McAuley, Mary. "Criminal Justice and the Welfare of Children." *Children in Custody: Anglo-Russian Perspectives*. London: Bloomsbury Academic, 2010. 27–49. *Bloomsbury Collections*. Web. 26 Apr. 2023. <<http://dx.doi.org/10.5040/9781849661027.ch-001>>.

Downloaded from Bloomsbury Collections, www.bloomsburycollections.com, 26 April 2023, 05:48 UTC.

Copyright © Mary McAuley 2010. You may share this work for non-commercial purposes only, provided you give attribution to the copyright holder and the publisher, and provide a link to the Creative Commons licence.

CHAPTER 1

Criminal Justice and the Welfare of Children

Crime does not exist. Only acts exist, acts often given different meanings within various social frameworks.

Christie 2004: 3

All the societies we are dealing with here have come to use a criminal justice system, but not all of them use it for children and, when they do, they use it in very different ways. In this chapter we set out, briefly, the issues raised by employing a criminal justice system and show how they led, at the beginning of the twentieth century, to attempts to use other means or to alter the principles and practices of criminal justice when the offender is a child.

In all societies there are types of behaviour that incur disapproval, or anxiety, among certain groups, and societies devise ways of coping with this – religious mechanisms, local community actions, family norms. The focus of disapproval shifts, and the type of sanctions changes, but agreement and disagreement within and between groups in society over what is acceptable behaviour is always present. The same behaviour may be seen as ‘normal’ by some or at one point in time, ‘anti-social’ or ‘criminal’ at another. Alongside the state’s criminal justice system, Russian peasant communities operated their own systems of ‘summary justice’, with their conventions, rituals and punishments (sometimes fatal) meted out to those who offended norms of appropriate behaviour. School playgrounds everywhere usually have their own very clear rules on acceptable behaviour and procedures for meting out punishment to those who infringe them. In an environment, such as a prison, the prisoners’ community will establish their own rules and methods of enforcing them to ensure ‘order’ and justice (Олейник 2001). ‘Criminal’ means that society’s rulers have decided which acts are unacceptable, and have created procedures – a criminal justice system – for dealing with them.

All ruling authorities, whether self-appointed or elected, must show that they can exert authority – both to defend their right to make the rules and to defend the realm for which they claim responsibility. A centralized authority, striving to extend its reach over the territory as a whole, claims priority for its rules, and needs to be able to enforce them. Order is critical. Rulers may use

physical means, including violence by the army or police, to put down disorder or riots. They may use the security services or enlist the support of church, educational establishments and employers to instil good behaviour. All ruling authorities are anxious to retain the right to use extra-judicial methods against their enemies (who may include their own citizens, as happened under Fascism and Stalinism), and we have seen the issue resurfacing with the use of detention and torture in 'the war against terror'. Yet concurrently many favour transferring part of the task of maintaining order to a justice system, closely associated with, but separate from, the political rulers themselves.

'Law' as a mechanism enables the sovereign to divest itself of everyday involvement in the settlement of disputes, between citizens or groups, and between citizens and the state, yet to retain authority (Glenn 2000; Holmes 2003). And this means creating procedures and finding people to implement them. A criminal justice system, it seems, is an admirable mechanism for transferring the direct management of dangerous and unruly behaviour to an agency, whose decisions will reflect the values of its more privileged or powerful citizens, while the rulers retain responsibility to provide institutions for the enforcement of the decisions. At the same time, rulers recognize that for the criminal justice system to work effectively judges must be seen to apply the law impartially; rulers and their servants should obey the law too, and for infringements they too will be charged and tried by impartial judges.

As we see, from Figure 4, almost all use a criminal justice system to deal with some of their children's actions. But which actions? Decisions on this and on the role allotted to the criminal justice system, compared with that of the government or social organizations, the church or the family, vary enormously from one country to the next.

The question immediately arises: What is the thinking behind such different approaches to dealing with errant children? And this leads on to: What are the consequences (good and bad) for using a criminal justice system to deal with unacceptable behaviour by children?

What is a crime?

Young people in Russia (both school children and those on police record or in a colony) were asked what they thought a crime was.¹ Some gave 'correct' answers:

breaking the law and the criminal code
illegal actions

Figure 4: Age of criminal responsibility, various countries

Notes: Poland: age 15 for serious crimes, 17 for more minor crimes; Russia: age 14 for serious crimes, 16 for more minor; USA: age varies by state.

and one (rightly) drew attention to the link between law and order:

Crime – it's infringing order and law

The straightforward answer is: those actions that 'the law' identifies as 'crimes'. The law changes, and 'crimes' appear or disappear. Exchanging currency and buying and selling foreign goods ceased to be crimes in Russia in the 1990s. Behaviour of young people that is found the world over – truancy, running away from home, loitering – falls into a category of 'status crimes' in the USA whereas in most European countries there is no such category. 'Carrying a knife' has become a new criminal offence in the UK. So 'crime' is determined by the law-makers but, in different societies, they approach their task differently. For the French there are contraventions, delit and crimes, which carry different kinds of sanctions, imposed by different agencies. If in Russia, to qualify as a crime an act must be considered to be socially dangerous, and all 'crimes' must be listed in the Criminal Code, in the UK 'crimes' are simply acts that a law classifies as such. Travelling without a ticket is a criminal offence in England, but

only an administrative misdemeanour in Russia. Hence the same act will or will not be a crime in one country, depending upon the law and the age of criminal responsibility: cross the border from England into Scotland (although the traveller may not be aware of where the crossing is) and the rules change.

