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## Citation Information

Stuart, Glenn M.. "Book Review: Rethinking Juvenile Justice, by Elizabeth S. Scott and Laurence Steinberg." *Osgoode Hall Law Journal* 47.1 (2009) : 167-173.  
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol47/iss1/7>

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## Book Review

### RETHINKING JUVENILE JUSTICE, by Elizabeth S. Scott & Laurence Steinberg<sup>1</sup>

GLENN M. STUART<sup>2</sup>

THE DEVELOPMENT OF THE JUSTICE SYSTEM'S RESPONSE to harmful youth misconduct has been characterized by a tension between a focus on the rehabilitation of youths and a desire to enforce public safety through punitive measures. To this day, the debate continues in both Canada and the United States. In *Rethinking Juvenile Justice*, Elizabeth S. Scott and Laurence Steinberg have brought together their interdisciplinary perspectives to develop a thorough rationale for the structure of a youth criminal justice system. An analysis that is drawn from the distinctive American experience is relevant to Canadians as we assess the continuing criticism (from some quarters) of the current approach to youth justice in this country.

The authors start from the premise that the legal framework for youth justice in the United States<sup>3</sup> has developed without a thorough and principled analysis of the elements necessary for an effective system. Thus, the rehabilitative model, based in the well-established notion of ensuring child welfare, focused exclusively on the rehabilitation of youths at the expense of procedural safeguards. Youths<sup>4</sup> were deemed to be children, lacking the cognitive capacity

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1. (Cambridge, Mass.: Harvard University Press, 2008) 370 pages.

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3. It is important for the Canadian reader to bear in mind that criminal law, and youth criminal law, in the United States is a matter of state jurisdiction. This means that Scott and Steinberg's analysis is confined to looking at trends among (sometimes) divergent state laws, and does not focus on a single legal model, as in Canada, where the system falls to federal jurisdiction.

4. In this review, the terms "youth" and "youths" will be used to refer to persons under the legal age of adulthood (typically eighteen); adolescents will refer to youths between the ages of twelve and eighteen.

to be held accountable for their misdeeds. As the authors discuss, this approach, without either effective rehabilitation or any consequences for youths, failed to effectively respond to youth crime. With high-profile incidents of youth violence increasing in the 1990s, public pressure seemed to grow for a reactionary overhaul of the system.<sup>5</sup> Scott and Steinberg therefore review the “moral panic”<sup>6</sup> that triggered the disjointed collection of measures in the United States that threw youths into the adult justice system<sup>7</sup> (notwithstanding these same youths being treated as children in other aspects of the law).<sup>8</sup> This punitive-based approach shifted large numbers of youths from the youth courts to the criminal courts and caused an escalation of the sentences imposed on youths, an extension of the crimes for which youths could be treated as adults, and an increase in the number of youths being incarcerated in adult facilities. After reviewing both extremes of rehabilitation and punishment, the authors conclude that neither system properly serves the ends of youth justice. Consequently, they set out to build a principled foundation for an alternative system.

Scott and Steinberg distill a wealth of scientific research<sup>9</sup> into a few key premises about the distinctive nature of adolescence—as a stage of development that is neither childhood nor adulthood—that provide a principled foundation for the model they propose. Significant attention is spent exploring the basis of those unique features that distinguish adolescents from both children and adults.<sup>10</sup> The authors propose three concepts of particular note derived from the research on youth development: adolescents’ choices are shaped by inherently immature judgment, which leads to increased propensity for criminal conduct and reduced culpability for that conduct; normal adolescents may become in-

