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ON PUNISHING JUVENILE OFFENDERS: WHERE DOES RETRIBUTIVISM GO WRONG?

Giorgia Brucato, Perica Jovchevski

I. Introduction

In this chapter we argue that there are inherent inconsistencies in the purely retributivist justification in the ascription of more lenient punitive measures to juvenile offenders than to adults for the same crime.¹ Commonly the justifications of punishment have been grouped in two clusters of theories, retributivists and consequentialists, with a varying degree of difference between the theories that compose each of them, as well as a wide diversity of mixed theories that combine them. A retributivist justification of punishment is one which relies essentially on backward looking considerations, implying that “committing an offense in the past is sufficient to justify punishment now, whether or not this will produce any beneficial consequences in the future.”² On the other side, by a non-retributive justification of punishment we understand any justification of punitive responses to crime which does not rely primarily, or at all, on backward looking considerations. For instance, consequentialist justifications of punishment are forward-looking and anchored in the imperative of maximizing social benefits, as a

¹ Alec Walen, “Retributive Justice,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Summer 2021 (Metaphysics Research Lab, Stanford University, 2021), <https://plato.stanford.edu/archives/sum2021/entries/justice-retributive/>.

² David Boonin, *The Problem of Punishment* (Cambridge: Cambridge University Press, 2008), 85, <https://doi.org/10.1017/CBO9780511819254>.

requirement of justice:³ punishment is just a means to achieve certain valuable and desirable ends, one of which is typically the reduction or prevention of crime through deterrence and/or incapacitation. Within both families of justification, punishment is also often thought to have an expressive and/or educative function (public denunciation of a wrong, communication of moral condemnation).⁴ It is worth noting that retributivists need not deny the non-retributive functions of punishment, particularly when they hold mixed accounts of punishment; however, they take the retributivist reason to be of weightier character for the moral justification for particular punishments.

While different types of retributivism can be rejected on both consequentialist and a variety of deontological considerations, our goal in this paper is to show that the lack of resources to plausibly account for the intuition that children should be punished less than adults for the same crimes points out to inherent inconsistencies within a purely retributivist justification itself. Before laying down our case against retributivism, in section II we discuss three theses which, in our opinion, distinguish retributivist punishment, and which will be the target of our criticism.⁵ In section III, we point to an exception from the second and the third thesis which retributivists commonly grant: namely, that juvenile offenders should be treated differently than adults within criminal legal systems for the same crimes by being subject to more lenient punitive, non-punitive, or a complex of punitive and non-punitive measures. Here we briefly consider what this differential treatment amounts to within criminal justice systems. While intuitively plausible, retributivists are far from being at ease with the reasons for the exception. Thus, in section IV, we consider two responses they commonly offer: the arguments from (a) moral responsibility and (b)

³ Zachary Hoskins and Antony Duff, "Legal Punishment," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Winter 2021 (Metaphysics Research Lab, Stanford University, 2021), <https://plato.stanford.edu/archives/win2021/entries/legal-punishment>.

⁴ Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2010); R. A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001).

⁵ Boonin (2008) distinguishes three prominent types of what we consider to be purely retributivist justifications of punishment, namely desert-based, forfeiture-based, and fairness-based retributivism, as well as some other variants of mixed justifications. We believe they all share the relevant thesis stated above. Hence the targets of our argument are all three purely retributivist justifications.

participation in a political community, but conclude that none of them offers a plausible justification for the ascription of more lenient punishment to young offenders of criminal age. In the last section, we start from the retributivist failure to justify the differential treatment and claim that our intuition for lesser punishment of children should be justified based on forward-looking considerations, unavailable to pure retributivists, which we believe in some circumstances also grant lesser punishment to adults as well.

II. Three theses of retributivism

Notwithstanding the wide variations among retributivists, all of them assume the conjunction of the following three theses regarding the justification of punitive measures:

- (1) punishing a culpable wrongdoer is justified, irrespective of whether or not this will produce any beneficial consequences in the future;⁶
- (2) the punishment should be proportional to the wrong done;⁷ and
- (3) equally culpable agents should be equally punished.⁸

As mentioned in the Introduction, the first thesis is a fundamental and distinctive retributive principle entailing further that the state of the world would be better when those who are culpable for a criminal offense are punished than the one in which they are not, even if punishing them does not bring about any other benefit in the world.⁹ The second thesis posits proportionality as the principle for the measurement of the adequate punitive response. Virtually all retributivists accept the claim that more serious crimes should be more severely punished than crimes which constitute less serious offenses.¹⁰ The logic of the punishment having to exactly match the gravity or kind of the act, however, has been widely contested, even among retributivists, both because it is practically difficult to measure and

⁶ Boonin, *The Problem of Punishment*, 85.

