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'Condemn a Little More, Understand a Little Less': The Political Context and Rights' Implications of the Domestic and European Rulings in the Venables-Thompson Case

DEENA HAYDON* AND PHIL SCRATON**

In 1993 Jon Venables and Robert Thompson were found guilty of the abduction and murder of two-year-old James Bulger. Aged ten at the time of the offence, the children were tried in an adult court before a judge and jury amidst a blaze of publicity. They were named by the trial judge and sentenced to detention at Her Majesty's Pleasure [HMp]. The Home Secretary set a minimum tariff of fifteen years imprisonment. In December 1999 the European Court of Human Rights held that, in the conduct of the trial and the fixing of the tariff, the United Kingdom government was responsible for violating the European Convention on Human Rights. This article maps how the case became a watershed in youth justice procedure and practice influencing Labour's proposals for reform and the 1998 Crime and Disorder Act. Examining the progression of appeals through the domestic and European courts, it explores the dichotomous philosophies separating the United Kingdom and European approaches to the age of criminal responsibility, the prosecution and punishment of children, and the influence of political policy on judicial decisions. Finally, the 'backlash' against 'threatening children', the affirmation of adult power and knowledge, and the implications of the European judgments in the context of a rights-based agenda are analysed.

** School of Education, Edge Hill University College, Ormskirk, Lancashire L39 4QP, England*
*** Centre for Studies in Crime and Social Justice, Edge Hill University College, Ormskirk, Lancashire L39 4QP, England*

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Childhood is a highly contested terrain. It suggests biological essentialism; the physical growth of the child to 'full maturity' mirrored by an invariant sequence of intellectual, psychological, social and moral development. Jean Piàget's commitment to the fundamental principle that childhood is a time-span of growth towards adulthood – contoured by discrete, age-related, universal stages of development, each defined by specific cognitive structures or ways of understanding the world – has left an enduring legacy. Within derivative developmental psychology, children's actions and interactions are interpreted as 'symbolic markers of developmental progress … prefigur[ing] the child's future participation in the adult world' as 'primitive concepts' give way to 'sophisticated ideas'.[1] It is assumed that, through 'natural' development, the child's egocentrism, dependency, incompetence, and irrationality eventually give way to adult independence, competency, ability to reason and act responsibly.

Piàget's 'voracious' and 'rigid' empiricism reflected a 'genetic epistemology' which 'through its measuring, grading, ranking, and assessing of children' has 'instilled a deep-seated positivism into our contemporary understandings of the child'.[2] Theories of child development 'both supported and were supported by child rearing/training practices, bridging the gap between theory and practice, parent and child, teacher and pupil, politician and populace'.[3] As Mayall demonstrates:

> the notion that children are best understood as incomplete, vulnerable beings progressing with adult help through stages needed to turn them into mature adults … has great power both theoretically and as a force shaping children's lives, through the operation of health, welfare and legal policies and services.[4]

Stimulated by the pivotal work of Ariès,[5] however, the biological essentialism of Piàget's legacy has been challenged. This has resulted in a complex contemporary debate which centres on the social fluidity, temporal context, and cultural variability of childhood. Within this debate, childhood is variously portrayed as a 'social artifact',[6] a 'social construction',[7] a 'discrete structural division',[8] and a 'social structural' relation.[9] While there are distinguishing emphases between these categories, they share a

1 A. Prout and A. James, 'A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems' in *Constructing and Reconstructing Childhood*, eds. A. James and A. Prout (1997) 11.
2 A. James, C. Jenks, and A. Prout, *Theorizing Childhood* (1998) 17, 19.
3 Prout and James, op. cit., n. 1, p. 9.
4 B. Mayall, 'Introduction' in *Children's Childhoods Observed and Experienced*, ed. B. Mayall (1994) 3.
5 P. Ariès, *Centuries of Childhood* (1962).
6 N. Postman, *The Disappearance of Childhood* (1994) xi.
7 C. Jenks, *Childhood* (1996).
8 B. Goldson, '"Childhood": An Introduction to Historical and Theoretical Analyses' in *'Childhood' in 'Crisis'?* , ed. P. Scraton (1997) 20.
9 James, Jenks, and Prout, op. cit., n. 2.

commitment to understanding the social and structural contexts within which children act and respond. They are concerned with children's experiences and meanings yet they recognize the imposition of institutional constraints and determining contexts.[10] This is the classic relationship and tension described by Giddens as 'agency' and 'structure'.[11] While 'recogni[sing] the obvious that children are a feature of all social worlds',[12] critical social theories guard against false universalism.

Cunningham concludes that 'discourses about childhood', and the ideologies they reflect and reinforce, are socially, culturally, and politically specific; they 'embody … power relationships' which prevail in time and place.[13] This is assured through the hegemony of social and political reproduction. Thus socialization is central to societal stability and continuity, invariably containing conflict and controlling change. While children are not without 'minds of their own', there is a powerful and imposed expectation on them to follow adult-prescribed roles during their socially constructed 'preparation' for adulthood. This is the process in which children are 'human becomings' as opposed to 'human beings';[14] excluded and marginalized from the decisions through which, and the arenas in which, the quality of their life is determined.

Central to 'becoming' is the imposition and formalization of regulations specific to children. Often initiated and administered under the remit of 'protection', these represent a 'world of confinement and limitation'.[15] Two distinct but related dynamics inform the discourses and interventions which contextualize the surveillance, regulation, and control of children within contemporary British society. One is the representation of childhood as a 'fact of human life with biology determining children's dependency on adults to provide care' in the private or public spheres; the other is manifested in the 'social, political and economic dimensions of the adult-child relation'.[16] Inevitably, 'child safety', 'child protection' and the child's 'best interests' are manifestations of care *and* control, liberation *and* confinement, freedom *and* discipline. Popular, academic, and professional discourses subscribe to and reproduce an image of childhood which is 'incorrupt but corruptible, requiring family and educational institutions to

10 P. Scraton and K. Chadwick, 'The Theoretical and Political Priorities of Critical Criminology' in *The Politics of Crime Control*, eds. K. Stenson and D. Cowell (1991).
11 See A. Giddens, *Central Problems in Social Theory* (1979); *The Constitution of Society: Outline of a Theory of Structuration* (1984).
12 James, Jenks, and Prout, op. cit., n. 2, p. 32.
13 H. Cunningham, *The Children of the Poor: Representations of Childhood Since the Seventeenth Century* (1991) 6.
14 J. Qvortrup, 'Childhood Matters: An Introduction' in *Childhood Matters: Social Theory, Practice and Politics*, eds. J. Qvortrup et al. (1994) 4.
15 Goldson, op. cit., n. 8, p. 2.
16 id.

preserve its innocence and purity en route to adulthood'.[17] Consequently, adult intervention in their lives – personal, familial, and institutional – is assumed to be beneficial and necessary to children's social and moral development.

Defining and safeguarding children's 'best interests', however, can also be dependency-creating. For Qvortrup this amounts to 'protective exclusion', justified 'because of children's alleged lack of responsibility, capability and competence'.[18] Further, 'protection' can have another function, 'not strictly necessary for the sake of the children' but arising 'to protect adults or the adult social orders against disturbances from the presence of children. This is exactly the point at which protection threatens to slide into unwarranted dominance'.[19] It is within this broader context of social and societal definition that 'childhood as a social institution exists beyond the activity of any particular child or adult'.[20] Despite their 'different social experiences' and contrasting personal lives, opportunities, and development, children remain 'enmeshed in the forced commonality of an ideological discourse of childhood'.[21]

While academic and practitioner debates over relative social and moral development persist, the law is used both to protect the interests and welfare of children and to establish their responsibilities as active participants in society. Here chronological age is 'a fundamental determinant in the distribution of rights, power and participation', confirming and guaranteeing children's 'marginalization by legal obligation and the rule of law'.[22] Age becomes a curious, even contradictory, indicator for legal participation in a range of social activities – cigarette and lottery ticket purchase, alcohol consumption, sexual intercourse, driving motor vehicles, and so on. It also fixes the point at which children can be held criminally responsible for their actions. But where does the law draw the line for the age of criminal responsibility and on what basis?

In his text on criminal law Howard confirms the well-established principle that '[no] civilised society regards children as accountable for their actions to the same extent as adults'.[23] Bandalli concurs: 'children are perceived as needing and receiving protection from the consequences of their immaturity in other areas of the law and this is equally appropriate for criminal responsibility'.[24] However, the conceptualization and framing of

17 D. Evans, 'Fallen angels? The material construction of children as sexual citizens' (1994) 2 *International J. of Children's Rights* 3.
18 J. Qvortrup, 'A Voice for Children in Statistical and Social Accounting: A Plea for Children's Right to be Heard' in James and Prout, op. cit., n. 1, pp. 79–80.
19 id., p. 80.
20 James and Prout, id., p. 27.
21 Jenks, op. cit., n. 7, p. 122.
22 Goldson, op. cit., n. 8, p. 19.
23 C. Howard, *Criminal Law* (1982, 4th edn.) 343.
24 S. Bandalli, 'Abolition of the Presumption of *Doli Incapax* and the Criminalisation of Children' (1998) 37(8) *Howard J.* 121.

children's behaviour within criminal law is 'somewhat more complex' because 'notions of guilt and seriousness are both dependent upon the attributes of criminal capacity and responsibility projected by the law'.[25] As King and Piper explain:

> ... the very use of categories has been a strategic legal response to external knowledge concerning the probable moral, intellectual and emotional capacities of children at various stages in their development. By solidifying these stages into fixed age categories, law is able to reconstruct such knowledge on its own terms.[26]

What results are 'closed and rigid division[s]' necessary 'to avoid long, intricate empirical arguments about the capacities of individual children' which would undermine the 'law's validity'.[27] Once a child reaches the age of criminal responsibility, 'the law employs the same range of concepts for dealing with him or her as it does with adult offenders ...'.[28] Thus, chronological age determines 'whether or not the child enters the legal arena; the nature of proceedings; the test applied in court to decide the child's capacity to commit offences, and ... the nature and severity of the punishment to be inflicted upon the guilty child'.[29]

In England and Wales the age of criminal responsibility is set at ten, unusually low compared to most European states. Until 1998, under the presumption of *doli incapax*, a child aged between ten and fourteen could be 'convicted of a criminal offence' only 'if the prosecution could demonstrate that he knew what he did was seriously wrong'.[30] Accordingly, 'proper allowance' had to be made for children whose 'understanding, knowledge and ability to reason are still developing'.[31] *Doli incapax* embodied a recognition that 'using criminal penalties to punish a child who does not appreciate the wrongfulness of his or her actions lacks moral justification'.[32] Its removal was based on the assumption that children of ten and above can differentiate between serious wrong and simple naughtiness.

