

Proportionate sentences for juveniles

How different than for adults?

ANDREW VON HIRSCH
University of Cambridge, UK

Abstract

Although an extensive theoretical literature has developed on proportionality and desert as it relates to the sentencing of adult offenders, there has been less discussion of desert theory as it concerns the disposition of juvenile offenders. The present article addresses this latter topic. It is suggested that 'deserved' punishments for juveniles should be scaled well below those applicable to adults, for three kinds of reasons: (1) juveniles' lesser culpability, (2) punishments' greater 'bite' when applied to adolescents, and (3) a principle of greater 'tolerance' in the application of penal censure to juveniles. The article argues that these three kinds of reasons must rest not just on factual claims regarding juveniles' lesser self-mastery or greater sensitivity to punishment, but must depend on different, age-related normative expectations for judging the behaviour of young persons. It is suggested that the present topic – of the criteria for proportionate punishment of juveniles – should be treated as analytically distinct from the question of whether a separate juvenile court should be retained or abolished.

Key Words

culpability • desert • juvenile sentencing • proportionality • punishment

INTRODUCTION

There now are much greater contrasts among Western European countries' approaches to juvenile justice than among those for adult criminal justice. Some countries (most notably, Sweden) have a justice system for juveniles with a strong emphasis on proportionality of sentence. Youthful offenders are tried in the same courts as adult offenders, and the severity of their sentences depends in important part (as it does in Sweden for adults) on the degree of seriousness of the actor's criminal offence. The salient difference in the treatment of juvenile offenders is in penalty levels: the onerousness of sentences is substantially scaled down (Jareborg, 1995). Other European jurisdictions adopt a sharply contrasting approach: Scotland has instituted a rehabilitatively oriented juvenile

justice scheme in which offence seriousness (theoretically, at least) has little or no importance (Norrie, 1997; Lockyer and Stone, 1998). Other countries, including England and the USA¹) have hybrid systems, employing a mixed set of aims. The divergency suggests that it may be worth considering further what the aims of juvenile justice should be. In connection with such a reassessment, a major question that should be addressed is that of the role of proportionality of sentence as it applies to young offenders.

In this reconsideration, developments in sentencing theory need to be taken into account. There has been considerable change in general conceptions of the deserved sentence, both in English-speaking and Scandinavian countries (von Hirsch, 1993; Ashworth, 2000: chs 3, 4, 9, 10; Jareborg, 1995; von Hirsch and Ashworth, 1998: ch. 4). The rationale supporting proportionality of sentence has shifted from notions of 'paying back' the offender for his crime to conceptions of penal censure (von Hirsch, 1993: ch. 2; Duff, 1996). This shift has permitted less Talionic conceptions of desert, and a greater emphasis on notions of proportionality, that would permit the use of moderate sanctions (von Hirsch, 1993: chs 2, 5, 10). Interest has grown in developing fuller criteria deciding the deserved sentence – criteria relating to crime seriousness, the assessment of punishments' severity and the role of the previous criminal record (von Hirsch, 1993: chs 4, 7; von Hirsch and Ashworth, 1998: ch. 4).

There also have been, in the Anglo-American literature of juvenile justice (and particularly in the writings of one of America's leading juvenile-justice scholars, Barry Feld²) suggestions that greater emphasis should, as a matter of fairness, be given to the degree of seriousness of a juvenile offender's criminal conduct, and less to predictions of his likelihood of returning to crime and his supposed receptiveness to treatment. Much of this literature advocates that proportionate sentences for juveniles should be scaled well below those applicable to adult offenders, as is already the case in Sweden.

In considering proportionate sentences for juveniles, there are two questions that need to be separated for purpose of analysis. The first concerns the nature of such sentences. Should proportionate sentences for juveniles be any different from those appropriate for adults; and if so, in what respects? Should such sentences, particularly, involve significant reductions in severity as compared with proportionate sentences for similar crimes imposed on adults; and if so, why? The second question relates to the desirability of such sentences. Should proportionality of sentence be given principal emphasis in the determination of sanctions for juveniles?

The present article will address only the first of these two questions: that of the nature of proportionate sentences for juveniles. That question can be put in the following conditional form: if it were assumed that desert principles should apply to young offenders, how might the resulting sanctions differ from proportionate sentences for adults? To answer that question, this article will look at certain salient features of growing up, and how these features should affect judgments regarding proportionate sanctions.

The second question, of desirability, will not be addressed here. One much-debated question is whether the desert rationale is a good idea at all – that is whether desert-based standards of proportionality should be utilized even for adults. On this matter, there is available an extensive body of writing.³ Another aspect of that question does deserve further attention: namely, the desirability of applying ideas of the proportionate sentence to juveniles. Conceivably, a policy of proportional, desert-based sentences might be justifiable for adults, but less so for juveniles (see Zedner, 1998). This could

be the case for a variety of possible reasons: for example, child welfare-oriented considerations might warrant a greater role in dealing with adolescents. However, because of limitations of space and time, I shall not address that important question here.

However, the two issues, of nature and desirability, are interrelated. In deciding whether a policy of proportionate sentences for juveniles is advisable, one important concern is what such sentences would be like. It is sometimes objected, for example, that proportionate sentences for juveniles would require too severe responses – namely, those at the same levels as would apply to adults (see Zedner, 1998: 171). Were it the case that severity-levels could considerably be scaled down for juveniles, this would answer such an objection.

