

Chapter 14

Sentencing Young Offenders

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The judicial approach to sentencing young offenders has evolved as society has developed. Statutes and case law now coexist with youth sentencing guidelines in England. Beyond this, government policy, academic research, media and public perceptions have also influenced youth courts. A number of themes recur in the youth sentencing debate in terms of how much priority is to be attached to the sentencing principles and interventions. For example, to what extent should youth court sentencing reflect deterrence, punishment and the protection of the public from harm? Should it reflect (to a greater degree than at the adult level) the promotion of offender welfare through rehabilitative programs? Which sentence types (or combination of interventions) can most effectively reduce youthful reoffending? There are few easy answers to such challenging questions.

Overview

After noting the principal justifications for a different sentencing regime for juveniles, distinct from, but related to that which applies to adults, the chapter provides some high-level statistical trends. The essay discusses some essential elements of procedure and powers of the youth court. This is followed by an examination of the sentencing guidelines applicable to youth courts in England and Wales. The chapter then illustrates the issues by considering a typical case being sentenced by the youth courts. The chapter concludes by discussing the future of youth court sentencing and in particular the issue of guidelines.

Justifications for separate sentencing provisions for young offenders

Some members of the public believe that young offenders should be treated the same as adults – if they are convicted of the same offence. ‘A crime is a crime’ seems to capture this perspective; if you have been mugged, the shock and loss of money is no different if the mugger happens to be 17 rather than 27. The crime – in terms of its impact on the victim – may be the same, but this analysis fails to consider the second principal determinant of the sentence: the offender’s blameworthiness. There are several reasons why we would blame young people less than adults convicted of the same crime – and therefore punish them more leniently. First, adolescents and young adults

do not have the same life experience as mature adults, and this raises questions about the levels of culpability. A 15-year-old can reasonably claim that he did not fully appreciate the wrongfulness of the crime, a claim that is much harder for a mature adult to make.

The second reason for sentencing young offenders differently relates to their life stage. Penalties should be appropriate to the offender as well as the offence. Some adult penalties are particularly inappropriate for juveniles, and custody is the obvious example. Depriving an individual of his liberty has many serious consequences – on his employment, for example. Yet a 12-month prison sentence will be much harder for a 15-year-old than a 30-year-old. Beyond the obvious difference, a 15-year-old may never have been away from home before, whilst a sustained period of detention could have a deleterious effect on their education. For these reasons, criminal justice systems attempt to use imprisonment very sparingly for young offenders, resorting to detention only when it is absolutely necessary (See von Hirsch et al., 2009, chapter 7 for further readings on youth court sentencing).

Some recent trends

In terms of the volume of youth court cases appearing for sentencing, the latest statistics from England and Wales (Ministry of Justice, 2014b) show that in 2012 to 2013

- 43,601 young people (ages 10–17) in total were sentenced, which represented a 28% fall from 2011 to 2012.
- 2,780 young people (ages 10–17) in total were sentenced to immediate custody, which represented a 31% fall from 2011 to 2012 and a 61% fall from 2002 to 2003.

The Ministry of Justice and the Youth Justice Board publish sentencing data for offence categories, sentencing options/outcomes, age ranges, gender and ethnicity for young people (ages 10–17), young adults (18–20) and adults (21+). The data allows us to consider: 1) the profile of offenders broken down by offence category, 2) representation in custody, 3) reoffending rates and 4) offender needs. For all offence categories, young people sentenced for indictable offences represented only 9% of the total numbers sentenced in 2012 to 2013. Young adults (18–20) represented 11%, and adults (21+) represented the remaining 80% of the total numbers sentenced in 2012 to 2013. Young people (10–17) represented only 16% of first-time entrants to the criminal justice system in 2012 to 2013, compared to adults (18+), who represented 84% of first-time entrants (Ministry of Justice, 2013a, p. 57). Young people (15–17) in custody represented only 1.5% of the total custodial population in June 2013, down from 3.7% in June 2003 (ibid, p. 58).

