



Re-imagining justice for children: A new rights-based approach to youth justice

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Abstract

Over the past decade international children's rights standards have been used as a tool to analyse and critique the youth justice system in England and Wales and have increasingly formed the basis of legal challenges. However, they have not necessarily addressed some of the major shortcomings in the English and Welsh youth justice system. This paper argues that this is because of a theoretical gap in the practice of children's rights in youth justice, and thus it attempts to address this by re-imagining justice for children by developing a theoretical basis for some of the key principles in youth justice. It does so by placing children's rights within a wider rights-based theory of criminal justice.

Introduction

Over the course of the past decade children's rights have become a principal tool for analysing and critiquing the youth justice system in England and Wales. The European Convention on Human Rights (ECHR) and the United Nations Convention on the Rights of the Child (UNCRC)¹ have provided the framework for scholars, non-governmental organisations, and international rights bodies to assess whether a culture of children's rights is evident in the treatment of adolescents who are in conflict with the law.²

International rights standards have also increasingly formed the basis of legal challenges brought by children and their advocates. Many of the successful claims have invoked what Ferguson calls 'rights for children' (2013): rights that extend to children not because of their identity as child per se (which, in contrast, she labels 'children's rights'), but because of their membership of another rights-holding group. In the criminal justice context these include human rights³ as well as the rights that protect interests *qua* (suspected) offender, such as the right to a fair hearing or the right not to self-incriminate.⁴ These rights become 'rights for children' by their extension to juveniles and through adjustment of their content to account for presumed and actual differences in capacity and vulnerability.

However, international (children's) rights standards have been less successful in addressing some serious and frequently identified shortcomings of the English youth justice system, including the low age of criminal responsibility⁵, the (over) use of (adult-like) detention⁶, and inadequate resettlement provision.⁷ This is not necessarily

¹ See especially Articles 37 and 40, and the general principles contained in Articles 3, 12, and 16; the United Nations Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) 1985; the UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) 1990; and UN Committee on the Rights of the Child *General Comment No 10: Children's Rights in Juvenile Justice* (CRC/C/GC/10, 25 Apr 2007).

² On the use of the UNCRC as an audit tool see Kilkelly, 2011.

³ Examples include *R (on the application of C) v The Secretary of State for Justice*, [2008] EWCA Civ 882; [2009] QB 657 and *R (on the application of BP) v Secretary of State for the Home Department* [2003] EWHC 1963 (Admin) at para 27 (though the applicant was unsuccessful on the particular facts of the case).

⁴ For example, *V v United Kingdom* (1999) 30 EHRR 121; *SC v United Kingdom* (2004) 40 EHRR 10; *R (on the application of K) v Parole Board*, [2006] EWHC 2413 (Admin); [2006] All ER (D) 75R; *R (on the application of C) v Sevenoaks Youth Court* [2010] 1 All ER 735; and *R (on the application of HC)(a child, by his litigation friend CC) v The Secretary of State for the Home Department; The Commissioner of Police of the Metropolis* [2013] EWHC 982 (Admin).

⁵ Which remains at 10 (Children and Young Persons Act 1933, s. 50). See *V v United Kingdom* above n.5.

⁶ Custodial rates for juveniles have dropped significantly in the last four years but this appears to be due to political and economic factors, not rights-based reasoning (see Bateman, 2012). On the limits of rights vis a vis the type and availability of custodial accommodation, see *R (on the application of Secure Services Ltd and others) v Youth Justice Board* [2009] EWHC 2347 (admin).

