

We are happy to share this information with you and encourage you to use this document for your research purposes. Please ensure that all credits are acknowledged when using all or any information within this document.

Commercial reproduction is strictly prohibited.

1. WHY QUESTION THE PUNISHMENT OF YOUNG OFFENDERS?

The dominant view in Western society continues to be that punishment is the appropriate response to the transgression of norms and values. Although the religious or utilitarian logic which typically underpins punishment extends beyond the sphere of criminal justice, it is in this context that its centrality is particularly obvious: the word "penology" itself stems in part from the Latin word for punishment, "poena". Punishment strongly colours juvenile justice systems as well, despite initial emphasis in countries such as the United States and Canada on the welfare of offenders. Heralding the replacement of the welfare-oriented *Juvenile Delinquents Act (JDA)* by the *Young Offenders Act (YOA)*, the words of Canada's Solicitor-General in 1982 reflected a trend sweeping Western states: "[W]e are attempting with this legislation to toughen the kiddie-court image of the juvenile court and to make it a place where a young person will be punished and held accountable to society for what he has done".¹ Worthy of note because of its placement as an interpretive guide within the body of the legislation, the *YOA's* Declaration of Principle (s. 3) in fact goes on to make references to responsibility and accountability that have been viewed as euphemisms for punishment.² Characteristically, however, punishment is in the *YOA* as in other pieces of national legislation worldwide left undefined.

¹ House of Commons, *Minutes of the Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, First Session of the Thirty-Second Parliament (Ottawa: House of Commons, 23 March 1982). Many Canadians do not consider the *YOA* to be this forceful, perhaps in part because the movement toward punishment was accompanied by greater respect for due process and young offenders' legal rights.

² D. Andrews, "Treatment Issues and Young Offenders: An Empirically Derived Vision of Juvenile Justice Policy" in R.R. Corrado et al., eds., *Juvenile Justice in Canada: A Theoretical and Analytical Assessment* (Vancouver: Butterworths, 1992) 347 at 354. Despite internal contradictions the Declaration of Principle does not reflect the view that "it is unjust to punish at all; for the criminal did not make his own character; his education, and the circumstances which surround him, have made him a criminal, and for these he is not responsible". See J.S. Mill, "Utilitarianism" in *On Liberty and Other Essays*, ed. by J. Gray (Oxford: Oxford University Press, 1991) 131 at 191, and, for additional

In a context where punishment is an accepted facet of criminal justice and of life in general, that neither its meaning nor its impact on young offenders has been established is troubling. A stark example of this ambiguity is the notion of cruel and unusual punishment. By May 1996, 187 countries had managed to ratify the Convention on the Rights of the Child without specifying what types of conduct were of the "cruel, inhuman or degrading" variety nominally prohibited by Article 37(a). Whether the category is wider for youths or adults also remains unresolved. Adults may be more able to bear physical pain or isolation, while youths already accustomed to correction and subordination may recover more quickly from chastisement.³ Furthermore, does the prohibition of certain punishments necessarily imply the existence of usual and humane forms which are beyond reproach? Questions about such issues still clearly need to be answered.

2. WHAT SIGNALS THAT "PUNISHMENT" IS IN PROGRESS?

Thomas Hobbes defined punishment as "an Evill inflicted by publique Authority, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the Law..."⁴ However, do such definitions create more problems than they solve? For example, one facet of punishment is often said to be "severe deprivation" or "the intentional infliction of unpleasantness or pain",⁵ yet the perspectives of punishers and punished may diverge. Offenders do not always consider sentences which judges intend to be punitive (a sub-category of all dispositions under laws such as the *YOA*) to be especially punitive: "[s]tone walls do not a prison

classicist-positivist debate, Note, "The Young Offenders Act: Principles and Policy - The First Decade in Review" (1993) 38 McGill L.J. 939 at 944.

³ See J. Hatchard, "The Fall of the Cane Again: Corporal Punishment in Namibia" (1992) 36 J. African L. 81.

⁴ *Leviathan*, ed. by C.B. Macpherson (London: Penguin, 1968) at 353.

⁵ Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987) at 109; R. Wassertrom, "Some Problems with Theories of Punishment" in W.L. Blizek & J.B. Cederblom, eds., *Justice and Punishment* (Cambridge: Ballinger, 1977) 173 at 173.

make", wrote English poet Richard Lovelace. Many offenders, including the young Raskolnikov in *Crime and Punishment*, may even welcome measures because of their recognizably "punitive" nature.⁶ Conversely, sentences which judges describe in positive terms such as treatment rather than punishment may seem intolerable to offenders coerced into treatment programs by virtue of past conduct. The behavioural modification which may then occur itself rests on the punitive threat of "negative consequences and/or withdrawal of positive supports" for the disobedient.⁷

Defining punishment poses other difficulties as well. One is the circularity of identifying punishment as a response to crime when crime may be defined, in turn, as punishable wrongdoing.⁸ Another problem is the standard association of punishment with administration by state officials when, judging by punishers' intentions, "more punishment is still handed down by families, institutions of work, and education, and within the interpersonal sphere than is dealt out by the state". Perhaps because it is less predictable, prospective delinquents have actually been found to worry more about the reaction of their families than of the state to their misconduct.⁹ It should also be noted that other humans are not considered to be the only sources of punishment: divine or supernatural forces are often counted on to assume this task either during the life or

⁶ See A.C. Diver-Stamnes & R.M. Thomas, *Prevent, Repent, Reform, Revenge: A Study in Adolescent Moral Development* (Westport, Connecticut: Greenwood Press, 1995) at 4; M. Henberg, *Retribution: Evil for Evil in Ethics, Law, and Literature* (Philadelphia: Temple University Press, 1990) at 181: "the criminal is much less daunted by the established legal punishment for a crime than lawgivers think", wrote Fyodor Dostoyevsky to his publisher, "partly because he himself experiences a moral need for it". This as well as other observations in the paper were also pointed out by Professor Yvon Dandurand of the International Centre for Criminal Law Reform and Criminal Justice Policy.