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5. This trend, which the authors observed in the United States, was also apparent in Canada and sparked pressure for the reform of the *Young Offenders Act*, R.S.C. 1985, c. Y-1 [YOA]. Nicholas Bala provides a discussion of its history, which culminated in the introduction of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 [YCJA]. See Nicholas Bala, “The Development of Canada’s Youth Justice Law” in Kathryn Campbell, ed., *Understanding Youth Justice in Canada* (Toronto: Pearson Education Canada, 2005) 41 at 43-50.
  6. Scott & Steinberg, *supra* note 1 at 9-11.
  7. *Ibid.* at 102-17.
  8. *Ibid.* at 100-01.
  9. It is notable that much of the developmental research that the authors rely on has only been undertaken since the shift to a more punitive model of youth justice occurred. *Ibid.* at 13.
  10. These features, as derived from behavioural science studies, are detailed by Scott and Steinberg. *Ibid.*, c. 2, 28.

volved in criminal behavior, but will mature out of it and grow to be law-abiding adults; and the salience of social context to development means that the structure of correctional environments will determine whether youths will become responsible adults.<sup>11</sup>

Scott and Steinberg apply their learning about youth development to a legal model that strikes a balance between the historical extremes discussed above. Their model stresses the rehabilitation of youths, including an emphasis on the need for investment in systems that support positive development before criminal behaviour arises. The premise is that if most adolescent delinquents are not destined to be life-long criminals, the system must not treat them as such. Indeed, the authors flag the concern that a non-rehabilitative response to youth criminal activity can entrench youths (who may not otherwise tend to life-long criminality) in a pattern of criminal behaviour as they become isolated from positive personal influences and external opportunities—such as employment and education—that support constructive development.<sup>12</sup>

However, recognizing the critiques of a purely rehabilitative model, the authors set out three elements that move their alternative “developmental model” beyond rehabilitation: proportionality in sentencing, mechanisms to ensure appropriate levels of trial fairness, and restricted judicial discretion in sentencing.<sup>13</sup> The idea of proportionality—fundamental to adult criminal law—recognizes the diminished culpability of youths, but permits adult sentences for more serious offenders or those who may not have diminished culpability (due to their particular maturity).<sup>14</sup> For example, the model favours keeping youths in a rehabilitative youth court generally, but recognizes that serious offences involving repeat offenders may need to be transferred to adult court. At the same time, it avoids the limitations of binary adult or child categorizations by introducing a more flexible spectrum that can account for the specific developmental level and circumstances of individual youths. Proportionality also tends to balance the elements of rehabilitation and public protection.

Key to the successful defence of their model is an answer to the problem of youths who may be on a path of repeat offences and serious criminal conduct as

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11. *Ibid.* at 223-25. The truth of this assertion is borne out by both scientific and statistical data showing a sharp drop in criminal behaviours from age seventeen onwards. *Ibid.* at 53.

12. *Ibid.* at 256.

13. *Ibid.* at 247-49.

14. *Ibid.* at 18-21.

adults. Scott and Steinberg recognize that a majority of youth crimes are committed by a small fraction of youths.<sup>15</sup> While this ratio supports a rehabilitative model, the authors' endorsement of rigorous sanctions for exceptional behaviour validates the model. Indeed, one may question whether they are too pessimistic about the potential for rehabilitation of the youths whose records appear to indicate troubling patterns of behaviour, given the undesirable effects that non-rehabilitative responses and negative external influences can have at an early age. However, a balance is largely crafted.

One of the most compelling sections of *Rethinking Juvenile Justice* is the challenge to the purported public pressures for "tough on crime" measures for youths and the deconstruction of the statistics that are rolled out to punish youths severely in the interests of public safety and deterrence.<sup>16</sup> The authors persuasively argue that the moral panic that arises following high-profile incidents distorts public opinion and creates an impression of increasing youth crime when rates are actually falling.<sup>17</sup> Moreover, they also effectively challenge the methodology by which these statistics are generated, reaching the conclusion that the public is actually more inclined to support less punitive, and more constructive, dispositions for youths in the interests of fostering the development of responsible adults.<sup>18</sup> Given the existence of a similar inclination to moral panic in other countries, including Canada, this insight is invaluable.<sup>19</sup>

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15. *Ibid.* at 252-53. This same trend has been identified in Canada: in a ten year study that followed youths born in 1987 and 1990, 10 per cent of those studied were involved in 46 per cent of the reported crimes for their cohort. Statistics Canada, "The Development of Police-Reported Delinquency Among Canadian Youth Born in 1987 and 1990," Cat. no. 85-561-MIE-No. 009 (2007), by Peter J. Carrington (Ottawa: Canadian Centre for Justice Statistics, 2007) at 58.

