect the welfare model have not been brought into force.[119]

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114. *Id.*

115. *Id.* More juveniles would be tried before the Crown Court because, in essence, Section 53 provides that juveniles charged with the offenses covered by its provisions will be tried in the adult courts of Great Britain, instead of the juvenile court. *See supra* note 98. *See also infra* Appendix I.

116. Godsland & Fielding, *supra* note 32, at 286-87. One article has studied the actual increase in the use of Section 53 by the courts. The study showed that the total number of juveniles sentenced under Section 53 rose from six in 1966 to ninety-two in 1981. The authors speculate that the courts use Section 53 to meet the need of society and the courts to punish, rather than to protect society from dangerous juveniles. *Id.* at 285-87. However, the authors do not correlate these statistics with other statistics showing the overall increase in juvenile crime, especially violent crime, in Great Britain. Nor do the authors address the issue of whether the welfare model of juvenile justice and the notion of rehabilitation are misplaced when addressing dangerous juveniles in today's society.

117. Children and Young Persons Act, 1969, ch. 54 (Eng.) [hereinafter 1969 CYPA].

118. *See* SMITH & HOGAN, *supra* note 58, at 191. *See also* Ball, *supra* note 27, at 279. The enactment of the 1969 Act showed a new commitment to the welfare model of juvenile justice, which views juvenile delinquency and crime as a manifestation of a deprivation that society has a responsibility to treat. *See id.* at 280.

119. In the United Kingdom, all legislation must contain express commencement provisions before its operation as a law begins. Commencement provisions specify the date on which the legislation comes into force. The commencement of many modern statutes is expressly postponed, empowering the Queen or a specified Minister of the Crown to designate a future date. Interpretation Act, 1978, ch. 30, § 4 (Eng.). The 1969 Act has no specified commencement date. Instead, the Secretary of State was empowered to order

The 1969 Act contains significant provisions advancing the welfare model of juvenile justice, but currently they have no influence on the British juvenile justice system because they are not in force. The first significant provision in the 1969 Act provides that criminal proceedings will only be brought against children as a last resort. In the case of a child under fourteen years of age, criminal proceedings would be completely eliminated, except in the case of homicide.[120] Additionally, Parliament intended the 1969 Act to raise the minimum age of criminal responsibility in stages, further reducing the number of children subject to court proceedings. However, these provisions are unlikely to be brought into force anytime in the near future.[121] If brought into force, these two provisions would substantially reduce the number of criminal proceedings initiated against children.

In addition to reducing the number of proceedings against young offenders, the 1969 Act provides for further restrictions on the prosecution of children over the age of fourteen.[122] The 1969 Act would restrict the right to prosecute these young persons to "qualified informants," defined in the Act as servants of the Crown, police officers, members of a designated police force, or local authorities.[123] Subject to regulations to be promulgated by the Home Secretary, these qualified informants would be the only persons able to institute proceedings against young offenders.[124] Additionally, these court proceedings would only be available when the qualified informant was of the opinion that the case could not otherwise be adequately addressed.[125] Specifically, the qualified informant could not institute proceedings against the young offender if the case could be sufficiently handled by a parent, a teacher, or other non-custodial means through the exercise of a local authority. However, this provision is currently

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commencement dates for the various provisions of the 1969 Act. 1969 CYPA § 73(2).

120. Section 4 of the 1969 Act provides that "[a] person shall not be charged with an offense, except homicide, by reason of anything done or omitted while he was a child." "Child" is defined as a person under the age of fourteen. 1969 CYPA § 4.

121. SMITH & HOGAN, *supra* note 58, at 191. If Section 4 were fully implemented, children aged ten to fourteen still could be held capable of committing a crime, but they could not be liable to prosecution, with the exception of the crime of murder. *Id.*

122. *See* 1969 CYPA § 5.

123. SMITH & HOGAN, *supra* note 58, at 191-92; 1969 CYPA § 5(9).

124. 1969 CYPA § 5(1). However, no such regulations have been promulgated because the provision is not in force.

125. 1969 CYPA § 5(2); SMITH & HOGAN, *supra* note 58, at 191-92.

not in force, and Parliament has no intention of bringing it into force at the present time.[126] Because the qualified informant provision is not in force, which individuals would constitute qualified informants is unclear. Likewise, whether the Home Secretary would enact regulations either limiting or further specifying the cases in which a qualified informant could initiate proceedings against a juvenile offender is also uncertain.

Although the drafters of the 1969 Act designed it to promote the welfare of juvenile offenders, the Act fails to address the controversial Section 53 of the 1933 Act. Section 53 received little attention from Parliament in the initial inquiries preceding its enactment of the 1969 Act for two reasons. First, in 1969 only six juvenile offenders were convicted and sentenced under Section 53;[127] thus, there was little concern about its misapplication. Second, in 1968 Mary Bell, an eleven-year-old girl, was convicted of a brutal manslaughter.[128] Bell's brutal crime provided further proof of the necessity of Section 53 to deal with the extremely violent crimes of young offenders. Bell's conviction and sentence under Section 53 attracted considerable publicity and was generally considered well deserved. Thus, the case also may have influenced Parliament's decision to retain Section 53.[129]

D. *The Justice Model Reflected in Great Britain's Juvenile Justice System: The Criteria for Imposing Custodial Sentences Under the Criminal Justice Act of 1991*

The purpose of the Criminal Justice Act of 1991 (1991 Justice Act)[130] was to regulate the use of all custodial sentences imposed by the British courts.[131] Under the British criminal justice system, a court may impose three types of custodial

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126. SMITH & HOGAN, *supra* note 58, at 191. *See also* Ball, *supra* note 27, at 279. Parliament only partially implemented the 1969 Act because the Conservatives came to power with very little sympathy for the welfare provisions in the Act. Additionally, the high recidivism rate (75-80%) of young offenders after release from community homes and other rehabilitative sentences gave the public little confidence in the measures of the 1969 Act. *See id.*

127. Godsland & Fielding, *supra* note 32, at 285.

128. *See id.* at 287. Mary Bell strangled two young boys, ages two and four, in the span of two weeks in 1968. *School-Age Killers Can Regain Freedom*, TIMES (London), November 25, 1993.

129. Mary Bell was released in 1980 after spending twelve years in various facilities for young offenders. She later changed her identity and lives in England with a family of her own. *See* Schmidt, *supra* note 9.

130. Criminal Justice Act, 1991, ch. 53 (Eng.) [hereinafter 1991 CJA].

131. *See generally* D.A. Thomas, *Criminal Justice Act 1991(1) Custodial Sentences*, 1992 CRIM. L. REV. 232.

sentences on juveniles: imprisonment, detention in a young offenders institution, and detention under Section 53 of the Children and Young Persons Act of 1933. Different views have emerged regarding the enactment of the 1991 Justice Act. Some commentators characterize the 1991 Justice Act as an important milestone in the history of British sentencing. Others view it as inconsequential to the sentencing system because it merely reinforces current sentencing practices by the British courts.[132] Still others criticize the 1991 Justice Act because its sentencing guidelines merely restate the judicial practice of "just deserts," which conforms to the justice model's prescription for sentencing young offenders.[133] This final view is valid insofar as the 1991 Justice Act does not significantly reduce the imposition of custodial sentences or their duration.[134]

Nevertheless, the 1991 Justice Act does contain several important procedural changes that differ from earlier Criminal Justice Acts.[135] As a whole, these Acts detail the sentencing structure of the entire criminal justice system. The Justice Acts develop two separate sentencing schemes—custodial and non-custodial.[136] The main thrust of the changes enacted by the 1991 Justice Act affect the statutory criteria for the imposition of the various custodial sentences set forth in earlier Criminal Justice Acts.

The Criminal Justice Act of 1991 differs from its predecessors in one significant respect: its sentencing provisions follow a more

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132. *Id.*

133. *Id.* These criticisms of the Criminal Justice Act of 1991 reflect support for the welfare model of juvenile justice and opposition to the prevalent use of the justice model in the 1991 Act. However, other commentators who support the justice model are not satisfied with the 1991 Act and criticize the sentencing procedures for juveniles set forth in the Act as following the welfare model too closely. *See generally id.*

134. *Id.*

135. *See generally id.*

136. *Id.* Because this Note focuses on the effects of Great Britain's juvenile justice system on young offenders who commit violent crimes, the discussion is limited to custodial sentencing. Parliament developed non-custodial sentences on the theory that if more offenders are "punished" by the community, it will lead to a reduction in custodial sentences. The approach of non-custodial sentencing encompasses three ideas. First, politically, and thus legislatively, the government needs to ensure that non-custodial sentences are tough and rigorously enforced. Second, the government needs to promote non-custodial sentences as forms of community punishment, restrictive of the young offenders' liberty in their own way. Third, non-custodial sentences should also reflect the principle of proportionality, with a graduated restriction on liberty in proportion to the seriousness of the offense and the particular offender. *See generally* Andrew Ashworth, *Non-Custodial Sentences*, 1992 CRIM. L. REV. 242, 243.

coherent theme, with proportionality as the leading principle.[137] The principle of proportionality requires a direct correlation between the crime and the sentence imposed. The 1991 Justice Act requires courts to base the offender's sentence on society's idea of the punishment deserved for the crime committed; however, it specifically prohibits the courts from lengthening sentences for retributive or even rehabilitative purposes.[138] This prohibition suggests that while the 1991 Justice Act is closer to the justice model than earlier versions of the Act, the welfare model has not been totally abandoned.[139] In fact, Parliament intended the principle of proportionality to reduce the courts' use of custodial sentences purely as a sanction and to encourage greater resort to non-custodial sentences.[140] The principle of proportionality seems to be a compromise within the juvenile justice system between the justice and welfare models.[141]