⁷ For example, a child leaving custody must cross the high threshold of Article 3 ECHR or rely on rights attaching to another legal status such as care-leaver in order to have a *right* to resettlement. See Hollingsworth, 2013.

because of deficiencies in the content of the international standards or weaknesses in the enforceability mechanisms.⁸ Rather, the failure of international (children's) rights standards to bring change in these areas is also likely to be as a result of a 'theory gap' (Ferguson, 2013) in the practice of children's rights in youth justice: claims are being made for children's rights even though there are 'unresolved conflicts of a philosophical nature'.⁹

Rights *for* children, such as rights *qua* (suspected) offender, are seemingly less affected by the theory gap because the child has the same status as rights-holder as the adult offender. Varying the content of rights so that they are child-appropriate – for example, altering the physical environment of the courtroom so it is less intimidating to a child, thus facilitating her effective participation under Article 6 ECHR – is simply a matter of achieving equality. In contrast, using rights to (for example) inform the minimum age of criminal responsibility (MACR), set differential sentencing for adults and children, and increase obligations for resettlement provision, is more challenging because these are examples of *children's* rights proper; dependent on recognising and prioritising the child's distinct status as child as the basis for differential treatment. This presents a conceptual difficulty: how can rights-based claims founded on children's special and distinctive status (for example, more lenient sentencing, greater resettlement rights) be simultaneously claimed alongside those that depend on children's shared status with adults (for example due process rights)? This can be achieved only by providing a theoretical approach that is able to reconcile the dual status and rights of the child: as child and as (suspected) offender.

Evidence of this theory gap emerges when we consider how arguments for increasing the minimum age of criminal responsibility, differential sentencing and resettlement rights for children are usually constructed. On the whole, such claims focus on children's status *qua* (suspected) offender, and attempt to show how, *vis a vis* that status, children are different from adults. Principal amongst these proclaimed differences are that children below a certain age lack the requisite capacities for criminal responsibility; or that the under 18s are less culpable because of reduced volitional control and cognitive and moral reasoning; or that childhood identities are less fixed and therefore resources invested in preventative resettlement programmes for children pay greater dividends than for adults. Framing the differences between adults and children within the offender paradigm avoids the conceptual difficulties identified above, but it means that the justification for the special treatment of children hinges on the narrow

⁸ Though this is likely to be a contributory factor for the UNCRC which is not domestically enforceable in UK law and currently only has a committee-based state reporting system. An Optional Protocol to the Convention has introduced a new individual complaints mechanism which will come into force when it has been ratified by 10 member states.

⁹ Official Commentary of the Beijing Rules, above n 1.

and highly contested issue of age-related differences in capacity(ies). Disputes become focused on the type of capacities required in the penal context and at what age those capacities are acquired, with proponents on either side drawing on competing scientific evidence or 'common sense' to support their various claims.¹⁰

This is not to say that capacity is irrelevant. However, there are more fundamental differences between children and adults as rights-holders which if articulated can provide the necessary justification to underpin some of the key children's rights standards in youth justice (such as a higher MACR and child appropriate sentencing), thus strengthening their application in practice. However, this must be done in a way that does not undermine the child's status and rights as (putative) offender.

This paper thus attempts to re-imagine justice for children by developing a theoretical account of children's rights in youth justice that is able to articulate and reconcile the child's dual status and rights as offender and as child, and in doing so provide a theoretical basis for some of the key principles in youth justice. It does so by placing children's rights within a wider rights-based theory of criminal justice. My argument starts from the position that a vital component of a rights-compatible criminal justice system in a liberal democracy is that it is consistent with citizens' autonomy. Autonomy is comprised of two essential elements: the first is 'agency' (choice) and the second is 'full autonomy'. Both are crucial to understanding the child's rights: the former to establish the child's shared status with adults as rights-holder in the penal context; and the latter to establish her difference. 'Full autonomy' derives from a definition of autonomy that is relational and founded within a capabilities approach, and which serves to highlight the importance of childhood experiences and relationships to a person's capacity to live autonomously. Specifically, it is argued that childhood is a time for gathering and developing 'assets'¹¹ which are considered essential (in the particular polity in question) for all to enjoy equally a fully (relational and capabilities based) autonomous adulthood. These assets should be protected by a category of (child-specific) rights that are deemed 'foundational'. Significantly, the difference between adults' and children's capacity for full autonomy that underpins the concept of foundational rights is not wholly dependent on empirical claims; it derives also from children's legal status.