The Crown Prosecution Service attempts to balance the 'interests' of 'youth' with the 'public interest'. It acknowledges that the 'stigma of a conviction can cause very serious harm to the prospects of a youth offender or young adult'. However, crown prosecutors are directed not to 'avoid prosecuting simply because of the defendant's age' as the 'seriousness of the offence or the offender's past behaviour may make prosecution necessary'.[33] Unlike most European states, prosecution and Crown Court trial is the

25 M. King and C. Piper, *How the Law Thinks About Children* (1995, 2nd edn.) 107.
26 id., p. 108.
27 id.
28 id.
29 id., p. 107.
30 Home Office, *Crime, Justice and Protecting the Public* (1990) para. 8.4.
31 id.
32 Penal Affairs Consortium, *The Doctrine of 'Doli Incapax'* (1995) 5.
33 Crown Prosecution Service, *Code for Crown Prosecutors* (1999) para. 6.8.

preferred route in murder cases, with the adversarial approach requiring the police to 'construct a case for the prosecution'; the inevitable outcome being that children as young as ten accused of murder are 'faced with the full might of the state against them'.[34] The imperative is not to establish the complexities of how they came to commit a serious crime at such a young age but to secure a conviction.

In 1968 Mary Bell, aged eleven, and her friend Norma Bell, aged thirteen, were prosecuted for the murders of two younger children. Their trial was held at Newcastle Assizes and Mary Bell was convicted of the murders. Commenting on the case, Gitta Sereny notes that a 'jury trial for murder is a fearful matter, deliberately grave in its procedures and awesome in its effect'.[35] Neither girl had been prepared for 'the solemnity of the courts', for 'two mutually incomprehensible languages' (of childhood and of the court), nor for the media, the crowds and the public interest in the case:

> The whole problem of trying children in adult courts is that the entire judicial process is solely based on evidence. Motivation is marginal … there is no in-built mechanism which requires knowledge about and from a child … no automatic investigation into the family background and circumstances of the child … no sense that children are, in fact, any different from adults in their understanding of the proceedings and function of the court, and in their understanding of right and wrong. In fact, they are tried as small adults.[36]

Such decontextualization confers meaning without understanding. It amounts to an institutional process of definition, ascription, and categorization bereft of personal histories, familial complexities, and social significance. As Ashford notes, since the trial and conviction of Mary Bell, there have been serious concerns raised about the physical and psychological intimidation of the Crown Court in the prosecution of young children, about the presence of the public and the media, about the inability of children to understand or participate in the proceedings and about the lack of psychological intervention between being charged and the case coming to trial. These concerns have been heightened by a 'worrying trend throughout [the] legal system for the law to impose adult standards of understanding and responsibility on children, both in terms of culpability and in terms of defences'.[37] As Bandalli observes, it is an 'inappropriate trend' to use the criminal law 'to address social problems' regarding young children, for 'right, wrong and serious wrong are complex issues …'.[38]

At the heart of the debate over the age of criminal responsibility is its relationship to moral judgement, competence and participation. Ashford

34 M. Ashford, 'The Trial Process in England and Wales' in *Children Who Kill*, ed. P. Cavadino (1996) 68.
35 G. Sereny, *Cries Unheard* (1997) 31–2.
36 id., p. 71.
37 Ashford, op. cit., n. 34, p. 70.
38 Bandalli, op. cit., n. 24, p. 121.

argues that 'children aged 10 and 11 accused of crimes … are not able to comprehend the complexity of the investigation and trial process'.[39] Declaring 'grave doubts concerning a child's ability to meaningfully participate in their own defence' he concludes that '[w]ithout an understanding of the criminal justice process, the right to a fair trial, as enshrined in the European Convention on Human Rights, cannot be preserved'.[40]

Despite such concerns, Jon Venables and Robert Thompson, both eleven years old, were tried for the murder of two-year-old James Bulger at Preston Crown Court in November 1993. The blurred images of the three children, captured on CCTV tapes, had been beamed around the world. Having been abducted from a shopping centre in Bootle, Merseyside, James Bulger was taken on a long walk to a railway line where he was killed by the older boys in horrific circumstances. What followed was a stark demonstration of a deeply punitive and retributive constituency within British society. While such a prosecution was, and remains, inconceivable in most European states it was fiercely supported by a combination of popular opinion and political opportunism. Hundreds of people bayed for blood outside the South Sefton Magistrates' Court as the boys arrived in prison vans for preliminary hearings.

From the time of their arrest, through the nine months before their trial, Jon Venables and Robert Thompson were held in custody and denied 'treatment in case it prejudiced their pleas'.[41] As Allan Levy comments, '[t]he full adversarial process of a major criminal prosecution enveloped the two boys'; reflecting 'the unacceptable face of our criminal justice system concerning children'.[42] According to the Penal Affairs Consortium:

> … most foreign commentators were amazed that children should be dealt with by an adult-style Crown Court criminal trial. Many observers questioned whether such young children were able to comprehend the complexities of a lengthy criminal prosecution and trial; whether they should have appeared in the full glare of the media coverage of Crown Court proceedings; whether they understood all the issues and the language used, in order to give clear instructions as necessary; whether their decision not to give evidence arose from fear of speaking in such a public forum; and whether it was right to lift reporting restrictions after conviction …[43]

However, on the 24 November 1993, the trial judge, as far distanced from the children in age as he was in social class, passed sentence framed by the phrase that the two boys had perpetrated 'an act of unparalleled evil and barbarity …'. Complex matters about the boys, their lives and experiences, about the roots of the killing, and the intricacies of social and structural

39 M. Ashford, 'Making Criminals Out of Children: Abolishing the Presumption of Doli Incapax' (1998) 16 *Criminal Justice* 16.
40 id.
41 Penal Affairs Consortium, op. cit., n. 32, p. 6.
42 A. Levy, *Guardian*, 20 November 1994.
43 Penal Affairs Consortium, op. cit., n. 32, p. 6.

influences were drowned in an outpouring of adult condemnation. The press lost no time in presenting full-page photographs of the now-named folk devils as 'Freaks of Nature'.[44] Another heading proclaimed 'How Do You Feel Now, You Little Bastards?'.[45] These pathologizing responses explicitly contrasted Robert Thompson and Jon Venables with the contemporary social construction of childhood as a period of vulnerability and innocence. While their grave actions were represented as aberrant, media and political commentaries also proclaimed them as evidence of a shift in the nature of childhood characterized by loss of innocence, earlier maturation, increased violence, and antisocial behaviour. As James and Jenks note, 'the loss of childhood itself seemed immanent'.[46]

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> Acts are not, they *become*. So also with crime. Crime does not exist. Crime is created. First there are acts. Then follows a long process of giving meaning to those acts.[47]

Nils Christie's proposition is central to understanding James Bulger's death and its aftermath. Except in the detail of 'who did what', and in what sequence, the acts of abduction and killing are not contested; they happened. What followed, however, was the 'long process of giving meaning to those acts'. The 'crimes' became adult creations of children's behaviour.

The reconstitution of acts operates at a range of levels: social, institutional, and societal. In this case, within the community, the sheer abhorrence towards the abduction and killing provoked outrage and public demonstrations for the severest retribution. At the institutional level, the police investigation and prosecution for murder were based on the assumption that there was an intention to kill or cause serious harm. The murder convictions of Jon Venables and Robert Thompson demonstrate the acceptance by the court that both children knew what they did was seriously wrong.

At a societal level something else happened as media and political debate gathered momentum around the case. The murder by children of James Bulger was identified as the iceberg's tip of contemporary child violence. 'Moral panics', first conceptualized by Jock Young[48] and Stan Cohen[49] in the early 1970s, have substance when certain acts are defined, portrayed, and

44 *Daily Mirror*, 25 November 1993.
45 *Daily Star*, 25 November 1993.
46 A. James and C. Jenks, 'Public Perceptions of Childhood Criminality' (1996) 47 *Brit. J. of Sociology* 325.
47 N. Christie, 'Between civility and state' in *The New European Criminology: Crime and Social Order in Europe*, eds. V. Ruggiero, N. South, and I. Taylor (1998) 121.
48 J. Young, 'The role of the police as amplifiers of deviance, negotiators of drug control as seen in Notting Hill' in *Images of Deviance*, ed. S. Cohen (1971).
49 S. Cohen, *Folk Devils and Moral Panics: The Creation of Mods and Rockers* (1972).

accepted as posing threats to the social order. They represent real challenges to 'something held sacred by or fundamental to … society', thus destabilizing the 'social order itself or some idealized conception of some part of it'.[50]

Reflecting on the conceptual ubiquity of 'moral panic', while establishing its theoretical relevance, Goode and Ben-Yehuda sequentially map its progress as it generates 'heightened emotion, fear, dread, anxiety, hostility and a strong feeling of righteousness'. Such responses are particularly sharp when the perpetrators, the 'enemy within', are represented as 'young and [therefore] morally weak … dabbling in evil …'. So 'problematic to others' and so 'wounding to the substance of the body social' is the evil illustrated and amplified as being, it 'represent[s] a crisis for that society'. What is created is a rush to judgement, a clamour for punishment. As Hay states, 'the moral panic thus becomes lived and begins to have substantive effects'.[51] Typically, this includes a concerted, hostile, and disproportionate reaction from the authorities; 'tougher or renewed rules, more intense public hostility and condemnation, more laws, longer sentences, more police, more arrests, and more prison cells … a crack-down on offenders'.[52]