The principle of proportionality also proscribes juvenile courts from imposing any custodial sentences on young offenders who commit non-serious offenses. Juveniles who commit serious offenses, however, still receive longer custodial sentences.[142] The principle of proportionality embodies the theory that the parents of young offenders, as well as society as a whole, have an equal responsibility with the courts to curb the criminal behavior of children.[143] Thus, the imposition of more non-custodial sentences forces society and parents to take more responsibility for the development and discipline of their children.[144] However,

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137. Ashworth, *supra*, at 243. *See also Editor's Remarks*, 1992 CRIM. LAW REV. 229 [hereinafter *Editor's Remarks*]. Although the 1991 Act is criticized because its theme is not readily apparent from the wording of the legislation, one can infer a theme and support it with other statutes and documents. *Id.*

138. *Editor's Remarks, supra*, at 229. However, there are exceptions for "public protection" sentences. *Id.*

139. *See id.*

140. *See id.* at 229-30. However, in more recent years, British courts have shown a strong tendency toward the issuance of custodial sentences, even for less serious offenses. The number of people in prison serving custodial sentences for longer than four years has risen from 6,077 in 1984 to 12,178 in 1990. *Id.* at 229.

141. *Id.*

142. *Id.* This policy goes against the principles of proportionality and "truth in sentencing," both of which assume that every part of a custodial sentence handed down should have some "meaning." *Id.*

143. *Id.*

144. *Id.* The most important aspect of the non-custodial sentencing scheme in the Criminal Justice Act of 1991 is the development and clarification of the "community sentence." Community sentences include probation, community service, combination orders (probation plus community service), curfew, supervision orders, and attendance center orders. The last two are only relevant for young offenders. *See generally* Ashworth, *supra* note 136, at 242-49.

rising violent crime rates and the high rate of recidivism among juveniles have dampened Great Britain's enthusiasm for non-custodial sentences and non-retributive punishment.

In addition to introducing the principle of proportionality, the Criminal Justice Act of 1991 also implements various long-campaigned-for changes in the Criminal Justice Act of 1982.[145] First, the 1991 Justice Act equalizes the imposition of sentences on male and female young offenders.[146] Second, it raises the minimum age for confinement to a young offenders institution to fifteen years of age.[147] In raising the minimum age for confinement to fifteen, this provision effectively abolishes all custodial sentences for any offender fourteen years of age or younger, unless the offender is convicted under Section 53 of the Children and Young Persons Act of 1933.[148] Third, the 1991 Criminal Justice Act changed the name of the juvenile court to the "Youth Court." Parliament viewed the new name as more representative of the purposes of the juvenile court, namely, to protect and care for troubled youth and to sentence juvenile offenders.[149]

Although the 1991 Criminal Justice Act emphasizes the justice model in most of its provisions, it also reflects the principles of the welfare model. Specifically, the 1991 Justice Act manifests the welfare model by providing courts with more options for sentencing seventeen-year-old offenders. Under prior Justice Acts, the courts treated offenders aged seventeen as adults. The 1991 Justice Act, however, brought the seventeen-year-old offender within the protection of the juvenile system, which requires the court to give first priority to the welfare of young offenders.[150] Thus, the 1991 Justice Act brings the seventeen-year-old offender under the greater protection of the Youth Court.[151]

In general, the most important changes made by the 1991 Justice Act affect all custodial sentences, regardless of the age of

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145. *Id.* Criminal Justice Act, 1982, ch. 48 (Eng.) [hereinafter 1982 CJA].

146. *See* Thomas, *supra* note 131, at 232-33.

147. 1991 CJA (amending part I of 1982 CJA). *See generally* JAMES MORTON, THE CRIMINAL JUSTICE ACTS OF 1987 AND 1988: A COMMENTARY (1988); Thomas, *supra* note 131, at 236-37 (detailing the influence of age thresholds).

148. *See* discussion *supra* part II.C.3.

149. *See generally* Ball, *supra* note 27.

150. 1991 CJA § 63(5). As a result, the maximum youth custody sentence for seventeen-year-olds was reduced to twelve months. This provision places the treatment of all young offenders aged seventeen in the hands of the juvenile courts, unless they are charged with committing a grave crime under Section 53 of the Children and Young Persons Act of 1933.

151. *Id. See also* 1933 CYPA § 44.

the offender.[152] The 1991 Justice Act abolishes the previous statutory criteria set forth in the Criminal Justice Act of 1982, which only governed the imposition of detention sentences in young offenders institutions.[153] The old statutory criteria has been replaced with three new criteria that restrict the courts' use of all types of custodial sentences—imprisonment, detention in a young offenders institution, and detention under Section 53 of the 1933 Act.[154] Under the 1991 Justice Act, a court may impose a custodial sentence if any of the following criteria is present in a particular case: (1) the offense is serious enough that only a custodial sentence is justified; (2) the offense is of a violent or sexual nature and the court determines that a custodial sentence is necessary to protect the public from danger; or (3) an offender refuses to serve a previously ordered community sentence. The 1991 Justice Act provides that a court may impose a custodial sentence if it decides that any one of the three new criteria applies to a particular offender's case. Moreover, the 1991 Justice Act requires the court to state, in open court, the specific criterion under which it is imposing the custodial sentence and the reason the specific criterion is fulfilled.[155] The court must then explain the reasoning behind the custodial sentence to the offender in ordinary language.[156]

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152. *See* Thomas, *supra* note 131, at 232-33. The Criminal Justice Act of 1991 applies whenever a court convicts an offender of an offense punishable by a discretionary custodial sentence, which includes most criminal offenses; however, this Act does not apply to murder, which carries a mandatory life sentence for adults and an automatic sentence to be detained at Her Majesty's Pleasure for young offenders. *Id.* at 235. 1991 CJA § 1. The Criminal Justice Act of 1961 amended Section 53 of the Children and Young Persons Act of 1933 to cover indictable offenses punishable by imprisonment for fourteen years or more in the case of an adult. However, the amendment specifically excluded offenses for which the sentence is "fixed by law." 1933 CYPA § 53. This exclusion applies to persons convicted of murder because a sentence of life imprisonment is mandatory for this offense under the Murder (Abolition of Death Penalty) Act, 1965, § 5.1(1), ch. 71 (Eng.).

153. 1982 CJA § 1(4)(a). *See generally* R v. Davidson [1990] 2 All E.R. 976 (1989) (applying CJA 1982 § 1(4)(a) in sentencing a young offender who was convicted of eight separate offenses of burglary).

154. 1991 CJA §§ 1(2)-(3).

155. *Id.* §§ 1(4)(a)-(b). *See generally* Thomas, *supra* note 131, at 233.

156. 1991 CJA §§ 1(9)(a)-(b).

1. The "Seriousness" of the Offense

The first criterion set forth under the 1991 Justice Act is the "seriousness" of the offense.[157] The Act provides that a custodial sentence may not be imposed unless the court is "of the opinion that . . . the offence, or the combination of the offence and one other offence associated with it, was so serious that only such a sentence can be justified for the offence."[158] Therefore, under the 1991 Justice Act, the judgment of whether an offense is serious is determined solely by the court. The 1991 Justice Act essentially maintains the seriousness requirement originally found in the 1982 version of the Act with an important modification—the court's opinion determines seriousness, rather than leaving the term open to any interpretation.[159]

A major difference between the 1991 Justice Act and the 1982 Justice Act, however, is the range of factors that courts may consider when determining the "seriousness" of the offense. The 1991 Justice Act permits the court to take more than one offense by the same offender into account when assessing the "seriousness" of an offense as a whole.[160] For example, a court

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157. *See* Thomas, *supra* note 131, at 233-37. Thomas argues that it is likely that seriousness will be the criterion used in the vast majority of cases to justify the imposition of a custodial sentence. *Id.* at 233.

158. 1991 CJA § 1(2)(a). *See also* Thomas, *supra* note 131, at 232. Under the Criminal Justice Act of 1991, the test for everything becomes "seriousness." Under the 1982 Criminal Justice Act, a court could impose a custodial sentence because of the seriousness of the offense. However, the 1991 Act declares that the *court's opinion* determines seriousness, in contrast to the 1982 Act, which left the term open to any interpretation. *See Justifying Custodial Sentences of Young Offenders*, 19 CAMBRIAN L. REV. 76, 83-84 (1988). In R. v. Bradbourne, (1985) 7 Cr. App. 180, the court defined an offense as "so serious" when its commission by a young person "would make right thinking members of the public, knowing all the facts, feel that justice had not been done by the passing of any sentence other than a custodial one." *Id.* The "right thinking man" test was criticized because it substituted poorly informed public notions of justice for the assessment of the court. *Id.* at 84.

159. *See* 1982 CJA § 1(4). Because the seriousness criterion in the 1991 Criminal Justice Act has not been applied to many cases, the first step of any court interpreting the "seriousness" requirement will be to look at the application of the 1982 Act in previous cases.

