

Accountability and Proportionality in Youth Criminal Justice

Malcolm Thorburn*

1. Introduction

As Justice Trotter rightly notes in *R. v. Lights*, “Under the YCJA, ‘accountability’ is the watchword.”¹ But what, exactly, does accountability mean in the context of the YCJA? One view is that it is nothing more than the adult sentencing principle of retribution: that the severity of the offender’s sentence should be proportionate to her moral culpability for her offence. But that view, I argue, is mistaken. Although retribution is clearly one facet of accountability, and although this is the only relevant facet of accountability in two important contexts (the decision whether to divert the young person away from youth court under s. 4 and the decision to sentence as an adult under s. 72), it is still not exhaustive of the concept more generally. As both the YCJA’s preamble and its statement of sentencing purpose in s. 38 make clear, accountability is concerned *both* with proportionality in the severity of sanction *and* with ensuring the rehabilitation and reintegration of the young person in the choice of sanction.

This move in the YCJA puts it squarely in one camp in the current sentencing theory debate. It stands with Antony Duff’s view² that sentencing communicates multiple messages (not only of a certain degree of censure of the offender but also of an

* B.A., J.D. (Toronto), M.A. (Pennsylvania), LL.M. (Columbia). Assistant Professor, Faculty of Law, Queen’s University, Kingston, Canada. I presented an earlier draft of this article to a National Judicial Institute conference, “Judging Effectively under the Youth Criminal Justice Act”. I would like to thank the organizers and the participants for helpful questions and comments. I would also like to thank my Queen’s Law colleagues Nick Bala, Larissa Katz and Allan Manson for invaluable comments on an earlier draft of this paper. Accountability for all remaining mistakes and infelicities belongs solely with the author.

1. *R. v. Lights*, 2007 ONCJ 173 at p. 16.
2. See section 7(3) of this article.

invitation to rehabilitate herself and reintegrate herself back into society). And it stands against the “just deserts” inclination to focus on the severity of censure to the exclusion of all else. And this, I believe, is much to the credit of the YCJA.

2. The Centrality of “Accountability”

What does it mean to hold a young person “accountable” under the *Youth Criminal Justice Act*? This is one of the central problems facing youth court judges in Canada today. The language of accountability is to be found both in statements of the Act’s basic purposes and also in the language governing the most crucial stages of the youth criminal justice process. The statute’s preamble makes clear that, along with reducing the use of custodial sentences for all but the most serious offences, one of the *Youth Criminal Justice Act*’s central purposes is to hold young people accountable for their wrongdoing.³ In the statement of the basic principles of youth sentencing in s. 3, the YCJA holds that youth sentences should “emphasize fair and proportionate accountability”.⁴ Further, in three of the most important decisions to be made under the YCJA — whether to divert the young person away from youth court,⁵ whether to impose a custodial sentence⁶ and whether to

3. *Youth Criminal Justice Act*, S.C. 2002, c. 1 (YCJA). These purposes are set out quite clearly in the preamble, as follows: “whereas Canadian society should have a youth criminal justice system that commands respect, takes into account the interests of victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons”.
4. In the “declaration of principle” set out in s. 3(b), the Act states that “the criminal justice system for young persons must be separate from that of adults and emphasize . . . (ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity”.
5. Section 4(d) states that, “extrajudicial measures should be used if they are adequate to hold a young person accountable for his or her offending behaviour”.
6. Section 39 states that the decision whether or not to impose a custodial sentence turns (among other considerations) on whether “the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38”. And, of course, first among the purpose and principles set out in s. 38 is accountability: the purpose of sentencing under the YCJA is “to hold

sentence him as an adult⁷ — a crucial factor to be considered is how to hold the young person accountable. And yet the YCJA provides no explicit definition of accountability.

