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Sentence Discounts and Sentencing Guidelines for Juveniles

Despite their shortcomings this article defends juvenile courts against their critics by highlighting the drawbacks of an adult-only system in which juveniles would be tried. The current focus on just deserts in the criminal justice system would quickly dismantle legislatively imposed youth discounts and diminish the flexibility inherent in the juvenile system, both to the detriment of juvenile offenders. However, the inequities in the juvenile system which arise from unbridled judicial discretion may be curbed by a flexible and simple guideline system that is built on a notion of "limiting retributivism" that allows for the protection of society and the rehabilitation of young offenders.

The original juvenile justice systems were designed to differ in material ways from the adult system. First, a youth's entry into the juvenile system was not predicated on the commission of a crime. Because the juvenile court's mission was to protect and rehabilitate wayward youths, those who committed "status offenses" (truancy, running away, and other acts of misbehavior that would not be criminal if committed by an adult) were to be dealt with in the same manner as youths who committed criminal acts. Second, the juvenile justice system emphasized informality. Rules of evidence, constitutional protections such as the right to a jury trial, even the assistance of counsel, were considered unnecessary or counterproductive to the juvenile court's mission. Finally, juveniles adjudicated to be delinquent received dispositions that were based, not on the nature of the offense, but on the juvenile's needs and prospects for rehabilitation. For youths who committed serious offenses, the duration of a disposition might be far less than in adult criminal court. On the other hand, minor offenders or status offenders could be confined, in the name of treatment, when an adult who engaged in similar conduct would remain free.

Most of these differences between juvenile courts and adult criminal courts have vanished. The framers of the juvenile court were overly optimistic about its potential to accomplish individualized treatment and rehabilitation. As the more complex nature of the juvenile court has become apparent, there has been a laudable effort to end the forced confinement of status offenders. In the wake of *In re Gault*, most procedural protections applicable to adult defendants are now available in juvenile court as well. Only the right to a jury trial is indefensibly denied to most juveniles. These changes reflect the reality that the juvenile court was always at least partly punitive in nature, and as such, they have been mostly positive developments.

It is in the area of sentencing that the juvenile court's differences retain the most relevance. For most juvenile offenders, the juvenile court remains the source of a sentence "discount". The juvenile court recognizes and implements the notion that the intellectual and psychological differences between children and teenagers, on the one hand, and adults on the other, warrant more lenient and supportive treatment of juvenile offenders. This is probably the main function of the juvenile court today.



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I. Should Juveniles Be Sentenced in Juvenile Court or in the Adult Criminal Court?

A legitimate question is whether this modest role justifies the juvenile court's continued existence. It is certainly true, as Barry Feld and others have argued, that the increasingly formal and punitive nature of the juvenile justice system has led to a significant convergence with the adult criminal justice system. For example, a number of states have revised the purpose section of their juvenile codes to include punishment and community protection. More juveniles than ever are being waived into adult criminal courts and waiver decisions are being increasingly based on the seriousness of the offense rather than the "best interests" of the offender. The philosophy of just deserts has become more influential in the sentencing of juvenile offenders,¹ as determinate sentences are becoming increasingly common and mandatory minimum terms of confinement based on the offense have appeared.²

A. Sentence Discounts for Young Offenders

It is precisely because of this convergence that the juvenile court should be retained as a source of more moderate sentences for juveniles. Abolitionists argue that juveniles in adult criminal court should and would receive significant sentence mitigation, thus reducing the impact of being in adult criminal court.³ If this were so, and if incarcerated juveniles were kept completely separate from adult offenders, the argument against abolition would be undercut. If the recent history of sentencing reform is any guide, though, meaningful sentence mitigation for juveniles in adult criminal court is unlikely to be implemented, or maintained legislatively. One of the powerful lessons of the past decade is how politicized crime has become and how reluctant legislators are to advocate any position than can be labeled as "soft on crime". It is hard to see how and why in such an environment sentence mitigation for juveniles would be implemented in legislation abolishing the juvenile court.

