CHILDREN OF THE ABYSS: PERMUTATIONS OF CHILDHOOD IN SOUTH AFRICA'S CHILD JUSTICE ACT

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This article critically examines recent legislation in South Africa intended to systematically overhaul the country's juvenile justice system. Developed and heatedly debated over the course of a decade, the Child Justice Act implements novel procedural protections and large-scale restorative justice programs. By analyzing the political history, social context, and evolving text of the Child Justice Act, I call into question prevailing assumptions about post-apartheid South Africa's socio-legal history. Close examination of the Act's major drafts (in 2002, 2007, and 2008) reveals a set of tensions in the political and rhetorical status of youths as alternately victims of circumstance and threats to society. Rather than confronting and resolving this tension, which subverts the linear logic of post-apartheid "transition," the act reinscribes that tension in a new vocabulary and logic of governance and social management. Contemporary South African history thus demonstrates a pattern not of transition but of problematic permutations.

Keywords: *South Africa, juvenile justice, restorative justice, diversion, transition, post-apartheid, crime control, governmentality*

INTRODUCTION

In June of 1976, several thousand high school students in Soweto, one of South Africa's largest black townships, organized a march to protest the

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compulsory use of Afrikaans—the "language of the oppressor"—in the curriculum.[1] After police fired on the students, chaos and rioting ensued. Fifteen hundred police armed with assault weapons arrived in Soweto, and by the time the violence abated two days later, some five hundred people had died.[2]

In March of 2010, dozens of police in Soweto fired rubber bullets at another crowd of children, thousands strong,[3] demonstrating and throwing stones outside of the local courthouse.[4] The children, some of them chanting death threats, had gathered at the bail hearing of Jub Jub, a formerly popular local rapper accused of killing four schoolchildren during a drug-fueled street car race, to protest against the prospect of his being released.[5] The Congress of SA Students' (COSAS) provincial chairperson announced that "COSAS will not surrender to anyone. We are very disciplined students. You give Jub Jub bail, we kill him, we don't surrender on that one."[6] Police arrested five of the children—but then released them pending court appearances under a new law that, according to a state prosecutor, "recommended it be avoided that children be held in prison if they could be released into their parents' custody."[7]

These two moments of student unrest are incommensurable in a number of important respects; nonetheless, they appear to fit together as part of a "historical metanarrative" that has come to explain the causes of and responses to

1. Following the rise of apartheid in 1948, "Afrikaans became known as 'the language of the oppressor': apartheid was enforced in Afrikaans, as it was the language of the bureaucracy and the police force." By contrast, "English was chosen as language of communication by the ANC and the other liberation organizations during the 'freedom struggle'. . . ." Penny Silva, South African English: Oppressor or Liberator?, in The Major Varieties of English, Papers from MAVEN 97, Vaxjo, Nov. 20–22, 1997 (Hans Lindquist et al., eds., 1998).

2. South Africa: The Soweto Uprising: A Soul-Cry of Rage, Time Magazine, June 28, 1976, http://www.time.com/time/magazine/article/0,9171,911814-1,00.html.

3. David Smith, South African rapper Jub Jub accused over deaths of four schoolboys is targeted by angry pupil army, The Observer, Mar. 21, 2010, http://www.guardian.co.uk/world/2010/mar/21/south-africa-jub-jub-riot.

4. South Africa police fire rubber bullets at children, BBC, Mar. 17, 2010, http://news.bbc.co.uk/2/hi/africa/8573267.stm.

5. Id.

6. Miranda Andrew & Kenichi Serino, Jub Jub's Lawyer Booed in Court, News24, Mar. 18, 2010, http://www.news24.com/SouthAfrica/News/Jub-Jubs-lawyer-booed-in-court-20100318.

7. Andrew & Serino, supra note 6.

crime and violence—particularly violent youth crime—in South Africa during and after apartheid. As one scholar has put it,

> Stories about random but deeply personalized crime committed by youths invert earlier narratives emphasizing the sociopolitical nature of conflict. . . . What these stories share in their myriad forms is a historical metanarrative organized by the perception that crime during the apartheid years was mainly political, while that which followed has been primarily extrapolitical and even antipolitical.[8]

The exploits of rappers, this is to say, have replaced "the language of the oppressor" as the grounds of violent youth action.[9] According to this story, following apartheid the deeply politicized landscape of crime and policing collapsed on two fronts. After "dismantling . . . the apartheid regime's nexus of security and policing institutions,"[10] the state had neither means nor reason to combat anti-apartheid insurgents. The former insurgents, largely black and colored, having outlived their political mission turned their skills toward less legitimate endeavors. The principled street fighters thus became merely mercenary street gangs,[11] with names like The Junkie Funky Kids betraying their adolescent composition and ambitions.[12]

This narrative, in which contemporary youth violence reflects at once apartheid's haunting presence and its institutional absence, enacts a concept that has become synonymous with contemporary South Africa: transition. Defined—particularly in Western eyes—by its transitional status, South Africa is paradoxically both deeply historicized (marked by its movement from past to future)

8. Rosalind Morris, The Mute and the Unspeakable: Political Subjectivity, Violent Crime, and "the Sexual Thing" in a South African Mining Community, in Law and Disorder in the Postcolony 60–61 (Jean Comaroff & John Comaroff eds., 2006).

9. Silva, supra note 1.

10. Id. at 61.

11. The parallel delegitimation/disintegration of the disciplined and highly organized "numbers gangs" in South African prisons has been aptly chronicled in Jonny Steinberg, The Number: One Man's Search for Identity in the Cape Underworld and Prison Gangs (2005).

12. Other gangs that rose to prominence after 1994 included many with names incorporating the words "boys" or "kids" such as the Sexy Boys, the Cobra Kids, the Cleaver Kids (or perhaps Clever Kids), and the Naughty Boys. On the other hand, the increasing power of gang syndicates such as The Firm speaks to the increasing institutional power of these criminal organizations. Duval Smith, Frontline: Cape Town: Deadly Groups Cause Mayhem in Junkie Funky Gang Wars, The Independent, Nov. 25, 1999, http://www.independent.co.uk/news/world/frontline-cape-town-deadly-groups-cause-mayhem-in-junkie-funky-gang-wars-1128548.html.

and completely static. As one scholar notes, U.S. perception of South Africa relies "on the reification of a particular moment in a national allegory, even on a single image, which is made to signify 'South Africa' . . . [F]oreign observers tend to be stuck in 1994, with the image of Mandela being sworn in as leader of what Jeremy Cronin has sardonically called the 'winning nation'. . . ."[13] Yet even as South Africa illustrates the protracted struggles of never-completed transition, it also exemplifies transition as a normative good. More than a decade after its conclusion, for example, South Africa's Truth and Reconciliation Commission remains the paradigmatic example of "transitional justice," the dream of legality persisting through political rupture—and the perfect medium between the lawless policing of apartheid and the mob justice called for at Jub Jub's trial.

This article is an intervention into the pervasive narrative of political transition and national disintegration that dominates accounts of modern South Africa's socio-legal history, particularly with respect to youth and crime. It challenges, moreover, the underlying linear logic of transition, in which the handover of political power in 1994 and the accompanying Truth and Reconciliation Commission mediate a historically rooted, diachronic move from apartheid to post-apartheid democracy that is still in the process of occurring. I propose in the alternative that the interaction of crime and justice in contemporary South Africa is marked not by progressive transition but by repetition, by the reiteration of rhetorical and political moves and countermoves that, through their tension, produce a paradoxical but fairly stable conception not only of young people but of the entire nation as, in Thabo Mbeki's words, "children of the abyss": alternately incorrigible hellspawn and victimized but heroic survivors of hell.[14] These competing conceptions of the child as a national symbol have, moreover, engaged in a tug-of-war over the past sixteen years that has hardly depoliticized crime and violence, as the pervasive metanarrative would suggest. It has instead given birth to a more

13. Ruth Barnard, Oprah's Paton, or South Africa and the Globalization of Suffering, 47 Eng. Stud. Africa 85–101 (2004).

14. Thabo Mbeki, Inaugural Address as president of South Africa (June 16, 1999). The broader structure of this portion of Mbeki's speech further demonstrates this pattern not of transition but of reiteration. He says, "As Africans, we are the children of the abyss, who have sustained a backward march for half a millennium. . . . Being certain that not always we were the children of the abyss, we will do what we have to do to achieve our renaissance." The "new" South Africa is not to be the product of transition but of return; it is not a nascent country but a renascent one.

regulatory, less confrontational structure of control that remains deeply, if covertly, political. The salience of individual concrete acts of criminality as the focus of state discipline has in the process diminished in a legal framework increasingly concerned with the orderly management of a population prone to problematic behavior.

To illustrate this complex process not of transition—in which one entire system supplants another—but of kaleidoscopic permutation—in which the whole is transformed by reordering rather than replacing the constituent parts[15]—I take up the most recent system-wide development in the apparent metanarrative of crime and punishment in South Africa, the enactment of the law responsible for sending the children arrested at Jub Jub's trial to their parents instead of to jail.

This law, the aptly titled Child Justice Act, (hereafter, the Act), effective April 1, 2010, has an ambitious dual agenda that promises to reform dramatically the criminal legal system's treatment of children in fulfillment of promises made after the fall of apartheid. It both grants juveniles a number of legal protections in line with the U.N. Convention on the Rights of the Child and establishes a large-scale diversion program. The diversion scheme redirects young offenders from the formal criminal justice process to local community-based alternatives built on a restorative justice paradigm. I begin by sketching the procedural framework envisioned in the Act, focusing on the innovations and key points of adjudication that differentiate the new procedural pathways from the previous criminal justice regime. Although there is much room now and in the coming years to question how well the practical realities of adjudication mirror the Act's reforms on paper, I focus on the Act's long history, which from initial drafting to final enactment covers nearly the

15. As one perceptive observer noted of the 1996 local government elections, "This was, for all of us, a kaleidoscopic moment when everything shifted to form new patterns. For the local councilors this moment of assuming formal power was one of fulfillment of years of struggle and enormous promise for the future, as well as a moment of profound danger; of being thrust into an arena strewn with the detritus of apartheid past, and sharply circumscribed by the negotiated settlement." Gillian Patricia Hart, Disabling Globalization: Places of Power in Post-Apartheid South Africa 1 (2002). The kaleidoscope image is a particularly appropriate one: as the kaleidoscope turns, the fragments inside the device fall out of place, assuming new positions, new angles, and new relations with each other. The optical result is a completely new pattern—but the kaleidoscope is still a closed world. The old fragments rearrange themselves into an illusion of novelty, but the inside of the scope remains "strewn with the detritus" that composed the previous pattern.

entire post-apartheid period. After analyzing the political struggles that have marked the Act's halting progress toward enactment, I look finally to the texts of the three major versions of the Act, which appeared in 2002, 2007, and 2008.[16] By reading across the three versions—that is, by examining the three variants of a given provision simultaneously—I highlight textual shifts that illustrate both the ideological tensions of transition and the ways in which the Act does not resolve but merely circumvents them, does not transcend but reinscribes them in newly obscured terms.

I. LOOKING THROUGH THE KALEIDOSCOPE: CONTOURS OF THE CHILD JUSTICE ACT

As a finished product, South Africa's Child Justice Act is a 188-page promise of procedural revolution that presents itself as a corrective to the fact that "before 1994, South Africa, as a country, had not given many of its children, particularly black children, the opportunity to live and act like children."[17] Its fourteen chapters cover the entire criminal process, from a child's initial encounter with police to appellate review and the maintenance of criminal records. Traversing this broad procedural terrain, the Act carves out a set of pathways built around a series of disjunctions, points of adjudication that direct a child toward more or less formal criminal proceedings. These points of adjudication in turn emphasize individual treatment of children within the limits of strict procedural constraints.

To illustrate the procedural contours of the Child Justice Act, I outline the Act's approach to adjudicating a seemingly simple issue: a child's age. The Act declares an intention to fulfill the U.N. Convention on the Rights of the Child's (UNCRC) mandate to treat each child "in a manner which takes into account the needs of persons of his or her age."[18] To take age into account in

16. The unenacted 2002 and 2007 versions of the Act are both identified as Child Justice Bill, no. 49 (2002). Electronic copies may be found at www.info.gov.za/view/DownloadFileAction?id=66971 and http://www.childjustice.org.za/downloads/ChildJusticeBill_2007.pdf, respectively. The 2008 version, Child Justice Act, no. 75 (2008), was signed into signed into law on May 9, 2009. It is available at http://www.childjustice.org.za/downloads/A75-2008.pdf. For the sake of clarity, I will hereafter identify the three versions as Child Justice Act (2002), Child Justice Act (2007), and Child Justice Act (2008).

17. Child Justice Act (2008), Preamble.

18. United Nations Convention on the Rights of the Child, Nov. 20, 1989, Art. 37.C. South Africa signed the Convention in 1995. The Child Justice Act takes into account "South Africa's

this way, judicial officials must, as a threshold matter, actually know the child's age. This determination is more complicated than might be expected: though South Africa has a well-established financial, communications, and transport infrastructure, its development in other respects is quite mixed.[19] Only about 40 percent of births get recorded, and many children, particularly those from poor or underdeveloped regions (often code for black or colored) do not know their precise age.[20] More, because of record-keeping holes and poor communication between jurisdictions, the identities of many street children remain perennially (and strategically) uncertain, even after repeated encounters with police.[21]

The Act's implementation of the UNCRC must also contend with a long history of relative indifference to age in South African criminal law. Under precolonial African customary law, the end of "childhood was not defined by age but by other defining characteristics such as circumcision or the setting up of a separate household."[22] Dutch and English colonization brought an understanding of childhood demarcated by broad age categories. Under the system (borrowed from Roman law) in place until the Act's passage, the age of seven marked the threshold of moral maturity and thus criminal responsibility. Though defendants between seven and fourteen enjoyed the rebuttable presumption that they were not criminally responsible,[23] the rules of criminal procedure, both on the books and in practice, scarcely took age into account.

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obligations as party to international and regional instruments relating to children, with particular reference to the United Nations Convention on the Rights of the Child. . . ." Child Justice Act, A75 2008 (2009), Preamble.