⁷ R.B. Coates, "The Future of Corrections in Juvenile Justice" in A.R. Roberts, ed., *Juvenile Justice: Policies, Programs, and Services* (Chicago: Dorsey Press, 1989) 281 at 287.

⁸ Wassertrom, *supra* note 5 at 176.

⁹ C. Harding & R.W. Ireland, *Punishment: Rhetoric, Rule, and Practice* (London: Routledge, 1989) at 31. Threatening or imposing punitive sanctions may even be a normal feature of parenting, although somewhat ironically parents tend to reserve punishment for lesser forms of misbehaviour (e.g., occasional drunkenness) while seeking professional help for the worst (e.g., heroin use). See Canadian Sentencing Commission, *supra* note 5 at 106. The heads of households were once actually entrusted with the carrying out of sentences on juveniles: in the colony of Massachusetts, youths charged with delinquency were frequently handed over to them for a whipping which court officials merely observed. See A.R. Roberts, "Treating Juveniles in Institutional and Open Settings" in Roberts, ed., *supra* note 7, 21 at 22. During the early Roman Empire, more drastically, "[t]he father was most definitely the agent of punishment both in terms of criminal law and socially. He could torture or punish any member of his family without any interference". See G. Newman, *The Punishment Response* (Philadelphia: J.B. Lippincott, 1978) at 56.

after the death of the offender.¹⁰ Learning about the possibility of such punishment may begin early: misbehaving children were once frequently threatened with "bogey men" or, in the case of the Hopi Indians, with the arrival of "a representative of the spirit world [who] would come to kidnap the child and cut off its head".¹¹ However, if punishment is defined widely enough for instances to be found throughout society and beyond, do its opponents have a hopeless task?

3. HOW ARE PUNITIVE MEASURES (BY THE STATE) JUSTIFIED?

The infliction of punishment by a state upon its citizens bears the character of a civil war in miniature - it depicts a society engaged in a struggle with itself. And though this may sometimes be necessary, it is never anything other than a necessary evil.¹²

Once the activity deemed worthy of punishment has been concluded, and the candidate for punishment is under sufficient control for it realistically to be imposed, the reason for it to be carried out is not always self-evident.¹³ Several justifications, which will be considered here under the headings of **prevention** and **retribution**, have emerged to fill this gap, each with implications for the degree and type of punishment to be imposed. However, additional questions remain to be asked. Do professed rationales match individual punishers' actual motivations? Is punishment at heart simply an instinctive response to perceived wrongdoing? Is it a means of releasing hostility otherwise directed elsewhere? Is it disguised vengeance?

a) Prevention: Is the punishment of young offenders a means to this end?

¹⁰ Harding & Ireland, *supra* note 9 at 39. Against this religious or moral backdrop individuals may also punish themselves, although perhaps this less formalized model does not apply as well to youths. "Whoever has a conscience will no doubt suffer, if he realizes his mistake. That's his punishment - on top of penal servitude", says the murderer in Dostoyevsky's *Crime and Punishment*. See also Newman, *supra* note 9 at 9: "the traditional Christian conscience is a kind of psychological societal punishment, in which the individual perceives ahead of time the threat of punishment and the threat itself becomes the punishment".

¹¹ Harding & Ireland, *supra* note 9 at 154.

¹² D. Garland, *Punishment and Modern Society: A Study in Social Theory* (Oxford: Clarendon Press, 1990) at 243.

¹³ R. Martin, *A System of Rights* (Oxford: Clarendon Press, 1993) at 218.

Although past acts bring offenders to official attention, utilitarians punish to prevent future crimes,¹⁴ and it is against this goal that the harm inflicted is to be balanced. Represented in the YOA's Declaration of Principle by references to the "protection of society", prevention is in fact the end most connected with juvenile justice, both in philosophical and in constitutional terms. However, the underlying assumption that youth crime rates are susceptible to improvement may deserve qualification. "[B]etween eighty and ninety percent [of youths under eighteen] admit to having committed an act in the past year that would be considered a criminal offence".¹⁵ If testing limits through criminal behaviour is, in countries like Canada, an innate part of growing up, "[p]erhaps it is most appropriate...to expect a delinquency program [only] to prevent the development of *serious* and *frequent* offenders".¹⁶

Several threads tie punishment to prevention. One version of prevention,¹⁷ meant to impact directly upon individuals other than the offender, is **denunciation**: punitive measures send the message that certain behaviour has violated societal norms, and in doing so reassure law-abiding members of society that their own conduct is proper and should be continued. However, this process is heavily dependent on the extent to which sentences are publicized, and as a means of educating the public about what behaviour to avoid, it seems that in fact "public views of the seriousness of offences...derive more from other sources (e.g., perceptions of harm, intent, etc.) than the severity of statutory maximum penalties or the harshness of the sentence actually

¹⁴ Of course, this both abbreviates utilitarianism and neglects Bentham's predecessors: Plato himself wrote in *Protagoras* that "punishment is not inflicted by a rational man for the sake of the crime that has been committed (after all one cannot undo what is past), but for the sake of the future, to prevent either the same man or, by some spectacle of his punishment, someone else from doing wrong a gain".

¹⁵ K. Onstad, "What Are We Afraid of? The Myth of Youth Crime" (1997) 112:2 *Saturday Night* 46 at 54.

¹⁶ J.S. Albanese, *Dealing with Delinquency: The Future of Juvenile Justice*, 2nd ed. (Chicago: Nelson-Hall, 1993) at 159, emphasis added.

¹⁷ Clearly a wide definition of prevention is being used here, as set out by J. Trepanier, "Principles and Goals Guiding the Choice of Dispositions Under the YOA" in L.A. Beaulieu, ed., *Young Offender Dispositions: Perspectives on Principles and Practice* (Toronto: Wall and Thompson, 1989) 27 at 50.

imposed in court".¹⁸ Does denunciation operate on more of an intangible moral level than is usual in the empirically verifiable world of prevention?