Law then creates ‘crime’. As Christie puts it, ‘Crime does not exist. Only acts exist, acts often given different meanings within various social frameworks’ (2004: 3). There are those who decide on the ‘law’ and there are procedures and institutions to ensure that the law is observed.

Property, violence and statistics

Many of the Russian children who were asked ‘what is a crime?’ thought in terms of concrete examples of bad behaviour:

murder, stealing, robbery
thieving
murder, stealing
murdering someone selling drugs, murder, stealing
it’s murder, robbing, it’s illegal activity
stealing cars, or from kiosks, or beating someone up

In their answers we see the two dominant ‘categories’ in criminal legislation in all our societies: acts against property and acts of violence but, even so, some kinds of property issues and types of violence have tended to occupy the law-makers.

Theft, burglary, and in some countries dealing in stolen property, dominate the code books and consequently the statistics. Such behaviour is age-related and income-related. These are young persons’ activities, and those of deprived young persons. Tax evasion, fiddling expense accounts, corporate theft – those adult white-collar practices – have not traditionally occupied such a dominant place in the code books, in the statistics, or in public discussion of ‘crime’. Recently, very recently, they have begun to attract more attention. But is there less of this behaviour than of theft by young people? Wilful damage to property, vandalism – is this as socially damaging or as dangerous as the dumping of toxic waste, developers breaking agreements on the preservation of green zones, or the export of arms to dictators?

At first sight crimes of violence against the person, as defined in law, seem to be more straightforward: murder, grievous bodily harm, assault. These are the recognized crimes of violence. But governments everywhere are anxious to keep violence committed by police, prison officers or the military out of the public gaze and, where possible, out of the ordinary justice system. Mugging is predominantly a young person's pastime – mugging other young people – and they get caught. But what about those adult patterns of violent behaviour – domestic violence, for example, which only relatively recently, and not as yet in Russia, has entered the statute books as a crime? Child abuse? These violent acts remain much less prosecuted. Yet do we really think that less domestic violence occurs than mugging on the streets?

Our criminal justice systems have traditionally identified as 'crimes' activities or behaviour that will cause the 'offenders' to be drawn disproportionately from among the young male and more deprived sections of the population.

As the criminal law is in the main directed against forms of behaviour associated with the young, the working class, and the poor, we should not be surprised to find that, officially, it is these groups that are 'found' to be the most criminal. (Muncie 1999: 37–40, 118–24)

The most 'criminal' age-cohort, everywhere, is that of young men between the age of 18 and 30. They seem to be the group that rulers feel are most dangerous, most unruly. They dominate the statistics and the prison population. Women everywhere appear as a small minority. Their deviant behaviour has tended to be subject to other kinds of control, and seen as less dangerous.² So the question arises: is 'crime' an appropriate descriptor of children's behaviour?

Official crime rates, recorded by the police, are hard enough to interpret for one society; doubly difficult if we want to make comparisons between societies, whose legislation differs on the definition of criminal acts, whose procedures for recording crimes differ, where public attitudes towards the police vary markedly, and the police's recording of incidents differs. The legislation changes and new 'crimes' appear. If the local population becomes less trusting of the police, they may report fewer crimes and the crime figures will show a decrease, although nothing has changed in the incidence of such activities. Social attitudes may change: when women

feel they can and should report rape, the statistics suggest that rape has increased. Changes are introduced in the reward system for the police (bonuses are tied to solving cases) and (hardly surprisingly) the recorded figures of difficult-to-solve crimes will drop.³

The importance of police behaviour has led some to argue that ‘Official statistics reflect not patterns of offending but patterns of policing’ (Muncie 1999: 20). I would put it a little differently: crime rates represent the result of many different responses to rulings from above. This means that we need to approach them and any claims made on their behalf with a great deal of caution. There are many interested parties in such debates: politicians, police, all the agencies of the criminal justice system, and the public. But the role of the police is critical in determining the future fate of young people, and we shall return to this in later chapters.

Everywhere only a small percentage of ‘criminal acts’ gets reported to or recorded by the police. So maybe unrecorded crime looks different? In order to get a better sense of criminal behaviour, some countries, including the UK, have introduced both victim surveys (where a representative sample of the adult population is asked whether it has been a victim of crime during the past 12 months and, if so, of the type of crime) and self-reporting surveys (where young people are asked whether they have committed a crime, and if so, of what kind). No one suggests that any of these approaches allows a ‘true’ representation of criminal behaviour, but they can offer a better picture of long-term trends than can officially recorded crime data. Surprisingly, perhaps, given all the factors that can affect recorded crime data, data from such surveys tend to support the official trends.

