



The Moral Asymmetry of Juvenile and Adult Offenders

David O. Brink¹

Published online: 26 October 2019
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Abstract

Many commentators agree that the trend to try juveniles as adults fails to recognize that there should be an *asymmetry* in our treatment of juvenile and adult crime such that all else being equal juvenile crime deserves less punishment than does adult crime. This essay explores different rationales for this asymmetry. A *political rationale* claims that the disenfranchisement of juveniles compromises the *state's democratic authority* to punish juveniles in the same way it is permitted to punish adults. A *developmental rationale* claims that juveniles *deserve* to be punished less than adults because their immaturity makes them less responsible and, hence, less culpable for their wrongdoing. Gideon Yaffe's new book *The Age of Culpability* expresses skepticism about the developmental rationale and defends a version of the political rationale. By contrast, this essay finds important limits to the political rationale and defends a qualified version of the developmental rationale. In the process, it argues against treating the asymmetry between juvenile and adult crime as a *categorical* one.

Keywords Adult offenders · Asymmetry · Categorical asymmetry · Culpability · Democratic authority · Desert · Developmental rationale · Juvenile justice · Juvenile offenders · Political rationale · Punishment · Retributivism

1 Introduction

The war on crime in 1980s and 1990s included demands to get tough on juvenile crime. A significant part of the war on juvenile crime was the trend to transfer juvenile offenders to adult criminal court, where the length and nature of sanctions are much more punitive. Though enthusiasm for some elements of the war on crime has abated recently, many of those laws—including the transfer trend—are still on the books and a feature of juvenile justice.

✉ David O. Brink
dbrink@ucsd.edu

¹ Philosophy Department, University of California, San Diego, 9500 Gilman Drive, La Jolla, CA 92093-0119, USA

The trend to transfer juvenile offenders to adult criminal court treats juvenile offenders on a par morally and legally with their adult counterparts. Many commentators find the transfer trend deeply problematic and claim that we ought to recognize an *asymmetry* in our treatment of juvenile and adult crime such that all else being equal juvenile crime deserves less punishment than does adult crime. This essay explores two different rationales for this asymmetry. A *political rationale* claims that the disenfranchisement of juveniles compromises the *state's democratic authority* to punish juveniles in the same way that it is permitted to punish adults. A *developmental rationale* claims that juveniles *deserve* to be punished less than adults because their immaturity makes them less responsible and, hence, less culpable for their wrongdoing.

These two rationales are not obviously inconsistent. But we might wonder about their comparative merits. I think it's fair to say that the orthodox rationale for this asymmetry is the developmental one.¹ But the political rationale is interesting and deserves our attention. Gideon Yaffe's complex and rewarding new book, *The Age of Culpability*, challenges this orthodox explanation of the asymmetry between juvenile and adult crime.² He criticizes the developmental rationale and defends the political one. He criticizes the developmental rationale, because he thinks it cannot justify a categorical asymmetry between juveniles and adults. By contrast, disenfranchisement is a categorical difference between juveniles and adults. Yaffe does not think that his defense of the political rationale requires him to abandon desert as a ground for treating juveniles differently, because he thinks that the fact that juveniles lack the franchise itself reduces their culpability and desert.

Though there is much to learn from Yaffe's wide-ranging and insightful discussion of juvenile culpability, I don't think that the political rationale can be the primary rationale for the asymmetry between juvenile and adult justice. There are important limitations to the political rationale, and it cannot avoid serious objections without relying on something like the developmental rationale. Fortunately, we can defend a qualified version of the developmental rationale. In the process, I argue against treating the moral asymmetry between juvenile and adult crime as a *categorical* one—it can admit of principled exceptions and can rest, in part, on pragmatic considerations.

¹ See, e.g., Barry Feld, *Bad Kids: Race and the Transformation of the Juvenile Court* (New York: Oxford University Press, 1999); Elizabeth Scott and Laurence Steinberg, "Blaming Youth," *Texas Law Review* 81(3) (2003): 799–840; and David O. Brink, "Immaturity, Normative Competence, and Juvenile Transfer," *Texas Law Review* 82(3) (2004): 1555–1585.

² Gideon Yaffe, *The Age of Culpability: Children and the Nature of Criminal Responsibility* (Oxford: Clarendon Press, 2018). Parenthetical references in this essay will be to chapters or pages in this book.

2 The Transfer Trend

The traditional juvenile court is different from adult criminal court in several significant ways. Whereas defendants in adult criminal court can and often do elect to have jury trials, the trials in juvenile court are bench trials, conducted by judges with experience in juvenile justice. Defendants in juvenile court also experience different sentencing and incarceration outcomes. Unless extended through the use of blended sentencing, which combines juvenile and adult sentencing, sentences in juvenile court expire at the age of majority, and so are much shorter than sentences for comparable offenses in adult court. Moreover, in adult court juveniles are subject to various mandatory sentencing minima. Juvenile criminal records are sealed, whereas there is public access to the criminal records of adult offenders. Juveniles do not suffer from various post-incarceration penalties as adults that are imposed on adult felons, such as disenfranchisement, loss of public assistance, and the duty to report felony convictions to potential employers. Finally, juvenile offenders are sentenced to juvenile correctional facilities, which can be and often are less dangerous than adult correctional facilities and which are supposed to address the particular developmental nutritional, physical, educational, and vocational needs of juvenile offenders.