160. Under the 1982 Criminal Justice Act, the court was limited to assessing offenses individually. Thomas, *supra* note 131, at 234. *See also Davison*, [1990] 2 All E.R. at 976 (examining whether the offense for which the defendant was convicted was so serious that a non-custodial sentence would not be justified and deciding that each offense must be considered separately—the total number of offenses cannot be aggregated when considering their seriousness).

may combine any two "associated" offenses[161] for this purpose.[162] If an offender has more than two offenses that are associated, the court may choose any of the two to determine the seriousness of the offense.[163] The seriousness criterion of the 1991 Justice Act differs from that of the 1982 Justice Act, which limited the court to assessing offenses individually.[164] This difference could increase the number of young offenders who are ultimately sentenced to custodial punishment, especially those young offenders who commit numerous minor crimes.[165]

Commentators expect that courts most often will use the "seriousness" criterion as justification for imposing custodial sentences, thereby making the definition of "seriousness" extremely important.[166] The provisions of the 1991 Justice Act, however, are vague, and its general terms do not give a court any indication of the threshold for imposing a custodial sentence under this criterion. Because the 1982 Justice Act also contained a seriousness criterion, the courts first must analyze the previous interpretation of the criterion under the 1982 Justice Act.[167] Because the 1991 Justice Act makes no attempt to explain the meaning of seriousness,[168] it leaves a great deal of responsibility with advocates and judges to interpret its provisions.[169]

Courts should be wary of using their previous interpretation of "seriousness" under the 1982 Justice Act, however, because the context in which the seriousness criterion of the 1982 Justice Act was considered differs from the context in which the 1991 Justice Act is to be applied.[170] Specifically, the 1982 Act only applied to young offenders, while the 1991 Act applies to a larger

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161. 1991 CJA § 1(2)(a). An offense is associated with another offense if the offender is convicted of both in the same proceeding, sentenced for the two offenses at the same time, or the offense is taken into consideration when the offender is sentenced for the other offense. Thomas, *supra* note 131, at 234.

162. Thomas, *supra* note 131, at 234.

163. *Id.*

164. *Id.* Commentators predict that problems with the seriousness criterion in the 1991 Act will arise in the case of a defendant who committed what is essentially a single, large-scale criminal enterprise with many single offenses, each of which would be considered minor on its own. *Id.* In such a case, a court may decide to impose a custodial sentence based on the number of offenses, rather than their relative gravity. *Id.*

165. *Id.*

166. *See* Thomas, *supra* note 131, at 233.

167. *Id.* at 236.

168. *Id.* at 235.

169. The courts also will have to consider the legislative intent behind any changes in the 1991 Criminal Justice Act. If any ambiguity remains, it should be resolved in favor of the defendants. *Editor's Remarks*, *supra* note 138, at 229.

170. *See* Thomas, *supra* note 131, at 236.

age group, including more offenders with substantial records.[171] Therefore, the interpretations of provisions under the 1982 Justice Act are not necessarily applicable to the 1991 Justice Act because the focus of the two Justice Acts is entirely different.

One case decided under the 1982 Justice Act, *Bray*, sets forth an interpretation of the seriousness criterion that is somewhat consistent with the general scheme of the 1991 Justice Act.[172] In *Bray*, the court concluded that while the nature of an offense may justify a custodial sentence, an offender's personal circumstances may mitigate the seriousness of the offense, thus allowing the court to decide *not* to impose a custodial sentence.[173] The holding in *Bray* is consistent with the overriding principle of the 1991 Justice Act.[174] Although the 1991 Justice Act requires a court to decide whether the offense meets the seriousness criterion without reference to outside information about the offender,[175] it does indicate that the seriousness of a particular offense must not rely on an offender's past convictions[176] and that a court should take into account all aggravating or mitigating circumstances of the offense.[177] The 1991 Justice Act also requires the court to obtain a pre-sentence report and to consider the information contained therein, reducing the sentence when appropriate.[178]

2. When a Custodial Sentence is Necessary for the Protection of the Public

The second criterion justifying a custodial sentence under the 1991 Justice Act requires the crime to be of a violent or sexual nature, and the court to determine that only a custodial sentence

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171. *Id.*

172. *Id.* at 236-37 (discussing *Bray*, 1991 Crim. App. (S.) 706).

173. *Id.*

174. *Id.*

175. *Id.* 1991 CJA §§ 1(2)(a)-(b).

176. "An offense shall not be regarded as more serious . . . by reason of any previous convictions . . . or any failure of [the offender] to respond to previous sentences." *Id.* § 29(1).

177. *Id.* § 3(3).

178. *Id.* §§ 3(1)-(4). For a general discussion of pre-sentence reporting under the new 1991 Act, see Nigel Stone, *Pre-Sentence Reports, Culpability and the 1991 Act*, 1992 CRIM. L. REV. 588. Under § 3(5)(a) of the 1991 Criminal Justice Act, a pre-sentence report is defined as a written report to assist the court in determining the most suitable means of dealing with the offender. However, there is a narrow exception. If one of the offenses for which the juvenile is standing trial is triable only by indictment *and* the court considers a pre-sentence report unnecessary, the court may choose not to consider the report before deciding the sentence. 1991 CJA § 3(2).

is adequate to protect the public from serious harm by the offender.[179] The 1991 Justice Act permits a court to impose a longer custodial sentence than would otherwise be permissible if this second criterion is satisfied.[180] A court has complete discretion in applying these provisions.[181] Commentators find the courts unfettered discretion under the 1991 Justice Act's custodial sentencing scheme anomalous because the purpose of the Act was to restrict the use of custodial sentences. The only limitation on the courts discretion is the requirement that the court consider the information in the pre-sentence report.[182]

This second criterion substantially changes the past practice of the court. Under previous Criminal Justice Acts, a court could not impose a custodial sentence that was disproportionately long in comparison to the seriousness of the offense solely because it considered the defendant dangerous.[183] Additionally, the second criterion seems to ignore the principle of proportionality, the purported foundation of the 1991 Justice Act. While a court cannot impose a longer than average custodial sentence for retributive or rehabilitative purposes, it can sentence a "dangerous" offender to a longer than average sentence to protect the public. By giving the court broad discretion in applying this criterion and denying stronger safeguards for the offender, the 1991 Act allows judges to sentence offenders to longer custodial sentences for retributive or rehabilitative purposes under the guise of protecting the public.[184]

3. When an Offender Refuses to Serve a Non-Custodial Sentence

The third criterion under which a court may impose a custodial sentence is when an offender refuses to serve a non-

179. 1991 CJA § 1(2)(b). *See generally* Thomas, *supra* note 131, at 238. A violent offense is one which leads or is intended or likely to lead to a person's death or to physical injury. A "sexual offense" is defined according to other specific statutory provisions. 1991 CJA § 31.

180. 1991 CJA § 2(2)(b).

181. *Id.*

182. *See* Thomas, *supra* note 131, at 237. Thus, a court could use the provisions of the 1991 Act first, to justify a custodial sentence for a violent or sexual offense under the criterion that the offense was so serious that only a custodial sentence could be justified and second, to impose a longer sentence than would otherwise be available for the offense on the ground that such a sentence is necessary to protect the public from harm. *Id.*

183. *Id.*

184. *Id.* at 237-38.

custodial community sentence.[185] The 1991 Justice Act provides that a court may impose a custodial sentence for an offender's failure to comply with a previously ordered community sentence. Because each criterion is independently sufficient to justify the imposition of a custodial sentence, the 1991 Justice Act allows a court to sentence an offender to custodial imprisonment under this third criterion even if the nature of the offense itself is not serious enough to warrant a custodial sentence and the offender is not a danger to society.

Parliament designed these criteria to place important restrictions on the imposition of both adult and juvenile custodial sentences.[186] While the criteria technically restrict the use of custodial sentences to certain cases, the specific wording of the statute provides individual courts with great discretion. Because the 1991 Justice Act also governs the imposition of juvenile custodial sentences, a judge's broad discretion under the Act may result in even more custodial sentences for juvenile offenders.[187] Although the 1991 Justice Act contains provisions that require the juvenile courts to consider the young offender's welfare when issuing a sentence, the Act primarily emphasizes the justice model.[188] The strong influence of the justice model in the 1991 Justice Act may adversely affect the treatment of juveniles under the Children and Young Persons Act by allowing courts to sentence juveniles under criteria that do not consider their welfare the highest priority.[189]

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185. 1991 CJA § 1(3). A community sentence consists of one or more "community orders" such as a probation order, community service order, or curfew order. *Id.* § 6(4).

186. Thomas, *supra* note 131, at 232-33.

187. *See generally id.* at 235. In addition to establishing the three criteria under which courts may issue custodial sentences, the Criminal Justice Act of 1991 provides an additional safeguard for young offenders who are tried and sentenced as adults under Section 53 of the Children and Young Persons Act of 1933. The 1991 Act states that a court must thoroughly reason its decision before imposing a custodial sentence on a young offender. 1991 CJA § 1(2). *Cf.* Morris v. Crown Office, [1970] 1 Q.B. 114. However, it is thought that this provision is only hortatory, so the court's failure to comply with it will not invalidate the sentence. Nevertheless, Parliament designated this safeguard to ensure that a court only imposes a custodial sentence on a juvenile as a last resort.

188. *See supra* text accompanying notes 146-51.

189. Additionally, the 1991 Criminal Justice Act unites the sentencing procedures of both juveniles and adults under the same criteria. This organization does not separate the two systems of criminal justice, as advocated by the Children and Young Persons Acts.

E. *The British System as Applied in the* Bulger *Case*

The Crown Court convicted Robert Thompson and John Venables of the abduction and murder of James Bulger under Great Britain's current juvenile justice system. The system provided the boys with every benefit and safeguard under the laws, but the court found both boys guilty of the charges.