⁷ David Gray, "Punishment as Suffering," *Vanderbilt Law Review* 63, no. 6 (1 November 2010): 1642; Douglas Husak, "Retributivism and Over-Punishment," *Law and Philosophy* 41, no. 2 (1 June 2022): 169–91, <https://doi.org/10.1007/s10982-021-09422-w>.

⁸ David Gray, "Punishment as Suffering," *Vanderbilt Law Review* 63, 6 (2010): 1642

⁹ Other goals, such as deterrence, incapacitation, or rehabilitation, while of relevance for mixed theories of punishment, are of no relevance for a purely retributivist position.

¹⁰ Husak, "Retributivism and Over-Punishment."

compare harm, and because hard cases, such as rape, challenge retributivism for recommending morally repulsive responses.¹¹ In this regard it is important to stress that the proportionality thesis rests on an objectivist standard about punishment. Recently there have been various suggestions by retributivist scholars which challenge this thesis and argue that punishment measures should be designed and inflicted in comparative proportionality with the amount of suffering they will have on wrongdoers.¹² The starting position of this view is that wrongdoers suffer differently and to a different degree the same punishments and that this fact must be reflected in our punishing practices. For instance, some claim that in the case of juveniles, the proportionality principle should be challenged since younger people may suffer more severely and for longer term from consequences of harsh punishments and punitive measures such as incarceration and isolation.¹³ The dispute between objectivists and subjectivists about punishment is beyond the scope of this paper. For the purpose of our argument, we assume the objectivist position is, on the one hand, deeply entrenched within the retributivist tradition, and on the other, operative in the background of the particular arguments we consider.

The third thesis implies that proportionality should hold among punishments ascribed for similar crimes. We call it the equality thesis although some term it “comparative proportionality.” It implies that it is morally impermissible to inflict a comparatively disproportionately harsh or lenient punishment on different wrongdoers for similar crimes committed, all other morally relevant factors being equal.¹⁴

¹¹ Samantha Kim, “A Defense of Retributivism as a Theory of Punishment” (2017), Undergraduate Honors Theses, William & Mary. Paper 1108. <https://scholarworks.wm.edu/honorstheses/1108>.

¹² Adam Jason, Kolber. “The Subjective Experience of Punishment.” *Columbia Law Review*. Vol. 109, (2009) Available at SSRN: <https://ssrn.com/abstract=1090337>.

¹³ Kelly Welch, Leah Fikre Butler, and Marc Gertz, “Saving Children, Damning Adults? An Examination of Public Support for Juvenile Rehabilitation and Adult Punishment,” *Criminal Justice Review* 44, no. 4 (December 2019): 470–91, <https://doi.org/10.1177/0734016819833141>.

¹⁴ Retributivists interpret this thesis in a non-comparative and comparative sense. Under the first interpretation the desert for punishment is insensitive to facts related to other offenders while under the second facts about how other offenders are treated affect the just desert of an offender. Many comparativists, rightly, argue that differential punishment among social groups of adults for the same crime is a violation of retributive justice. However, it is not the case that retributivists consider all differential

While the conjunction of these theses is accepted by virtually all retributivists, it allows for one general exception from (2) and (3): namely, the treatment of juveniles. This is the point at which we would like to target our argument against pure retributivism and claim that, given its commitments, the exception granted to juveniles is unjustified where age is the only different variable between the two groups.¹⁵ Before reviewing the two arguments which retributivists may use to justify differential treatment, let us specify how principles of juvenile justice consider it.

III. Juvenile Justice and the Differential Treatment

Broadly understood, juvenile justice deals with how to respond properly to children who break the law. The criminal law imposes a rigid threshold on who qualifies as a “child,” determined in most jurisdictions at 18 years of age.¹⁶ However, the age limit specified by the criminal law does not, in itself, reveal much about why children should be treated with less harsh measures than adults. There are further age delimitations stipulated by the law. For instance, wrongs committed by individuals who are considered incapable of committing a crime¹⁷ are not mitigated—punished with more lenient measures than the same crimes are punished in the case of adults—but fully excused. There are disagreements between systems about the exact age below which a child is considered to be incapable of committing a crime, and about the thresholds for reduced liability of minors.¹⁸ Still, there exists no general disagreement

punishment unjust. As we will argue below they do grant differential treatment of child and adult offenders. On the non-comparativist vs comparativist debate see Benjamin S. Yost, “What’s Wrong with Differential Punishment?,” *Utilitas* 29, no. 3 (September 2017): 257–85, <https://doi.org/10.1017/S095382081600039X>.

