The role of lawyers in supporting young people in the criminal justice system: balancing economic survival and children's rights.

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Legal aid reductions have caused a crisis in the criminal justice system impacting the quality of representation and advice provided by lawyers. This paper is particularly concerned with the impact of these cuts on young people in the youth criminal justice system. The paper will examine how changes to the way in which defence lawyers are funded is having a damaging impact upon the experience of young people involved in the criminal justice system. The particular vulnerability of young people, coupled with the complexity of laws and procedures surrounding youth justice make it particularly concerning that the system is financially incentivising the provision of inadequate representation in the youth justice system. These issues will be considered in light of the standards set by the Council of Europe *Guidelines on Child-Friendly Justice.*

Keywords: legal aid cuts, competency of youth advocacy, youth court trials, right to a fair trial

Introduction

Where a person aged between 10 and 17 is charged with a criminal offence, the matter is dealt with in the youth court, unless there is a statutory bar.[3] The youth court is a special type of Magistrates' Court which is designed to meet the specific needs of young people. The youth court is designed to be less formal than a Magistrates' Court and hence less intimidating. Magistrates are encouraged to sit on the same level as other people (Judicial College 2016). It is closed to the public to protect the young defendants and they are addressed by their first names. However, in recent years there has been extensive research examining young people's experiences of youth criminal proceedings. This evidence indicates that young people in the

criminal justice system are struggling to engage meaningfully with the criminal process in the youth court, that the standards of advocacy in the youth court are variable and many advocates were found to lack knowledge of youth justice law, procedures and provisions and struggled to communicate with young defendants in an age-appropriate and effective manner (Wigzell *et al.* 2015). These factors are resulting in a paradoxical situation where, in light of the particular complexity of youth justice law and the multifaceted needs of young people involved in the criminal justice system, those defendants most in need of specialised and individualised legal support are receiving the lowest quality.

This paper aims to explore how changes to the way in which criminal lawyers are funded for their work is having a damaging impact upon the quality of legal services provided to young people involved in the criminal justice system. We will examine how cuts to legal aid have inexorably exacerbated the devaluing of working in the youth court, resulting in youth court work being left to inexperienced and over-worked professionals and the consequent deficient representation for young people outlined above. The article will build upon recent empirical studies critiquing the practices of criminal legal aid lawyers by proposing an original lens for analysing and understanding that how legal aid is funded creates inequalities and asymmetries of power that violate principles enshrined in children's rights law. The United Nations children's rights instruments and Council of Europe 'child friendly' justice guidelines provide the children's rights frameworks that we will draw on. Specifically this problem will be situated in the theoretical framework of Mantouvalou's (2020) concept of state-mediated structural injustice, which offers a lens through which to critically explore how funding of legal aid assists in the (re)production of structural inequalities that impact children in a way which replicates Shalhoub-Kevorkian's (2019) concept of 'unchilding', a process of social exclusion and disruption. The reason we develop an integrated theory of state-mediated structural injustice that results in unchilding is because both the origins and solutions to these theoretical

frameworks are intertwined and inseparably connected. Using these frameworks allows us to unravel the legal, economic and social practices that generate accepted rules, norms and structures that inevitably and imperceptibly produce hierarchies of oppression, injustice and dispossession of children's rights. Critically exploring how the state funds the legal advice and representation of young people in the criminal justice system in this way could support pragmatic advancements towards responses to youth criminal and anti-social behaviour that that are commensurate with supporting the rights and welfare of those children.

Young people's experiences of the youth court and their lawyers

Felstiner (2001) emphasised that justice depends on the health of the lawyer–client relationship. Lawyers themselves also recognise that the need to foster these good relations with their clients is at the core of their role. The ideal approach places the interests of the client at the forefront (Mungham and Thomas 1979). These views are reflected in leading criminal practitioner guides such as that offered by Cape (2006, p. 7) which explains that:

> The client may be in a variety of emotional states which will require an approach that is both empathetic and inspires confidence. Empathy may be demonstrated by being willing to listen to what the client has to say … allow the client the time and the opportunity to express how and what they are feeling.

Furthermore Binder et al. (2004) conceptualise the lawyer–client relationship as counselling; lawyers need to be willing to listen to clients' concerns. Research has shown that young people in the criminal justice system place a particular weight on relationship-building (Wigzell et al. 2015, p. 43) and that poor rapport between the young defendant and the lawyer makes it more difficult for lawyers to elicit relevant information from the young client (Sommerlad and Wall,