A second and more obvious theoretical link between punishment and prevention on a societal scale is **general deterrence**: potential offenders are to be **dissuaded** by the threat of the same swift, certain and severe punishment inflicted on others. Of course, exemplary punishments in particular have encountered criticism, even in the adult context. Are judges qualified to inflate sentences based on factors outside the case being tried? Is it fair to punish one individual harshly because others, over whom that individual has no control, might commit a similar offence if undeterred?¹⁹ On a more practical level, is it true that, as Montesquieu wrote in the mid-seventeenth century, "[i]f one examines the cause of every instance of laxity, one will see that it is unpunished crimes and not moderated penalties"?²⁰ Why is his remark still open to debate?

International instruments' call for minimal interference with the freedom of young offenders²¹ suggests that general deterrence comes under added fire in the context of juvenile justice. The first question is whether youths, traditionally dismissed as more impulsive than adults, are nevertheless utility maximizers who pause to compare the costs and benefits of particular activities. Do they think of the consequences before they act? The second difficulty even for level-headed young offenders lies in the attribution and calculation of the costs of their behaviour. The juvenile justice system in Canada and other countries is not known for speed, yet punishments may need to be virtually immediate both to be attached in the public consciousness to particular forms of conduct and, if attached, not to be heavily discounted.²² More importantly,

¹⁸ Canadian Sentencing Commission, *supra* note 5 at 143. This report dealt with adult offenders.

¹⁹ Trepanier, *supra* note 17 at 45.

²⁰ *The Spirit of the Laws*, ed. by A.M. Cohler, B.C. Miller & H.S. Stone (Cambridge: Cambridge University Press, 1989) at 85.

²¹ This issue will be addressed in greater detail later in the paper with regard to permissible forms of punishment.

²² A.L. Schneider, *Deterrence and Juvenile Crime: Results from a National Policy Experiment* (New York: Springer-Verlag, 1990) at 2; C. Beccaria, *On Crimes and Punishments*, trans. H. Paolucci (Indianapolis: Bobbs-Merrill, 1963) at 56.

sporadic media coverage of young offender cases may mean that potential offenders never learn of likely sentences - should such routine costs exist. In fact, the *YOA*'s guiding principles are broad enough to make the punishments against which youths are to weigh benefits unpredictable. Third, and conversely, youths already eager to display their personal invincibility to peers in the course of high-speed driving and experimentation with drugs may see even the acknowledged risk of a particular punishment as a benefit, thus encouraging and perpetuating anti-social behaviour.

Punitive measures are often justified as well on the basis of preventing recidivism by specific offenders. One route by which this is to be achieved is **individual deterrence**, with punished offenders being taught a lesson that should make them more aware and fearful of future responses to their misconduct. Western courts have, in fact, long tended to support the idea of specific deterrence despite struggling with the wider preventive processes of general deterrence and denunciation.²³ Only after prolonged disagreement among courts in the provinces, for example, did the Supreme Court of Canada rule in 1993 that general deterrence has a role in the young offender context, albeit one of "diminished importance".²⁴ Addressing only involved youths through individual deterrence has otherwise seemed safer - or easier? - than using the punishment of its relatively vulnerable members to mould society as a whole.

Another suggested means of preventing individual offenders from committing future offences is **rehabilitation** during the course of punishment. This process was central to Canada's *JDA* and may have reasserted itself in its successor, the *YOA*: the latter always referred to the "special needs" of youths in its sentencing guidelines, but in its reformed Declaration of Principle explicitly goes on to praise rehabilitation as "best serv[ing]" the protection of society. However,

²³ See "The Young Offenders Act: Principles and Policy", *supra* note 2 at 1007, 1009.
²⁴ *R. v. J.J.M.*, [1993] 2 S.C.R. 421, 20 C.R. (4th) 295.

is this legislative signal enough to conclude that judges once again *should* "prescribe punishment as a cure"?²⁵ Rehabilitation has a history of leading to long custodial sentences despite the resentment of those subjected to it and the possibility that it is, more basically, misdirected: "most offenders are not really abnormal. They are making rational decisions, given their social situation, toward gaining those things our society values most".²⁶

Finally, punishment may be intended to prevent crimes by **incapacitating** a member of the small group of repeat offenders blamed for the bulk of youth crime.²⁷ Unfortunately - both for the society left exposed to those treated with undue sympathy and for some mistakenly jailed or executed penitents - predicting who will in fact re-offend is far from an exact science. Furthermore, it is often forgotten that offences may still be committed by jailed offenders, with fellow inmates and staff as potential victims: "no environment known to man is more crime-ridden than a prison".²⁸ The danger is particularly acute in the many countries where adult and young offenders inhabit the same prison facilities, contrary to the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules, at Rule 26.3). Might the threat of victimization in such facilities increase the deterrent value of custodial sentences? Are the potential horrors of prison life implicitly condoned by authorities as a means of avenging young offenders' original victims? Why else do jailed offenders not receive better protection?

b) Retribution: Should juvenile courts look to the past as well as to a longer future?

²⁵ C.F. Abel & F.H. Marsh, *Punishment and Restitution: A Restitutionary Approach to Crime and the Criminal* (Westport, Connecticut: Greenwood Press, 1984) at 12. It should be noted that although this paragraph is worded to suggest that rehabilitation falls into the punitive category, many of its advocates would likely describe it as an alternative to punishment meant largely to benefit the offender. In addition, specifically with regard to medical treatment orders, it should be mentioned that the *YOA* requires youths' consent rather than being coercive (s. 22).