¹⁵ Obviously, the idea that juveniles should be punished less is granted not only by retributivists but also non-retributivists, such as proponents of consequentialism and mixed theories of punishment.

¹⁶ “Juvenile Justice,” *Innocenti Digest* (Florence: UNICEF, 1998), <https://www.unicef-irc.org/publications/105-juvenile-justice.html>.

¹⁷ The historical legal doctrine of *doli incapax* presumes that a child is incapable of committing a crime under the law. Albeit often contested, it is endorsed by the United Nations’ *Convention on the Rights of the Child* (1989) which requires signatory states to establish “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.”

¹⁸ Barry Goldson and John Muncie, “Juvenile Justice: International Law and Children’s Rights,” in *International Encyclopedia of the Social & Behavioral Sciences (Second Edition)*, ed.

on full criminal liability past the age of maturity, and no discounts to punishment are granted based on the age difference above the threshold.¹⁹

The age limit is thus generally taken as probative for what really justifies the attribution of lenient punitive measures, which is the lack of some capacities necessary for attribution of culpability for wrongdoing. The attribution of culpability is commonly accepted as a necessary condition for desert of just punishment and culpability is generally attributed when the person is morally responsible for one's wrongful action.

One can understand the claim that children should be subject to lesser punishment than adults because they are children in two different ways: a weak and a strong one. The weak one claims that all criminally liable children should be subject to lesser punishment because there is something about being a child which does not make them fully morally responsible. This interpretation is at the basis of the argument from "moral responsibility" which we consider below. The strong interpretation of the claim for differential treatment states that even when children are fully morally responsible, they still deserve lesser punishment than adults in virtue of their status as children. This interpretation is at the basis of the argument from "political participation" which we assess below, according to which the disenfranchised status of children makes them entitled to lesser punishment.

Before we proceed in evaluating the two arguments in favor of differential treatment, let us point out what this differential treatment amounts to. Criminal systems have various core principles which are common to the criminal proceedings against both adults and children, and include the presumption of innocence as well as procedural guarantees, such as the rights to a fair trial, legal assistance, and transparency. However, notwithstanding significant variations among practices within criminal justice systems tailored for the treatment of juveniles, they do share some commonalities which distinguish them

James D. Wright (Oxford: Elsevier, 2015), 956–62, <https://doi.org/10.1016/B978-0-08-097086-8.86045-6>.

¹⁹ This last claim might be contested, as some criminal systems are willing to discount or adjust punishment to account for wrongdoers who are elderly; however, they are typically paired with considerations such as health status.

from the ones dealing with adults. Regarding the process, the main differences concern: the physical separation of courts and detention centers, the milder terminology (to avoid stigma), and the stronger guarantees of assistance, protection, and care of the juvenile.²⁰ Among the principles of juvenile justice that particularly influence the workings of courts adjudicating young offenders, we find the following principles: best interest, according to which the law should be interpreted in the most favorable way such that the physical, emotional, intellectual, social, and moral development of the child is not hampered; last resort, suggesting a strong preference to alternative, non-punitive measures and limited appeal to judicial proceedings; and reintegration, often stated as the main aim of juvenile justice, suggesting that the main goal of responding to crime committed by juveniles is to give them the opportunity to develop into functioning members of society.²¹ It is worth noting here that all these principles are based on forward-looking considerations in responding to the crimes of juveniles, which following thesis (1) above are considered not to be of moral relevance in a purely retributivist justification of punishment. Regarding the outcomes, the main differences concern the kinds of permissible punishments and the pursuit of alternative measures such as rehabilitation, mandated therapy or counseling, or other mental health treatments. The idea here is that children still need to mature into law-abiding citizens, and they remain under the care of the state, which is responsible for facilitating such development. Thus, the general tendency is to prefer more lenient punitive measures or alternative non-punitive ones, which are better suited for avoiding disproportionate harm and stigma while providing the opportunity for the child to keep developing her social skills and human capital.²² Indeed, instead of severe financial restitutions, long-term incarcerations, or solitary confinements, measures like community services, foster homes, home or juvenile detention confinements, and care facilities, are preferred for juveniles.²³

²⁰ Jeffrey Fagan, “The Contradictions of Juvenile Crime & Punishment,” *Daedalus* 139, no. 3 (July 2010): 43–61, https://doi.org/10.1162/DAED_a_00022.

