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# **Recognising children's citizenship in the youth justice system**

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## **Abstract**

Citizenship literature has tended to portray children as 'citizens in the making' or as citizens invested with full agency. English law treats young people in an ambiguous fashion, sometimes as pre-citizens and consequently in need of protection and sometimes as full citizens, principally so in the context of the youth justice system. This article will examine how neither the view of a child as a 'citizen in waiting' or as a citizen with full agency adequately protects their status as a child citizen in the context of responding to their antisocial and offending behaviour. Seeing young people in conflict with the law through the lens of a 'different-centred' youth citizenship offers a potentially workable child-centred conception of children's citizenship which allows for children's antisocial and offending behaviour to be regulated in a way which acknowledges the child's particular socio-economic circumstances, evolving capacities and awareness but does not diminish their equality of status as citizens.

Keywords: young people, citizenship, youth justice system.

## **Introduction**

This article will examine how changing conceptions of citizenship can be used as a lens to magnify and understand the ways in which young people are treated by the youth justice system in England and Wales. I will argue that the English youth justice system takes a fragmented view of youth citizenship and that different types of youth citizen are invoked by youth justice law, policy and practice. On the one hand, the youth criminal justice system acknowledges the need to protect the young person as a 'citizen in the making', but it also takes the contrary view and constructs young people as citizens invested with agency and consequently overestimates children's capacities and disregards the child's right to respect for their evolving capacities and

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competencies. Thus the youth justice system lacks a workable child-centred conception of children's citizenship which allows for children's antisocial and offending behaviour to be regulated in a way which does not diminish their equality of status as citizens and acknowledges the wider socio-economic context within which youth offending occurs, while also allowing them the opportunity to make amends for the harm they have caused.

Children's citizenship status is important as it reflects the particular constructions of childhood through which laws and policies for children and young people are implemented. The position of children as citizens, and the limitations and exclusions placed on that citizenship by criminal laws, raise questions about the legitimacy of criminally punishing children and young people who engage in offending behaviour. The idea that as citizens we are answerable to other members of the community in relation to those wrongs that violate the values on which civic enterprise and citizenship status depend legitimises the imposition of criminal responsibility (Duff 2007). According to this view, punishment will only be justified as a vindication of the defendant's status as a citizen where the defendant has deliberately denied to others the civil rights of citizenship (Ramsay 2006, p.45). In respect of children who engage in offending behaviour, Hollingsworth suggests that if children lack the status of citizen (for example, by virtue of their exclusion from democratic accountability processes and from specific citizenship duties associated with the criminal justice system, such as jury duty) then the state should only impose criminal responsibility in a way which is appropriate to their age and maturity (Hollingsworth 2012, p. 255). When it comes to imposing criminal liability upon children, the criminal justice system recognises that the basic competencies of young people and adults differ in fundamental ways. The youth justice system represents a separate and distinct system of justice for children which has the power to intervene to tackle the known risk factors associated with youth offending, including personal, family, social, educational and health factors. It also confronts young offenders with the consequences of their offending, and offers offenders the opportunity to demonstrate responsibility and to make amends to victims. However the English youth justice system also characterises children who offend as rational actors who are capable of dealing with complex realities and have the capacity to be mentally culpable. This incoherent approach to children's citizenship in the context of responding to children's antisocial behaviour neither adequately protects children nor enhances their status in society.

By examining how young people's citizenship is interpreted and applied in the context of the criminal justice system, I will question the extent to which law, policy and the youth justice system have advanced the experience of the child as citizen and consider whether conceptions of children's citizenship need to be re-shaped in order to better accommodate children in conflict with the law. My argument is not whether or not young offenders possess citizenship, but rather that children's citizenship is problematic within the youth justice context, as we lack a sufficiently workable child-centred conception of children's citizenship. The article will articulate an alternative envisioning of children's citizenship in the context of youth offending. Within feminist, anti-racist, gay, lesbian and transgendered movements there has emerged a 'different-centred' approach to youth citizenship (for example see Hart 2009, Moosa-Mitha 2005) which recognises young people as citizens while respecting their differences. Applying this interpretation to young people in conflict with the law would recognise that childhood inherently involves children and young people experiencing vulnerability and dependency which must not be exploited or disregarded. Children have rights and obligations, but they also need guidance in the development of their citizenship and the child's citizenship must consequently be given value and meaning and be protected from unrealistic obligations. Seeing young people in conflict with the law through the lens of a 'different-centred' youth citizenship creates the potential for a more integrated response to young people's antisocial and offending behaviour which would acknowledge the child's particular socio-economic circumstances, evolving capacities while also offering the potential for improved outcomes for young people in conflict with the law.