The impact, amplification, and lasting significance of the James Bulger case is well illustrated by the force of the subsequent media commentary. His killing was reported as 'simply the worst possible example of amoral childish viciousness; horrible precisely to the degree that it was childlike – random, aimless, and without conscience'.[53] Throughout the United Kingdom, announced a *Sunday Times* editorial, parents 'view[ed] their sons in a new and disturbing light' wondering 'if the Mark of the Beast might not also be imprinted on their offspring'.[54] Walter Ellis witnessed children at play 'with a frisson of apprehension and fear that was not there before … we can never know which of them has the Satan bug inside him'.[55]

Novelist Beryl Bainbridge, returning to her native Liverpool, saw children whose 'countenance was so devoid of innocence that I was frightened … old beyond their years and undeniably corrupt. Women passing by said there's more of them than there used to be, they should have been drowned at birth'.[56] For the columnist Lynda Lee Potter, a 'nightmarish world' beckoned 'where children go rarely to school, roam the streets 'til midnight, know how to roll a joint, gloat over sick videos and think fun is tying a firework to the tail of a cat and setting it alight … a world where children are

50 K. Thompson, *Moral Panics*, (1998) 8.
51 C. Hay, 'Mobilization Through Interpellation: James Bulger, Juvenile Crime and the Construction of a Moral Panic' (1995) 4 *Social & Legal Studies* 198.
52 E. Goode and N. Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (1994) 31.
53 J. Daley, *Times*, 25 November 1993.
54 *Sunday Times*, 28 November 1993.
55 W. Ellis, id.
56 *Daily Mail*, 20 February 1993.

growing up virtually as savages'.[57] A year later, Gerald Warner used the case as central to his proposition that 'civilisation' was now 'menaced by adolescents from hell'; a 'nation of vipers' had been bred 'whose prevailing ethos is anti-social'.[58]

What emerged and consolidated in the press was a 'brutal and hysterical … vilification of Venables and Thompson' which 'spilled over into more generalized assertions about childhood … unrelentingly retributivist and punitive'. The boys 'were judged to be entirely morally culpable' with 'any complicating social mitigation … serv[ing] only to blur the clear lines of moral responsibility'.[59] An exceptional case led inexorably 'to a prolonged and generalized condemnation of children, families and communities'.[60] The debate was not confined to the media. It dovetailed into an ongoing battle, between new right commentators[61] and the self-styled 'ethical socialists',[62] for the moral high ground on childhood and parenting. For Melanie Phillips, the 'catastrophic' consequences of failure in parental relationships ranged 'from depression and eating disorders, through to educational underachievement, truancy and the flight from what is sometimes laughingly called home, into lives of homelessness, crime, drug abuse, failed relationships, suicide and despair'.[63]

The 'crisis of the family' became defined as a 'crisis in authority' with 'illegitimacy' and 'family breakdown' presented as indicators of a more universal moral collapse.[64] Britain's streets were portrayed as the terrain of 'drug users, runaways, joyriders and persistent young offenders', schools as enduring 'the excesses of bullies, truants and disruptive pupils' and functional families 'replaced by lone mothers, characterised by absent fathers'; the nation's social and moral fabric in tatters.[65] The post-1960s era was characterized as one of nihilism and hedonism in which selfish individualism had generated the proliferation of 'dismembered' or 'dysfunctional' families alongside an acceptance of 'barbarism' and 'lawlessness' among children and young people. James Bulger's death 'came to signify something more than an isolated tragic event … Demons had invaded the innocents'.[66]

57 *Daily Mail*, 26 November 1993.
58 *Sunday Times*, 3 July 1994.
59 B. Franklin and J. Petley, 'Killing the Age of Innocence: Newspaper Reporting and the Death of James Bulger' in *Thatcher's Children? Politics, Childhood and Society in the 1980s and 1990s*, eds. J. Pilcher and S. Wagg (1996) 138–42.
60 P. Scraton, 'Preface' in Scraton, op. cit., n. 8, p. vii.
61 See, for example, C. Murray, *The Emerging British Underclass* (1990).
62 A.H. Halsey, 'Foreword' in *Families Without Fatherhood*, N. Dennis and G. Erdos (1992).
63 M. Phillips, *Observer*, 13 June 1993.
64 Dennis and Erdos, op. cit., n. 62; N. Dennis, *Rising Crime and the Dismembered Family* (1993).
65 Scraton, op. cit., n. 8, p. viii.
66 J. Muncie, *Youth and Crime: An Introduction* (1999) 7. See, also, B. Goldson, 'Children in Trouble: State Responses to Juvenile Crime' in Scraton, id., pp. 124-45.

At the very moment when renewed moral panic over lawlessness required considered political judgement and sound leadership, the then Prime Minister, John Major, called for a 'crusade against crime', a 'change from being forgiving of crime to being considerate to the victim'.[67] The Home Secretary, Kenneth Clarke, attacked 'persistent, nasty, little juvenile offenders' bereft of either 'values' or 'purpose'. He dismissed social workers as mouthing 'political rhetoric … about why children in their care are so delinquent'.[68] Contributing to rare political consensus, the Shadow Health Minister, David Blunkett, accused professionals of a 'paternalistic and well-meaning indulgence' which accepted 'the sub-culture of thuggery, noise, nuisance and anti-social behaviour often linked to drug abuse'. Tony Blair, then Shadow Home Secretary, considered that descent into 'moral chaos' could be avoided only through teaching the 'value of what is right and what is wrong'. A 'moral vacuum' required the challenge of policies 'tough on crime and tough on the causes of crime'.[69]

Newly appointed as Home Secretary, Michael Howard reiterated a previously censored statement made by a junior colleague: 'we are sick and tired of these young hooligans … we must take the thugs off the streets'.[70] Picking up the punishment baton from his predecessor, he announced secure accommodation for twelve to fourteen-year-olds with the introduction of United States military-style 'boot camps'. According to the *Sunday Times*, the new Shadow Home Secretary, Jack Straw, was 'not to be outdone', announcing Labour 'proposals for more secure accommodation for young offenders … even talk[ing] of curfews for 10-year-olds'.[71] The moral panic, derived within a punitive ideology, now bore tangible political outcomes:

> Within months, James Bulger's death had become a catalyst for the consolidation of an authoritarian shift in youth justice … replicated throughout all institutional responses to children and young people. It carried media approval and popular (adult) consent, reflecting the well-established Thatcher agenda of the 1980s.[72]

While a rare and unpredictable killing became central to the moral panic around 'dangerous children' and 'lawless youth', a significant row unfolded behind the scenes concerning the government's complacency and denial over children's rights. As a signatory to the UN Convention on the Rights of the Child, in 1995 the United Kingdom government presented its initial report on progress and implementation of the Convention. In response, the UN

67 *Mail On Sunday*, 21 February 1993.
68 *The World This Weekend*, BBC Radio 4, 21 February 1993.
69 *Guardian*, 20 February 1993.
70 *Sun*, 7 October 1993.
71 *Sunday Times*, 18 August 1996.
72 P. Scraton, 'Whose "Childhood"? What "Crisis"?' in Scraton, op. cit., n. 8, p. 170.

Committee raised fifteen major issues of concern. The Committee noted 'insufficiency of measures' for ensuring implementation, particularly regarding the 'best interests' of the child.[73] Of particular concern were the 'low age of criminal responsibility' and 'national legislation relating to the administration of juvenile justice'.[74] Further, the Committee was concerned that the 'ethos and guidelines for the administration and establishment of Secure Training Centres … appears to lay emphasis on imprisonment and punishment'.[75]

The government's response, fired by Euro-sceptic debates over state sovereignty and complacent about its denial of rights to children and young people, was predictable. Conflating nationalism, patriotism, and xenophobia, the government expressed 'considerable anger at the explicit criticism of the poor record of the United Kingdom in implementing the Convention … given the poor record of respecting children which pertains in so many other countries in the world'.[76] The Committee's Vice-Chair was swift to administer a sharp rebuke: '… of more than 30 governments that have now appeared before the Committee, none has reacted with such hostility …'.[77]

Following a landslide General Election success in 1997, Jack Straw, Michael Howard's successor as Home Secretary, announced 'root and branch' reform of youth justice. He condemned the 'excuse culture … within the youth justice system' which 'excuses itself for its inefficiency and too often excuses young offenders … allowing them to go on wasting their own, and wrecking other people's lives'.[78] Straw's announcement came as no surprise. In November 1996 the Audit Commission had heavily criticized the youth justice system as expensive, inefficient, inconsistent, and ineffective.[79] Its controller, Andrew Foster, called for a 'systematic overhaul' of youth justice to end 'the cycle of antisocial behaviour that has become a day-to-day activity'.[80]

The Audit Commission suggested preventive measures directed towards:

> inadequate parenting; aggressive and hyperactive behaviour in early childhood; truancy and exclusion from school; peer group pressure … ; unstable living conditions; lack of training and employment; drug and alcohol abuse.[81]

73 UN Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland*, CRC/C/14, Add. 34 (15 February 1995) para. 11.
74 id., para. 17.
75 id., para. 18.
76 Children's Rights Office, *Making the Convention Work for Children* (1995) 8.
77 id.
78 *Guardian*, 21 November 1996.
79 Audit Commission, *Misspent Youth: Young People and Crime* (1996).
80 *Guardian*, 21 November 1996.
81 Audit Commission, op. cit., n. 79, p. 3.