19. John Prinsloo, The Dawn of a Child Justice System in South Africa, in In the Best Interest of the Child 157, 162 (Irene Sagel-Grande ed., 2001).

20. Ann Skelton & Boyane Tshehla, Child Justice in South Africa 44 (2008).

21. Though an increasingly thorough fingerprint database does exist in South Africa, due to legal and technological limits police investigators until recently had access only to a much narrower database maintained by the police service. See, e.g., Chantall Presence, Cops Get Access to Bigger Fingerprint Database, Eyewitness News, June 3, 2010, http://www.eyewitnessnews.co.za/articleprog.aspx?id=40986.

22. Skelton & Tshehla, supra note 19, at 29.

23. Id. at 42–43. This is not to say that the adoption of age as a criterion of childhood has produced any great degree of definitional consistency or consensus. In the South African prison system, the term "juvenile" has long encompassed all persons under 21. Until 1937, police and courts considered those under sixteen juveniles, but after liberalizing reforms the term encompassed all those under eighteen. Elrena van der Spuy, Wilfried Scharf, & Jeffrey Lever, The Politics of Youth Crime and Justice in South Africa, in The Blackwell Companion to Criminology 163 (Colin Sumner ed., 2004).

Children over seven were subject to the criminal code exactly as adults were and were eligible to be tried in the same court system. The sole significant concession to age, a requirement that children be tried privately in a separate room from adults, resulted in the de facto development of dedicated juvenile courts in major cities, but these courts had no distinct legal status.[24]

The significance of childhood in sentencing and punishment has a slightly more varied history, though protection for children has been the exception rather than the norm. The 1917 Criminal Procedure and Evidence Act permitted children to be sent to reform schools as an alternative to prison, but as a practical matter far more children continued to be sent to prisons than to reformatories.[25] Fitful efforts at rehabilitative reform tailored to children also emerged during the pre-apartheid era, but largely benefited only wayward white youths. In 1934, for example, the newly appointed minister of education transferred a number of reformatories and other semicarceral institutions for youths from the Prison Department to the Education Department, in line with a general trend toward an ideology of rehabilitation.[26] These reforms, however, remained experimental and largely failed to benefit nonwhite children.[27] A more sweeping proposal for legislative reform, the Young Offender's Bill, would have softened the consequences of a juvenile conviction, created courts of special jurisdiction, and otherwise emphasized the distinctiveness of juvenile delinquency.[28] Though much debated in the late 1930s, the bill never came to fruition.[29] A decade later, the 1947 Penal and Prison Reform Commission, or Lansdown Commission, released a systematic assessment of the South African penal system.[30] Among other recommendations, the report called for sharply curtailing corporal punishment, reasoning that: "Where other and better methods exist, there can be no virtue in using the cane."[31]

24. J. Midgley, Children on Trial: A Study of Juvenile Justice 58, 70 (1975). Other procedural distinctions include the summoning of parents along with an accused child, the protection of a child's name from publication, the exclusion of the public when a child testifies, and slightly looser bail restrictions. Id. at 71.

25. Id. at 65. According to one report, in 1931, there were 1526 children under age twenty-one in prison, while fewer than 5000 children were in reformatories.

26. Laurent Fourchard, The Making of the Juvenile Delinquent in Nigeria and South Africa, 1930–1970, in 8 History Compass (2010), 132.

27. Id.

28. Midgley, supra note 24, at 63.

29. Id.

30. Id. at 109.

31. Midgley, supra note 24, at 110–11.

These glimpses of reform, however gave way after 1948 to a harsh retributivism that relied heavily on corporal punishment and mass incarceration, and bore down most harshly on blacks and coloreds, children and adults alike[32]:

> After 1952, with the backing of the Minister of Justice, Blackie Swart, there was an exponential increase in the use of the corporal punishment by juvenile and children courts. The Minister of Justice responded to criticism that "South Africa has been described in foreign newspapers as a cruel country where children are mercilessly beaten" by asking, "Where are we in South Africa if a child can no longer even be given a hiding?"[33]

Nor was corporal punishment peculiar to colonial courts. As one (female) court leader of a locally administered township court declared in the 1970s, "the only remedy for children is *sjambok* thrashing: you must teach them the law."[34]

In addition to these formal legal sanctions, quasi-legal and even outright illegal action by police contributed significantly to the incarceration and casualty rate of children under apartheid. In 1985, using authority granted in the Public Safety Act of 1953, President Botha declared a state of emergency, empowering police to make arrests without warrant and hold detainees indefinitely.[35] Far from being exempted from these powers, youth activists were specifically targeted; by one contemporary estimate, 40 percent of the twenty thousand people detained by 1987 were children.[36] The basic practice

32. Fourchard, supra note 26, at 135.

33. Van der Spuy et al., supra note 23, 168. The Criminal Sentences Amendment Act of 1952 made whipping mandatory for a variety of offenses. Midgley, supra note 24, at 111.

34. Richard Wilson, The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State, 191 (2001).

35. Public Safety Act, No. 3 (1953). The state of emergency, expanded in 1986 (ahead of the tenth anniversary of the Soweto uprising) lasted until 1990, when Botha's successor, F.W. de Klerk, lifted it.

36. Nicholas Haysom, Statistics of Repression, in Children of Resistance: On Children, Repression, and the Law in Apartheid South Africa, 55–56 (Victoria Brittain & Abdul Minty eds., 1988) (hereafter Children of Resistance). Even before the so-called emergency years, large numbers of children were detained. Following the Soweto Uprising in 1976, the apartheid government began making use of indefinite detention powers granted in the Terrorism Act of 1967; by November of 1977, some 25% of the known detainees were estimated to be children, though for "public interest" reasons the government witheld official figures. Detention of Children in South Africa: A Special Report Prepared by the International Commission of Jurists 2–3 (1978).

of indeterminate detention was further exacerbated by the specific conditions of confinement. Parents were not informed of detained children's whereabouts, and the emergency regulations sharply restricted publication of detainee information, resulting in the effective social disappearance of arrested children. Accounts of detention describe routine assaults by guards, teargassing, children being forced to eat hot porridge with bare hands, overcrowding, and malnutrition.[37] Exceeding even these broad powers, police gunned down and tortured youth activists.[38]

The fall of apartheid in 1994 saw the outlawing of whipping, the end of intentional race-based punishment, the signing of the UNCRC, reform of the South African Police Service, and the short-lived elimination of pretrial detention for children, but no broad procedural reforms.[39] Against this backdrop, the Child Justice Act asserts the importance of childhood, of age rather than race, as the determinative factor governing criminal adjudication of youths in the "new" South Africa. It establishes immunity from prosecution for all children under age ten and constructs a sliding scale of protections for those between ten and eighteen.[40] Children between ten and fourteen continue to enjoy the presumption that they lack criminal capacity,[41] for example, and may not be placed in prison while awaiting trial.[42] Fourteen- to

37. See, e.g., Peter Harris, A Lawyers Experience, in Children of Resistance, supra note 36, at 62–68.

38. In one striking account, a fifteen-year-old youth activist described police firing on a group of youths walking down the street from a car. After shooting one of the fleeing children, one or more officers approached the child, then got back in the car. Haysom, in Children of Resistance, supra note 36, at 56. In another account, a 16-year-old wearing a Free Mandela shirt was abducted by soldiers driving a mobile torture chamber and subjected to electric shock treatment. Harris, supra note 37, at 66.

39. Wilson, supra note 34, at 175.

40. South African Law Commission, Juvenile Justice Report 29 (2000). Though apparently a minor modification, determining a new minimum age of responsibility in line with scientific evidence and international standards was "one of the most challenging issues facing the Commission" that drafted the original bill (21). Notably, the drafters rejected a proposal to establish a set age of criminal responsibility, eliminating the gray area between ages seven (or ten) and fourteen. In recognizing that "[c]ulture, rural or urban environment, and socio-economic and educational factors all play a role in shaping children's development, and, consequently, the age at which they attain criminal capacity" (25), the drafters decided to retain some sense of age as tied to community and social relations.

41. Child Justice Act (2008) § 7.

42. Id. at § 30.

sixteen-year-olds may be placed in prison only if charged with a very serious offense.[43]

Building on the conceptual framework of age and criminal responsibility, the Act moves on to the practical problem of structuring children's interaction with the criminal justice system. Typically this interaction begins with a child encountering police, and the Act lays out a matrix of discretionary standards of conduct bounded by several bright-line rules governing police behavior. Per the first of these rules, police may not arrest anyone under ten years old and must instead return the child to his or her parent/guardian or to a "child and youth care center."[44] When police arrest a child ten years or older, they must notify a probation officer of the child's arrest within twenty-four hours.[45] The Act mandates similar notification if a child is called to court by other means, such as written notice or summons.[46]

Slightly less rigid guidelines govern the treatment of children according to the severity of the alleged offense. The Act's appendix contains a hierarchy of crimes, which it neatly divides into three levels or "schedules." The first schedule contains very minor offenses, including petty theft, blasphemy, trespass, and low-level assault.[47] Schedule 2 includes more serious theft, public violence, arson, gang activity, and indecent exposure.[48] The most serious crimes, under Schedule 3, include murder, treason, rape, trafficking, and serious drug and weapons charges.[49]

The treatment of children under the Act depends in large part upon these schedules. Only children accused of Schedule 1 offenses, for example, enjoy

43. Id.

44. Id. at § 9.

45. Id. at § 20.

46. Id. at §§ 18, 19.

47. Child Justice Act (2008), Schedule 1.

48. Id., Schedule 2. In the years following apartheid, sexuality became increasingly politicized, with national focus not only on the issue of HIV/AIDS but also on the (sometimes related) phenomenon of infant rape and the rape of children. See Deborah Posel, Sex, Death and the Fate of the Nation: Reflections on the Politicization of Sexuality in Post-Apartheid South Africa, 75 Africa 125 (2005). Concern in the Act over the child as a sexual agent is the other face of the growing worry about the child as a sexual object. The two worries come together as a generalized anxiety about the sexualization of childhood.

49. Child Justice Act (2008), Schedule 3. The schedules make no specific mention of status offenses, with the exception of statutory rape. Numerous other sexual offenses, most of them associated with pedophilia, merit strict punishment under the schedule system. The concern with sexual crimes against children represents another current in South African legal reform—one that here somewhat ironically criminalizes behavior by children.

protection from arrest beyond the age of ten, though even then the protection is not absolute.[50] The Act carves out an exception if there are "compelling reasons" for arrest, such as where there is concern that the child may harm others or continue to commit crimes, where a crime is in progress, or where the child may have no permanent address.[51] These "compelling reasons" introduce a degree of subjective valuation into the rule-based system of schedules and prohibitions.

The schedule system lays down bright lines, however, in its exclusion of more serious offenders from procedural protections. Children over ten suspected of Schedule 3 offenses may be imprisoned before trial under some circumstances and are ineligible for bail, whereas those accused of lesser offenses must be placed in a less restrictive "youth centers."[52] Perhaps most important, the schedules restrict the possibility of diversion from the criminal proceedings into alternative programs based on restorative justice (discussed below). A Schedule 1 offender enjoys eligibility for diversion once she or he willingly acknowledges responsibility for the offense, whereas Schedule 2 offenses warrant input from the victim(s) and police before diversion. Schedule 3 offenders may be diverted only under "exceptional circumstances."[53]

For all but these most serious offenders, however, the possibility of diversion from formal judicial proceedings remains an integral part of each procedural step under the Child Justice Act. As mentioned above, whenever police take action that brings a child into contact with the criminal justice system, they must immediately notify a probation officer, which triggers the second stage of adjudication, a mandatory "initial assessment" by the probation officer.[54] This procedural innovation represents the first point at which a child may be diverted from the criminal justice system toward one of a number of programs built around a restorative justice paradigm.[55] It also

50. Id. at § 19.

51. Id.

52. Id. at § 30.

53. Id. at § 52. The possibility of diversion for any serious offenders produced stiff political opposition in the legislature, contributing to the bill's failure to pass in 2002. When the bill resurfaced in 2007, the new version stripped many procedural protections from older children accused of serious crime. The bill as finally passed, however, retains the basic framework of the original 2000 draft, though it sharply restricts access for serious offenders. Ann Skelton & Jacqueline Gallinetti, A Long and Winding Road: The Child Justice Bill, Civil Society, and Advocacy, SA Crime Q. 5, September 2008.

54. Child Justice Act (2008) § 34.

55. Id. at § 35.

serves as an opportunity to verify the child's age and to determine whether she or he is "in need of care," has previous convictions, and ought to be detained or released.[56]

The problem of adjudicating age exemplifies the challenges and implications of this approach. To make an age determination as mandated by the Act, the probation officer "*must* consider any available information."[57] The specifically sanctioned sources of information include not only previous official age determinations made by a magistrate or the scientific estimations of a medical professional but also the testimony of the child's parent or guardian, community and religious leaders, and even the child him- or herself.[58] Similarly, documents that carry evidentiary weight include not only school records but also baptismal and other religious records.[59] According to this scheme, probation officers are not merely allowed to consider statements by community leaders and other local, nonofficial sources; they are *required* to do so. This requirement is intended, first, to facilitate the age determination that is so central to the Act's general purposes. In the process, however, it also makes the system explicitly dependent upon the participation of diffuse local individuals and institutions typically associated with civil society rather than central state authority. The probation officer who encounters a child of unverified age is, per the Act, not free to make an age estimation based only on casual observation or sketchy official records. The officer must instead seek out—and give weight to the opinions of—members of the community and other unofficial sources before making an age estimation and filling out the proper paperwork.

The probation officer's estimation is not the final arbiter of a child's age. After the initial assessment, the government decides whether to proceed with formal prosecution. If the prosecutor chooses to pursue the matter, the child must be brought before a magistrate for a "preliminary inquiry." The magistrate judge presiding over the preliminary inquiry has broad authority in cases where the child's age remains uncertain or contested to require the production of documents and to subpoena testimony.[60] This inquiry, far from being merely a judicial review of the probation officer's judgment, represents the procedural heart of the Child Justice Act: it is the chief point of disjuncture

56. Id.
57. Id. at §13, emphasis added.
58. Id.
59. Id.
60. Id. at § 14.

at which the system diverts children who would otherwise face criminal sanctions from the formal adjudicative process.