The staying power of criminal justice systems

Both (civil) continental and common law are based on the following principles:

1. a) There exists a public (written and accessible) listing of those actions that are ‘crimes’, and ignorance of the law is no excuse;
b) the individual is responsible for his/her actions.
2. a) All are equal before the eyes of the court;
b) the accused must have the right of defence;
c) the judge is independent, and guided by the law, and only the law.
and, further:

- 3.a) The court should determine whether the accused did commit the crime;
- b) the judge should award a 'proportionate' sentence, i.e. proportionate to the offence;
- c) the court decision is upheld by the government, which is responsible for seeing that there are agencies to ensure its implementation.

To understand this quite complicated set of principles, we need to remember that criminal justice, as a mechanism, evolved in societies where inequality in wealth and power prevailed, and that criminal justice systems are designed by the powerful, and powerful adult males at that.

Take the principle that the individual is responsible for his actions, and all are equal before the court. If a rich man steals a loaf of bread, and a poor man steals a loaf of bread, they are both equally culpable. It is the offence that matters. No privileges allowed here. Both have the same right of defence. Both should be sentenced to the same punishment, if found guilty. 'Equal cases have to be treated equally and according to the rules. But of course cases are never equal, if everything is taken into consideration' (Christie 2004: 76). There is no good reason for a rich man to steal a loaf of bread, and should he absentmindedly walk off with one, he can pay for a lawyer to explain the mistake, and the judge will recognize that he is not really a bread-stealer... and so on. It is then a system that advantages those who have already established a place for themselves in society. Is it then appropriate for children?

Had it not proved itself to be such a flexible and useful mechanism for deciding who is a danger to society and enforcing order, criminal justice would not have established such a foothold in so many very different societies. But there is more to it than that. Although designed by the powerful, criminal justice systems simultaneously can and do provide valuable protection for large sections of the population in a number of areas. People want to feel they can walk the streets safely, that their homes will not be burgled, or that their children will not be approached by drug dealers (though they may be tolerant of advertisements for junk food that damages their health). One of the great pluses of a criminal justice system is that it can help to provide this kind of security, and one that does bring benefit to many. It can offer a means of defence to those whose only chance of defending themselves is clear rules and judges who believe in evidence. And it provides a check on arbitrary behaviour by rulers. If this were not the case, it is unlikely that such a mechanism for solving some of society's problems would have survived the introduction of

universal suffrage, which can require governments to listen to the voices of the poor as well as the rich.

However, perhaps as important, pronouncing on ‘crime’ allows the making of public moral statements, something that groups and societies seek as one form of social glue. ‘Law’ allows the rulers to pronounce on society’s moral codes, sometimes reflecting widely shared values, sometimes imposing those of the powerful. Some of the children’s answers to the question ‘what is a crime?’ emphasize the perceived link between ‘moral’ or ‘socially unacceptable’ behaviour and crime:

a bad action, breaking the law
breaking the rights of society and laws
it’s breaking moral and social norms
deviation from moral norms
harming a person
it’s betrayal of other people
it’s a bad act affecting people around you
it’s insulting someone and causing him harm, only a really low person acts this way

The connection between ‘crime’ and ‘morally reprehensible behaviour’ comes out quite clearly in their answers although, of course, everywhere only a small minority of morally reprehensible acts is classified as ‘crimes’. Across the societies we are talking about, there is wide agreement that murder and violent assault are unacceptable as a way for individuals or groups of individuals to settle disagreements among themselves; that disputes over property should be settled ‘fairly’ and not by force; that people have a right to a fair trial and, a more recent development, that people have a right to humane treatment by those in a position of authority. In contrast, attitudes on sexual morality, on treatment of children, animals or the environment differ widely, and changing attitudes find their reflection in criminal codes. In their turn, norms or values may change, influenced by the law or the operation of the criminal justice system.

Maintaining order, maintaining privilege, maintaining social cohesion – the different interpretations that have been offered to explain the role or rationale of criminal justice systems reflect the fact that to different degrees at different times in a variety of contexts criminal justice systems are doing

all of these – and this largely explains why they have become engrained in modern societies. Yet there is still something else. As one child put it: ‘crime must be punished’.

People, it seems, want not only security from those who threaten their life or possessions, but they want ‘justice’. And justice involves a variety of things – not only repayment for damage done, the restoration of rights, but also, many feel, punishment for wrongdoing. Several of the children pick this up in their answers – crime is linked with punishment:

a person must be punished for murder or stealing
a crime must be punished, it’s an offence against the law
a crime – it’s something that you can be put in prison for

Criminal justice enables a society to identify the guilty and then to punish them. Crime and punishment are, it seems, inextricably linked. If this were not the case, it would be difficult to understand why – in the face of all evidence to the contrary that detention either rehabilitates or reduces crime by young people – some governments, at different times and in different countries, actively pursue policies of locking up more of their young people. But is punishment then the aim of sentencing policy?