ASSUMPTIONS OF AND QUESTIONS FOR THIS ANALYSIS

For the sake of the present argument, we might begin with a hypothetical sentencing scheme for adults, based on the principle of proportionate, deserved sentences. In such a scheme, penalties would be graded according to the seriousness of the offences involved, with only a modest adjustment for previous convictions.⁴ The underlying rationale would emphasize penal censure, rather ‘paying back’ the offender for his offence (see von Hirsch, 1993: ch. 2), so that levels of deprivation visited on offenders would not need to approximate the degree of suffering experienced by victims. The scheme thus could employ moderate penalties, well below those prevailing (for example) in England.⁵

With such a scheme in mind, the question I shall be addressing is how such a desert-based scheme should be modified if extended to juvenile offenders.⁶ The thesis to be defended in this article is that substantial overall penalty reductions would be called for, with the amount of those reductions graded according to young offenders’ age.⁷ The issue then becomes why there should be such severity-reductions for juveniles. The available literature refers to three kinds of reasons, relating to (1) juveniles’ lesser culpability; (2) criminal sanctions’ greater ‘punitive bite’ for juveniles and (3) the notion of adolescence as a ‘time of testing’. Each of these three purported reasons will be examined, next. My aim is to evaluate these reasons more fully in the light of desert theory than has been attempted in the past.

CULPABILITY

One argument for reduced punishments that has surfaced in the literature concerns juveniles’ lesser degree of culpability. If a 15-year-old commits burglary, or if a 35-year-old commits it, the harmful consequences of the act are the same; but what should differ are ascriptions of culpability: the juvenile acts with less personal fault in committing the act, making the behaviour less serious. Thus there should be less punishment for the crime, because it is less serious compared to the same criminal act committed by an adult.

The question then becomes, why is culpability reduced? Two kinds of arguments have been put forward: (1) a cognitive claim, that juveniles have less capacity to assess and appreciate the harmful consequences of their criminal actions; and (2) a claim concerning volitional controls, that they have had less opportunity to develop impulse control and resist peer pressures to offend. This provides a useful general framework, but an

analysis is needed of why these factors should be permitted to count as culpability reducing. For a legally competent adult, insufficiently developed appreciation of consequences or impulse control is not ordinarily considered grounds of reduced culpability. Why should it be otherwise for juveniles?

Cognitive factors

The cognitive claim relates to juveniles' more limited capacity to grasp the harmful consequences of their actions. Adolescents, it is said, 'have not acquired the capacity to realise as fully as adults the consequences of their actions' (Ball et al., 1995: 115; see also Feld, 1999: 306–12; Zimring, 1998b: 487). But what kinds of consequences are being referred to here?

This deficiency of knowledge could not ordinarily concern those consequences that constitute the defining elements of the crime. Many commonplace offences committed by juveniles are *mens rea* crimes, requiring purpose or knowledge on the part of the defendant. Knowledge of the defining elements, for such crimes, is a prerequisite of criminal liability. For residential burglary, for example, a person satisfies the act-requirements of the offence if he enters the dwelling of another and takes property belonging to that person. He must, however, be aware that the dwelling and the property are not his own; and must, when entering the dwelling, have had the intention to steal the property or commit another offence.⁸ If he does not understand such matters, he is not committing burglary at all. However, simple knowledge of this kind is something that most juveniles are quite capable of having. Even a 15-year-old, when he breaks into a flat and steals a television set, is ordinarily quite able to grasp that the flat is someone else's and that the television is not his for the taking.

In what other respects, then, might the juvenile be said to have less comprehension of harmful consequences? Perhaps, the reduced awareness concerns the character and importance of the interests which the prohibition is designed to protect – interests which often are not specified in the defining elements of the crime. The prohibition against residential burglary relates to unauthorized entry into the dwelling of another for purposes of committing a theft or other offence. But what interests are thereby protected? Prevention of theft could not be the sole aim, as that is dealt with by other criminal prohibitions. Prevention of trespass into the homeowner's real property also cannot be a sufficient explanation, as trespass is not itself a criminal offence in most English-speaking jurisdictions. The paramount interests at stake, it would seem, relate to personal privacy and the sense of personal security (von Hirsch and Jareborg, 1991: 27). It is with respect to consequences of this kind, perhaps, that juveniles' understanding may be insufficient. While the 15-year-old house burglar may be quite aware that he has entered his victim's flat illegally and is stealing his television set, he may well have less grasp of how his presence affronts that victim's legitimate sense of the dwelling as personal space, and of how his entry might make that person feel vulnerable and insecure. And even if he comprehends these matters in theory, he still may not properly appreciate them – that is, have a sense of (say) what it might feel like to lose one's privacy.

What remains to be explained, however, is why this kind of incomplete understanding of the relevant interests should affect the ascription of culpability in the criminal law. For adults, it usually is not considered exculpating or even mitigating: the 35-year-old house burglar who thinks he is merely trespassing and stealing small items of property

is not considered to merit less punishment in virtue of the fact that he fails to understand or appreciate the character of the privacy invasion which his conduct involves. We demand of a competent adult a minimal general understanding of other persons' basic interests, and of how various kinds of criminal conduct intrude upon such interests (Husak and von Hirsch, 1993: 163–5). Lack of understanding of such matters constitutes just a failure to have the relevant moral standards, and should not be extenuating; the house burglar who lacks this kind of comprehension is not thought preferable, morally speaking, to the burglar who does understand and enters and steals anyway.

If the conclusion is to be different for juveniles, it must be because we should have different normative expectations. Young adolescents, the reasoning must be, cannot reasonably be expected to have a fully fledged comprehension of what people's basic interests are and how typical crimes affect those interests – because achieving this kind of understanding is a developmental process. It takes a greater degree of moral sophistication to appreciate how house burglary affects someone's sense of privacy, than to know that it is impermissible to take that person's TV set. Developing that understanding calls both for cognitive skills and capacity for moral reasoning which develop over time – and does so precisely during the period of adolescence with which we are concerned. A 14- or 15-year-old has had less opportunity to develop the understanding of other people's interests that we reasonably may demand of an adult.