3. The Novelty of the YCJA

We receive only very limited guidance on the interpretation of the YCJA from pre-2003 case law. Justice Charron made clear in *R. v. P. (B.W.)* that because the YCJA was explicitly designed to make a clean break from the regime of the *Young Offenders Act*, “. . . little can be gained by attempting a detailed comparison of the two statutes. The YCJA created such a different sentencing regime that the former provisions of the YOA and the precedents decided under it . . . are of limited value.”⁸ Parliament also made quite explicit that the sentencing regime in the YCJA is distinct from the one set out for adult offenders in part XXIII of the *Criminal Code*. With only a few notable exceptions, s. 50 of the YCJA makes clear that “Part XXIII (sentencing) of the Criminal Code does not apply in respect of proceedings under this Act”.⁹ Moreover, even if we were to look to the case law interpreting these other statutory regimes, we would find them of little value because neither the *Young Offenders Act* nor the *Criminal Code*’s sentencing provisions uses the language of “accountability”. As a result, courts over the past six years have not had the luxury of turning to precedents from earlier youth justice regimes or to adult sentencing regimes for guidance in the interpretation of the YCJA’s sentencing provisions; they have simply had to work hard to make sense of the YCJA’s new legislative scheme on its own terms.

a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public”.

7. Section 72(1)(a) and (b) make clear that the decision whether to sentence the young person under the YCJA regime or as an adult turns on whether the appropriate youth sentence “would have sufficient length to hold the young person accountable for his or her offending behaviour”.
8. *R. v. P. (B.W.)*, [2006] 1 S.C.R. 941 at para. 21, 267 D.L.R. (4th) 385, 374 W.A.C. 1.
9. YCJA, s. 50.

4. The Offender-centric Nature of Accountability

What, then, are we to make of the YCJA's language of accountability? Some possibilities have been thoroughly considered and roundly rejected by appellate courts. In *R. v. P. (B.W.)*, the Supreme Court of Canada dealt with the Crown's contention "that . . . the statute speaks of 'accountability' which, it is submitted, is a sufficiently broad concept to encompass considerations of general deterrence".¹⁰ Justice Charron (for the court) provided a clear and unambiguous answer to this suggestion. She held that the YCJA's sentencing regime is concerned only with the particular offender and *not* with the accomplishment of broader societal aims. She wrote: "[W]hen the statute speaks of 'accountability' or requires that 'meaningful consequences' be imposed, the language expressly targets the young offender before the court . . . Parliament has made it equally clear in the French version that these principles are offender-centric and not aimed at the general public".¹¹ Accordingly, she held that the YCJA necessarily excludes both general and specific deterrence as sentencing objectives. On general deterrence, she insisted that, "the YCJA does not permit . . . the use of general deterrence to justify a harsher sanction than necessary to rehabilitate, reintegrate and hold accountable the *specific young person before a court*".¹² And on the subject of specific deterrence, she pointed out that¹³

the new sentencing regime does not speak of specific deterrence as a distinct factor in sentencing. Rather, Parliament has specifically and expressly directed how preventing the young offender from re-offending should be achieved, namely by addressing the circumstances underlying a young person's offending behaviour through rehabilitation and reintegration and reserving custodial sanctions or the most serious crimes. In my view, nothing further would be gained by trying to fit specific deterrence, as a distinct factor, by implying it in some way under the new regime.

She summed up her findings in the following terms: "I conclude that deterrence, general or specific, is not a principle of

10. *R. v. P. (B.W.)*, *supra*, footnote 6, at para. 25.

11. *Ibid.*, at para. 33.

12. *Ibid.*, at para. 38 (emphasis in original).

13. *Ibid.*, at para. 39.

sentencing under the YCJA.”¹⁴ *A fortiori*, we may conclude that deterrence plays no part in the concept of accountability under the YCJA either.

5. Accountability and Sentence Length

Some of the leading cases dealing with the concept of accountability under the YCJA have done so in the context of the decision whether or not to impose an adult sentence under s. 72 of the Act. But that provision is explicitly concerned only with one aspect of accountability: whether a youth sentence “would have sufficient *length* to hold the young person accountable for his or her offending behaviour”.¹⁵ So it should come as no surprise that the case law on accountability that has developed in the context of s. 72 has focused exclusively on the requirements that accountability imposes on the *severity* of sentence (which, when we are dealing with custodial sentences, translates simply into the *length* of the custodial sentence) and it has ignored entirely questions about the *type* of sentence that might be most conducive to the rehabilitation and reintegration of the young person.