Put simply, the Act's diversion scheme endeavors to permit children who have committed relatively minor crimes and who admit to their offenses "without undue influence" to participate in a process of adjudication focused more on restoration (and reinforcement) of the status quo ante than on punitive retribution.[61] The process recognizably derives from international restorative justice practices (such as New Zealand's[62]) but it also presents itself as "promot[ing] the spirit of *ubuntu* in the child justice system."[63] *Ubuntu*, an "African philosophy of humanity and humanitarian co-existence,"[64] 4 evokes a communitarian sense of solidarity absent in the rights-based system of rules and schedules that marks formal criminal procedure under the Act. A more nuanced examination of *ubuntu*, however, reveals that even as it emphasizes community consensus, it simultaneously assumes alterity: "a human being is a human being through the otherness of other human beings," as one translation of the term reads.[65] Ideally, *ubuntu* promotes dialogue between the individual and community rather than complete submersion of the individual into the community.

In line with these principles, sentencing often occurs interactively in victim-offender mediation (sometimes with families involved), the better to account for "the circumstances of the child, the nature of the offence and the interests of society."[66] Several possible sentences are also broadly social: a child might apologize to the victim, perform some act of symbolic restitution, or do community service work.[67] Many other remedies, however, eschew symbolic gestures and emphasize practical methods of compelling the child to reintegrate into social life: a child might be required to remain in school,

61. Id. at § 52. Children, their parents, and prosecutors must also consent to diversion, and there must be a prima facie case to be made against the child for diversion to be appropriate.

62. See Allison Morris & Gabrielle Maxwell, Restorative Justice in New Zealand: Family Group Conferences as a Case Study, 1 W. Criminology Rev. 1 (1998).

63. Child Justice Act (2008) § 2.

64. Juvenile Justice Report, supra note 40, at 18. The final Act contains no definition of *ubuntu*.

65. Dirk J. Louw, The African Concept of Ubuntu and Restorative Justice, Handbook of Restorative Justice 167 (Dennis Sullivan & Larry Tifft eds., 2006). Community, in turn, has both very local connotations and yet also an expansiveness that encompasses all humanity—the dead, the living, and the not-yet-born (165).

66. Child Justice Act § 3.

67. Id. at §§ 53, 57–59.

enter a trade school, or even associate with the proper peers—all under threat of potential re-arrest and prosecution.[68] The Act also authorizes confinement of Schedule 2 offenders in residential education programs and referral to "intensive therapy."[69] These remedies adopt a much more institutional conception of community than *ubuntu* might suggest. Here, being "in" or "out" of the community does not refer to a child's abstract social and moral status. Instead, reintegration physically corrals the child into one location, such as school, and/or forbids the child from frequenting less acceptable locales.[70]

These protocols of assessment and diversion are of course not solely for the benefit of the children involved or local community structures. They offer an important boon to the state as well. According to models comparing the existing and reformed juvenile justice systems, the introduction of a preliminary inquiry to facilitate pretrial diversion could reduce the number of children facing trial from 80,800 to 23,250.[71] This dramatic drop in children brought into the trial phase would not only benefit the children spared the ordeal of trial and the risk of incarceration but would also contribute to a projected annual savings of 20 percent, or 180 million rand relative to the existing system.[72] The creation of the preliminary inquiry stage itself, however, would cost the system roughly 59 million rand per year.[73]

68. Id. at § 58. In any subsequent prosecution, the child's acknowledgement of responsibility can be entered as evidence at trial.

69. Id. at § 53.

70. Id. This is especially significant because in South Africa (as elsewhere), educational and other legitimate community institutions do not comfortably dominate a child's social landscape; instead, they struggle for territory with gangs and other organized criminal culture. More, the traditional community presupposed by *ubuntu* is shaken in modern South Africa by both shifting socioeconomic strata and fragmentation at the basic family level. The end of apartheid brought to a close the economic repression and forced ghettoization of black and colored South Africans, but as some experienced upward mobility and moved into previously white areas, they left behind protective neighborhood associations, leading to both a sense of isolation and greater vulnerability to crime. Prinsloo, supra note 19, at 157. On a more micro level, the notion that children are governed and cared for by an immediate family is often far from reality. In one study of violent young offenders, only 28% reported living with both their mother and father, and many were not living at home at all. Even within the home, 84% reported emotional, physical, or sexual abuse. Id. at 158. Restorative justice mechanisms in the Act are thus tasked with growing and even creating the very community into which the offending child is "reintegrated."

71. Conrad Barberton & John Stewart, Recosting the Child Justice Bill: Updating the Original Costing Taking into Account Changes Made to the Bill, 15 (2001).

72. Id. at 20, 22. Roughly US$ 24.5 million.

73. Id. at 22.

For the remaining 23,000 or so children expected to proceed to trial each year despite the diversion scheme, the Act supplements the general rules of criminal procedure with a set of child-specific protections.[74] Borrowing a phrase familiar in international child advocacy, the Act enjoins the trial judge to "ensure that the best interests of the child are upheld."[75] Specifically, the judge is to prevent the trial (and especially cross-examination) from becoming unduly harsh or beyond the understanding of the child. In other departures from typical criminal proceedings, the judge may ask questions from the bench to elicit additional information, and only those people essential to the case are allowed in the courtroom.[76]

Though the formal trial follows most of the procedural contours of adult criminal adjudication and therefore looks quite different from the relatively informal treatment of diverted cases, the child-protective and restorative principles underlying diversion reappear at the sentencing stage. The Act's general sentencing provisions, for example, mandate that imprisonment may be used "only as a measure of last resort and only for the shortest appropriate period of time," and that the sentence should "promote the reintegration of the child into the family and community."[77] Tempering these child-protective provisions, the Act also calls for the inclusion of victim impact statements at sentencing, which bring to the court's attention the victim's interest in sentencing.[78] That said, the inclusion of the victim's perspective is not clearly or simply a device for enhancing sentences; rather, it suggests the continued emphasis on community-based and restorative justice even where diversion is not a viable option. Both the modes of sentencing (victim-offender mediation, family group conferencing) and the actual sanctions employed in the diversion scheme remain available, though more traditional fines and incarceration also have a place.[79]

After conviction, children under sixteen and those sentenced to prison time may appeal their convictions or sentences.[80] Though criminal records persist through adulthood, upon written request convictions for Schedule 1

74. Child Justice Act (2008) § 63.
75. Id.
76. Id.
77. Id. at § 69.
78. Id. at § 70.
79. Id. at § 72–78.
80. Id. at § 84.

offenses may be expunged after five years, and Schedule 2 offenses after ten years.[81]

II. POOR INCARCERATED URCHINS AND TEENAGE THUGS: THE KALEIDOSCOPE IN MOTION

Though the Child Justice Act presents itself as a clean and comprehensive break from past practice, the Act is actually the product of over ten tumultuous years of political wrangling that produced three distinct—and often contradictory—draft versions. The history of the Act's development, which is in many respects also the history of post-apartheid South Africa, thus exposes details obscured in the final version by offering a sedimentary archive chronicling the definition and redefinition of youth crime and childhood over the past sixteen years. The following section outlines that history, which reveals a set of ambivalences, both legal and more broadly social, regarding the status of children in a newly (and neo-) liberal legal order.

On a rhetorical or political level, the challenge of defining the relationship between children and the law has held a prominent symbolic place since the African National Congress (ANC) first took power. On May 24, 1994, less than a month after the official end of apartheid in South Africa, Nelson Mandela delivered his first State of the Nation address to parliament. He began the speech with a poem written at the height of apartheid by Ingrid Jonker, the daughter of a prominent Afrikaner nationalist:

> The child is not dead
> the child lifts his fists against his mother
> who shouts Africa! . . .
>
> The child is not dead
> Not at Langa nor at Nyanga
> nor at Orlando nor at Sharpeville
> nor at the police post at Philippi
> where he lies with a bullet through his brain . . .
>
> the child is present at all assemblies and law-giving
> the child peers through the windows of houses

81. Id. at § 87.

and into the hearts of mothers
this child who only wanted to play in the sun at Nyanga
is everywhere

the child grown to a man treks on through all Africa
the child grown to a giant journeys
over the whole world
without a pass![82]

Jonker wrote "The Child Who Was Shot Dead by Soldiers at Nyanga" in 1963, two years before her suicide by drowning. Per Mandela, Jonker's life and suicide embodied the paradoxically despairing hopefulness of her poem. "Confronted with death," Mandela declared, Jonker "asserted the beauty of life. . . . [but] In the dark days when all seemed hopeless in our country, when many refused to hear her resonant voice, she took her own life."[83] Incorporated into Mandela's address, Jonker's act of ultimate despair became a sort of glorious martyrdom. This retrospective casting of Jonker as a public symbol of apartheid and its discontents, however, is by no means an unproblematic appropriation of either her work or her death. Jonker's poetic corpus, often likened to the confessionalism of Sylvia Plath, refuses even in its more political moments to read simply as public proclamation. Rather her poetry turns inward or backward, sometimes raising controversial political themes only to submerge them.[84] In keeping with her poetic output, Jonker's death likewise is not an uncomplicated reflection of the times. Her suicide has been attributed to a combination of mental health issues, a failed marriage, several affairs, an abortion, and bitter enmity with her father.[85] Mandela's suggestion

82. Nelson Mandela, State of the Nation Address, Houses of Parliament (May 24, 1994), quoting Ingrid Jonker, The Child Who Was Shot Dead by Soldiers at Nyanga.

83. Id.

84. In "Daisies in Namaqualand," for example, Jonker pairs overtly political imagery with a refusal to carry any obvious political message: "Behind my word killed in action / Behind our divided home / Behind the heart locked against itself / Behind wire fences, camps, locations / . . . / sits the green mantis of the veld." In sharp contradistinction to a prophetic reading of "The Child," this poem's final stanza clearly turns away from active political engagement and toward an unpopulated pastoral vision of the African veld.

85. See, e.g., Liesl Jobson, Ingrid Jonker, Poetry International Web, http://southafrica.poetryinternationalweb.org/piw_cms/cms/cms_module/index.php?obj_id=11226. Jonker's father, a prominent conservative parliamentarian, reportedly responded to her suicide by announcing, "They can throw her back into the sea for all I care." Id. Here again the public/ private distinction is a very blurry one, with ideological antagonism inextricable from familial relations.

that Jonker killed herself because "all seemed hopeless in our country" and "many refused to hear her resonant voice"[86] was therefore a distinctly reductionist move that collapsed a complex social and psychological event into a simple illustration of the political evils of apartheid.

As moving—and problematic—as Mandela's ode to Ingrid Jonker is on its own terms, his allegorization of the poet's life merely prefaced his rhetorical deployment of the child described in the poem.[87] Like Jonker herself, the poem's child is a complex and conflicted figure, at once destroyed and transcendent, innocent and caught up in violent politics, wishing to "play in the sun" in the most dangerous of South Africa's unwholesome townships.[88] In Mandela's hands, however, the note of almost ironic hopefulness in the poem's last stanza ("the child grown to a man treks on through all Africa . . .") became not fantastic but prophetic, with the black president's speech itself the fulfillment of the prophecy. Mandela imposed a temporal dimension onto the poem, which was written entirely in the present tense; under his reading, the poem is not a conflicted depiction of a child who at once "lies with a bullet through his brain" and "treks on through all Africa"; instead, it is a vision of the child at two distinct historical moments. The child who was shot dead at Nyanga in 1963 grows up to trek through Africa thirty years later, in 1994.

86. Mandela, supra note 82.

87. Mandela's rhetorical turn here echoes a 1987 speech by Oliver Tambo, then-president of the ANC, at the opening of a conference on children and apartheid held in Harare, Zimbabwe. The speech, which began with a reading of the poem, ended with the declaration, "Our liberation would be untrue to itself if it did not, among its first tasks, attend to the welfare of the millions of children whose lives have been stunted and turned into terrible misery by the violence of the apartheid system." Oliver Tambo, The Child Is Not Dead, September 24, 1987, in Children of Resistance, supra note 36, at 28. Compared with Mandela's later invocation, Tambo's speech reflects the relative simplicity of revolutionary idealism.

88. The townships (minimally habitable settlements created to house black and colored South Africans forcibly displaced from the city centers) themselves bear something of this paradox. When first constructed, Langa was intended to be a bucolic garden village, "healthy, sufficiently far away from the noise of the city, and in idyllic surroundings." Cape Times, July 7, 1926. Quoted in Christopher Saunders, From Ndabeni to Langa, in 1 Studies in the History of Cape Town 200 (1984). The chosen site, however, "lay adjacent to Cape Town's main sewerage works, but the City Engineer hoped that a belt of trees would break up the smell from there." Even the townships' names are in many cases quite loaded. Langa, for example, refers literally to the word "sun" but bears a more direct link to Langalibalele, an African imprisoned in Cape Town for rebelling against the colonial government. South Africa's largest township, where many blacks were forcibly relocated in 1985 bears the cruelly ironic name Khayelitsha, "our new home."

Following what he called Jonker's "glorious vision . . . instruct[ing] that our endeavours must be about the liberation of the woman, the emancipation of the man and the liberty of the child," Mandela promised to "empty our prisons of children"[89] and further declared, "The basic principle from which we will proceed from now onwards is that we must rescue the children of the nation and ensure that the system of criminal justice must be the very last resort in the case of juvenile offenders."[90] With these dual promises, Mandela played into the historical metanarrative constructed around a categorical distinction between crime during and after apartheid. To "empty our prisons of children" would bring closure to the social and political plight of children under apartheid while at the same time inaugurating the new, depoliticized problem of dealing with "juvenile offenders."