²¹ Carolyn Hamilton, “Guidance for Legislative Reform on Juvenile Justice” (Children’s Legal Centre and United Nations Children’s Fund, Child Protection Section, UNICEF, 2011), https://www.un.org/ruleoflaw/files/Juvenile_justice_16052011_final.pdf.

²² Fagan, “The Contradictions of Juvenile Crime & Punishment.”

²³ The review of these principles makes one question why they would not apply to the treatment of adults as well. In fact, one of the aims that move us in this chapter is to

IV. Assessing Retributivist Arguments in Favor of the Differential Punitive Treatment of Juveniles

Some of the most appealing justifications for the retributivist differential punitive treatment are that children are somehow qualitatively different from adults.²⁴ We summarize and group some of these beliefs into the first general argument retributivists use: the argument from moral responsibility, which exemplifies the weak interpretation of the justification for lesser punishment of children, as specified in the previous section. In addition, we review a second retributivist argument, which has been proposed by Gideon Yaffe, who argues that the reasons for the differential treatment of children should be found in their disenfranchised status.²⁵ We call this the argument from political participation, and consider it a token of the strong interpretation of the justification of lesser punishment for child offenders, as specified in the previous section. In what follows, we proceed with presenting and evaluating the plausibility of both arguments. We will spend considerably more space in discussing the argument from moral responsibility as it has already been extensively covered in the retributivist literature.

A. Argument from Moral Responsibility

According to the argument from moral responsibility, it is because children cannot fairly be held fully morally responsible for their wrongdoing that we ought to ascribe to them lesser punishments than adults. Most of the contemporary empirical research used to explain the factors contributing to criminal behavior of children, especially of mid-adolescents—who appear to be most common offenders—locates the reasons for the lack of responsibility of children in “brain system immaturities,” which make it hard for children to satisfy the conditions for responsibility. Neuroscientific insights have documented the differences in the brain structure between childhood, adolescence, and adulthood, and have consequently developed models which aim at explaining the decision-making processes characteristic for each of these

show how adults are just as deserving of similar protections and less punitive measures within criminal practices.

²⁴ Welch, Butler, and Gertz, “Saving Children, Damning Adults?”

²⁵ Gideon Yaffe, *The Age of Culpability Children and the Nature of Criminal Responsibility* (Oxford: Oxford University Press, 2018).

phases. Steinberg's model, for instance, explains that it is due to changes in the brain's "cognitive control system" that individuals strengthen their capacity for self-regulation in their post-adolescence period.²⁶ However, this system is insufficiently developed in adolescents, who are prone to risk-taking behavior due to the changes that occur during puberty, in what he calls the brain's "socio-emotional system," which leads to increased reward-seeking acts, especially in the presence of peers. Other models lead to similar conclusions, pointing to the susceptibility of adolescents to reckless and impulsive reward-seeking behaviors.²⁷ The explanatory character of these traits, especially of the last one, for the criminal behavior of most young offenders is made stronger by empirical research which points out that most of the crimes committed by children occur in the company of their peers or under peer pressure.

These empirical insights have been used to support the argument from moral responsibility in two ways. Some may claim that (1) it is the nature or the particular features of these immaturities which justifies the differential treatment, as they are directly impacting the capacities to satisfy the conditions for responsibility. We address below two general strategies to support this claim depending on the type of conditions for responsibility which children are claimed to be incapable of satisfying due to the detected immaturities. Others may claim that (2) it is the transitional character of these immaturities, namely the fact that such developmental features can be outgrown, which grants the lesser punishment to children. Given that we have empirical data demonstrating that harsh punishment does not constitute favorable conditions for outgrowing these traits, and given the high level of plasticity of the brain of children detected by empirical research, we have good reasons—or so the argument goes—to ascribe lesser punishment to young offenders than adults, thereby creating environments in which we appropriately shape their potential for rehabilitation.²⁸ However,

²⁶ Laurence Steinberg, "A social neuroscience perspective on adolescent risk-taking," *Developmental Review* 28, no.1 (2008): 78-106.

²⁷ See Casey, B. J., Getz, S., & Galvan, A, "The adolescent brain," *Developmental Review*, 28, no.1 (2008):62-77.; Beatriz Luna, "The Relevance of Immaturities in the Juvenile Brain to Culpability and Rehabilitation," *Hastings Law Journal* 63, no. 6, (2012):1469-1486

²⁸ It is worth noticing that brain plasticity is an ongoing life process. Although in adults it remains more restricted in scope than during the developmental phase of childhood, it is an ongoing possibility that allows for modification through experiences. This opens

since we are interested in evaluating arguments from moral responsibility from a purely retributivist position, we set aside this second argument because it involves forward-looking considerations, dependent on what we consider to be a proper way to outgrow the immaturities in question, which are not available to pure retributivist justifications.