The different, sometimes contradictory, aims behind sentencing policy

Garland maintains that

Although legal punishment is understood to have a variety of aims, its primary purpose is usually represented as being the instrumental one of reducing or containing rates of criminal behaviour.

However, Garland continues, the failure over the centuries of legal sanctions to demonstrate their effectiveness as a method of controlling or reducing crime alerts us to the fact that punishment (or sentencing)

is a social institution embodying and ‘condensing’ a range of purposes. ... It involves discursive frameworks of authority and condemnation, ritual procedures of imposing punishment, a repertoire of penal sanctions, institutions and agencies for the enforcement of sanctions and a rhetoric

of symbols, figures and images by means of which the penal process is represented to its various audiences (Garland 1990: 17),

and this means that it can take very different forms.

Today, politicians, the media, penal reformers, judges and the public – with different voices in different societies – will cite a number of aims that sentencing should be achieving: retribution, deterrence of the individual or of others, safeguarding society from danger, rehabilitation of the individual (morally or in terms of skills), compensation for damage to the victim or the community. These are very different aims, and seem to be addressing different audiences (in some cases ‘the offender’, in others ‘society’, in some ‘moral sensibilities’, in others ‘the victim’...). It is clear that no sentence could possibly address all these aims simultaneously. Some contradict each other. Yet, here again, we see the flexibility of criminal justice. The proliferation of aims allows those who sentence to respond very differently to similar acts at different times or in different social contexts. Sentencing policy can adapt to changes in attitude towards what is a crime or how to ‘treat’ criminals. It can be tough or soft; pay more or less attention to the consequences for the individual, for the offender or for the victim.

Officially recorded data, for countries across the northern hemisphere, suggests that crime by young people has, over the past ten to fifteen years, levelled off or decreased. In England and Wales between 1980 and 1990 the number of 10-16-year-olds cautioned or convicted fell from 175,700 to 110,800; police recorded crime fell every year between 1992 and 1999, and fell by 25 per cent over the longer period 1992–2005. Despite the Crime and Disorder Act of 1998, which limited police discretion on the recording of minor offences (which inflates the figures), the overall trend has been one of stability, and this is supported by the findings of the Crime Survey and self-reporting surveys (NACRO 2005; Bateman 2006). Russia looked different in the early 1990s (when it experienced a rapid increase increase in offending behaviour (both crimes and administrative offences) by children under the age of 18; by 1997 the figures were stabilizing but the financial crisis of 1998/9 brought another upsurge; since 2000 the figures have flattened out again to bring Russia in line with other countries.

Local police forces everywhere are aware of changing patterns – types of theft or burglary, in drug-dealing, use of guns, trafficking in women – which reflect changes in society. Crime waves (of some kinds) transcend borders.

There is some evidence across several countries that violent crime, which accounts for a small percentage of youthful crime everywhere, is increasing, and that everywhere there is a very small minority of kids who are the serious, repeat offenders (Junger-Tas 2002; Van der Laan 2004; Mehlbye and Walgrave 1998; Dunkel 2003; *Youth Crime Action Plan* 2008). As regards England and Wales, NACRO (2003: 4) argues that ‘violence against the person, which accounts for less than 13% of youth crime, is falling’, while Hough and Roberts (2004: 9) suggested some rise in the known number of young offenders involved in robbery and violence, and these figures (although small as a percentage of youth crime) have almost certainly risen in the past two years. The numbers of those sentenced to custody for crimes involving violence against the person remained almost unchanged between 1996 and 2006, as did the share of such sentences (around 14 per cent) among all those sentenced to custody (*Sentencing Statistics*, Tables 2.4–2.6). The recent spate of murders of teenagers by other teenagers or young people, while highly localized, will increase the homicide figures for 2008.

In Russia the number of violent crimes has risen significantly since 1997 and continues to rise, although at a slower rate. The homicide figures are high (higher than in Europe, if not in the USA). In this respect, and not only in this, Russian youth seems to be behaving as its counterparts in many other countries. Figure 5 provides data on convictions for violent offences in

Figure 5: Convictions (14–17-year-olds) for violent crime, Russia, 1997–2004

Source: Data from MVD statistical handbooks, 2002, 2004 and 2006.

Russia. As a percentage of all convictions violent crimes remain very small. The percentage increases over the period – from 6 to 12 per cent – but this should be seen in context: the total number of criminal convictions is less than it was in the mid-1990s. Theft, everywhere the key to youth crime, has fallen sharply and, very recently, hooliganism has been reclassified in such a way as to take many activities out of the criminal code. Hence the percentage of violent crime will surely rise, regardless of actual numbers.