Mandela's speech did not succeed, however, in cleanly separating one epoch from another. Instead, his equivocation, the slippage between the phrases "rescue the children" and "juvenile offenders," foreshadowed the conflicted development of a post-apartheid juvenile justice system over the course of the next decade and a half. In 1995, as part of its belated entrance into the international community, South Africa signed its first international convention, the 1989 U.N. Convention on the Rights of the Child.[91] The initial signing of the Convention brought with it the now-familiar rhetoric of transition and renewal, with Mandela triumphantly proclaiming, in fulfillment of the promise of his state of the nation address, "an end to the detention of young people in prisons."[92] Three days after the

89. Mandela, supra note 82. Notably, the ANC's agenda did not include emptying the prisons of adult prisoners whose sentences could be indirectly linked to the inequities of apartheid. As one prisoner, left disappointed by the ANC's ascent to power, complained, "The ANC came home and started preaching high words of forgiveness and reconciliation. But they meant forgiveness for their own people and for right wing murderers. We are the ones who fought the boere in prison; but as far as the ANC was concerned we could rot in hell." Steinberg, supra note 11, at 247.

90. Id.

91. Dan Seymour, 1989–2009: Convention Brings Progress on Child Rights, but Challenges Remain, UNICEF, http://www.unicef.org/rightsite/237.htm. The Convention among other things obliges signatories to treat children "with humanity and respect for the inherent dignity of the human person, in a manner which takes into account the needs of persons of his or her age." United Nations Convention on the Rights of the Child, supra note 18, at 2.

92. Nelson Mandela, Speech on South African Youth Day, Ladysmith (June 16, 1995).

ratification of the Convention, and in celebration of South Africa's second annual Youth Day, Mandela declared:

> We celebrate June 16, 1995 after our first Freedom Year, with new and bigger challenges facing the youth. You were in the forefront of the liberation struggle. Today you must be in the forefront of reconstruction and development. . . . The government recently brought an end to the detention of young people in prisons. The Constitutional Court outlawed corporal punishment of children. These were totally unacceptable practices, with no place in our society. But these measures have a wider meaning for the youth. And I want to address a special plea to all South Africa's youth: Join hands and assist government in dealing with the scourge of crime and lawlessness. The success of the Community Safety Plan depends on co-operation between the youth in particular and the police. Resist the temptation to use drugs, and to be used by criminal syndicates in their drive to destabilise our society.[93]

A number of the elements in this speech reiterate the tensions in Mandela's tribute to Ingrid Jonker, though in somewhat more explicit form. In one sentence the incarceration of children has "no place in our society," but a few sentences later children are the potential agents of criminals who aim to "destabilize our society." This reorientation reflects the broader process of existential reckoning that the ANC underwent as it transformed from a militant political insurgency into a governing body. In this reconfiguration, four distinct moments stand out, both politically and rhetorically. The ANC defined itself first through resistance against apartheid. In the "liberation struggle" that Mandela invokes, anti-apartheid organizers had exhorted South Africa's black youth to street-level insurgency, calling on them "make the townships ungovernable" by the racist apartheid state.[94] The next moment of self-definition was the victory over apartheid, culminating in the "first Freedom Year." In a speech upon being released from prison in 1990, Mandela "pay[ed] tribute to the endless heroism of youth, [to] the young lions, [who] have energised our entire struggle."[95] On the heels of this victory came promises of reform, a third moment of self-definition. A new constitution granted

93. Id.

94. The phrase "make the townships ungovernable" has come to symbolize the resistance strategy of the late apartheid era. The language can be traced to a declaration by Tammy Mahli of the Soweto Civic Association. Richard Abel, Politics by Other Means: Law in the Struggle against Apartheid, 1980–1994, 346 (1995).

95. Nelson Mandela, Speech on His Release from Prison (Feb. 11, 1990).

citizens a litany of rights and protections; children were released from prison. But the "heroic energy" of the young lions continued to undermine the governability of the townships. Street crime did not vanish in the absence of political justification, and by 1995, Mandela was declaring war on those "bent on engaging in criminal anti-social activity."[96] In this fourth moment of self-definition, the ANC refashioned itself as the champion of law and order in an attempt to govern the country it had helped make ungovernable.

The immediate prehistory of the Child Justice Act chronicles the advent and demise of the ANC's third moment of jubilant promise. On May 8, 1995, a month before Mandela's Youth Day speech, the South African Parliament in dramatic fashion passed the Correctional Services Amendment Act 17 of 1994, which forbade pretrial detention of children.[97] Originally introduced in 1994 to general acclaim, the bill inexplicably languished until the media in 1995 highlighted the plight of children awaiting trial in prison. In response, Parliament hastily promulgated the law, resulting in the immediate release of some fifteen hundred children awaiting trial.[98] The legislation failed, however, to account for the logistical consequences of its dramatic symbolic intervention. The absence of secure "alternatives in welfare-managed places of safety" resulted in the massive release of children onto the streets,[99] and the noncarceral institutions that did exist were ill equipped to deal with the influx of delinquent children.[100] The tenor of media reports soon changed dramatically: children characterized as "poor incarcerated urchins" in news headlines before the bill now terrorized the streets under the new label of "teenage thugs."[101] Amidst strong public backlash and rising fear of youth crime, Parliament

96. Nelson Mandela, Opening Address to Parliament (Feb. 17, 1995). ("We must take the war to the criminals and no longer allow the situation in which we were mere sitting ducks for those in our society who . . . are bent on engaging in criminal anti-social activity.").

97. Correctional Services Amendment Act No. 17 (1994).

98. Julia Sloth-Nielsen, The Juvenile Justice Law Reform Process in South Africa: Can a Children's Rights Approach Carry the Day, 18 QLR 469, 474 (1998–1999).

99. Julia Sloth-Nielsen, The Business of Child Justice, 2003 Acta Juridica 175, 177–178 (2003).

100. Interim National Protocol for the Management of Children Awaiting Trial, Child Justice Project, 1 (n.d., [2001]) www.info.gov.za/view/DownloadFileAction?id=97262. According to the report, "staff in the facilities were not trained to deal with children requiring intensive management, nor were the staff:child ratios adequate. Problems developed within the system, with child and youth care workers going on strike and children absconding from places of safety."

101. Headlines quoted in Sloth-Nielsen, supra note 98, at 475.

partially reversed the legislation in 1996, allowing the pretrial detention of children facing serious charges—and auguring the rise of law and order governance by the ANC.[102]

The drafting of the Child Justice Act began in late 1996 and followed a similarly controverted, though considerably more deliberative, path. Responding to the unfolding repercussions of the 1994 legislation, a drafting committee composed largely of academics and activists set out to construct a juvenile justice system that would provide a set of internally coherent substantive and procedural rules governing the treatment of children from initial arrest through appellate review.[103] Unlike the earlier legislation, this pragmatic system of reforms was to entrench the values of human rights and restorative justice while operating within the bounds of fiscal and other practical limitations. The drafting committee's composition reflected this progressive yet technocratic ambition. The project's leader, Ann Skelton, a lawyer with a decade's worth of experience in human rights work, had recently returned from a tour of New Zealand's groundbreaking restorative justice program and had subsequently established a restorative justice pilot project in Pretoria.[104] Julia Sloth-Nielsen, a professor (and future Dean of Law) at the University of Western Cape, had been writing on the topic since 1995. Tseliso Thipanyane would go on to become CEO of the South African Human Rights Commission.

From the start, though, the aspiration toward systemic coherence produced predictable political tensions. For example, the drafting committee's first publication, a short issue paper in 1997, opened with an invocation of the U.N. Convention on the Rights of the Child as obliging South Africa to extend certain rights to children.[105] Public and institutional response to the paper, although generally positive, reflected popular concern about rising crime rates. The committee's next publication, a 1999 discussion paper, responded to complaints that the issue paper overemphasized the rights of offenders relative to the rights of victims by highlighting the fact that restorative justice, although beneficial to accused children, is also "a conceptualization of justice which attempts to make the victim more centrally

102. Interim National Protocol for the Management of Children Awaiting Trial, supra note 100, at 1.

103. Sloth-Nielsen, supra note 98, at 478.

104. Ann Skelton, Restorative Justice Online, http://www.restorativejustice.org/leading/skelton.

105. South African Law Commission, Issue Paper 9, Project 106: Juvenile Justice, 1 (1997).

involved in the justice process."[106] Even within the committee's progressive starting point, the fragility of children and the fragility of victims posed competing rights claims.

The early development of the Child Justice Act also exhibited signs of the ANC's broader shift from the logic of political promise that marked the ill-fated release of incarcerated children in 1995 toward a logic of governance. In addition to weighing the competing ideals of human rights and restorative justice, the drafters commissioned a then-innovative cost assessment (which would be repeated several years later) from the Applied Fiscal Research Centre at the University of Cape Town to demonstrate that the proposed plan was feasible.[107] This new focus on cost marked part of a larger turn from liberation to neoliberalism that was interpreted among some of the ANC's supporters as a betrayal of revolutionary ideals.[108]

By the time the drafting committee completed its work in 2000, "a further influence ha[d] been brought to bear" on the project that eclipsed concerns over the project's neoliberal tendencies. Despite evidence that crime at

106. South African Law Commission, Discussion Paper 79, Project 106: Juvenile Justice (1999).

107. Conrad Barberton, John Stuart, & Tania Ajam, Costing the Implementation of the Child Justice Bill, Applied Fiscal Research Centre (1999). Prior to this, no project committee of the South African Law Reform Commission had ever attempted a cost assessment; this empirical analysis initially met with resistance within the Commission itself, but external players lauded the approach. Reforming Child Law in South Africa: Budgeting and Implementation Planning, UNICEF Innocenti Research Centre 22 (2007).

108. In 1996, the ANC government introduced the Growth, Employment and Redistribution (GEAR) program, which explicitly embraced core neoliberal values including privatization and a strong faith in market efficiency. The five-year plan was intended as "a fundamental shift away from the 'statist' service delivery models of the past where the state subsidized and delivered municipal services (albeit in a racially-biased manner), towards a more 'neo-liberal' service delivery model where the private sector (and private sector principles) dominate. In the latter model, the state acts as a service 'ensurer' rather than a service 'provider' and municipal services are 'run more like a business,' with financial cost recovery becoming the most effective measure of performance." Quoted in Ashwin Desai, Neoliberalism and Resistance in South Africa, 54 Monthly Review (Jan. 2003), http://www.monthlyreview.org/0103desai.htm. GEAR marked a dramatic departure from the ANC's Reconstruction and Development Programme (RDP), issued ahead of the 1994 elections. The RDP had adopted a largely Keynesian economic framework and emphasized reconstruction and redistribution, with the government playing a key role in development. Asghar Adelzadeh, From the RDP to GEAR: The Gradual Embracing of Neo-Liberalism in Economic Policy, 31 Transformation 66 (1996).

the time was actually declining,[109] public apprehension had turned crime control into a major political issue, and the 2000 report reflected the "deep concern in South African Society about the high levels of crime."[110] Reinforcing reformers' fears that crime control imperatives had begun to override commitments to human rights and other ideals, the 2000 draft bill hardened its approach to crime, provoking Julia Sloth-Nielsen, one of the drafting committee members, to warn of a growing "risk that a philosophy of crime control rather than children's rights [would] determine the future of juvenile justice in South Africa."[111] Despite these concerns even from within the drafting committee, remedies that earlier reports had rejected, such as trial in higher courts, prison sentences, and permanent criminal records, now reemerged as ways to control serious offenders.[112] Notably, the new draft introduced a set of rigid schedules designed to definitively set apart those offenders viewed as threatening from children facing less serious charges. This move split the difference between political factions: youth advocates had to settle for diversion programs and procedural leniency limited to less serious child offenders, whereas crime control militants won harsher, adult-like treatment for only the most serious child offenders.[113]

Caught between these competing criminological paradigms and political pressures, the Child Justice Bill introduced in Parliament in 2002 languished in limbo for another half decade. Over the course of 2003, Parliament's Portfolio Committee on Justice and Constitutional Development mooted and revised the bill. The revision process pushed the bill in a distinctly more punitive direction, further restricting various protections to younger children and those charged with less serious crimes. A provision of the rule establishing a presumption that children under fourteen lack criminal capacity, for example, originally mandated that these younger children be released unless the prosecutor formally declared an intent to prosecute within fourteen days.[114] During parliamentary deliberation, the Chairperson of the Justice

109. Anton du Plessis and Antoinette Louw, Crime and Crime Prevention in South Africa: 10 Years After, Revue Canadienne de Criminologie et de Justice Pénale, 429 (April 2005).

110. Juvenile Justice Report, supra note 40, at 9.

111. Sloth-Nielsen, supra note 98, at 489. Sloth-Nielsen, writing in 1999, identified this as the risk involved "[i]f exceptions were to be contemplated—for children charged with serious offenses or children above a certain age."

112. Juvenile Justice Report, supra note 40, at 9.

113. Id. at 12.

114. Child Justice Act (2002).

and Constitutional Development Portfolio Committee, Johannes Hendrik ("Johnny") de Lange, declared this rule "impossible" on the grounds that "[t]he state cannot let a murderer free because he has been held for fourteen days."[115] The provision disappeared from subsequent versions of the bill. In this representative move, fear of the extreme scenario (the child murderer) propelled systemic harshening of the procedural framework.

Parliament recessed in late 2003, ahead of the 2004 elections, leaving consideration of the bill incomplete.[116] When Parliament reconvened after the elections, the portfolio committee, headed by a new chairperson, Fatima Chohan-Kota, ceased deliberating on the bill, letting the topic drop without comment or explanation.[117] Despite some agitation surrounding the disappearance of the bill, no official explanation for this inaction emerged from Parliament.[118] Though the precise reasons for the bill's tabling and subsequent neglect remain uncertain, personality conflicts among key decision makers may have contributed significantly to the delays.[119]

Then, as surreptitiously as it vanished, the Child Justice Bill reappeared three years later. In the absence of official explanation, the bill's reappearance invites speculation, and it is perhaps not coincidental that the bill's return came at the eleventh hour of the new Parliament's tenure: that is, at the last chance for legislators to avoid the appearance of complete inaction on what had been a fairly high-profile matter.[120] In October of 2007, the Justice Department released a quite punitive version of the bill, which the cabinet then

115. Child Justice Bill: Informal Deliberation Minutes, Justice and Constitutional Development Portfolio Committee (Mar. 10, 2002), http://www.childjustice.org.za/parl_reports/2003Mar10.pdf. De Lange, far from being unsympathetic to child defendants, is a former defense attorney with a history of defending children accused of political crimes under apartheid. See Johnny De Lange, Children in the Dock, in Children of Resistance, supra note 36, at 68–69.