The most prominent case dealing with accountability under s. 72 is the Ontario Court of Appeal’s unanimous decision in *R. v. O. (A.)*, which held that “accountability *in this context* [of whether or not to sentence the young person as an adult under s. 72(1) of the YCJA] is the equivalent of the adult sentencing principle of retribution”.¹⁶ That is,¹⁷

for a sentence to hold a young offender accountable *in the sense of being meaningful* it must reflect, as does a retributive sentence, ‘the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender’s conduct.’ We see no other rational way for *measuring* accountability.

If we did not pay attention to the Court of Appeal’s careful recognition (in the three expressions in italics in the passages above) of the specific statutory context within which they are

14. *Ibid.*, at para. 41.

15. Section 72(1)(a) and (b) both use this language (emphasis added).

16. *R. v. O. (A.)* (2007), 84 O.R. (3d) 561 at para. 46, 222 O.A.C. 38, 218 C.C.C. (3d) 409 (C.A.) (emphasis added).

17. *Ibid.*, at para. 47 (emphasis added).

dealing with the notion of accountability, we might be tempted to think that accountability is concerned only with the severity of sentence: any sentence that is proportionate in its severity to the seriousness of the young person's moral culpability for her offence must *ipso facto* hold her accountable. But this, I suggest, would be a serious mistake. Although the principle of retribution — that the severity of the sentence should be proportionate to the offender's moral culpability for her offence — is one important aspect of accountability, it is far from exhaustive of that concept. Instead, if we keep in mind that the Court of Appeal is dealing only with the meaning of accountability in the context of s. 72 (where it is required by the statutory language to focus only on the length of sentence), we leave open the possibility that there is a richer notion of accountability at work in the YCJA of which sentence length is only one aspect. Specifically, this richer notion of accountability includes not only some concern for maintaining rough proportionality between the severity of the sanction and the offender's moral culpability for her offence, but also some concern that the *type* of sanction imposed be one that is most likely to bring the young person to recognize the wrongfulness of her conduct and thereby help to rehabilitate her and to reintegrate her back into society. But in order to set out this richer notion of accountability, we need to consider the other provisions in the YCJA that use the language of accountability.

6. The Two Faces of Accountability

Although the case law from the Supreme Court of Canada and the Ontario Court of Appeal is of significant assistance to youth court judges looking to understand the meaning of “accountability” under the YCJA, we can only understand the full meaning of these precedents if we locate them within their proper statutory context. That is, these cases are not directly concerned with our general question about the meaning of accountability under the YCJA; rather, they concern only the use of “accountability” in the context of specific provisions of the Act. We will be able to make better use of their guidance if we bear this context in mind as we read them.

The first step toward understanding the meaning of “accountability” as it is used in the YCJA, then, is to note the different contexts in which the term is used. Interestingly, “accountability” seems to be used in three quite different contexts in the YCJA. First, in two of the YCJA’s provisions dealing with the offender’s accountability for her wrongdoing (the decision whether to divert the offender away from youth court under s. 4 and the decision to sentence the young person as an adult under s. 72), it seems that accountability is, indeed, concerned exclusively with the appropriate *severity* of the sanction. But there are three other provisions (the preamble, the statement of purpose and principles of sentencing in s. 38 and the decision whether to impose a custodial sanction under s. 39) that relate the notion of accountability to a much broader set of considerations that include not only the proportionality of the sentence’s *severity* to the offender’s moral culpability for her wrongdoing but also the appropriate *type* of sanction for the purpose of rehabilitating the offender and reintegrating her into society. And finally, in the YCJA’s general statement of purpose in s. 3, we find the language of “proportionate accountability”, which suggests that proportionality and accountability must have different meanings (on pain of redundancy in the legislative wording). If we are to make sense of the term “accountability” as it is used in the YCJA, then we must reconcile these various uses of the term within the statute.