### **Children, Young People and Citizenship**

Many important social science concepts can be considered essentially contested concepts, whose strong normative character, multidimensional nature and openness to modification over time provoke much debate over their meaning and application (Gallie 1956). The literature on citizenship presents vast, multi-faceted and much-contested conceptions and perceptions of citizenship. The definitions of citizenship have been broadened from the narrow meaning of political, legal and welfare rights. Stalford (2000) identified two common visions of citizenship, one which defines it in Aristotelian terms as the relationship between individuals within a community as well as individuals' relationship with the state (Wallace 1993), or in terms of membership of a community through participation in a set of political, civil and social rights (Marshall 1950). Werbner and Yuval-Davis (1999) argue that citizenship is no longer understood simply in terms of 'the formal relationship between the individual and the state' but as 'a more

total relationship inflected by identity, social positioning, cultural assumptions, institutional practices and a sense of belonging'. Citizenship grants legal, political and social rights (Knight Abowitz and Harnish 2006), it confers membership status to individuals within a political unit, confers an identity on individuals and constitutes a set of values. Citizenship is usually interpreted as a commitment to the common good of a particular political unit, it involves practicing a degree of participation in the process of political life, and implies gaining and using knowledge and understanding of laws, structures, and processes of governance (Enslin 2000). Moreover Lister and Isin and Turner reason that contemporary citizenship theory has a contribution to make over and above that of legal rights. It involves responsibilities towards the wider community and social processes through which individuals and social groups engage in claiming, expanding or losing rights. This has led to a sociologically informed definition of citizenship in which the emphasis is less on legal rules and more on customs, norms, meanings, identities and responsibilities (Lister 2007, p. 699, Isin and Turner 2002). Young people's own understanding of citizenship confirms that children recognise a relationship between their rights and responsibilities and that being responsible and exercising responsibility is considered by young people as a key experience of being young including engaging in responsibilities in the family home and the local community (France 1998, p. 101, Smith et al. 2005, Such and Walker 2004, 2005). Young people actively seek membership and inclusion within adult communities and wish to be incorporated in the development of relationships of mutual trust and respect (Hart 2009).

Lister (2007, p. 697) has argued that children's citizenship is subject to two representations within the dominant literature. Children are either characterised as citizens in waiting or as citizens with full agency. The latter representation saw children as full citizens of the present who are autonomous from, and equivalent to, adults (Lister 2007, p. 697). The view of children as citizens in waiting invokes a future-oriented image of the child as a potential citizen of the future. Children are not viewed as individuals fully equipped to participate in a complex adult world, but as underdeveloped or unfinished human beings or 'human becomings' (Jenks 2001). Children have been portrayed as 'citizens in waiting' (Cutler and Frost 2001, p. 8, Kennelly 2011), 'learner citizens' (Arnot & Dillabough 2001, p. 12), 'apprentice citizens' (Wyness *et al.* 2004), 'not-yet-citizens' (Moosa-Mitha 2005) or 'citizens-in-development' (Bynner 1997, France 1998, Frazer and Emler 1997). TH Marshall, author of the seminal post-war treatise on citizenship, referred to children and young people as 'citizens in the making' (Marshall 1950, p. 25) and through time the unknowing and unworldly child becomes 'corrupted' by society (Jenks

2005, p. 124). Out of these writings emerged notions of parental responsibility and the general collective interest of the state in the wellbeing of children as a future generation (Dingwall *et al.* 1995, p. 220).

Children's rights scholars emphasise the importance of acknowledging children's evolving capacities in the maintenance of their rights. O'Neill (1992, p. 24) cautions against thinking that the inscription of children's rights in domestic and international law is the best way of ensuring that children live better lives and receive better care and protection. O'Neill argued that children should be protected and nurtured because of their special vulnerabilities and thus should not and could not have full rights of citizenship. O'Neill recommends that 'children's fundamental rights are best grounded by embedding them in a wider account of fundamental obligations'. Similarly, Brighouse (2002) warns that children's rights talk could systematically mislead people into 'neglecting the facts of children's vulnerability, dependence, and inabilities'. In response to these concerns about discussions of children's rights, Nassbaum & Dixon (2012) suggest a capabilities approach (or a human development approach) which recognises a range of rights for children with sensitivity both to children's welfare needs and children's agency. Under the capabilities approach the key question is always, what measures are required to show full respect to the equal human dignity of each person, including children? This approach recognises human vulnerability and the obligation of the state to ensure all people have access to a life worthy of human dignity. The capabilities approach views children in terms of 'human becomings', that is children come into the world with a variety of undeveloped capacities and there is a consequent moral need to protect children while they develop these capacities. Hollingsworth (2013) suggests that a system of criminal justice will be illegitimate if it permanently restricts the child's ability to develop the capacities necessary for future global autonomy. To ensure that children can develop into fully autonomous right-holders when they achieve majority, the state must give special status to 'foundational rights' that support the conditions that make it possible for children to have a fully autonomous life at a point when majority is acquired (*Ibid.*). Similar to Nassbaum and Dixon, Hollingsworth views children as 'becomings' and this is what distinguishes them from adults and provides the foundation for special treatment for children in the criminal justice system. Likewise Fionda has argued that children enjoy special rights because of the need to ensure that they have the opportunity to achieve their full potential as citizens (Fionda 2005). Campbell (1992) distinguishes children's rights and interests into four separate categories, their rights as persons, as immature and

dependent children, as developing juveniles approaching maturity and as future adults. Similar to Hollingsworth and Nussbaum and Dixon, Campbell's classifications require decision-makers to balance the interests of the child as a 'becoming' or future adult with what the child is currently interested in.