The most traditional mechanism for trying juveniles as adults is the *judicial waiver* or transfer to adult criminal court. The judicial waiver occurs in juvenile court hearings, decided on a case-by-case basis. Model Penal Code §4.10 contemplates that the waiver will occur only in cases in which the juvenile is at least 16 years old. It does not specify the conditions in which such a waiver is appropriate. Traditionally, a juvenile court judge takes into consideration the age and maturity of the accused, the prior record of the accused (e.g., whether he is a repeat offender), and the severity or seriousness of the offense. Several states have passed legislation that affects the judicial waiver, effectively expanding its scope. For instance, several states have lowered the age at which the judicial waiver can be issued either as a general matter or for certain categories of offense. For example, in 1978 New York passed a Juvenile Offender law that made 13-year-olds eligible for trial for murder in criminal court and made 14-year-olds eligible for such trial in cases involving lesser violent offenses.³ In effect, the judicial waiver, as traditionally conceived, creates a presumption in favor of trying the accused juvenile as a juvenile, a presumption that can only be rebutted on a case-by-case basis when it is shown that the juvenile is sufficiently mature and has already shown signs of sufficient incorrigibility as to justify treating him as an adult. Recently, several states have also expanded the scope of the judicial waiver by shifting the presumption from juvenile jurisdiction to adult jurisdiction for certain ages and categories of offense. Partly as the result of such statutory changes the scope of the judicial waiver has expanded considerably.

Another mechanism of transfer to adult court involves *prosecutorial discretion*. Legislation in several states gives prosecutors the authority, either as a general rule

³ 1978 N.Y. Laws, Chapter 478 §2(h) (codified as amended at N.Y. Penal Law §30.00 (McKinney 1998)).

or in special circumstances relating to the age of the accused and the category of offense, to determine whether to bring the case in adult court. This mechanism allows the prosecutor to bypass the need for a judicial hearing and waiver. Recent legislation has simultaneously expanded prosecutorial discretion—expanding the pool of cases in which prosecutors can exercise their discretion to try juveniles as adults—and restricted it—by creating presumptions for transfer for certain ages and categories of offense. These changes in prosecutorial discretion have had the effect of increasing the number of transfers.

However, even with the legislative changes in these two transfer mechanisms, they do not mandate transfer. Even when there is a presumption in favor of transfer, it can be rebutted in individual cases. Perhaps the most significant and disturbing aspect of the transfer trend is the adoption in many states of *mandatory transfer* statutes that require juvenile cases to be tried in adult criminal court, bypassing both judicial and prosecutorial scrutiny of the appropriate forum for the offense. Typically, mandatory transfers lower the age at which juvenile cases go to adult court either as a general rule or for special categories of violent offenses, such as murder, rape, and aggravated assault. The majority of states have now adopted some kind of mandatory transfer legislation. For instance, adoption of Proposition 21 in 2000 added a mandatory transfer to the California Welfare and Institutions Code requiring that juveniles 14 years of age or older be tried as adults in cases where they are accused of murder or various sexual offenses, including rape, forcible sodomy, and lewd and lascivious acts with a child under the age of 14.⁴

The net result of such departures from the Model Penal Code provisions for juvenile transfer is that more juveniles are being transferred to adult court at younger ages for a broader variety of crimes.⁵ Though enthusiasm for the transfer trend may have abated in the last decade, the legacy of the transfer trend is still with us, especially in jurisdictions with mandatory transfer still on the books.

It is this broad trend to try juveniles as adults and, in particular, the trend to try ever-younger juveniles as adults on account of the seriousness of their offenses that ought to raise serious jurisprudential concerns. The transfer trend denies that there is anything special about juvenile justice. The extreme expression of this trend would be the *abolition* of the juvenile court altogether, treating juvenile offenders exactly the same as their adult counterparts. Those of us who think that the abolition of the juvenile court and the transfer trend are unjust must explain what is special about juvenile justice.

⁴ CAL. PEN. CODE §§187–188.

⁵ The trend is well documented in Patrick Griffin, Patricia Torbert, and Linda Szymanski, *Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions* (Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention, 1998); Howard Snyder and Melissa Sickmund, *Juvenile Offenders and Victims: 2006 National Report* (Washington D.C.: Department of Justice, Office of Juvenile Justice and Delinquency Programs, 2006), Chapter 4; and John Whitehead and Steven Lab, *Juvenile Justice*, 9th ed. (Boston: Routledge, 2018), Chapter 8.

3 Predominant Retributivism and Fair Opportunity

My discussion of the moral asymmetry between juvenile and adult offenders occurs against the background of a *broadly retributive conception of punishment* and a *fair opportunity conception of responsibility*.

A broadly retributive conception of punishment claims that punishment should be proportional to desert, where desert is the product of two independent variables—wrongdoing and responsibility or culpability.

$$P \propto D (= W \times R)$$

In particular, *predominant retributivism* makes the following three claims:

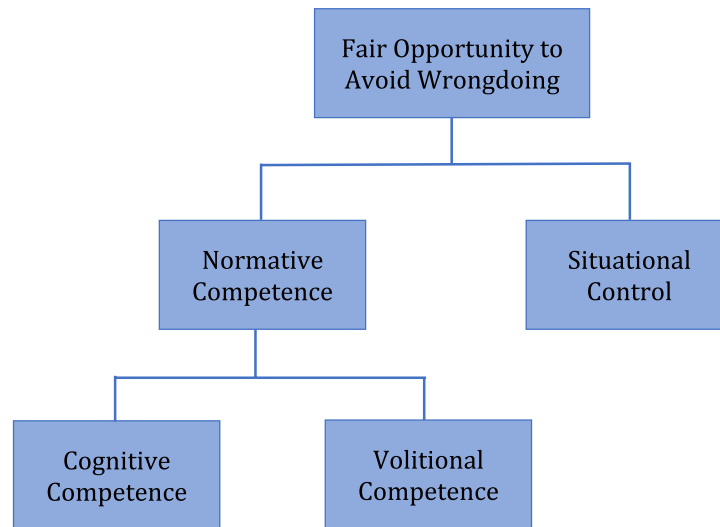
1. Desert in the form of culpable wrongdoing is a necessary condition of punishment.
2. Proportionate justice sets an upper limit on permissible punishment.
3. Punishment is a fitting response to culpable wrongdoing in the sense that there is a strong *pro tanto* case for punishment that is proportionate to desert. However, there may be good forward-looking reasons for punishing less than the offender deserves.

The first two claims are negative retributive theses. (1) insists that desert in the form of culpable wrongdoing is a necessary condition on justified punishment, which implies that punishment is impermissible in the absence of culpable wrongdoing. (2) treats proportionate justice as setting an upper limit on permissible punishment. (3) is the positive retributive thesis that desert provides a reason to hold culpable wrongdoers accountable by punishing them. But predominant retributivism leaves the form of punishment open, provided it does not exceed proportionate justice, and insists that desert-based reasons for punishment must sometimes compete with non-desert reasons to punish less than desert and may not always carry the day.

Claims about culpability are funded by a conception of responsibility. A plausible working hypothesis is that responsibility and excuse are inversely related. An agent is responsible for conduct for which she has no excuse, and she is excused for conduct for which she is not responsible. If so, excuse is a window onto responsibility and vice versa.⁶ The criminal law recognizes two main kinds of excuse—*incompetence* excuses, such as insanity, and *duress* excuses. Incompetence involves impairment of an agent's internal capacities. By contrast, duress involves a situation in which wrongful interference by another with the agent's options deprives her of the fair opportunity to act on her own deliberations about how to behave. In this way, standard excuses reflect impairment of the agent's *capacities* or *opportunities*. If we treat excuse as a window onto responsibility, we should factor responsibility into capacities and opportunities. Specifically, we might conceive of responsibility in terms of *normative competence* and *situational control*. Normative competence

⁶ Michael Moore, *Placing Blame* (Oxford: Clarendon Press, 1997), p. 548, describes excuse as “the royal road” to responsibility. It's important to recognize that it is a two-way street.

involves a kind of reasons-responsiveness that factors into *cognitive competence*—the ability to recognize moral and criminal norms—and *volitional competence*—the ability to conform one’s conduct to this normative knowledge. Normative competence and situational control are individually necessary and jointly sufficient for responsibility, because significant impairment of either condition results in an excuse. These forms of impairment are excusing, because punishment despite these forms of impairment would violate the norm that punishment is appropriate only when the agent had the *fair opportunity to avoid wrongdoing*.⁷



4 A Developmental Rationale

An orthodox rationale for what is special about juvenile justice appeals to juvenile immaturity and the way this tends to diminish the responsibility, culpability, and desert of juvenile offenders. The developmental rationale claims that by virtue of their immaturity juveniles tend to be less responsible for their wrongdoing than their adult counterparts with the result that all else being equal they are less culpable for their crimes and deserve less punishment.

This developmental rationale for the asymmetry could probably be funded by different conceptions of responsibility. But I will articulate it in terms of the fair opportunity conception of responsibility. Fair opportunity factors responsibility into the agent’s capacities—normative competence—and her opportunities—situational control. Normative competence has both cognitive and volitional dimensions. Responsible agents must be able to recognize reasons bearing on their conduct and make

⁷ For fuller discussion, see David O. Brink and Dana K. Nelkin, “Fairness and the Architecture of Responsibility” *Oxford Studies in Agency and Responsibility* 1 (2013): 284–313 and David O. Brink, *Fair Opportunity and Responsibility* (Oxford: Clarendon Press, forthcoming).

suitable normative discriminations, and they must be able to conform their conduct to this normative knowledge. If so, normative competence involves a variety of psychological capacities. It involves cognitive capacities to recognize the relevant norms and to grade their comparative urgency, so as to navigate potential normative conflicts. It also involves volitional capacities, including capacities for impulse control necessary to implement one's judgments about what is best, despite temptation and distraction, and independence from peer pressure for conformity. These capacities are *scalar* insofar as they can be possessed to different degrees. Of course, adults can vary in the degree to which they possess these capacities. But we believe that most normal adults have these capacities to a sufficient degree to make them responsible for their actions. By contrast, the gradual development of normative competence is what marks normal normative progress through childhood and adolescence to maturity. Though not all individuals mature at the same rate, this sort of normative maturation is strongly correlated with age. The reduced normative competence of juveniles provides a retributive justification for reduced punishment for them.