Before we assess the two strategies of the first argument from moral responsibility, we first specify the conditions for moral responsibility which will serve us as guidance in the evaluation of the argument.

Conditions for moral responsibility

There is a wide disagreement regarding the conditions for moral responsibility articulated within a wide spectrum of theories of responsibility. In a paper of this scope, it is necessary that the adoption of a theory of responsibility for the purpose of our argument is pragmatic: specifically, the theory should be such that it reflects the concerns in the moral and legal world in which we live in, and which are relevant for the practice of punishment.

In that respect, what our moral and legal practices of ascription of culpability presuppose is that responsible persons satisfy certain conditions for moral competence and independence. The law presupposes that the actions of individuals are intentional and although these can also be explained in terms of physical causes, the law considers that generally the actions of individuals are governed by reasons, including practical or moral ones. The conditions for moral competence thus presuppose the following: first, that individuals are minimally rational and have capacities for logical reasoning which enables them to draw conclusions from premises given certain rules, recognize contradictions, and recognize and respond to sufficient reasons for their actions; second, that individuals are responsive to moral reasons in particular: this includes individuals being able to distinguish good from bad, to tell right from wrong, to determine the difference between prohibited from non-prohibited actions, to understand the moral nature of their acts, and to understand the consequences of prohibited acts.²⁹

to the possibility that favorable external environmental conditions and social factors, like the ones recommended by rehabilitative practices, can affect the outgrowth of criminal behavior, even in adults.

²⁹ See John Martin Fisher, and Mark Ravizza. *Responsibility and Control: A Theory of Moral Responsibility*, (Cambridge: Cambridge University Press, 1998), 71; Susan Wolf, "Sanity

For example, virtually everyone would claim that a person convinced that torturing babies for fun is morally permissible is in fact morally incompetent; the same holds for a person who kills another innocent person but believes she is in fact saving her, since it is God who mandates her murder, and one should not question God's will. The first person is unable to rationally comprehend the difference between right and wrong; the second is unable to understand the moral nature of her acts.

What we termed as "independence conditions" require that the individuals are not externally coerced or under duress to perform an act, nor are they irresistibly internally compelled. For instance, if person A threatens to take person B's life, if B does not perform action x, then in most cases we would discount or fully excuse B for performing x, because in most cases we would consider B to be either fully non-responsible or only partially responsible. This is so because B's independence, necessary for moral responsibility, was externally violated. The independence condition might also be violated if an individual is compelled to perform an action due to certain dispositions which create intense desires such as for instance taking a drug in the case of drug addicts, or stealing in the case of kleptomaniacs. In most extreme cases of this kind, we would again either discount or fully excuse the agent due to internal violation of the independence condition necessary for responsibility. There are limits in both conditions which are determined by what Stephen J. Morse calls "reasonable firmness," where "if we judge that the person had the general capacity to comply with the reasonable firmness standard, even if it is harder for her than for most, then she will be held responsible if she yields when a person of reasonable firmness would have resisted."³⁰ A person who is given the choice of killing another person or being punched in the face would not, should she choose the former option, be excused because of lack of responsibility, even if one is very cowardly and would do everything to avoid being subject to pain. The same holds for a person who is internally compelled

and the Metaphysics of Responsibility," in *Responsibility, Character, and the Emotions: New Essays in Moral Psychology*, edited by Ferdinand Schoeman (Cambridge: Cambridge University Press, 1987), 46-62, doi:10.1017/CBO9780511625411

³⁰ Stephen J. Morse. "Immaturity and Irresponsibility," *The Journal of Criminal Law and Criminology* vol.88, no. 1 (1997): 27-29.

but is generally morally competent and could satisfy the “reasonable firmness” requirement.³¹

Testing the attributability of moral responsibility to children

So, the argument from moral responsibility claims that the nature of the immaturities detected should be taken as relevant for non-attributing moral responsibility in children, as they act in an impulsive, reward-seeking manner which would not have been the case if a mature cognitive control system was operative. It would be simply unfair³² to hold them responsible for something which they were incapable of doing otherwise, given the traits stemming from their brain system immaturities. Given the two conditions for responsibility specified above—moral competence and independence—there are two strategies to support this argument: the first one aims to show that children fail to satisfy the independence condition, while the second one claims that children fail to be morally competent agents to a sufficient degree. One might consider that children are both non-independent and morally incompetent, but for the retributivist argument for the differential treatment to succeed only one needs to be demonstrated as true.

