



1-1-2012

# Adolescence, Choice, and Punishment

John H. Robinson

Follow this and additional works at: <http://scholarship.law.nd.edu/ndjlepp>

### Recommended Citation

John H. Robinson, *Adolescence, Choice, and Punishment*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 257 (1991).

Available at: <http://scholarship.law.nd.edu/ndjlepp/vol5/iss2/1>

This Introduction is brought to you for free and open access by the Notre Dame Journal of Law, Ethics & Public Policy at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of Law, Ethics & Public Policy by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

## FOREWORD

### ADOLESCENCE, CHOICE, AND PUNISHMENT

JOHN H. ROBINSON\*

Puberty is a natural process, adolescence is a social construct. Thus puberty is relatively invariant across cultures; adolescence differs markedly from culture to culture. This is not to demean adolescence, as if its status as a social construct rendered it second rate metaphysically. Nothing is more natural for humans than is the creation of social constructs, and the kind of construct that a culture imposes on a particular natural process is immensely important. Indeed the impoverishment of the social constructs that we moderns have imposed on such basic natural processes as birth, death, feeding, and copulation is a source of great distress. It may be that we are inclined to find life meaningless in ways that our ancestors did not simply because our constructs fail to tap the full potential for meaning of the natural processes that our bodiliness makes us heir to.

In the case of adolescence, the contours of that construct are partially the by-product of certain social practices and partially the by-product of widely-shared, if rarely articulated, normative ideas. The social practices that I have in mind relate to family structure, career pursuit, wealth distribution and the like. These practices all weaken the extended family, the local neighborhood, the religious community, and other institutions that mediate between individuals and the state—the ultimate enforcer of the social contract that must exist if human interaction is not to be wildly chaotic. The normative ideas that I have in mind relate fundamentally to notions of human development and secondarily to beliefs about the role that the state should play in that development. My initial focus here will be on those normative ideas; I will then develop what I call a responsive account of punishment. But first, a word about the effect of family structure, career pursuit, and wealth distribution on adolescence conceived of as a social construct.

---

\* Assistant Professor of Law and Philosophy and Director, Thos. J. White Center on Law & Government, Notre Dame Law School.

We experience adolescence as we do not because we have to and not because we choose to. We experience it as we do because we have made other choices, choices whose relevance to the structure of adolescence is rarely clear to us. We choose wealth maximization over ill-defined alternatives as a route to status and happiness, as almost synonymous with them. We choose careers over the necessitous tedium of the fast food dispensary because we see careers as ways to make work meaningful and lucrative. We choose the nuclear family over the extended family both for its fit with the imperatives of careerism and for the greater liberty that it confers on the married couples and their children. We then offer our choices to our children in ways that make it very difficult for them to criticize, modify, or reject, as the short-lived counter-culture of the sixties illustrated.

Having made these choices, we discover that we have given adolescence a structure that none of us intended, and that few of us would wish, it to have. Adolescence is, for our children, distressingly bereft of the effective guidance of solicitous elders. It is something like the beach that the Galapagos sea turtles must traverse before they can enter the safety of the Pacific, a gauntlet full of risk and meretricious allure. Perhaps this is how things must be if we are not to retrogress into some form of state-imposed, illiberal, conformist community of just the sort that the people of Central and Eastern Europe have worked so hard to escape. But we make this gauntlet doubly, and I think unnecessarily difficult, by the conceptual confusion that we bring to the entire project of individual development. It is to that confusion, and to its affect on our ideas of punishment, that I will devote the remainder of these reflections.

Confusion sets in as soon as we conceive of personal happiness as idiosyncratic and opaque and of the good as basically unknowable. I will argue, in contrast, that we make an awful mess of things when we act as if we were, or at least ought to be, agnostic on these matters. It is true, and not offensively paternalistic, for me to say that I know what is good for you, and for you to say that you know what is good for me. We *do* have this knowledge, and we ought to act on it in structuring and criticizing the social institutions and practices that influence our lives. Admittedly this knowledge is limited, taking the form primarily of an awareness of the wrongness of the unwarranted resort to force and fraud in our dealings with others. Ethical theorists differ both as to how the principles that emanate from this awareness should be grounded and as to the exceptions to them that might be justified, but those differ-

ences do not nullify the crucial fact that we possess a shared core of moral knowledge.