2000). Studies have shown that young people who had input into the court decision are more likely to accept that court decision, even if the ultimate outcome is not what they wanted (Home at Last and Children's Law Centre 2006). Young people feel empowered when they think their input is being considered (Ibid.). However evidence suggests that young defendants are often not in a position to participate in this was as they struggle to understand legal proceedings or the language used by lawyers, they report feeling intimidated and isolated in court and may not receive a proper explanation of what has happened until after a hearing is over (Hazel *et al.* 2002; Botley *et al.* 2010). As a result the young person may not be able to give instructions to her lawyer and may not be in a position to make vital decisions. Cleghorn *et al.* (2011) found that young people often feel frustration that the courts seem rarely to understand the context in which their offences were committed, including the pressures facing them. The United Nations Committee on the Rights of the Child (2016, para. 29) have also expressed concern that many children feel they are not listened to by legal professionals working with children in conflict with the law. Such feelings of bewilderment can lead to young people becoming passive parties in the court process unable to understand the impact the proceedings will have on their lives, thus undermining the rehabilitative function of the youth court (Driver and Brank 2009). The *Youth Proceedings Advocacy Review* report similarly highlights that the highly formal language and nature of court proceedings pose significant barriers to young defendants' understanding of, and engagement with, the criminal trial process (Wigzell *et al.* 2015). The young defendants interviewed reported that advocates could be difficult to understand in the context of a court process that, more generally, was often regarded as highly confusing. Many advocates were found to lack knowledge of youth justice law, procedures and provisions and struggle to communicate well with young defendants in an age-appropriate and effective manner. Communication is a necessary condition to enable young people's agentic engagement with the criminal justice process. Young defendants in the *Youth Proceedings Advocacy Review*

reported inadequate, inconsistent and often ad hoc approaches to assessing their needs and vulnerabilities, with the result that in many instances specific needs were not identified by the time of the court appearance.

Many of the children in the criminal justice system come from some of the most dysfunctional and chaotic families where drug and alcohol misuse, physical and emotional abuse and offending is common (Ministry of Justice 2016). Around 60% of young people in the criminal justice system have speech, language and communication needs and 30% have a learning disability (Bryan *et al.* 2007; Hughes *et al.* 2012). In comparison to the general and adult population, young offenders exhibit much higher rates of learning disability (Loucks 2007); post-traumatic stress disorder (Steiner *et al.* 1997); attention deficit hyperactivity disorder (Kazdin 2000); and other psychiatric disorders, notably conduct disorder (Royal College of Psyciatrists 2006, p. 50). Furthermore their functioning in respect of considering issues empathically from the perspective of others, capacity for autonomy and resisting pressure from others and their ability to experience guilt and shame are underdeveloped (Stone 2010, p. 292). All of these factors will inevitably impact upon their ability to understand the justice system and to communicate their wishes and needs (Justice Committee 2016). This is particularly pertinent in view of the fact that legal advisers are often required to advise, and obtain instructions from, very young children whom they have had no prior involvement with and who have no previous experience of police custody, are distressed by the experience, may have complex behavioural or intellectual difficulties, and may be accompanied by hostile or distressed appropriate adults (Coleman *et al* 2011; Department of Health 2009). As will be seen later in the article, a failure to identify and address these needs can lead to disposal, bail and sentencing decisions that can further entrench young people in the criminal justice system (Deuchar and Sapouna 2015). In the next section we will examine how the structure and organisation of criminal legal aid provision is imposing huge financial constraints upon

criminal firms, forcing them to engage in practices which prioritise financial efficiency, which in turn has a serious impact on the quality of representation received by young people in the criminal justice system, who as we have seen are often particularly vulnerable.

Reductions in legal aid

Reductions in legal aid over the past ten years are having a serious negative impact on how lawyers perform their role in criminal proceedings.[4] Spending on legal aid for criminal law has fallen from around £1.2 billion to £890 million per year during this period (Ministry of Justice 2019a). In April 2013, the then Lord Chancellor, Chris Grayling, announced cuts of at least 17.5 per cent to criminal legal aid fees for solicitors, solicitor advocates and barristers, to be implemented in two tranches. The first tranche saw an 8.75 percent cut implemented in March 2014. In 2017 the Ministry of Justice announced that the second tranche of an 8.75 per cent fee cut would not be implemented, instead changes would be made to the Litigators Graduated Fee Scheme (LGFS). The LGFS was introduced in 2008 and is a remuneration scheme for litigators undertaking Crown Court work. The LGFS includes a cap on the number of pages of prosecution evidence for which defence solicitors receive payment under the graduated fee (Justice Committee 2018). Any pages over this cap may only be remunerated at the discretion of the Legal Aid Agency. Up until 1 December 2017, the cap on the number of claimable pages of prosecution evidence was set at 10,000 pages but this was reduced to 6,000 pages. The Ministry's Impact Assessment estimated that, as a result of the reduction of this cap, legal aid providers would receive approximately £26-£36 million less per year (Ministry of Justice 2017). In response to these cuts to the LGFS fees, the Crown Prosecution Service (CPS) has recently unveiled a package of revised fees for prosecution advocates to address concerns in relation to unused materials and trials involving multiple defendants, which means for the first time, prosecution counsel will be paid to examine unused material. This however, does nothing

to assist defence lawyers. These changes 'threaten the economic sustainability of criminal defence firms, with negative implications for the criminal justice system – especially for defendants' (Justice Committee 2018, para. 44). Legal aid firms were generally not highly profitable before the reduction in fees; in 2013, such firms were achieving an average five per cent net profit margin for criminal legal aid work (Otterburn Legal Consulting 2014, p. 5). Since criminal legal aid providers tend to be specialized, rather than generalist firms (a long-term trend encouraged by successive governments and legal aid authorities), they cannot easily offset losses in criminal legal aid work with alternative work in other areas of law (Otterburn Legal Consulting 2014; Smith and Cape 2017). Most criminal defence work is largely carried out under legal aid; there is relatively little privately paid criminal defence work and that which does exist tends to be dominated by a small number of relatively large firms.