(1) Accountability as Retribution/Proportionality

In ss. 4 and 72 of the YCJA (*i.e.*, the provisions that deal with diversion from youth court and the imposition of adult sentences, respectively), the language of accountability focuses quite narrowly on the *severity* of the sanction to be imposed on the young person. The language of s. 4 is as follows:

- (c) extrajudicial measures are presumed to be *adequate to hold a young person accountable* for his or her offending behaviour if the young person has committed a non-violent offence and has not previously been found guilty of an offence; and
- (d) extrajudicial measures should be used if they are *adequate to hold a young person accountable* for his or her offending behaviour

and, if the use of extrajudicial measures is consistent with the principles set out in this section, nothing in this Act precludes their use in respect of a young person who

- (i) has previously been dealt with by the use of extrajudicial measures, or
- (ii) has previously been found guilty of an offence. [emphasis added]

When dealing with accountability, s. 4 uses the quantitative language of adequacy rather than the qualitative language of, say, appropriateness. This suggests that the primary concern here is a quantitative one: are extrajudicial measures sufficiently severe to provide an adequate response to the young person's offending behaviour? Although it is possible to interpret the language of adequacy in a qualitative way that is concerned at least as much with the appropriate type of sanction as with the appropriate severity of sanction, the *prima facie* most plausible interpretation of the language of s. 4 suggests that we are concerned with the quantitative question of whether extrajudicial measures are sufficiently severe.

The language of s. 72 is even more explicitly quantitative:

- (a) if [the court] is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would have *sufficient length to hold the young person accountable* for his or her offending behaviour, it shall order that the young person is not liable to an adult sentence and that a youth sentence must be imposed; and
- (b) if it is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not have *sufficient length to hold the young person accountable* for his or her offending behaviour, it shall order that an adult sentence be imposed. [emphasis added]

That is, as the Ontario Court of Appeal has made clear in *R. v. O. (A.)*, accountability in this context is clearly concerned with the same basic issue as the concept of retribution in the adult sentencing context: is the sentence a sufficiently severe response to the young person's offending conduct? The only role of accountability in this context is to determine whether the sentence is sufficiently long. Although it might be possible to evaluate other aspects of the sentence by determining whether it holds the young person accountable, it is clear from the

language of s. 72 that these other aspects of sentence are simply not of concern in the decision whether or not to impose an adult sentence.

(2) Accountability as Concerned with Rehabilitation and Reintegration

There are three other sections of the YCJA where the statutory language makes clear that accountability is concerned with more than just the severity of sentence. The preamble, the statement of sentencing principle in s. 38 and the decision whether or not to impose a custodial sanction governed by s. 39 all connect accountability not only with “meaningful consequences” (which has a clear connection to proportionality in sentencing¹⁸) but also to the “effective rehabilitation and reintegration” of the young person (which, I shall argue, is more closely connected to the *type* of sanction imposed rather than to its severity).

The language of the relevant part of the preamble is as follows: “[W]hereas Canadian society should have a youth criminal justice system that . . . ensures *accountability through meaningful consequences and effective rehabilitation and reintegration . . .*” (emphasis added). In this part of the preamble, it is clear that the imposition of meaningful (*i.e.*, proportionate) consequences is not itself sufficient to hold the young person accountable; “effective rehabilitation and reintegration” are equally important means through which to hold the young person accountable.

The YCJA’s statement of sentencing purpose and principles in s. 38 is equally clear in connecting accountability not only to meaningful consequences (*i.e.*, proportionate sanctions) but also to the rehabilitation and reintegration of the offender:

38. The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person *and* that promote his or her rehabilitation and reintegration into society . . . [emphasis added]

That is, as a general matter, youth sentences should be

18. It is clear from *R. v. O. (A.)*, *supra*, footnote 14, at para. 47 that “meaningful” is the functional equivalent of “proportionate” in this context.

concerned not only to match the seriousness of the young person's offending behaviour but also to ensure his rehabilitation and reintegration into society *as components of holding him accountable*. That is, this crucial statement of principles makes clear that we do not hold a young person accountable merely by imposing a proportionate sentence; we do so only if we *also* promote the young person's rehabilitation and reintegration into society.

Section 39, which deals with the decision whether or not to impose a custodial youth sentence, does not employ the language of accountability directly. Rather, it simply invokes the purpose and principles enunciated in s. 38 as limiting factors in the choice of sanction:

39(2) . . . a youth justice court shall not impose a custodial sentence under section 42 (youth sentences) unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles set out in section 38.