There is widespread agreement among developmental psychologists that the period between 12 and 18 years of age is a time of very significant physical, cognitive, and emotional development.⁸ Older adolescents may have many of the cognitive abilities that adults have, but they lack the wealth of experience and factual information that adults typically possess. Even when older adolescents share cognitive abilities with adults, they typically lack familiar forms of emotional and social maturity and control. They are less able to represent the future adequately, with the result that they are more impulsive and less risk-averse.⁹ They also tend to be more susceptible to the influence of peers, with the result that they lack a kind of autonomy ingredient in normative competence.¹⁰ Finally, there is emerging evidence that the neurological correlates of these cognitive, emotional, and social capacities are undergoing crucial development throughout adolescence and well into late adolescence.¹¹ If normative

⁸ For one useful survey, see Laurence Steinberg, *Adolescence*, 11th ed. (New York: McGraw-Hill, 2017). Also see Elizabeth S. Scott, N. Dickon Reppucci, and Jennifer L. Woolard, "Evaluating Adolescent Decision Making in Legal Contexts," *Law and Human Behavior* 19(3) (1995): 221–244; and *Youth on Trial: A Developmental Perspective on Juvenile Justice*, edited by Thomas Grisso and Robert G. Schwartz (New York: Oxford University Press, 2000).

⁹ See, e.g., P. Finn and B. Bragg, "Perception of the Risk of an Accident by Young and Older Drivers" *Accident Analysis and Prevention* 18 (1986): 289–298; M. Tester, W. Gardner, and E. Wilfong, "Experimental Studies of the Development of Decision-making Competence" in *Children, Risks, and Decisions: Psychological and Legal Implications* (New York: American Psychological Association, 1987); and Scott, et. al., "Evaluating Adolescent Decision Making in Legal Contexts."

¹⁰ See, e.g., T. Berndt, "Developmental Changes in Conformity to Peers and Parents" *Developmental Psychology* 15 (1979): 608–616; S. Steinberg and S. Silverberg, "The Vicissitudes of Autonomy in Early Adolescence" *Child Development* 57 (1986): 841–851; Scott et. al., "Evaluating Adolescent Decision Making in Legal Contexts."

¹¹ See, e.g., S. Anderson, A. Bechara, H. Damasio, D. Tranel, and A. Damasio, "Impairment of Social and Moral Behavior Related to Damage in Human Prefrontal Cortex" *Nature Neuroscience* 2 (1999): 1032–1037; F. Benes, "The Development of Prefrontal Cortex: The Maturation of Neurotransmitter Systems and their Interactions" in *Handbook of Developmental Cognitive Neuroscience*, ed. C. Nelson and M. Luciana (Cambridge: MIT Press, 2001).

competence is a condition of responsibility, then the reduced or diminished normative competence of juveniles calls into question the moral equivalence of adult and juvenile crime embodied in the transfer trend.

5 A Democratic Rationale

A different explanation of the asymmetry between juvenile and adult offenders, which the transfer trend ignores, is that juveniles, unlike adults, are disenfranchised. There is a worry about the political legitimacy of the abolition of the juvenile court and the transfer trend given the fact that juveniles do not have the vote. Just as American revolutionaries appealed to democratic legitimacy in complaining about taxation without representation, so too juveniles might object to the transfer trend by complaining about incarceration without representation.¹²

Democratic principles give citizens a voice in determining institutions and policies that affect them, and we might say that institutions and decision-making mechanisms are democratic insofar as they reflect the will of the governed. For this reason, democratic principles favor extending the franchise and making it universal, or nearly so. Democratic principles are compelling, and can be defended from a wide variety of normative perspectives—on *procedural grounds* as part of a fair procedure, on *substantive grounds* as leading to substantively more just or optimal outcomes, or by a *mixture* of procedural and substantive perspectives. For present purposes, I'll assume that one or more of these justifications of democracy is plausible, and I won't rehearse or assess these arguments.¹³

If we accept democratic principles for any of these reasons, we might doubt the political legitimacy of the transfer trend.

1. The state can legitimately enforce only those laws against citizens who have had a say in enacting them in the sense that they have had an opportunity to influence the adoption of those laws.
2. Juveniles lack the right to vote and so lack the opportunity to influence the adoption of laws that affect them.
3. Hence, the state is not justified in enforcing laws against juveniles as it is in enforcing laws against adults.

¹² Disenfranchised felons might also complain about incarceration without representation. However, in their case, disenfranchisement, whether right or wrong, is the consequence of conviction and incarceration. By contrast, juvenile offenders are incarcerated without ever having had the franchise.

¹³ For a sample of justifications of democracy, see Charles Beitz, *Political Equality: An Essay in Democratic Theory* (Princeton: Princeton University Press, 1989); Thomas Christiano, *The Rule of the Many* (Boulder: Westview Press, 1996); Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997); Richard Arneson, "Democracy is Not Intrinsically Just" in *Justice and Democracy*, ed. K. Dowding, R. Goodin, and C. Pateman (Cambridge: Cambridge University Press, 2004); and David Estlund, *Democratic Authority* (Princeton: Princeton University Press, 2007).

Do our democratic commitments compromise the political legitimacy of the state punishing juveniles the same as adults? This is a promising suggestion, similar to Yaffe's main line of argument, though he focuses less on the issue of political legitimacy *per se* and more on a complicated argument from juvenile disenfranchisement to their reduced culpability, which I will discuss later (§8 below). But I think that the political legitimacy argument is best assessed, at least initially, independently of claims about desert. Despite the initial appeal of this argument from democratic legitimacy to explain what is special about juvenile justice, there are several problems that need to be addressed. Some problems have potential solutions, but others may not be so easy to fix.