This brings us to the critical point of whether these cognitive claims are descriptive or normative ones. If descriptive, then claims to reduced culpability would depend on empirical evidence of reduced comprehension of consequences.⁹ But that degree of understanding varies greatly within a given age group: a clever 15-year-old will have a better grasp of such matters than a dull one – or even, than a dull adult. A descriptive approach would thus lead to diverse treatment of young persons of the same age, and call for trying to make elusive judgements about the degree of moral sophistication a given adolescent has.¹⁰ It would also lead to the perverse consequence of punishing children with greater moral sophistication more severely¹¹ – a difficulty that has been apparent already in the application of the (recently repealed) English rule of *doli incapax*.¹² Above all, a purely descriptive approach would fail to explain why limited understanding of consequences should affect culpability.

The claim of reduced culpability thus is one that must have strong normative elements: it is not just that adolescents tend in fact to have a less full understanding of criminal consequences. It is, rather, that this is all that we reasonably should demand of them, given the degree to which such understanding depends on experience, learning, and capacities for moral reasoning that develop in adolescence over time. Were children to appear in the world fully fledged like Athena at her birth, the demands we might make upon them might well be different. But then, we would no longer be speaking of children.

In such a normative account, it is appropriate to employ age-based gradations. Because opportunities to develop cognitively and to gain experience are related to age, fuller comprehension may reasonably be required of 17-year-old adolescents than of 14-year-old ones. A graded scale may thus be established in which there is a reduction in severity based on age, and the reduction is greatest for those closest to the minimum age of responsibility.¹³ What such a scale reflects are normative expectations, not actual patterns of development among individuals. It will vary how much a particular 14-year-old, vis-a-vis a particular 17-year-old, actually grasps typical harmful consequences of

burglarizing someone's home. But more can reasonably be expected of the 17-year-old, because he has had more time to grow towards adulthood.

Volitional controls

The other aspect of culpability concerns volitional controls. Adolescents tend to be less able to postpone gratification, to control feelings of anger and aggression, and to resist peer pressures (see Feld, 1999: 309–13).¹⁴ It is harder to say 'No' when one is only 14 or 15.

With respect to this dimension, however, the relevant normative expectations become still more critical: it must be asked why lesser self-control should be culpability reducing. For adults, this characteristic should not ordinarily serve to mitigate fault. Were an adult criminal defendant to assert that his penalty should be diminished because of his deficient command of his impulses, we ordinarily would regard this to be a moral failing which did not render his conduct any less reprehensible. It is only if these deficiencies were based on significant mental or emotional disabilities that a claim for mitigation of punishment could be made.¹⁵ Why should the conclusion be otherwise for adolescents?

Self-control, as other aspects of moral development, is a learned capacity, and childhood and adolescence is the period during which they are learned. Angels might have self-discipline from the moment of their creation, but we do not and should not expect children to be born with similar virtues. It is through cognitive and emotional growth, interaction with others and exposure to social norms that such capacities are gained; and this can be expected to occur not just in childhood, but also throughout adolescence. The adolescent who offends has had less time and opportunity to develop impulse control and ability to resist the urgings of peers than the adult man or woman, which is why these factors properly may bear on their degree of culpability. And as with the cognitive dimension discussed earlier, the expectations we should have should vary with age. As the adolescent approaches the age of adulthood, he should be expected to control himself better.

Youth 'discount' or individualized assessment?

If culpability factors suggest reduced penalties for juveniles, should this involve categorical penalty reductions or individual determinations of culpability? The principle that my foregoing arguments support is one of categorical, age-related reductions. While actual appreciation of consequences varies highly among youths of the same age, the degree of appreciation we should demand depends on age: we may rightly expect more comprehension and self-control from the 17-year-old than a 14-year-old, so that the 17-year-old's penalty reduction should be smaller. Assessing culpability on the basis of individualized determinations of a youth's degree of moral development would be neither feasible nor desirable (see p. 225 above).

But even accepting this principle, the amount of sentence reductions will not readily be reducible to a simple formula. Numerical, age-related discounts from existing adult penalty levels would clearly be unsatisfactory, because the adult system now operates in most places with a hybrid sentencing rationale, in which proportionality, crime-prevention and various other aims play varying roles (see Zimring, 1998a: 149–52). Even assuming a hypothetical system for adults that chiefly reflected proportionality principles, numerical discounts for juveniles may still be too mechanical, as the adult

sentences for given types of offences may still represent a considerable range of dispositions, depending on the degree of harmfulness of the conduct and on the degree of culpability found to exist in particular cases.¹⁶ Deciding upon the extent of age-related penalty reductions may well have to involve a degree of qualitative judgement.

Aside from the categorical, age-related reductions, juveniles should also be entitled to individualized claims in mitigation of a kind that adults could assert. A young offender may, for example, merit punishment somewhat below the level normally appropriate for his age, if he was only a peripheral actor in the offence, or was provoked.¹⁷

What requires further exploration is whether any individualized mitigating claims should be recognized that hold for adolescents only. Even if we do should not try usually to make individualized assessments of moral development, certain particular types of situations might be recognized where children have been confronted with unusually grave objective impediments to developing comprehension or self-control. Taking such an approach would necessitate further reflection on what kinds of special circumstances should warrant such special mitigation.