Any reduction in the number of solicitors' firms that are able to offer legal aid services means that client choice will inevitably be limited. Outside major conurbations, suspects and defendants in future may be unlikely to have any real choice since there may be only a small number of criminal law firms (Otterburn Legal Consulting 2014). Indeed, in some locations that currently have few providers there will be no effective competitive market in the future. Defendants who do not perceive that they have a choice may be less likely to trust their solicitor (Smith 2013) which, in turn, may diminish their trust in the criminal justice system more generally (Hough *et al.* 2010). The quality of criminal defence services is also likely to be a casualty. Quality is the product of an interaction between professional ethics, competition, and financial and other incentives, mediated by any applicable quality assurance measures. Lawyers are often placed in the iniquitous position of deciding whether to act in the clients' best interests or in the financial interests of the firm (Welsh 2017). Faced with a contract that is on the borderline of profitability, lawyers will be incentivised to spend less time on client consultations, case preparation, considering disclosure and investigating evidence. If an early

guilty plea is likely to be the most profitable option from the lawyer's perspective, it may be difficult for the lawyer to resist the temptation to emphasise to their client the systemic incentives of sentence discount and reduced costs. The implementation of a fixed fee payment structure for advice at the police station can only compound such problems (Spiro and Bird 2010, p. xiii). A firm of solicitors is paid a fixed fee for each case they attend at the police station. The fee varies depending on the location of the police station.[5] This ranges from £126.58 for a case in Blackpool to £257.33 for a case in Stanstead.[6] The fixed fee covers the time incurred at the police station, waiting time and travel. Unless the costs of the case, recorded at the hourly rates,[7] are higher than three times the amount of the Fixed Fee (the Escape Fee Threshold), no matter how long the lawyer spends at the police station, the fee will remain fixed (HM Government 2019). The fixed-fee regime for advice at the police station effectively incentivises lawyers to spend the minimum amount of time advising suspects in person and for work to be delegated to representatives (not lawyers) who may lack the experience to deal with complex cases and who may work freelance for an unregulated company (Gibbs and Ratcliffe 2019, p. 22, Kemp 2010). Kemp (2013) also found that the introduction of fixed fees has encouraged solicitors to 'stack' cases at the police station taking several cases in one single day. Not only will this practise cause delays which can result in detainees giving up on their lawyer and opting to go into a police interview without legal representation to speed up the process, but there is also a risk that these detainees will become products being churned out in the criminal justice system rather than human beings with needs and rights (Newman and Welsh 2019, p.80).

Whilst these economic constraints and pressures placed on criminal firms can also impact the representation that adults in the criminal justice system receive, we argue in this paper that it is young people who are particularly affected. The Inns of Court College Advocacy (ICCA) guidelines stress the importance of obtaining as much background information as

possible from young clients (ICCA 2019) in order to effectively advise and represent them. Young clients cannot be expected to know what is legally or evidentially important, not just with regards to the offence itself, but also in relation to the circumstances of arrest. As we have seen, lawyers need time to obtain this information and also often need time to build a rapport with their clients to enable them to feel comfortable enough to share the necessary information with them. However, with the time constraints arising from legal aid cuts, it is rare lawyers have the time to build these necessary relationships and obtain such background information which in turn could have a negative impact on the outcome in court. The retraction of legal aid funding consequently creates a culture that Sommerlad (2001) labelled as 'the factory model of practice', Newman (2012, p.3) labelled a 'sausage factory' and Marsh (2016) characterised as akin to an assembly line.

Legal aid reforms have also led to reduced remuneration for lawyers across criminal courts (Wigzell *et al.* 2015, p. 53). This has led to a 'general undervaluing' (*Ibid*., p. 54) of the Youth Court in particular and has resulted in it being used as a 'training ground' by junior advocates (Gibbs and Ratcliffe 2019). Advocates are paid approximately £500 for a two-day robbery trial in the youth court compared with £1,600 for an adult offender tried in the Crown Court (Ministry of Justice 2016, p.28). Those advocates with more experience are more likely to undertake work elsewhere for higher remuneration while those less experienced will use the youth court as an opportunity to build their skills. An advocate interviewed in the *Youth Proceedings Advocacy Review* reported that the youth court 'is a kindergarten for professionals to gain skills' and similarly a district judge said 'the youth court is side-lined by the profession…it's seen as a place where young barristers and solicitors cut their teeth' (Wigzell *et al.* 2015). All of these factors create a perverse incentive for under 18 year olds to be represented by less experienced advocates for very serious cases, when they need the most experienced lawyers (Gibbs and Ratcliffe 2019, p. 23). These practices are congruent with

Wacquant's (2008) views that economic deregulation of contemporary criminal justice creates an insecure underclass who are cast outside society by welfare state retraction. In the context of this article it is young people involved in the criminal justice system who do not have the resources to pay for their own legal representation, who are often particularly vulnerable, that become Wacquant's insecure underclass. Legally aided criminal defence merely exists to process these individuals in and out of the system, hastening their progression further into the criminal justice system.

