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PENAL POPULISM AGAINST THE PROTECTION OF YOUTH

"When a child steals a bike, it isn't the bike you should care about, but the child."[1] These were the words of Jean Chazal, judge and pioneering advocate of specialized—which is to say specific and "protectionist"—juvenile justice. In 1945, an authentically humanist criminal justice policy was drawn up for juvenile offenders. It took the shape of the February 2, 1945 *ordonnance*, often called the "charter of child offenders," never written into the Criminal Code or the Code of Criminal Procedure, meaning that it was intended as an exception. "France is not that rich in children that it can afford to neglect anything that can make them into healthy creatures... The government of the French Republic is intent on effectively protecting juveniles, and especially juvenile offenders...", reads the preamble.

It soon became clear, moreover, that the intention to protect, socialize, and integrate children and adolescents had overlooked all those who were not delinquents, but were endangered and often deviants, such as school dropouts. The December 23, 1958 *ordonnance* on endangered children completed juvenile justice law and was included in the Civil Code when a law on parental authority was passed in 1970. I must mention endangered children as well as delinquents because the juvenile court judge (the JCJ), simultaneously a civil and criminal judge, and a central figure in the protectionist model, is in

charge of both. This twofold competence, a remarkable French exception, highlights the extent to which these two categories, handled by the juvenile court judge, are intertwined. Indeed, although all endangered minors are not offenders, the protectionist model postulates that all juvenile offenders are endangered, and therefore, deserving of protective educational measures.

> Roughly speaking, juvenile justice is presently faced with three sorts of delinquent behavior:
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> (1) "initiatory" offending, with the sort of transgressive behavior that has always been a part of the passage from adolescence to adulthood;
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> (2) "pathological" offending tied to psychological, and possibly psychiatric disorders, particularly difficult to deal with when the public child psychiatry institutions are deserted by the authorities, as is presently the case;
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> (3) "exclusion-related" offending, in the ghettoized, stigmatized neighborhoods: the offending that scares people.

No one denies its link with the loosening of social ties and the mounting social insecurity of all sorts.[2] Whether or not they commit offenses, adolescents on those fringes of the Republic suffer from what Robert Castel calls affirmatively negative action because they combine social handicaps and others known as "ethnic."[3] These youthful offenders are emblematic of those groups with the greatest problems, and at the same

time, it is they who feed both concern with security and actual insecurity.[4]

Now there's the fatal word: insecurity. In a zero risk—and zero tolerance—society, where numbers are everything, where the intensification of offending in some places is not an illusion, in a society whose policies are grounded in emotionalism and communication, the protectionist model, whose effects are only visible in the more or less long term, is necessarily challenged, if not to say reviled. The protective approach of 1945 was based on solidarity in the face of deviancy and delinquency, consenting as a sort of *collective responsibility*. When the security mania broke out, a resurgence of the notion of individual responsibility with no consideration for social or mental vulnerability produced a mutation in the protectionist model.[5] In the name of the victim, of the reality of the offense, and of the youth's profile (is he a recidivist?), the will to punish has replaced the commitment to socialize and rehabilitate.

THE GRADUAL EROSION OF THE SPECIFICITY OF JUVENILE JUSTICE LAW

And yet, the 1945 *ordonnance* has never been repealed, as if to avoid admitting to the current mutation in the original model. "Massive penal weaponry"[6] has been written into that very foundational text through a series of reforms put through at a dizzying pace since 2002. Better yet, for the first time, on August 29, 2002, the *Conseil Constitutionnel* (the French Supreme Court) proclaimed it a founding principle acknowledged by the laws of the French Republic, thus apparently giving the protectionist model a constitutional status, as if to absolve itself for consenting to all the bills that increasingly

assimilate juvenile justice to adult justice. According to that ruling, the founding principle involves:(1) a necessarily mitigated penal responsibility of minors, depending on their age, which rule was clearly defined in the founding *ordonnance* and repeated in article 122-8 of the 1992 Criminal Code, which provides a general outline of criminal justice for juveniles;

> (2) the obligation to work toward the educational and moral betterment of delinquent children and adolescents through measures appropriate for their age and personality. This reasserts the primacy of education over repression, as in the February 2, 1945 *ordonnance*; and
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> (3) the obligation to have specialized courts and appropriate procedures.