PUNITIVE BITE

A second line of argument for penalty reductions that appears in the literature relates to 'punitive bite'. A given penalty is said to be more onerous when suffered by a child than by an adult. Young people, assertedly, are psychologically less resilient, and the punishments they suffer interfere more with opportunities for education and personal development (Ball et al., 1995: 116; Zedner, 1998: 173).

Such claims, however, raise the question of what conception of punitive bite should be used. A possible perspective is a subjectivist one: that severity of a sanction depends on how unpleasant it is experienced as being. Penalties thus are more onerous when applied to adolescents simply because those persons feel them to be more unpleasant. Such a subjectivist conception of severity would have disturbing consequences, however. It would permit a high degree of variation among offenders of any given age. Some 15-year-olds are tough, others are tender, so that greater deprivations might be visited on the tough ones, on grounds that they would feel them less keenly. Measuring degree of punitiveness by personal sensitivities of particular offenders would have troublesome social implications, to the extent that toughness and degree of inuredness to deprivation are related to social class. The approach also would not comport well with how the severity of punishment is gauged for adults. It is commonly assumed that the onerousness of (say) a term of imprisonment should depend chiefly on such objective factors as its duration and (possibly but more controversially) the kind of conditions prevailing in the institution, rather than on the defendant's personal sensitivities to the deprivations of punishment.¹⁸

The subjectivist view of penal severity strikes me, moreover as being misconceived in principle. What makes punishments more or less severe is not identifiable sensations that vary greatly from person to person; it is rather, the extent to which those sanctions interfere with important interests that people have. Interests are not merely subjective: they consist of resources over which persons have legitimate normative claims. The severity of imprisonment depends not on its 'feeling bad' in some immediate sense, but on its interfering with such important interests as freedom of movement, privacy, personal

autonomy in daily activities, and the right to choose one's associates (von Hirsch, 1993: ch. 4).

It thus would be preferable to apply an interests-analysis to the assessment of punitive bite. Penalties should be ranked in severity according to the degree of importance of the interests affected, and the extent to which the penalty intrudes upon such interests. The importance of those interests, I have suggested elsewhere, may be gauged by the degree to which they affect an ordinary person's 'living standard' – that is, the resources such a person should ordinarily need to conduct a satisfactory life (see more fully, von Hirsch and Jareborg, 1991; von Hirsch, 1993: ch. 4).

Adopting such an interest-analysis means that the assessment of severity is not made dependent on the preferences and sensitivities of particular individuals. The living standard, in the sense just referred to, refers to the means and capabilities that ordinarily should be important for living. If a given interest is important in this sense, it would warrant a high rating – notwithstanding that some persons might find it less important or choose to go without it. Imprisonment thus qualifies as a severe penalty in virtue of the interests in freedom of movement, privacy and autonomy it takes away. This judgement, moreover, is in significant part a normative and not just a descriptive one. It is not just that many people happen to like being free to move about, enjoy a modicum of privacy and having control over their daily activities – and hence dislike being imprisoned. It is, rather, that such interests should be regarded as important for persons in a free society, and hence that imprisonment should be regarded as being very burdensome.

How would this interest-analysis bear on gauging punitive bite for juveniles? Young people, it may be argued, have certain special interests; and punishments are more onerous for them because of their intrusion upon those interests. There are, first, certain developmental interests. Ordinarily, there are critical opportunities and experiences that need be provided between the ages of 14 and 18. The youth requires adequate schooling and learning opportunities; needs to be in a reasonably nurturing atmosphere such as that of a family; requires exposure to adequate role models; and needs to be able to begin to develop ties to friends and associates who can be trusted. These are not mere preferences, but real interests: a young person should have such resources in order to mature adequately and have a good life. Punishments are thus more onerous for adolescents because of the way they compromise these kinds of interests. This is most obviously true of imprisonment – which tends to stunt learning opportunities, provides a hostile rather than nurturing atmosphere, offers few role models or destructive ones; and fosters attitudes of distrust. If punishments are therefore more onerous when undergone by juveniles, proportionality would require that they be reduced.

A second kind of interest relates to capacity for self-esteem. Given the necessary censoring connotations of punishment, it is difficult for anyone to undergo being punished without having their self-esteem affected but the difficulty is greater for juveniles, especially as they enter adolescence. It is characteristic of adolescents that their self-esteem, their sense of self as worthwhile persons having the potential for a better future, tends to be more fragile – and can reasonably be expected to be more fragile – than that of adults. Again, this is a normative and not just a descriptive matter. Developing a robust conception of self, one that is resilient yet capable of coping with the legitimate criticism of others, is a product of maturation and experience. It is thus appropriate to demand from juveniles a lesser degree of psychological resilience in the face

of being punished than we should be able to demand of adults. Such normative judgments, again, are age-related. The younger the offender is, the less resilience can reasonably be demanded of him.

These developmental interests may point also to differing criteria regarding type of sanction. Those criteria may, for example, need to call for greater reliance on non-custodial penalties in preference to short terms of imprisonment, given the disruptive effects of imprisonment on a young person's schooling, family life and the like.¹⁹

A SPECIAL 'TOLERANCE' FOR JUVENILES?

The literature on proportionate sanctions for juveniles mainly touches upon the foregoing issues of culpability and punitive bite. Juveniles are to be punished less because (1) they are less culpable, and (2) punishments 'bite' them more. Suppose (to oversimplify greatly²⁰) that we were to rank crimes in seriousness from '1' to '10', and severities of punishment from 'I' to 'X'. The foregoing arguments might suggest that, for a young person of a given age, a crime having a seriousness-rating of '5' for an adult might rate a '3' for 15-year-old juvenile; and that a punishment having a severity-rating of 'V' for an adult would rate a 'VII' for such a young person. This still assumes, however, that the conventions linking severity and seriousness are unchanged. Where the crimes (adjusting for culpability factors) have the same seriousness-ratings, and where the penalties (adjusting for juveniles' greater vulnerability) have the same severity-ratings, then juveniles and adults would receive equivalent punishments.