Because both boys were ten years old at the time of the murder, they had reached the age of criminal responsibility in Great Britain. They were charged with murder under Section 53 of the Children and Young Persons Act of 1933. Under Section 53(2), children aged ten and older may be tried as adults for the crimes of murder and manslaughter.[190] However, because both boys were under age fourteen,[191] the 1933 Act required the prosecution to satisfy the heightened burden of proof before the court could find either Venables or Thompson guilty of murder. The prosecution bore the onus of proving to the court that the boys murdered James Bulger with the requisite mischievous discretion.[192]

The prosecution had no difficulty proving mischievous discretion in this case. To prove that the boys knew the difference between right and wrong, the prosecution introduced a wide variety of evidence about their families and educational backgrounds, as well as the details of the murder.[193] The physical evidence demonstrated the extreme brutality of the murder, and the testimony of the witnesses tracked the two young defendants for two and one-half miles to the scene of the murder. Further evidence showed that both boys possessed normal intelligence and had attended a Church of England primary school, where they were taught the difference between right and wrong.[194]

Under the facts of this case, the jury could convict the boys of murder or manslaughter.[195] The judge instructed the jury that they should convict both boys of murder if the jury found that the

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190. 1933 CYPA § 53(2). *See* discussion *supra* note 98.

191. *See supra* text accompanying notes 69-72.

192. *See id.*

193. Edward Pilkington, *Liverpool Boys Jailed for "Cunning" Murder of Toddler*, GAZETTE (MONTREAL), November 25, 1993, at A1. The prosecution called more than thirty witnesses and handed more than a hundred exhibits to the jury. *Id.*

194. Eugene Robinson, *2 British Boys Guilty in Toddler's Murder*, WASH. POST, November 25, 1993, at A47. Both boys pled not guilty, blaming each other for the actual murder. *Id.*

195. *The Meaning of Murder*, DAILY MAIL (London), November 25, 1993, at 7.

boys decided to kill or inflict serious harm on Bulger.[196] The judge also instructed the jury that the actual infliction of the fatal injury was immaterial to the jury's determination of guilt.[197] Instead, the presence of mischievous discretion was the decisive factor in the choice between murder and manslaughter.[198]

In determining whether the boys were guilty of murder or manslaughter, the court instructed the jury to consider several factors. The brutality of the murder, including the number of blows to Bulger and the weapons the boys used, was to weigh heavily in the jury's reasoning.[199] The judge also reminded the jury that both boys had kicked Bulger before they killed him, that neither boy had a mental defect, and that both were of average intelligence.[200] The jury also considered possible mitigating factors such as the boys' troubled home lives, their economic deprivation, and disciplinary problems in school. After taking into account these mitigating factors, the jury found that the boys possessed the requisite mischievous discretion when killing James Bulger and held Venables and Thompson criminally responsible as adults for the murder.

Because Thompson and Venables were convicted and sentenced under Section 53 of the Children and Young Persons Act of 1933, both boys were automatically sentenced to detention at Her Majesty's Pleasure.[201] While this penalty can mean a life sentence, the Home Secretary periodically reviews the progress of all young offenders and their recent conduct to decide if they are fit to return to society.[202]

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196. *Id.* "Either of the 11-year-old defendants can be found guilty if it was clear they meant [Bulger] serious injury." *Id.*

197. *Id.*

198. *Id.* By not offering any defense witnesses, the defense hoped that the jury would opt for the lesser charge of manslaughter. Robinson, *supra* note 194, at A7.

199. *The Meaning of Murder*, *supra* note 195, at 7. "You will take into account the age of the victim . . . . and that the murder . . . involved a number of blows to the skull of a . . . nearly three-year-old little boy." *Id.*

200. *Id.* Judge Morland also instructed the jury not to let emotions play a part in the final decision. *Id.*

201. Pilkington, *supra* note 193, at A1. A defense source said that the Crown Prosecution Service had refused to negotiate anything less than a murder charge. *Id.* Judge Morland did state that the boys will be detained for "many, many years." *Id.* Typically, even adults found guilty of murder in Great Britain serve approximately ten years. The last time an eleven-year-old was convicted of murder was in 1968, when Mary Bell was imprisoned for the murder of two toddlers. Bell was released after serving a twelve-year custodial sentence. *Id.*

202. Thompson and Venables will be remanded to one of Great Britain's secure lock-up facilities. When the boys reach the age of fifteen, they could be transferred to an institution for young offenders. If they are still in custody at the age of twenty-one, they could then be sent to an adult prison.

F. *Criticism of the British Juvenile System*

Although Venables and Thompson had the benefit of every safeguard available under Great Britain's current juvenile system, some commentators contend that the current juvenile system[203] is not sufficient to protect the welfare of young offenders.[204] Specifically, commentators view Section 53 of the Children and Young Persons Act of 1933 as a serious threat to the liberty of many young offenders, and speculate that the juvenile courts are using Section 53 to circumvent the restrictions placed on their sentencing powers by the Criminal Justice Acts.[205] Courts allegedly use their wide discretion under Section 53 to incarcerate a wide variety of juvenile offenders for long periods of time.[206]

Because Parliament enacted Section 53 of the Children and Young Persons Act to apply only to juvenile offenders who committed grave crimes, the courts' recent use of this section to impose custodial sentences on a wide array of offenders has attracted criticism. Juveniles tried and convicted for grave crimes under Section 53 represent a minority of the young offenders punished under that provision of the law.[207] Moreover, only those juveniles convicted of murder must automatically be tried outside the juvenile justice system and sentenced under Section 53 to detention at Her Majesty's Pleasure.[208] Juveniles who commit other violent offenses are not necessarily tried or sentenced under Section 53.[209] The juvenile courts have the discretion to sentence juveniles who commit all other violent crimes, except murder, to a multitude of both custodial and non-custodial sentences.[210]

Section 53 has been criticized on several additional grounds. First, the sentencing scheme under Section 53 dictates that the crime of murder must be handled outside the juvenile system, thus ensuring that at least one part of the juvenile system is connected to the adult criminal system.[211] While the young

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203. *See generally* Turner, *supra* note 5.
204. *See generally* Godsland & Fielding, *supra* note 32.
205. *Id.* at 283.
206. 1933 CYPA § 53; Magistrates' Courts Act § 24(1).
207. Godsland & Fielding, *supra* note 32, at 289.
208. *Id.*
209. *Id. See supra* part II.C.3.
210. *Id.* Magistrates' Courts Act § 24(1).
211. *Id.* One commentator believes that the exception for murder is an unnecessary concession by those favoring the welfare model to proponents of the justice model, and is an overreaction to some juvenile crimes. The commentator argues that there are no juvenile crimes which are so heinous that the offenders

offender is assured legal representation, a jury, and other aspects of a "public display of justice," the question remains whether most juveniles, especially those of a young age, sufficiently understand the laws and procedures of the normative justice system to be tried there.[212]

Second, the courts' broad discretion under Section 53(a) to determine the sentence for violent crimes other than murder[213] has resulted in a wide range of sentences for the same crime. Some courts avoid Section 53 and use alternative means to sentence juveniles who commit crimes that clearly fall within that provision's criteria,[214] while other courts use Section 53 to sentence such juveniles to detention for long periods of time.[215] Sentences for violent offenses, such as manslaughter and robbery, range from non-custodial sentences such as fines and community orders to long periods of detention under Section 53.[216] Consequently, the courts' virtually unfettered discretion over sentencing adds an element of chance to the nature and duration of the sentence.[217]

The application of Section 53 to juveniles has also been criticized on procedural grounds. Juveniles charged with more serious crimes against the person spend at least two or three months in detention before trial.[218] This time is usually spent in a Prison Department Remand Center where juveniles are not separated from other offenders who are up to twenty-one years old.[219] In these centers, juveniles encounter many aspects of adult prison life.

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should not be subject to the jurisdiction of the juvenile court, whose first concern is their welfare. *See* Turner, *supra* note 5, at 736.

212. *Id.*

213. The same criticism applies to sentencing under the Criminal Justice Act of 1991. *See* TERRILL, *supra* note 2, at 27-30. *See also infra* Appendix I.

214. Godsland & Fielding, *supra* note 32, at 289. Only eighty-seven percent of manslaughter and attempted murder cases heard by the Crown Court were sentenced under Section 53(2) of the Children and Young Persons Act of 1933; thus, alternate means of sentencing were used in thirteen percent of these cases. *Id.*

215. *Id.*

216. *Id.* Life sentences are often imposed for manslaughter, rape, and wounding with intent to cause grievous bodily harm. *Id.*

217. *Id.* at 289-90.