Was the mutation in the protectionist model merely surreptitious and unfinished? This consecration did not prevent a flood of emotive, declarative laws since 2002 (seven bills, all passed using an emergency procedure, except for the March 5, 2007 law on the prevention of offending), contributing to the gradual discarding of the protectionist model and the barely veiled lowering of the age of penal responsibility to sixteen.[7] The outcome is in flagrant contradiction with the criminal justice policy message carried by the charter on juvenile offenders, still legally binding. It is not an exaggeration to say that the text has gradually become incomprehensible, both in form and in content.

In spite of strong resistance from JCJs, from educators working in the judicial department for the protection of youth (the PJJ), from the actors doing field work, lawyers, and aca-

demics working on doctrine, the mutation in the protectionist model is in progress. It is in fact rumored that juvenile court judges will no longer be in charge of endangered minors and will be confined to a purely punitive role, sometimes obliged to pronounce at least minimum prison sentences, depending on the type of offense and independently of the offender's personality. A "participatory" criminal justice policy (that is, one combining prevention and repression) is being replaced by a policy with simplified functions and goals. The preferred model is no longer the one based on criminal justice legislation expressing fundamental, educational values, but a repressive one made of declarative laws aimed at impressing public opinion, used as an extension of (often populist) political discourse on the need for a firm hand, whose positive effects on social cohesion or on figures for offending have not been scientifically demonstrated.

French lawmakers should, however, be more sensitive to the lack of positive effects of greater repression on figures for offending. England, the European country where repressive responses have been tightened the most, has the highest level of juvenile offenders within overall offending (20 percent); in Norway, which has retained its protectionist model, juveniles represent under 5 percent of all offenders.

OFFENSE-FOCUSED CRIMINAL JUSTICE POLICY: PUTTING THE OFFENDER IN THE BACK SEAT

If there is one constant in France, shown by the legislation and jurisprudence, it is the assertion of the penal responsibility of juvenile offenders.[8] Contrary to its reputation, the 1945

ordonnance was in no way a permissive text: it actually took a principled ruling ("*arrêt de principe*") by the Court of Cassation in 1956 to exclude minors "without discernment" from penal action. The September 9, 2002 law confirms this exclusion: "Minors able to understand what they are doing are criminally responsible for the felonies, misdemeanours or petty offences of which they have been found guilty, and are subject to measures of protection, assistance, supervision and education according to the conditions laid down by specific legislation." The "specific legislation" here is the February 2, 1945 *ordonnance* authorizing the actual sentencing of a minor having reached the age of thirteen, if required by the circumstances and the youth's personality.

The primacy of education and an understanding of the minor's personality are essential to the protectionist model: they imply that sufficient time must be taken to assess the minor's situation in all of its dimensions—family, social, educational, behavioral, psychological, and sometimes psychiatric—with temporary measures, such as pre-judiciary probation, adopted in the meanwhile. The goal of judging a youth and not merely an act is hardly compatible with rapid, sometimes even expeditious, procedures. Now, two sorts of short penal circuits for juveniles have proliferated: alternatives to prosecution on the one hand, and rapid procedures on the other hand. What has often been termed the "tutelary" model of protection of the individual is disappearing, to be replaced by systematic, rapid responses. The heightened power of the public prosecutors' offices is the first sign of this, operating to the detriment of JCJs and juvenile courts, no longer in charge of much of petty offending, in the name of efficiency and rapidity.

Alternatives to prosecution are the outcome of serious practical testing prior to their consecration by lawmakers. They aim at providing a fast, effective response to petty offenses, and may have a positive effect on the youth's socialization. With the exception of "*composition pénale*" (see below), alternative procedures are located upstream of prosecution, and do not entail inscription on the criminal record; they therefore cannot be assimilated to expeditious sentencing procedures. Rather, they represent new ways of regulating the flow of offenses by the use of sanctions that are more educational than punitive. The code of criminal procedure was first modified by the January 4, 1993 law, introducing the first alternatives to prosecution, some of which applied to both minors and adults, such as "reminder of the law" by a representative of the public prosecutor. The same law, adding to the 1945 *ordonnance*, introduced the measure, often called "mediation-reparation," requiring a reparative activity. This measure is unusual in that it may be advanced by the public prosecutor as an alternative to prosecution, as well as during the judicial inquiry once the procedure is in motion, or even by the court. The public prosecutor must then demand the prior consent of the minor and of the persons with parental authority.