But might a further step be worth taking? Might not there be different conventions linking severity of punishment with seriousness of crimes for juveniles than for adults? That would constitute a real claim that young persons deserve less: that there should be different and milder punishment conventions for juvenile offenders, even once one takes differences in culpability and in punitive 'bite' into account. I believe this step would be desirable. The question then becomes, why so, and how can the adoption of a different punishment convention for juveniles be squared with notions of proportionality of sentence?

Adolescence as a time of 'testing limits'

Youth, we know, is a time for experimentation; that is, for breaking away from adult authority, for trying to live autonomously, for testing limits. As a result, it is a time for making mistakes, including those that harm others. Franklin Zimring likens this period of life to the period when a driver obtains a learner's permit: we know he will drive less well than an experienced driver, and hence is more likely to do harm, but permit him to drive anyway (although, perhaps, with specified restrictions) because it is only through doing so that he can become an adequate driver (Zimring, 1982: ch. 5) Giving scope for this process of experimentation, Zimring argues, is particularly important for a free society. There, we do not wish to train young persons to perform predetermined social roles, in the manner of traditional societies. Instead, we wish to help them learn to act autonomously, and make their own life choices. That requires permitting adolescents actually to make such choices, and taking the risks inevitably involved.

If these are the risks inevitably involved in permitting adolescents to experiment with acting autonomously, how do we deal with the harms that we know may result? The

sensible response is one of cutting losses – of, in Zimring's words, 'keeping to a minimum the harm we inflict on [young offenders] when they have abused opportunities in ways that harm the community' (1982: 91). Punishment policy for juveniles should be designed to 'preserve the life choices for those who make serious mistakes' (1982: 91). Again this is a gamble: that many or most juveniles who do abuse such opportunities will, as they mature, learn better how to live autonomously – and should not be unduly burdened with the penal consequences of their earlier bad choices.

One way of reducing that burden is to adopt a punishment convention for juveniles which is less stringent than that for adults. Even after controlling for differences in culpability and 'punitive bite', we should utilize a milder punishment convention than would be applicable to adults. In punishing less, it is hoped that we will preserve better the young person's opportunities and prospects less – and thus permit him or her to live freely as an adult, carrying fewer burdens from his earlier mistakes.

To what extent does this line of argument support reduced punishment levels for juveniles? There are several matters that need clarification. One concerns the consequences that can be expected of such a reduction. Can it be said that rates of juvenile crime will be lower if a milder punishment scale is adopted? It has variously been argued that, on one hand, milder sanctions will cause juveniles to self-identify less as criminals and hence offend less frequently; or, on the other hand, that such reduced sanctions will diminish marginal deterrent effects and hence cause crime to increase. These potential effects cannot be gauged with even a modicum of confidence, however, given the current state of knowledge of marginal deterrence and other crime-preventative effects (see, for example, von Hirsch et al., 1999).

Any claim about beneficial effects of reducing the penalty scale for youthful offenders would need to focus, instead, on how punishment affects ordinary processes of growing up. Living autonomously involves not only making choices but being held accountable by others for those choices. Part of that accountability, a proportionalist sentencing rationale assumes, is undergoing penal censure for the legal wrongdoing. Punishment, however, also tends to interrupt the ordinary routines and developmental opportunities of growing up. A way of holding young persons accountable but seeking to reduce damage to their life prospects is to adopt less stringent punishment conventions for adolescents.

This, however, does not yet take us to our desired conclusion. 'Cutting losses' is a consequentialist concern: it relates to the beneficial (or less injurious) consequences of punishing less. But a proportionalist sentencing rationale uses punishment criteria that are retrospectively oriented: it concerns the penal censure expressed through sanctions for misdeeds already committed. How, then, can the 'testing of limits' thesis be related to such retrospective criteria? We turn to this issue next.

'Tolerance' as grounds for scaling-down punishment levels – the first-offender discount

In judging the proportionate sentence, the primary criteria are the seriousness of the criminal offence, and the degree of severity of the punishment. These dimensions, as applied to juvenile offenders, have just been addressed. In certain contexts, however, there is an additional consideration, of what I have called a partial tolerance (von Hirsch and Ashworth, 1998: 191–7). The tolerance does not address offence seriousness but

rather, how much penal censure should attach to conduct of a given degree of seriousness. The idea of the partial tolerance is that, in certain situations, we should entertain a certain degree of sympathy for the predicament of those punished – and hence utilize more forgiving standards of blame.

I have, elsewhere, applied this notion of a partial tolerance in a different context, namely, in order to argue for a modest discount in the punishments of (adult) first offenders (see von Hirsch, 1981, 1985: ch. 7; von Hirsch and Ashworth, 1998: 191–7). My suggested first-offender discount is not based on a claim of reduced culpability; it applies to the first offender who appears to be fully culpable – for example, quite aware of the wrongfulness of his conduct. The essence of the claim is even if the first offence reflects no less culpability, it should be judged by less stringent standards.

The partial tolerance for the first offender, I argued, rests the notion of a lapse. A transgression (even of penal statutes) is to be judged less stringently when it occurs against a background of prior compliance. The idea is that even an ordinarily well-behaved person can have his moral inhibitions fail in a moment of wilfulness or weakness. Such a lapse reflects a kind of human frailty for which some sympathy should be shown.