One worry about the democratic objection to the transfer trend is that it proves too much. If laws can be legitimately enforced only against those who have had a say in enacting them, then the disenfranchisement of juveniles would imply that the state has *no authority* to enforce *any* laws against juveniles. But this claim that democratic states lack legal authority altogether over disenfranchised juveniles is a very radical claim, much more radical than (3)'s claim that juveniles deserve to be punished less than their adult counterparts. We should be able to resist the transfer trend without completely relinquishing authority over disenfranchised youth.

However, this objection assumes that the vote is the only way that people can have a say over the laws that affect them. One might deny this assumption, pointing out that there are other opportunities to influence what laws are enacted or repealed besides voting. Political speech is also one way to affect political decision-making, and juveniles have First Amendment rights to political speech and assembly. They may not have the full complement of First Amendment rights that adults do, but they nonetheless have significant expressive liberties. If so, juveniles, though disenfranchised, do not lack political influence altogether.

But this reply threatens to undercut the original argument providing a democratic rationale for thinking that juvenile justice is special. After all, if juveniles have forms of political say other than the vote, then it might seem that we've lost the democratic rationale against the transfer trend. The answer, as Yaffe notes, is to recognize that political say is *scalar*. While the First Amendment rights of juveniles ensure that they are not without political say entirely, it's nonetheless true that they have less political say than do adults, who possess both First Amendment rights (indeed, less qualified expressive rights) and the franchise (pp. 165–171). This means that the state enjoys *differential* democratic authority in relation to juveniles and adults. But this claim is precisely what's needed to explain how the state can have some authority over juveniles, though less than the authority it has over adults.

Another worry that the democratic argument against the transfer trend proves too much is that it would apply equally well to other non-voting groups that nonetheless are subject to the law, such as resident aliens, foreign nationals, and other visitors. Not only do foreign visitors lack the right to vote, but they also lack some, though not all, of the constitutional protections afforded to juvenile and adult citizens. Perhaps the expressive liberties that foreign visitors possess are enough to ensure that they don't lack political say altogether. But surely they have less political say than juvenile citizens, and even less political say than adult citizens. This implies that a democratic state has less authority to enforce its criminal law against foreign visitors

than against its own citizens, both juvenile and adult. But that seems like an unacceptable commitment.

The proponent of the democratic rationale for what is special about juvenile justice might claim that foreign visitors effectively agree to be subject to the host country's laws when they voluntarily enter that country, thus waiving any complaint of democratic legitimacy that they might otherwise make later in response to prosecution for noncompliance with the laws of the host country (pp. 185–195). According to this suggestion, host countries retain democratic authority over foreign visitors by virtue of their consent to be subject to the laws of the host country.

However, it's not clear that this solves the problem with the democratic rationale. Foreign visitors might not agree to be governed by some laws in the host country. Why assume that their decisions to visit nonetheless constitute consent to be governed by all the laws of the host country? We can't answer that this is the condition that the host country places on visitation. If that were an adequate answer, then the proponent of the transfer trend would have an answer to the appeal to democratic legitimacy. For the state can equally say that full criminal penalties are a condition that it places on noncompliance with the criminal law. Then, when a juvenile commits a crime, the state can say that the juvenile's noncompliance constitutes consent, perhaps tacit, to be subject to the same penalties for noncompliance as adults. The stipulation about tacit consent is no more plausible in the case of foreign visitors than it is in the case of juveniles.¹⁴ If so, this is an unresolved problem in the democratic rationale for why juvenile justice is special and what is wrong with the transfer trend. If sound, it has very unattractive and revisionary implications about the legitimate authority of democratic states over foreign visitors. But if we abandon this argument we can no longer appeal to democratic legitimacy to explain what is special about juvenile justice and to reject the transfer trend.

Finally, there is a worry about whether democratic legitimacy could constitute a free-standing rationale for the special treatment of juvenile justice that does not presuppose the plausibility of the developmental rationale. If the only thing wrong with the transfer trend is that disenfranchised juveniles are treated the same as enfranchised adults, there's an obvious solution: give juveniles the vote. There are two problems with this. First, anyone attracted to the developmental rationale will think that even if juveniles had the vote, there would still be reason to view many of them as deserving less punitive treatment on account of their immaturity and its presumed effect on their level of normative competence and desert. Second, even if we could be persuaded that it was legitimate to treat some 17-year-olds or perhaps even 16-year-olds as adults, provided they had the right to vote, most of us would be reluctant to think that it would be permissible to treat much younger

¹⁴ This concern about how the democratic rationale for the juvenile/adult asymmetry can avoid exculpating criminal wrongdoing by foreign visitors extends to Yaffe's willingness to assimilate juvenile disenfranchisement to the disenfranchisement of felons. Though I don't want to defend the political legitimacy of disenfranchising felons during, much less after, incarceration, it's not clear why the state couldn't equally well insist that disenfranchisement is part of the price of criminal offense, with the result that felons could be construed as having consented to forfeit the franchise when they choose to engage in criminal activity.

juveniles as adults if only they had the right to vote. Surely, it would be objectionable to treat 8-year-olds as adults if only we gave them the vote. The developmental rationale explains both objections. We would think that there was something problematic about treating many juveniles as adults, even if they had the vote, because we believe that their immaturity explains their reduced normative competence and desert. Moreover, the same immaturity that explains why it would be wrong to treat enfranchised juveniles as adults explains why there are lower limits on how early the franchise should be granted. It may well be that 18 years of age is not the only plausible age threshold for the vote, but 8-year-olds are developmentally below the threshold.¹⁵

Where does this leave us? The idea that the state might lack political legitimacy to treat juvenile offenders the same as adult offenders on account of juvenile disenfranchisement is certainly suggestive. However, there are unresolved worries about whether that argument proves too much to be acceptable. Moreover, even if these worries can be addressed, it is unlikely that this democratic rationale for the different treatment of juvenile offenders can be free-standing, independent of the developmental rationale that many juvenile offenders are immature and so deserve lesser punishment. Even if we gave juveniles the vote, we would still be moved to treat them differently from their adult counterparts on account of their immaturity, and there are limits to how much we should lower the age threshold for the franchise that track developmental aspects of normative competence. For these reasons, the case for treating juvenile offenders differently than their adult counterparts must rest primarily on the developmental rationale.