116. As recorded in the final meeting minutes of 2003, the committee reached 75 of the 87 provisions. According to the minutes, while clause 75 was being discussed, "Just then the division bell rang and the meeting was hastily adjourned." Child Justice Bill: Deliberation Minutes, Justice and Constitutional Development Portfolio Committee (Sept. 5, 20030, http://www.childjustice.org.za/parl_reports/2003Sept05.pdf.

117. "'After the elections, we got a new minister [of justice] and a new parliamentary portfolio committee on justice. Nothing has happened since then,' said Jackie Gallinetti, coordinator of Child Justice Alliance, a child rights advocacy group." South Africa: Parliament Delays Child Rights Bill, IRIN News, Aug. 14, 2006.

118. Jacqueline Gallinetti, What Happened to the Child Justice Bill?: The Process of Law Reform Relating to Child Offenders, in 17 SA Crime Q. 7–12 (2006).

119. Conversation with Julia Sloth-Nielsen, Jan. 6, 2010.

120. Id.

approved.[121] Child justice advocates responded with a media and lobbying campaign to restore the comparatively mild 2002 version of the bill.[122]

In 2008, the Portfolio Committee on Justice and Constitutional Development, led by a new chairperson, Yunus Carrim, reopened public hearings on the bill. The ensuing deliberations resulted in a final bill that, according to advocates, largely recaptured the leniency of the 2002 bill,[123] but the process exposed persistent policy rifts. Commissioner Geldenhuys of the South African Police Service, for example, asked for a provision explicitly authorizing police officers to consider whether a child had a permanent place of residence when deciding whether to make an arrest.[124] Dr. Ann Skelton, a member of the original drafting committee, raised concerns that such a provision might always authorize police to arrest the so-called street children prevalent in many urban areas.[125] Lirrette Louw, a legal advisor at the Department of Justice, also noted the potential for discriminatory arrest patterns; Dr. Skelton and Imam Gassan Solomon, a major figure in the anti-apartheid movement, both warned that this might render the provision unconstitutional.[126] Nonetheless, the committee members approved the commissioner's proposed amendment, citing the need to prevent children from disappearing and eluding adjudication.[127] As in the 2003 deliberations discussed above, there was in this debate a palpable reluctance to hamper effective policing; the tenor of this reluctance, however, was dramatically different. Unlike the 2003 fear of a single murderous child roaming the streets, here the concern revolved around the orderly regulation of an entire population of petty offenders.

Even couched within the terms of this official history—the way its development has been described by academics and activists close to its development—the Child Justice Act presents a paradox: it is a symbol of South Africa's progressive transition to enlightened democracy, but its legislative history refuses to exhibit signs of linear progress. Instead, its series of reversals and restorations

121. Skelton & Gallinetti, supra note 53, at 25.

122. See, e.g., Siyabonga Mkhwanazi, Rights Groups Slam Child Justice Bill, IOL News, Feb. 6, 2008, http://www.iol.co.za/news/politics/rights-groups-slam-child-justice-bill-1.388232.

123. Skelton & Gallinetti, supra note 53.

124. Child Justice Bill: South African Police Services Input, Justice and Constitutional Development Portfolio Committee, Mar. 26, 2008, http://www.childjustice.org.za/parl_reports/2008Mar26.pdf.

125. Id.

126. Id.

127. Id.

appears to reflect an unreconciled schism of competing ideologies of crime control and child protection. The following close analysis of the concrete textual changes from one draft to the next reveals further nested tensions that operate beneath the level of overt ideology. The playing out—and resolution—of these hidden tensions subtly but fundamentally changed the terms of the debate from those of crime and punishment to that of managerial governance.

III. INSIDE THE KALEIDOSCOPE: AN ARCHAEOLOGY OF THE CHILD JUSTICE ACT

Close examination of the texts of the three versions of the Act reveals a pattern of changes, both dramatic and subtle, that signal not only overt ideological struggles over the balance between crime control and child protection but also a less obvious, more fundamental shift in how this conflict was framed. The three drafts, I propose, demonstrate a permutation in the structural relationships among children, crime, and the state with implications far beyond the harshness or mildness of outcomes for particular children. Through these permutations the basic and persistent equivocation regarding the nature of lawless children in contemporary South Africa has been reconfigured and reordered, creating the illusion that it has been resolved but instead reinstating it. Child criminality thus continues to define South African nationhood and its problematic progress.

The Child Justice Act as finally passed by the National Assembly in November of 2008 opens by declaring that:

> . . . before 1994, South Africa, as a country, had not given many of its children, particularly black children, the opportunity to live and act like children, and also that some children, as a result of circumstances in which they find themselves, have come into conflict with the law.[128]

The passage in the 2007 version of the Act was substantively identical, except for the last phrase, which read: ". . . some children, as a result of circumstances in which they find themselves, have *turned to crime*."[129] At a glance, the rhetorical distinction is obvious: the final version of the act employs extremely delicate, even euphemistic, language: the juveniles are not outlaws

128. Child Justice Act (2008), Preamble.

129. Child Justice Act (2007), emphasis added. The tabled 2002 version of the bill did not contain any preamble.

but merely "in conflict" with legality; they have not turned to crime but have merely "come into conflict" with the law. The less varnished language of the 2007 version, by contrast, made clear that juvenile offenders are much less innocent than the child in Jonker's poem. This tiny revision appears to neatly reflect the ideological sparring between liberal champions of children's rights and the conservative forces focused on the maintenance of law and order.

This clear binary, however, falls apart under closer inspection. The preamble invokes 1994, the year apartheid ended, to structure the passage and position the Act as a whole. In an intertwining of grammar and politics, it builds two diametrically opposed worlds around this date: whereas before 1994 South Africa "as a country" deprived children of the opportunity to "live and act like children," now children are the ones with agency, actively "find[ing] themselves" in a set of passive "circumstances" that loosely involve conflict with the law. Unlike much contemporary South African political rhetoric, the Act does not draw a distinction between the apartheid regime and the "new South Africa" as a nascent country.[130] Instead, it acknowledges the continuity of South African nationhood before and after 1994—but then it abstracts the present country of South African into a "circumstance" in which people live. The nation seemingly disappears as an active agent that might be held accountable for the situation of children. At the same time, the children who were, before 1994, the (grammatical and political) object of the state's action are now active subjects who, following some unspecified path, "have come into conflict with the law" (or in the 2007 version's stronger language, have "turned to crime"). The children in need of rescuing have become juvenile offenders, transformed from political objects into depoliticized agents. The whole story is depoliticized.

In this context, the two versions of the Act do not merely reflect different levels of harshness by the state toward children. Rather, they gesture toward two quite distinct conceptions of the individual (child) as she or he confronts the state. As further comparisons show, a disciplinary/punitive/criminal modality that marked the 2007 version has given way, in part, to a bureaucratic/regulatory scheme in the final Act. This disciplinary/regulatory

130. The rhetoric of a new South Africa is quite widespread and consequently covers a range of meanings, from triumphalism to sarcasm (with the "new" in scare quotes). The concept is well captured in Allister Hadon Sparks's Beyond the Miracle: Inside the New South Africa (2003), which presents itself as "an assessment of what has taken place since that transformation; an assessment in other words of the status of Nelson Mandela's dream of building a single nation of many races and colours, races and religions" (vii).

tension only partially maps onto the apparent harsh/mild dichotomy described above, and it provides a window through which to critically reassess that story.

Reading the three versions of the Act in juxtaposition, provision by provision, reveals how politically salient differences in their visions of child justice obscure large, overarching similarities. For all the political reversals and restorations over the course of the Act's long history, the basic procedural framework envisioned by the Act's initial academic drafters remains largely intact. Notably, the Act's three major procedural innovations—the initial assessment, preliminary inquiry, and diversion program—all remain basically unchanged in each of the iterations. The changes that have made their way into the successive bills instead operate at a much more micro level by tweaking the decision-making criteria that govern a child's pathway through each of these fixed procedural stages. The result is a series of drafts that change by way of permutation—the reordering of existing elements—as well as more obvious modification. The consequences, however, are all the more dramatic for their apparent lack of novelty.

A. General Principles and the Police Encounter

By way of introduction both to this comparative approach and to the distinctive tones of the three major versions of the bill, it is useful to look carefully at two representative elements of the Act, its general "guiding principles" and the specific rules governing arrest of a child, and their interaction.

1. Guiding Principles

Although many of the Act's principles remain constant through the versions, a provision in the Act's "Guiding Principles" ("General Principles" in the 2002 version) has gone through an illuminating transformation (Table 1).

Immediately apparent in this cross-section of the Act's development is the absence of an obvious linear progression from a rough draft to final, polished product. Although in a number of areas the 2002 version does read as a less organized, less sophisticated precursor to the subsequent drafts,[131] here

131. The increased sophistication of the subsequent drafts has been a source of criticism. In its submission regarding the 2007 version of the Act, the Child Justice Alliance, a nonprofit child advocacy group, complained, "As it stands the 2007 version of the Bill is extremely difficult to read. It is cumbersome, confusing and too legalistic. If the spirit of the legislation is such that it is intended to be inter-disciplinary and accessible to parents and children alike, the drafting fails in this intention." The Child Justice Alliance, Submission on the Child Justice

Table 1. Guiding principles

2008	*2007*	*2002*
3.*(a)* All consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interests of society.	3.*(a)* All consequences arising from the commission of an offence by a child should be proportionate to the nature of the offence.	3.(1)*(g)* All consequences arising from the commission of an offence by a child must be proportionate to the circumstances of the child, the nature of the offence and the interests of society, and a child must not be treated more severely than an adult would have been in the same circumstances.

significant language in the 2002 version was substantially modified in the 2007 version, then *almost* completely restored in the 2008 version. Far from being a simple reworking of language or mere incidental modification, this pattern of reversal and restoration points to deliberate—and contested—manipulation on the part of the Act's drafters.

The injunction in the 2002 version that all consequences "must be proportionate to the circumstances of the child, the nature of the offence and the interests of society" lost both its mandatory status and most of the proportionality factors in the 2007 version, under which consequences simply "should be proportionate to the nature of the offence." The 2008 version generally restored consideration of factors such as "the circumstances of the child" and "the interests of society," but it retains the 2007 version's shift from "must" to "should," thereby vitiating the operative force of the guiding principle of proportionality.

2. Arrest

Encounter with police represents the first major procedural event in a child's interaction with the criminal justice system and the initial point where the guiding principles might be deployed. All the versions of the Act agree that police generally cannot arrest children for Schedule 1 offenses, but each has a distinct vision of how far the exceptions to that rule go (Table 2).

Bill to the Portfolio Committee on Justice and Constitutional Development (Jan. 30, 2010), http://www.childjustice.org.za/submissions/Child Justice Act.htm.

Table 2. Arrest rules

2008	*2007*	*2002*
20.(1) A child may not be arrested for an offence referred to in Schedule 1, unless there are compelling reasons justifying the arrest, which may include the following circumstances: *(a)* Where the police official has reason to believe that the child does not have a fixed residential address; *(b)* where the police official has reason to believe that the child will continue to commit offences, unless he or she is arrested; *(c)* where the police official has reason to believe that the child poses a danger to any person; *(d)* where the offence is in the process of being committed; or *(e)* where the offence is committed in circumstances as set out in national instructions referred to in section 97(5)*(a)*(ii).	18.(1) A child may not be arrested for an offence contemplated in Schedule 1, unless— *(a)* there are compelling reasons justifying such an arrest; or *(b)* the offence is in the process of being committed.	7.(1) Unless there are compelling reasons justifying an arrest, a child may not be arrested for an offence contemplated in Schedule 1.

In contrast with the general principles, the three versions do appear to share a linear relationship, with each iteration elaborating on what "compelling reasons" justify arrest. On slightly closer inspection, however, it is clear that successive versions have not merely clarified the vague compelling reasons exception; instead, they have expanded the realm of situations in which arrest is explicitly sanctioned while in no way defining the limits of police officers' ability to arrest children for Schedule 1 offenses.[132] The 2007

132. The notion that this provision is a check on police action as much as a right vested in the child is already somewhat masked in the 2002 version. The 2000 draft included in the South African Law Commission's Juvenile Justice Report, supra note 40, read: "In respect of the offences referred to in Schedule 1, a police official may not effect an arrest and must use any alternative to arrest as referred to in subsection (6) unless there are compelling reasons justifying an arrest." Although the distinctions between this and the language of the 2002 version are dwarfed by the subsequent modifications, two syntactical points are worth noting: the 2000 draft uses an active injunction, "a police official may not . . . ," whereas the 2002 version switches to a passive construction, "a child may not be. . . ." Although what a police officer

version did not explicitly elaborate on the vague "compelling reasons" highlighted in the 2002 version, but by characterizing the most obviously compelling reason for arrest—a crime in progress—as categorically distinct from the general exception (there must be compelling reasons *or* the offense must be in progress), it implicitly authorized arrest for a range of reasons unrelated to the immediate crime at hand. The 2008 version goes significantly farther in the same direction, setting out a list of explicitly sanctioned "compelling reasons" that is both subjective and nonexhaustive. The permissible reasons for arrest "may include," for example, reason to believe the child has no permanent home or will continue to commit offenses, but this does not suggest that the reasons may not also include any number of other justifications as well.[133] More, because the specifically authorized compelling reasons are themselves vague and expansive, there is actually little practical restriction on a police officer's power to arrest a child: it is certainly not difficult to argue that a child who committed one offense will commit another, or that a child discovered in a public space may not have a fixed address.[134]

That the exceptions to this child-protective provision against arrest finally swallowed the rule only in the 2008 version of the Act is a bit surprising: on the traditional political reading of the Act's history, one would expect the harshest and most expansive arrest powers to have appeared in the 2007 bill, not the generally milder 2008 version. To explain what is going on in these three distinct approaches to police powers (and how the specific rules governing arrest relate to the general principles discussed above), it is illuminating to break the rules down further, laying bare their structural component parts. Below, the three versions of the arrest rule are diagrammed as a series of

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may do and what may be done to a child are two sides of the same coin, only the 2000 construction is explicitly concerned with limiting police action. More subtly, the compelling reasons exception appears after the general rule in the 2000 draft; in the 2002 version the exception is front and center, setting up its increasing salience.