Understanding legal aid cuts as 'state-mediated structural injustice'

We will use Mantouvalou's (2020) concept of 'state-mediated structural injustice' to question the liberal rationality that appears to govern young people's experiences of navigating the criminal justice system and the illiberal values that view legal representation for young people as a privilege rather than a right. Mantouvalou's concept of structural injustice attributes responsibility to the state for creating structures of exploitation and domination that place some groups in a position of disadvantage. For Mantouvalou this injustice violates principles that are enshrined in human rights law, which the authorities have an obligation to examine and address. Such a human rights-based approach to exploitation raises fundamental questions about how people experiencing austerity are regarded and treated and about the responsibilities of others towards them (Lister 2013, p.109). Recognition of human rights is particularly valuable for the most marginalised groups as it offers 'the potential for human rights to challenge unequal power relationships and recast the relationship between people experiencing poverty and the state' by enabling them to hold the state accountable (Lister 2013, p.109). One example of such a marginalised group is young people in the criminal justice system.

The compromised approaches to youth criminal advice and representation can be seen as examples of Mantouvalou's (2020) 'state-mediated structural injustice' as the state has reformed the system of legal aid for legitimate reasons (save public money) but that this is particularly problematic when applied to young people and consequently violates children's rights. According to Mantouvalou's theory the state does not directly exploit people, yet the injustice is structural because the processes set up create an unjust structure through state action with a legitimate aim that has harmful effects for large numbers of people. Mantouvalou analyses state-mediated structural injustice in the following ways: it is constituted by legislation, which targets those who are already in a position of disadvantage, supported by a legal framework and an administrative system which sustain these unjust structures and give rise to violations of human rights law. The theoretical framework of Mantouvalou's state-mediated structural injustice helps us to understand how the ways in which the state funds youth criminal representation produces, re-produces and sustains structures of youth exploitation, inequality and domination. While a number of these challenges discussed throughout this paper can apply equally to vulnerable adults in the criminal justice system, they are all specifically problematic for young people given the particular complexity of the laws and procedures surrounding the youth court. As we will see below, the law and procedure is complex within the adversarial youth justice system, and understanding their legal rights and the consequences of certain decisions made may be well beyond the comprehension of many youths within the criminal justice system. Therefore the need for high quality legal advice is particularly important. By analysing the particular complexities and idiosyncrasies of the English youth justice system, this will demonstrate that structural injustice is much more than an abstract concept. It is a defining feature of the institutional arrangements and web of unfair patterns of advantage and power, including subordination, exploitation, and social exclusion

that contribute to and grow out of unjust social, structural and legal conditions (Powers and Faden 2019, 1).

The complexity of youth proceedings and the implications of poor legal advice

Legal advice is a crucial determinant of the outcome for young people (Lamb and Sim 2013; Skinns 2009) and it is very important that young people receive accurate advice at every stage of the process to dispel any misconceptions they may have. For example, research conducted with children and young people to ascertain their understanding of the criminal record regime shows that many mistakenly believe that when they reach adulthood their childhood record of offending is 'wiped clean' (Carr 2019, p. 256; Carr *et al.* 2015). These misconceptions are particularly common in relation to youth cautions which are often erroneously considered as a slap on the wrist. Youth cautions are indeed 'spent' immediately under the Rehabilitation of Offenders Act 1974. However, under the Exceptions Order 1975[8], where a person is applying for an excepted position, which includes work with children and vulnerable adults, spent cautions will be disclosed through a DBS check, unless they are protected under the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 (*SI 2013/1198*). A caution which was administered to a person under 18 years old will be protected if two years have passed since the date that the caution was administered and it is not a listed offence. Listed offences are violent and sexual offences specified in Schedule 15 of the Criminal Justice Act 2003.[9] Therefore despite the fact that a youth caution is an alternative to prosecution and is immediately spent, for certain offences in certain circumstances youth cautions will be disclosed through a DBS check for the rest of an individual's life.

A recent judgment by the Supreme Court shows the damaging effect that a youth caution can have on a youth's future.[10] In one of the cases in this judgment, G was arrested in 2006, when he was 13 years old, for sexually assaulting two younger boys. The offences took place when G was 12 years old and the other two children were aged 9. The police record indicated that the sexual activity was believed to have been 'a case of sexual curiosity and experimentation on the part of all three boys'. The Crown Prosecution Service decided it was not in the public interest to prosecute and G received two police reprimands. He had not offended since. In 2011, when working as a library assistant at a college, he was required to apply for an enhanced criminal record check because his work involved contact with children. The police proposed to disclose the reprimand, with an account of the mitigation. As a result, G withdrew his application and lost his job.