²⁶ *Ibid.* at 14; A. Young, "Appellate Court Sentencing Principles for Young Offenders" in Beaulieu, ed., *supra* note 17, 67 at 91. See also with regard to the length of sentences P. Devlin, *The Judge* (Oxford: Oxford University Press, 1979) at 29-32: "Those who are concerned with the rehabilitation of the criminal, whether as social workers or as doctors and whether the trouble is an addiction or mental disorder or just foolishness or wickedness...find it difficult to see why a criminal has to be let out before he is cured...Since in their minds the cure is the thing and the detention only incidental, they will prolong the detention so as to make sure of the cure".

²⁷ R.J. Lundman, *Prevention and Control of Juvenile Delinquency* (New York: Oxford University Press, 1984) at 188.

²⁸ Canadian Sentencing Commission, *supra* note 5 at 130; Trepanier, *supra* note 17 at 54.

Retribution is punishment "imposed on a person because that person deserves it", most famously (or notoriously) in the framework of "life for life, eye for eye, [and] tooth for tooth" for the purpose of re-establishing the "moral equilibrium".²⁹ Although not subject to empirical verification, this non-scientific justification at least allows punishment to be scrutinized by a wider public and, by making (or attempting to make) the punishment fit only the crime which an offender chose to commit, may be more respectful of that offender's individuality and rights.³⁰ In a more instrumental vein, when the state intercedes it presumably also helps to avoid the chaos of private vendettas and the growth of vigilante groups.

In practice what role do the ancient laws of retribution play in the modern theatre of juvenile justice? Although compatible with references to accountability, retribution is not explicitly written into Western laws such as the *YOA*. More fundamentally, does there exist an ideal proportionality between crimes and punishments on which judges could truly base their sentencing decisions? To the extent that judges have such a scale in mind and enjoy sentencing discretion, it seems in fact that proportionality operates chiefly in cases of low moral gravity, serving as a restraint since no more than an eye for an eye is demanded. At the other extreme, legally unable to exceed statutory maximum sentences, judges arguably cannot make punishments fit the high levels of blameworthiness and harm found, for example, in murder cases.³¹

Perhaps this is just as well. After all, does the fact that youths are deemed competent enough to be punished mean that their moral capabilities have developed to the extent that they

²⁹ *Ibid.* at 45. The *lex talionis* was first used under Hammurabi and of course retribution has, since the eighteenth century B.C., assumed many other forms; this paper is intended only to give a general overview and provide additional references. One of these is J. Hampton, "An Expressive Theory of Retribution" in W. Cragg, ed., *Retributivism and Its Critics* (Stuttgart: Franz Steiner Verlag, 1992) 1 at 15-17, emphasis added. She actually suggests a "non-punitive retributive response" - e.g., kindness by the victim toward a duly humbled offender, with the demeaning message originally sent by the offender to the victim being annulled. See also N. Lacey, *State Punishment: Political Principles and Community Values* (London: Routledge, 1988) at 17-18.

³⁰ See H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968).

³¹ Trepanier, *supra* note 17 at 45.

share judges' view of the (im)morality of their behaviour? What happens when the minimum age for criminal responsibility falls to ten years or less?³² Youths are not simply adults in smaller bodies: a separate juvenile justice system would be redundant if its figurehead became the blindfolded goddess who, unable to see the youthful qualities or related special circumstances of the offender, symbolizes retributive justice.³³ The commentary included in the Beijing Rules (Rule 17) thus states that

[w]hereas in adult cases, and possibly also in cases of severe offences by juveniles, just desert and retributive sanctions might be considered to have some merit, in juvenile cases such considerations should always be outweighed by the interest of safeguarding the well-being and the future of the young person.

c) Do non-punitive responses to wrongdoing require the same degree of justification?

Alternatives to punishment have recently garnered much attention. In New Zealand, for example, the *Children, Young Persons and Their Families Act* has since 1989 shifted the focus to restorative justice within the context of family group conferences.³⁴ However, how are these alternatives to be assessed? Must a particular measure prove more effective in accomplishing the ends of punishment than punishment itself to gain approval? Is the opportunity for greater involvement by victims enough to make it worthwhile? Is a new response acceptable, without additional justification, simply because it does not qualify as punishment?

At least before embracing alternatives for the sake of avoiding punishment, it might be asked whether these so-called alternatives are in themselves forms of it. Of course, on the one hand this question may seem ridiculous: the answer seems to be an obvious "no". Returning stolen property in the course of reconciliation, for example, is widely seen as a stage at which "the

³² This downward movement is being contemplated in the case of violent crimes in Canada, for example, and is being encouraged at the federal level in the United States. International instruments demand that minimum ages be set but fail to do so themselves.

³³ W. Cragg, *The Practice of Punishment: Towards a Theory of Restorative Justice* (London: Routledge, 1992) at 18.

offender has not yet received any real punishment".³⁵ Fear of suffering "real" punishment has even been blamed for reinforcing the adversarial system at the expense of deeper movement toward the resolution of conflict between victim and offender.³⁶ On the other hand, what does one make of offenders who prefer what traditionally would be seen as punishment, such as custody, to reconciliation? Might they find the entire process of attempted reconciliation burdensome enough, when confronted by angry victims and working to make restitution, to be punitive?³⁷ Indeed, dispositions such as compensation, restitution and community service are not listed separately from custody or fines in the *YOA*,³⁸ while for his part, John Locke cited both "reparation and restraint" as the ends of punishment.³⁹

4. WHAT FORM SHOULD PUNISHMENT TAKE?

a) Why consider public demands based on inadequate information?

The news media and entertainment programs often leave an impression of youth crime that is at odds with statistics. For example, one study of Toronto newspapers found that 94 percent of stories on youth crime concerned violence when less than one quarter of the cases which reached youth court in the province of Ontario did so. The media also tends not to report extensively on the sentences actually handed down, and certainly not on how judges explain

³⁴ M. Dyhrberg, "Sentencing of Children in New Zealand: A New Direction" (1995) 19 *Crim. L.J.* 133. See also the proceedings of the Symposium on Achieving Satisfactory Justice, Vancouver, B.C., March 1997, forthcoming.