Measures of assistance and reparation, directed at the victim rather than serving the interest of the community, cannot be granted without the victim's consent. This arrangement is very interesting in that it partakes of what is called a "restorative" model of justice, both for the minor and for the victim, but is also the main expression of a transfer of competences from the bench to the public prosecutor's office. Along with other alternatives to prosecution, it was instrumental in the

establishment of "public prosecutors for minors," which did not become the rule until the late 1990s.[9] While this innovation, now extended to most first-instance courts, is fortunate in many respects, some reservations may be expressed about the non-specialization of the deputy prosecutors in charge of minors, as opposed to juvenile court judges, and about their ensuing lesser sensitivity to the specificity of illegal acts committed by juveniles, which should not be judged without reference to the offender's personality. Furthermore, public prosecutors are less independent, as the Attorney General repeatedly pointed out in the fall of 2007. This may lead to the development of a quantitative policy, contrary to the protection of juveniles and to the very spirit of the original alternatives to prosecution.

One alternative to prosecution, *la composition pénale*, introduced in 1999, should receive special attention, since the March 5, 2007 law on the prevention of offending has recently extended it to minors over age thirteen. This measure allows the state prosecutor to suggest a sentence, which is then validated by the judge, among a number of sanctions enumerated in the February 1945 *ordonnance*. The first requisite is that the person admit to having committed one or several offenses punishable by a main sentence of a fine or a prison term not exceeding five years. Now, this requisite is in complete contradiction with Article 4-1 of the International Convention of Children's Rights, directly applicable in French law and prohibiting self-accusation by a minor—that is, forbidding minors from relinquishing the presumption of innocence—since *composition pénale* precisely implies that the minor admit his or her guilt. In spite of the safeguards contained in Article 7-2 of the

ordonnance, how can any specialist of juvenile offenders accept such an extremely rapid procedure, applicable to minors from age 13, when the sentence is written into the criminal record and admission of guilt is demanded at the start?

Even more serious, the March 5, 2007 law extends the summary trial procedure to minors, under the designation of "immediate appearance." Whereas the faults and perverse effects of summary trial are almost unanimously denounced, Parliament felt it necessary to extend the purview of summary trial by a juvenile court judge or a juvenile court to minors over age thirteen. In spite of the provisions written into the law, this distorts the protectionist model based on the fair assessment and knowledge of the act committed and of the offender's personality. When submitted to the *Conseil constitutionnel* by the parliamentary opposition, immediate appearance was judged to be in conformity with the founding principle defined in the laws of the Republic as specified by the *Conseil* itself five years earlier.

Along with the increasing denial of specialization, turning juvenile justice into a penal procedure in response to quantitative, security-oriented policies, a striking new turn is evidenced in sanctions for sixteen to eighteen year-olds. Eighteen may be found acceptable as the voting age, but with the security mania, it is hardly tolerable as the legal majority, for punishment.

PUNITIVE CRIMINAL JUSTICE POLICY

In juvenile criminal law, there is still the choice between an educational measure and actual punishment. However, a new category of sanctions known as "educational sanctions" was introduced in the September 9, 2002 law. Secondly, two suc-

cessive laws on recidivism, the first dated December 12, 2005 and the second August 10, 2007, call into question the underage argument as a mitigating circumstance, prescribed for minors over age sixteen. These texts, highly controversial but again validated by the *Conseil constitutionnel*, pave the way for increased incarceration of juveniles.

The introduction of the new category of educational sanctions, applicable to minors starting at age ten, are clear evidence of a headlong forward rush without any provision, once again, of the resources needed to implement those new sanctions, often borrowed from the complementary sentence catalog.[10] Educational sanctions are defined by a series of prohibitions, such as going to specific places or meeting certain people. Clearly, the efficiency of this sort of measure seems extremely questionable if the youth is not given some help as well.

Over and beyond these prohibitions and the citizenship training workshops, one educational sanction is truly emblematic of the repressive spirit of the 2002 law: the creation of custodial reform schools, completing the range of institutions to which educational measures may send juveniles. The last of those custodial institutions for minors closed their doors in 1979: was it necessary to revert to them? Wasn't this a way of abdicating, of not treating the real problems for the sole benefit of producing a reassuring, mediagenic discourse? Soon after the first custodial reform schools were opened, a new government program for the literal incarceration of minors was launched, in the form of the construction of prisons for juveniles (EPM, or "*établissements pénitentiaires pour mineurs*"). As of November 1, 2007, three EPM had opened and housed 10.8 percent of juveniles in detention. Because of the 2005 and

2007 laws on recidivism, the number of minors in prison will necessarily increase, and 90 percent will not be put in EPMs, but in the traditional prison wings for minors.