Finally, recent reoffending rates suggest that they were higher for young people: 35.8% (young offenders, 10–17), 30.6% for young adults (18–20) and 24.4% for adults (21+) in 2011 to 2012 (ibid, p. 59). The higher reoffending rate for these offenders may suggest that a targeting of resources at the youngest is an important consideration in the battle to reduce recidivism (ibid, p. 60).

Youth court procedures and powers

Whilst the sentencing principles within section 142A of the Criminal Justice Act (2003) have remained prospective, youth courts continues to be primarily focused on the prevention of youth offending under section 37(1) of the Crime and Disorder Act (1998). Despite this, the long established principle of preserving youth welfare under section 44 of the Children and Young Persons Act (1933) has retained its importance. Youth welfare incorporates various societal, family, community, individual and situational elements (Morrell et al., 2011). These welfare elements only hint at the complexities facing youth court judges working with Youth Offending Teams (YOTs) as they attempt to divert young offenders away from custody (Allen, 2011). According to sections 65–66 of the Crime and Disorder Act (1998), diversion from court is attempted via police reprimands and warnings. Under section 65(4), the police are encouraged to warn rather than reprimand, depending on the seriousness of the offence. Under section 66, youth offending team referrals are supported so that more time can be spent with youth offenders in order to better understand individual welfare needs. It is important that this information via a pre-sentence report, which includes important forms of mitigation, is reported back to the youth court. The district judge or the magistrates panel sitting in the youth court are then required to consider the most suitable method of dealing with the offender. If there is insufficient information about the offender, the court may adjourn their sentencing until such information is provided (Moore, Rahman and Rendell, 2010).

The Criminal Justice and Immigration Act (2008) provides a range of youth sentencing options including youth rehabilitation orders (YRO), referral orders (RO) and detention and training orders (DTO). The youth court may also need to consider if the youth offender has committed a grave or dangerous offence. Section 174 of the Criminal Justice Act (2003) requires youth judges to provide reasons and to explain the impact of the sentence imposed. The explanation to a young offender should be responsive to the young person's chronological age and level of psychological maturity (Moore, Rahman and Rendell, 2010). With respect to the sentencing option thresholds, there is a requirement upon youth courts, under section 148 of the Criminal Justice Act (2003), to not

pass a community sentence on a young offender unless the offence or combined offences are serious enough and such a sentence is the most suitable.

Youth sentencing guidelines

Section 125 (1) of the Coroners and Justice Act (2009) provides that every court must follow any relevant guideline, unless the court is satisfied that it would be contrary to the interests of justice to do so. At the adult level, courts apply the offence-specific guidelines issued by the Sentencing Council and its predecessors. Youth courts do not have the benefit of a set of offence-specific guidelines applicable to the sentencing of young offenders. However, there is a stand-alone guideline which provides guidance across offences. In 2009, the Sentencing Guidelines Council issued a definitive guideline to assist courts in sentencing young offenders. This guideline – which contains ‘overarching principles’ for sentencing youths – remains in effect until such time as it is revised or is replaced by the current statutory authority, the Sentencing Council of England and Wales.

The youth sentencing principles advocated prescribe an individualistic and flexible judicial approach. The support that is provided identifies a series of factors that affect the decision making towards young people (see Sentencing Guidelines Council, 2009, pp. 7–8). These are followed by four key elements to consider when determining the appropriateness of sentence in a case involving a youth:

- the age of the offender (both chronological and emotional);
- the seriousness of the offence;
- the likelihood of further offences being committed and
- the extent of harm likely to result from those offences.

Young offenders are considered unlikely to have the same experience and capacity as an adult to understand the effect of their actions. Whether in fact a lack of individual experience, empathy and understanding can fully explain the propensity of a young person to offend or reoffend is too complex for the guideline to answer. Instead, it simply acknowledges that each individual young person is to be left to the judges to understand. There is no list of aggravating factors beyond previous convictions, and mitigating factors beyond an offender’s maturity level and personal mitigation. Pre-sentence reports and advocates’ representations are relevant when considering the relevance of maturity, reoffending risk, and the extent to which societal reintegration may be possible (Sentencing Guidelines Council, 2009).