³⁵ Canadian Sentencing Commission, *supra* note 5 at 106; H.A. Bedau, "Concessions to Retribution in Punishment" in Blizek & Cederblom, eds., *supra* note 5, 51.

³⁶ Church Council on Justice and Corrections, *Satisfying Justice: Safe Community Options that Attempt to Repair Harm from Crime and Reduce the Use or Length of Imprisonment* (Ottawa: 1996) at xiv.

³⁷ R.A. Duff, "Alternatives to Punishment - or Alternative Punishments" in Cragg, ed., *supra* note 29, 43 at 49; Abel & Marsh, *supra* note 25; M.R. Holmgren, "Punishment as Restitution: The Rights of the Community" in M.J. Gorr & S. Harwood, eds., *Crime and Punishment: Philosophic Explorations* (Boston: Jones and Bartlett, 1995) 402.

³⁸ Reparation to the victim was ordered in seven percent of adjudicated young offender cases in Canada in 1993, while in 1994-95 community service - often coupled with probation or other types of dispositions - was found in 29 percent. See S. Moyer, *A Profile of the Juvenile Justice System in Canada: Report to the Federal-Provincial-Territorial Task Force on Youth Justice* (Toronto: 1996) at 109; G. Doherty & P. de Souza, "Youth Court Statistics 1994-95 Highlights" (1996) 16:4 *Juristat* 1 at 10. .

³⁹ Although Locke later seems to contradict himself by discussing punishment and reparation as distinct concepts, see *The Second Treatise of Government*, ed. by T.P. Pearson (New York: Macmillan, 1952) at 6

them.⁴⁰ However, is this reason enough to exclude public input? Youth crime does not exclusively affect experts in the field; the other citizens who have their property stolen or vandalized, or who live with the fear of being assaulted, surely deserve a voice. In addition, is it possible that, because members of the public *are* in daily life directly exposed both to youths and to their crimes, they might detect and be responding to trends for which expert measurements fail to account?

Listening to the demands of the public in this regard would appear to mean imposing more severe punishment on young offenders. A January 1997 survey revealed that a majority of Canadians favoured harsher punishment as a means of dealing with what 92 percent saw as "a serious or very serious problem".⁴¹ A 1994 poll found that 92 percent also wanted more youths tried in adult court, presumably so that they could receive adult punishments, and 89 percent supported boot camps as one alternative.⁴² Corporal punishment has had a resurgence in popularity as well. In the United States, 38 percent of respondents to another 1994 survey applauded the caning of American Michael Fay in Singapore; the sentence in fact boosted interest in corporal punishment not merely for criminal offences (such as the vandalism to which Fay confessed) but also in the educational system.⁴³ However, most American parents still want it removed from government-run schools.⁴⁴

b) How far will we go in punishing young offenders?

A large variety of dispositions is imaginable in the young offender context. Indeed, the Convention on the Rights of the Child (Article 40(4)) and the Beijing Rules (Rule 18.1) urge that

⁴⁰ J.B. Sprott, "Understanding Public Views of Youth Crime and the Youth Justice System" (1996) 38 Can. J. Criminology 271 at 288.

⁴¹ Onstad, *supra* note 15 at 48.

⁴² *Ibid.* at 54.

⁴³ M.R. Czumbil & I.A. Hyman, "What Happens When Corporal Punishment is Legal?" (1997) 12 *Journal of Interpersonal Violence* 309.

a range be available to allow for proportionality in sentencing. Unanswered is how the punishments then imposed should be compared. Is the primary consideration recidivism rates? Can society afford to prioritize humanity? Might the same measures improve the welfare both of young offenders and of their prospective victims? Do the answers vary with gender?

i) Is the only good offender a dead offender?

At once a method of incapacitation, denunciation and retribution, capital punishment entails "intentionally killing someone as a means of administering justice".⁴⁵ As a means of general deterrence it is more questionable: in Canada homicide rates have not increased since capital punishment was abolished (for adults) in 1976. American data also suggests that capital punishment is no more of a general deterrent to murder than is long-term incarceration; at least stereotypically this is even more true for young offenders not frightened by personal danger but greatly attached to their freedom.⁴⁶ Correspondingly open to question is which fate is more humane, although there is no question as to which one leaves room for mistakes by the state.

For whatever reason there has been some reluctance both in principle and in practice to execute juveniles. Ancient Jewish law did not permit the death penalty for youths under twenty years of age, and Islamic tradition protected youths under seventeen from such a sentence. In more modern times, none of the 103 death sentences imposed on youths under fourteen in London between 1801 and 1836 was carried out.⁴⁷ By 1991, only 282 of the 16,000 offenders executed in the United States were under eighteen at the time of their crimes; of this group, more

⁴⁴ C.P. Weiss, "Curbing Violence or Teaching It: Criminal Immunity for Teachers who Inflict Corporal Punishment" (1996) 74 Wash. U.L.Q. 1251 at 1255.

⁴⁵ Diver-Stamnes & Thomas, *supra* note 6 at 19. Of course, it may be questioned even on this basic level whether capital punishment truly does provide the reassurance implied by the first two ends. "For a society to have to use this ultimate weapon, there must be real doubt that a significant number of people can be trusted to obey even the most fundamental of laws in [its] absence...therefore [it] is as likely to undermine public confidence in the capacity of the law to fulfil its function as it is to provide assurance". See Cragg, *supra* note 33 at 189.

⁴⁶ V.L. Streib, "Imposing the Death Penalty on Children" in R.A. Weitsheit & R.G. Culbertson, eds., *Juvenile Delinquency: A Justice Perspective* (Prospect Heights, Illinois: Waveland Press, 1990) 143 at 146.

than eighty percent were either sixteen or (the majority) seventeen.⁴⁸ Today, for juveniles as well as adults, it can be argued that in the United States capital punishment has been "retained more as the symbol of a particular politics than as an instrumental aspect of penal policy - a point which is largely confirmed by the massive number of offenders who have been sentenced...without actually being executed".⁴⁹ Should young offenders be condemned to hypocrisy as well as death row? Is it unfair to highlight American experience in this manner?

