

YOUTH JUSTICE AND COGNITIVE DIVERSITY

A REVIEW OF *LAW AND NEURODIVERSITY: YOUTH WITH AUTISM AND THE JUVENILE JUSTICE SYSTEMS IN CANADA AND THE UNITED STATES*, DANA LEE BAKER, LAURIE A. DRAPELA & WHITNEY LITTLEFIELD (VANCOUVER: UBC PRESS, 2020)

The book *Law and Neurodiversity: Youth with Autism and the Juvenile Justice Systems in Canada and the United States* explores the complex relationship between juvenile justice, disability, and intersectionality (or multilayer discrimination).¹ Its highly sensitive analysis offers a comparative legal and public policy perspective between the United States and Canada with a primary objective: closing the gap between the theory and practice of juvenile criminal justice in relation to disability rights and neurodevelopmental conditions such as autism and dyslexia.

Dana Lee Baker, Laurie Drapela, and Whitney Littlefield's transdisciplinary research tackles a compelling issue: when multiple variables such as justice, youth, disability, and intersectionality are involved, balancing the social-collective right to security — inherently entrenched in the criminal justice system — with the rights and needs of highly vulnerable and underprivileged juveniles becomes extremely challenging. For decades, in Europe and North America, this balance appeared to favour repressive criminal justice. Although there are some relatively recent reforms in most Western countries, the widespread lack of implementing rehabilitative and restorative forms of justice is cause for concern.

Social and bench sciences have long established that there is a higher prevalence of criminal justice involvement for specific classes of individuals in both adult and juvenile inmate populations. It is unquestionable, especially in the US, that there is an over-representation in prisons of ethnic and racial minorities,² underserved cognitive-diverse individuals,³ the underprivileged and those disenfranchised by poverty, as well as people having experienced Adverse Childhood Experiences (ACEs) such as trauma, stigma, abuse, discrimination, and neglect.⁴ However, advancements in neuroscientific knowledge on brain functioning, cognition, and development mechanisms have sparked debate about long-held criminological assumptions. According to new evidence and theories, dysfunctional and maladaptive behaviours correlate with underserved, undiagnosed, and misunderstood neurodevelopmental and chronic conditions, as well as with the onset of neurodegenerative diseases such as Alzheimer's disease or dementia, and can be responsible for disruptive and

¹ Dana Lee Baker, Laurie A Drapela & Whitney Littlefield, *Law and Neurodiversity: Youth with Autism and the Juvenile Justice Systems in Canada and the United States* (Vancouver: UBC Press, 2020).

² Ashley Nellis, "The Color of Justice: Racial and Ethnic Disparity in State Prisons" (13 October 2021), online: <www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

³ Rachel L Fazio, Christina A Pietz & Robert L Denney, "An Estimate of the Prevalence of Autism-Spectrum Disorders in an Incarcerated Population" (2012) 4 *Open Access J Forensic Psychology* 69; J McCarthy et al, "Characteristics of Prisoners with Neurodevelopmental Disorders and Difficulties" (2016) 60:3 *J Intellectual Disability Research* 201.

⁴ Dana D DeHart, "Pathways to Prison: Impact of Victimization in the Lives of Incarcerated Women" (2008) 14:12 *Violence Against Women* 1362.

legally relevant behaviours.⁵ Moreover, traumatic socio-environmental factors, neglect, and deprivation result in brain-related outcomes impairing individual decision-making ability, stimula and emotion processing, as well as executive functioning capacity. This translates into a higher frequency of criminally relevant behaviours.⁶ Furthermore, in case of prosecution, these factors compromise effectively navigating trial procedure, understanding written complex documents, collaborating in questioning, and mastering trial-sensitive verbal and social communication, ultimately leading to more severe judicial outcomes. Through new forms of interdisciplinary collaboration between neurosciences, law, and social sciences, judicially relevant factors such as impulsivity, prospective thinking, risk analysis, and understanding actions are re-contextualized with brain-related variables that, in most of the cases, should be redressed through more effective interventions rather than repression.