Recognising the existence and importance of children's 'foundational rights' allows for greater conceptual clarity in understanding the requirements of a rights-consistent youth justice system: it must not only be compatible with the child's *current agency* (as is the

¹⁰ See Buss, 2009 for an excellent account of the difficulties of relying on social science and neuroscience evidence to understand capacity and the differences between adults and children.

¹¹ I have borrowed the term 'assets' from Martha Fineman's work (2008) on vulnerability, which she says builds on relational accounts of autonomy.

case for adults) but also her *future* capacity for *full* autonomy, as protected by her foundational rights. Accordingly, there should be an obligation placed on the state to ensure that the youth justice system is structured in such a way that children's foundational rights are not permanently or irreparably harmed.

1. The centrality of autonomy to a rights-based criminal – and youth - justice system

My argument starts from the premise that punishment is a form of coercive force which deliberately inflicts pain and restricts liberties and is thus the antithesis of the liberal democratic state's duty – and the source of its legitimacy – to protect equally the rights and interests of its citizens (Dubber, 2007; Thorburn, 2011). Political justification is therefore needed to legitimate the use of such force and, taking a Hegelian approach to punishment, this can be achieved where the punishment is consistent with the freedom, or autonomy, of *all* agents (Hegel, 1991).

Two types of freedom, or autonomy, are distinguished here.¹² The first is autonomy as agency. Agency – the bare capacity for choice – is a concern that all agents share because it is the basis of their rights-status as members of the polity¹³ and therefore it is also the basis of criminal responsibility.¹⁴ For children, this means, *prima facie*, that when they have developed the capacity for agency they acquire both rights-status and responsibility before the criminal law. Equating rights-status and criminal responsibility with agency is beneficial to children in a number of ways. First, it 'honours' the child when it holds her criminally responsible by recognising her status as a rights-holder (Brooks, 2012). Second, when children are subject to criminal processes then, like adults, they must be treated according to principles of equality, due process, and justice. This means that a juvenile justice system founded on discretionary powers, such as welfare, is prohibited under this account.¹⁵ Finally, it places limits on the types of punishment used. An individual's agency in a *local* sense can legitimately be restricted by punishment,¹⁶ but punishment that permanently deprives a rights-holder – including a child – of her capacity for *global* agency is illegitimate in the sense that it deprives her of her autonomy over the course of her life (see A. Franklin-Hall, 2013). In such circumstances, the offender – adult or child – cannot accept the punishment as

¹² The analysis draws on Brudner's legal retributivist account (2009).

¹³ My concern here is with political, or legal, rights-status. Whether children who lack this capacity are rights-holders in a moral sense is beyond the scope of this paper.

¹⁴ Brudner (2009: 30) 'Not only do all beings for whom free choice is possible have the same rights to exercise their capacities for choice; they also have the same legal liabilities'.

¹⁵ See the US Supreme Court decision in *In Re Gault* 387 US 1 (1966) which rejected *parens patriae* as the basis for the juvenile justice system and C. Worrell, 1995.

¹⁶ *Local* autonomy relates to authority over a particular decision at a particular time; punishment can legitimately restrict how a person spends her money for example (where she is fined), or requires that her time is spent in community service.

consistent with her own autonomy. It is for this reason that Dubber (2007) argues against the death penalty as a politically justified punishment.

However, an account of a rights-based system of punishment that requires only consistency with agency, where agency is understood simply as the capacity to exercise choice, is impoverished in at least two regards. First, given that the capacity to exercise choice is acquired at a very early age (Brennan, 2002), under a 'pure' agency account children would become criminally liable at a stage in life that most of us would find grossly unacceptable. Secondly, because the imagined rights-holder is stripped of all characteristics, experiences, and social conditions, it assumes that all individuals are equally able to act freely when in fact they are not. Formal justice can therefore lead to social *injustice*, particularly for children.