The abolition of capital punishment for individuals who were less than eighteen at the time of their offence has been mandated by the Convention on the Rights of the Child (Article 37(a)) and the Beijing Rules (Rule 17.2). This is in line with Article 6(5) of the International Covenant on Civil and Political Rights, although the United States in this context

reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, *including such punishment for crimes committed by persons below eighteen years of age*.⁵⁰

ii) Might corporal punishment endanger society as much as it does those punished?

Involving the "intentional...causing [of] any degree of physical pain, discomfort, and/or injury that does not directly result in death",⁵¹ corporal punishment is perceived to have several advantages. It requires no special institution, skill or elaborate instruments, so is widely available, and it can be used against offenders who lack the resources to pay a fine or the freedom of which a court could otherwise deprive them.⁵² It certainly seems likely as well to make youths

⁴⁷ L. Andre-Wells, "Imposing the Death Penalty Upon Juvenile Offenders: A Current Application of the Eighth Amendment's Prohibition against Cruel and Unusual Punishment" (1991) 21 New Mexico L. Rev. 373 at 375.

⁴⁸ S. L. Sanders, "The Imposition of Capital Punishment on Juvenile Offenders: Drawing the Line" (1992) 19 Southern Univ. L.R. 141.

⁴⁹ Garland, *supra* note 12 at 246.

⁵⁰ Quoted in W.A. Schabas, "Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?" (1995) 21 Brook. J. Int'l. L. 277 at 281, emphasis added.

⁵¹ Diver-Stamnes & Thomas, *supra* note 6 at 19.

⁵² Harding & Ireland, *supra* note 9 at 193.

who can afford fines take notice.⁵³ The practice has thus won favour even outside the criminal justice context. "Spare the rod, spoil the child" is a proverb in which many adults put considerable faith, and s. 43 of Canada's *Criminal Code* follows the British model of excusing certain individuals who inflict corporal punishment from criminal liability:

[e]very schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child...who is under his care, if the force does not exceed what is reasonable under the circumstances.⁵⁴

At least as a means of individual deterrence, however, corporal punishment encounters long-term problems. An obvious one in the family or educational context is that the persons who initiate the punishment and from whom any future threat would emanate may depart without replacement or become smaller than their growing charges.⁵⁵ A more general problem wherever administered is that corporal punishment may supply a "model of aggression" which puts others with whom the offender comes into contact in danger.⁵⁶

Corporal punishment is in fact discouraged by international instruments on juvenile justice. As noted earlier, the Convention on the Rights of the Child forbids "cruel, inhuman or degrading punishment", while the Beijing Rules (Rule 17.3) address and reject "corporal punishment" *per se*.⁵⁷ The UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines, in IV(B)(21)(h) and VI(54)) also oppose "harsh disciplinary measures" such as corporal punishment in any institutional context.⁵⁸ However, it should at least be asked

⁵³ Doherty & de Souza, *supra* note 38 at 11. Fines were the most serious disposition in six percent of young offender cases in Canada in 1994-95, with the maximum fine under the *YOA* being \$1000. Arguably, they are even easier than corporal punishment to administer, but can fines that in most cases are less than \$100 cause youths to alter their behaviour?

⁵⁴ See A.F. Phillips, "Teachers, Corporal Punishment and the Criminal Law: Retrospect and Prospect" (1992) *Jur. Rev.* 3. In the United States, Alabama is among the states which grant both criminal and civil immunity for corporal punishment that is appropriate and in accordance with school board policy. See Weiss, *supra* note 44.

⁵⁵ J. Sarkin, "Problems and Challenges Facing South Africa's Constitutional Court: An Evaluation of its Decisions on Capital and Corporal Punishment" (1996) 113 *S. Afr. L.J.* 71 at 83.

⁵⁶ Weiss, *supra* note 44 at 1280.

⁵⁷ In the criminal arena domestic constitutional constraints have been important as well. For instance, corporal punishment for young offenders was declared unconstitutional in Namibia in 1991 and in South Africa in 1995.

⁵⁸ In South Africa, corporal punishment in schools is correspondingly to be abolished, as it has been in Austria, Cyprus, Denmark, Finland, Norway, Sweden, and 25 American states. Despite s. 43 of the *Criminal Code*, various jurisdictions in Canada have also outlawed

whether such distaste for the practice, relative to custodial sentences, might derive in large part from the fact that "the mental anguish and gradual deterioration of an incarcerated inmate is much more difficult to observe and much easier to overlook".⁵⁹ Are jailed offenders less subject to abuse and does their punishment make them any less abusive?

iii) Is the state a fit custodian? Are custodial sentences simply ones of convenience?

Canada is second only to the United States in the number of youths institutionalized on a per capita basis, with a custodial sentence handed down in approximately one third of young offender cases. Indeed, youth incarceration rates have increased by over 200 percent in the province of British Columbia since the introduction of the *YOA*.⁶⁰ The fact that young offenders who were twelve or thirteen at the time of their offence account nationwide for only ten percent of those in open custody and five percent in secure custody⁶¹ does not necessarily indicate benevolence either. Peak years for criminal activity are not until sixteen and seventeen, and in Israel youths under fourteen are not to be imprisoned at all.⁶²

Although in Canada custodial dispositions have become more frequent, their average length has declined. The majority of sentences are much shorter than custodial maximums which in the reformed *YOA* range from two years for most crimes to six years for first degree murder. Only ten percent of custodial sentences in 1994-95 were for longer than six months, with the proportion of cases resulting in sentences of less than three months increasing overall.⁶³ The purpose specifically of this "short sharp shock" is individual deterrence, and although its success

corporal punishment in their schools. By the 1980s this had already been done, for example, by the Toronto Board of Education and the province of British Columbia.

⁵⁹ Garland, *supra* note 12 at 243.