(3) In determining whether there is a reasonable alternative to custody, a youth justice court shall consider submissions relating to

- (a) the alternatives to custody that are available;
- (b) the likelihood that the young person will comply with a non-custodial sentence, taking into account his or her compliance with previous non-custodial sentences; and
- (c) the alternatives to custody that have been used in respect of young persons for similar offences committed in similar circumstances.

Custodial sanctions are different from their alternatives in at least two ways. They are clearly different from fines, restitution, community service orders, etc. not only in their severity (for most custodial sanctions are generally considered to be more serious than these alternatives) but also in kind (for, even if they are of equivalent severity, they are very different sorts of sentences, possibly conveying different messages to the young person and having different rehabilitative and reintegrative effects). It is appropriate, then, to assume that when we are concerned with the choice between custodial and non-custodial sanctions, we are interested in both the proportionality and the reintegration/rehabilitation aspects of accountability.

(3) Accountability as Contrasted with Retribution/Proportionality

Finally, in the statement of general principles in s. 3 of the YCJA, accountability is linked with proportionality, but in a way that makes clear that they are distinct concepts. Specifically, in s. 3(b)(ii), the YCJA uses the language of “proportionate accountability” as follows:

- (b) the criminal justice system for young persons must be separate from that of adults and emphasize . . .
 - (ii) fair and *proportionate accountability* that is consistent with the greater dependency of young persons and their reduced level of maturity . . . [emphasis added]

This provision is perhaps the most complex in the way that it presents the relationship between accountability and proportionality in sentencing. On the one hand, it makes clear that accountability is something that is susceptible to measurement (so that talk of “proportionate accountability” is meaningful); on the other hand, accountability is not simply reducible to the notion of proportionality (because otherwise Parliament’s use of the term “proportionate” as a qualifier for accountability would be redundant, and we should, if possible, avoid any interpretation of a statutory provision that gives rise to redundancy).¹⁹ Given our readings of the other provisions of the YCJA in which the language of accountability appears, it is clear how to satisfy these competing demands in the interpretation of s. 3(b)(ii): although proportionality is susceptible to measurement (and therefore a sentence can be either proportionate or not), its substance also concerns other matters such as rehabilitation and reintegration of the offender

19. Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes* (Markham, Ont.: Butterworths, 2002), p. 158: “It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain.” Sullivan and Driedger then cite *Hill v. William Hill (Park Lane) Ltd.*, [1949] A.C. 530 at p. 546 (H.L.) *per* Viscount Simons: “The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out.”

that are not simply concerned with the measurement of a sentence's severity.

7. Accountability and Sentencing Theory

In this final section of the paper, I consider some of the central debates in sentencing theory that have taken place over the past 40 years in the English-speaking world. I do so because it seems that the YCJA's understanding of accountability reflects a sophisticated understanding of that concept which seems to reflect some of the very best recent work in the field. The YCJA reflects an understanding that proportionality is a crucially important aspect of accountability in sentencing for some of the reasons we will see below. But it also recognizes, with Antony Duff, that criminal sentences hold an offender accountable not only by condemning his actions as wrongful (and indicating precisely *how* wrongful through the severity of the sentence), but also by conveying a message of encouragement to the offender to rehabilitate himself as well as a message of welcome to the offender to reintegrate himself back into the community that holds him accountable (once he has recognized and come to repudiate his wrongdoing).

(1) The Consensus about Punishment's Communicative Function

In 1965, Joel Feinberg published an influential article entitled "The Expressive Function of Punishment"²⁰ in which he argued that most of the writing on punishment up to that point had ignored its defining purpose. Although it is clearly a good thing if punishments reduce future criminality through deterrence, rehabilitation, incapacitation, etc., he argued, these are surely only positive *effects* of punishment. What makes punishment punishment is what Feinberg called its "expressive function": the fact that we punish as a way of conveying a message of censure to the offender by punishing him. If we have no intention of conveying such a message, then, however useful and desirable the activity is that we might be doing, it is not punishment: we can deter without censure through the use of

20. J. Feinberg, "The Expressive Function of Punishment" (1965), 49 *The Monist* 3.

price disincentives; we can incapacitate with censure through the use of quarantine, and so on. It is only if a practice is designed to convey a message of censure that it can properly be called punishment.²¹

In the years since the publication of Feinberg's celebrated article, virtually everyone writing in sentencing theory has come to agree with Feinberg's basic point. There is now almost unanimous consensus that the very nature of punishment is to communicate²² censure of the offender. The great areas of disagreement that remain are: (1) precisely what it is that a criminal sentence is supposed to communicate; and (2) what role other aspects of punishment — deterrence, retribution, rehabilitation, etc. — have to play in our understanding of punishment.