With the exception of drug use, the list reflected earlier studies of youth crime.[82] The emphasis on broader constructions of 'antisocial behaviour' ran parallel to the Labour Party's previous discussion document on youth justice reform.[83] In September 1997 the Home Office published a consultation document in anticipation of the Crime and Disorder Bill.[84] This detailed the 'conduct' which would trigger an application for a 'community safety order', subsequently termed an antisocial behaviour order, as that which:

> causes harassment to a community; amounts to antisocial criminal conduct, or is otherwise antisocial; disrupts the peaceful and quiet enjoyment of a neighbourhood by others; intimidates a community or section of it.[85]

While not restricted to young people, the consultation document made it clear that this order would be available against any person over the age of criminal responsibility.

Within a year the 1998 Crime and Disorder Act was passed. Apart from its overhaul of youth justice, the Act also introduced parenting orders, child safety orders, local child curfew schemes and detention and training orders. It abolished the presumption of *doli incapax* and allowed courts to draw inferences from the failure of an accused child to give evidence or answer questions at trial. The Act was the linchpin of a package considered by government as delivering a new morality to underpin a more disciplined and responsible society. It was a discourse of social inclusion, equal opportunities, and community stake-holding well-illustrated in the United Kingdom government's 1999 report to the UN Committee on the Rights of the Child.[86]

In this report, child safety orders, directed at children under ten, are represented as 'early intervention measure[s] designed to prevent children being drawn into crime', thus providing 'an early opportunity to intervene positively in an appropriate and proportionate way to protect the welfare of the child'.[87] Child curfews tackle 'unsupervised children gathered in public places at night', judged 'too young to be out alone', who 'can cause alarm or misery to local communities and encourage one another into antisocial and criminal habits'.[88] Parenting orders give 'help and support … in addressing a child's offending behaviour' thus restoring 'a *proper*

82 For an overview of these studies, see J. Graham and B. Bowling, *Young People and Crime* (1995).
83 Labour Party Consultation Paper, *Tackling Youth Crime: Reforming Youth Justice* (1996).
84 Local Government Information Unit, *Community Safety: Consultation in Advance of the Crime and Disorder Bill: Community Safety Order* (1997).
85 id., p. 2.
86 United Kingdom, *Convention on the Rights of the Child: Second Report to the UN Committee on the Rights of the Child by the United Kingdom* (1999).
87 id., p. 181.
88 id., p. 182.

relationship between the child and its parent or guardian'.[89] Counselling or guidance sessions instruct parents 'how to set and enforce acceptable standards and behaviour'.[90] These measures are formulated around the political rhetoric of 'crime prevention', 'harm reduction', and 'child protection'.

Abolishing the presumption of *doli incapax*, however, removed a significant protection for children aged ten to fourteen. The Home Secretary's commitment to abolition was based on securing convictions of young offenders, 'who are ruining the lives of many communities' and justified by the claim that children over ten 'were plainly capable of differentiating between right and wrong'.[91] As Bandalli notes, this misrepresents the principle underpinning the presumption of *doli incapax*. Quoting from recent case law, she concludes that the presumption 'is not dependent on an ability to tell right from wrong, but on knowing the action to be ''seriously wrong'' in the sense of not merely naughty or mischievous'.[92]

Yet, the government represents the prosecution of young children within a self-evident, rational logic of 'opportunity':

> In today's sophisticated society, it is not unjust or unreasonable to assume that a child aged 10 or older can understand the difference between serious wrong and simple naughtiness, and is therefore able to respond to intervention designed to tackle offending behaviour. If … a child is lacking in this most basic moral understanding, it is all the more imperative that appropriate intervention and rehabilitation should begin as soon as possible. Similarly, it is common sense to expect a child who has an innocent explanation for his or her conduct to provide that explanation, rather than to deprive him or her of that responsibility. Children will continue to be protected by the court's discretion not to draw inferences from silence if it considers that the child's mental or physical state makes this undesirable.[93]

This extraordinary paragraph polarizes 'serious wrong' and 'simple naughtiness' without acknowledging the difficult terrain that lies between. The continuum of seriousness in offending behaviour involves the complexities of relative perception, experience, understanding, and knowledge as well as premeditation, intent, and spontaneity. Reducing these complexities, difficult to disentangle at any age, to simple opposites in the minds of young children amounts to incredible naivety or purposeful misrepresentation.

The government underlines a commitment to the courts as the site most appropriate to intervene and rehabilitate where there exists a deficit in 'basic moral understanding'. Seemingly not courts of judgement and punishment but of discretion and rehabilitation, they become the protectors of the

89 id., p. 181.
90 id.
91 Quoted in J. Muncie, 'Institutionalized intolerance: youth justice and the 1998 Crime and Disorder Act' (1999) 19 *Critical Social Policy* 154.
92 Bandalli, op. cit., n. 24, p. 116.
93 United Kingdom, op. cit., n. 86, p. 180.

innocent and the guarantors of children's mental and/or physical state. The government stresses that the 'emphasis is firmly placed not on criminalising children, but on helping them to recognise and accept responsibility for their actions and enabling them to receive help to change their offending behaviour'.[94]

The 1998 Crime and Disorder Act, however, cannot be divorced from its context. Ashworth et al's:

> hope that the new government would take a more sober and realistic approach to criminal justice issues … one that concentrates on what might be really helpful in alleviating the impact of crime, that avoids posturing stances, and that takes care that the fundamental rights of citizens are not violated

was dashed by the new legislation.[95] Even those who argue that it is 'mistaken … to portray the Labour government as simply continuing the ''get tough'' policies of its predecessor', claiming a 'qualitative difference' between their civil orders and the Conservative emphasis on 'tough sentencing', recognize significant consistencies:

> Getting tough with disorderly and delinquent children and youths and their negligent and slack parents was a core theme in Conservative rhetoric. Labour seems to be trying, with some success, to prove itself even tougher … Whilst the Conservatives talked tough, it is Labour that introduced stringent measures such as child curfews, antisocial behaviour orders and parenting orders.[96]

The Crime and Disorder Act embodies a 'regulatory-disciplinary approach to crime prevention, combined with ''welfarist'' assistance to help people meet its standards', reaching 'much further and deeper into the social body than that pursued by the Conservatives'.[97] For Muncie, it is:

> an amalgam of 'get tough' authoritarian measures with elements of paternalism, pragmatism, communitarianism, responsibilization and remoralization … worked within and through a burgeoning new managerialism whose new depth and legal powers might be best described as 'coercive corporatism'.[98]

Allen expresses serious concern over the combination of net-widening, implicit in the targeting of antisocial behaviour and raised public expectations of tougher responses, with the 'coercive approach of zero-tolerance policing'. He concludes, with some irony, that the Act 'could end up promoting rather than tackling social exclusion'.[99] Where the Act is

94 id.

95 A. Ashworth, J. Gardner, R. Morgan, A.T.H. Smith, A. Von Hirsch, and M. Wasik, 'Neighbouring on the Oppressive: The Government's ''Anti-Social Behaviour Order'' Proposals' (1998) 16 *Criminal Justice* 7.

96 G. Johnston and K. Bottomley 'Introduction: Labour's Crime Policy in Context' (1998) 19(3/4) *Policy Studies* 177.

97 id., p. 178.

98 Muncie, op. cit., n. 91, p. 169.

99 R. Allen, 'Is What Works What Counts? The Role of Evidence-based Crime Reduction in Policy and Practice' (1999) 2 *Safer Society* 22.

most closely associated with the moral panic which consolidated post-Bulger is in Labour's insistence on moral renewal. The Labour government interprets the crimes of children as indicative of a 'breakdown of morality associated with a feckless underclass, dysfunctional families and a parenting deficit'; it 'persists with a vision that focuses on young people as the perpetrators, rather than the victims of crime'.[100] As Hendrick concludes, 'since the murder of Jamie Bulger . . . most commentators agree that public and legal attitudes towards children have hardened'.[101]

CHILDREN V. THE UNITED KINGDOM

1. *Howard's Way*

Following their conviction for murder, and being under eighteen, Jon Venables and Robert Thompson were sentenced to detention during Her Majesty's pleasure (HMp). It was a sentence 'in lieu thereof' a life sentence.[102] Establishing the length of time to be served, however, was a matter for the Home Secretary, guided by the recommendation of the trial judge and advised by the Lord Chief Justice. This procedure was an ambiguous mix of law, interpretation and Home Office policy developed over the previous decade. In 1983 it had been decided that the Home Secretary would seek advice from the judiciary in satisfying requirements of retribution and deterrence.[103] This process became known as fixing the 'tariff' or penal element within a sentence. Further, the Home Secretary would seek advice from the parole board as to whether the detainee continued to present a risk to the public. The first review of a life sentence would take place normally three years before the expiry of the tariff to enable informed risk assessment and preparation for release. Ultimately, responsibility for release remained at the Home Secretary's discretion.

The 1991 Criminal Justice Act judicialised the tariff-fixing process for assessing the tariff for adult *discretionary* life sentences. But it left assessment of adult *mandatory* life sentences with the Home Secretary. In July 1993, between the death of James Bulger and the trial, Michael Howard, then Home Secretary, reaffirmed previous policy regarding the tariff for adult mandatory life sentences and applied it to those sentenced to HMp detention.[104] He would decide on the tariff in consultation with the trial judge and the Lord Chief Justice, effectively placing the process outside the judicial frame of reference.

100 Muncie, op. cit., n. 91, p. 171.
101 H. Hendrick, 'Constructions and Reconstructions of British Childhood: An Interpretative Survey, 1800 to the Present' in Prout and James, op. cit., n. 1, p. 57.
102 Children and Young Persons Act (1933) s. 103.
103 L. Brittan, 49 *H.C. Debs*., cols. 505-7 (30 November 1983).
104 M. Howard, 229 *H.C. Debs*., cols. 861-4 (27 July 1993).