This article will offer an alternative and complimentary theorisation of the place of childhood in the youth justice system. The article will demonstrate that neither the view of a child as a 'citizen in waiting' or as a citizen with full agency adequately protects their status as a child citizen in the context of responding to their antisocial and offending behaviour. The citizen in waiting model over-emphasises the position of the child as a future adult and consequently downgrades their present interests. The view of the child as a full citizen ignores the relevance of childhood in determining an appropriate criminal justice response and ignores the traits that make children exceptional. Instead the 'different-centred' theorist's alternative configuration of children's citizenship offers a potentially workable child-centred conception of children's citizenship which potentially allows for children's antisocial and offending behaviour to be regulated in a way which does not diminish their equality of status as citizens, their need for protection and their dependence on adults while also allowing them the opportunity to make amends for the harm they have caused.

### **Young offenders as 'citizens-in-development'**

In England throughout most of the twentieth century the criminal justice system explicitly acknowledged that young offenders were in need of protection and redirection rather than simply punishment. The development of separate courts for juveniles, and separate custodial institutions, served the twin goals of protecting young offenders from the stigma and brutality of the criminal justice system and intervening in their lives to remedy the factors which lead to their involvement in criminal and antisocial behaviour. Section 44 of the Children and Young Persons Act 1933 imposes an important welfare principle which requires every court to have regard to the welfare of a child or young person who is brought before it, either as an offender or otherwise. The welfare principle recognises that the child offender lacks capacity and consequently there is a need for both the family and the state to take responsibility for children's needs and to respond to youth offending by providing young people with the necessary tools to grow into more civilised and competent adults (Hendrick 2002). The Children and Young Persons Act 1969 also reflected the view that the problem of youth offending could be solved by

the welfare state and the belief that social workers and other professional agencies can rehabilitate those involved in delinquent lifestyles. The *Sentencing Guidelines* also stress the need for the Youth Court to acknowledge the young person's status as a citizen in development by interpreting section 44 of the Children and Young Persons Act 1933 to include the need to choose the best option for the young person taking account of all of the circumstances of the offence including the need to be alert to the high incidence among young people in the criminal justice system of mental health problems, learning difficulties, learning disabilities, speech and language difficulties, self-harming, abuse, bereavement and substance abuse (Sentencing Guidelines Council 2009, para 2.9). This welfarism is characterised by the pursuit of social justice through the provision of universal services and thus reflects a prevailing assumption that the role of the state is to try to realise a more just, equitable and inclusive society. In an inclusive society, the young offender is someone who is failing to live up to the expectations of citizenship but who can be converted and welfarist tendencies in the youth justice system represent the means to achieve such a conversion (Vaughan 2000). This transformative view of the youth justice system reflects a developed sense of social citizenship such that the young offender is not regarded as a threatening outsider but rather as an individual who can be socialised, rehabilitated and included within society. This approach is based on the view of the child as a future citizen in need of guidance and support and it encourages young people to belong to society and to think of themselves as citizens.

The Criminal Justice Acts of 1982, 1988 and 1991 also acknowledged this need to protect the child as a 'citizen in development' and ensured that custodial sentences were reserved for the most violent, dangerous and recidivist offenders and non-custodial sentences were increasingly used for less serious offenders. This trend towards diversion, decriminalisation and decarceration resulted in a significant and sustained decline in the use of custody for young people throughout the 1980s. In the White Paper *No More Excuses*, the New Labour government proposed promoting more effective ways of preventing offending by young people by undertaking early interventions that seek to address the known causes of criminogenic behaviour (Home Office, 1997). New Labour aimed to create the opportunity for the offender to face the consequences of their behaviour and reintegrate them into the community, while also allowing the victim a role in deciding how to respond to the young person's behaviour. The desire to hold children accountable for their own behaviour engages the rights and responsibilities of citizens, whether as offenders, victims, their families or concerned members



of communities. Final warnings, youth conditional cautions and referral orders offered victims a chance to speak about how they have been affected by what has happened and to get answers from the offender. Young offenders were presented with the opportunity to demonstrate responsibility, apologise for the harm caused, and to make amends. For Vaughan these developments represent a 'move away from a paternalistic regulation that stresses the essential passivity of youth' towards a more 'active subjectivity' within which young people are required to take more responsibility for their lives (Vaughan 2000, p. 348).