Baker, Drapela, and Littlefield's book is structured around eight chapters analyzing a large cluster of sensitive and interconnected issues. First, they clarify the evolution of both juvenile justice and disability rights in North America (Chapter 2). Discussing the historical development of Canadian and US juvenile justice systems, which were both shaped by state paternalism and retributivism, the authors point out how the judicial response to young offenders evolved with the gradual differentiation of the juvenile justice system from the adult one. The growing acknowledgment of the specificity of justice-involved youth compared to adults triggered twentieth-century reforms after the due process revolution and civil rights and deinstitutionalization movements. Baker, Drapela, and Littlefield go on to describe the different trajectories of disability rights in North America. Canada was more inclined to incorporate international frameworks of disability rights; in fact, starting in the late 1970s, Canadian advocates and stakeholders began to endorse disability rights as part of human rights and anti-discrimination. In the US, despite the development of important federal disability rights laws in the early 1970s, barriers and the asymmetric geographical availability of resources continue to undermine disability anti-discrimination. In both countries, however, disabled citizens still experience high levels of poverty and marginalization, which increase the likelihood of justice involvement. In this context, Baker, Drapela, and Littlefield show how juvenile justice and disability rights appear deeply interconnected and interrelated as part of the same public policy dynamic. Interestingly, state institutions focusing on repressive crime control tends to coincide with a slower expansion of a therapeutic approach to disability rights.

The autism spectrum disorder (ASD) is a powerful case study not only for illustrating how cognitive diversity increases the risk of juvenile justice involvement and more severe juridical outcomes, but also for discussing how a rights-based disability policy should complement criminal justice (Chapters 2 and 3). ASD-related disruptive or dysfunctional behaviours tend to be dealt with dramatically through control and repressive means instead of services, interventions, anti-discrimination, and disability rights frameworks. As a result, underserved and underdiagnosed ASD juveniles are exposed to multiple sources of social

⁵ Sergio C Lanata & Bruce L Miller, "The Behavioural Variant Frontotemporal Dementia (bvFTD) Syndrome in Psychiatry" (2016) 87 J Neurology, Neurosurgery & Psychiatry 501; Stefanie Danielle Piña-Escudero et al, "Neurodegenerative Disease and the Experience of Homelessness" (2021) 11:562218 Frontiers in Neurology 1.

⁶ Robert M Sapolsky, *Behave: The Biology of Humans at Our Best and Worst* (New York: Penguin Books, 2017).

exclusion among which ASD-unfriendly judicial systems are the ultimate discrimination. Consequentially, a public system that emphasizes repression-control responses instead of services and interventions is not only inherently unjust, but it is also highly ineffective.⁷ Baker, Drapela, and Littlefield point out critical areas of improvement such as modifying the structure of trials and hearings, increasing the awareness of practitioners (judges, attorneys, law enforcement), reconsidering culpability and competency, ensuring proportionality in sentencing, and, ultimately, strengthening rehabilitation instead of retribution.

The relationship between juvenile detention and health care is particularly controversial, especially with regard to cognitive-diverse adolescents (Chapter 4). Baker, Drapela, and Littlefield's analysis emphasizes how detained youth have compelling health care needs. Justice-involved juveniles present a high prevalence and risks of fragile mental and physical health conditions. Policy in Canada and the US in this regard has different outcomes. The public health care system in Canada helps prison environments to provide better medical services for inmates than in the US, where the mostly private nature of health care providers makes health care delivery in detention insufficient and ineffective. To improve health care delivery for incarcerated youth, the authors suggest enhancing several key areas such as intake screenings to evaluate juveniles' status and needs, special education, personnel training, and empathy. By strengthening social and medical services, juvenile justice systems would likely become a chance for widespread interventions rather than containment.