In sentencing the boys, the trial judge, Mr Justice Morland, told them that they would be 'securely detained for very, very many years until the Home Secretary is satisfied that you have matured and are fully rehabilitated and are no longer a danger to others'.[105] On the 29 November 1993 he submitted to the Home Secretary his assessment on the length of detention 'necessary to meet the needs of retribution and general deterrence for the offence'. While stating that 'very great care' should be taken before release, he also noted that the boys' backgrounds reflected 'great social and emotional deprivation' and regular exposure to 'abuse, drunkenness and violence'. For these 'appalling circumstances' to be challenged, considerable 'psycho-therapeutic, psychological, and educational investigation and assistance' would be necessary. Had they been adults, he would have recommended an eighteen-year tariff. Given the circumstances, he advised eight, entitling review at five. Reflecting on his closing remarks at the trial he concluded that eight years constituted 'very, very many years for a ten or eleven year old. They are now children. In eight years' time they will be young men'.[106]

The Lord Chief Justice considered the trial judge to be best placed to assess the boys and their crime and that 'a much lesser tariff should apply than in the case of an adult'.[107] His assessment of the minimum period for punishment and deterrence, however, was ten years, with review after seven. A significant feature of both assessments was that, should the boys be released after eight or ten years, they would not serve part of their sentence in an adult prison. These assessments reflected a well-founded concern that those imprisoned as children or young people, who experience a welfare-based and treatment-oriented regime in children's secure units, are not well served by the harsher and more punitive regimes of young offenders' institutions or adult prisons.[108] This tension is particularly marked when the crimes of the individuals concerned have widespread notoriety, an issue noted by the trial judge in advising that the boys should be protected from 'the very real risk of revenge attacks . . .'.[109]

The intense public pressure previously surrounding the trial and its immediate aftermath now refocused on the sentence. A petition, urging Michael Howard 'to take account of our belief that they should not be released in any circumstances and should be detained for life', was presented. It was signed by 278,300 people. 5,900 signed another petition

105 Mr Justice Morland, cited in *T.* v. *The United Kingdom* judgment, Strasbourg (16 December 1999) para. 19.

106 id.

107 *R.*v. *Secretary of State for the Home Department, Ex parte V. and Ex parte T.* Judgments, House of Lords (12 June 1997) 2.

108 See J. Kuper and J. Williamson, *Treated with Humanity and Respect? Conditions for Young People in Custody* (1993); Howard League, *Banged Up, Beaten Up, Cutting Up: Report of the Howard League Commission of Inquiry into Violence in Penal Institutions for Teenagers Under 18* (1995).

109 Morland, op. cit., n. 105.

demanding a twenty-five-year minimum sentence. The Bulger family received 4,400 letters supporting their campaign. Most controversial, however, were 22,638 items of correspondence sent directly to the Home Office. Of these, 21,281 were coupons published by the *Sun* newspaper and submitted by readers. The coupon read: 'Dear Home Secretary, I agree with Ralph and Denise Bulger that the boys who killed their son James should stay in jail for LIFE'.

In this climate Howard fixed the tariff at fifteen years, preventing review for twelve years. Both boys would be in adult prisons by the time initial assessments took place. Howard claimed that he had listened to the judges' advice and weighed this against the circumstances of the offence, legal representations, precedent, and 'public concern'. He admitted taking note of the petitions and correspondence, emphasizing the 'need to maintain public confidence in the system of criminal justice'.[110] A defining aspect for the Home Secretary was the 'exceptionally cruel and sadistic' nature of the crime, perpetrated against 'a very young and defenceless victim' and 'committed over a period of several hours'.[111] He argued that had the boys been adults, its seriousness would have warranted a minimum twenty-five years sentence. In Howard's estimation, given the age of the boys, fifteen years was an accurate, proportionate tariff.

Howard's decision drew immediate criticism. The campaigners felt it was too lenient. Others realized the implications of an executive decision which was essentially judicial. A *Guardian* editorial railed against the lack of separation of powers: 'The last person who should be involved in sentencing is a highly political politician … of all that breed Michael Howard, on his record, is the last to be called'.[112] Allan Levy QC, considered Howard to have persistently 'exploit[ed] his hard-line views about the police, prisons and punishment in a bid to bolster his party politically'. Sentencing, he argued, is a 'judicial process and not a political exercise'. The trial and sentencing of the boys represented, 'an unpalatable insight into outmoded thought, reform denied, and appearance of political calculation'.[113] Gitta Sereny was outraged by the tariff. For an eleven-year-old, fifteen years was the 'other side of the moon'; a tariff without 'hope' leading inevitably to 'a situation in which they cannot but be corrupted'.[114]

110 Goff, op. cit., n. 107.
111 Howard, op. cit., n. 105, para. 22.
112 *Guardian*, 8 February 1995.
113 A. Levy, 'The End of Childhood' *Guardian*, 29 November 1994.
114 *Guardian*, 8 February 1995.

On 7 November 1994 leave was granted to Jon Venables and Robert Thompson for a judicial review of the Home Secretary's decision. It was argued that the tariff was disproportionately long, ignoring the needs of rehabilitation emphasized in the trial judge's statement. On 2 May 1996, in the Divisional Court, Lord Justice Pill and Justice Newman concluded that an HMp sentence obliged the Home Secretary to review regularly the period of detention imposed on children and young people. They ruled that establishing 'an identified penal element' within an HMp sentence was unlawful, that neither punishment nor deterrence should inform the Home Secretary's decision in setting a release date. It was unacceptable to set any tariff for children who 'change beyond recognition during the running of the tariff period'.[115]

The Home Secretary appealed the Divisional Court ruling and on 30 July 1996 his appeal was dismissed. Again, the majority ruling centred on the contradiction in setting a tariff while maintaining the duty to keep the progress of young people under continual review. The Home Secretary then appealed to the House of Lords. By the time the appeal was heard, in June 1997, there was a new government and a new Home Secretary. In a majority ruling the Lords dismissed the appeal, allowing a cross-appeal by Jon Venables and Robert Thompson on the grounds of procedural unfairness. As in the Court of Appeal, the Lords' judgments centred on the principle of the welfare of children in custody, the judicial function of setting a tariff and the undue influence on the tariff decision of public opinion.

According to Lord Goff,[116] there was no statutory provision requiring a penal element or tariff. It was solely a policy decision and in a previous case it had been established that tariff-fixing 'begins to look much more a sentencing exercise …'.[117] Lord Goff considered that if the Home Secretary 'implements a penal element' it amounts to 'a sentencing function'. Lord Hope identified a 'serious conflict between the process of tariff-fixing' which the Home Secretary 'embarked upon in this case and his duty to keep the period of detention under review'. The 'risk' in such cases was 'replacing the duty of review with the blanket of rigidity'. It was a risk of unacceptable proportions given that it involved the development of two young children.

According to Lord Browne-Wilkinson, the policy applied by Howard, 'precludes any regard being had to how the child has progressed and matured during … detention until the tariff originally fixed has expired'. Thus, throughout the tariff period, appropriate 'weight to the circumstances

115 Goff, op. cit., n. 107.

116 The following quotes from Lords Goff, Browne-Wilkinson, Steyn, and Hope are found in op. cit., n. 107.

117 *R.*v. *Secretary of State for the Home Department, Ex parte Doody* (1994) 1 A.C. 57.

directly relevant to an assessment of the child's welfare' could not be given; the essential prerequisite of flexibility in dealing with the 'welfare of the child' had been denied. To fix a tariff covering, without review, a person's childhood infringed international treaty obligations. Failing to keep track of how a child matures while under sentence, not reviewing progress for the purpose of reintegration into society, would be grounds for establishing violations of the UN Convention on the Rights of the Child. Lord Hope was clear that a sentencing 'policy which ignores at any stage the child's development and progress while in custody as a factor relevant to his eventual release date is an unlawful policy'.

While the Lords' judgments focused primarily on the legitimacy of tariff-setting, Lord Hope stated that in this case the long tariff precluded review by the Parole Board until the applicants had 'ceased to be young persons and [had] been moved into prison conditions with adults'. The Home Secretary had provided no evidence that he recognized his duty 'to keep the progress and development of the children under review'. Consequently, the Home Secretary's tariff decision was procedurally unfair; informed by an improper application of his discretionary powers. He had failed to demonstrate an appropriate 'measure of detachment from the pressure of public opinion'. While Lord Steyn accepted that public confidence in the criminal justice system was important, there was no place for the excesses of public clamour and protest. As fixing the tariff was a 'classic judicial function', the Home Secretary should act 'with the same dispassionate sense of fairness as a sentencing judge'.

For Lord Goff, a 'desire for revenge', including the 'infliction of the severest punishment upon the perpetrators of the crime', while 'perhaps natural', tended to be 'whipped up and exploited by the media' thus 'degenerat[ing] into something less acceptable'. Paying heed to such 'public clamour' constituted an 'irrelevant consideration … render[ing] the exercise of his [the Home Secretary] discretion unlawful'. In a reference to the *Sun* coupons, Lord Steyn observed that the Home Secretary should have ignored the 'high voltage atmosphere of a newspaper campaign'. Howard had 'misdirected himself in giving weight to irrelevant considerations' which, having their intended impact, had 'influenced his decisions … to the detriment of Venables and Thompson'.