The current coalition government has championed the Big Society as a means of building a bigger and stronger society (Cabinet Office, 2010). One objective of the Big Society is to mend 'societally Broken Britain', by stressing the importance of individual action and activism with an added emphasis on nurturing people's sense of community, civic duty and citizenship (Evans, 2011). The Big Society considers that the primary responsibility for society's problems rests with the community and thus it aims to give more power and responsibility to communities (Cabinet Office 2010). As such the youth justice system under the coalition government has attempted a more joined-up approach to address the multiple disadvantages and chaotic lives experienced by young offenders, moving towards 'austerity-driven minimal intervention' (Smith 2014, p. 192) and 'away from an approach that has unnecessarily criminalised ... young people' (Home Office 2011, p. 10). The Big Society thus embraces the young person as a citizen in development and seeks to devolve greater discretion to the local community to respond to crime and anti-social behaviour. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 has abolished the final warning scheme in favour of youth cautioning which allows significantly more discretion to the police to avoid prosecution in appropriate cases. The 2012 Act invests trust in the professionals who are working with young people on the ground to determine the most appropriate response, depending on the severity of the offence and the circumstances of the young offender. The Home Office's position paper *More Effective Responses to Anti-social Behaviour* (Home Office 2011) encourages the development of Neighbourhood Resolution Panels which would see community members and practitioners working together to decide how to deal with perpetrators of anti-social behaviour and low level crime (Home Office 2011, p. 13). These panels are part of a process which requires the offender to accept a deeper level of responsibility for their actions. The coalition government also acknowledges the intense pressure on families and has established a Troubled Families Unit to co-ordinate intensive targeted support for high risk families who have been characterised as 'victims of state failure'

(Cameron 2011a). These developments reflect a concern with community engagement, community problem-solving, community mobilisation and law-abiding and responsible citizens and communities nurturing children into the values of decency, respect and good citizenship. They acknowledge that the challenges that confront children who are engaging in anti-social and offending behaviour, their families and the various professionals who work with them are complex, deep-rooted and multi-faceted. Many youths entering the youth justice system have serious multiple problems in terms of their school achievement, psychological health, and alcohol and drug abuse (Arthur 2007).

From the 1970s conceptions of citizenship changed in tandem with fundamental changes in the public sector, including the reform of the welfare state, as governments sought to challenge citizens' expectations of what the state should provide for them. The view of children as citizens in development and in need of protection was subject to criticism for allowing children to be treated as objects of intervention rather than as legal subjects (Freeman 1992, p. 54) and justifying a lack of formal recognition of children as citizens and their exclusion from citizenship rights (O'Neill 1992). Welfarism, with its focus on the child's needs, can lead to indeterminate and disproportionate sentencing as a child may justifiably be kept in care for as long as needs be. This concern about welfarism was fuelled by the landmark US Supreme Court decision *re Gault* (387 US 1 (1967)). In *re Gault* the US Supreme Court ruled that where a young person faced incarceration the young person should be entitled to the protection of due process of law, in the same way as adults and that any period spent in an institution should be proportionate to the offence. The US Supreme Court believed that an individualised welfare approach could lead to indeterminate sentences in the name of treatment, in circumstances where if an adult had committed the offences they would have been treated more leniently. The US Supreme Court rejected the view of children as 'pre-citizens' or potential adults and cast children as full human beings invested with agency and important social citizenship rights. Similarly the UN Convention on the Rights of the Child, signed by the UN General Assembly in 1989 and ratified by the UK government in 1991, promotes the idea of children as full citizens in their own right and as independent bearers of rights invested with agency integrity and decision-making capacities (Stasiulis 2002, p. 509). The UN Convention promotes the view that children are no longer merely 'pre-citizens' or 'potential adults' or 'becomings' (James 2011), but are cast as full human beings invested with important social citizenship rights, including the right to have their best interests seen as a primary consideration in all court actions involving them (Article 3), the right to a standard of living adequate for their physical, mental, spiritual, moral and social

development (Article 27), the right of young people accused of engaging in criminal behaviour to be treated in a manner consistent with the promotion of the 'child's sense of dignity and worth ... and which takes into account the child's age' (Article 40), the obligations of the state to assist families in raising their children (Article 18), the need for detention to be used only as a measure of last resort (Article 37), and the right to have their voice heard and taken into account in all decision-making (Article 12). Under the UN Convention the child is considered as a 'citizen now' rather than a 'citizen becoming' (Doek 2008).

### **The young offender as adult citizen**

The English youth justice system subsequently developed in a way which weakens and negates the protection rights stemming from the UN Convention by perpetuating the idea that if children are competent they are automatically assumed capable of negotiating their way through a liberal universe of choices, and the offender is no longer a child and no longer worthy of special protection of their rights (Lister 2007, p. 526). The child-centred focus of the UN Convention has been applied in a way which reduced the expectations on the state and increased the responsibility of the individual child and a diminished conception of social citizenship (Ibid., p. 697). The governments of Thatcher and Major argued vehemently that crime could not be explained away by social conditions (Monterosio 2009). Indeed Thatcher's view was that there is no such thing as society, only individuals and their families (quoted in Keay 1987). Accordingly, individuals and families were solely responsible for their own actions and not society. Similarly under New Labour social problems became defined in terms of the individual and family failure rather than state responsibility, echoing the views of the Thatcher and Major governments. Consequently under successive New Labour administrations it became increasingly common to treat young offenders as entirely rational, fully responsible young adults rather than children, thus justifying their subjection to the full rigours of the criminal law. For example the Children Act 1989 had already removed from the youth court the power to order a young person into the care of a local authority. Care and supervision orders can now only be made in the Family Proceedings Court, leaving the youth court to deal exclusively with criminal matters. The Criminal Justice and Public Order Act 1994 lowered the age at which children could be detained in custody for grave crimes, extended the courts' remand and sentencing powers to younger offenders and increased the maximum length of detention in a Young Offenders Institution. The Crime and Disorder Act 1998 abolished the presumption of *doli incapax* which means that a child aged 10 years of age is no longer presumed incapable of