However, agency is only one aspect of freedom that is relevant to the penal system. The second type of freedom is 'full autonomy': the freedom to exercise real choice in a way that reflects one's subjective preferences, values and morals. It is here that the differences between children and adults emerge. Although most children acquire basic agency at an early age, the capacities required to be 'fully' autonomous are more numerous and complex and are developed and acquired throughout childhood and adolescence.¹⁷ Once adulthood is reached, the law assumes the requisite capacities have been attained and the person is fully autonomous. But it presumes the opposite for children, and this presumption regarding children's status as rights-holder should be incorporated into the penal system. My argument, therefore, is that just as a system of punishment would be illegitimate if it restricted a person's capacity for global agency (because that cannot be accepted by an individual as consistent with her freedom), it is also illegitimate if it permanently restricts the child's ability to develop the capacities necessary for future (global) full autonomy.

2. Defining full autonomy: A relational and capabilities approach

The definition of 'full autonomy' used here is based on relational autonomy and the capabilities approach. Philosophical accounts of relational autonomy begin with the premise that persons are 'socially embedded' and identities are developed within the context of social relationships. From this perspective, it is possible to identify three ways in which autonomy may be affected by a person's socialisation and experience of relationships, as influenced by cultural norms, practices, and expectations (see Nedelsky, 1989; Friedman, 1997; Brison, 2000). First, it impacts upon the formation of the individual's values, desires, attitudes, and beliefs that together make up her 'motivational set', against which the authenticity of a person's decision-making can be assessed. Second, it influences the development of the internal capacities necessary to

¹⁷ See section 2 below.

act autonomously, which includes the possession of certain ‘attitudes to self’ (self-respect, self-trust and self-esteem) in addition to agentic skills. These capacities underpin the ability to assess and re-assess one’s motivational set and to make decisions that are in alignment with it. Finally, an individual’s place in and experience of various social structures (for example the family, education, or employment) and social constructs (such as race, gender, or class) affect the extent to which she is able to act on her desires, by shaping both the range of options available, and her ability to recognise that she has those options.

A relational account of autonomy is used here and is supplemented by the capabilities approach developed by Sen (1992; 1999) and Nussbaum (2007; 2011). The capabilities approach measures freedom by examining the ‘opportunities for activity’ and ‘the alternative combinations of functionings (beings and doings) that are feasible for [an individual] to achieve’ (Sen, quoted by Nussbaum, 2011: 20). This is an individual’s ‘capabilities set’. It follows from a capabilities definition of freedom that a person is autonomous where not only is she free to choose but where she also has an adequate number of options to choose *from*. Brison describes this as ‘an adequate capability to function’ (2000: 283), or, in the words of Sen, it is where a person is able to do and to be what she has reason to value (1999: 18).

When ‘full autonomy’ is defined in this way – with an emphasis not only on agentic skills but also self-esteem, self-worth, and self-respect and on having the ‘freedom to do and to be what one has reason to value’ – the differences between children and adults begin to emerge. As noted above, children acquire basic agency from a young age but the capacity for ‘full autonomy’ develops throughout childhood and adolescence. However, like capacity for agency, *de facto* full autonomy will vary between individuals of any age and thus no clear line can be drawn between *all* adults and *all* children. Therefore, if – as argued below – the justification for special rights for children based on protecting their capacity for full autonomy – foundational rights – cannot be based on actual differences between children and adults, then where is that justification to be found? The answer comes by examining the child’s status as a rights-holder within the legal and political community.

3. The child as rights-holder in the legal and political community

That children are considered rights-holders in law is beyond question. However, children do not have *full* enjoyment of their rights in the same way as adults. This is evident in two ways: the procedural differences between adults and children as rights holders (i.e whether they have *de jure* autonomy: the legal framework does not always recognize the child’s right to claim or waive their rights in full, regardless of capacity) and the differences in the substantive content of rights: we deny children certain rights (e.g. the right to vote) whilst conferring on them a range of additional rights in

recognition of their perceived and actual differences. Therefore, there is a legal distinction between children and adults as autonomous rights-holders that is both procedural (who claims and when) and substantive (what is claimed). Children thus have a special status as rights-holder, one that reflects their 'probationary' status in the legal and political community (Noggle, 2002).