16. Scott & Steinberg, *supra* note 1, c. 9, 265.

17. *Ibid.* at 105.

18. *Ibid.* at 278-82.

19. The classic example of this phenomenon in the Canadian context is the push for increased penalties under the former *YOA*, *supra* note 5, at a time when Canada had one of the highest rates of youth incarceration in the world. See *e.g.* Nicholas Bala, *Youth Criminal Justice* (Toronto: Irwin Law, 2003) at 65ff, 71. A similar analysis emerged in the Canadian literature leading up to the *YCJA*, *supra* note 5. See Jane B. Sprott, "Understanding Public Views of Youth Crime and the Youth Justice System" (1996) 38 Can. J. Crim. 271. The dichotomy perceived in popular views about the incidence of youth violence has also been revisited elsewhere. See Anthony N. Doob, Jane B. Sprott & Cheryl Marie Webster, "Understanding Youth Crime: The Impact of Law Enforcement Approaches on the Incidence of Violent Crime Involving

This study thoroughly canvasses legal and psychological perspectives on youth justice in the United States. Indeed, the psychological perspective is one that has not been given extensive consideration in the literature. However, one notable omission is a consideration of the social factors that contribute to how youths come into conflict with the law. While the authors provide insights into youth psychology, a consideration of the social context of youth crime is equally important to a thorough assessment of the elements that need to be incorporated into an effective youth justice system.<sup>20</sup> To understand how youths are impacted by the justice system, we need to look at the impact of changing community structures, racism, structural poverty, and, particularly, the different policing practices across communities on youth behaviour. These factors can distort the frequency with which youths encounter the justice system and, in turn, how they respond to it.<sup>21</sup>

The central question that a Canadian reader may ask about this work is how the proposals in *Rethinking Juvenile Justice* are breaking new ground. The answer, in Canada, is that they are not. The three principles framing the model are those embraced by the *YCJA*<sup>22</sup> and the insightful appellate jurisprudence that has developed under it. The premise that a youth criminal justice system provides long-term protection for the public by addressing the circumstances leading to the youths' conduct, rehabilitating the youths, and providing meaningful consequences for offences is the defining paradigm for the *YCJA*.<sup>23</sup> In 2008, the Supreme Court went beyond recognizing that young people have a diminished level of culpability to give this concept constitutional recognition as a principle of fundamental justice.<sup>24</sup> Furthermore, the *YCJA* clearly restricts the discretion of

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Youth and Matters Related to Understanding the Implications of These Findings" in *The Review of the Roots of Youth Violence*, vol. 4, by Roy McMurtry & Alvin Curling, co-chairs (Toronto: Queen's Printer for Ontario, 2008) 65.

20. An analysis of these issues is quite common in the Canadian literature, arising largely from sociological and criminological perspectives. For a representative overview, see Sanjeev Anand & Nicholas Bala, "Canadian Youth Crime in Context" in Nicholas Bala, *ibid.*, 553. Recently, Roy McMurtry and Alvin Curling thoroughly explored these issues in Ontario in their multi-volume report. McMurtry & Curling, *ibid.*
21. McMurtry & Curling, *ibid.*, vol. 1, c. 4 at 29ff; Doob, Spratt & Webster, *supra* note 19.
22. *YCJA*, *supra* note 5.
23. *Ibid.*, s. 3(1)(a).
24. *R. v. D.B.*, [2008] 2 S.C.R. 3 at para. 61 [*D.B.*]. Although the Court divided on whether this principle precluded a reverse onus on youth to remain under the youth sentencing

youth judges by limiting the factors to be considered—currently excluding deterrence as an express consideration and restricting the use of custodial sentences.<sup>25</sup> The absence of any reference to the Canadian experience, which is built on the principles advanced by Scott and Steinberg, dilutes the impact of their model outside the United States. Ironically, in developing our system, comparative analysis was clearly a benefit to Canadian policy makers,<sup>26</sup> and it continues to be an important element of the literature.<sup>27</sup> On the whole, the process leading to the introduction of the *YCJA* exemplifies the type of principled analysis that Scott and Steinberg advocate as essential to avoid the patchwork of systems in the United States that the authors describe. Thus, while the authors implicitly offer affirmation of the Canadian model, they do not move forward from that point.