When considering the welfare interests of young offenders, the youth guideline endorses a sentencing approach which incorporates detailed welfare information about the young person. The guideline lists relevant youth factors such as: 1) mental health conditions, 2) learning and communication difficulties, 3) youth stigmatization in court, 4) increased suggestibility, 5) adolescent angst, and 6) abuse (ibid, pp. 5-6). It also lists common factors in youthful offending such as: low family income, poor housing and employment records, low educational attainment, early experience of offending, violence or abuse by role models, and the misuse of drugs (ibid, p. 7). The sentencing approach advocated in the guideline supports the early recognition of young people's problems and the value of intervention, particularly in the lower age bracket of 10–14.

Beyond this detailed yet generic guideline, which applies to all offences, the offence-specific approach applicable to the sentencing of adult offenders (18+) has relevance to youth sentencing practices. When youth judges consider the seriousness of offences committed by young offenders under 18, some aspects of offence harm and offender culpability can assist them. This can include young offenders being considered as potentially vulnerable victims whose offending reflects a lower level of culpability (Sentencing Guidelines Council, 2004). When a young offender enters a guilty plea, the adult guideline can apply, with modification, in the youth court (Sentencing Guidelines Council, 2007). For young offenders receiving an antisocial behavior order (ASBO), principles have been provided in order to assist sentencing. In particular, whilst the assessment of the seriousness of an ASBO breach for adult offenders applies equally to young offenders, the different intellectual and emotional maturity levels of young people may affect their perceptions of time between imposition and breach (Sentencing Guidelines Council, 2008).

The definitive guideline for robbery contains a separate section which provides for factors to be taken into account at sentencing when the offender is a youth. Adult and young offenders involved in robbery may have different characteristics which are relevant to sentencing considerations. In particular, the age, maturity and reaction to group or peer pressure may vary between young offenders and adults (Sentencing Guidelines Council, 2006). Finally, there is reference to the sentencing of youthful offenders in the new guidelines for sexual offences. Whilst the sentencing of adults convicted of sexual offences follows a definitive guideline (Sentencing Council, 2014), those sentencing young offenders are currently referred to part 7 of the council's sexual offences guideline, which list six specified offences. This will remain in force until the Sentencing Council produces more comprehensive guidelines for sentencing youths.

Approaching the youth custody threshold

Where the custody threshold lies for young offenders can be complex, depending on the seriousness of the offence and the risk posed to the public. Box 14.1 provides a typical example of the challenging cases confronting a youth sentencing court. It illustrates the complexity of youth court sentencing, particularly with respect to the youth custody threshold.

Box 14.1

The youth court is faced with sentencing a young 14-year-old male convicted of grievous bodily harm (GBH) and theft contrary to section 20 of the Offences against the Person Act (1861) and section 1 of the Theft Act (1968). He has low intelligence and is currently within a residential center (non-secure) due to his persistent offending and lack of parental control. The vulnerable young victim of the GBH, a 14-year-old male, has suffered a fractured skull and jaw from being viciously and repeatedly beaten about the head. He has been left psychologically traumatized, and his current depression and anxiety problems have been exacerbated. This victim also had his new smart phone stolen. The convicted young offender says he is sorry and has pleaded guilty. According to the pre-sentence report, the risk factors include a dysfunctional family background, limited interpersonal social skills, learning difficulties, substance abuse, and a proclivity for violent outbursts. Psychological testing reveals high impulsivity, suggestibility and psychopathic tendencies. His remorse for the offence appears to be more based on a fear of imprisonment rather than on the harm caused. In social situations, he is inept, threatens others in the community and chooses to exclude himself. The youth offender has received numerous police reprimands and cautions for past antisocial behavior. This then escalated to the use of YRO's. There is one previous conviction for GBH, 5 for assault occasioning actual bodily harm, and over 15 for minor thefts and cannabis possession offences.