The existence of a separate juvenile justice system may operate as a partial brake on legislators' punitive instincts. Legislators and the public today take as the norm the idea that there is a separate juvenile justice system. Debate for the most part focuses on how sternly to treat offenders in the juvenile justice system, and which offenders are serious enough to warrant transfer to adult criminal courts. When juvenile sentences are increased by statute, there is at least some momentum to select a midpoint between traditional juvenile sentencing practices and adult sentences. Without a juvenile justice system, the terms of the debate would shift subtly. The issue would no longer be which juveniles should be treated more harshly than the accepted, if criticized, baseline, but rather whether all or most juveniles should receive some discount from the prevailing (adult) rates of punishment. For this debate to be resolved in favor of moderation for juveniles would require more legislative self-restraint than we are accustomed to seeing.

Individual judges may believe that youth should be a mitigating factor,⁴ but the prevailing sentencing philosophy, as implemented in sentencing guidelines and mandatory minimum statutes, is at odds with mitigation for juveniles. All guideline systems and mandatory minimum statutes restrict or prohibit consideration of individual offender characteristics. The federal sentencing guidelines provide that age "(including youth) is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range"⁵ and most courts have refused to allow deviation from this principle.

Abolitionists apparently believe that sentencing commissions or legislators would buck this trend and carve out an exception for youth. I see little reason for such optimism. If abolitionists believe that sentence mitigation for young offenders is appropriate, the most judicious course would be to hold the line on the punitive philosophy's inroads into the juvenile system and to continue working to improve the juvenile system. If this seems naive and idealistic, I would argue that it is less so than hoping for a mature, balanced, fair approach in adult criminal courts.

Even if a criminal justice system incorporating a newly abolished juvenile justice system initially offered reduced sentences to many juveniles, I fear that this policy would not endure. With the highly politicized nature of criminal justice policymaking today, anecdotal evidence or highly publicized individual cases can lead to rapid, poorly considered changes in policy. In a world without a juvenile justice system, when a particularly horrendous crime is committed by a juvenile, particularly if the juvenile has previously been the beneficiary of a sentence reduction based on age, the legislature may come under enormous pressure to "tighten up" the "loopholes" that benefit youthful offenders.

B. The Cost of Applying Adult Sentencing Rules to Juveniles

Without any significant sentence mitigation, the lives of countless youthful offenders would be decimated by adult criminal sentences. Imprisonment is at historic levels. Mandatory minimum sentences mechanically send away to prison offenders for terms far longer than justified by any reasonable theory of punishment. We should pause here for a moment and consider drug sentencing policy. The "war on drugs", which reverberates loudly in current law, has exacted a huge price from relatively low level offenders. Many juveniles are involved with drugs at some time in their adolescence. It would be disastrous if many teenagers, who may otherwise be law abiding and who, in any event, are likely to cease their involvement in crime as they mature, were to receive the draconian mandatory minimum sentences so commonly handed out today.

The cost of applying current sentencing policies to juveniles would be disproportionately born by minority youths and communities. Sentencing policies of the past decade have led to an explosion in the incarceration of African-Americans. The same pattern holds true for juveniles. Policymakers have not been sensitive to the disproportional racial impact of these sentencing policies. Thus, removing all juvenile offenders from juvenile court would likely expose an increasingly large percentage of minority youths to unduly severe sentences.

It would be wrong to sentence all juvenile offenders under the currently prevailing adult system (albeit for somewhat shorter terms), even if some form of sentence mitigation were to survive the abolition of the juvenile justice system. The shift of sentencing reform to a just deserts, offense-based approach has been too restrictive. It has led to sentences that are too harsh, and it reflects an exceedingly narrow view of culpability. These shortcomings are even more profound when youthful offenders are considered. The offense committed is but one measure of a youth's culpability. When one assesses a young person's responsibility for criminal behavior, it is especially counterintuitive to refuse to consider the youth's age, maturity and life circumstances. Imagine two teenage boys who have been caught stealing a car. One is a gang member who neither attends school nor works. The other has maintained a reasonably solid school record, but has recently experienced some personal or family trauma. Although "equity" may call for identical sentences, is it really in society's interests to impose the same sanction on these two? Judges should be able to mitigate punishment for youthful offenders who demonstrate some promise or seem less than fully responsible for their actions. Such judgments will always be subjective and subject to second guessing, but the illusory equality of just deserts seems particularly misplaced in juvenile sentencing decisions.