218. *See* Godsland & Fielding, *supra* note 32, at 291. In one study, the authors discovered that bail and remand to the care of a local authority were rarely granted for such juveniles. Instead, juvenile offenders experienced an average delay of four and one-half months between arrest and sentence. The longest delay experienced was eight and one-half months, with some young offenders experiencing six months or more. *Id.*

219. *Id.*

Juveniles also report that the judicial process induces a great deal of stress.[220] The long period between arrest and trial, as well as the trial itself, are frightening to young offenders.[221] Although juveniles sentenced in the adult courts have access to the normal court procedures, the young offender and his family rarely understand the process, forcing them to rely entirely on legal advisors.[222] Publicity of the trial can also cause anxiety.[223] Under juvenile court practices, publicity is not allowed.[224] When a young offender is tried in the adult courts, however, the details of the trial often reach the national and international press, as in the *Bulger* case, inflaming local feelings against the juveniles and their families.[225]

Finally, juvenile offenders experience uncertainty and stress once sent to the detention center to serve their sentence. Because detention at Her Majesty's Pleasure under Section 53 is an indeterminate sentence, neither the offender nor the staff at the detention center knows the offender's eventual release date.[226] The Home Secretary periodically reviews each case to determine the extent to which the offender has been rehabilitated, but the young offender is not informed of his status and cannot plan for the future.[227]

The treatment of Thompson and Venables in the *Bulger* case illustrates some of these criticisms. Their trial received substantial national and international press coverage. The boys

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220. *Id.*

221. *Id.* Both Thompson and Venables remained motionless during most of their trial, although it seemed that each understood what was happening and the consequences they faced. Venables wept when the verdict of guilty was returned, and Thompson continued to show no emotion. *See generally* Robinson, *supra* note 194.

222. *See* Godsland & Fielding, *supra* note 32, at 291.

223. *Id.*

224. *Id.* The courts cannot release the name and address of the young offender or his family. After sentencing Thompson and Venables, Judge Moreland permitted the boys to be identified but prohibited from being published the photographs of either the boys or the detention centers in which they would reside. Turner, *supra* note 5, at 736.

225. *See* Godsland & Fielding, *supra* note 32, at 292. Many commentators claim that the anxiety resulting from such publicity could prevent or impede rehabilitation. *See* Turner, *supra* note 5, at 736. Although the boys' names were not released to the press until after their conviction, the trial had to be moved from Liverpool, the location of the murder, to Preston because of repeated mob violence directed at the boys. *See* Meares, *supra* note 39. At least one commentator suggested that moving the trial only thirty miles away from the scene of the murder did not allow Thompson and Venables a fair trial with an unbiased jury. *See* Turner, *supra* note 5, at 735.

226. Godsland & Fielding, *supra* note 32, at 294-95.

227. *Id.*

became the subject of mob violence, experienced an adult trial at the age of eleven, and are now incarcerated indefinitely with the possibility of being detained for life.

G. *Recent Legislation in Great Britain*

The latest battle between the justice and welfare schools of thought was won by the justice model with the recent passage of Great Britain's Criminal Justice and Public Order Bill (Bill) in November 1994.[228] The Bill was one of the most controversial measures considered by Parliament in recent years.[229] The Bill represents the British government's increasingly tough stance on "law and order" issues and favors the innocent and the victims of crime.[230]

The Criminal Justice and Public Order Bill is the product of British Home Secretary Michael Howard's twenty-seven point plan for tackling crime.[231] Howard presented this plan at the 1994 Tory Conference and intended it to result in the jailing of the more persistent offenders, removing such offenders from the community so they cannot commit more crimes.[232] The Bill itself restricts bail and abolishes an offender's right to silence.[233]

The Bill introduces several changes in the laws dealing with young offenders.[234] First, the Bill provides for the development of

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228. *See* Terrence Shaw, *Howard's Core Law Reforms Survive Intact, Criminal Justice Bill,* DAILY TELEGRAPH (London), October 29, 1994, at 11 [hereinafter *Howard's Core Law Reforms*]. The Criminal Justice and Public Order Bill received the Royal Assent on November 3, 1994. *See* Terrence Shaw, *Act Makes Ravers Face the Music,* DAILY TELEGRAPH (London), November 4, 1994, at 12.

229. Shaw, *Howard's Core Law Reforms, supra.* While both the justice model supporters—the Tory Party—and the welfare model supporters—the Labour Party—agree that something has to be done to combat crime, their approaches are completely different. The Labour Party believes the roots of crime are in deprivation and unemployment and, thus, wish to address the problem at that level. The Tory Party believes that crime is actually a part of human nature and, therefore, needs to be combated with deterrence and harsh punishments.

230. *See* Alex D. Smith, *Conservations: Cracking Down on Crime,* GUARDIAN (London), October 11, 1994, at E11.

231. *Id.* Crime figures have doubled in the last fifteen years and some Home Office estimates suggest that three times as many crimes are committed as are reported. *Id.*

232. *Id.*

233. *Id.*

234. Shaw, *Howard's Core Law Reforms, supra* note 228. The Bill also changes other aspects of the criminal law, such as limiting bail for many offenders and denying it completely for murder, manslaughter, and rape when the offender has been previously convicted of one of those crimes. The Bill further allows a court to draw inferences of guilt from a defendant's choice to remain

five new secure training units to house persistent young offenders.[235] These units will have room for 300 offenders, and space for another 170 offenders is already planned.[236] Second, the Bill enables a court to impose a longer sentence on persistent offenders aged twelve to fourteen. This sentence would last from six months to two years and would be served in one of the five new secure training facilities.[237] The Bill also empowers the courts to order juveniles aged twelve to fourteen to be kept in secure accommodations while awaiting trial or sentencing.[238] Third, the Bill enlarges the category of serious offenses for which children may receive extended periods of detention and doubles the maximum period of detention for young offenders, aged fifteen to seventeen, from twelve months to twenty-four months.[239]

These changes in the laws applicable to young offenders have already received much criticism. First, commentators criticize the plan to build more secure training units. Under the old laws, juveniles aged twelve to fourteen were sent to local council units where they were kept near their families.[240] The new secure training units could hold youths hundreds of miles from their homes.[241] Second, the new secure training units seek not only to contain the overflow of dangerous young offenders, but also to imprison less serious offenders.[242] For example, under the old laws a twelve-year-old who has shoplifted three times and has disobeyed the terms of a community service order would usually be sentenced to a harsher community sentence.[243] Instead, the Bill encourages the courts to imprison such an offender.[244] This

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silent when questioned by the police. *Id.* However, given the focus of this Note, only the aspects of the Bill that affect young offenders are discussed.

235. *Young Offenders*, *supra* note 31, at 65.

236. Shaw, *Howard's Core Law Reforms*, *supra* note 228. Private companies will run these new secure training units. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* Mr. Howard also has announced that community sentences against young offenders will be more stringent, including the removal of graffiti and the collection of litter. *See* Darbyshire, *supra* note 51. This announcement followed a storm of protests that erupted over some young offenders who were sent on expensive foreign holidays aimed at rehabilitating them through "character-building experiences." Because the public felt that such trips simply rewarded the offender, Mr. Howard banned the trips. Smith, *supra* note 230.

240. See *Young Offenders*, *supra* note 31.

241. *Id.* Most studies show that family contact helps to reduce recidivism rates. *Id.*

242. *Id.*

243. *Id.* Such a sentence could include working for the victims of his crimes or undergoing intensive counseling. *Id.*

244. *Id.*

practice contradicts the previously stated goal of the juvenile justice system to impose custodial sentences only as a last resort. However, these new measures to deal with persistent young offenders will take a while to implement, and their future effect on juvenile crime and rates of juvenile recidivism is yet unknown.

III. EUROPEAN LAWS AND INTERNATIONAL STANDARDS

The debate in Great Britain that accompanied the murder of James Bulger and the subsequent trial and convictions of two ten-year-old boys revolved around different paradigms of juvenile justice and ideas of "individual responsibility," "economic deprivation," and "cracking down on juvenile offenders."[245] The murder of the toddler also stirred similar debates across Europe and throughout the world. While the laws of Great Britain and those of many other states reflect the long-standing debate over the goals of juvenile justice, the United Nations has suggested an international solution to the rising rates of juvenile crime. Specifically, the United Nations has recommended minimum standards for the administration of juvenile justice.[246] In addition, the future development of Great Britain's juvenile offender laws may be influenced by its membership in the European Union, which has entertained the idea of legislating in the field of juvenile justice.[247] In particular, as the organs of the European Union mature, they may make setting minimum standards for juvenile justice a priority.[248] Generally, the rise in the juvenile crime rate has individual states questioning whether their methods of dealing with juvenile crime are the most effective.

In re-evaluating their juvenile justice systems, most states face the issue of how to treat the very young offender. Every nation has a different idea about the proper age of criminal responsibility and whether the very young should be punished

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245. *Id.* David Selbourne, *Civic Duty First or We Drown*, INDEPENDENT (London), November 25, 1993, at 21.

246. *See generally* MARGERY FRY ET AL., LAWLESS YOUTH: A CHALLENGE TO THE NEW EUROPE (1947); LOPEZ-REY, *supra* note 3. *See generally* SEVENTH CONGRESS, *supra* note 6; *Report of the Secretary General*, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Juvenile Justice and the Protection of the Young, U.N. Doc. A/Conf.144/4 (1990) (implementation of the Beijing Rules and adoption of the Riyadh Rules) [hereinafter *Report from Eighth Congress*].

247. *See generally Recommendation on Consistency in Sentencing*, EUR. PARL. ASS. DEB., 1992-93 Sess., Doc. No. 4(92) 17.

248. *Id.*

within the juvenile court system or rehabilitated in the community. Thus, the development of international standards for juvenile justice systems is hampered by the inability of individual states to agree on whether a justice or welfare model should dominate. If juvenile crime among the very young does not decline, perhaps individual states, if not the international community as a whole, will adopt Great Britain's current juvenile justice system—including its low age of criminal responsibility—as a workable model of juvenile justice.

A. *The United Nations and Juvenile Justice*

1. The United Nations Minimum Standards

Although the United Nations cannot require individual states to implement its policies, UN policies serve as important guidelines.[249] While the United Nations has developed criminal policies over the years, it traditionally has not been successful in encouraging individual states to implement such policies. The area of criminal law seemed firmly embedded within the scope of national jurisdiction, and most states refused to give up national autonomy in this policy area.