The point that interests us here is why, despite stable or declining crime rates, some societies are reacting more punitively towards their young people and adults. The toughening response in the USA in the 1990s came at a time when youth crime, including violent crime, had dropped. UK politicians insist that more prisons are needed, although crime rates in England and Wales are lower than they have been since the 1960s. In England and Wales, with no increase in the youth crime rates, changes in prosecution and sentencing policy, particularly since the 1998 Act, led to a rise in custodial sentences from 4,719 in 1994 to 6,183 in 2006 (Morgan and Newburn 2006; *Sentencing Statistics*, and Figure 3 above). In Russia, sentencing policy has been remarkably unresponsive to changes in crime rates. So what explains this? Goldson suggests that patterns in the use of penal custody

have little or no direct relation either to the actual volume and/or seriousness of youth crime on the one hand, or the outcomes of incarcerative interventions on the other. Rather the ebbs and flows of custodial sanctions are more readily explained by reference to the vagaries of political imperatives and policy contingencies. (Goldson 2006: 140)

This is something we shall need to explore in later chapters.

If politicians and publics, in some countries, seem convinced that crime rates can be brought down by the harsher treatment of offenders, criminologists have long recognized that ‘crime rates rise and fall according to laws and dynamics of their own’ (Lappi-Seppala 1998: 25), and he adds that ‘sentencing policies in turn develop and change according to dynamics of their own: these two systems are fairly independent of one another’. There seems to be little evidence that crime rates and sentencing policy are related. Finland demonstrates, very clearly, how a radical shift away from the use of detention can have little impact on crime (Figure 6).

Figure 6: Prison and crime rates of the Nordic countries

As Lappi-Seppala (1998: 25), from whom the information is taken, suggests, 'A simple comparison between the Scandinavian countries reveals a striking *difference* in the use of imprisonment as well as a striking *similarity* in the trends in recorded criminality' [my emphasis – MM].

If only to persuade politicians that 'prison doesn't work', it would be nice if one could demonstrate that a humane sentencing policy is directly related to a reduction in crime. But, since crime data represents a (summed) indicator of many activities, only one of which is 'actual deviant behaviour', it is not surprising that such evidence is not available. On the other hand, we can say that societies that opt for using alternatives to detention do not suffer from higher crime rates. And we can add that subjecting young people to detention probably increases the incidence of crime. Time spent in detention will almost certainly make it more difficult for a young person to cope with life outside, let alone find a job, and will encourage him or her to return to crime, regardless of whether time spent in detention has meant induction into a criminal fraternity.

There is no evidence that tougher sentencing has an effect on crime, whether it is Russia or the UK (Мапорулова 1992; Bateman 2006). Crime, by adults or youth, is governed by far more factors than sentencing policy or indeed by the type of justice system. The editors of a recent comparative study of different youth justice systems concluded

There is a good argument for seeing youthful offending and the youth justice system that responds to it as quite separate phenomena. Youthful offending may affect the youth justice system, but youth justice systems probably have very little impact on youthful offending. (Tonry and Doob 2004: 19–20)

In other words, one should not look to a criminal justice system to ‘solve’ the problem of youth crime.

So are we suggesting that policies towards youth will have no effect upon ‘crime’? No, of course not. We are saying that the criminal justice system is a clumsy and ineffective instrument to use for reducing or changing patterns of behaviour by children – whether it is stealing because they are hungry, robbing their peers of their mobile phones, consuming alcohol or drugs, or increasingly using knives and other instruments in violent attacks. When it is already too late, the criminal justice system is expected to solve the problems, something it cannot do. All these types of behaviour have to be addressed by other means and, despite a century’s experience, the record is still poor.

From retribution to re-education

If retribution and isolation were the dominant characteristics of sentencing policy in the eighteenth century, by the beginning of the nineteenth century, from North America across to Russia, views of the adult criminal and hence of appropriate sanctions were changing, and by the end of the century judges and governments were talking a different language. Reform the offender, correct his ways, became the key words. This was to have major consequences for policy towards children, for whom, it was accepted, education was paramount.

Russia had traditionally relied upon corporal punishment, hard labour and exile (graded according to social status) as the core of its sentencing policy, but as the first two – for a variety of practical as well as altruistic reasons – came to be considered less effective means of maintaining order and political control, prisons began, in the nineteenth century, to occupy a more important place. Use of the knout (which could result in death) was abolished in the mid-nineteenth century but birching continued. Europe and America had earlier witnessed the rapid expansion of prisons and reformatories as places where offenders, maybe in solitary confinement reading the Bible, maybe

under Spartan conditions and hard labour, were to learn to repent of their ways and return to society as reformed individuals. The deporting of felons to Australia (England's Siberia) gradually fell out of use.

In Russia in the mid-eighteenth century, secret instructions recommended that corporal punishment and penal servitude should be adjusted to take account of age, but this was on the grounds that children (under the age of 17) were physiologically weaker than adults. By 1845, while the principle was reaffirmed, a debate as to whether this was the appropriate approach for children was under way, and it was agreed that a child must understand his actions to be held responsible for them. This, the principle of *razumeniye* (understanding) had its counterpart in the English common law presumption of *doli incapax* (for children aged 10–13).⁴

However, in Russia as in Europe and America, the reformers were arguing more than this. If adults could be reformed, how much more so could children. A child's moral sensibilities had to be developed. Regardless of whether in part this view stemmed from the desire to create well-behaved members of an expanding industrial labour force out of the bands of roving vagrants, begging children, and the filthy and 'depraved' street children in the expanding cities, the result was the conviction that the child needs education and moral upbringing to become a law-abiding member of the community. If the family fails to provide this, and society creates a damaging environment, then the state must step in *loco parentis* to bring up the child, and attention must be focused on those social conditions that create young criminals. The line between the abandoned kids in need of care ('the deprived') and those who commit offences ('the depraved') became blurred: the former will become depraved if they are not cared for, but even the depraved can be taught skills and morality. It is inappropriate, it was argued, to hang an eight-year-old for stealing a loaf of bread (UK) or to birch him and send him to Siberia (Russia), and to send a child to prison will only set him or her on the path to crime.