But the most devastating enactment against the protectionist model is the August 10, 2007 law, Article 5 of which completely overhauls the economy of the specific sentence-reducing system for juveniles, and above all, makes lighter sentences for sixteen to eighteen year-olds an exception rather than the rule. Furthermore, in a number of instances, the law sets minimum sentences, impossible for judges to circumvent unless they motivate their decisions, an extremely difficult move. In case of a second repeat offender, the law demands that the offender provide proof of exceptional guarantees of integration or rehabilitation. Take the example of a sixteen year-old boy previously sentenced twice for snatching a cell phone. Theoretically, he must be sentenced to at least two years in prison. It is inconceivable that the *Conseil constitutionnel* considers the founding principle acknowledged specifically by itself and inscribed in the laws of the Republic to be compatible with several very rightly criticized provisions of the August 10, 2007 law.

For many years, the protectionist response to juvenile offending was viewed as the pearl of the French criminal justice system. It has even played a major role in the evolution of criminal law for adults. It has produced participatory criminal justice policy, and receptiveness of the criminal justice system to the community. It made individuals and their rehabilitation the focus of criminal justice concerns. We are indebted to it for the diversification of alternatives to prosecution and the wider range of sanctions of all sorts. Moreover, it has led us to seek

the offender's consent to the sanction pronounced, a major factor in the successful rehabilitation of sentenced offenders. Last, and above all, we are indebted to it for all sorts of experiments, and for an imaginative justice system in the hands of specially trained, committed judges.

But the wind has turned, we have lost our bearings and have begun to drift uncontrollably in response to a demand for immediate punishment, however short-sighted a solution that may be. Although a 2002 *Conseil constitutionnel* ruling proclaimed the protective model, as written into the laws of the Republic to be its founding principle, that model has been eroded, and replaced by an "authoritarian neoliberal model," under the combined pressure of statistics on offending and "penal populism" founding an emotive criminal policy for both juveniles and adults. Denis Salas has no qualms about qualifying any discourse calling for punishment in the name of neglected victims and in opposition to discredited institutions as penal populism.[11] Giving victims compensation and reparation should always be a major concern, but this does not entail the need to change our model: rather, it should be given the means to be effective. One cannot reasonably prefer the exclusion of troublemakers to their socialization without abandoning the idea that everyone has the right to a future. Who can deny the extreme urgency of finding ways of responding to the phenomenon of affirmatively negative action, that leavening of deviancy and delinquency, of which so many youths are victims? A criminal policy that partakes of the securityinsecurity mania by adopting repressive legislation of merely declarative scope is a politics of abdication, doomed to fail: the statistics on

offending and the desperation in our suburbs are there as proof.

NOTES

1 J. Chazal, *L'enfance délinquante* (Paris: PUF, 1983 [1953]).

2 R. Castel, *L'insécurité sociale* (Paris: Seuil, 2003).

3 R. Castel, *La discrimination négative* (Paris: Seuil, 2007).

4 A. Garapon, D. Salas, *La justice des mineurs. Evolution d'un modèle* (Paris, LGDJ, 1995).

5 F. Bailleau, Y. Cartuyvels (ed.), *La justice pénale des mineurs en Europe* (Paris: L'Harmatttan, 2007).

6 J. Danet, *Justice pénale, le tournant* (Paris: Gallimard, 2006).

7 The September 9, 2002 law on the orientation and program of the justice system; the March 18, 2003 law on internal security; the March 9, 2004 law on adapting justice to evolutions in criminality; the December 12, 2005 law on the treatment of recidivism; the January 23, 2006 law on the fight against terrorism, on safety and on border control; the March 5, 2007 law on the prevention of offending; the August 10, 2007 law reinforcing action against recidivism in adults and minors.

8 C. Lazerges, "De l'irresponsabilité pénale à la responsabilité atténuée des mineurs délinquants, relecture des articles 1er et 2 de l'ordonnance du 2 février 1945," *Revue de science criminelle et de droit pénal comparé*, 1995, p. 149.

9 C. Lazerges, J.-P. Balduyck, *Réponses à la délinquance des mineurs,* Rapport au premier Ministre (Paris: La documentation française, 1998).

10 C. Lazerges, "La sanction du mineur : la fuite en avant," in *Apprendre à douter. Etudes offertes à Claude Lombois* (Limoges: Presses Universitaires de Limoges et du Limousin, 2004, p. 525).

11 D. Salas, *La volonté de punir. Essai sur le populisme pénal* (Paris: Hachette, 2005).