Whether or not this accurately maps on to children's *de facto* autonomy is not important here. What matters is that childhood is a time during which the legal framework treats children's autonomy differently from adults. It follows from this that when a child reaches the age of majority and the 'legal scaffold' (Buss, 2009) that supports her special status is removed,¹⁸ she is presumed legally and politically to have gathered and developed that which is necessary to enjoy a fully autonomous life. Thus, I wish to argue, the state should have a duty to ensure that, at the point when the framework that creates and supports the *child's* special status as rights-holder is removed, the child is in a position to 'step up to the mark' and is capable of acting as a fully autonomous rights-holder. One way to meet this duty is to identify and give special status to a particular category of childhood rights, 'foundational rights', that support the conditions that make it possible for the child to live a *de facto* fully autonomous life at the point when she acquires *de jure* autonomy.

This argument may seem tautological – that the law gives children special rights so it should give them special rights (foundational rights) – but there are two benefits to this argument. The first is that it provides support for a consistent approach to children across legal contexts. If the state regards the child as a special type of rights-holder, a semi-autonomous rights-holder, this should be taken into account in all of the child's interactions with the state, including for example, in criminal justice. To be clear, this is not an argument for what Barry Goldson (2009) calls 'intra-jurisdictional' coherence (such that all legal rights and responsibilities should be granted to children consistently, at the same chronological age or capacity-determined threshold); rather, it is an argument for consistency in how we view the child's legal status as rights-holder *overall*. This leads to the second benefit: the description of the law's approach to children's autonomy is intended to make the point that children have a different status as rights-holder; it tells us something about how we see children within the law and the political community. Arguably, what it demonstrates (especially given the mismatch between *de facto* and *de jure* autonomy) is that the law is concerned not only with what children *are* (their achieved capacities) but also with their *potential* (Buss, 2009).

¹⁸That is, when she is conferred with full autonomy rights (*de jure*) and the rights that protect the special interests of children are terminated.

Foundational rights are an explicitly articulated example of the focus on children's potential and future status as rights-holders and show us what is special about *children's* rights. It is not that children are lacking something that adults possess, but that we wish to maximise their potential to become something more. By decoupling achievement from aspiration, the capacities for 'full' autonomy that we aim to develop during childhood can go beyond the level of autonomy that we expect of adults in order to regard them as independent. As Franklin-Hall notes:

[d]uring a person's youth, we may attempt to prepare the young person as well as possible with competencies, skills, and virtues for adult life. But after a person reaches a certain age, she attains full independence so long as she has the necessary minimal competence which almost all adults possess.
(2013)

This account of children's rights may appear overly paternalistic or too future-focused on the child as *becoming* rather than *being*. However, as Freeman has recently commented:

[i]t is important to recognise that children are more than pre-adult becomings. But it is equally important to understand that appreciating that they are 'beings' does not preclude their being also 'becomings'. It is all too easy to assume that children have to be one thing or the other. That the child is both a 'being' and a 'becoming' is often glossed over.
(2010: 13)

In youth justice, attention is primarily placed on the child as 'being'. Foundational rights are an attempt to highlight the child's special status as a 'becoming' rights-holder; one whose potential means that we can justifiably focus on 'what we want children to become and how we might help them get there' (Buss, 2009: 54). It is this that forms the basis of specifically *children's* rights in youth justice.

4. The significance and scope of foundational Rights in the Youth Justice System

The significance of foundational rights in the criminal justice system is two-fold. First, because these rights derive from the special status of children, there are a specific category of *children's* rights rather than 'rights of children'. This means that even if we are unable to demarcate adults from children on the basis of vulnerability or capacity, we can still make claims for differential, rights-based, treatment for children. Secondly, because foundational rights protect children's capacity for future full *autonomy*, they are an essential part of a legitimate criminal justice system. This allows us to identify certain international standards or children's rights as *fundamental rights* and not simply aspirational, instrumental, or benevolently conferred goods that can be restricted – or at least not permanently – where the child is in conflict with the law.