⁶⁰ Doherty & de Souza, *supra* note 38 at 9; "We're Jailing More Young People" *The Province* (8 December 1996).

⁶¹ Moyer, *supra* note 38 at 189-90.

⁶² J. Karp, "Alternatives in the Treatment of Juvenile Offenders in Israel" in *Children and Juveniles in Detention: Application of Human Rights Standards* (Vienna: Austrian Federal Ministry for Youth and Family, 1995) 146 at 149.

⁶³ Doherty & de Souza, *supra* note 38 at 9.

rate is unknown, it has become popular enough to "in many cases, put...young people in jail for committing the same crime for which an adult would only be fined or given probation".⁶⁴ Indeed, it should be noted that although tending to be short and required to be shorter than the statutory maximums for adult offenders, in practice sentences for youths may exceed those typically served by adults before parole. Young offenders may also be sent to worse conditions: British Columbia's Youth Secure Custody Centre has been described as the province's worst prison.⁶⁵

Custody is a major feature of punishment in the United States as well, where pre-trial detention itself is a troubling "growth industry".⁶⁶ California, Georgia, Florida, Michigan and most notably Massachusetts have even made incarceration mandatory for gun-related offences by youths. Similarly, mandatory custodial sentences were introduced in Western Australia under the 1992 *Crime (Serious and Repeat Offenders) Sentencing Act*, for re-offending car thieves who cause death or serious injury during the use of their stolen property.

What confining young offenders accomplishes, other than protecting the general public from particular youths while they serve their sentences, is unclear. Incapacitation lasts for only a limited time, and youths released from prison have generally high rates of recidivism, since it is not a promising setting for treatment and reform. Jailed offenders may really be attending "crime school", with the opportunity to learn criminal behaviour from, or have criminal attitudes reinforced by, other inmates - although perhaps "the experience of 'liberty' at home and on the streets, for many youths, is every bit as...hardening as confinement to an institution".⁶⁷ It may also be questioned whether custody poses a strong general deterrent. In New York state, for

⁶⁴ Onstad, *supra* note 15 at 54.

⁶⁵ "We're Jailing More Young People", *supra* note 60.

⁶⁶ I.M. Schwartz & W.H. Barton, *Reforming Juvenile Detention: No More Hidden Closets* (Columbus: Ohio State University Press, 1994) at 19.

⁶⁷ S. Guarino-Ghezzi & E.J. Loughran, *Balancing Juvenile Justice* (New Brunswick, U.S.A: Transaction, 1996) at 157.

example, the violent crime rate grew by eleven percent even as its prison capacity doubled, and some inner city youths who have witnessed the sentencing of many neighborhood adults to prison facilities may now accept or embrace imprisonment as a "rite of passage".⁶⁸

Apparently recognizing the existence of such uncertainties, New Zealand has closed approximately two-thirds of its young offender institutions, and in the year following the introduction of family group conferencing and greater reliance on police cautioning the number of custodial sentences was cut by more than half. In the state of Victoria in Australia, numbers sent to youth training schools also fell - even more dramatically - between 1981 and 1992, and now several Australian states are experimenting with conferencing models.⁶⁹ These steps are in line with the Convention on the Rights of the Child (Article 37(b)), the Beijing Rules (Rule 19.1), and the UN Rules for the Protection of Juveniles Deprived of their Liberty (I(2)), which state that imprisonment should be a "last resort and for the minimum necessary period".

iv) What is the future of boot camps?

Boot camps are on the harsh end of a spectrum of facilities that includes the forestry and wilderness camps already established in Canada. Although often associated with the United States, boot camps are singled out for praise by publics elsewhere as well because of their perceived encouragement of discipline among the youths involved. The idea of transforming youths who devote much of their energy to looking rebellious into crewcut model citizens, at typically less cost than imprisonment, does have considerable appeal. Unfortunately, there seems

⁶⁸ Public Agenda, *Kids Who Commit Crimes: What Should Be Done about Juvenile Violence?* (New York: McGraw-Hill, 1995) at 17-18.

⁶⁹ "We're Jailing More Young People", *supra* note 60; Canada, Federal-Provincial-Territorial Task Force on Youth Justice, *A Review of the Young Offenders Act and the Youth Justice System in Canada* (August 1996) at 206.

to be at best "little difference" in the rate of recidivism among youths leaving either type of structured environment. This has persuaded Arizona to close down its own program.⁷⁰

v) Does probation do more than generate paperwork?

In 1994-95, probation was the most serious disposition handed down in 48 percent of cases involving Canadian youths; altogether it was imposed in nearly two-thirds of cases. This makes it the most frequently used punitive measure in Canada, with the median sentence being one year.⁷¹ Throughout Canada the use of probation has increased: in British Columbia 23 percent more youths were on probation daily in 1995-96 than in 1990-91.⁷²

This form of "punishment" - a term with which probation officers often identified more closely with social work may disagree⁷³ - is supposed not only to provide a form of monitoring but also to supply the guidance required to steer offenders toward acceptance of social norms. However, there is "scant evidence" that youths counselled in the manner envisioned by more stringent supervisory regimes are less likely to commit new crimes.⁷⁴ Youth probation officers are habitually overloaded, calling into question the amount of personalized attention that offenders receive despite the fact that supervision might over the long term exceed the cost of short-term custody. On the other hand, it seems logical that greater exposure to and direct support from the community into which youths would anyway eventually be released facilitates rehabilitation.

vi) Is public censure unwisely overlooked as a means of punishing young offenders?

⁷⁰ Public Agenda, *supra* note 68 at 21; Church Council on Justice and Corrections, *supra* note 36 at 171.

⁷¹ Moyer, *supra* note 38; Doherty & de Souza, *supra* note 38 at 11.

⁷² B. McLintock & A. Rees, "Attorney-General Admits Young-Offender Caseloads Are Too Heavy" *The Province* (11 December 1996).

⁷³ Duff, *supra* note 37 at 56.