The first strategy claims that the nature of the causation in the case of children’s brain immaturities should be understood as one of compulsion: given their immaturities, they simply cannot do otherwise. Unlike free actions which are rooted in the agent’s will, compelled actions are caused or constrained by a “force” foreign to the agent’s will, and hence compelled agents do not satisfy the independence condition.

It is true that individuals who possess certain psychological traits which incite them into behavior which we take to be wrong are in a more difficult situation to comply with the requirements of morality. For instance, a child who has irresistible kleptomaniac urges might find it more difficult to satisfy the independence condition and consequently to

³¹ As mentioned, there is a wide spectrum of theories of responsibility proposing a range of other conditions, one being for instance the capacity for feeling empathy. Given the scope and the aim of this paper, we focus on the two groups of conditions specified above as being most prominently defended as necessary for responsibility within the retributivist literature.

³² Wallace makes this general claim although the responsibility theory he uses is different than the one we adopt in this paper. See R. Jay Wallace, *Responsibility and the Moral Sentiments* (Cambridge, MA: Harvard University Press, 1994), 105.

comply with our moral imperatives not to steal. We agree that in an extreme case of this type a person might be granted an excuse. But that kind of excuse would not be granted only to children but would also hold for adults. On the other hand, it is hard to see that the traits described in children resulting from brain immaturities have this compulsive character as in the case of the child with irresistible desires to steal. It seems that what is at stake is not the irresistibility of a desire to steal, which if unsatisfied results in dysphoric consequences for the individual,³³ but rather a proneness to episodic impulsive behavior. Lastly, the neuroscientific insights claim that the immaturities are of a “normal developmental nature” rather than pathogenic as in the example of the child kleptomaniac. As such, the mere possession of traits which dispose one to act impulsively or in an impassionate way or that make it hard for one to control one’s actions can hardly be a generally exculpatory reason. An impulsive bad-tempered person who slaps others whenever she is angry cannot be excused for her actions if the person had the general capacity to comply with the reasonable firmness standard, which the “normal” developmental causes imply it is the case with children already from a young age.³⁴ Hence, the claim that the immaturities in children’s brain systems point out to incapacities to satisfy the independence condition for responsibility cannot be sustained.

A retributivist may object that while it might be the case that children and adults can sometimes be subject to the same impulsive behavior—all other things being equal—we would intuitively condemn more harshly the adult and treat more leniently the child, because from the standpoint of fairness, an adult will have had more opportunities in life to learn how to cope with their impulsivity, while a child will be facing the same impulsivity with less resources at their disposal to cope with it.³⁵ We doubt however that this is generally the case: while this might seem intuitively convincing in cases of petty crimes committed by young offenders in contexts of peer pressure, thereby providing a weightier mitigating reason to discount their moral responsibility (in any case, not exclude them from it), we maintain that the requirements of moral

³³ Stephen J. Morse, “Immaturity and Irresponsibility.”

³⁴ It is plausible that the presence of external factors affects the “normal” development of capacities in children, for those cases we should evaluate to what extent such factors bear on the assessment of responsibility.

³⁵ We thank an anonymous reviewer for bringing this point to our attention.

responsibility dictated by the standard of “reasonable firmness,” in case of more serious crimes such as those under consideration here (physical violence, torture, murder) do not grant more lenient responses for young offenders. In other words, in those cases the argument for the differential treatment from moral responsibility does not hold, because we can expect young and adult potential offenders to resist their urges to the same extent, and thus consider them equally culpable.

The second strategy claims that the brain immaturities impair the moral competence of children. In our view, morally competent agents have the capacity to act on moral reasons, which implies that agents are able to understand and apply moral reasons to particular situations, to understand whether their actions are morally wrong or right, and to understand the consequences as well as other people’s reactive attitudes to their actions such as blame or praise. In this regard, what the second strategy claims is that the features of the immaturities detected diminish the abilities of children to satisfy some of these components that make morally competent agents. For instance, some believe that due to the immaturity of the brain systems associated with self-control children cannot act on principled moral reasons which should constrain their actions to a sufficient degree. As Michael Tiboris claims, “emotional states such as anger, humiliation, fear, and jealousy make it more difficult for adolescents to act in ways that they know they should. And to the extent that emotionally charged situations make it more difficult to identify normative reasons, they pose an obstacle to competent judgment.”³⁶ Others claim that the proneness to risk-taking behavior makes children bad deliberators when the moral consequences of their actions are concerned, and that entails that they should not be a proper subject of blame for their actions. The conclusion reached from these considerations is that children should be punished less because of their diminished responsibility due to the “relatively poorer skill at successfully using the moral agency...when responding to social standards for behavior.”³⁷

The first thing we should stress about this argument is that unlike other views in the literature which deprive children of moral agency, this argument rightly grants it to them, but claims that their agency does not

³⁶ Michael Tiboris, “Blaming the Kids: Children’s Agency and Diminished Responsibility,” *Journal of Applied Philosophy* 31, no.1 (2014), 86.