(2) Communication, Censure and Proportionality: von Hirsch's "Just Deserts"

The first person to set out a complete theory of sentencing based on Feinberg's expressive understanding of punishment was Andrew von Hirsch.²³ In 1976, he published his report of the committee for the study of incarceration in New York State entitled *Doing Justice: The Choice of Punishments*²⁴ in which he set out a blistering argument against the then-prevailing practice of indeterminate sentencing in the United States. Criminal sentences ought only to reflect the seriousness of the

21. Although there are a few (e.g., Nils Christie, "Conflicts as Property" (1977), 17 *Brit. J. Criminol.* 1) in the sentencing theory debates who would like to uncouple criminal sentencing from the notion of punishment altogether, they are a distinct minority. Certainly, criminal sentencing in Canada for adults and for youth is essentially connected to the concept of punishment.

22. In subsequent debates, most sentencing theorists have moved away from talk of "expression" to talk of "communication". Antony Duff explains the difference between the two with his usual clarity in *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001), p. 79: "Expression requires only the one who expresses By contrast, communication requires someone to or with whom we try to communicate. It aims to engage that person as an active participant"

23. For a more detailed discussion of von Hirsch's position, see Malcolm Thorburn and Allan Manson, "The Recent Sentencing Theory Debate: Divergence in Reasoning, Convergence in Result" (2007), 10 *New Crim. L. Rev.* 278.

24. A. von Hirsch, *Doing Justice: The Choice of Punishments* (New York: Hill & Wang, 1976).

offender's past wrongs, he argued; they should never be used merely as a tool to prevent future wrongdoing. The basis for his argument was a theory that has come to be known as "just deserts", a position he has defended in a series of books published over the past 30 years.²⁵ According to that theory, the only legitimate ground for punishment is the communication of a message of censure to the offender. The state simply has no business incarcerating people merely for the sake of rehabilitating them, incapacitating them, deterring them, *etc.* It is only insofar as particular individuals deserve to be punished in virtue of their wrongdoing that the state has any business interfering with their liberty. Von Hirsch puts this point quite vividly, in the following terms:²⁶

A neutral sanction would treat offenders or potential offenders much as tigers might be treated in a circus, as beings that have to be restrained, intimidated, or conditioned into compliance because they are incapable of understanding why biting people (or other tigers) is wrong. A condemnatory sanction treats the actor as a person who is capable of such understanding.

According to von Hirsch's "just deserts" account, a criminal sentence communicates the degree of censure that the offender deserves for his wrong by the severity of the sanction it imposes: a long prison sentence communicates a high degree of censure, a small fine communicates a low degree of censure, and so on. Von Hirsch then adds an important refinement on this position: because the message that punishment is supposed to convey is the degree of censure that the offender deserves, it is crucially important to calibrate this message precisely. We do wrong to an offender if we give him a harsher sentence than someone else who (on the basis of moral culpability for his offence) deserves the same degree of censure. Thus, von Hirsch argues that we should dismiss as unjust all arguments in favour of modifying sentence severity on deterrence, rehabilitation or any other ground.²⁷ Justice demands that we punish each person precisely

25. A von Hirsch, *Doing Justice, ibid.*; *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (New Brunswick, NJ: Rutgers University Press, 1985); *Censure and Sanctions* (Oxford: Oxford University Press, 1993); *Proportionate Sentencing: Exploring the Principles* (with Andrew Ashworth) (Oxford: Oxford University Press, 2005).

26. *Censure and Sanctions, ibid.*, at p. 11.

27. In his most recent work (with Andrew Ashworth), *Proportionate Sentencing, supra*, footnote 23, von Hirsch has moved away (slightly) from this position.

according to the degree of censure that he deserves in virtue of his moral culpability for wrongdoing.