understanding the nature of criminal conduct and is considered as legally responsible for their actions as an adult. The Crime and Disorder Act 1998 also establishes the prevention of offending by children and young people as the principal aim of the youth justice system and places all those working in the youth justice system under a duty to have regard to that aim in carrying out their duties. These legislative responses to youth offending reveal much about the broader nature of the state of childhood and children's citizenship and the morals and values attached to these concepts. This view of young people in conflict with the law pays little heed to the acute levels of socio-economic disadvantage, marginalisation and social exclusion experienced by such young people and instead views young people as citizens with full agency and deserving of adult-like punishments. In the White Paper *No More Excuses* the government stressed that it did not see any conflict between protecting the welfare of the young offender and preventing that individual from offending again, 'preventing offending promotes the welfare of the individual young offender and protects the public' (Home Office 1997, para. 2.2). However this is not a view shared by the courts. In *R v Inner London Crown Court, ex p N. and S.* ([2001] 1 Cr. App. R. 343) Rose LJ examined section 37 of the Crime and Disorder Act 1998 and stated that the need to impose a deterrent sentence may take priority over the provisions of section 44(1) of the Children and Young Persons Act 1933 which requires the court to promote the welfare of individual offenders. Thus despite the government's assurances in *No More Excuses* to that it would protect the welfare of young people who engage in offending behaviour, section 37 of the 1998 potentially allows the youth court to impose a deterrent sentence with the aim of preventing young people in general from offending, but which does not necessarily serve the welfare of the individual offender.

The criminal law in England clearly recognises that children may lack the capacity to be criminally culpable for their behaviour. Previously the presumption of *doli incapax* meant that children between 10 and 14 years of age would only be held criminally responsible if the prosecution could prove, beyond all reasonable doubt, that when doing the criminal act, the child knew that what they were doing was seriously wrong as opposed to being merely mischievous or naughty. This meant that normative criteria, such as the physiological and psychological development of the individual child, were used to identify the divide between childhood and adulthood rather than simply the child's age. Section 34 of the Crime and Disorder Act abolished the presumption of *doli incapax*. Consequently the youth justice system now assumes that in the context of criminal proceedings, young people from the age of 10 are capable of participating meaningfully in any court case involving them, have a rational

understanding of court proceedings, are able to follow what is said by prosecution witnesses, can explain their version of events, point out any statements with which they disagree, make the court aware of any facts which should be put forward in their defence and have a broad understanding of the nature of the trial process and of what is at stake, including the significance of any penalty that may be imposed. Indeed a young person will be treated as an autonomous adult and subjected to a trial in the adult Crown Court, rather than the youth court, if they are accused of committing a homicide, an offence punishable with at least 14 years imprisonment or where a young person has committed an offence with an adult offender. In *V. v the United Kingdom* and *T. v the United Kingdom* ([2000] 30 EHRR 121) the European Court of Human Rights determined that the trial of a child aged as young as 11 years does not in itself give rise to a breach of the Convention, as long as effective participation is ensured. In *S.C. v United Kingdom* ([2004] 40 EHRR 121) the European Court of Human Rights defined 'effective participation' as including a broad understanding of the trial process and an understanding of the general thrust of what was said in court, in particular the ability to follow, and, if relevant, explain or challenge prosecution evidence. This requires that the child is dealt with in a manner which takes full account of his or her age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote the child's ability to understand and participate, including taking appropriate steps to enable a youth with learning difficulties or mental impairment to participate in their trial (*R on the application of TP v West London Youth Court* ([2005] EWHC 2583 Admin)). Evidence suggests that young defendants often do not 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). They also feel frustration that the courts seem rarely to understand the context in which their offences were committed, including the pressures facing them. Although a judge has a continuing jurisdiction to stay proceedings if it becomes apparent during the course of the hearing that the young person is unable effectively to participate, neither youth nor limited intellectual capacity alone necessarily leads to breach of the Article 6 right to effectively participate in a trial. A child might be *doli incapax* without any such impairment but simply on account of immaturity or the unusual nature of his upbringing.

The abolition of the defence of *doli incapax* for children aged 10 and above means that the developmentally immature child over the age of 10 will be held criminally responsible unless their decision-making capacities are impaired, for example by mental illness which is attributable to a condition falling within the M'Nagthen rules or they are substantially intellectually impaired.