Baker, Drapela, and Littlefield's fifth chapter points toward a crucial tool for containing risk factors of juvenile criminal justice involvement: learning and skill building. Like health care, public education is a highly efficient domestic policy for fostering social inclusion, personal fulfillment, and community well-being.⁸ In this context, the prevalence of "Language-based Learning Disabilities" (LLD) in delinquent juveniles appears statistically higher than in the general population of their peers.⁹ The most common LLD is developmental dyslexia.¹⁰ It is speculated that when LLDs occur in underprivileged environments, they go unaddressed and are exacerbated by racial discrimination as well as by gender, ethnic, and socioeconomic divides that facilitate the so-called school-to-prison pipeline.¹¹ According to the 2015 *US National Council of Disability Report*, among

⁷ Andrea Lollini, "Brain Equality: Legal Implications of Neurodiversity in a Comparative Perspective" (2018) 51:1 NYUJ Intl L & Pol 69.

⁸ David Osher, Darren Woodruff & Anthony E Sims, "Schools Make a Difference: The Overrepresentation of African American Youth in Special Education and the Juvenile Justice System," in Daniel J Losen & Gary Orfield, eds. *Racial Issues in Special Education* (Cambridge, Mass: The Civil Rights Project, Harvard University, 2002) 93; Deyanira Zamora, "Levels of Academic Achievement and Further Delinquency Among Detained Youth" (2005) 2:1 Southwest J Crim Justice 42.

⁹ Elena L Grigorenko et al, "Academic Achievement Among Juvenile Detainees" (2015) 48:4 J Learning Disabilities 359 (estimates 24.9 percent of 1,337 young offenders placed in detention in Connecticut in 2010–2011 have learning disabilities); Candace Cortiella & Sheldon H Horowitz, "The State of Learning Disabilities: Facts, Trends and Emerging Issues," 3rd ed (New York: National Center for Learning Disabilities, 2014), online: <www.nclcd.org/wp-content/uploads/2014/11/2014-State-of-LD.pdf>.

¹⁰ The prevalence of dyslexia in the general population is approximately 5–9 percent, see Thomas F Boat & Joel T Wu, eds, *Mental Disorders and Disabilities Among Low-Income Children* (Washington, DC: National Academies Press, 2015) at 180. See also Julian G Elliott & Elena L Grigorenko, *The Dyslexia Debate* (New York: Cambridge University Press, 2014) (prevalence of dyslexia in the general population is approximately 3–10 percent, at 31–34).

¹¹ National Council on Disability, "Breaking the School-to-Prison Pipeline for Students with Disabilities" (2015), online: <nccd.gov/publications/2015/06182015>; Christine A Christle, Kristine Jolivet & C Michael Nelson, "Breaking the School to Prison Pipeline: Identifying School Risk and Protective Factors for Youth Delinquency" (2005) 13:2 Exceptionality 69; Thalia González, "Keeping Kids in

incarcerated youth, 85 percent have learning or emotional disabilities, yet only 37 percent receive formal special education services in school.¹² Most were either undiagnosed or not properly served in school. Many students have invisible disabilities, such as specific learning disabilities, emotional disturbance, post-traumatic stress disorder, or attention deficit hyperactivity disorder. This report concludes that many disabled offenders in the US juvenile justice systems are deprived of an appropriate education that could have disrupted the school-to-prison pipeline. Preliminary data show that young people with LLDs are more than twice as likely to be arrested for a delinquent offense than their non-disabled peers and are 3.9 times more likely to be arrested while enrolled in school than non-disabled students. In case of a law enforcement arrest, when answering questions before a judge or in processing verbal or written criminal justice procedures, juveniles with LLDs are more likely to have worse outcomes than non-disabled peers.¹³