Lord Hope argued that as an 'orthodox judicial exercise' the tariff-fixing should have been confined to 'the circumstances of the offence and those of the offender and to what, having regard to the requirements of retribution and deterrence, is the appropriate minimum period to be spent in custody'. He concluded:

> Expressions of opinion [via petitions or a media-led campaign] however sincere and well-presented, are rarely based on a full appreciation of the facts of the case … they cannot be tested by cross-examination or by other forms of inquiry in which the prisoner for his interest can participate. Natural justice requires that they be dismissed as irrelevant to the judicial exercise …

As a consequence of the House of Lords judgments the new Home Secretary, Jack Straw, announced his intention to revise the policy for fixing and implementing the tariff for young offenders imprisoned during HMp. He reaffirmed his commitment to seeking advice from the trial judge and from the Lord Chief Justice in establishing appropriate 'punishment'. Combining that advice with representations 'on the prisoner's behalf' he would then 'set an initial tariff' giving the reasons for his decision. Each case would be monitored annually, focusing on 'the progress and development' of the prisoner. A comprehensive report would be compiled at the mid-point of the tariff and considered at ministerial level, informed by relevant legal representations.[118]

3. *The European Court of Human Rights*

With the Lords' judgment delivered, domestic remedies had been exhausted. Applications presented in May 1994 by Jon Venables and Robert Thompson to the European Commission were resumed. They alleged six violations of the European Convention on Human Rights (ECHR). On 6 March 1998 the Commission declared their applications admissible to the European Court of Human Rights (ECtHR). It found the United Kingdom government responsible for three violations of the ECHR in the trial and sentencing of the two boys. Article 6 had been breached because the public trial in an adult court was seriously 'intimidatory', preventing the boys from playing an effective part in the proceedings. This impaired establishment of the facts of the case and allocation of responsibility. Further, the Home Secretary was neither independent nor impartial in setting the tariff. This also violated Article 6 with regard to fixing sentence. Finally, Article 5.4 had been breached because the tariff-fixing policy denied the right to a periodic review of detention by a judicial body. While the remaining alleged violations were not accepted by the Commission, it concluded that 'the case raises complex issues of fact and law under the Convention, the determination of which should depend on the merits of the application as a whole'.[119]

Despite the immediate public outcry, a *Guardian* editorial stated that, 'No-one should be surprised by the Commission's ruling that the Home Secretary was wrong to intervene in the sentences …' as sentencing should be a 'judicial process, not a political exercise'.[120] What it did note, however, was the anomaly in rejecting the argument that a Crown Court trial of eleven-year-old children was inhuman and degrading while finding it unconstitutional because they were unable to participate effectively. It concluded:

118 J. Straw, 300 *H.C. Debs.*, cols. 421–3 (10 November 1997).
119 *Application No. 24724/94 by T.* and *Application No. 24888/94 by V. against the U.K.* (6 March 1996) 12.
120 *Guardian,* 16 March 1999.

> The trial did have a cathartic effect on a traumatised nation but few other nations would have allowed it. Should the interests of a nation outweigh the interests of offenders? That is a dangerous precept. Both children were severely traumatised. Strasbourg is ideally placed to balance the conflicting interests.

Even this lucidly expressed dilemma failed to sharply draw the issue. More appropriately, it should have been presented as the 'interests of the nation' set against the '*rights* of offenders'. If the denial of participation amounted to inhuman or degrading treatment it constituted a violation of rights, not interests.

On 16 December 1999 the ECtHR finally delivered parallel judgments on the two cases.[121] The overall decisions reflected those taken by the Commission. In terms of the boys' allegation that their cumulative experiences of the trial and its procedure amounted to inhuman or degrading treatment, the Court held, on a majority of twelve votes to five, that there had been no violation of Article 3. The boys specified the age of criminal responsibility, the length and accusatorial nature of the trial, adult proceedings in a public court, overwhelming media and public presence, a jury of twelve adults, attacks on the prison van, and the disclosure of identity together amounted to violation. While the Court noted that Article 3 'enshrines the most fundamental values of democratic society' the alleged ill-treatment 'must attain a minimal level of severity'.[122] The lack of an established common age of criminal responsibility throughout Europe denied grounds for a breach of Article 3. While the Court considered that juvenile defendants' privacy should be protected, and the European Convention affirmed the possibility of media and public exclusion, this could not be 'determinative of … whether the trial in public amounted to ill-treatment attaining the minimal level of severity necessary …'.[123] Further, there was no intention by the state to humiliate or cause suffering.

The boys alleged a breach of Article 6.1, the right to a fair trial. In Robert Thompson's case, a diagnosis of post-traumatic stress disorder together with an enforced absence of therapeutic work between the offence and the trial were claimed to have restricted his ability to instruct his lawyers. The psychiatric opinion concerning Jon Venables stated that at the time of the trial he had the emotional maturity of an eight or nine-year-old, did not understand the proceedings and was too traumatized and intimidated to effectively participate. The Commission had recognized the issues of mass publicity, severe intimidation, and the denial of effective participation. The Court agreed.[124] The special measures adopted at the trial did not eradicate

121 *T.* v. *The United Kingdom, (Application No. 24724/94); V.* v. *The United Kingdom (Application No. 24888/94)*, European Court of Human Rights, Strasbourg, (16 December 1999). As parallel judgments, references in text are to the former.

122 id., paras. 67–8.

123 id., para. 75.

124 id., para. 82.

its 'formality and ritual' which 'must at times have seemed incomprehensible and intimidatory'.[125] In raising the dock, the boys had been placed on public view. Whatever the skills of their lawyers, it was 'highly unlikely' that the defendants 'would have felt sufficiently uninhibited … to have consulted with them during the trial'.[126] Given their 'insecurity' and 'disturbed emotional state' they would have been incapable of co-operating in the preparation of their defence. Their inability to 'participate effectively' had denied them a fair hearing and on a majority of sixteen to one, the Court held that Article 6.1 had been violated.[127]

The boys argued that HMp detention 'was severely disproportionate' and contained an element of retribution thus violating Article 3.[128] While recognizing that the Home Secretary's tariff of fifteen years had been ruled against in the House of Lords, the Court noted that no new tariff had been set. Effectively the tariff-fixing remained a political or executive decision. There was continuing uncertainty concerning the boys' future and a real risk that the sentences would be completed in adult prison. The Court referenced international instruments which state that the imprisonment of children should be limited to a minimum period and used as a measure of last resort. Yet, on a close majority of ten votes to seven, it did not consider that the punitive element in the tariff amounted to inhuman or degrading treatment.

The lawfulness of their detention was challenged on two grounds. First, the boys alleged a breach of Article 5.1 on the basis that HMp detention was an arbitrary imposition on young offenders irrespective of personal circumstances or needs. It disregarded minimum periods of detention and the well-being of the child. In line with the Commission, the Court unanimously upheld the United Kingdom government's submission that HMp was neither arbitrary nor unlawful as detention comprised of punishment, rehabilitation, and protection of the community.[129] Second, however, was the allegation that in setting the tariff the Home Secretary, rather than an appropriate tribunal, performed a 'sentencing exercise' thus violating Article 6.1.[130] The Court agreed with the domestic rulings, stating that 'in contrast to the mandatory life sentence imposed on adults convicted of murder which constitutes punishment for life … HMp is open-ended'.[131] Tariff-fixing amounted to a sentencing exercise and, as a politician, the Home Secretary did not constitute a court or tribunal independent of the executive. As a 'fair hearing by an independent and impartial tribunal' had not occurred, the

125 id., para. 86.
126 id., para. 88.
127 id., para. 89.
128 id., para. 92.
129 id., para. 104.
130 id., para. 106.
131 id., para. 109.

Court held unanimously that Article 6.1 had been violated. Further, since their conviction, the boys had been denied the opportunity to have the continued lawfulness of their detention reviewed by a judicial body. The court held unanimously that this amounted to a violation of Article 5.4.

Given the domestic judgments in the case, the ECtHR's rulings were anticipated. While the allegations of inhuman or degrading treatment were not upheld, five judges specified significant issues which together amounted to 'a substantial level of mental and physical suffering': treating ten-year-olds as criminally responsible; prosecuting eleven-year-olds in an adult court; handing down indeterminate sentences.[132] Their opinion was severe:

> bringing the whole weight of the adult processes to bear on children … is a relic of times where the effect of the trial process and sentencing on a child's physical and psychological condition and development … was scarcely considered, if at all.

It was a prosecution brought for 'retribution, rather than humiliation' but vengeance, particularly against children, 'is not a form of justice … and should be excluded'.[133]

It was an instructive paradox that, while the children 'were deemed to have sufficient discrimination to engage their criminal responsibility', they had been provided with a 'play area for … use during adjournments'. The adult court, length of proceedings, and formality amounted to an 'experience' for 'children of this age in an already disturbed emotional state' that 'must have been unbearable'.[134] Medical evidence demonstrated that the trial, followed by the lifting of restrictions on publishing their identities, produced 'a lasting harmful effect … and a high level of suffering'.[135]

The dissenting judges noted that Jon Venables cried throughout the trial. It 'caused suffering and humiliation … at a level which went beyond the needs of ''proceedings'' and inquiry to determine the circumstances of the acts committed' thus exceeding 'the minimum level of inhuman and degrading treatment'. This was exacerbated by an indefinite sentence, the 'uncertainty and anxiety' for children 'inevitably add[ing] another element of suffering'. This represented a denial of their status as children and, as such, 'must be qualified as inhuman'.[136]

In acknowledging the ECtHR judgments the Home Secretary, Jack Straw, noted violations by the United Kingdom of the European Convention 'relating to the trial process, to the way in which the tariff linked to their sentence was set, and the failure to subsequently review the tariff'.[137] Michael Howard was appalled that the Convention could be 'applied to cases

132 id., p. 33.
133 id.
134 id., p. 34.
135 id., p. 35.
136 id.
137 J. Straw, 340 *H.C. Debs.*, col. 398 (6 December 1999).

like this …'.[138] Bristling with indignation over the 'interference' of the ECtHR in domestic matters, editorial writers warmed to Howard's theme. The *Liverpool Echo* claimed that the Court's intervention would be:

> bitterly resented by those who feel we need no lessons from Europe on how to operate a just legal system in a democracy … this European Court has no obvious claim to lecture us on how to behave.[139]

The Sun was as typically outraged as it was ill-informed:

> Who gave a bunch of European lawyers, from countries with much less satisfactory and mature legal systems than ours, the right to dictate how British courts and elected British politicians should deal with child murderers?[140]

According to the *Daily Mail*, the ruling amounted to 'an outside court interfering in long-standing judicial and political procedures which have been democratically established and accepted by the British people'.[141] Writing in the *Daily Telegraph*, Minnet Marrin opined, 'There is something rather monstrous … about a bunch of foreigners telling us what is right. And what a gallimaufry of foreigners they are too …'.[142]

Undeterred by the logic and detail of the rulings, the press continued to defend the part played by public opinion in influencing the legal process. 'Surely', argued the *Daily Mail*, 'it is the job of democratic politicians to take account of public feeling …'.[143] While acknowledging that 'Public outrage may be unattractive', the *Daily Telegraph* claimed that:

> revulsion from extraordinarily wicked crimes is still entitled to expression in sentencing … Jack Straw is better placed to judge that entirely proper outrage than a gaggle of lawyers in Strasbourg.[144]

That the European judgments were consistent with those in the British courts seemed an insignificant detail to editorial writers. As with much of the parliamentary response, xenophobia was an easier option than handling the complexities of the injustices exposed by the judgments and dissenting opinions.