The existence of moral knowledge is relevant both to how we assess the choices that we and others make and to how we relate punishment to those choices. As for the first point, the existence of moral knowledge delivers us from the presumed opacity of personal choice. While we are not ordinarily privy to what maximizes others' satisfaction, conceived of as the gratification of an urgent desire, we do have access to what is morally good for them, as do they. We can thus both be certain in judgments of a certain sort and hold others to the consequences of these judgments. Whatever the preferences of others and whatever the causes of those preferences, when it comes to the moral goodness or evil of their choices, we can often speak definitively. We can, that is, say of murder, rape, and arson that they are wrong. We can, further, say something morally important about the process by which those kinds of choices are made. That last point will provide the linkage between choice and punishment.

Everything rides here on the relationship between happiness and goodness. From the Psalmist to Kant, at least, the structure of this relationship has proved to be immensely puzzling, even mysterious, and my few observations here will scarcely be exhaustive of what can be said, but let me venture the following. I tell my children that I want them to be happy and that I want them to be good. I can assure them that most of the time goodness will lead to happiness, but I must acknowledge that there may be occasions when morally good choices result in intense personal unhappiness. I can finesse this last point by distinguishing between superficial and profound happiness and by arguing that righteous persons who suffer from the ostracism that their unpopular conduct elicits can rejoice in the sense of integrity that they have retained, and I can extend this same claim to situations where wealth or status or even life is taken from the just who do right in the face of a social consensus to the contrary. Alternatively, of course, one can always assert that the coincidence of goodness and happiness will be achieved in the afterlife, where eternal happiness will be bestowed on those who sacrificed terrestrial happiness in order to do good in circumstances in which it went unacknowledged or rejected. As nothing forces us to choose between these two strategies, we are free to accept both of them either independently or, as I prefer, as mutually supportive.

One could, of course, reject both of these strategies and argue that the possibility that goodness will not produce happiness renders our entire condition absurd. One could, on the other hand, devise a more sophisticated strategy of reconciliation than either of those that I have suggested here. None of this, however, should distract us from two things: first, that happiness, like moral goodness, is intelligible—it is not hopelessly inaccessible and utterly privatized such that only I am expert on my happiness and only you on yours; and second that there is standardly a convergence between happiness and goodness, one that actually illuminates both of them.

If what I have just said is true, it follows that choice itself has an intelligibility that at first blush we are inclined to deny to it. When we choose, we choose what for the moment, at least, we have convinced ourselves is good and conducive to our happiness. When in fact that choice is of something evil, we have perforce rationalized our choosing, presenting the evil to ourselves as good. The modes of rationalization are as varied as is the human capacity for evil. A complete account of them would cover the rationalization of self-regarding evils, like gluttony and sloth, as well as the rationalization of the other-regarding evils that are the standard occasions for legal punishment. For our purposes here, however, we can act as if those rationalizations could be reduced to the unwarranted privileging of our own agenda and to the equally unwarranted marginalizing of the legitimate demands of others. The abstractions that I have just used mask monumental difficulties relating to how we determine when self-preference is justified and when not and as to how we determine when the marginalization of others' demands is tolerable and when not, but that is as it should be as the resolution of those difficulties is not my objective here. My objective is the more modest one of linking up the rationalization essential to wrong-doing with the phenomenon of punishment.

At this juncture it might be helpful to correct an error often attributed to Plato's thinking about choice. Plato is said to have reasoned from the fact that what we choose we choose as good to the conclusion that wrong-doing is a species of ignorance. That, however, is a mistake. Ignorance and rationalization differ in at least one crucial respect: the former often exculpates morally; the latter regularly inculpates morally. Not to know facts relevant to the wrongness of a course of conduct absolves one of blame where the ignorance is not itself culpable, but rationalization is a wholly different matter. When we rationalize, we momentarily and more or less consciously take

leave of the relations that constitute the moral community that subsists between us and our fellows. We act as if those relations did not obtain, and we pretend for a moment to an exemption from them to which we have no right. We do this by way of a more or less skillful bit of self-deception, and the self-deception is, unlike genuine ignorance, itself evidence of our guilt.