Beginning in 1946, however, the United Nations began to develop an international criminal policy that had some slight impact on the criminal policies of certain states.[250] The current United Nations policy on criminal justice evolved against the backdrop of three main principles: (1) violent crime constitutes one of the most severe problems of the late twentieth century; (2) the penal systems in many states are frequently unable to deal with such crime; and (3) criminal justice is not equated with social justice in many countries.[251] Nevertheless, the United Nations policy on criminal justice has been implemented by individual states only to a limited extent.[252]

Although the United Nations commenced studies on juvenile delinquency in 1940, these first studies had limited value.[253] Records of the first meetings of the United Nations reveal the same debate over the justice and welfare models that occurs in individual states today. The supporters of the welfare model

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249. *See generally* LOPEZ-REY, *supra* note 3.
250. *Id.* at ix.
251. *Id.*
252. *Id.*
253. *Id.* at 101. The studies only analyzed the legislation pending in a few countries. *See id.*

proposed that the United Nations adopt a broad view of juvenile delinquency, which would encompass the social and economic problems of children.[254] In contrast, advocates of the justice model proposed that the United Nations adopt a narrower and more practical solution to juvenile crime aimed solely at prevention.[255]

The Second Congress of the United Nations actually made the first step, albeit minimal, toward the development of an international juvenile justice policy by providing insight into the meaning of the term "juvenile delinquency."[256] The debate over the meaning of juvenile delinquency hinged on its international "characterization." The justice model supporters advocated a narrow definition of juvenile delinquency, encompassing only criminal violations by juveniles.[257] The welfare model supporters, however, advanced the idea that the term should include a broad range of juvenile problems, such as troubled and homeless youth.[258] The justice model supporters won this first battle when the Second Congress decided that the term "juvenile delinquency" should not include social welfare measures.[259] Although the United Nations did not formally adopt a definition of juvenile delinquency, it restricted the meaning of the term to juvenile violations of criminal law.[260]

The United Nations did not address the issues of juvenile delinquency and juvenile justice systems again until the Sixth United Nations Congress on the Prevention of Crime and Treatment of Offenders in 1980 (Sixth Congress).[261] The discussions at the Sixth Congress focused on the welfare model and called for minimum standards to implement such a model of juvenile justice internationally.[262] The deliberations over juvenile justice revolved around the need for greater family and community control of juveniles and the avoidance of judicial intervention.[263] While the Sixth Congress did not invalidate the characterization of the term "juvenile delinquency" adopted at the Second Congress, which was based on the justice model, the

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254. LOPEZ-REY, *supra* note 3, at 102-04.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.* at 103.
260. *Id.*
261. *Id.* at 104-05.
262. *Id.*
263. *Id.*

focus of the Sixth Congress definitely shifted toward the welfare model.[264]

The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Seventh Congress) resulted in the most important development in the United Nations juvenile justice policy. At the Seventh Congress, the United Nations recommended the adoption of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules or Rules).[265] The Beijing Rules set forth minimum standards for the administration of a juvenile justice system and the care of juveniles within that system.[266] The United Nations designed the Beijing Rules to serve as a model for its member states in their development of a comprehensive framework of social justice for all juveniles.[267] The General Assembly adopted the Beijing Rules and called for its member states to enact any appropriate legislation to reflect the minimum standards within their individual juvenile justice systems.[268]

The Beijing Rules adhere to the welfare model of juvenile justice. The commentary to the Rules states that they were designed to promote juvenile welfare to the greatest possible extent and to minimize the need for intervention by the juvenile justice system.[269] The General Assembly adopted the Beijing Rules with the aim of having established criminal systems throughout the world apply the minimum standards.[270] In particular, the Rules broadened the range of ages covered by the definitions of "juvenile" and the "age of criminal responsibility" because existing legal systems already contained widely varied age limits in those areas.[271] The Rules stated that variations in their application were inevitable because any juvenile justice system necessarily depended on the economic, social, political, cultural, and legal systems currently in place in each state.[272]

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264. *Id.*

265. *Id. See also* SEVENTH CONGRESS, *supra* note 6, at 18-19.

266. LOPEZ-REY, *supra* note 3, at 104-05.

267. *Id.*

268. *Id.*

269. *Id.* at 21 (Beijing Rules, Commentary to Rule 1).

270. *Id.* In fact, the United Nations deliberately formulated the Rules to apply within many different legal systems. *Id.* at 22 (Beijing Rule 2.3 and Commentary).

271. *Id.*

272. *Id.* States define the maximum age of a juvenile anywhere between seven and eighteen years of age. However, the Beijing Rules state that such variety should not diminish their impact in any way. SEVENTH CONGRESS, *supra* note 6, at 22.

Consistent with the welfare model, the Beijing Rules set forth a model system of juvenile justice designed to meet the special needs of young offenders and to protect their rights while meeting the needs of society.[273] Specifically, the Beijing Rules provide guidelines for determining the age of criminal responsibility.[274] Rule 4 of the Beijing Rules states: "[i]n those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity."[275] The comments to this Rule encourage all states to agree on the lowest age limit that could apply internationally, taking into account each state's own cultural and legal systems.[276]

While the Beijing Rules dictate that the welfare of the juvenile should be the most important concern of a juvenile justice system, the sentencing guidelines of the Beijing Rules emphasize the justice model. Rule 5 proposes that a juvenile justice system ensure that any criminal sanctions imposed on the young offender be proportional to the particular circumstances of the crime and the offender.[277] The comments to Rule 5 specifically state that any sentencing scheme for juveniles should follow the principle of proportionality.[278] This principle is based on the justice model's idea of "just deserts." While a court may not sanction an offender for purely punitive purposes, the gravity of the offense is still a factor in determining proper punishment.[279] Therefore, the Beijing Rules dictate that a court must base juvenile sentences on the gravity of the offense as well as the personal circumstances of the offender.[280]

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273. *Id.* at 19. The Beijing Rules were developed with an awareness of the young offender's special needs "owing to their early stage of human development." *Id.* pmbl.

274. *Id.* at 23.

275. *Id.*

276. *Id.* "The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially anti-social behavior." *Id.* at 23 (Commentary to Beijing Rule 4.1).

277. *Id.* at 24 (Beijing Rule 5.1).

278. *Id.* (Commentary to Beijing Rule 5.1).

279. *See* Thomas, *supra* note 131, at 232.

280. The Commentary to Rule 5 lists factors to be considered in juvenile sentencing such as social status, family situation, the harm caused by the offense, and any other factors affecting personal circumstances. LOPEZ-REY, *supra* note 3, at 24.

Finally, the Beijing Rules call for broad discretion within an individual state's juvenile justice system. Rule 6.1 states that a nation should establish a system of juvenile justice administration that allows for the exercise of discretion at all significant levels of proceedings.[281] However, Rule 6.2 also states that the juvenile justice system should make those persons with discretion accountable for their decisions in particular cases.[282] The Rules establish the principle that broad discretion must always be accompanied by checks and balances to safeguard the juvenile's welfare.

In 1990, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders made two additions to the development of an international juvenile policy. First, the General Assembly recommended and adopted the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines).[283] Second, the Congress studied the implementation of the Beijing Rules by individual states.[284] Most of the European states, including Great Britain, France, Germany, Greece, the Netherlands, and Russia, reported that their national systems already reflected some or all of the Beijing Rules.[285] While such participation illustrates that many states are interested in developing an international juvenile justice system, the fact that most nations reported that their current systems reflected the goals of the Beijing system demonstrates that national policy concerns are still their first priority.

2. Great Britain's Compliance with the United Nations Standards

Great Britain's current juvenile justice system, as expressed in the various provisions of the Children and Young Persons Acts and the Criminal Justice Acts, reflects the minimum standards of the Beijing Rules. The recent enactment of the Criminal Justice Act of 1991 exemplifies Great Britain's compliance with the Beijing Rules. First, Great Britain's juvenile justice system is separate from the adult criminal system, with the exception of sentencing under Section 53 of the Children and Young Persons Act of 1933.[286] Second, the British system employs the principle

281. *Id.* at 24-25 (Beijing Rule 6.1).
282. *Id.* at 25 (Beijing Rule 6.2).
283. *Report from Eighth Congress, supra* note 246, at 37-41.
284. *Id.* at 5.
285. *Id.*
286. *See* discussion *supra* part II.C.3.

of proportionality in its sentencing scheme.[287] Finally, the British system allows courts to exercise broad discretion, yet provides safeguards to limit that power.[288] The fact that the Beijing Rules and the British system draw specific provisions from both the welfare and justice models perhaps illustrates that no system could be based exclusively on either the welfare model or the justice model.

B. *The European Community and Juvenile Justice*

Great Britain's membership in the European Community may affect the British juvenile criminal justice system. The ultimate goal of the European Community is to move toward an "ever closer union" consisting of independently functioning member states.[289] The power to adopt legislation remains largely with the member states, although the European Parliament may share this power concurrently.[290] Eventually, European Community law could strongly influence areas of national law.[291]

European Community law presently affects the national law of its member states in one of two ways. In certain areas of policy, the member states relinquished power to the Community and, therefore, those matters are no longer managed at the national level.[292] In other areas of policy, the Community and the individual member states share legislative powers.[293] Presently, individual states retain jurisdiction over criminal law and criminal procedure. The Community, however, could decide to influence the area of criminal law in the future.[294]

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287. *See* discussion *supra* text accompanying notes 135-36.