4. *Establishing a rights-based agenda*

In March 2000, amid press speculation that he was about to announce the early release of Robert Thompson and Jon Venables, the Home Secretary stated that the decision on fixing a minimum tariff to be served would be made by the Lord Chief Justice. His announcement, in keeping with the

138 id., col. 403.
139 *Liverpool Echo*, 17 December 1999.
140 *Sun*, 17 December 1999.
141 *Daily Mail*, Editorial, 17 December 1999.
142 *Daily Telegraph*, 17 December 1999.
143 *Daily Mail*, op. cit., n. 141.
144 *Daily Telegraph*, op. cit., n. 142.

ECtHR ruling, returned the responsibility of tariff-fixing to the judicial process. Given the ruling he was 'bound to bring forward legislation, which will be in the Criminal Justice and Court Services Bill, to provide for tariffs to be set by the trial judge in open court' ensuring 'that the views of victims and their relatives are better taken into account'.[145] He noted that this change in policy would bring approximately 250 cases under review as well as impacting on pending cases.

Jack Straw stated that because the ruling concerned 'both the law on sentencing and court practice and procedures' it had to be 'dealt with through a mixture of legal and administrative changes'. He had consulted with the Lord Chief Justice who issued a practice direction to judges on the trial of children in the Crown Court. While reaffirming a commitment to the use of the Crown Court – 'if justice is not open, it cannot be seen to be fair' – several changes were directed: restrictions on public attendance and the press; better seating arrangements on the same level; 'positive steps to ensure a juvenile defendant understands court procedure'.[146] The Lord Chief Justice's direction appeared to take into consideration age, maturity, intellectual, and emotional development in the prosecution of children, confirming that the trial 'should not itself expose the defendant to avoidable intimidation or distress'.[147]

Yet, given the strength and consistency of the rulings, serious doubts remain as to whether the proposed changes address the issues raised by the case. The proposed modification of language and offering of more detailed explanations to enable children's understanding do little to enable effective participation in the intimidatory environment of a public trial in an adult court. While the submission that Jon Venables and Robert Thompson had been subjected to inhuman and degrading treatment was not upheld by the ECtHR, the dissenting judges were persuaded that the prosecution of children in an adult court caused substantial mental and physical suffering. The ECtHR rulings and the fierce opinion of the dissenting judges were to be expected given the criticisms levelled against the United Kingdom government by the UN Committee in 1995.

The United Kingdom government's 1999 response to those criticisms claims that the extensive measures directed towards children and young people through the 1998 Crime and Disorder Act 'will be effective in further implementing the UN Convention on the Rights of the Child'.[148] In sharp contrast, the Howard League argues that the government has 'failed to maintain', and 'in some cases has positively undermined', important protections within its much-proclaimed reform of juvenile justice.[149] With

145 J. Straw, *H.C. Debs*., col. 22 (13 March 2000).
146 id., col. 21.
147 *Guardian*, 17 February 2000.
148 UK Government, op. cit., n. 86, para. 24.
149 Howard League for Penal Reform, *Protecting the Rights of Children: Briefing Paper* (1999) 3.

'basic protections' removed 'from those children who have committed more serious offences … the thrust of the changes negates the immaturity of these young people and treats them as if they were adults' thus denying 'the fundamental spirit and purpose of the UN Convention on the Rights of the Child'.[150] As Fionda concludes, the Act's reforms represent a 'melting pot of principles and ideologies' mixing 'punishment and welfare approaches'; perpetuating rather than resolving the confusion over these incompatible frameworks for intervention.[151]

The UN Convention, and other international instruments, are clearly based on a 'welfare approach' underpinned by three core principles: recognition that children's status is different from adults; prioritization of children's welfare; participation of children in decisions affecting their lives. These principles have specific implications in the administration of criminal justice for children. The UN Convention defines a child as 'every human being below the age of eighteen years'. National legislation confers on young people responsibilities or activities associated with 'adult' status (for example, marriage, leaving school, consent to sexual relationships). In England and Wales, these are generally applied to sixteen-eighteen year olds. Yet, ten-year-old children are judged responsible for criminal behaviour. Their actions are interpreted as underpinned by the understanding and intentions of an adult well before the age at which they are considered capable of abstract and ethical thinking, moral reasoning, or accepting social responsibilities.

While none of the international instruments suggest what might constitute an acceptable 'age of criminal responsibility', the Beijing Rules refer to 'the facts of emotional, mental and intellectual maturity'. The important consideration is 'whether a child, by virtue of his or her individual discernment and understanding, can be held responsible for essentially anti-social behaviour'. In this, 'the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities' are closely related.[152] However, despite the UN Committee recommendation that the United Kingdom seriously consider raising the age of criminal responsibility,[153] the government has reaffirmed its commitment to ten as 'an appropriate level',[154] arguing: 'if children aged 10 or older start to behave in a criminal or anti-social way … we do them no favours to overlook this behaviour'.[155] In a statement

150 id., p. 15.
151 J. Fionda, 'New Labour, Old Hat: Youth Justice and the Crime and Disorder Act 1998' (1999) *Crim. Law Rev.* 46.
152 *UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*, adopted by General Assembly resolution 40/33, (29 November 1985) rule 17, commentary.
153 op. cit., n. 73, para. 36.
154 op. cit., n. 86, p. 180.
155 id.

which typically represents punitive responses as welfare interventions, the government proposes:

> It is *in the interests of children and young people* themselves *to recognise and accept responsibility*, and *to receive assistance in tackling criminal behaviour*.[156]

Present legislation breaches the requirement that 'laws, procedures, authorities and institutions *specifically applicable to children'* be established,[157] since a child aged ten or over accused of murder or manslaughter will be tried publicly in an adult court. Fionda notes that there has been a growing tendency to assume that children mature earlier, challenging their need for protection while underestimating 'the incapacities of childhood'.[158] As the trial of Jon Venables and Robert Thompson illustrates, even alterations to the courtroom, aimed at reducing formality and making the environment supposedly 'child-friendly', have little positive impact on the intimidating atmosphere of a Crown Court, a child's understanding of procedures or capacity to give informed instructions to legal representatives. The decision, embodied in the 1998 Crime and Disorder Act, to allow courts to draw inferences from the failure of an accused child to give evidence or not answer questions at trial challenges their rights 'not to be compelled to give testimony or to confess guilt'[159] and to 'be presumed innocent until proven guilty according to law'.[160] In establishing the principle that procedures, at all levels, should be appropriate to the status of the child, international instruments sharply challenge the adversarial, public, and revelatory form of the United Kingdom juvenile justice system.

The 'welfare principle' has underpinned domestic legislation since the 1933 Children and Young Persons Act and is the most frequently quoted article in the UN Convention: 'In all actions concerning children … the best interests of the child shall be a primary consideration'.[161] The government, however, cites 'welfare' as being just one factor to be taken into account, rather than a factor of 'primary consideration'.[162] Reflecting political priorities and demand for visible accountability of offenders, the others include punishment, risk and public confidence in the system. Ironically,

156 id.
157 UN Convention on the Rights of the Child, adopted by General Assembly (20 November 1989) Article 40.3.
158 Fionda, op. cit., n. 151, p. 39.
159 UN Convention, op. cit., n. 157, Article 40.2b.ix. See, also, Universal Declaration of Human Rights, Article 11; International Covenant on Civil and Political Rights, Article 14.3g.
160 UN Convention, id., Article 40.2b.1. See, also, Universal Declaration, id.; International Covenant, id., Article 14.2.
161 UN Convention, id., Article 3.1.
162 Howard League, op. cit., n. 149, pp. 12–13.

these factors were found by the ECtHR to deny the rights of Jon Venables and Robert Thompson to fair trial and sentencing procedures.

Contrary to popular belief and media hype, the number of children and young people convicted of either murder or manslaughter is small and there has been no increase in such convictions over the last twenty years.[163] While rare, these offences are 'almost always committed by young people with major personal problems', and therefore 'there is a great need for welfare considerations to be in the forefront'.[164] Perpetrators of offences are also recognized as victims[165] with a range of international instruments[166] reinforcing promotion of 'physical and psychological recovery and social reintegration … in an environment which fosters the health, self-respect and dignity of the child'.[167] Currently, the law focuses on legal priorities, such as establishing intent, proving guilt, and applying punishment, at the expense of the child's welfare. There is frequently a considerable time lapse between often harrowing police interviews, being charged, and the trial verdict. Yet children on remand are unable to receive treatment or psychological help because of fear that this may affect the integrity of evidence. As the psychiatrists working with Robert Thompson and Jon Venables stated, this delay can have long-term mental health implications and debar children from effectively participating in their trial.[168]

Adoption and implementation of the welfare principle would also have significant implications for sentencing. The requirement that 'arrest, detention or imprisonment of a child … shall be used only as a measure of last resort and for the shortest appropriate period of time'[169] has been negated by the open-ended, mandatory custodial sentence of indefinite detention during HMp for children aged ten or over convicted of murder. The Beijing Rules imply that 'strictly punitive approaches are not appropriate'. While 'just desert and retributive sanctions' may be considered to have some merit in adult cases, or cases in which young people have committed serious offences, such considerations 'should always be outweighed by the interest of safeguarding the well-being and the future of the young person'.[170] Modelled on the mandatory life sentence for

163 Justice, *Children and Homicide: appropriate procedures for juveniles in murder and manslaughter cases* (1996) 1.

164 id., p.12.