The partial tolerance not only reflects this sympathy; it is granted on the assumption that humans also are capable of something worthy of respect – namely, attending to others' censure. Recognizing the fallibility – the human susceptibility to the lapse – calls for a limited tolerance of failure, expressed through some diminution of the initial penal response. The respected process, on account of which the discount also is granted, is that by which the person can attend to the disapproval visited on him through being punished for his first offence, and alter his behaviour accordingly. In viewing the person as a moral agent, we initially assume him capable of such a response and thus give him his 'second chance'.

This tolerance is, however, a temporary one: it is granted for the first offender, diminishes for a second or third offence and then (or soon thereafter) is lost. Repeated offending no longer qualifies as a mere lapse; and the offender has not responded to censure in the hoped-for way, of exercising greater self-control. This temporary character is crucial, as it assures that offenders will ultimately be held accountable for their actions without any tolerance-based discount.

Should a 'tolerance' thesis be applied to juveniles?

Can a comparable tolerance thesis be applied also to juveniles, to justify a milder punishment convention? I think it can – although its specifics would operate differently. The notion of adolescence as a time of testing, sketched above, provides good reason for granting a partial tolerance. Why does it do so? The point to emphasize is not just that adolescents are more liable to overstep legal limits. It is, rather, that the situation in which they are placed, of being encouraged to begin making autonomous choices, prompts experimentation on their part and hence the overstepping of bounds. If young persons are supposed to 'try out' making their own decisions, notwithstanding the foreseeable harmful choices that may ensue, then there should be some sympathy for failures, and those should be judged by a less stringent standard.

A few features of this argument are worth noting. First, it is different than the claim made earlier (pp. 6–10) that juvenile offenders are less culpable. This tolerance argument is not reducible to claims about lesser understanding of consequences, less adequate

impulse control, etc. It is, rather, that young persons, when given the opportunity of more autonomous living, will often make wrong choices – including wrongs for which they know the harmful consequences full well, and which they could well have avoided making. Learning to make choices carries with it the risk of making bad choices.

Second, the tolerance should generally be available to youthful offenders; it should not be the kind of mitigation that is accorded to this youthful offender and denied to that one, because the one attracts our sympathies more than another. Any youth, in virtue of the status of adolescence, faces the predicaments involved in learning to live in freedom, and any should be entitled to a degree of sympathy for transgressing the limits.

Third and critically, the tolerance is temporary. It should be greatest in early adolescence, and gradually diminish with the approach of the age of majority. This comports with the underlying rationale – that adolescence is a time for learning to live in freedom. When adulthood is reached, the person will already have had his or her opportunity to test limits, and should be treated as an adult – that is, held normally accountable.

What does this account have to do with Zimring's thesis about youth as a time for testing? His arguments are, as noted above, consequentialist: that less harm to juveniles will be done if penalties are scaled down. What was needed, in order to justify penalty reduction under a proportionalist sentencing rationale, is a retrospectively oriented reason – and that (I think) has been supplied by the tolerance argument. My thesis is that scaling down punishments is not just a matter of avoiding undesirable consequences in future; but that it is appropriate to judge juveniles by a less stringent standard, in view of the predicaments they face learning how to live autonomously.

While this thesis resembles the first-offender discount in its reliance on a notion of 'tolerance', its criteria for application are, manifestly, different. The first-offender reduction depends on prior convictions and their frequency: the idea is that the first offence may be seen as a 'lapse' warranting a discount in punishment, that diminishes with a few repetitions and then is lost. The penalty reduction for youths constitutes another application of the general notion of judging persons less stringently in view of certain kinds of human fallibility and capacity for agency. But this does not rely on notions of a temporary lapse, and depends on something other than offence repetitions: namely, the age of the youths involved. The reduction is largest for youths near the minimum age of responsibility, and diminishes as adulthood approaches. Recidivism is not the criterion here.²¹

WHAT PRACTICAL DIFFERENCE?

In practical terms, how would the proposed scheme differ from existing juvenile-justice systems? One cannot give a general answer, given the multifariousness of juvenile justice schemes in various jurisdictions. My proposed approach would have considerable similarities to the Swedish system for juveniles, but greater dissimilarities with those of other jurisdictions.

The point of departure would be an adult sentencing system with moderate, graded penalties. Penalty levels would be well below those in most English-speaking jurisdictions, and would be more reflective of offence seriousness.

Compared with such an adult system, however, penalties for juvenile offenders would be substantially scaled down for the three reasons discussed in this article: culpability,

punitive 'bite' and a special 'tolerance' for juveniles. The extent of the discount would be related to age. What this article has mainly focused upon is an analysis of these three kinds of reasons.

There would be no provision comparable to waiver in US juvenile courts – whereby for various (often more serious) offences, juvenile status would be withdrawn and young defendants punished at adult penalty levels.²² Greater crime seriousness would be reason for imposing higher penalties compared with those imposed on juveniles for other lesser crimes, but not for ignoring the reasons for reducing generally the penalties for juveniles.

In the American debate, the adoption of proportionate but scaled-down penalties for juveniles has often been linked with proposals for abolition of a separate juvenile court (see particularly, Feld, 1999). The difficulty of such linkage, however, is that – unless sentencing practice in adult courts is substantially changed – abolition could lead to large penalty increases for juveniles.