Given that a youth caution is an alternative to prosecution and is immediately spent, it is understandable why legal representatives at police stations, who are trying to obtain the best possible result for their client, would advise them to accept a caution where possible. There is evidence to suggest that some legal advisers have been known to facilitate admissions from children and young people − in the absence of satisfactory evidence against them − in order to 'benevolently' ensure that they are cautioned and spared the rigours of the formal court process (Kemp *et al.* 2011). There is also evidence that young people themselves may, on occasion, make admissions in the absence of evidence for similar reasons (Kemp *et al.* 2011). However, as we have seen the law in relation to the disclosure of cautions is complex and the implications for a young person's future employment prospects can be deleterious (Arthur 2019). As we have also seen, due to current financial conditions, it is often young and inexperienced lawyers who are the favoured employees to be sent to the police station, making it even more likely that young people are being advised to accept cautions without being informed of the potential implications. In addition to this *The Youth Justice Board, Youth Cautions Guidance for Police*

and Youth Offending Teams states that when a youth caution is given orally by the police officer, he/she must explain that the caution will have to be disclosed in certain circumstances if the employer or other organisation is exempted from the Rehabilitation of Offenders Act 1974, for example where they involve working with children or vulnerable adults. It is unlikely however that the police officers will be able to explain this in detail to a youth, given that lawyers who are legally trained, lack knowledge and understanding of the legislation. In the case of *G*, when the caution was administered, his mother was given a leaflet from Surrey Police which suggested the caution would be expunged from his record after he reached the age of 18 or within five years of its issue.[11] This was incorrect and emphasises the complexity and general lack of knowledge around this area. As with the laws around the disclosure of cautions, if a youth is convicted of an offence, even a minor one, it may be disclosed for the rest of their life. Not only is this concerning for reasons similar to those above, but also, we have seen that lawyers are financially incentivised to encourage clients to plead guilty and pushing these young clients through the criminal justice system will only encourage a violation of children's rights. We can conceptualise the approach to youth cautions and criminal records as a form of structural injustice because it coerces poor, vulnerable and disadvantaged young people into making precarious choices that create and sustain routine structures of exploitation that may further entrench them in the criminal youth justice system.

Laws around bail provisions in youth proceedings are also complex and differ from those in relation to adults. Under section 4 of the Bail Act 1976 there is a statutory presumption in favour of bail to all defendants, both adults and youths. This general presumption is rebutted where the right to bail is excluded, for example where a person is charged with murder or where one or more exception applies under schedule 1 of the Bail Act 1976, for example, the defendant would fail to surrender or commit an offence on bail. These provisions are almost the same as those for adults and lawyers routinely challenge the exceptions and attempt to

alleviate these concerns by suggesting bail conditions at the police station and in court. However, there is a further framework in place for young people who are remanded or granted bail which is complex. Bail conditions for young people differ depending on the age of the individual. Young people aged between 10 and 11 years can be remanded on unconditional bail or conditional bail which there are different variations of. Young people aged 12 to 17 can be remanded on bail on the same conditions but electronic monitoring can also be imposed in certain circumstances, for example where the youth has been charged with a violent or sexual offence.[12] When the court refuses a youth bail the court must remand the youth to local authority accommodation under section 91 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Young people aged between 10 and 11 can only be remanded to local authority accommodation. Whereas, young people aged between 12 and 17 may be remanded to Youth Detention Accommodation, rather than local authority accommodation if a set of conditions are satisfied under sections 98 to 101 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The first set of conditions are based on the type of offending. The second set of conditions are based on the history of absconding and also whether there is a real prospect that the youth will receive a custodial sentence. Advocates' lack of knowledge risks undermining the confidence of judges and magistrates. A YOT officer in the *Youth Proceedings Advocacy Review* commented in relation to defence solicitors making bail applications in youth courts:

> …if they think you actually understand what this bail application means, what the risks are and you've actually properly considered what conditions could be put in place to manage that person's risk, then that's fine - they'll release on bail. If you come across as someone that can't string a sentence together, they… [may as well] just go and sit down (Wigzell *et al.* 2015, p. 30).

As well as these complex bail and remand provisions, guidelines for the sentencing of young people are very different from those for adults. Rather than having sentencing guidelines in place for the specific offences as there are with adults, for young people there are definitive guidelines. These guidelines are complex and detailed and differ very much to that of an adult offender. An advocate who was interviewed in *The Youth Proceedings Advocacy Review* commented '[T]he sentencing and the remand procedures for young people are absolutely labyrinth and they have got more complicated rather than better since LASPO' (Wigzell *et al.* 2015, p.25). Various methods of disposal are to be considered when sentencing a youth, such as a conditional discharge, financial order, referral order, youth rehabilitation order (YRO), YRO with intensive supervision or a custodial sentence. A custodial sentence can be a detention and training order which lasts between four months and two years, longer detention if the offence comes under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000, extended sentence of detention where the youth is found to be dangerous or detention during Her Majesty's Pleasure where the defendant is convicted of, or pleads guilty to, murder. A suspended custodial sentence is not available for anyone under 18 years of age.[13]