When we engage in wrongdoing, it is as if we were asserting a falsehood that is so palpably false and so utterly destructive that not even we, the wrongdoers, can acknowledge it; hence, the evasion, the self-deception, the rationalization. What it is that we assert in our wrongdoing is either that we enjoy an exemption from the constraints of morality that we, quite properly, deny to others, or that there are at least some others whose equally proper demand for morally defensible treatment at our hands has no hold on us. Punishment is, I believe, ordinarily best understood as a response to that assertion. When we punish, we say to those who have, by their conduct, asserted their exemption from the constraints of morality that they are not in fact exempt, that they, like we, are bound to honor the legitimate moral demands of others. Just as wrongdoing is not mere assertion, so punishment must be more than a counter-assertion. It too must take the form of conduct, and that conduct must be intended to burden the one receiving it. Unlike the burdening incident to wrongdoing, the burdening incident to punishment is moralized; i.e. it is presented to the world as either permitted or required morally—as if the failure to punish would itself be a wrong. The burdening is meant not so much to right a past wrong or even to square accounts with the wrongdoer, as to reassert the fundamental terms of life in a moral community in the face of the wrongdoer's assertion of his or her exemption from them. Punishment is, therefore, a necessary part of any moral community's means of providing for its own vindication and self-preservation.

Punishment, understood as conduct intended to burden one believed to be a wrongdoer and intended as response to the morally intolerable assertion that was implicit in the wrongdoer's act, is wholly consistent with—although it does not require—love for the one being punished. Insofar as we hope by punishment to disabuse those being punished of the self-deception effected by their rationalizations of their choices, we are intending their good in ways wholly consistent with love for them. Insofar as we despair of bringing wrongdoers back into moral community with the rest of us—as in capital punishment—then the responsive component of that punishment is

addressed to the community, the moral ties to which the malefactor has allegedly broken by his or her wrongdoing. In either case, the extent to which punishment communicates is determined by factors external to punishment itself—by, for example, the mode of the punishment, the credibility of the punisher, the docility of the one being punished, and the attitudes of others in the community. The key point here is that punishment need not—although it may be—intended “to crush” the one being punished and it need not—although it may be—an expression of hatred for him or her, as any parent who has ever punished a child knows.

To punish is to acknowledge membership in the moral community and to respond to one form or another of attempted defection from that community. This is why it is correct, if apparently perverse, to say that in punishing others we honor them—in punishing we take others seriously; we treat them as moral agents, we impute to them an awareness of the norms the observance of which makes moral community possible, we assume, as we are entitled to, their endorsement of those norms at least notionally and inchoately, and we predicate of them the capacity to conform their conduct to the requirements of those norms. In punishing we distinguish between agents and their acts, saying of some of their acts that they are expressive of the agents in their best self-understanding and of other of their acts that they are expressive of the agents only in self-understanding that it is neither possible nor tolerable for them to maintain. In this sense too, punishment is consistent with love inasmuch as it attempts to bring the one being punished around to a self-understanding that both accords with reality and makes community with him or her desirable.

If we understand adolescence as the socially constructed set of processes whereby the young of a society are gradually integrated into the ranks of its mature members, and if we understand punishment as conduct responsive to attempted defection from moral community with one’s fellows, we are in a position to see the relationship between adolescence and punishment. On a social level, adolescents are shedding the derivative identity they once had as children of their parents and acquiring an identity more or less their own, one to which the identity of their parents is not crucial. On a moral level, they ought to be achieving a different and better purchase on moral agency than the one that characterized their childhood. Their awareness of the obligatory character of moral norms ought to be sharper. Their ability to ground those norms in some

account of reciprocal respect among persons of equal moral worth ought to be greater. Their endorsement of those norms ought to be more whole-hearted. Their willingness to conform their conduct to them ought to be more complete, even when that conformity costs them something very desirable. All of this, however, is commonly very inchoate, very rudimentary. The adolescent's grasp on the intrinsic attractiveness of the good is still very weak, and adolescence as we have structured it in twentieth century America, deprives the struggling man- or woman-child of many of the supports that should help him or her to strengthen that grasp. We, therefore, rightly regard adolescents as less responsible for wrongdoing than adults are, and we correctly attempt to devise modes of punishment that are both less harsh and more reintegrative than are those that we impose upon adult wrongdoers.

This issue of our Journal explores the most troublesome problems that can confront one who tries to relate punishment to adolescents. Those are problems stemming from the phenomenon of serious and persistent juvenile criminality. The issue is divided into four sections. In the first article in the first section, Franklin Zimring focuses on the process by which some serious juvenile offenders are tried and, if convicted, punished as if they were adults. This process is known as waiver. Zimring argues that for all of its faults, a system of discretionary waiver is superior to other ways of addressing the problem of serious juvenile criminality. He also offers a basic waiver criterion, some guidance to the appellate courts that will inevitably review waiver decisions, and some suggestions as to how the sentencing of those juveniles who are convicted in criminal court should be governed. In their article, Donna Bishop and Charles Frazier focus on the phenomenon of prosecutorial waiver. Basing their conclusions upon a study of prosecutorial practice in Florida, Bishop and Frazier argue for the abolition of prosecutorial waiver, and in favor of reliance upon the legislature and the judiciary to effect the transfer of juveniles to criminal court in appropriate cases. Where prosecutorial waiver is allowed, they argue that the discretion that prosecutors enjoy relative to it should be severely constrained by the legislative articulation of standards and guidelines. This, they believe, will promote the even-handed treatment of juveniles caught up in the toils of such a system.