There is another practical reason for imposing

shorter, more individualized sentences on youthful offenders. Rightly or wrongly, we are currently incapacitating a large number of young adult offenders for the remainder of their crime prone years (and then some, in many cases). Most young offenders, even if they serve substantial prison terms, will still be released during those crime prone years. It is surely a recipe for disaster to take a young offender, imprison him for an extended period in a criminogenic environment, then release him when he possesses few if any job or life skills, but while he is still young enough to menace society. An extra few years of imprisonment for a juvenile may come at a substantial cost to society. A different cost may be incurred, however, if we lengthen juvenile sentences yet more.

C. The "Punishment Gap"

Before proceeding, the so-called "punishment gap" should be considered. Several studies have reported that while adult sentences imposed on youths convicted of violent offenses are much more severe than sentences imposed in juvenile court for similar offenses, for property offenders, the situation is reversed. That is, young recidivist property offenders who are waived to adult court are actually treated more leniently than similarly situated youths whose cases are retained by the juvenile court.⁶ A number of factors may account for this seemingly anomalous treatment of property offenders. Individual judges in adult criminal court consider youth to be a mitigating factor, unless legislatively prohibited from doing so. In addition, youths making their first appearance in criminal court may be treated as first offenders, while in juvenile court their entire record is considered. Finally, to sentencing judges, even repeat juvenile property offenders compare favorably to the many serious and violent offenders in adult court.

If these studies are accurate, one might argue that abolition of the juvenile justice system would benefit many property offenders currently retained by juvenile courts. It seems fair to conclude that at least some juveniles now incarcerated by juvenile courts for property offenses would receive shorter terms or nonimprisonment sentences in criminal court. Overall, however, nonviolent youthful offenders would suffer. First, those recidivist property offenders now waived to adult court would no longer seem like the least serious offenders if all juvenile crime were handled in the same adult courts. In addition, with no juvenile court confidentiality available, many of these currently waived juveniles would be sentenced as repeat offenders. Perhaps most importantly, repeal of the juvenile court's delinquency jurisdiction would lead to the imposition of long mandatory terms of imprisonment on many juveniles, pursuant to the nation's drug and "three strikes" laws.

In sum, even if there were some "winners" under

the abolitionists' proposals, there would likely be many more losers. Still, the probable existence of the "punishment gap" does point out that the juvenile court's unbridled discretion and indeterminate sentencing leads to many nonviolent young offenders being incarcerated longer than appropriate.

II. Implementing Sound Juvenile Sentencing Policy through Sentencing Guidelines

One of the most important lessons of failed efforts at sentencing reform, such as the federal sentencing guidelines, is that judicial discretion is not an evil that needs to be stamped out. Properly constrained, judicial discretion at sentencing has been shown to be superior to excessive prosecutorial or legislative control. Discretion is inherent in any criminal justice system; the question is how to divide up and supervise the exercise of that discretion. Judges will certainly not always make the right decision, but that is hardly an adequate response to the problems caused by overly restricting judicial discretion.

This is not to say that judicial discretion should be unfettered. Early sentencing reformers were right that unbridled judicial discretion leads to disparity, undue leniency or severity, and bias. This pattern is probably more apparent in the traditional juvenile court, with its frequent use of lenient dispositions for serious offenders, and coercive dispositions for minor offenders. As a result, the goal in sentencing juveniles should be to preserve the individualized sentences for juvenile offenders as the best course for young people and society, while at the same time providing adequate guidance and consistency. Sentencing guidelines, properly structured, and determinate sentences can be a great aid in balancing individualization and consistency. Guidelines should ensure that secure confinement is reserved for serious and violent offenders; nonviolent offenders should be incarcerated only as a last resort.