The conviction that children not only can but must be brought up to be good laid the ground for the setting up of new educational–correctional institutions for the young. These dated from the late 1850s in the UK, from the 1860s in Russia. From Mary Carpenter's campaigning on behalf of the 'perishing' (deprived, vagrant, homeless, begging) children and the 'dangerous' (depraved, stealing, gambling, drinking, engaged in prostitution) came the industrial schools and the reformatories in the UK.

These were to reform the child, to produce moral, hard-working, law-abiding adults, but punishment was still part of the agenda. Children could be sent for a short, sharp prison spell as a salutary punishment before beginning their training in the institutions, and judges still could and did sentence them to prison in preference to a reformatory (Muncie 1999). In Russia, hard labour and exile to Siberia came to be used increasingly sparingly. Between 1891 and 1893 only 42 children, including one 11-year-old, were sent to Siberia (Труды IV съезда 1898: 17). The majority of young offenders now received prison sentences but nineteen ‘correctional’ *priyuty* (shelters, refuges) or *kolonii* opened between 1866 and 1891, and by 1907 there were 53. By 1909 (now renamed ‘educational–correctional’) they housed both criminal offenders and the vagrant and needy. In England the first Borstal was opened in 1902.

The combination of changing attitudes towards the purpose of sentencing, and towards the child, whose personality had still to be developed, produced a radical critique of existing practices. Penal reformers (in North America, Europe and Russia) shared a vision of how young offenders ought to be treated, of measures that would benefit them and society. They thought they had the answer: solve the social problems bred by poverty and ignorance, and save the children at risk through education; re-educate, do not punish, young offenders. Abolish imprisonment for young people, and keep it to a minimum for adults. Russian criminologists, charitable societies and judges were as active as their western counterparts in advancing these claims and offering alternatives. All were talking a common language: re-educate, do not punish, and above all do not use detention as punishment.

In a two-year study of child crime published in Moscow in 1912, Gernet, a leading criminologist from Moscow State University, quoted approvingly Winston Churchill’s statement of the British government’s position in the debate on the prison bill in 1910:

The first principle which should guide anyone trying to establish a good system of prisons should be to prevent as many people as possible getting there at all. There is an injury to the individual, there is a loss to the state whenever a person is committed to prison for the first time, and every care, consistent with the maintenance of law and order, must be taken constantly to minimize the number of persons who are committed to goal.⁵ (Churchill, quoted by Гернет: 415)

The authors of the study reminded the reader that in Russia, as in western countries, it had long been recognized and accepted that prison is a school for criminals: a visit to UK prisons in the 1870s by a Russian delegation confirmed that the hardened criminals had all begun their criminal careers with a prison sentence for a minor misdemeanour when they were still young. More than a hundred years later a delegation could have made the same observation, this time quoting Andrew Coyle:

In the late 1980s I was appointed Governor of Peterhead Prison. At that time Peterhead held the sixty prisoners who had been identified as being the most difficult and dangerous in Scotland.... I immediately discovered one fact which has remained with me ever since. Almost all of these 'most difficult and dangerous' men had been with me some 12 years before when I had been an assistant governor at Polmont Borstal. At that point, like me, they were fairly new to the prison system. Many of them had previously been in what were then known as Approved or List D schools before graduating to the borstal system. Also like me, they had progressed through the criminal justice system, subsequently serving time in young offender institutions and adult prisons and here we were together in 1988 in a bleak granite fortress on the north east shoulder of Scotland.... But I found myself asking whether their progression through the criminal justice system had been inevitable. At what point might it have been possible to divert them to other paths?⁶

Although the authors of the 1912 study made the abolition of prison their key target, they argued for far more radical changes than this in the treatment of young people. They prefaced their book with the statement:

Russian society, as that in many countries, is paying more and more attention to the issue of child crime and of new measures to deal with it. Society now has the opportunity to take an effective and active part in shifting the justice system into a quite new framework – not one which embraces the sharp sword of Femida and sumptuous palaces of justice with their altars consecrated to 'just deserts' but one which takes on the form of sensible and heart-felt aid to those who are drowning and, as far as is possible, leads to the elimination of at least some of the causes of crime.