³⁷ Tiboris, “Blaming the Kids: Children’s Agency and Diminished Responsibility,” 85.

match the competence of adults. While we believe that the presupposition about the moral agency of children on which this argument rests is true, the argument is insufficient to grant a general differential punitive treatment between children and adults from a purely retributivist point of view. Plausibly, some children exhibit full moral competence. But also, of course, some adults fail to do so. So, the argument does not justify the claim that “children should be punished less than adults,” but only the claim that “some children should be punished less than adults” and it also implies, based on the same considerations, that in some cases some children should be punished as adults. Namely, as Tiboris points out, the practice of attributing responsibility, or “how much, we think [people] are responsible for failures to meet social demands for good behavior ... depends both on the kinds of normative competence we expect a person to have, the degree to which the individual in question has them, and the particular demands of the situation.”³⁸ But, as mentioned in the evaluation of the previous argument, it seems that unless an individual cannot satisfy the independence condition for responsibility, due to, for instance, pathogenic factors, our practices of attributing responsibility and willingness to punish are also functions of the gravity of the crimes committed. If this is the case then Tiboris’ argument can be used to give children as severe punitive measures as adults. For the sixteen year old who “acts as a cool guy” in front of his peers and steals sports shoes from a shop some might be inclined to say, “he is still a child,” implying this immature act to be normal for his age. However, most will think differently if the 16-years-old kills another person just to “act cool” as in the previous case.

At this point we can conclude that none of the two strategies, from independence and moral competence, to defend the argument from moral responsibility, supports to a satisfactory degree the differential punitive treatment of all young offenders. If pure retributivists are to plausibly justify the differential treatment of young offenders, as we believe is preferable, they need to offer arguments other than the one referring to the lack of moral responsibility of children. One such argument is the argument from political participation, to which we turn in the next section.

³⁸ Tiboris, “Blaming the Kids: Children’s Agency and Diminished Responsibility,” 87.

B. Argument from Participation in the Political Community

The second argument in favor of differential treatment which retributivists offer claims that children should be punished more leniently than adults because they do not participate in lawmaking (specifically, they do not vote) which implies they do not have a way to co-author the law yet. This does not mean that the law does not consider the interests or behaviors of children: indeed, there are many codifications of norms whose function is to protect and grant children's rights both at the international and national level, including codes that address children's wrongdoing. Yet, the line of argument developed by Yaffe³⁹ maintains that, as non-participants in the law-making of the political community, children simply have weaker legal reasons to obey the law. In fact, he considers them less criminally culpable for disobeying a law, simply because they did not co-author or authorize the law. Two separate points can be made here: one is to claim generally that children are not liable under the law because they cannot author it, and the other is to claim that the measurement of an appropriate response to law-breaking committed by children should be sensitive to the exclusion of children from law-making, which, as Yaffe claims, gives them less reasons to comply and therefore makes them less culpable when they disobey it.

In what follows we develop two objections to Yaffe's argument from (1) fairness and (2) independent moral obligations.

Argument from Fairness

The appeal to fairness has notably been used to justify retributivism by arguing that, as it is to our mutual benefit to live in a well-ordered society, we need to accept certain restraints on our behavior. In such society it would be unfair to be free riders in the sense of not obeying the law. Punishment in such case is justified as it permits removing the unfair advantage of freeriding.⁴⁰ This position has been contested on many grounds the most serious being that not all crimes, especially not the most heinous ones, can be compared to freeriding. However, if we only

³⁹ Yaffe, "The Age of Culpability."