*Doli incapax* previously offered children between the ages of 10 and 14 a 'benevolent safeguard' (*C v DPP* [1996] 1 AC 1, per Lord Lowry, para. 33) against punishment where a child had not yet become a rational or moral agent. Children and young people are still developing in terms of cognitive capacity and emotional maturity and are often much more impulsive than adults. This contributes to the tendency to make choices that are harmful to themselves and others. Additionally the way in which psycho-social factors influence decision-making depends in part on the social and family context in which young people find themselves. Children involved in crime, particularly persistently, have often had difficult, deprived backgrounds and serious multiple problems in terms of their school achievement, psychological health and family life. These children are usually the most disadvantaged, have the poorest educational experiences and are more likely to suffer from poor health, including mental health and substance misuse than children who have had no contact with the criminal justice system. These developmental differences render such children and young people the least ready to assume the responsibilities associated with autonomous individuality and to participate effectively in their own criminal proceedings. They are the most seriously in need of adult help and guidance. The abolition of *doli incapax* marginalises the important development differences between children and adults and instead reconstructs young people who offend as non-children and denies them the right to remain children and their rights as child citizens.

The lesson from this is that, once children in England exercise agency/competence then they are no longer worthy of protection as children (Stasiulis 2002). Such is the ambiguity with which English children are regarded that, as Such and Walker (2005) have shown, children are seen as competent and hence responsible for the crimes they commit at the age of 10 within the criminal justice arena. However, within family law, young people are assumed to lack the competence to participate responsibly and articulate their own wishes and feelings. In *Gillick v West Norfolk & Wisbech AHA* ([1986] AC 112) the House of Lords held that the mature minor possessed certain rights, in this case the right to a confidential relationship with a doctor for the purposes of receiving contraceptive advice and treatment. Adult patients are entitled to such a confidential relationship and the House of Lords in *Gillick* held that young people should not be discriminated against, but only if the young person fully understood all the issues. The Children Act 1989 allows children to instruct a solicitor to start family proceedings, but, again, only if the solicitor and the court are satisfied that the child has sufficient understanding to initiate the legal action. In *Re H* ([1993] 1 FLR 440) the court held that a child wishing to instruct their own solicitor in their own right had to demonstrate sufficient 'rationality that leads to coherent and

consistent instruction'. The House of Lords in *Gillick*, the Children Act 1989 and the Children Act 2004 all require courts to ascertain and pay due regard to the wishes and feelings of the child; however these wishes and feelings may be marginalised, ignored or overruled where it is considered to be in the child's best interests. Article 12 of the UN Convention on the Rights of the Child protects the right of every child to have their views heard and ultimately embodies the ethos of autonomy which the Convention aims to create for the child. Nonetheless Article 12 only requires that every child's views be taken seriously. Even older children's wishes can be so contrary to their long term welfare that a court is empowered to override them if the court believes the child is not competent to understand the implications of their choices. In *Mabon v Mabon* ([2005] EWCA Civ 634) three young people aged 13, 15 and 17 applied to the court for leave to represent themselves independently. The court acknowledged that the law must reflect the 'keen appreciation of the autonomy of the child', nonetheless it emphasised that a balance needed to be struck between the child's right to participate in decision-making processes that fundamentally affect his family life and the 'sufficiency of the child's understanding'. A young person cannot join the armed forces until they are 16 years old. A young person must be 16 years old before they can consent to sexual relations, including consensual sexual relations with another young person. They must be 18 years old to buy cigarettes or alcohol, get a tattoo or vote. Thus the law recognises that these actions require a certain level of maturity and capacity and that children need protection in a paternalistic form from the long-term consequences of their immaturity in various areas of their lives. Children appear only to be granted unconstrained agency and autonomy in the context of wrong-doing (Such & Walker 2005). Children need a better conception of citizenship as the law recognises them as citizens by some standards (in the context of wrong-doing) and not by others (namely in the family law context) (Cohen 2005, p. 234). Moss (2002, p. 4) argued that the child of children's services '... is incomplete and immature, a becoming adult who will attain complete personhood ... through processes of development'. Whereas in the youth justice context, the child is conceptualised as evil, undeserving, troublesome (Goldson 2002), competent and responsible (Tisdall 2006). Troubled children and young people who offend are thus 'relegated to a purgatory where they are no longer children and yet not-quite adult, and thus fail to enjoy the rights associated with either social category' (Stasiulis 2002).