If advocates and non-advocates at court are struggling with the complexity of the legislation and guidelines and do not have the requisite knowledge or the ability to communicate effectively with young people, their futures are potentially at risk. Young people could be in danger of being unnecessarily remanded, given overly stringent bail conditions which they are at risk of breaching or may be denied the necessary support they require. We can understand these aspects of the youth justice system as a form of structural injustice because they limit and shape individual choices and circumstances and are sustained by the actions, whether intentional or not, of institutions norms and habits (Parekh 2011, 677). These arrangements, institutions and practices, have highly consequential, differential, and unjust effects on young people in the youth justice system. They further entrench patterns of severe

disadvantage, they foreclose options and impose burdens, reduce the control these groups have over their own lives, diminish their social standing, expose them to greater vulnerability to deprivation and abuse, and make them more susceptible to further entrenchment in the criminal justice system and human rights violations (Powers and Faden, 85). These issues have been compounded by the illogical level of qualification that is required when representing youths and the economic restraints making it impossible for criminal firms to offer any additional training, when it is an area which requires it the most.

Competency to work in youth court

Given the complexity of law and procedures in the youth justice system and the unique challenges that representing young people brings, the level of qualification and training undertaken appears to be somewhat lacking. The level of qualification required to represent young people in serious cases appears to be inconsistent with what is required of advocates who are representing adults in serious cases. A rape case involving an adult defendant will always be heard in the Crown Court as it is an indictable only offence. The individual would be represented by either a barrister or a solicitor with the Higher Rights of Audience qualification. A solicitor without this qualification could not represent an individual in the Crown Court. A person aged 10-17 facing the same charges, could be tried in the youth court. In fact, it is increasingly common for young people to have rape cases heard in the youth court, between 2014-2018 763 young people were proceeded against at youth courts for rape offences.[14] The only distinguishing feature in rape trials at youth courts and adult courts are the defendants' ages, but where such cases are heard in the youth court the advocate would not need to be a barrister or a solicitor with Higher Rights. It is concerning that a youth would be denied the automatic right to a Higher Rights Advocate or a barrister in a rape case just because

of the age and consequently the venue of their hearing. Some of this training for Higher Rights Advocates and barristers will be around the formalities in the Crown Court which is not relevant to the youth court, for example plea trial and preparation hearings and indictments. However, a large part of the training would be relevant, and arguably essential, regardless of whether the case is heard in the youth court or the Crown Court. For example, bad character opinion and expert evidence, cross examination, opening and closing speeches, but youths again appear to be the disadvantaged and forgotten underclass. In the Solicitor Regulation Authority's recent consultation *Assuring Advocacy Standards: Consultation* they propose that solicitors practising in youth courts have a criminal Higher Rights of Audience qualification where they are acting as an advocate in any case which would go the Crown Court if it involved an adult, but this is yet to be implemented. Responses to this consultation raised concerns that imposing such requirement would lead to an increase in costs for the Government and place further financial pressure on legal aid firms which are already within an 'extremely fragile market' (Solicitors Regulation Authority 2020). The current economic structure is arguably denying youths an adequate level of representation in some circumstances and therefore putting youths at a disadvantage which is analogous to Mantouvalou's (2020) concept of 'state-mediated structural injustice'.

In addition to the contrasting levels of qualification needed in serious cases for adults and children, the lack of training to work in youth proceedings is generally of concern. The United Nations Committee on the Rights of the Child, in *General comment No. 24 (2019) Children's Rights in the Child Justice System*, emphasise that continuous and systematic training of professionals in the child justice system is crucial. Such professionals should be able to work in interdisciplinary teams, and should be well informed about the physical, psychological, mental and social development of children and adolescents, as well as about the special needs of the most marginalised children. The continuous training should not be limited

to information on the relevant national and international legal provisions. It should include established and emerging information from a variety of fields on the social and other causes of crime, the social and psychological development of children, including current neuroscience findings, disparities that may amount to discrimination against certain marginalized groups such as children belonging to minorities groups, the culture and the trends in the world of young people, the dynamics of group activities and the available diversion measures and non-custodial sentences, in particular measures that avoid resorting to judicial proceedings. The Council of Europe *Guidelines on Child Friendly Justice* similarly require that all professionals dealing directly with children, be it legal officials or others, should receive initial and on-the-job continuous training in matters such as communicating with (traumatised) children and young people, child psychology and children's rights (Vandekerckhove and O'Brien 2013, p. 533). Such training aims to make justice systems more focused on children's rights, more sensitive to children's interests, and more responsive to children's participation in formal and informal decision-making concerning them (Liefaard 2016, p. 911).