However, there is still immense value in this work because it sets out a cogent and principled analysis of the necessary elements of a youth justice system at a time when the *YCJA*—the mirror image of Scott and Steinberg’s model—is under challenge. While the majority of Canadian courts have remained committed to the principles of the *YCJA*, there is clearly an underlying discord, reflective of the fundamental tension between rehabilitative and punitive responses with which the authors grapple. This debate is captured by the divide between the Supreme Court’s majority and dissent in *D.B.*: do we remain committed to the principles set out in the *YCJA*, with its emphasis on rehabilitation and long-term public safety? Or do we erode those principles in the name of harsher sanctions, in reaction to a perceived increase in crime, when youths commit serious crimes?<sup>28</sup> Even more clearly, as Canadian legislators look to react to Canadian moral panic regarding youth crime—especially serious, violent crime—the possibility of the balance of the *YCJA* being skewed by less thoroughly considered measures has reappeared. This effort was embodied in Bill

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regime (as the majority concluded), there was consensus on the conclusion that it was such a principle.

25. *R. v. B.W.P., R. v. B.V.N.*, [2006] 1 S.C.R. 941 at para. 19 [B.W.P.]; *YCJA*, *supra* note 5 at s. 38.
26. See e.g. Nicholas Bala *et al.*, eds., *Juvenile Justice Systems: An International Comparison of Problems and Solutions* (Toronto: Thompson Educational, 2002). See especially Nicholas Bala & Rebecca Jaremko Bromwich, “Introduction: An International Perspective on Youth Justice” in Bala *et al.*, 1.
27. Most recently, see Tullio Caputo & Michel Vallée, “A Comparative Analysis of Youth Justice Approaches” in McMurtry & Curling, *supra* note 19.
28. *D.B.*, *supra* note 24 at paras. 76, 130-31.

C-25, which sought a shift from the nuanced collection of sentencing principles to the blunt club of deterrence and a renewed use of incarceration for youths.<sup>29</sup> Although proportional sentences—as urged by the authors and the *YCJA*—will inevitably have a deterrent value,<sup>30</sup> this initiative to promote deterrence as an objective validates Scott and Steinberg’s concern that moral panic can lead to the advancement of poorly conceived proposals in reaction to the perceived threat of youth crime in the short-term.

To the extent that *Rethinking Juvenile Justice* advances a model for a youth justice system that reflects the primary elements of the *YCJA*, the book will not be as radical in its approach to the Canadian reader as it may be to an American audience. While there are some minor points of departure, the analysis in the book endorses a system that looks much like the current Canadian model. The thorough interdisciplinary consideration of many of the principles underlying the youth justice system is a valuable and accessible resource for anyone navigating the legal needs of youths. More importantly, the arguments supporting the “developmental model,” paired with implicit critiques of a more punitive model, serve as important reminders to legislators seeking to overhaul the *YCJA* in ways that will over-emphasize deterrence and move away from the empirically demonstrated, balanced model. The current approach addresses the underlying behaviours leading to criminal conduct (with an eye to developing well-adjusted adults) and compels youth offenders to accept responsibility for their acts, in proportion to their developmentally-gauged culpability.

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29. Bill C-25, *An Act to Amend the Youth Criminal Justice Act*, 39th Parl., 2d Sess., 2007 (the bill did not become law before the 39th Parliament ended on 7 September 2008).

30. *B.W.P.*, *supra* note 25 at paras. 4, 31, 39.