6 Qualifying the Developmental Asymmetry

Even if the developmental rationale is primary, we should be careful about what it implies about the ways in which juvenile justice is special. The idea that there is a moral asymmetry between juvenile and adult crime is a useful generalization or slogan, but it requires various qualifications.

First, we should not expect the developmental rationale to provide a purely principled justification of a categorical asymmetry between juveniles and adults without resort to pragmatic considerations. For instance, we are unlikely to be able to justify treating everyone over 18 in adult criminal court and everyone under 18 in juvenile court without appeal to pragmatic factors. This is because,

¹⁵ The worry that the democratic rationale for the differential treatment of juvenile offenders is not a free-standing rationale should be especially troubling for someone like Yaffe, who wants to accept the democratic rationale and reject the developmental rationale. Yaffe describes this kind of concern as “facile” (p. 8). But I’m not sure he ever explains why it is facile. The only reply he makes is to defend a comparatively high threshold for the franchise by appeal to claims about the way in which parental interests in influencing the further future through legislation, constrained by equality of influence, militates against setting the franchise threshold substantially lower (pp. 172–182). I found this discussion both hard to follow and normatively problematic insofar as it posits a legitimate adult interest in having a say not just about present policy but also about further future policy.

when the underlying normatively relevant factors are scalar, thresholds and bright lines will be somewhat arbitrary, because they attach enormous significance to small differences straddling the threshold and ignore large differences above and below the threshold. There will typically be little difference in normative competence between a young 18-year-old and an older 17-year-old, though a categorical asymmetry would treat them very differently. Moreover, there will be individual variation, with some juveniles being more normatively mature for their age than other juveniles the same age and perhaps than some young adults. In order to maintain a categorical asymmetry between juveniles and adults, we would need to resort to pragmatic considerations. For instance, the case for a categorical asymmetry is stronger if the following claims are plausible:

1. Age is a generally reliable proxy for normative maturity.
2. Most 18-year-olds are sufficiently mature to be held responsible.
3. Normatively precocious juveniles are rare.
4. It is difficult to identify normatively precocious juveniles reliably.
5. Blackstone's asymmetry: mistakes of over-punishment are worse than mistakes of under-punishment.

Together, these claims make the best case for embracing a categorical asymmetry between juveniles and adults in which we treat all juveniles differently than adults. Because it relies on empirical claims, especially about our epistemic limitations, it is a partly pragmatic rationale for a simple asymmetry between juveniles and adults.

Second, even if this is a reasonable pragmatic solution to handling individual variation, it does nothing to address reliable differences between older and younger juveniles and similarities between older juveniles and younger adults. If we assume that most 18-year-olds have reached a threshold of sufficient normative competence to be tried in adult court, we may wonder whether a categorical asymmetry between 18- and 17-year-olds makes sense, given their similarities. It's not clear if their modest differences in normative competence and Blackstone's asymmetry justify categorically different treatment. It is noteworthy that the Model Penal Code does not embrace a categorical asymmetry between juveniles and adults. As we have seen, it presumes that all juveniles should be tried in juvenile court but allows that presumption to be rebutted in a case-by-case manner for juveniles between 16 and 18 years of age based on a judicial determination that the juvenile in question demonstrates culpability comparable to an adult (§4.10). Because judges have limited discretion and must rebut a presumption in favor of 16 to 17-year-olds being tried in juvenile court, this limited use of judicial waiver is a modest departure from categorical asymmetry, one that aims to better track developmental facts about competence and culpability.

Third, another well-motivated departure from a categorical asymmetry between juvenile and adult crime concerns the selective use of *blended sentencing* that combines a juvenile sentence until the age of majority and an adult sentence subsequent to the juvenile one. Older mature adolescents will often

be significantly, if not fully, normatively competent. This will be true of many 17-year-olds. So they can be largely, if not fully, responsible for committing crimes, heinous and otherwise. Under the traditional juvenile sentencing rules that require juvenile sentences to expire by the age of majority, such offenders are unlikely to receive sentences commensurate with their desert. Indeed, there is a puzzle for the traditional juvenile sentencing system that the older and more responsible the offender—the closer to being 18 years old—the less time he can serve for his crimes. Blended sentencing provides a solution to this puzzle insofar as it allows mature adolescents who are substantially culpable for serious crimes to serve adult sentences of limited duration in addition to limited juvenile sentences. I am not claiming that the actual use of blended sentencing has typically conformed to the retributive formula of proportionality, only that the retributive conception of proportionality endorses the selective use of blended sentencing.