When sentencing, there are a number of considerations that are applicable when determining the custody threshold in this case. Custody, if deemed appropriate, would consist of one of the three secure estates: a secure children's home, secure training centre or a young offender institution. The detention training (community supervision) order (DTO) is the most common custodial sentence and may be applicable in this case. In recent years, there has been a decline in youth custody usage overall (Allen, 2011; Ministry of Justice, 2014a). A DTO is regarded as a last resort when a YRO, RO or a fine is not appropriate, and it may last from four months to two years. The order is split

between a young person spending the first half of the order in custody and the second half released on license. If they reoffend whilst on license, they may be returned to custody. There is a test to be applied to a 12- to 14-year-old persistent offender as in this example: Is the offence of such gravity that a sentence substantially beyond the 2-year maximum for a DTO is a realistic possibility? (Judicial Studies Board, 2013).

If custody is to be imposed, there would need to be a significant risk of serious harm to the public from the young offender committing further similar offences. The court needs to determine whether a sentence of 4 years detention would be appropriate for the current GBH and theft offences, and whether as a dangerous offender, it would be more appropriate for him to be sentenced in the Crown court (*ibid.*). In determining where the threshold lies, the seriousness of the crime is determinative, and this includes offender culpability and offence harm. There is a strong presumption against youth court judges sending cases to the Crown court unless it is the appropriate forum (*R v Wirral Borough Magistrates Court, ex parte K, 2002*).

Referring to the youth sentencing example in Box 14.1, GBH falls within the 2-year DTO maximum penalty, but could tip into the Crown court, as the maximum penalty for GBH is 5 years detention (Judicial Studies Board, 2013). For GBH youth offenders under 18, the assault guideline does not appear to apply (Sentencing Council, 2011). Under section 100(2) of the Powers of Criminal Courts (Sentencing) Act (2000), a DTO can only be applied to persistent offenders under the age of 15. Persistence has been defined widely in case law with a focus on the established sentencing principles of offender welfare through mitigating factors and prevention from reoffending/public protection through aggravating factors (*R v L 2012*). It involves an offence that is regularly repeated which depends on the case facts, offence type and time gaps in offending behavior (*R v M 2008*). All offences may be relevant to establishing persistence, but the threshold appears to be high with convictions for the same offence and cautions required (*R v TTG 2004*) and (*R v D 2001*). Where there are no applicable offence specific guidelines, the court must look to the sentence that may have been appropriate for an adult offender convicted of the same offence (Judicial Studies Board, 2013).

Current youth sentencing concerns

Recent research sheds light on the ways that youth courts have responded to changes in youth sentencing law and policy. Between 1992 and 1997, a 40% increase in the use of custody for 10- to 17-year-olds, followed by a decline from 2001 to 2003, with the 10–14 age group particularly increasing was noted in the Ministry of Justice statistical

bulletins (Audit Commission, 2004). This appears to be based upon the more punitive approach in the early 1990s of the Conservatives, which gave way to the political consensus of supporting a more engaging and costly model of intervention under New Labour from 1997 to 2010. More recent statistics recorded a peak in 2006, although the overall level came down from 2007 to 2010 (National Audit Office, 2010). Since 2010, the coalition government has endorsed alternatives to custody through rehabilitative youth programs and expanding victim access to restorative justice conferences (Ministry of Justice, 2012b).