The keys to effective juvenile sentencing guidelines are simplicity and flexibility. The Byzantine process of applying the federal sentencing guidelines should be avoided. Departures from the guidelines should not be feared or too strongly discouraged. Judges should be able to inquire into the life history of an offender and make adjustments from the applicable sentence range if appropriate. Judges, because they like to follow rules and because they welcome guidance in performing what many consider to be the most difficult part of their job, will impose most sentences within the ranges set by reasonable guidelines. Meaningful appellate review can ensure the development of principles to guide the individualization of sentences.

Because properly constrained judicial discretion is so important, juveniles should not be exposed to mandatory minimum penalties. Many defendants who receive

mandatory minimums should serve substantial sentences. This crude tool, though, is too rigid, manipulable, excessively punitive and extremely vulnerable to discriminatory enforcement. As has been true in the past, eventually mandatory penalty statutes are likely to be discarded. For juveniles, mandatory minimums are particularly pernicious and should be immediately rejected.

In creating sentencing guidelines we should reject the false binary choice that the juvenile justice system must seek to punish or rehabilitate, but not both. These goals can and should be integrated. No one believes any longer that we do or should incarcerate in order to attempt to rehabilitate an offender. We incarcerate for the obvious reasons: to punish, to incapacitate and to deter. At least with juveniles, though, we must commit ourselves to doing what we can, with education, counseling and training, to increase the chances that those youths convicted of criminal actions, whether incarcerated or not, will avoid lives of crime.

One of the weaknesses with just deserts theory is its notion that there is a "right" punishment for each offense. Instead, as Norval Morris has argued,⁷ the best we can probably do is to say that there is a range of appropriate punishment for an offense: neither so lenient as to invite disrespect for the law, nor so severe as to be unfair. This principle of "limiting retributivism" can serve as a good model for a juvenile court sentencing system. Some offenses are so grave that they require significant periods of incarceration, no matter what we learn about the offender. Many minor offenses should never be the basis for an offender's removal from the community. Within the range of acceptable punishments for each offense,

though, there should be room for considered judicial discretion. This approach provides the best opportunity for both protecting society and providing fairness and the opportunity to reform to offenders.

Notes

- ¹ See Barry C. Feld, *The Juvenile Court Meets The Principle of Offense: Punishment, Treatment, And The Difference It Makes*, 68 B.U. L. REV. 821, 832-38 (1988).
- ² See *id.* at 851-79; Julianne P. Sheffer, *Serious And Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within The Juvenile Justice System*, 48 VAND. L. REV. 479 (1995); Brian R. Suffredini, *Juvenile Gunslingers: A Place for Punitive Philosophy in Rehabilitative Juvenile Justice*, 35 B.C. L. REV. 885 (1994)(supporting mandatory penalties for juvenile gun offenders).
- ³ Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 113-23 (1997).
- ⁴ Several studies support this notion. See, e.g., Barry Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 501 (1987); P. GREENWOOD, A. ABRAHAMSE & F. ZIMRING, *FACTORS AFFECTING SENTENCING SEVERITY FOR YOUNG ADULT OFFENDERS* 13-14 (1984).
- ⁵ § 5H1.1.
- ⁶ See, e.g., Marcy Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver Policy And Practice: Persistence, Seriousness And Race*, 14 LAW & INEQUALITY 73, 88, 159-65 (1995); M.A. Bortner, *Traditional Rhetoric, Organizational Realities: Remand of Juveniles to Adult Court*, 32 CRIME & DELINQ. 53, 56-59 (1986); James P. Heuser, U.S. Dep't of Justice, *JUVENILES ARRESTED FOR SERIOUS FELONY CRIMES IN OREGON AND "REMANDED" TO ADULT CRIMINAL COURTS: A STATISTICAL STUDY* (1985).
- ⁷ See NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 59-62 (1974).