133. Reading "may include" as extending permission rather than setting a limit is both natural and in keeping with typical judicial interpretation. As the United States Supreme Court put it in *United States v. Sischo*, the words "may include" "on their face indicate rather an extension than a restriction." 262 U.S. 165, 169 (1923).

134. To the extent that these justifications are limited, their limits seem to be uncomfortably correlated with socioeconomic (at least partially code for "racial") status: it is likely much harder for a police officer to argue that a well-dressed white child has no permanent address than it is to argue the same regarding an impoverished-looking youth. As noted above, Dr. Skelton and Imam Solomon have both suggested that this may be a problem of constitutional proportions.

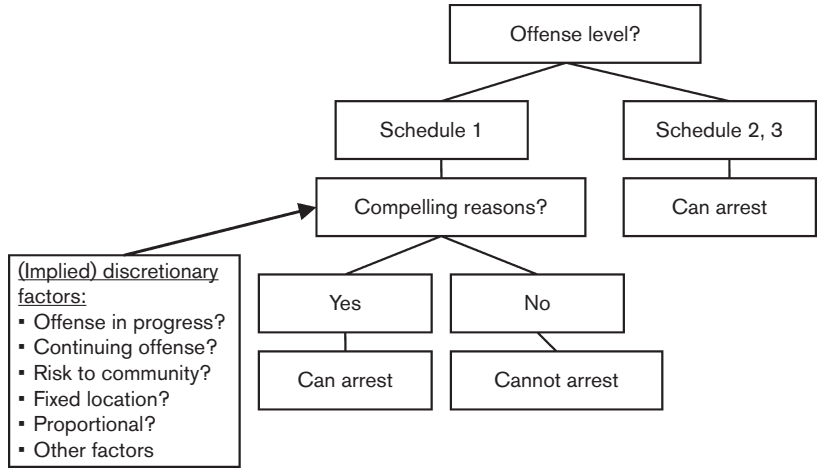

Figure 1. Arrest Rule, 2002

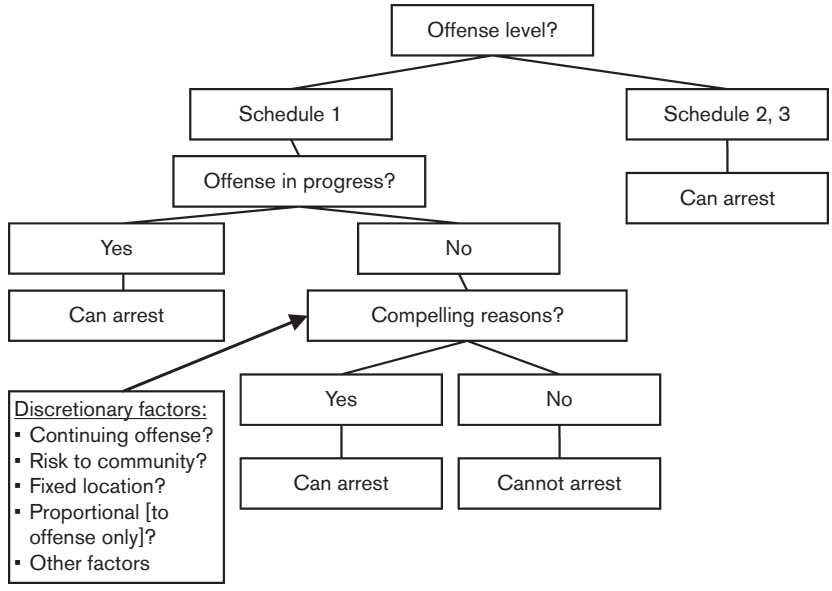

Figure 2. Arrest Rule, 2007

questions, the answers to which determine whether arrest is permissible. The questions are organized from most determined—what schedule does a particular offense fall under?—to most discretionary—are circumstances "compelling"? (Figures 1, 2, and 3).

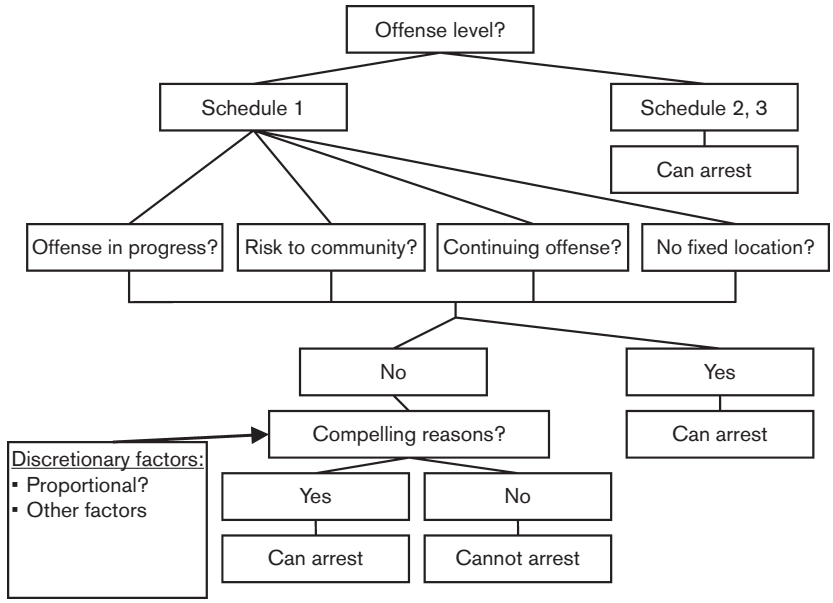

Figure 3. Arrest Rule, 2008

In comparing at these increasingly complex decisional structures, it is important to note first that the component parts of each version are essentially identical. Although some of the explicit factors listed in the 2008 version are new, they could be introduced as implicit "compelling reasons" even in the 2002 version.[135] What changes is instead the positioning of the various factors, with each draft performing a permutation, or rearranging, of the previous version. The clearest trend in this respect is the gradual movement of factors contained in the universe of "compelling reasons" for arrest out of their relatively unstructured and implicit place in the 2002 version and into the fixed framework of the grid. In broad terms, there is a trend here from broad standards to narrow rules, with successive draft further elaborating on how each factor plays into police behavior. In keeping with the values typically assigned to rules and standards, the "rulification" of the provision

135. The Act's legislative history indicates that the "compelling reasons" language of the 2002 version was "aimed at preventing a child from being traumatized by police officers for petty offences," but that "final discretion to arrest must lie with the police officer." Child Justice Bill: Informal Deliberation Minutes, supra note 115.

appears to produce a harsher, less child-protective regime that explicitly authorizes arrest in more scenarios.

As Duncan Kennedy has pointed out, however, rules and standards hardly align perfectly with one ideology or another; the reliance on standards to resist a rule structure "may be reactionary or revolutionary, reformist or mildly conservative."[136] Here, seeing these three diagrams as governed by a harsh/mild or child protective/punitive tension leads to the surprising conclusion that, with respect to something as significant as arrest powers, the 2008 version appears harsher than the 2007 version, a finding in clear conflict with the known political history of the Act. A more careful look at these dissected rules (and particularly at the shift from 2007 to 2008) reveals that each version represents a fairly dramatic reprioritization of factors relative to its predecessors, which is not readily explained as movement along a continuum from mild to harsh treatment or from "child protection" to "law and order."

Under the 2002 version, there was no easy path to arrest for Schedule 1 offenders, and a police officer always had to make a difficult judgment regarding the existence of "compelling reasons" for arrest: is the fact that a child will continue to offend sufficient grounds for arrest?; is this outweighed by the fact that the officer knows where the child lives?; what response is "proportionate to the circumstances of the child, the nature of the offence and the interests of society," as required by the general principles? The 2007 version introduced an easy grounds for arrest: if the crime is in progress, arrest is justified—whether it is "compelling" or not. This permutation moved the "crime in progress" factor out of the discretionary box and into the flowchart hierarchy *above* the other factors: the officer can dispense with asking any of the "compelling reasons" questions when faced with a crime in progress. Under the 2007 draft, what mattered was the offense and the proper reaction to it. This shifting attitude is also reflected in the proportionality analysis called for under the Act's general principles;[137] the 2007 test no longer looked

136. Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1777 (1976). In the criminal context, the Warren Court's efforts to extend rights to criminal defendants represents an example of liberal reformist rules. The requirement of Miranda warnings, for example, laid down a defendant-protective rule, although standards-based exceptions to that rule have permitted much less liberal police practices than the rule hoped to enforce.

137. Since explicit and specific statutory provisions generally trump general ones, there is no reason to fret over the weight of the Act's "guiding principles," such as proportionality, in applying the offense in progress justification. But the guiding principles still remain in the

to the interests of society or the circumstances of the child, as the 2002 law required, but instead focused only on the nature of the offense. Coming into play in the "compelling circumstances" analysis, this narrower proportionality requirement again favored a reactive approach governed by the offense itself.

The 2008 diagram looks much different: the "offense in progress" factor no longer ranks above the discretionary factors, which now assume a place in the structure at the same hierarchical level as the offense characteristics. These other factors, moreover, call on police not to respond to a specific offense, but instead to make predictions of future risk: will the child repeat the offense, harm someone, vanish from the grid? These are all social questions that ask about the place of a child vis-à-vis other people rather than focus on the antisocial act of offending. The 2008 version thus does not emphasize robust child protection or swift response to crime. Instead, it takes a more impersonal stance that is no longer really about either child protection or punitive response. What matters to the nation's ongoing security from crime is understood by way of probabilities, measurements of risk that account for individualized features only insofar as they inform a generalized picture of potential future harms. In this final diagram, the clean lines connecting the present offense to a punitive response have disappeared, replaced by a complex, messy web of relations that captures more information, if less precisely.

Michel Foucault, studying urban development in late-seventeenth-century France, has described a similar trend in what he termed a move from discipline to security:

> Discipline works in an empty, artificial space that is to be completely constructed. Security will rely on a number of material givens. It will, of course, work on site with the flows of water, islands, air, and so forth. . . . [Second], this given will not be reconstructed to arrive at a point of perfection, as in a disciplinary town. It is simply a matter of maximizing the positive elements, for which one provides the best possible circulation, and of minimizing what is risky and inconvenient, like theft and disease, while knowing that they will never be completely suppressed. One will therefore work not only on natural givens, but also on quantities that can be relatively, but never wholly reduced, and, since they can never be nullified, one works on probabilities.[138]

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background, and I include them among the discretionary factors governing whether there are "compelling reasons" for arrest.

138. Michel Foucault, Security, Territory, Population: Lectures at the College de France 1977–1978, 19 (Michel Senellart ed., Graham Burchell trans.) (2007).

Whereas the historical object and sweeping scope of Foucault's inquiry clearly differentiates it from the analysis here, the questions he raises demand attention. Is there really a turn from discipline to security? What does it look like; what does it accomplish; what are its politics; where does the power go? In the specific context of post-apartheid South Africa, a further question should be added to this list: what does "transition" from one mode of power to another entail?

This section's micro level forensic study of the Child Justice Act's shifting structure responds to these questions. Through close analysis of textual evidence, exemplified above and applied to several of the Act's other key provisions below, I uncover some of the concrete mechanisms through which power reinscribes itself in a manner simultaneously more stable and more dynamic than the outward appearance of political transition would suggest.

B. Setting (Some) Children Apart: Initial Assessment and Diversion

More than the rule governing arrest, modifications in two provisions addressing the initial assessment and diversion sparked intense political quarreling. The primary point of contest concerned how inclusive these protocols would be with respect to serious offenders. On the surface, the final rule governing initial assessment marked a major victory for child-protection advocates, whereas the diversion rule took a decidedly punitive turn. Closer analysis again reveals the underlying compatibility of these apparently incongruent outcomes and the increasing irrelevance of the child protective/punitive dichotomy.

1. Initial Assessment

As mentioned above, the general contours of the initial assessment have remained fairly constant across versions of the Act, with only minor procedural variations distinguishing them.[139] Noticeably different, on the other hand,

139. One somewhat notable, though still minor, shift concerns the process of determining a child's age. The 2002 and 2007 texts contain a list of potential sources of information regarding age, which includes baptismal records, the estimation of a medical professional, and statements by the child, a parent, or "any other person likely to have direct knowledge of the age of the child." The 2008 version adds to this final category the phrase, "including a religious or community leader likely to have direct knowledge. . . ." Although the statements of community figures could well qualify under the general "direct knowledge" requirement of the earlier drafts, this new language for the first time explicitly invites probation officers to give weight to statements by figures in civil society.

Table 3. Initial assessment

2008	*2007*	*2002*
Duty of probation officer to assess children 34.(1) Every child who is alleged to have committed an offence must be assessed by a probation officer, as set out in subsections (2) and (3), unless assessment has been dispensed with in terms of section 41(3). . . . 41.(3) If the child has not been assessed, the prosecutor may dispense with the assessment if it is in the best interests of the child to do so: Provided that the reasons for dispensing with the assessment must be entered on the record of the proceedings by the magistrate in chambers referred to in section 42.	**Duty of probation officer to assess certain children** 35. A child who is alleged to have committed an offence must be assessed by a probation officer if— *(a)* the child was below 10 years of age at the time of the commission of the alleged offence or is a child referred to in section 9(1)*(c)*(ii); *(b)* the child may be in need of care for purposes of referring the child to a children's court in terms of section 51 or 64; *(c)* the matter is being considered for diversion in terms of section 11*(b)* or *(c)*; or *(d)* in the case of a child who is 10 years or older but below 14 years at the time of the commission of the alleged offence, the matter is being considered for diversion in terms of section 11*(b)* or *(c)* or prosecution in terms of section 11*(e)*.	**Duty of probation officer to assess child** 19. A probation officer who receives a notification from a police official that a child has been arrested, served with a summons or issued with a written notice must assess the child before the child appears at the preliminary inquiry.

are the criteria for determining who benefits from this child-protective procedural safeguard (Table 3).