As discussed previously, general practices and procedures concerning children and young people who offend differ considerably to those that apply in the case of adult offenders and, accordingly, the CPS has developed specialist accredited youth lawyers. Similarly, in response to the *Youth Proceedings Advocacy Review*, the Bar Standards Board (BSB) published Youth Proceedings competences. Moreover Rule S59 of the BSB Handbook now sets out that barristers working in the youth court, and those intending to do so in the next 12 months, must register with the BSB and declare that they have the specialist skills, knowledge and attributes necessary to work effectively with vulnerable children and young people, which are set out by the BSB in the *Youth Proceedings Competences* and guidance. It is expected that most advocates will undertake a specialist training course. Barristers may also acquire the specialist skills, knowledge and attributes from academic or vocational qualifications, pupillage or

previous work experience; reading resources such as the BSB's guidance or the toolkits available on the Advocates Gateway; informal or formal training including shadowing and any other relevant learning. Practising barristers will have to answer a mandatory question when renewing their full practising certificate, asking if they have accepted instructions to work within the youth court in the last 28 days, are currently instructed and/or intend to undertake youth court work in the next 12 months. The fact that a barrister is registered to undertake youth court work will start to appear on the Barristers Register.

Remarkably, particularly considering the complexities of the law, the particular vulnerability of young people and the serious implications that poor legal advice has on young people, there are no similar standards and/or accreditation for solicitors who advise children and young people in police custody or represent them at court. The Youth Justice Legal Centre and the Law Society have developed a training course for youth justice advocacy. This however is an optional course and there is no requirement that solicitors must complete this before representing young people in the youth court. The course is undertaken in one day at a cost of £295. Firms are reluctant to provide learning opportunities (Taddia 2019) and given the financial constraints of criminal firms, as discussed above, it is highly unlikely that firms would be able to pay for employees to undertake this course and even more unlikely that employees would pay for it themselves. The cuts to criminal legal aid incentivises firms to push their employees through the exams to become duty solicitors and accredited police station representatives as the end result will be much more lucrative. Young people in the criminal justice system are again being put at a disadvantage and the current position and issues surrounding the requisite qualifications and training to represent youths is very much an example of Mantouvalou's (2020) concept of 'state-mediated structural injustice' as the economic structures are organised in a way which exposes young people to vulnerability, victimization and further entrenchment in the youth criminal justice system.

Ensuring children's rights are upheld

Examining structural injustice, Parekh (2011, 683) suggested that the state's obligations to change the structures and unfair power relations that create the injustice and disadvantage for children can be grounded in children's rights law. As Vandenhole (2014, p. 615) notes, an analysis through the prism of children's rights is often coined 'a children's rights-based approach' which is part of a more general human rights-based approach. As austerity measures weaken social protection systems and the provision of legal aid, a children's rights approach offers the possibility of challenging the parameters of the neoliberalism and the austerity agenda used to justify using financial efficiency as an excuse to marginalise young people in the criminal justice system. Thinking about children in the youth justice system through this lens enables us to build a theoretical construct illustrating the invidious position current financial conditions place young people in the criminal justice system.

A fair trial requires that the child accused of having infringed the penal law be able to effectively participate in the trial, and therefore needs to comprehend the charges, and possible consequences and penalties, in order to direct legal representatives, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measures to be imposed. High quality representation is essential if young people are to receive appropriate advice and a fair trial, as good representation helps to mediate the power disparity between the state and the child and ensure that the treatment of children is directly linked to their legal status under international human rights law. The Council of Europe *Guidelines on Child Friendly Justice* provide a conceptual bridge between the discourses on legal representation and children's rights. In 2010, the Council of Europe (COE) issued its comprehensive *Guidelines on Child Friendly Justice* developed as part of the CoE's

comprehensive children's rights strategy. These Guidelines explain precisely how children's rights should be upheld before, during and after justice proceedings, and define child friendly justice in the following terms:

> … justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings.... [IIc].

With the adoption of the Guidelines, the concept of child-friendly justice has become part of the European legal and political framework concerning the position of children in criminal justice systems, as well as civil and administrative justice systems. Although the Guidelines must be regarded as a nonbinding legal instrument, they are based on the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights whose judgments are binding in domestic law. Despite Brexit, the UK is not planning to leave the Council of Europe. Therefore there is a strong imperative to locate children's rights within the Council of Europe's *Guidelines on Child Friendly Justice.* The Guidelines clearly signal that children should be enabled (legally empowered) to play active roles before, during, and after judicial proceedings. They also identify the essential components of legal empowerment of children as including the provision of adequate information, legal or other appropriate assistance, and access to justice. Similarly the UN Committee on the Rights of the Child General Comment No. 24 (2019) on *Children's Rights in the Child Justice System* reiterates the need to support children with communication and the reading of documents. Furthermore General Comment No.12 on *The Right of the Child to be Heard* (2009) recommends that the context in which a child exercises her or his right to be heard has to be enabling and encouraging, so that the child can be sure that the adult who is responsible for the hearing is willing to listen and seriously consider what the child has decided to communicate (UNCRC 2009, [42]). Proceedings must be both accessible and child-appropriate. Particular attention

needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy and appropriately trained staff (*Ibid*., [34]).