⁷⁴ W.G. West, *Young Offenders and the State: A Canadian Perspective on Delinquency* (Toronto: Butterworths, 1984) at 101.

In certain cultures public shaming is ranked as a punishment second only to death in severity. Although the reputations affected have arguably become less important as communities have grown, advances in communications mean that negative information about offenders can also be spread more easily over greater distances and to a larger audience.⁷⁵ With this in mind, there is the possibility that publicizing the identities of young offenders may deter potential followers and encourage parents reluctant to see the family name tarnished to restrain their children.

However, this line of reasoning may have its flaws. Any benefits of public censure would at best be confined to the few types of young offender cases predictably covered by the media. More alarmingly, in those cases youths who desire attention could be spurred on rather than deterred by the prospect of being publicly identified. Once labelled, youths might also face added difficulty in gaining access to, and develop a self-image contemptuous of, the employment and education which would otherwise help them to avoid crime in adulthood.

Privacy is expected throughout young offender proceedings by the Beijing Rules (Rule 8) and the Convention on the Rights of the Child (Article 40(2)(b)), and in line with countries such as Australia and New Zealand, the *YOA* generally restricts publication. However, 29 U.S. states allow young offenders' names, and on occasion photographs of them, to be released to the public.⁷⁶ Public censure has also been used, as an actual sentencing option, in countries such as Bulgaria, where in 1993 it was imposed on slightly more than ten percent of young offenders.⁷⁷

5. WHY STOP AT PUNISHING YOUNG OFFENDERS ALONE? WHY NOT CONSIDER VICARIOUS OR COLLECTIVE RESPONSIBILITY?

⁷⁵ Harding and Ireland, *supra* note 9 at 100.

⁷⁶ Federal-Provincial-Territorial Task Force, *supra* note 69 at 402.

⁷⁷ B. Stankov, *Criminal Justice Systems in Europe and North America: Bulgaria* (Helsinki: European Institute for Crime Prevention and Control, 1996) at 47.

In many schools it is still not uncommon for an entire class to be punished for one student's misconduct, yet the idea of "punishing" parents - without whom troublesome youths would physically not exist to inflict themselves on others - for their children's misconduct draws criticism. Certainly some forms of punishment seem extreme, as when the Israeli army announced in late 1989 that the parents of rock-throwers would have their homes sealed or property impounded. On the other hand, why not, as provided by a 1990 Florida law, imprison or fine parents who own guns which their children proceed to use?⁷⁸ What makes the situations different?

There are various means of holding parents responsible. Civil liability could allow victims to recover damages (although these are typically not punitive in nature); criminal liability could make parents subject to fines, compensation orders, community service orders, or parenting classes. In New Zealand, parents may be required to pay prosecutorial costs or compensation when children less than sixteen years of age are brought to court. In the United States, the "heartland of parental liability laws", all but one state provide for civil liability, many states have imposed criminal liability, and even some cities pursue parents when their children violate curfews or rules against truancy.⁷⁹

As this suggests, there is also a variety of scenarios in which liability could be imposed - each of which raises its own questions. Should parents be held liable for all misconduct by their children, or is it unfair to blame them for offences over which they could exercise no direct control (e.g., by locking up loaded weapons)? Can a list of offences attributable to bad parenting be developed, or are these impossible to screen out from those driven by factors such as poverty?

Are any offences, in fact, caused by parenting style? Is this answered by the fact that there does not seem to be much evidence in the criminal context that punishing parents (or, more accurately, having laws which allow parents to be punished, since enforcement and conviction are often uncertain) reduces the youth crime rate?⁸⁰ Should responsibility be borne, without discriminating against parents, by any adult who involves youths in crime, as in the amendment to Canada's Criminal Code which makes it an offence subject to more severe punishment for an individual to live on the avails of prostitution of someone under the age of eighteen?

CONCLUSION

Countless youths are brought yearly before the courts - or other types of adjudicators - to account for their behaviour. With so much at stake, it is important that at least five sets of questions⁸¹ about society's reliance on punishment be asked before sentences are in fact imposed:

Is punishment an immutable part of society? Is it worth questioning? How would the development of alternative or restorative measures be explained if the answer was no?

Is there agreement, whatever other problems punishment may raise, at least on how it should be defined? From which perspective should punishment be assessed? Is it for the punisher/lawmaker or the punished/offender to distinguish between categories such as punishment and torture? Do the lines shift from either perspective when young offenders are involved?

Can punishment be justified once it is identified, whether in terms of its social utility or on other philosophical or moral grounds? Is it because punishment creates so much suffering that a lack of express justifications makes punishers uncomfortable? Is there a degree of suffering beyond which no justification can apply? Does the answer vary with the justification offered, whether prevention or retribution? Which rationale is more appropriate for youths?

⁷⁸ See A. Binder & G. Geis, "Sins of their Children: Parental Responsibility for Juvenile Delinquency" (1991) 5 Notre Dame J.L. Ethics & Pub. Pol'y 303.

⁷⁹ Federal-Provincial-Territorial Task Force, *supra* note 69 at 473.

⁸⁰ *Ibid.* at 474.

⁸¹ Of course, this paper has neglected one of the most fundamental. Who is qualified to answer these questions? Can the suitability of a particular punishment be as clear to prosecutors, trial judges and the academics who study their decisions as to priests or moral philosophers?

Can different forms of punishment rationally be compared? Are sentences of death and probation truly on the same spectrum, capable of being measured against the same standard? Does the punishment selected depend less on its abstract justification than on the personality of the judge or on the history or culture of which he or she is a product? Do alternative means of imposing punishment, such as sentencing circles, result in different forms of punishment being imposed?

Is punishment a matter between only the legal authorities and the offender? What is the role of victim? Does more attention need to be paid in this respect to the concept of "restorative justice"? Does punishing either young offenders or their parents really help victims? Does punishing parents make victims out of the youths on whom punished parents may take revenge? Is there any sympathy left over for them?