My analysis presupposes no such linkage. What counts on this analysis are the criteria for dispositions of juveniles – namely, the emphasis on proportionate sanctions, and the use of scaled-down penalties. This could be implemented in various ways. One possible approach would be to dispense with a separate juvenile court, and have the courts of general jurisdiction process juvenile cases but apply separate (and milder) sentencing standards. This is now the case in Sweden. An alternative approach would be to create or preserve a separate juvenile court, but alter its criteria in the ways that have been suggested here. Alternatively, there could be hybrid approaches – such as having courts of general jurisdiction operate with special juvenile divisions. It might be argued, on one hand, that if the basic rationale of proportionality applies also to juveniles, there is no further need for a separate juvenile court. On the other hand, it may appear that juveniles need special support and assistance that can best be provided by specially trained judicial personnel. Which of these various organizational solutions is preferable may vary among different jurisdictions, depending on their particular judicial traditions. It is important not to conflate the issues of rationale and dispositional criteria with those of judicial organization.

This article has, deliberately, tried to sketch an ideal scheme, designed to reflect how a desert rationale should deal with juveniles. In many jurisdictions at present, it will be difficult to achieve either the degree of emphasis on proportionality or the reduced levels of punishment that I have here proposed. But my aim here has been to specify why a desert-oriented approach should adopt different (and milder) penalty standards for juveniles. What I am speaking of is the direction of desired change.

Acknowledgements

This article is based on a lecture given at All Souls College, Oxford in May 1999. The author is grateful for the comments of Andrew Ashworth, Anthony Bottoms, Antony Duff, Barry Feld, Tatjana Hoernle, Amanda Matravers, Michael Tonry, Beatrice von Silva-Tarouca, Lucia Zedner and three unidentified reviewers for this journal.

Notes

- 1 For a description of the English system in force before 1998, see Ball et al. (1995). The present Labour government has adopted significant changes under the Crime and Disorder Act 1998, and these have been implemented nationally in April 2000. For

a description and discussion of the American system of sanctions for juveniles, see Feld (1999).

It is worth noting that one non-European jurisdiction, New Zealand, has adopted a system of dispositions for juveniles with yet another rationale – one of restorative justice (see Maxwell and Morris, 1993).

- 2 See, particularly, Feld (1999: ch. 8).
- 3 For the pros and cons of a desert rationale, see von Hirsch and Ashworth (1998: ch. 4); and more fully, Walker (1991) and von Hirsch (1993).
- 4 For discussion of the role of prior convictions under a desert model, see pp. 230–231 below.
- 5 Given a rationale emphasizing censure, penalties ranked in severity according to the gravity of the offence (even if not involving harm-for-harm equivalence) would suffice to convey blame for various crimes. I have also argued (von Hirsch, 1993: ch. 5) that high overall severity levels are inconsistent with the moral functions of penal censure. Through punishments' censuring features, the criminal sanction offers a normative reason for desistance that can be offered human beings seen as moral agents: that doing certain acts is wrong and hence should be refrained from. Punishments' material deprivations can then be viewed as providing a supplemental disincentive – that is, providing humans (given human fallibility and the temptations of offending) an additional prudential reason for complying with the law. The higher penalty levels rise, however, the less significant can be the normative reasons for desistance supplied by penal censure, and the more predominant the system's purely threatening aspects become (in Hegel's apt words, a stick being raised to a dog). To the extent this argument is accepted, it points towards keeping penalties at moderate levels.
- 6 Juvenile offenders, for purposes of the present analysis, would be those whose ages run from the minimum age of criminal responsibility (14 in many Western European jurisdictions, but now 10 in England) to the age of legal adulthood (say, 18).
- 7 Such a general approach, of proportionate sanctions but with age-related reductions in sentence levels, is also recommended in Feld (1999: ch. 8).
- 8 For a specification of the elements of the offence of burglary, see, for example, American Law Institute, *Model penal code* (1962: s. 221.1(1)).
- 9 For discussion of psychological studies regarding reduced comprehension, see Feld (1999: 306–14).
- 10 Feld points out that: '[d]evelopmental psychology does not possess reliable indicators of moral development that equate readily with criminal . . . accountability' (1998: 248).
- 11 Such an approach seems perverse because a youth's degree of appreciation of the harmful consequences of his conduct may depend not only on his innate abilities and his opportunities but (at least to some degree) also on his own efforts at learning to comprehend others' interests. To the extent that he succeeds in increasing his comprehension, it seems inequitable to penalize his efforts by holding him to a higher fault standard and thus punishing him more severely than other youths of his age.
- 12 Under English law until 1998, a child between ages 10 and 14 could be held criminally responsible only if the prosecution, in addition to establishing the elements of the crime, met a burden of showing that the child knew that the conduct was wrong. In the Crime and Disorder Act 1998, s. 34, this rule was eliminated. Instead of using

the repeal of the *doli incapax* rule to raise the age of responsibility to 14, however, the Act reduced that age for all juvenile offenders to the astonishingly low level of 10 years.