On its face, this set of provisions epitomizes the mild/harsh/mild trend: the 2002 version required assessment of all children; the 2007 version limited access to assessment, particularly for older children and those accused of serious offenses; the 2008 version restored (almost) universal assessment. The restriction on assessment, blamed at least in part on resource constraints, was one of the most controversial modifications in the 2007

version.[140] In its submission in response to the amended legislation, the National Institute for Crime Prevention and the Reintegration of Offender (NICRO), the principal national NGO responsible for developing diversion programs, argued:

> Assessment is a necessary process that if applied and used appropriately will provide assistance to the criminal justice system in deciding the best way to deal with the child. Even if a child is sentenced assessment will assist with sentence planning. . . . [W]e have to stop using [lack of resources] *as a reason not to achieve certain things we set out to achieve*.[141]

Another NGO, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN), noted further that because procedures for assessing all children had already been developed and implemented in the shadow of the long-delayed Act, restricting access would actually "constitute a move backwards" from current practice.[142] Other groups expressed similar concerns, including the Department of Social Development at the University of Cape Town[143] and The Children's Rights Project at the University of the Western Cape.[144] In the face of this intense lobbying, as well as a growing recognition that broad assessment would not be financially disastrous, the 2008 version restored a universal right to assessment.

2. Diversion

Another major issue involving the scope of the Act's protections is the availability of diversion in more serious cases. Rather than representing simple linear shifts along a spectrum of choices from universal diversion to no diversion, the three versions of the bill reveal deeper changes in the mode of

140. Vuyokazi Tyakume, Child Justice Bill & Impact of State of Nation Address: Researcher's Briefing (22 Feb. 2008), http://www.childjustice.org.za/parl_reports/2008Feb22.pdf.

141. Submission by NICRO on the Child Justice Bill to the Portfolio Committee on Justice and Constitutional Development, 5 (emphasis in original), http://www.childjustice.org.za/submissions/2008Submissions/NICRO.pdf.

142. Promoting Crime Prevention and Responding to Sexual Offending in the Child Justice Bill, 8, http://www.childjustice.org.za/submissions/2008Submissions/RAPCAN.pdf.

143. Submission to the Portfolio Committee on Justice and Constitutional Development, 3, http://www.childjustice.org.za/submissions/2008Submissions/Department%200f%20Social%20Development.pdf.

144. Submission on the Child Justice Bill 49 of 2002, 12–13, http://www.childjustice.org.za/submissions/2008Submissions/CLC.pdf.

Table 4. Diversion—the principle of proportionality

2008	*2007*	*2002*
Minimum standards applicable to diversion 55.(1) Diversion options, in keeping with the objectives of diversion must be structured in a way so as to strike a balance between the circumstances of the child, the nature of the offence and the interests of society, and— . . .	**Minimum standards applicable to diversion and diversion programmes** 55.(1) Diversion programmes, in keeping with the objectives of diversion must be based on the principle of proportionality, and— *(a)* must be structured in such a way so as to strike a balance between the circumstances of the child, the nature of the offence and the interests of society, especially in relation to section 57. . . .	**[No comparable language]**

decision making. Specifically, the principle of proportionality has taken an increasingly central role in governing diversion (Tables 4 and 5).

The 2007 version categorically eliminated diversion for certain high-level offenders in a separate provision;[145] this harsh rule was not reversed in 2008. Instead, it was retained and in some respects further hardened by the final draft.

The 2007 version shifted the conceptual framework of diversion by introducing the "principle of proportionality" as a major feature of this section, which sets out the principles governing diversion generally. As in the provisions governing arrest, the shifts here are best seen as permutations, though this time the borrowing and swapping of component parts has occurred not at a minute textual level but in the Act's overall structure. The 2002 version contained a specific requirement that individual sentences under the diversion scheme comport with proportionality concerns,[146] and the bill's "general

145. Child Justice Act (2007) § [11(e)]: "if a child is accused of committing an offence referred to in Part I of Schedule 3, or item 2, 5 or 6 of Part II of Schedule 3, or where the matter is not divertedin terms of Chapter 6 or 7 and the provisions of section 50(3) apply, the child must be brought before a child justice court to be dealt with in terms of Chapter 8."

146. Child Justice Act (2007) § [47]: "In selecting a specific diversion option for a particular child at a preliminary inquiry, consideration must be given to," among other things, "the proportionality of the option recommended or selected to the circumstances of the child, the nature of the offence and the interests of society. . . ."

Table 5. Diversion—specific considerations

2008	*2007*	*2002*
Consideration of diversion 52.(1) A matter may, after consideration of all relevant information presented at a preliminary inquiry, or during a trial, including whether the child has a record of previous diversions, be considered for diversion if— *(a)* the child acknowledges responsibility for the offence; *(b)* the child has not been unduly influenced to acknowledge responsibility; *(c)* there is a *prima facie* case against the child; *(d)* the child and, if available, his or her parent, an appropriate adult or a guardian, consent to diversion; and *(e)* the prosecutor indicates that the matter may be diverted in accordance with subsection (2) or the Director of Public Prosecutions indicates that the matter may be diverted in accordance with subsection (3). (2) A prosecutor may, in the case of an offence referred to in Schedule 1, if the matter has not already been diverted in accordance with Chapter 6, or in the case of an offence referred to in Schedule 2, after he or she has—	**Child justice court may divert matter** 68.(1)*(a)* A child justice court may, at any time before the conclusion of the case for the prosecution, and, with the consent of the prosecutor, make an order for diversion in respect of the child, if the court is satisfied that— (i) the child acknowledges or intends to acknowledge responsibility for the alleged offence; (ii) there is a *prima facie* case against the child; (iii) the child has not been unduly influenced to acknowledge responsibility; (iv) the child and his or her parent, or an appropriate adult, consent to diversion and the diversion option; and (v) the offence in question is not an offence referred to in item 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13*(a)*, 13*(b)*, but excluding possession of only a firearm, or 14 of Part I of Schedule 3, or an offence referred to in item 2, 5 or 6 of Part II of Schedule 3, or any conspiracy, incitement or attempt to commit any of these offences listed here. . . . **Diversion of certain sexual offences cases by child below 14 years** 57.(1) The diversion of a matter in respect of the offence of	**Child to be considered for diversion under certain circumstances** 44. A child must be considered for diversion if— *(a)* the child voluntarily acknowledges responsibility for the offence; *(b)* the child understands his or her right to remain silent and has not been unduly influenced to acknowledge responsibility; *(c)* there is sufficient evidence to prosecute; and *(d)* the child and his or her parent, or an appropriate adult, consent to diversion and the diversion option.

(*continued*)

Table 5 Diversion—specific considerations (Continued)

2008	*2007*	*2002*
(a) considered the views of the victim or any person who has a direct interest in the affairs of the victim, whether or not the matter should be diverted, unless it is not reasonably possible to do so; and *(b)* consulted with the police official responsible for the investigation of the matter, indicate that the matter may be diverted. (3) *(a)* The Director of Public Prosecutions having jurisdiction may, in the case of an offence referred to in Schedule 3, in writing, indicate that the matter be diverted if exceptional circumstances exist, as determined by the National Director of Public Prosecutions in directives issued in terms of section 97(4)*(a)*(iii). *(b)* A Director of Public Prosecutions may only indicate that a matter may be diverted in terms of paragraph *(a)* after he or she has— (i) afforded the victim or any person who has a direct interest in the affairs of the victim, where it is reasonable to do so an opportunity to express a view on whether or not the matter should be diverted, and if so, on the nature and content of the diversion option being	rape or compelled rape in circumstances contemplated in item 1, or an offence referred to in item 3 or 4 of Part II of Schedule 3 may be considered at a preliminary inquiry in accordance with section 50 if— *(a)* the child was below the age of 14 years at the time of the commission of the alleged offence; and *(b)* the matter qualifies for diversion in terms of the directives issued by the National Director of Public Prosecutions as contemplated in section 95(4)*(a)*(i)*(bb).*	

(*continued*)

Table 5 Diversion—specific considerations (Continued)

2008	*2007*	*2002*
considered and the possibility of including in the diversion option, a condition relating to compensation or the rendering of a specific benefit or service and has considered the views expressed; and (ii) consulted with the police official responsible for the investigation of the matter. . . .		

principles" contained a similar umbrella injunction.[147] It was only in the 2007 draft, however, that the micro and macro level calls for proportionality, which were in their original contexts largely injunctions against disproportionately harsh sentences,[148] came into play in the mid-level procedural rules that govern, for example, when children may be diverted. In this context, the principle of proportionality necessarily became a tool for enhancing the bill's severity: because not all children are similarly situated, to treat them all identically (that is, by giving them all equal access to the procedures leading to diversion) would be disproportionate with respect to some children. To correct this "problem," the bill withdrew access to diversion proceedings for some children, creating a bifurcated system with offense level as the primary variable governing proportionality.

Despite vociferous arguments from the same groups opposing limits on access to assessment, the 2008 version of the bill did not roll back the changes made in 2007.[149] Instead, in key respects it further limited the

147. Child Justice Act (2007) § [3]: "All consequences arising from the commission of an offence by a child must be proportionate to the circumstances of the child, the nature of the offence and the interests of society, and a child must not be treated more severely than an adult would have been in the same circumstances."

148. This is particularly apparent in the general principles section, where the 2002 version (unlike its successors) merges the proportionality requirement and the injunction against overly severe treatment.

149. See, e.g., NICRO, supra note 141, at 7; see also Children's Rights Project, University of the Western Cape, supra note 144, at 14.

scope of diversion. For example, the 2007 bill excluded only a (large) subset of particularly serious Schedule 3 offenses from diversion. Though the 2008 version does include an "exceptional circumstances" escape valve, it broadly bans diversion for all Schedule 3 offenses.[150] Thus, a child accused of possessing over 20,000 rand (US$ 2700) of drugs would have remained eligible for diversion under the 2007 version, but a child accused of possessing drugs worth more than 5000 rand (US$ 675) under the 2008 version is ineligible for diversion except under exceptional circumstances. In addition to this generally finer-grained approach to sorting crimes, the 2007 version also offered an escape hatch of sorts that permitted diversion for children under fourteen accused of sexual crimes, including rape, that disappeared in 2008.[151]

The 2008 version also introduced a set of requirements governing access to diversion even for Schedule 2 offenses, and thus for some forms of theft, assault, arson, drug possession, and obstruction of justice. Before a child accused of these offenses can be diverted, the judge at a preliminary inquiry not only must obtain consent from the prosecutor but also must consult with the victim(s) of the offense and the police officers involved. Counterbalancing these added hurdles to diversion, however, the 2008 version's broader access to the initial assessment encourages adjudication entirely outside of the context of formal court proceedings. The 2007 version, by contrast, called for diversion in more serious cases to be handled by a formal hearing of a child justice court.

The distinction between these two approaches again does not align well with a harsh/mild dichotomy. Rather, the change in approach is best seen as a reorientation, or rather relocation, of the domain of adjudication. The judicial discretion exercised by a child justice court per the 2007 version is in keeping with the logic of a criminal trial and punishment: the police, victims, and other witnesses may come into court to testify, but these witnesses are always somehow strangers in the frame of judgment. The hermetic world of

150. In another striking turn, the 2008 text also eliminated language, not quoted above, that had survived the "harsh" 2007 version, requiring that diversion "must promote the dignity and well-being of a child, and the development of his or her sense of self-worth and ability to contribute to society."

151. In this respect the 2007 version is tough-on-crime but not victim-centric: the scope of analysis remains focused on the offender and his actions and capacities. The victim in the 2007 version enters the scene only at the sentencing stage.

the courtroom reduces ultimately to the fraught relationship between the defendant and the judge who holds the power to sentence.[152] The 2008 version breaks open that closed world, making the diversion decision explicitly reliant on the participation of those in the social world for whom the offense has particular salience, namely the police and any victims.

This reorientation also helps to explain the move toward restoring inclusive access to the initial assessment in the 2008 version: where the process of adjudication leading to diversion is no longer focused solely on the offender, the public fear that serious offenders will get let off by "the system" against the interests of those in the community dissipates. That is, where police and victim(s) exercise a sort of veto power over diversion later on, the stakes at the initial assessment are considerably lower. The restored inclusivity of initial assessment, in isolation an apparent victory for the partisans of child protection, is upon closer look merely part of a larger rebalancing/reconfiguration of the Act's structure that shifts decision-making power to police and even victims, but that does not necessarily meaningfully alter the child's fate in terms of harsher or milder consequences.

C. Aftermath: Sentencing and Criminal Records

These patterns emerge again in the provisions governing sentencing and the maintenance of criminal records. These provisions relate to the subset of children bound to trial—that is, those who do not "win" at the diversion stage. Unlike the provisions considered above, these portions of the law are explicitly future-oriented, governing the treatment of children for a period of time to come—often a period that will extend well past the end of childhood. The three versions of the Act offer three distinct visions both of what should happen to convicted children in the future and how that treatment should relate to the past offending that led to the present adjudication.

152. As Robert Cover notes in Violence and the Word, "Just as the torturer and victim achieve a 'shared' world only by virtue of their diametrically opposed experiences, so the judge and prisoner understand 'punishment' through their diametrically opposed experiences of the punishing act." 91 Yale L. J. 1601, 1609 (1986). Cover argues that the judge and defendant may never share an understanding of the judgment's meaning, but this hermeneutic divide is the product of the relationship—diametric opposition—between the judge and the defendant. In the 2008 version, that direct, binary relationship loses much of its clean symmetry with the introduction of other potent interpreters.

1. Prison

The portion of the Act governing when a child, once convicted of an offense, may be sentenced to prison repeats the familiar pattern of reversal and restoration, with familiar caveats (Table 6).

The 2002 version imposed a categorical ban on imprisoning children under fifteen years old, and it permitted imprisonment of older children only where "substantial compelling reasons" for doing so exist. The remarkably concise 2007 version eliminated the age threshold entirely as well as the requirement that there be affirmative "compelling reasons" for imprisonment. Instead, prison appeared as an option of "last resort"—under the logic of the 2007 version there are no criteria for choosing prison because it is the default position in the absence of any other options. The 2008 version restored an absolute age threshold but retains the "last resort" approach supplemented by a requirement that imprisonment be for the "shortest appropriate period of time."