Now, von Hirsch does not specifically address the concept of *accountability* in sentencing — he is concerned only to offer an account of justice in the communication of censure through criminal sentencing. Nevertheless, it is clear that his “just deserts” theory of criminal sentencing concerns the communication of only one message through the criminal sentence: *viz.*, the severity of censure for wrongdoing. Other considerations, such as encouraging rehabilitation and reintegration of the offender back into society, are matters of secondary importance to be dealt with in whatever way might not interfere with the communication of the primary message of the criminal sentence. An interpretation of the YCJA’s talk of “accountability” that concerned only the length of sentence and excluded all talk of rehabilitation and reintegration of the offender would fit well with von Hirsch’s just deserts, but the YCJA’s apparent concern for rehabilitation and reintegration as central to the very purpose of sentencing as a way of holding the offender accountable seems to run contrary to von Hirsch’s theory.

(3) Communicating Censure and Other Messages: Duff’s “Secular Penance”

Antony Duff is the leading philosopher of criminal law and sentencing working in the United Kingdom today. He has published extensively on the purpose of trials, punishment, the structure of *mens rea*, the structure of particular offences, youth justice, the limits of the criminal law and a great many other topics. His work has not only had an extensive influence of its own in all of these fields, but it has also inspired a generation of criminal law and sentencing theorists in the United Kingdom and beyond to develop the lines of inquiry that he has sketched out in his own works.²⁸

He now maintains that once a proportionate sentence has been determined, it is justifiable to move away from this somewhat for instrumentalist reasons (by either 5-10% (at p. 161) or 10-15% (at p. 7)).

28. John Gardner writes in the preface to his new book that he, along with many of the most important criminal law writers of his generation, was inspired by Duff to look beyond the justification of punishment as the central problem in

It is largely because of the work of Antony Duff that talk of “accountability” has become front and centre in discussions of criminal law and punishment in recent years. In his first book, *Trials and Punishments*,²⁹ Duff suggests that the criminal justice system could not be justified in the terms under which it is normally conceived. We can make better sense of many of our existing institutions of criminal justice, Duff argues, if we see them as part of a larger communicative enterprise of calling people to account for their wrongdoing. He argues that the criminal trial should not be seen merely as a forum within which we determine whether or not punishment is justified in the particular case. The basic rationale for the presentation of evidence for and against guilt, he suggests, is not simply to demonstrate that the state is entitled to punish the accused. Rather, Duff insists, the trial has intrinsic value as a forum for calling the accused to account for his wrongdoing, demanding that he provide some sort of explanation for his conduct. For once the prosecution has presented evidence that the accused in fact committed the offence with which he is charged, it is then up to the accused to make a case for why he acted as he did — showing that his conduct was justified (say, as an act of self-defence) or excused (say, because it was undertaken under duress or in circumstances of necessity). Even if there are no further consequences for the accused beyond the trial (*i.e.*, no punishment), Duff argues, the criminal justice system has gone a long way toward holding the accused to account simply by holding the trial, demanding a plea, presenting evidence against the accused, demanding an answer from the accused in reply to the prosecution’s evidence, and condemning the accused for his wrongdoing by way of a criminal conviction.

In subsequent writings, Duff has developed this “calling to account” view of the criminal justice process with great subtlety and in remarkable detail. *Answering for Crime: Responsibility and Liability in the Criminal Law*³⁰ is his most recent work,

criminal law and to look instead to the ways in which the criminal justice system as a whole holds offenders to account for their conduct. See John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007), p. vii.

29. A. Duff, *Trials and Punishments* (Cambridge: C.U.P. 1986).

30. (Oxford: Hart Publishing, 2007). For a more detailed account of his

applying the model of accountability to the structure of the trial and the elements of offence and defence in common law systems. But it is in *Punishment, Communication and Community*,³¹ his 2001 monograph on the implications of this view for sentencing, that Duff presents his views on sentencing and accountability most fully. According to Duff, it is not only the trial that should be understood as a communicative enterprise of calling to account. Sentencing, too, should be seen not as the carrying out of a threat, the unilateral imposition of state power over individuals, but as a communicative enterprise among citizens. Those who have been called to account for their wrongdoing by their fellow citizens and who have failed to provide an adequate account for their conduct (by way of justification, excuse, etc.) are subject to criminal sentencing.