- 13 Gradations of response based on age are also suggested in Feld (1999: 315–20).
- 14 See also Zimring (1998a: 77–81, 1998b: 487–90).
- 15 Thus under Swedish sentencing law, it is deemed a mitigating factor that the defendant ‘. . . because of mental abnormality . . . had a reduced capacity to control his behaviour’ (Swedish Penal Code, ch. 29, s. 3:2).
- 16 This is especially true of desert-oriented standards such as Sweden’s, which rely on general statutory principles which the courts are to apply in particular cases, rather than numerically prescribed numerical sentencing ranges; see Jareborg (1995).
- 17 Sweden’s sentencing statute generally recognizes provocation as a mitigating circumstance. See Swedish Penal Code, ch. 29, s. 3:1. For discussion of the role of provocation under a desert rationale, see Narayan and von Hirsch (1996).
- 18 There may be some exceptions on account of special types of vulnerability that typify certain disadvantaged groups of adult offenders – such as the aged and the ill. Thus the Swedish sentencing law permits sentence reduction when ‘punishment imposed according to the crime’s penal value [i.e. seriousness] would affect the accused unduly severely, due to advanced age or bad health’ (Swedish Penal Code, ch. 30, s. 5:6).
- 19 For discussion of the possibility of some degree of choice, under an adult desert model, between short prison terms and the severer forms of non-custodial sentences, see von Hirsch (1993: 61).
- 20 This example of numerical grades of seriousness and severity is for illustrative purposes only. Whether numerical guidelines or statutory sentencing principles are a preferable method of regulating sentencing discretion may vary with the jurisdiction involved, and is in any event a separate issue – which will not be addressed here. See more fully, von Hirsch et al. (1987: ch. 3).
- 21 Because of these differing criteria, a youthful first offender might be permitted to avail himself of both discounts. Any 14-year-old, for example, would, on the basis of the tolerance theory for juveniles, receive a significant penalty reduction compared to that for an adult. But then, if a first offender, he could also receive a modest discount compared to a youthful recidivist of the same age.
- 22 In various American states, juveniles whose cases have been ‘waived’ to the adult court may face very severe punishments. Indeed, juveniles as young as 13 years of age have been sentenced to life imprisonment without parole (see Logan, 1998).

References

- American Law Institute (1962) *Model penal code*. Philadelphia, PA: American Law Institute.
- Ashworth, A. (2000) *Sentencing and criminal justice*. 3rd ed. London: Butterworths.
- Ball, C., K. McCormac and N. Stone (1995) *Young offenders: Law, policy and practice*. London: Sweet & Maxwell.
- Duff, R.A. (1996) ‘Penal communications: Recent work in the philosophy of punishment’, in M. Tonry (ed.) *Crime and justice: A review of research 20*, pp. 1–97. Chicago, IL: University of Chicago Press.
- Feld, B. (1998) ‘Juvenile and criminal justice systems’ responses to youth violence’, in

- M. Tonry and M. Moore (eds) *Youth violence. Crime and justice: A review of research 24*, pp. 189–261. Chicago, IL: University of Chicago Press.
- Feld, B. (1999) *Bad kids: Race and the transformation of the juvenile court*. New York: Oxford University Press.
- Husak, D. and A. von Hirsch (1993) 'Culpability and mistake of law', in S. Shute, J. Gardner and J. Horder (eds) *Action and value in the criminal law*, pp. 157–74. Oxford: Oxford University Press.
- Jareborg, N. (1995) 'The Swedish sentencing reform', in C. Clarkson and R. Morgan (eds) *The politics of sentencing reform*, pp. 95–123. Oxford: Oxford University Press.
- Lockyer, A. and F. Stone (1998) *Juvenile justice in Scotland*. Edinburgh: T. & T. Clarke.
- Logan, W.S. (1998) 'Proportionality and punishment: Imposing life without parole on juveniles', *Wake Forest Law Review* 33: 681–725.
- Maxwell, G. and A. Morris (1993) *Family, victims and culture: Youth justice in New Zealand*. Wellington, New Zealand: Social Policy Agency.
- Narayan, U. and A. von Hirsch (1996) 'Three conceptions of provocation', *Criminal Justice Ethics* 15(1): 15–25.
- Norrie, K. (1997) *Children's hearings in Scotland*. Edinburgh: W. Green.
- von Hirsch, A. (1981) 'Desert and previous convictions in sentencing', *Minnesota Law Review* 65: 591–634.
- von Hirsch, A. (1985) *Past or future crimes: Deservedness and dangerousness in the sentencing of criminals*. New Brunswick, NJ: Rutgers University Press.
- von Hirsch, A. (1993) *Censure and sanctions*. Oxford: Oxford University Press.
- von Hirsch, A. and A. Ashworth, eds (1998) *Principled sentencing*, 2nd edn. Oxford: Hart Publishing.
- von Hirsch, A. and N. Jareborg (1991) 'Gauging criminal harm: A living-standard analysis', *Oxford Journal of Legal Studies* 11: 1–38.
- von Hirsch, A., K. Knapp and M. Tonry (1987) *The Sentencing Commission and its guidelines*. Boston, MA: Northeastern University Press.
- von Hirsch, A., A.E. Bottoms, E. Burney and P.-O. Wikström (1999) *Criminal deterrence and sentence severity*. Oxford: Hart Publishing.
- Walker, N. (1991) *Why punish?*. Oxford: Oxford University Press.
- Zedner, L. (1998) 'Sentencing young offenders', in A. Ashworth and M. Wasik (eds) *Fundamentals of sentencing theory*, pp. 165–86. Oxford: Oxford University Press.
- Zimring, F.E. (1982) *The changing legal world of adolescence*. New York: Free Press.
- Zimring, F.E. (1998a) *American youth violence*. New York: Oxford University Press.
- Zimring, F.E. (1998b) 'Toward a jurisprudence of youth violence', in M. Tonry and M. Moore (eds) *Youth violence. Crime and justice: A review of research 24*, pp. 477–501. Chicago, IL: University of Chicago Press.

ANDREW VON HIRSCH (LL.D., Cambridge) is Honorary Professor of Penal Theory and Penal Law and Fellow of Fitzwilliam College, University of Cambridge. He is author of *Doing Justice* (1976), *Past or Future Crimes* (1985), *Censure and Sanctions* (Oxford University Press, 1993); co-author of *Criminal Deterrence and Sentence Severity* (Hart Publishing, 1999); an co-editor of *Principled Sentencing* (Hart Publishing, 1998). He is Director of the recently established Centre for Penal Theory and Penal Ethics at the Institute of Criminology at Cambridge.