In a similar way to previous governments, the coalition government's Big Society also adopts a fragmented approach to children's citizenship. The government rhetoric of helping 'troubled families' with targeted specialist support is undermined by councils being empowered to take

tough punitive sanctions against families who refuse to participate, such as loss of a secure tenancy, court action or even care proceedings, all of which are stigmatising and could increase the risk of poverty and social exclusion. For the Conservatives the causes of crime lie in the 'broken society' characterised by 'family breakdown, welfare dependency, debt, drugs, alcohol abuse, inadequate housing and failing schools' and the source of these problems lie in the 'choices that people make' (Cameron 2008, 2011b). The root causes of youth crime are once again viewed in terms of a breakdown of morality associated with dysfunctional families and a delinquent underclass. These views reflect Conservative arguments around the problem of young people as recalcitrant, delinquent and the product of poor parenting (Frost & Phillips 2012) and welfare recipients as failing to take responsibility for themselves (Bednarek 2011). For Bone (2012), the Big Society represents less a call for people to build a stronger society and more of a charter for government to abdicate from its responsibilities to support and defend its citizens. Thus Bone is echoing Clarke's analysis of citizenship under New Labour where he concluded that under New Labour activated law-abiding citizens were empowered with greater responsibility to eschew anti-social behaviour in order to promote harmony, as a requirement of citizenship, in exchange for increased abandonment as the state systematically divested itself of its responsibilities to safeguard citizens (Clarke 2005). As such the Big Society can be seen as a continuation of Thatcher's, Major's and Blair's narratives about citizenship and 'rights with responsibilities' and the view that the undeserving have failed to take their responsibilities alongside their rights. In the Big Society citizenship has become inextricably linked with civility, leading law-abiding lives and enterprising families preparing their children for their role as citizens of the future. Families which are failing in this function are labelled as 'troubled' families (Rodger 2012, p. 414). Similar to Thatcherite and New Labour policies, the Big Society represents a moralising effort to reposition the state as enabler rather than provider; to shift the responsibility for welfare and care to individual personal responsibility; and to abandon troubled young people and their families, thereby increasing their alienation from any sense of inclusive citizenship.

### **A 'different-centred' approach to young people in conflict with the law**

In *Gillick* Lord Scarman believed that it was important to acknowledge realism and to be 'sensitive to human development and social change' and that imposing fixed limits upon the process of growing up was inconsistent with the reality that the independence associated with the transition to adulthood was acquired gradually through the progressive relaxation of parental



control rather than suddenly on reaching the age of majority. The image of young people in conflict with the law as either full citizens or citizens-in-development is, to paraphrase Lord Scarman in *Gillick*, artificial and lacking realism. The youth justice system is treating young people as citizens in a way which ignores their need for protection and the acute levels of socio-economic disadvantage and social exclusion experienced by the majority of young people in conflict with the law. The view of young people as citizens in development emphasises passivity and incompetence and limits the recognition of children as citizens. The view of children in conflict with the law as full human beings invested with agency and decision-making skills belittles their future potential and devalues their right to remain children. These children are among the most seriously in need of adult help and guidance and the least ready to assume the responsibilities associated with autonomous individuality. Thus in the context of youth justice, child citizenship is interpreted in a way which is detrimental to the child's welfare.

If young people in conflict with the law are to be recognised as citizens a broader understanding of citizenship is needed in order to facilitate a more 'inclusive and conceptually comprehensive view of citizenship' (Smith *et al.* 2005). The laws which regulate young people in conflict with the law need to be reformed to give 'substance to an identifiable youth citizenship' (Harris 1992, p. 187). Children's citizenship requires children in conflict with the law to be treated as both competent and in need of protection from harm, exploitation and abuse. This reform should allow for children's citizenship to be recognised in a way which does not devalue their right to remain children (Stasiulis 2002, p. 509) while also recognising that young people who are involved in the youth justice system are bearers of citizenship rights. As Roche comments, nobody is arguing that children are identical to adults or that they should enjoy exactly the same bundle of rights as adults, but that children be seen as members of society too, with a legitimate and valuable voice and perspective (1999, p. 487). Hart has echoed this by arguing for a 'difference-centred' approach to citizenship which would truly recognise and empower young people as citizens of a fair society while respecting their differences, rather than simply treating young people as a homogeneous group in need of responsibilisation (Hart 2009). Similarly Moosa-Mitha asserts that children should be treated as 'differently equal' members of society (2005, p. 386). These difference-centred theories of children's citizenship have arisen from, and echo, social movements such as feminist, anti-racist, gay, lesbian and transgendered movements. They reject the simple binary of viewing children as 'not-yet' or 'less-than' adults' and therefore dependent or children as the same as adults and bearing the same responsibilities as adults. Moosa-Mitha's ethnographic study of sexually exploited children found

that a child who shows agency by participating in sexual relationships is no longer conceived of as a child but is treated as an adult. Consequently, children who actively sell sex are treated as criminals under the same laws used against adult prostitutes, without any reference to the harm they suffer when working in the sex trade or their responsibility for being involved in the sex trade. Moosa-Mitha's 're-visioning' of children's citizenship sees citizenship defined in a way which takes children's rights seriously and recognises children's differences, vulnerabilities and interests but without reference to adult standards (2005, p. 371-372). This 'liberal paternalist' approach (ibid, p.378) emphasises the reality of children's vulnerability and dependency while also respecting children's capacity to be autonomous, as determined on a case-by-case basis (ibid, p. 379, also Freeman 1983). Each child's contractual and social liberty is determined by the individual child's capacity to make rational decisions. A difference-centred approach to children's citizenship acknowledges that young people 'belong' as full members of society even though they may not enjoy some of its more formal rights, while also recognising their distinct vulnerabilities and interests (Moosa-Mitha 2005, p. 372).