What message should criminal sentences communicate to the offender? For Duff, we ought to communicate more than just a message of moral censure for wrongdoing. He writes: "Punishment aims . . . to do more than simply communicate — as it were, at arm's length — a certain degree of formal censure. Punishment aims to persuade offenders to face up to what they have done — to the substantive moral character and implications of their crimes as public wrongs."³² Recall that Andrew von Hirsch emphasizes that the severity of the sanction should be strictly proportionate to the seriousness of the offence because severity of sanction is the measure of the seriousness of our moral censure of the offender's conduct. Duff, however, takes a more nuanced approach to the communicative function of criminal sentences and their role in holding the offender to account for his offence. He argues that punishments ought not to be disproportionately punitive (for this would undermine their legitimacy), but within those limits, there is no reason why they must be strictly proportionate to the seriousness of the offence. Instead, Duff argues, punishments ought to communicate a rather different

argument in this book and in his earlier book, see my review essay of that book and two others: "Three Models of Criminal Justice", forthcoming in the *University of Toronto Law Journal* 2009.

31. (Oxford: Oxford University Press, 2001).

32. *Punishment, Communication and Community*, *supra*, footnote 20, at p. 143.

message. They ought to be designed in such a way as to lead the offender to recognize the wrongfulness of his conduct and to undertake what Duff calls “secular penance”. This means that judges ought to be highly creative in their choice of criminal sentences, looking for ways that might be most effective in bringing the offender to see the error of his ways, but always with an eye toward reintegrating him back into society. For Duff, this means that custodial sentences should be a last resort (because they tend to break societal bonds rather than helping to re-establish them). Instead, judges should prefer sentences that convey the wrongfulness of the offender’s conduct. He writes:³³

[P]robation, Community Service Orders, and criminal mediation and reparations programs are appropriate punishments because they are suited to the aim of persuading offenders to face up to and repent their crimes, to begin to reform themselves, and to make apologetic reparation to those whom they wronged . . . This dimension of meaning — not just the meaning of punishment as punishment but the meaning of particular modes of punishment — is important for a communicative account of punishment, though it is too little discussed by penal theorists. We must ask what *modes* of punishment are appropriate, either in general or for particular kinds of offense.

The point here is not that we ought to follow Duff in the details of his account of sentencing. Rather, the point is simply to see that what is perhaps the best-known model of criminal justice based on the notion of “accountability” makes clear that both rough proportionality in sentence severity and appropriateness of sentence type for the purposes of rehabilitation and reintegration are both crucial elements of the idea of accountability.

8. Conclusion

Some of the best-known precedents on the interpretation of the YCJA seem to suggest, upon first inspection, that the notion of accountability there is concerned only with sentence severity. Upon closer inspection, however, we see that the Ontario Court of Appeal’s reasons in *R. v. O. (A.)* are only concerned with the interpretation of accountability in the quite special context of

33. *Punishment, Communication and Community, ibid.*, at p. 145.

s. 72 of the YCJA. Once we keep this context in mind, it becomes apparent that the Court of Appeal's statement that "accountability in this context is the equivalent of the adult sentencing principle of retribution"³⁴ is not a general statement about the meaning of accountability in the YCJA. Rather, it is only a limited statement about the use to which accountability is put in s. 72 of the Act. In fact in three other places in the YCJA (in the preamble, in s. 38 and in s. 39), it is plain that accountability is concerned not only with ensuring proportionality in sentencing between the seriousness of the offender's moral culpability for his wrongdoing and the severity of the resulting sentence but also with ensuring the offender's rehabilitation and reintegration to society.

Our whirlwind tour of recent sentencing theory debates suggests that a criminal sentence can best hold individuals to account for their wrongdoing if it is designed in such a way as to demonstrate to them the wrongfulness of their conduct *and* to bring them to a position in which they can recognize the wrongfulness of their conduct and seek to reintegrate themselves into society. In order to accomplish that end, sentencing judges ought to embrace more creativity in the crafting of sentences and not be restricted by an undue emphasis on retribution.

34. *R. v. O. (A.)*, *supra*, footnote 14, at para. 46 (emphasis added).