288. *See supra* text accompanying notes 150-54.

289. *See generally* JOSEPHINE STEINER, TEXTBOOK ON EEC LAW 4, 5 (3d ed. 1988). An express "federal" goal was dropped from the final draft of the Treaty of European Union in favor of a pledge to an "ever closer union." *Id.* at 5.

290. *Id.*

291. See T.C. Hartley, *The Impact of European Community Law in the Criminal Process*, 1981 CRIM. L. REV. 75.

292. *Id.*

293. *Id.*

294. *Id.* at 76. The Community law is most influential on national law when it has a "direct effect." In order to be directly effective, a Community law must be clear and unambiguous, unconditional, and must not envisage further action on the part of any authority before it comes into operation. If a provision of Community law is directly effective, it applies in each member state as part of the law of the land "*without any action on the part of the national legislature.*" (emphasis in original). *Id.* The European Communities Act of 1972 provides "for the operation of direct effect and [recognizes] the supremacy of Community law." *Id.* at 76 n.2. For a general discussion regarding the application of the criteria for "direct effects" in the case law of the European Court of Justice, see *id.*

The European Community has not passed any legislation affecting juvenile criminal justice systems. Moreover, there is no indication that the Community plans to enact any such legislation in the near future.[295] In light of the European Community's goal of substantial unification, however, the Community may try to develop a unified criminal justice policy.

Currently, several obstacles stand in the way of a unified criminal policy within the European Community. Most significantly, European states do not agree on whether the welfare model or the justice model should prevail in a juvenile justice system. Furthermore, each state differs in its determination of the age of criminal responsibility. In general, Great Britain has the lowest age of criminal responsibility within the European Community and among industrialized nations in general.[296] With most states experiencing rising crime rates, especially among the very young, perhaps it is time for other states to follow Great Britain's example and lower their age of criminal responsibility, at least for the most violent of crimes. A brief comparison of Great Britain's juvenile system with that of France, however, demonstrates that a lower, unified age of criminal responsibility is not likely in the near future.

C. *The Juvenile Justice System in France: The Welfare Model*

A recent event in France, unfortunately reminiscent of the Bulger incident, thrust that nation into the debate over the treatment of juvenile offenders. Specifically, many commentators and policymakers in France are questioning the proper age of criminal responsibility, especially for violent crimes. Unsurprisingly, the opinions in France are as divided as the opinions in Great Britain.[297]

The event that precipitated the debate over juvenile justice in France involved facts as shocking as those of the Bulger incident.

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295. The Council of Europe, however, has made recommendations regarding sentencing, particularly with regard to the use of previous convictions and aggravating and mitigating factors in the determination of sentences. *See Council of Europe Recommendation on Consistency in Sentencing*, EUR. PARL. ASS. DEB., 1992-93 Sess., Doc. No. R.(92)17.

296. *See* TERRILL, *supra* note 2, at 148-357. In France, the age of criminal responsibility is 13; in Sweden, it is 15; in Japan, it is 14; in the Soviet Union, it is 16 for most offenses. *Id.* However, Scotland's age of criminal responsibility is only 8. *Horrifying Precedents*, *supra* note 33, at 9.

297. *See* Charles Bremner, *Evil Children Chill French With Echo of Bulger Case*, TIMES (London), November 29, 1993 (Overseas News).

On November 28, 1993, Boy T,[298] a ten-year-old, confessed to the beating and murder of Pierre Boura, a thirty-seven-year-old vagrant from Vitry-sur-Seine.[299] Another vagrant, Jean-Marc, was charged with inciting Boy T and two other boys, who were between the ages of eight and ten, to murder.[300] According to different accounts, the boys punched, kicked, and hit Boura with wooden sticks. The boys then attempted to hide Boura's body in a shallow well.[301]

The examining judge decided not to bring murder charges against the boys and instead prosecuted them for a lesser offense. The children were charged with the offense of "deliberate wounding leading to unintended death," a charge equivalent to manslaughter.[302] The judge prosecuted the children on a lesser offense because he believed that the children were too young to understand the consequences of their actions.[303] The event sparked debate in France over a child's culpability for his or her actions.[304]

The juvenile justice systems developed by Great Britain and France are on opposite ends of the spectrum. Great Britain leans more toward the justice model, although the welfare model dominates some aspects of its system. In contrast, France's system embraces the principles of the welfare model more fully. An analysis of the two systems provides a study of one possible outcome of the debate between the welfare and justice models in the European Community and the international community as a whole.

The French juvenile justice system developed from the welfare model. From the end of World War II through 1982, France's criminal justice system, including the juvenile system, favored a high degree of freedom and individualization on the part of judges in sentencing.[305] French courts had the discretion to impose whatever correctional measures they deemed appropriate in relation to the crime committed, up to a stipulated maximum.[306] This individualization of penalties supported the

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298. *Id.* Boy T was interviewed by *Le Journal Du Dimanche.* He confessed to beating the vagrant to death. *Id.*

299. *Id.*

300. *Id.* According to media accounts, the boys had befriended these vagrants weeks before the incident and visited them often. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. See George W. Pugh & Jean H. Pugh, *Measures for Malaise, Recent French "Law and Order" Legislation*, 42 LA. L. REV. 1301, 1315 (1982).

306. *Id.*

notion that the purpose of imprisonment was to rehabilitate the offender for future reintegration into society, instead of retribution.[307]

However, rising violent crime rates forced French policymakers to develop a new criminal justice system with a greater emphasis on the justice model than its previous system. Because French policymakers viewed the original criminal system as ineffective with regard to violent adult criminals, the policymakers[308] enacted the Law of Security and Liberty in 1981.[309] The new law sought "to restore to the criminal law its credibility by assuring certainty of punishment of the perpetrators of violent crimes."[310] Thus, the new French system incorporated the theme of the justice model in the enactment of the Law of Security and Liberty.

Although the Law of Security and Liberty incorporated the justice model, its application was limited to adult offenders. The juvenile offenders were still prosecuted under a system based on the welfare model.[311] The French juvenile system, like the British system, establishes a hierarchy of criminal responsibility for juveniles based on their age and the offense committed. Even with rising crime rates among juveniles in France, the state has not changed its age of criminal responsibility since Article 67 of the French Penal Code was adopted in 1955.[312] In France, the age of criminal responsibility is thirteen. Therefore, children under thirteen do not participate in any type of criminal proceeding. They are handled separately and informally within the social welfare system.[313]

The first category of criminally responsible juveniles includes those offenders aged thirteen to fifteen.[314] Juveniles between the ages of thirteen and fifteen can receive penal sanctions. In order

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307. *Id.*

308. *Id.* at 1302. From 1972 to 1979, France had an eighty-five percent increase in violent crime. *Id.* at 1303 n.13.

309. *Id.* (citing Law of February 2, 1981, *published in* [1981] D.S.L. 37).

310. *Id.* at 1315. Under previous laws, "sentencing judges" had the authority to reduce sentences and to grant leaves and pardons. Some offenders were released under this power even though they had committed brutal crimes. This abuse led to great public mistrust of the practice and a call for a decrease in the judges' power to grant such releases. The 1981 Law of Security and Liberty granted that request. *Id.* at 1316-17.

311. *Id.*

312. Code pénal [C. PÉN.] art. 69 (Fr.). According to Article 67, the age of criminal responsibility is determined by taking into consideration the age of the offender and the type of offense committed. The legislature also considers the circumstances of the offense important. *Id.*

313. Pugh & Pugh, *supra* note 305, at 1316-17.

314. *See generally* TERRILL, *supra* note 2, at 148-52.

to prosecute these offenders, a court must first determine that the offense was serious.[315] Additionally, Article 67 of the Penal Code requires a juvenile aged thirteen to fifteen to receive a shorter sentence than an adult would receive for the same crime. Article 67 generally requires that the duration of the juvenile's incarceration equal one-half of the typical adult sentence.[316] However, given the emphasis on the welfare model in the French system, the judge will try to impose a short, non-institutional sentence if the circumstances of the case support such a sentence.[317]

The last category of criminally responsible juveniles includes young offenders aged sixteen to eighteen.[318] If an offender is included in this category, the court may impose penal sanctions if the judge deems it appropriate. The judge has great discretion in this area and makes the determination of whether to award a penal sanction according to the circumstances of the case. However, the type of offense committed is usually the determining factor, and a court likely will impose penal sanctions only for the most serious offenses.[319]

The French judicial system refused to hold Boy T and his cohorts criminally responsible for their brutal murder of Boura. The children were not held criminally responsible because they had not reached the age of thirteen at the time of the murder. A juvenile court will send the boys to a state institution for "therapeutic education."[320] Such institutions provide both long-term and short-term care and, depending on the individual institution, the regimen may be either strict or more permissive.[321] However, Boy T will not be "locked up" in this institution because, with the exception of the adult prisons that have a juvenile wing, there are no closed facilities for the juvenile delinquent in France.[322] The emphasis is placed on keeping the

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315. *Id.* at 148. The French Penal Code does not define what constitutes a serious crime. However, Article 67 of the French Penal Code, which provides for a reduction in penal sanctions when assessed against juvenile offenders, lists various types of sanctions that must be reduced in the case of a young offender. Such sanctions include death, imprisonment, hard labor for time, loss of civil rights, and banishment. Code pénal [C. PÉN.] art. 67 (Fr.). Presumably, crimes that result in such sanctions are serious.