Slightly more subtly, the 2008 version measures age at the time of sentencing rather than at the time of the offense, as the 2002 version did. A child who committed an offense at age thirteen but was sentenced after his or her

Table 6. Prison

2008	*2007*	*2002*
Sentence of imprisonment 77.(1) A child justice court— *(a)* may not impose a sentence of imprisonment on a child who is under the age of 14 years at the time of being sentenced for the offence; and *(b)* when sentencing a child who is 14 years or older at the time of being sentenced for the offence, must only do so as a measure of last resort and for the shortest appropriate period of time.	**Sentence of imprisonment** 78.(1) A child justice court, when sentencing a child to imprisonment, must only do so as a measure of last resort.	**Referral to prison** 69.(1) A sentence of imprisonment may not be imposed unless— *(a)* the child was over the age of 14 years of age at the time of commission of the offence; and *(b)* substantial and compelling reasons exist for imposing a sentence of imprisonment, which may include conviction of a serious offence or a previous failure to respond to alternative sentences, including sentences with a residential element.

fourteenth birthday is thus eligible for prison under the 2008 law but would not have been under the 2002 version. Although this distinction only has practical significance for the small subset of children who turn fourteen between the time of the offense and sentencing, it represents a fairly significant reorientation: at issue is not the child's culpability (a function in part of age at the time of the offense), but his or her present—and future—status. Put otherwise, what matters in the 2008 version is not reactive, retributive punishment of children who have "turned to crime,"[153] but ongoing control, the "appropriate" regulation of children "who have come into conflict with the law."[154]

2. Expungement

The final procedural question relates to the aftermath of conviction—specifically, what becomes of the record of a child's encounter with the law as he or she moves into adulthood (Table 7).

Although there is consensus across the versions that Schedule 3 offenses may not be expunged, in other respects they reflect radically different approaches. The 2002 version invested great discretion in the sentencing judge, authorizing the judge to determine, taking into account the factual circumstances, whether and when (within a five-year range) expungement is appropriate, subject to appellate review. The 2007 version eliminated this discretion and set a schedule of automatic expungement for all offenses in Schedules 1 or 2. The 2008 version has retained this schedule, but with two significant differences: expungement is not automatic but must be formally requested, and expungement is contingent on the child not reoffending. In combination, these modifications create a system far better equipped for future monitoring and regulation without appearing unduly harsh: expungement is available, but many, perhaps most, offenders will likely fail to request it. As I have suggested above, however, "harshness" is not quite the appropriate standard of measure here. Whereas the 2002 version's approach to expungement focused on the particular nature of the child, and the 2007 version tied consequences directly and exclusively to the nature of the offense, the final 2008 Act somehow does neither. Even as it ties expungement both to the nature of the initial offense and the child's subsequent behavior, the bureaucratic red tape attached to the process effectively turns juvenile

153. Child Justice Act (2007), Preamble.

154. Child Justice Act (2008), Preamble.

Table 7. Expungement

2008	*2007*	*2002*
Expungement of records of certain convictions and diversion orders 87.(1)*(a)* Where a court has convicted a child of an offence referred to in Schedule 1 or 2, the conviction and sentence in question fall away as a previous conviction and the criminal record of that child must, subject to subsections (2), (3) and (5), on the written application of the child, his or her parent, appropriate adult or guardian (hereafter referred to as the applicant), in the prescribed form, be expunged after a period of— (i) five years has elapsed after the date of conviction in the case of an offence referred to in Schedule 1; or (ii) 10 years has elapsed after the date of conviction in the case of an offence referred to in Schedule 2, unless during that period the child is convicted of a similar or more serious offence.	**Automatic expungement of records** 88.(1) The effect of an expungement of a record contemplated in this section is that the conviction in question falls away and is deemed to have never occurred. (2) The record of any conviction and sentence imposed upon a child may not be expunged in terms of this Act, except in respect of an offence referred to in Schedule 1 or 2. (3) The record of any conviction and sentence imposed upon a child convicted of an offence referred to in Schedule 1 or 2 must, subject to subsection (4), be expunged— *(a)* in the case of an offence referred to in Schedule 1, after a period of 5 years from the date of imposition of the sentence; and *(b)* in the case of an offence referred to in Schedule 2, after a period of 10 years from the date of imposition of the sentence: Provided that the record of any conviction and sentence imposed upon a child who, on the date of imposition of the sentence	**Expungement of records** 81.(1) The record of any sentence imposed upon a child convicted of any offence referred to in Schedule 3 may not be expunged. (2) In respect of offences other than those referred to in Schedule 3, the presiding officer in a child justice court must make an order regarding the expungement of the record of the child's conviction and sentence and must note the reasons for the decision as to whether such record may be expunged or not when he or she imposes the sentence after consideration of any relevant factor, including— *(a)* the nature and circumstances of the offence; and *(b)* the child's personal circumstances. (3) If a presiding officer decides that a record referred to in subsection (2) may not be expunged, such decision is subject to review or appeal on

(*continued*)

Table 7 Expungement (Continued)

2008	*2007*	*2002*
	in respect of an offence referred to in either Schedule 1 or 2, is— (i) below the age of 14 years, must be expunged on the date on which that child turns 18 years; or (ii) 14 years of age or older, must be expunged on the date on which that child turns 21 years, whichever period referred to in paragraph *(a)* or *(b)* expires or event referred to in subparagraph (i) or (ii) occurs first.	application by or on behalf of the child. (4) If an order has been made in terms of subsection (2) that the record of the 30 conviction and sentence of a child may be expunged, the presiding officer must set a date upon which the record of conviction and sentence must be expunged, which date may not exceed five years from the date of the imposition of the sentence.

conviction into a device for long-term regulation, whatever the details of the child or the offense.

CONCLUSION: KALEIDOSCOPIC FRAGMENTS AND THE DETRITUS OF APARTHEID PAST[155]

For a large number of children, South Africa's Child Justice Act is clearly a good thing. Children who before might have been arrested, held in confinement, tried as adults, and sentenced to prison or corporal punishment for relatively minor offenses now might go through the entire adjudicative process without once seeing the inside of a jail or even a courthouse. What is at stake, however, is not only the fate of individual children traveling through the criminal justice system. And what has happened to the Child Justice Act over the course of its decade-long development is revealing of more than the contours of South African political infighting.

155. Hart, supra note 15 ("this moment of assuming formal power was one of fulfillment of years of struggle and enormous promise for the future, as well as a moment of profound danger; of being thrust into an arena strewn with the detritus of apartheid past . . .").

South Africa's recent political history makes it a particularly inviting home for the logic and rhetoric of "transition," of wholesale change accomplished through linear continuity. The past fifteen years of South African legal history, as seen through the development of the Child Justice Act, exhibits far more discontinuity and far less novelty than this rhetoric would suggest. Careful examination of the Child Justice Act thus casts doubt on what I have called the metanarrative of transition, whose logic organizes thinking about crime and punishment around the depoliticization of crime and the shifting politics of punishment. For all of its skepticism about this particular metanarrative's explanatory value, however, my analysis has hardly been a thoroughgoing critique of metanarrative as such.

This leaves a pressing question, whose answer I have only hinted at above: what remains, if the metanarrative edifice of transition and progress crumbles? Does the deconstruction of this epic story, the national bildungsroman, leave behind only what Jean-François Lyotard has famously termed "des petits récits," little stories of purely local significance? In Lyotard's conception, "The narrative function is losing its functors, its great hero, its great dangers, its great voyages, its great goal. It is being dispersed in clouds of narrative language elements—narrative, but also denotative, prescriptive, descriptive, and so on."[156] As the ability to tell grand stories of great heroes and dangers vanishes, what remain are "clouds" of disparate elements that never cohere into a monolithic whole. Ethical engagement continues to occur within and even between local elements of this cloud, but no overarching authority dictates moral norms.

It is tempting to see juvenile justice in South Africa enacting precisely this move from the grand narrative of apartheid and its demise to the local stories of restorative justice meted out at the level of villages and local neighborhoods. Seen in this light, the Child Justice Act's three iterations mark the retreat of centralized state authority, with local police, prosecutors, victims, and community members stepping in to fill the void. Under the 2008 version of the Act, local police—who operate in an increasingly decentralized manner[157]—enjoy far more discretionary power in determining whether to

156. Jean-François Lyotard, The Postmodern Condition: A Report on Knowledge, xxiv (Geoff Bennington & Brian Massumi trans., 1984).

157. See, e.g., Elrena van der Spuy, Interview with Director Jeremy Vearey of the South African Police Service, Mitchell's Plain, Cape Town, South Africa, in Trends in Policing: Interviews with Police Leaders Across the Globe 165, 168–169 (Dilip K. Das & Otwin Marenin eds., 2009) ("What stands out particularly [in policing after 1994] is the decentralization of

arrest a child than under earlier drafts; victims and local police and prosecutors play a more definitive role in determining whether diversion is available; local civic leaders play a larger role in establishing a child's identity. Outside of the Act, more troubling developments echo this story. Private security companies hired by individuals and companies, for example, have come to dominate the crime control landscape, outnumbering official police by a ratio of at least three to one.[158] For virtually everyone who can afford such security, crime prevention and response begins and ends with these companies; official police are rarely summoned even if a perpetrator is caught, and victims rarely file charges.

This vision of national disintegration into a cloud of local ethical engagement, with its promising and problematic offer of freedom from a national superstructure, fails however to appreciate the superstructural features of the cloud, or the contingent logic of the kaleidescope. The South African state has in many respects withdrawn from the symmetrical business of retributive justice, of meting out individual punishments in response to individual crimes. As I show above, in the context of juvenile justice this move put to rest the apparently intractable political debate over how harshly to treat children who have "come into conflict with the law." At the same time, however, the state has reinscribed itself onto the lives of individuals and communities. It has done so not by regimenting the conduct of individuals and rigidly defining the structure of communities, as the apartheid state attempted so ardently to do. Instead, the Child Justice Act in its final iteration permits the state to regulate the *general* flow of an entire population of child-offenders through the justice system in a manner that minimizes risk of future offending and that permits the state to track and monitor that population. The result is not the

command and control, particularly over resources. Formerly the South African Police had a culture of overcentralized decision making and bureaucratic control. The space now exists within the guidelines of policy, of course, to be much more creative in terms of our approaches to crime at the precinct level.").

158. Rita Abrahamsen & Michael C. William, Public/Private, Global/Local: The Changing Contours of Africa's Security Governance, 35 Rev. Afr. Pol. Econ. 543 (2008) ("By far the largest private security sector on the African continent is found in the Republic of South Africa, which as a percentage of GDP has the largest private security market in the world. Currently, there are 4,898 registered private security companies (PSCs) in South Africa, employing 307,343 active security officers. By comparison, the South African Police Service has 114,241 sworn police officers. In the nine years from 1997 to 2006, the number of security guards grew by over 157 per cent, and as South Africa prepares for the 2010 World Cup, this figure is set to increase yet further.") (internal citations omitted).

sort of panoptic surveillance and control made famous in Foucault's *Discipline and Punish*[159] but a new paradigm of governance (borrowing another term from Foucault) that operates nearly invisibly, directing the flow of currents through Lyotard's postmodern cloud by "organizing circulation, eliminating its dangerous elements, making a division between good and bad circulation, and maximizing the good circulation by diminishing the bad."[160]

The shifting unit of analysis appears first in the Act's guiding principles, which set out the principle of proportionality. The 2002 version mandates proportionality as a means of child protection; the 2007 version responds by prioritizing (though not requiring) proportionality to the offense. Rather than reaching a political compromise or choosing one version over the other, the final Act creates an apparent hybrid that is actually categorically different from either option. By restoring the general language of the 2002 version but importing the term "should" from the 2007 version, the Act ceases to be a universal command of law that applies to each child individually. Instead, it is a general order, given to an unmentioned executor, that may or may not apply in a given instance. In a later provision governing arrest, the executor of the law is clearly the police. Here, the level of explicit discretion—the number of situations where the police officer may choose to arrest a child—expands dramatically in the final version of the Act. By making this discretion explicit, however, the Act structures the discretion: it does not dictate a solution to the dilemma of whether to arrest a child, but it does determine which questions must be asked in reaching a conclusion. Those questions concern not only the event at hand but also the likely future risks the child poses.

159. This panoptic desire marked not only the apartheid state but also the colonial government that preceded it. In one particularly striking example, in the 1920s the government constructed the black township of Langa such that a guard in a tower at the city's center "will be able to see not only from end to end of the Central Avenue, but will be able to look into each of the large compounds and directly up to the Station Square, and a Police Patrol on the east roads running north and south would get an immediate view East and West down all the other roads and across the open spaces." Minutes of the Native Township Committee of the Cape Town Council (1923), 108; quoted in Saunders, supra note 88, at 199.

160. Foucault, supra note 138, at 18. It is worth noting that the governmental task of "organizing circulation" presupposes a certain "freedom of circulation" (49). The free movement of individuals, which threatened the rigid control structure of the apartheid regime, gets subsumed within the broader, if looser, framework of governmental power, creating a somewhat paradoxical controlled freedom.

The final version of the Child Justice Act restructures not only the type of questions asked but also who answers them. Whereas the 2002 and 2007 versions stood for opposing positions on the question of whether all children should have access to an initial assessment (the first step on the path to diversion), the 2008 version renders the dispute nearly irrelevant. Though the 2008 Act allows universal access to the initial assessment, at the same time it shifts this gatekeeping function from the initial assessment to the preliminary inquiry. Unlike earlier drafts, under the final version police and victims play a significant role in determining whether even moderately serious offenses may be diverted at the preliminary inquiry. The national authority thus cedes some control over diversion decisions in individual cases, but by investing specific players—police and victims—with decision-making power, it can predict on a more general level when cases will be diverted.

By manipulating decision-making pathways, empowering and connecting particular elements of local community clouds, and by developing its knowledge of future risks, the national authority behind the final version of the Child Justice Act creates the illusion of depoliticization in order to practice a new form of politics. As I suggest above, the African National Congress has gone through four moments of self-definition. The final version of the Child Justice Act gestures toward yet another turn of the kaleidescope: a turn from the rigid logic of command and control to a more weblike mode of structural governance. The spider does not need to know where the fly is at all times, so long as it is stuck in the web.