However, the limited empirical data on the relationship between academic attainment, LLDs, and criminal behaviour among young people¹⁴ undermines our abilities to fully address manifestations of LLDs in justice-involved juveniles.¹⁵ If the school-to-prison data trend is comparatively visible in several European and North American countries, in the US, underserved public-school environments are clearly the trigger to life trajectories with a high risk of justice involvement. Baker, Drapela, and Littlefield highlight how the US's fragmented and segregating public special education system, based on Individualized Education Plans (IEPs) directly negotiated by families and schools under the federal framework of the *Individuals with Disability Education Act*,¹⁶ creates less effective results compared to Canada. Canada recognizes public education as a universal public good thanks to provincial and territorial education acts. Under the umbrella of the *Canadian Charter of Rights and Freedoms*, human rights acts ensure both access as well as protection from discrimination.¹⁷ Therefore, children with disabilities must have equal access to educational, learning, and support services organized and delivered by the Provinces.¹⁸ Baker, Drapela, and Littlefield join a growing number of scholars and experts in different fields who rightly consider LLD interventions that improve youth literacy and academic skills as a powerful instrument for decreasing the likelihood of justice involvement and recidivism, for containing

Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline" (2012) 41:2 *JL & Educ* 281; Elena L Grigorenko, "Learning Disabilities in Juvenile Offenders" (2006) 15:2 *Child & Adolescent Psychiatric Clinics North America* 353; Christopher A Mallett, "The School-to-Prison Pipeline: Disproportionate Impact on Vulnerable Children and Adolescents" (2017) 49:6 *Education & Urban Society* 563; Michael Rocque & Raymond Paternoster, "Understanding the Antecedents of the 'School-to-Jail' Link: The Relationship between Race and School Discipline" (2011) 101:2 *J Crim L & Criminology* 633.

¹² National Council on Disability, *ibid* at 6.

¹³ Michele LaVigne & Gregory J Van Rybroek, "Breakdown in the Language Zone: The Prevalence of Language Impairments among Juvenile and Adult Offenders and Why It Matters" (2011) 15:1 *UC Davis J Juvenile L & Policy* 37.

¹⁴ Susan Bouregy, John F Chapman & Elena L Grigorenko, "Need for and Barriers to Inclusion in Health Research of Justice-Involved Youth," in Elena L Grigorenko, ed, *Handbook of Juvenile Forensic Psychology and Psychiatry* (New York: Springer, 2012) 127.

¹⁵ Catherine Foley Geib et al, "The Education of Juveniles in Detention: Policy Considerations and Infrastructure Development" (2011) 21 *Learning & Individual Differences* 3.

¹⁶ 20 USC § 1400 (2020).

¹⁷ *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

¹⁸ Mel Cousins, "Health Care and Human Rights after *Auton* and *Chaoulli*" (2009) 54:4 *McGill LJ* 717.

maladaptive and antisocial behaviours, and, ultimately, for increasing individual life fulfillment and access to socio-economic opportunities.¹⁹

Law and Neurodiversity: Youth with Autism and the Juvenile Justice Systems in Canada and the United States is a significant contribution to the debate on critical issues. Although perceived as contiguous and separated sub-systems, criminal justice, health care, public education, and disability rights are part of the same domestic public policy. Especially in the field of juvenile justice, complementary public policy sub-systems such as health care, schools, and social services should be strengthened and highly synchronized. A long list of interventions may contribute to radically improving juvenile justice systems in North America, such as expanding health and learning services to prevent recidivism, improving professional training, and developing community-based intervention and family involvement to decrease detention time. Moreover, as Baker, Drapela, and Littlefield point out, state policy should pay more attention to the intersectional dynamics of discrimination, as our societies are increasingly diverse, heterogeneous, and characterized by multi-dimensional differences. In this regard, this book provides compelling motivation for both reviewing current screening tools to prevent stigma and bias and for developing new interdisciplinary research that can support a science-based policy.

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¹⁹ Antonis Katsiyannis et al, "Juvenile Delinquency and Recidivism: The Impact of Academic Achievement" (2008) 24:2 Reading & Writing Q 177.
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