By the end of the nineteenth century, the pendulum had swung away from 'retribution' and towards what has come to be called a 'welfare approach'. This new welfare philosophy, which would subsequently influence policies towards youth crime across all the societies of the northern hemisphere, includes the beliefs that:

- the underlying causes of juvenile crime are social, primarily deprivation;
- the deprived will become the depraved unless their circumstances are addressed;
- if parents are too poor or unable to care for and bring up their children, state and society should take on the responsibility.

Some children, when asked what is a crime, automatically make such an association:

a person commits a crime when he needs money or he kills someone for his money
it's breaking the law which is usually done by children (orphans)
crimes are committed by children who don't have a family

and we can see it borne out by some of the children's essays, quoted in the Introduction.

Further, the welfare philosophy assumes that

- children can and should be reformed, to grow into moral and industrious adults;
- they should not be punished; their needs should be addressed;
- prison is the worst possible environment for a child: it creates criminals; residential care, which provides education, can play a role where parents have failed.

The 'welfare' approach, with its emphasis on government's and society's responsibility to ensure that its children are provided for, its insistence that children should not be punished, and that prison is not appropriate for them, brings into question the appropriateness of criminal justice as an instrument for dealing with youth crime.

A criminal justice system rests on the assumption that the individual is responsible for his action. The judge (or jury) should determine whether the offence was committed, and the judge award an appropriate sentence. To a greater or lesser degree criminal justice systems allow the judge some flexibility in sentencing, that is, to take into account the individual circumstances, but the underlying principle remains – it is the ‘offence’ that warrants the response. It is hard to imagine that that anyone would set out to devise such rules to deal with children’s behaviour, especially when some may be illiterate, others hungry, homeless, or abused by adults. And when, as we know, young children often are not able to foresee or think in terms of the consequences of their actions. They may act impetuously. One child picked this up when asked ‘What is a crime?’: ‘rashness, not thinking’, he wrote.

If a child does not understand the morality or the consequences of an action, it is difficult to hold him or her ‘responsible’. According to criminal law, ignorance of the law is no defence. But the conviction, strongly held by children, that if they did not know they were not allowed to do x, it is not fair to punish them, is one to which we usually give weight in our relations with children. To concentrate on the ‘offence’, with no regard as to whom the ‘offender’ is – his or her age, the circumstances – is not the way we usually respond to children’s behaviour.

While the penal reformers came up with different answers they all agreed that society should tackle the causes of crime, which was not the job of a criminal justice system. Its role should be slimmed right down and, where the offender was a child, it should operate on the basis of different principles. Five key issues preoccupied them, and they are the issues that still dominate discussion today.

1. Limiting the activities that are classified as ‘crimes’

Imagine a society where none of its children broke the rules. Would it be a healthy society?⁷

The authors of the 1912 Moscow study argued that most of the ‘offences’ committed by young people should be taken off the statute book: stealing by the wanderers and the hungry in order to eat, or to keep warm, and the pranks – riding on tram buffers, ringing doorbells, catapulting windows, setting off fireworks, peeing in letter boxes. Such actions, they suggested, deserved another name and a different treatment. And, indeed, one way of reducing the category of ‘crime’ for children, or of keeping them out of the

criminal justice system, is to take a range of actions out of the statute books or classify them as administrative misdemeanours rather than crimes. This can be done in Russia or in France, whereas in America or the UK this in-between category does not exist.

2. Raising the age of criminal responsibility

The simplest and most radical strategy to ensure that children do not fall into the jaws of a justice system devised to treat and punish adults is to pass legislation that fixes the age of criminal responsibility at 18. Children younger than this cannot ‘commit crimes’ and be dealt with by courts. In Belgium, we noted, there are no ‘criminals’ under the age of 18. Most societies have opted for a younger age, and the range indicates just how differently societies approach this issue.

3. Creating agencies that are responsible for dealing with unacceptable behaviour

The 1912 authors suggested that police and social services should play a key role in treating such behaviour and diverting children from the criminal justice system. Here the range of solutions tried by different societies has been as wide as the age of criminal responsibility: police, social services, welfare agencies, charitable organizations, probation officers, community boards and residential institutions, all make their appearance at different times and guises in different countries. The creation of alternative bodies or approaches to address youthful offending – and the role left for criminal justice institutions remains perhaps the key issue today. It is closely tied to perceptions of how the justice system can or should operate.

4. Where young people are held responsible for ‘crimes’, changing the procedures and practices of the criminal justice system

Gernet and his co-authors argued that, with its assumptions of responsibility, complex procedural rules, its focus on the offence rather than the offender, and on sentencing a guilty person, the criminal justice system is not appropriate for dealing with children’s actions. It should be adapted: new juvenile courts should operate according to different principles. Although the ‘crimes’ (theft, burglary, assault, murder, etc.) would remain on the statute books, when the accused was a child the court’s task would be a

different one. No longer should the judge focus on whether the offence had been committed and on awarding the appropriate sentence, rather he or she should seek to discover what had led the child to commit the crime, and impose a sentence that would help the child to overcome the difficulties that had prompted the behaviour. The court would be concerned with the welfare of the child, with 'offenders' rather than 'offences'. This meant a court where procedures would be simplified, and be comprehensible to the child; the judge would need detailed information from social workers or child experts on the personality and circumstances of the child; the judge (maybe a doctor or teacher) would talk to the child, and would endeavour to find a member of the community (voluntary 'social' workers) to take responsibility for the youngster or to place him or her in care.