165 *General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by States Parties Under Article 44, Paragraph 1(b) of the Convention*, adopted by the UN Committee on the Rights of the Child (11 October 1996) para. 149.

166 See International Covenant, op. cit., n. 159, adopted by General Assembly resolution 2200A(XXI) (16 December 1996) Article 10.3; Committee of Ministers of the Council of Europe (17 September 1987) rec. no. R(87) 20.

167 UN Convention, op. cit., n. 157, Article 39.

168 op. cit., n. 121, paras. 16-18.

169 UN Convention, op. cit., n. 157, Article 37b.

170 Beijing Rules, op. cit., n. 152, rule 17, commentary.

adults, the sentence of HMp can require a child to remain in custody into adulthood. This means transferring to adult prison and being subjected to the same regime as if they had been convicted as adults, despite the proposition that 'Every child deprived of liberty shall be treated with humanity and respect … and in a manner which takes into account the needs of persons of his or her age', and 'in particular … separated from adults'.[171] While 'all appropriate legislative, administrative, social and educational measures' should be taken 'to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation',[172] the regimes operated by the Prison Service (young offender institutions and adult prisons) are notoriously intimidating and oppressive.[173]

Regarding criminal cases, the Beijing Rules affirm that 'reaction taken' should be proportionate not only to the 'circumstances and the gravity' of the offence, but essentially to the 'circumstances and the needs of the juvenile'.[174] Use of custodial sentences for children and young people is strongly opposed. The UN Convention recommends availability of a 'variety of dispositions' to 'ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence'.[175] As well as full use of the range of existing alternative sanctions, the Beijing Rules encourage development of 'new alternative sanctions' for juvenile offenders.[176] For young people whose actions are often the result of psychological disturbance and disadvantaged family circumstances, the priorities should be treatment, support, and guidance rather than punishment, retribution, and deterrence.

The right of the child to involvement in decision-making was established as a general principle of fundamental importance, relevant to all aspects of the implementation and interpretation of other articles, in the UN Convention. Thus, 'any child who is capable of forming his or her own views' has the right to 'express those views freely in all matters affecting the child'; their views 'being given due weight in accordance with the age and maturity of the child'.[177] Significantly, as well as assuring children the right to express their views, it obliges adults to hear and take seriously those views. In 'freely' expressing their views, children should 'not suffer any pressure, constraint or influence that might prevent such expression or indeed even require it'.[178] There is no requirement to express views, in fact

171 UN Convention, op. cit., n. 157, Article 37c.
172 id., Article 19.1.
173 See n. 108.
174 Beijing Rules, op. cit., n. 152, rule 17.1a.
175 UN Convention, op. cit., n. 157, Article 40.4.
176 Beijing Rules, op. cit., n. 152, rule 17, commentary.
177 UN Convention, op. cit., n. 157, Article 12.1.
178 Manual on Human Rights Reporting in *Implementation Handbook for the Convention on the Rights of the Child*, R. Hodgkin and P. Newell (1998) 150.

the right 'not to express' is established. There are no specific age limitations to children's participation in decision-making as age is not the sole criterion, it is combined with maturity. However, despite the Home Secretary's assurances that children will be helped to understand Crown Court procedures, currently competence is not determined by maturity but by the age of criminal responsibility set at ten.

The UN Convention stresses that children have the right to be 'provided [with] the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body'.[179] As Hodgkin and Newell state: 'There is an increasingly recognized need to adapt courts … to enable children to participate' including 'innovations such as more informality in the physical design of the court and the clothing of the judges and lawyers, the videotaping of evidence, sight screens, separate waiting rooms and the special preparation of child witnesses'.[180] Such recognition is evident in the 'special measures' afforded to 'vulnerable' and 'intimidated' witnesses by the 1999 Youth Justice and Criminal Evidence Act which consolidates and develops previous legislation. These measures offer a range of protection to children and young people under the age of seventeen: the use of screening and provision of live links; removal of gowns and wigs; giving evidence in private (restricted to sexual cases or those where there is intimidation); video-recorded evidence, cross-examination, and re-examination; examination via an intermediary.[181] Such special measures for child witnesses, however, are some distance from the Lord Chief Justice's recent direction concerning improved accommodation and assisted understanding for children facing prosecution for serious offences.

Finally, Naffine raises the important issue of legal representation: 'the tacit assumption remains that once a lawyer is present … the child has made an informed decision and that the lawyer is always acting on the child's instructions'.[182] However, 'in truth, children are passive … unsuited to the rigours of higher court justice which presupposes a rational and informed defendant, capable of invoking her [or his] rights'.[183] Naffine's resolution is a process:

> which rests at least some of the control of the proceedings from the legal experts and hands it to the child; one in which proceedings are comprehensible, where children's choices are therefore informed and where the court

179 UN Convention, op. cit., n. 157, Article 12.2.

180 Hodgkin and Newell, op. cit., n. 178, p. 151.

181 For a detailed analysis, see D. Birch, 'A Better Deal for Vulnerable Witnesses?' (2000) *Crim. Law Rev.* 209-327. Also overviewed in V. Baird, 'Youth Justice and Criminal Evidence Act 1999: part 2' *Legal Action* (December 1999) 15-16.

182 N. Naffine, 'Children in the Children's Court' in *Children's Rights and the Law*, eds. P. Alston, S. Parker, and J. Seymour (1992) 95–6.

183 id.

carries an enforceable obligation to ensure that the interests of children are paramount.[184]

Resolute support by the Home Secretary for a policy which puts young children into a Crown Court, justified on the grounds of 'open' and 'seen' justice, stands the principle of the child's best interests on its head.

FROM DEMONIZATION TO DENIAL: INTERPRETING THE BACKLASH AGAINST CHILDREN

The Bulger case had at least three related consequences. First, it initiated a reconsideration of the social construction of ten-year-olds as 'demons' rather than 'innocents'. Second, it coalesced with, and helped to mobilize, a moral panic about youth crime in general. Third, it legitimated a series of tough law-and-order responses which came to characterize much of the 1990s.[185]

The conviction of Jon Venables and Robert Thompson was followed by an unprecedented public clamour for retributive punishment. Also, as the earlier discussion demonstrates, the amplification of the case transformed it into an exemplar of a contemporary 'crisis' in childhood. What was so disturbing, although not unique,[186] was the ease with which assumptions of 'loss of decency', 'corrupted innocence', 'inherent evil', 'ill-discipline', 'lawlessness', 'barbarism', 'nastiness', and 'moral degeneration' were deployed and represented as hard evidence of 'dismembered' families, 'soft' juvenile justice, and educational decline.

A significant consequence of the moral panic was a trend towards the reconstitution of adult authority. Central to this was the powerful adult construction that children inherently are 'bad'; that left to their own devices they will be barbarous, out-of-control. Adult authority, imposed rather than negotiated, incorporates three primary constructs: prevention, discipline, and correction. Yet, prevention is manifested as surveillance – the child monitored, assessed, and classified from the earliest age. Discipline becomes subservience; an unquestioning, passive, silent child a child under threat, under curfew. Correction translates as punishment – a child secured, locked away.[187]

A second trend, and probably the most contentious, is the ideological whiff of *child-hate*. There is no established term which reflects the systemic and interpersonal prevalence of harm, abuse, degradation, exploitation, fear, rejection, and exclusion endured by children in their daily encounters with

184 id., p. 96.

185 J. Muncie, 'Media Politics and Criminal Justice' in *Social Policy, The Media and Misrepresentation*, ed. B. Franklin (1999) 177.

186 See G. Pearson, *Hooligan: A History of Respectable Fears* (1983).

187 For a comprehensive overview of these developments, see B. Goldson (ed.), *Youth Justice, Contemporary Policy and Practice* (1999).

adult worlds. Children's pain and suffering makes news only when cases are so extreme, the brutality so callous, that they shock. Yet the climate of fear, the rituals of degradation, and the calculus of violence are more accurately represented and understood as a continuum. In the chastisement of children, the administration of physical punishment, it is adults who decide on degree, necessity, and appropriateness. This is the prerogative of adult authority. Adults alone, particularly in the private domain, draw the line of legitimacy within the continuum. Child-hate is evident in the physicality essential to the punishment and sexual abuse of children. It also emerges as a powerful expression, unwitting maybe, of adult hegemony.

The images constructed in newspaper headlines and politicians' speeches by the vocabulary of demonization and condemnation are rooted in a disdain for children as active participants in their own destinies; by a fear of children's rights as challenging adult authority and, ultimately, adult power. While that power is usually interpreted as legitimated in the two inter-related but distinct domains of the *'public'* and the *'private'* , the reassertion of adult power also operates at both *structural* and *social* levels and through the pre-eminent institutions of the *state* and the *family*. Adult power is imposed without negotiation or consultation. It amounts to a dominant and dominating ideology supporting a politics of adultism. Legitimated, reinforced, and reproduced through professional discourses, adultism is expressed via a language of exclusion and denial, confirming children and young people as outsiders; the 'other' to adult essentialism.

Not all shifts in the law, in policy or in professional guidelines should be interpreted as manifestations of child-hate, reducible to some universal adult conspiracy. The relationship between structure and agency is more complex than that. Yet, as this article has shown, political and interventionist agendas, informed by a perceived 'crisis' in childhood, are reactive and authoritarian. Together they regress into a political backlash, disregarding advances in children's rights or child-centred, advocacy-based initiatives originating from within critical professional discourse and radical practice. The retributive climate that engulfed Jon Venables and Robert Thompson fed the backlash and consolidated the 'social authoritarianism' and 'moral renewal' of subsequent policy and law reform. Ironically, it has been the institutionalized denial of the welfare principle that has been tellingly exposed by the legal rulings in this case.

If the United Kingdom government is to implement international rules and conventions promoting and protecting children's rights, it has to acknowledge the different status of children while recognizing individual experiences, opportunities, and capacities. It should also address dominant constructions of childhood which marginalize their best interests and active participation. As the above discussion demonstrates, the current 'crisis' is within adulthood and adult conceptions of childhood rather than in childhood itself.