If this 'liberal paternalist' approach to children's citizenship were applied to young people in conflict with the law it would ensure that young people who are not sufficiently mature and competent to understand the process of a trial in a criminal court, including the youth court, could not be held criminally culpable for their behaviour. Criminal liability could only be imposed after an assessment of the mental capacity, competence and maturity of each child. Such an assessment would need to acknowledge the limitations of criminal justice as a means of preventing and dealing with crime and antisocial behaviour and instead consider whether the child's needs would best be met by methods of social intervention delivered outside of the criminal justice system. This is not to imply that the harms caused by youth offending should be tolerated, but means ensuring that all children who are alleged to have offended have access to the range of health and social care services they require whether they are formally prosecuted or not. And with respect to those who are prosecuted, it entails recognising fully the range of difficulties that they are likely to face throughout the court process, and taking steps to address them. This will necessarily require a closer integration of the youth justice system and the child care/protection system. The youth court will need to embrace the family law view that youth crime is a symptom of underlying problems in the life of the child and recognise the difficult nature of the transitions from childhood to adolescence to adulthood. In 2012 the Centre for Social Justice (CSJ) report *Rules of Engagement* (2012, p.212) recommended that youth court and family court proceedings be integrated and that an inquisitorial approach be adopted in

order to achieve a joined up approach to youth offending. Previously the Centre for Child and Family Law Reform (2004) proposed a similar change to the law to enable the transfer of cases from the youth court to the family court. This proposal was supported by the family law committee of the Law Society, which said 'It is a serious lacuna that there is at present no route by which the [youth] courts can secure the involvement of children's services.' Youth courts already have a power under section 9 of the Children and Young Persons Act 1969 to request a local authority to investigate the circumstances of children appearing before them, and local authorities have a duty to provide such information. The 1969 Act does not explicitly require the local authority to consider applying for a care or supervision order. However, if as a result of investigations under section 9 there is reasonable cause to suspect that the young person is likely to suffer significant harm, the local authority has a duty under section 47 of the 1989 Act to consider whether it should take any action to safeguard or promote the child's welfare. That could include applying for a care or supervision order. These powers under the 1969 Act are rarely, if ever, used. It was recently proposed in Parliament that there be an extension of the powers available to the family court under section 37 of the Children Act 1989 to the youth court (per David Burrowes, HL, 29<sup>th</sup> January 2013, col 214-221). Section 37 of the Children Act 1989 allows courts in family proceedings to order an investigation into whether a child is at risk of suffering significant harm. Such a change would be one concrete step towards giving substance to an 'identifiable youth citizenship' (Harris 1992, p. 187) which would extend to young people in conflict with the law.

## **Conclusion**

Neale defines citizenship for children as 'an entitlement to recognition, respect and participation' (Neale 2004). According to this definition citizenship may increase children's status in society so that their voices can be heard in decision-making that affects their lives (Coppock and Phillips 2013). For Neale, seeing children through the lens of their citizenship gives a very different picture of their place in the social world. It affects how they are viewed and treated, how youth policy and services are developed and how young people feel about themselves and their value in society. 'Real citizenship' recognises young people as having strengths and competencies and involves a search for ways to alter the culture of adult practices and attitudes in order to include children in meaningful ways and to listen and respond to them effectively (ibid). Yet what is evident from this article is that children are being disadvantaged by a criminal justice response to their behaviour which is grounded in the currently available conceptions of

children's citizenship which fail to properly respond to children's antisocial behaviour in a way which adequately advances their independent position. The child as adult approach fails because of the necessity for a child to possess capacity and ignores the traits that make children exceptional and vulnerable. The child as a 'citizen in waiting' ultimately fails as it is premised on a conception of dependence, vulnerability and powerlessness while permitting adults to claim they are protecting children in circumstances which promote adult interests and agendas. This approach emphasises individualised personal responsibility and overlooks the complex patterns and interrelated problems that young people endure and obscures the fact that the government can be implicated in the causes of anti-social and criminal behaviour. New ways of thinking about children, childhood and children's citizenship are required in order to cultivate space for children to claim rights by having their voices heard and being active participants when decisions are being made about their lives (Coppock and Phillips 2013). As Hart states: 'In liberating them from the pressure to conform to an adult notion of ideal citizenship, young people may be given the mutual recognition and respect that they are entitled to as "differently equal" citizens' (2009, p. 647). This counter hegemonic approach would ensure a consistent approach to children's citizenship and recognise the reality that most young offenders' have are vulnerable and have suffered abusive and disadvantaged lives. Young offenders are usually victims of deprived, and depriving, socio-economic circumstances and should be seen as under-socialised individuals in need of help and assistance. Both troubled and troublesome young people share the same characteristics and needs, and neither group should have their citizenship diminished.

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