Foundational rights are a political not a metaphysical concept and so their precise articulation should be determined within each polity. Some examples of the types of interests that could, under a relational capabilities approach, be attributed the label 'foundational right' include¹⁹: the right to life; an adequate level of healthcare and living standards such that the child's future health is not unavoidably damaged; educational provision sufficient to develop the child's capacity for rational decision-making, as well as her future participation in political and community life; and the protection of nurturing, positive, relationships that go beyond the prioritisation of certain *forms* of relationship to include also their *quality*. These latter two interests are both essential for developing attitudes to self, such as self-esteem, self-respect and self-worth.

5. A Children's Rights-Based Youth Justice System?

To reiterate, a criminal justice system is legitimate only to the extent that it is compatible with autonomy including, for children, their capacity for future *full* autonomy.

Foundational rights protect the 'assets' that help to develop and protect full autonomy and thus the youth justice system should be structured in such a way as to ensure that there is no irreparable, permanent damage to these child-specific rights. This can be achieved in at least four, mutually supportive, ways.

First, the minimum age of criminal responsibility should be set above the age that we think there will be permanent harm caused to the foundational rights of most children. This approach avoids the difficulties of attempting to match the MACR to capacity (difficulties arising because capacity varies between individuals and its meaning in criminal justice is contested) and instead requires the long-term impact of punishment on children's potential for autonomy to be taken into account: the stigmatising effect of punishment, the impact of removal from families, schools, and communities where a child is imprisoned, the diminished likelihood of achieving educational and employment success, and the impact on long-term physical and mental health for example. Also, by focusing on the impact of punishment on what the child might *become*, rather than backwards at what capacities she has, blame can be detached from punishment (see Buss, 2009) thus creating space for alternative, non-penal accountability mechanisms such as restorative conferences. This ensures that victims of childhood criminality, including other children, are not deprived of justice.

Secondly, the youth justice system should be structured so as not to cause harm to children's developing capacity for full autonomy. To identify a few examples, we might expect to see equal educational provision for children in custody as for children outside

¹⁹ These are based upon Nussbaum's ten central capabilities: see Nussbaum, (1997).

of the criminal justice system;²⁰ protection of the child's privacy in court and the removal of 'naming and shaming', investment in social workers in custodial institutions to ensure local authorities meet their Children Act 1989 duties to imprisoned children; specialist training and a low child-to-worker ratio in secure institutions so that children have the nurturing relationships necessary for the development and maintenance of healthy attitudes to self; and frequent family visits if the child is incarcerated.

The final two ways the youth justice system must be structured to avoid permanent harm to foundational rights is through differential sentencing for adults and children (setting limits on child punishment and integrating child-specific principles such as detention as last resort); and by underpinning a reparatory obligation to children leaving the criminal justice system, thus establishing a rights-based system of resettlement.

Concluding remarks

Foundational rights are not intended to provide a complete rights-based approach to youth justice but they are one essential element of a legitimate youth justice system. Nor is the *content* of the interests protected by foundational rights completely novel; many reflect the existing legal rights of children and the standards in international children's rights documents, and for the most part they align with what criminological and child research tells us is good for children. The correlation is not a weakness of foundational rights as a concept; it is its strength. It provides the necessary theorisation to explain why some of the standards can rightly be deemed fundamental; not just from an external children's rights analysis, but from an internal criminal justice perspective. In this sense, the proposal does not 're-imagine' justice for children, rather it reinforces justice by strengthening the arguments of those who practice children's rights, allowing us to demand special treatment for children without diminishing their claims to rights *qua* offender.

²⁰ See the Ministry of Justice's recent proposals in *Transforming Youth Custody: Putting Education at the Heart of Youth Justice* (2013).

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