Fourth, even if the developmental rationale is right that competence and culpability generally track immaturity, justifying lesser sentences for juveniles than adults, we might wonder if a youth discount should extend to especially heinous crimes, such as murder, torture, and aggravated sexual assault that wounds or maims victims. Borrowing a concept from wartime wrongdoing, we might wonder whether the partial excuse that applies to many juvenile offenses should apply to *manifest illegality*, at least as committed by older adolescents. Manifest illegalities are actions that are wrong on their face and would be clearly wrong under any realistic circumstances.¹⁶ If manifest illegality involves especially obvious wrongdoing, we might wonder if it requires the same normative acuity to recognize. We have treated wrongdoing and responsibility or culpability as independent variables in the retributive desert basis for punishment. For the most part, this is both right and important. However, wrongdoing and culpability may not be completely independent in the case of manifest illegality, because we may think that it requires a fairly basic, rather than subtle, normative competence to recognize manifest illegality as wrong. If so, we can and should hold young adolescents less responsible for acts of manifest illegality, but we might doubt that we should extend a youth discount to 17-year-olds guilty of manifest illegality.¹⁷ This limited departure from a categorical juvenile/adult asymmetry could be readily accommodated by the provisions for possible judicial waiver for 16- and 17-year-olds recognized in the Model Penal Code. Especially since judges need to rebut the presumption in favor of trying such cases in juvenile court, the waiver could be restricted to older adolescents in cases involving manifest illegality.

We could try to defend a simple categorical asymmetry between juvenile and adult crime by appeal to both the developmental rationale and pragmatic considerations. However, we should recognize that the developmental rationale supports a qualified asymmetry, rather than a simple categorical asymmetry.

¹⁶ See Model Penal Code §2.10 and Manual for Courts Martial 2012, Rule 916(d).

¹⁷ Here, I revisit and express doubts about a position I defended in “Immaturity, Normative Competence, and Juvenile Transfer,” 1576–1577.

7 Skepticism about Skepticism about the Developmental Rationale

It is perhaps worth saying why I think we should resist Yaffe's skepticism about this sort of developmental rationale (Chapters 1–2). Yaffe reconstructs the developmental rationale in roughly the same terms that I have here. However, though he agrees that adolescent development tends to make juveniles normatively less competent and culpable than their adult counterparts, he thinks that these developmental factors can't provide a principled rationale for a categorical asymmetry between juveniles and adults in which all juveniles are tried in juvenile court and all adults are tried in adult court. The problem is twofold. First, individual variation means that some mature adolescents are as culpable as normal adults, and some young adults are no more culpable than mature adolescents (pp. 24–30). Second, the developmental rationale holds the special treatment of juveniles hostage to the truth of these empirical claims, whereas Yaffe regards the juvenile/adult asymmetry as a categorical one (pp. 31–39).

Yaffe's skepticism assumes that we should be committed to a simple categorical asymmetry and that such a categorical difference between juveniles and adults cannot depend on empirical or pragmatic considerations. But the version of the developmental rationale developed here rejects these assumptions. The strong, but imperfect, correlation between age, maturity, and normative competence could be sufficient to justify a categorical asymmetry only on pragmatic grounds that appeal to the strength of the correlation, the infrequency of exceptions, and our inability to reliably identify the exceptional cases. But it is better to reject a categorical asymmetry and treat the chronological juvenile/adult threshold as establishing a rebuttable presumption about the treatment of individual cases that would permit the judicial transfer of older adolescents to adult criminal court when and insofar as sufficient competence and culpability could be demonstrated.¹⁸ However, this use of the judicial waiver should be used sparingly and should not extend to younger juveniles, under the age of 16.

Moreover, I don't see any reason that the rationale for treating juvenile misconduct as special should not rely on plausible empirical claims. Yaffe criticizes the empirical character of the developmental rationale, noting that if it turned out, as an empirical matter, that girls were developmentally more mature than boys by, say, 2 years, then the youth discount that applies to boys would not extend to girls (pp. 31–33). In this case, there would be a gender asymmetry in the sort of transfer that was permissible. Yaffe takes this to be a *reductio* of the developmental rationale, describing the potential gender asymmetry as “laughable” and “morally intolerable” (pp. 39, 183). But I don't see why this is laughable or morally intolerable. Given the importance of desert to punishment and competence to desert, with which Yaffe agrees, I think we would need to take the gender asymmetry seriously *if but only if* we were confident that girls were more developmentally advanced than boys *in*

¹⁸ Currently, there is no provision for transferring immature young adults to juvenile court. Their options could be partial excuse or sentence mitigation in adult criminal court. However, these options are often excluded by mandatory minimum sentences in adult criminal court.

all normatively relevant respects. But I don't believe that there is good empirical evidence for this proposition, at least not at the present time. In the absence of such evidence, gender equality should be our norm. Indeed, given the pervasiveness of gender discrimination against girls and women, we might have sufficient reason to oppose the gender asymmetry even if there were good empirical evidence that girls are more mature than boys in all normatively relevant respects. This would be an argument of overall justice, not a claim about individual responsibility and desert.