Goldson and Muncie acknowledge the importance of United Nations children's rights instruments and Council of Europe 'child friendly' justice frameworks as important benchmarks for rethinking approaches to youth justice (Goldson and Muncie 2012, p. 61). They also caution that there is a clear disjuncture between the rhetoric of children's human rights and the reality of the circumstances of children and young people in conflict with the law and that for these children their procedural and human rights may be little more than 'illusory'(*Ibid*., p. 60) or a 'mirage' (*Ibid*., p. 59). To avoid the creation of a mere illusion, the concept of child-friendly justice, which is directly connected to the legally binding principles of international and European human rights law discussed above, needs to be embedded as part of the domestic legal framework aiming to safeguard the rights and procedural status of children, including the provision of legal aid. Identifying the legal, economic, and psychological practices that produce hierarchies of oppression and dispossession of children's rights offers the groundwork for new approaches that go beyond justice frameworks that have failed to grasp the histories and conditions of systemic disadvantage against children. These systemic disadvantages are also evident as foundational principles of what Shalhoub-Kevorkian (2019) refers to as 'unchilding'. Unchilding is the authorized eviction of children from childhood (Shalhoub-Kevorkian 2019, p. 122). Shalhoub-Kevorkian developed the concept of 'unchilding' to document and analyse the experiences and voices of Palestinian children living under Israel's control. Unchilding is marked by social exclusion and extinction, '[it] operates with government policies and legal frameworks barely seen and often unnoticed, an almost lethargic violence, including … through juvenile justice institutions that "save," "rehabilitate," and criminalize them' (Ibid., p.13). This normative understanding of a disrupted and interrupted childhood enables us to identify and illuminate a conflict between the aim to

cut public spending on legal aid and how achieving this aim targets those who are already in a position of disadvantage. The language of children's rights challenges the process of unchilding as it offers an inclusive and empowering way of challenging the economic and political imperatives that sustain the everyday disadvantages that young people in the criminal justice system must endure. The processes of unchilding are visible in young people's experiences of the youth criminal justice system. Utilizing the language of 'unchilding' allows us to challenge children's experiences of the criminal justice system from their political and historical contexts and not only through the lens of trauma, victimhood, or even children's rights.

Conclusion

This paper has highlighted the prevalent macro-level socio-structural factors that fail to recognise or appropriately respond to the adverse childhood experiences and multiple disadvantages common to many of the children involved in the youth justice system. Defendants under 18 years of age are often extremely challenging to represent and the laws and procedures are complex, yet lawyers get low fees for youth court work and are not required to complete any specialist training or hold any additional qualification. Newman and Welsh (2019, p.87) argued that legally aided criminal defence has been subverted into a neoliberal standard of cheap and speedy justice and the changes to the funding of legal aid compels lawyers to spend as little time on a case as they can (*Ibid.,* p.73). This has inevitably resulted in the findings by the *Youth Proceedings Advocacy Review* that the quality of advocacy in youth proceedings was highly variable; there is a lack of specialist knowledge amongst some advocates of the legal framework for dealing with child defendants; mixed ability amongst advocates to communicate clearly and appropriately with children whom they are representing; a lack of specialist training for advocates doing work in the youth court; and in some instances a lack of professionalism and passion (Wigzell *et al.* 2015).

It is vital that the power imbalance inherent in any dispute with the state, where one party lacks personal and professional resources, is recognized, and resources and support are provided to mitigate this imbalance to ensure a fair trial. Children involved in crime, particularly persistently, are often the least ready to assume the responsibilities associated with autonomous individuality. They are also often the least ready to participate effectively in their own criminal proceedings and the most seriously in need of specialised adult help and guidance. Representation usually involves lawyers acting under the client's instruction regarding how the case should be conducted. Lawyers work to facilitate justice and ensure that those suspected and accused of crimes attain justice through communicating to them their rights and providing advice. The state has obligations to develop and appropriately finance social, political and legal institutions that foster the autonomy and the capacity for self-determination of its youngest citizens to ensure that they receive a fair trial where they are subject to legal proceedings. Currently how criminal legal aid is funded has incentivised a diminution in the quality of legally aided defence services, the erosion of the lawyer/young client relationship and a consequent lurch towards a youth justice system that falls short of the *Guidelines on Child Friendly Justice*.

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[5] The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2016, SI 2016/313.
[6] *Ibid*., Schedule 3, (2)(d).
[7] *Ibid*., Schedule 3, (2)(c).
[8] The Exceptions Order 1975, SI 1975/1023.
[9] Article 2A(5) The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 (*SI 2013/1198*).
[10] *Re an application by Lorraine Gallagher for Judicial Review (Northern Ireland); R (P, G & W) v Secretary of State for the Home Department; R (P) v Secretary of State for the Home Department* [2019] UKSC 3
[11] *R (G) v Surrey Police and others* [2016] EWHC 295 [3].
[12] s.3AA Bail Act 1976
[13] s. 189 Criminal Justice Act 2003.
[14] Obtained under Freedom of Information Act, Request Ref: FoI 190617002