According to (Smith, 2014a) three principal youth sentencing concerns emerge from the recent empirical trends: 1) ethnicity discrimination, 2) the sentencing of young rioters from 2011 (such as *R v Blackshaw and others 2011*) and their condemnation and blame within the sentencing explanations given to the public, and 3) the decline in YOT prevention services due to public funding cuts since 2010 (House of Commons Justice Committee, 2013). In terms of the second concern, the public condemnation and blame of youth crime requires an understanding of the communication nexus between the judiciary, the public and the media. Most youthful offending is relatively minor and more common amongst children and young adults, peaking at 19 for males and 21–24 for females. Furthermore 85% of detected offending was from adults over 21 in 2012 (Bateman, 2013, pp.9-10). Despite these statistics, which suggest youth crime is not prolific, the public misperceive youth crime trends. It has been found that 75% of the public appear to misperceive youth crime levels as rising (Hough and Roberts, 2004, p. 17). Such public misperceptions are a result of media reporting, which negatively reflects upon the minority persistent or grave crime young offenders rather than the majority (Mattinson and Mirrlees-Black, 2000).

In terms of the third concern, there is evidence of Black and Asian overrepresentation in remand and custodial populations (Feilzer and Hood, 2004). These differences do not appear to be fully explained by offence characteristics or past offending history (May et al., 2009). However, at sentencing the evidence for discrimination against males at the custody threshold is not apparent when the detailed case facts are considered (Feilzer and Hood, 2004). Furthermore, youth court judges are only involved in the later stages of youth justice, and their contact time with youth offenders can be limited.

Overall, the current picture for youth custody suggests a continuing downward trend from 2005 to 2014, regardless of ethnicity (Ministry of Justice, 2014a). Young people from a black ethnic background have the highest reoffending rate (42.5%), compared to those of white at 35.8% and Asian at 30.2% (Ministry of Justice, 2013a).

These latest figures suggest that ethnicity remains an important factor in the reduction of reoffending debate. The extent to which youth court judges can themselves reduce these reoffending rates is limited. However, courts can provide independent judicial oversight and ensure youth offenders are treated fairly through fully informed sentencing decisions.

The future of youth court sentencing

According to the Youth Justice Board (YJB), the key focus from 2014 will be to reduce reoffending by young people, to ensure proportionate and effective punishment and to expand restorative justice. The YJB consider that there is a valuable opportunity to improve youth understanding (AssetPlus) and the young adult threshold (Youth to Adult Transitions program). The YJB also notes that young people in custody appear to be more maladjusted and can benefit from educational opportunities in order to reduce reoffending rates (Youth Justice Board, 2013, p. 2).

Future of guidelines for youth

It may be that youth sentencing, like adult sentencing, will become subject to offence-specific guidelines. It remains to be seen whether the Sentencing Council pursues this route, creating separate guidelines for young offenders, or whether courts will be required to merely discount the sentencing ranges applicable to the sentencing of adult offenders. If the Sentencing Council decides that separate offence-specific guidelines are necessary in relation to youths, will more transparency, consistency and fairness in sentencing practice necessarily result? Can such offence-specific guidelines enhance the current efforts of the judiciary operating in the youth courts to effectively engage with the most troubled and at risk young offenders? In other words, before we provide further sentencing guidelines, do we currently know enough about how best to gain the participation, trust and acceptance of young offenders whose complicated needs, if left unaddressed, may worsen as they progress towards adulthood? Perhaps we should be more concerned with the current effectiveness of the various noncustodial sentencing options which seek to reduce and prevent future youth offending. A clear priority for research at the youth court level is to determine which of the various disposals are most effective.

In future, research should address these questions in order to better inform youth sentencing practices. The answer to youth crime may lie in more effective pre-trial diversion or post-trial community and custodial options. Youth courts will continue to require access to detailed youth offender information, via pre-sentence and other expert witness reports. These reports can help to ensure that the problems and potential solutions for young

offenders are fully understood. Targeting research and funding on the youngest offenders (ages 10–14) could reveal important insights into the etiology of youthful offending. Furthermore, research focused on the small number of severely maladjusted young offenders in custody currently appears important. Finally, by exploring the experiences and perceptions of youth court actors, future researchers can expand our understanding of youth court team work, which is crucial to delivering proportionate and effective youth sentencing.

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