8 Democracy and Culpability

We've seen a clear developmental rationale for the claim that juveniles tend to be less culpable for their crimes, even if the resulting asymmetry between adults and juvenile offenders is not a categorical one. Yaffe rejects the developmental rationale. Instead, he provides a rationale for a categorical asymmetry between juveniles and adults that appeals to juvenile disenfranchisement. His argument is not exactly the argument for the political illegitimacy of punishing disenfranchised juveniles, which we discussed critically earlier (§5 above). Rather, he argues that because juveniles have less say over the laws that govern them they are less culpable for qualitatively identical crimes than are adults, a result that in no way depends on developmental differences between juveniles and adults. This is an interesting and complex argument that defies easy summary. The structure of the argument is something like this¹⁹:

1. Legal culpability is a matter of one failing to track the legal reasons one has and can be measured by the degree of departure from the ideal of full or perfect tracking.
2. Deserved punishment is a matter of legal culpability.
3. The weight of legal reasons one has is partly a function of whether one is entitled to have a say over the content of those reasons.
4. Because they are disenfranchised, juveniles have less say over the content of their legal reasons than do their adult counterparts.
5. Hence, all else being equal juveniles are less culpable and, hence, less deserving of punishment, than their adult counterparts.

Several steps in this argument deserve discussion.

First, notice that the comparative conclusion (5) does not itself establish a categorical difference between juvenile and adult criminal conduct that assigns juveniles to juvenile court and adults to adult criminal court. These differences may require some leniency toward juveniles, but it does not require all the features of juvenile court. Moreover, these differences may be offset by other factors affecting the culpability of individual offenders. We may have no reason to view a normatively

¹⁹ Though the argument is developed over four chapters, it is effectively summarized at pp. 158–159.

precocious juvenile who is disenfranchised as less culpable overall than a normatively immature young adult who has the franchise. This is just to say that having the vote is at best one element of culpability. The most that could be said is that other things being equal disenfranchised juveniles would be less culpable than their adult counterparts. This isn't sufficient to defend the claim that juveniles, as such, deserve to be punished less, much less in juvenile court, rather than adult criminal court.

Second, we might wonder if having a say over the laws that govern one does affect the weight of one's legal reasons to comply, as (4) claims. Don't foreign visitors have the same legal reasons to comply with the laws of the host country as adult citizens do? Isn't that simply a matter of the state having legal authority to pass laws regulating the behavior of people within its borders? But this authority is the same in the case of adult citizens and foreign visitors. Similarly, there seems to be the same legal reasons for juveniles and adult citizens to comply with the laws in place, which derives from the state's authority to pass laws regulating the behavior of individuals within its borders. It is implausible to suppose that the legal reasons to refrain from first-degree murder are different for adults and juveniles.

Yaffe's claim that having a say in enacting the laws that govern one affects one's reasons for compliance is especially implausible as applied to crimes *mala in se*. Crimes *mala in se* are wrongs in themselves, whereas crimes *mala prohibita* are wrongs by virtue of prohibition. Crimes *mala in se* violate natural duties and include wrongs against the person, such as murder, rape, assault, theft, and fraud. Crimes *mala prohibita* do not violate natural duties and can include crimes of prostitution, drug use, gambling, tax evasion, traffic violations, loitering, and truancy. Because they involve crimes against the person that violate natural duties, crimes *mala in se* tend to be more serious offenses than crimes *mala prohibita*, which serve more to facilitate security, cooperation, and coordination. In the case of crimes *mala in se* the reasons for compliance do not depend on legal enactment. If so, it's unclear how failure to participate in enactment could change one's reasons for compliance.

Third, we have reason to question Yaffe's conception of culpability in (1). Here, we need to recall that the retributivist desert basis for punishment has two independent variables—wrongdoing and responsibility or culpability. The two main affirmative defenses—justification and excuse—deny different elements in this retributive desert basis. Whereas justifications deny wrongdoing, excuses deny responsibility or culpability. Partial defenses would reduce or mitigate wrongdoing or culpability. Partial justifications would reduce wrongdoing, whereas partial excuses would reduce responsibility or culpability. The developmental rationale conceives of culpability in terms of responsibility and, ultimately, fair opportunity and normative competence. The denial of culpability in this sense is an excuse. The developmental rationale in effect says that immaturity affects the normative competence and culpability of juvenile offenders, providing a partial excuse for juvenile wrongdoing. By contrast, Yaffe's conception of culpability is focused not on normative competence but on failure to track one's reasons. Juveniles, he thinks, are less culpable for the same conduct as adults because there are fewer reasons for juveniles to avoid this conduct than there are for their adult counterparts. But this suggests that on Yaffe's conception of culpability juvenile crime is less wrong than its adult counterpart. That is to treat the reduced culpability of juveniles as sounding in justification,

rather than excuse. That contrasts with the developmental rationale, which treats the asymmetry between juveniles and adults as sounding in excuse, rather than justification. Here, we have reason to agree with the developmental rationale's focus on excuse. Juvenile offenses, such as murder, are no less wrong than the same offenses committed by adults, but other things being equal juveniles are less responsible than their adult counterparts and, hence, less blameworthy.

9 Conclusion

What is special about juvenile justice and what explains the asymmetry in desert between juvenile and adult offenders? Yaffe criticizes the developmental rationale because it can't deliver a categorical asymmetry; instead, he defends a democratic rationale. But it is a mistake to treat the asymmetry as categorical in nature, and even Yaffe's own democratic rationale fails to deliver a categorical asymmetry. If the asymmetry need not be categorical, this removes objections to the developmental rationale. This is a welcome result. The democratic rationale is interesting and suggestive and might explain why the state's authority to punish juveniles the same as adults is compromised. But it has important limitations, cannot stand on its own, independently of the developmental rationale, and is better addressed to the state's authority to punish than to the culpability and desert of juvenile offenders. If so, the developmental rationale provides the best explanation of what is special about juvenile justice and what explains the asymmetry in desert between juvenile and adult offenders.

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