In the third article of the first section, Gilbert Geis and Arnold Binder offer a critique of legislation that would make parents civilly or criminally liable for the crimes of their children. Then Martin Forst and Martha-Elin Blomquist review



the history, ancient (1890-1920) and modern (1960-1990), of the American juvenile law with a view towards assessing the value of the reforms introduced in the modern era. They conclude their article by making the case for the "graduated responsibility" of the juvenile offender, requiring sentencing to be moderated to take account of the offender's diminished culpability. Ira Schwartz, Martha Wade Steketee, and Jeffrey Butts next argue that the reform movement of the 1970s had little impact on the practices of juvenile justice systems in the 1980s. Over the past decade, they contend, those systems have become more punitive and more incarceration-oriented than they were in the '70s, despite the pressure from federal law and other sources to move in a contrary direction. They advocate efforts to reduce race- and gender-based disparities in juvenile incarceration, and to educate the public as to the "true facts" regarding juvenile crime. They also advocate a federal leadership role in juvenile justice policy-formation.

In the final article in the first section of this issue Charles Springer, a Justice on the Nevada Supreme Court, argues against the rehabilitative orientation of juvenile courts. He offers instead a justice-modeled juvenile court. Justice Springer believes that the juvenile justice system, however we structure it, is unlikely to have much of an impact on the juvenile crime rate. He believes, however, that we as a society have a moral obligation to acknowledge the moral agency, albeit diminished in most cases, of those juveniles who are brought into juvenile court and to treat them as they deserve to be treated. He then sketches some of the components of a juvenile justice system predicated upon his justice model.

The "Essays" section of this issue begin with a highly technical meta-analysis of research literature on the effect of juvenile offender treatment programs on recidivism rates. The authors of that essay, Albert Roberts and Michael Camasso, conclude that those programs that include family counseling probably are more effective at reducing recidivism than are those that do not. As to other strategies, Roberts and Camasso argue that there does not now exist reliable evidence in support of their effectiveness. In her essay, Anne Rankin Mahoney argues that American society will not begin to solve the multiple problems posed by serious juvenile offenders until it develops a comprehensive network of services for children that complements the set of sanctions that we apply to juvenile offenders. In his student article, Gregory Bassham analyses Justice Antonin Scalia's approach to constitutional challenges to the imposition of the death penalty on juvenile offenders.

Bassham finds Scalia's approach to be seriously defective. He, like Zimring in his article and Forst and Blomquist in theirs, argues that even those juvenile offenders who commit homicide ought to be spared the death penalty because their youth denies them the capacity for full moral culpability.

The final section of this issue consists of a Report by the Milton S. Eisenhower Foundation that focuses on those programs that seem to succeed at reducing crime rates and drug use among urban youth. It is included in this issue in part to balance the highly theoretical tone of most of the other contributions to it and in part to suggest that, as redoubtable as the serious juvenile crime problem is, there are steps that states and municipalities can take to reduce the incidence of youth crime in their jurisdictions. Despair in the face of monumental difficulties and of the failure of past efforts to overcome them is so attractive and so destructive that grounds for hope need to be revealed wherever they exist. The Eisenhower Foundation Report argues that those grounds are abundant.

Do we have the energy, the imagination, and the self-confidence to refashion the social construct that we know as adolescence so that the passage from childhood to maturity is less prey to disaster? Can and should we come to see serious juvenile crime as, in large part, a by-product of that construct? Should we understand serious juvenile crime against the background of an adolescence that needs restructuring or should we understand it primarily as the moral fault of the youths who perpetrate it—or can we strive to understand it both as a socially conditioned phenomenon and as culpable conduct? These are hard questions, for which I, at least, have no determinate answers. My hope, however, is that the few thoughts advanced in this Foreword and the many advanced in the contributions that make up this issue will make it easier for all of us to ask and to answer those, and other, related, questions more intelligently than we otherwise might.