⁴⁰ Herbert Morris, "Persons and Punishment," in Richard Dagger, *Playing Fair: Political Obligation and the Problems of Punishment* (Oxford: Oxford University Press, 2018), <https://doi.org/10.1093/oso/9780199388837.001.0001>.

consider fairness for the role it plays in justifying the scheme of principles governing our mutual cooperation (which produces presumptively beneficial goods) including the distribution of the benefits and burdens from our cooperation, it becomes clear why children, who are also the recipients of such benefits, insofar as they are raised in a well-functioning society, become subject themselves to the legally binding restraints on behaviors that potentially disrupt such cooperation. For instance, George Klosko's account of the basis for our political obligations is grounded on the assumption that there are certain goods which are presumptively beneficial, such that all reasonable persons would accept them, and that their acceptance creates obligation to obey the law.⁴¹ If we accept his position, and apply it to children qua members of society, with particular interests which are taken care of by adults, whose lives go better when the state grants (directly or through the institution of the family) such goods as access to health and educational services, as well as the various institutions and structures needed to supply nourishment, movement, assistance, and care in children's developmental needs, then they do seem to have an obligation to obey the law to the same extent as adults because they both acquire their political obligations in the same way. If this is so, then fairness in mutual cooperation should imply fairness in punishment as well.

Argument from Independent Moral Obligations

Even if one is not convinced by our appeal to fairness in mutual cooperation and its relation to fairness in punishment, an examination of the purpose of a criminal justice system suggests that there are some non-political, moral obligations which give us reasons to comply with the criminal law. For instance, while it is true, based on the criminal law, that children under a certain age bear no criminal liability, and this conclusion can be a product of a political decision-making in a given country, it is also true that a law prohibiting murder need not be subject to such decision, as there are independent moral reasons for its justification. All citizens who exhibit moral competence are subject to the moral law, and not acting in compliance with the law is widely considered grounds for blame, reproach, and punishment. Unless we want to consider children

⁴¹ George Klosko, "Presumptive Benefit, Fairness, and Political Obligation," *Philosophy & Public Affairs* 16, no. 3 (1987): 241–59.

as entirely morally incompetent (a claim we believe to be false, as argued above) one must grant that children should be considered subjects, at least to the prescriptions of the criminal law that are independently morally justified, and that they are liable for violations of the moral law. If this is so, then in respect to actions committed against such prescriptions, it again follows that retributivists should justify punishing children as adults.

We believe that our responses from fairness and independent moral obligations give us reasons to reject the retributivist justification of the differential treatment of juvenile offenders based on their exclusion from political participation. So, even if children are not fully politically active members of a society, especially because they are not allowed to vote,⁴² it does not follow that we cannot treat them as members of a political community who should be socialized to be responsive to general moral norms and sensitive to fairness, many of which are exemplified in our laws, and which children therefore have good reasons to comply with.

Absent a satisfactory justification by the argument from political participation, we reject the retributivist logic for the differential treatment on this ground, too. In our final section we discuss further implications of this conclusion for the retributivist position and the more lenient punishment of juveniles.

V. Differential punitive treatment beyond retributivism?

Both arguments from moral responsibility and political participation do not seem to offer a satisfactory justification for the more lenient punishment of children. The second one, which relies on the strong interpretation of the claim for differential treatment, according to which even when children are fully morally responsible, they still deserve lesser punishment because they are not full members of our political community, in our evaluation fails to provide any support for a differential treatment and a lesser punishment of juvenile offenders. The first one, which relies on the weak interpretation of the claim for differential treatment, according to which all criminally liable children

⁴² Attila Mráz, “Disenfranchisement and the Capacity/Equality Puzzle: Why Disenfranchise Children but Not Adults Living with Cognitive Disabilities,” *Moral Philosophy and Politics* 7, no. 2 (1 October 2020): 255–79, <https://doi.org/10.1515/mopp-2019-0054>.

should be subject to lesser punishment because they are not fully morally responsible, does seem to justify a differential treatment, but not without some controversial consequences. Specifically, pure retributivists face a dilemma. They either commit to the differential treatment as they justify it, but in that case they should allow that some children should be punished to an equal degree as adults for the same offense. Or, if they want to avoid this horn of the dilemma (as it seems to lead to endorsing a morally objectionable treatment of some children) then they need to propose additional moral factors justifying the differential treatment of children in general consistent with their retributivist commitments.

In our view, endorsing the second horn of the dilemma heads in the right direction, but such justification seems to only be able to proceed on forward-looking reasons having to do with the special character of the interests of a child and her well-being, the specificities of temporally conditioned goods a child should enjoy in order become a functioning member of a society and a political community, the potential for rehabilitation and reintegration, and the long term effects of harsh punishment. These justifications, however, are unavailable to pure retributivists to the extent that they are committed to (1) above, which states that punishing a culpable wrongdoer is justified irrespective of whether or not this will produce any beneficial consequences in the future. Hence, a plausible defense of the differential treatment of child offenders in which they are subject to more lenient measures than adults for the same offenses cannot be derived merely on purely retributive premises.

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