316. Code pénal [C. PÉN.] art. 67 (Fr.).

317. TERRILL, *supra* note 2, at 148.

318. *Id.* In France, a young offender reaches full adult criminal responsibility at age eighteen. *Id.*

319. *Id.*

320. *Id.*

321. TERRILL, *supra* note 2, at 150.

322. *Id.*

juvenile in close contact with the community.[323] The institutions that provide therapeutic education follow the basic assumption that juvenile offenders, especially the very young, are in need of care and supervision through the community as a whole. This belief is consistent with the welfare goals that pervade the French juvenile justice system.[324]

A comparison of the British and French juvenile systems and their respective treatment of very young offenders who commit violent crimes illustrates that the two systems have a very different focus. While Venables and Thompson, both age eleven, were given the equivalent of a life sentence for their roles in the murder of Bulger, Boy T will be sentenced to therapeutic education and will not be held criminally responsible for the murder of Boura. It is troubling that such similar cases could lead to such dramatically different results, but the different results are based partly on one obvious factor—the two states' respective ages of criminal responsibility.

The consensus among French experts who commented on the *Bulger* case immediately after the Crown Court handed down the conviction and sentence was that the French system was more humane.[325] The French experts suggested that the punishment of Thompson and Venables responded mainly to that society's need for vengeance.[326] However, after the Boura murder, at least one French commentator stated that the French system may be in need of a change. A leading child psychiatrist commenting on the Boy T case maintained that while the British system may be viewed as inhumane, the French system tended to be too sympathetic to the young offender.[327] The French system is viewed as too lenient because it downplays the youth's involvement in such a brutal crime and makes such actions seem almost ordinary—an especially dangerous attitude for a young child to have. The commentator contended that if society fails to punish those who commit wrongs, the child will not understand the difference between right and wrong.[328] The commentator concluded that a juvenile justice system, above all, should instill and reinforce in the minds of children an understanding of right and wrong. At present, the French system may fail to achieve that goal.[329]

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323. *Id.*
324. *Id.*
325. *See* Bremner, *supra* note 297.
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*

IV. CONCLUSION

Given the increase in violent crime among the young in today's world, the time has come to hold our youth accountable for brutal and especially violent crimes against people. A criminal system should focus primarily on the victims of crimes, and the criminals should not be released into society until they are completely rehabilitated. Society has a right to be protected from violent criminals, regardless of their age. In order to ensure society's safety, the age of criminal responsibility should be low enough that criminals like Robert Thompson, John Venables, and Boy T are punished for their crimes and removed from society until their rehabilitation is complete.

Although a juvenile system should provide for the punishment and rehabilitation of brutal young offenders, such a system should have adequate safeguards so that young offenders committing minor offenses are not incarcerated. Great Britain has a system that distinguishes young offenders according to their age and the type of crime committed. This system ensures that young offenders are severely punished only when they commit brutal crimes and the prosecution satisfies a heightened burden of proof. Great Britain's age of criminal responsibility is low enough to catch brutal murderers as young as age ten. While the case of a child murderer might be extremely rare, Great Britain has the mechanism in place if such a horror becomes a reality, as it did in Liverpool.

The age of criminality in Great Britain meets the minimum standards set forth in the Beijing Rules. Holding children criminally responsible at the age of ten realistically acknowledges the true moral and psychological age of a ten-year-old in today's sophisticated world. Most ten-year-olds know that beating a two-year-old toddler to death is gravely wrong. If a child has the emotional, mental, and intellectual capacity to reach the conclusion that murder is wrong, then the child is old enough to be held criminally responsible for such an action.

Arguably, it is society's duty to remove brutal juvenile criminals from society and to punish children that violate the law. Even critics of the British system agree that some children do need to be punished and, therefore, the goal of a juvenile justice system should be to separate those children who commit minor crimes from those that commit violent crimes, punishing only the latter. Commentators argue that such punishment will teach children that they need to take responsibility for their actions. A comment on the result of the *Bulger* case expresses the concept most adequately: "If these lads had not been punished, society would have let them down. If we don't get what we deserve, we

have been let down—and punishment is what these two deserved."[330]

However, young offenders should be incarcerated for two reasons in addition to punishment. First, incarceration will facilitate rehabilitation. Arguably, an offender cannot be completely rehabilitated within the same society that apparently trained and encouraged a child killer. Non-institutional rehabilitation is risky in the case of a child criminal who, if not incarcerated, undoubtedly will come into further contact with the bad influences in his or her life, perhaps before he or she can resist them. A child who commits a brutal crime obviously has difficulty functioning within the legal guidelines of society and, thus, should not be released back into society until he or she is able to act in accordance with its laws.

Second, a child criminal who commits a brutal crime should be incarcerated to protect society. A juvenile justice system not only owes a duty to the young offender, but also has a duty to his or her victims. Incarcerating young offenders ensures that they will be unable to cause more harm during their rehabilitation. In the case of a child criminal, who many commentators argue cannot understand the difference between right and wrong, such incarceration is especially important. If a ten-year-old child is so confused with regard to the meaning of right and wrong that the child encounters no moral dilemma when beating a two-year-old toddler to death, then the child should be removed from society, for society's protection, until the distinction between right and wrong is understood.

While it is true that a juvenile system does not have to hold a child criminally responsible in order to "punish," "rehabilitate," or "protect society" from a child criminal, it is perhaps the surest way to accomplish all three. Otherwise, society may be left with the brutal child criminal who fails to receive the rehabilitation he or she so desperately needs because society does not want to seem as if it is punishing a child. Most child criminals do not need to be incarcerated to accomplish the previously mentioned goals; however, the world community should consider whether Great Britain's juvenile justice system might be the solution to the very young, but brutal, criminal.

Stephanie J. Millet

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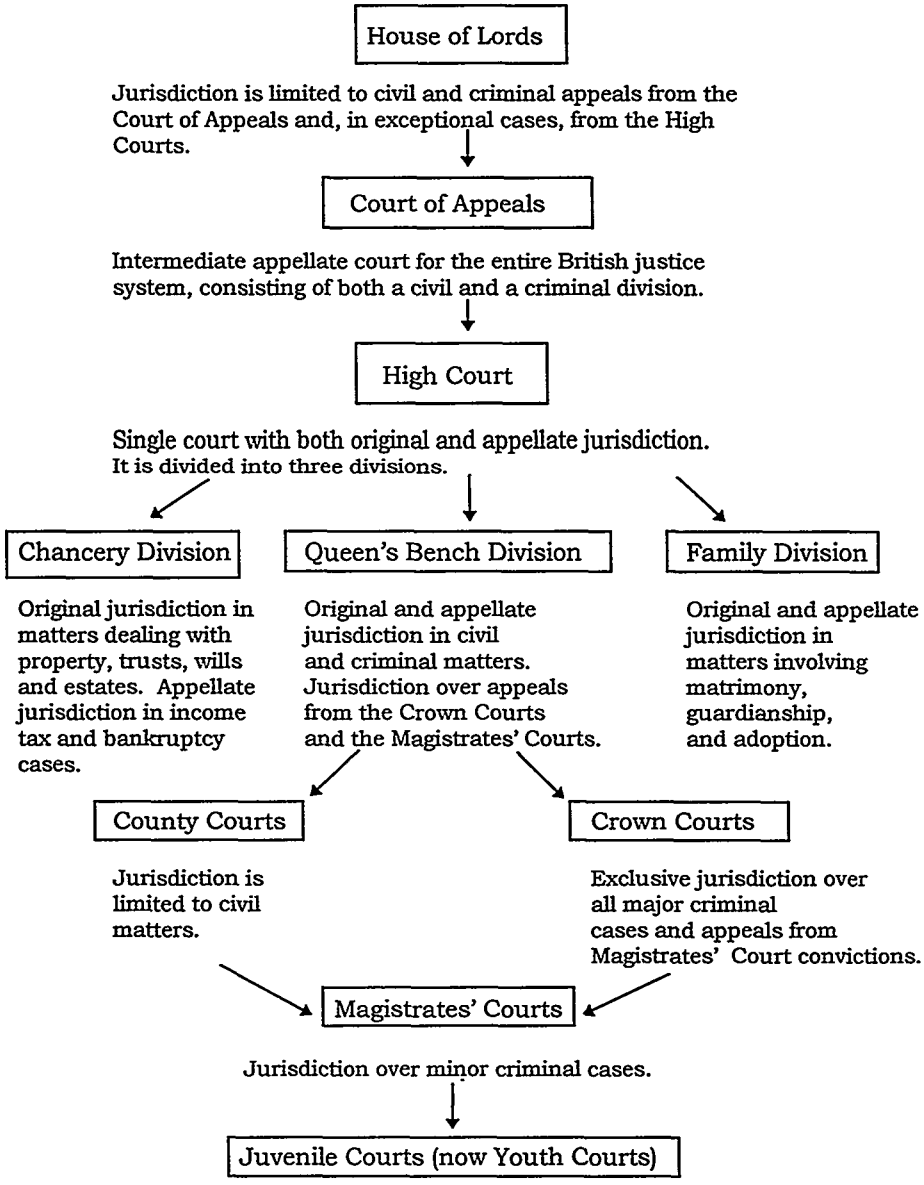
330. *See* Passmore, *supra* note 50, at 3.

Appendix I - Structure of the British Court System*



*Adapted from RICHARD J. TERRILL, WORLD CRIMINAL JUSTICE SYSTEMS: A SURVEY 27-30, 79-80 (2d ed. 1992).