During the twentieth century many societies have tried the institutional variant of a youth court, operating according to different principles. Some have favoured a juvenile court that adopts civil proceedings and focuses on the needs and welfare of the child, whether a child in need of protection or an offender. This approach, that of a 'socialized juvenile tribunal', was reflected in the first 'juvenile court' set up in Chicago in 1889, and that in St Petersburg in 1910. In Scandinavian countries today, and in Scotland, welfare commissions or children's hearings deal with all cases involving under-15 or 16-year-olds, whether the issue is care or an offence; older children come before adult courts. In some other countries (England, for example) a youth court operates as 'modified criminal court', dealing with less serious offences, while a higher adult court deals with all grave offences for children aged 10 and over (Bottoms 2002: 415). In Germany a youth court will deal with offences for 14–20-year-olds; in the USA offences by children as young as 15 (depending upon the state) may be passed from the juvenile criminal court to an adult court. A juvenile court or juvenile magistrate, while remaining within the criminal justice system, may still be charged with recognizing the welfare of the child as the priority.

The two different approaches – that of a 'socialized juvenile tribunal' versus a 'modified criminal court' – do not automatically lead to different outcomes. It is not only, as we shall see from the English example, that so many factors influence the way in which juvenile justice agencies work but also that, despite the stated commitment to the welfare principle, competing claims – of rights, of crime prevention, community safety, victims' rights and justice – continually jostle for attention, regardless of the institutional

framework. At times, in a society or societies, particular claims are voiced more vigorously, command attention and influence policy. While there is as yet no resolution of these issues, past history and comparative experience tells us that there are better and worse strategies or options – both for the child and for the community.

The most we can say is that the modified criminal court approach (regardless of whether it is under English common law or the continental system of justice) holds out the danger that criminal law principles (focus on the offence, a tariff of sanctions, punishment) can outweigh the principle of attending to the child's needs and welfare. England and Wales have continued to rely upon a modified criminal court approach from 1908 until today. Russia moved back to using adult courts in the mid-1930s. The Scandinavian countries have a higher age of criminal responsibility (15) and no juvenile courts, only adult. However, a socialized juvenile tribunal can impose institutionalized and secure 'child care' that may be as damaging as detention in penal custody. As we shall see, while the 'system' of juvenile justice is relevant, more important may be the way legislators and practitioners flesh it out.

The final issue, and the one that we are most concerned with, is:

5. Using a variety of sanctions and keeping detention as a measure of last resort

The death penalty for children was abolished in most societies in the northern hemisphere during the first half of the twentieth century, in Russia after the revolution, in England and Wales in 1933. Corporal punishment was abolished by many societies (in 1948 in England and Wales) but detention of young people continued, sometimes in Borstals or reformatories, rather than prisons, and usually advocated as part of an educational, rehabilitation, strategy. The Russians opted for labour, correctional or educational colonies. To different degrees in different societies, over the next half-century detention or custody gradually, over time, gave ground to fines, repayment of damage, community service, compulsory training, curfew or territorial limitation and suspended sentences. But, from time to time, detention comes back into favour, and length of a custodial sentence continues to differ widely from one society to another, as do rules on parole.

Following the revolution, Russia was the most ardent advocate of a 'welfare' as contrasted with a 'punitive' approach. By the mid-1930s, although the

rhetoric was retained, harsh punitive policies and extensive use of custody had been reintroduced. Under Khrushchev the pendulum swung back, slightly, towards welfare but then stuck, and since 1990 reform has only inched forward. Meanwhile, in other countries in the northern hemisphere, over the past century there have been a great variety of approaches to crime by young people. More often than not they have been based on a welfare approach, and detention has come down. In England and Wales prison for under-14-year-olds was ruled out in 1908; a welfare philosophy was reflected in legislation, culminating in the Children and Young Persons Act of 1969, which aimed to phase out penal custody for 14–16-year-olds. But by the 1990s policy was changing – in favour of, not against, the use of custody for children – and since then the numbers have steadily grown.

While welfare ideology still dominates thinking and policies in most European countries, since the 1980s politicians in North America, England and Wales, and in Holland, have turned to a new (older) more ‘punitive’ philosophy. This sees the young person (not society) as responsible for his/her actions, criticizes ‘the excuse-culture’, believes that sanctions are salutary, that punishment is deserved and will serve as a deterrent for the individual and others. While this more punitive approach is not shared across all of Europe, ‘the main trend in juvenile justice in many of our countries is tending towards an ever more repressive, but not necessarily more effective, system’ (Junger-Tas 2006: Introduction). What accounts for this more punitive trend in some societies? How is it that today gains and reforms made in the first half of the twentieth century seem to have been lost, tossed aside, and repressive and ineffective policies either left in place (Russia) or reintroduced (England and Wales)? We begin with Russia.