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# A child-friendly youth justice?

By Professor Jo Phoenix

## Introduction

The term ‘child-friendly justice’ has its origins in international human rights legal frameworks, specifically the Council of Europe guidelines for implementing the United Nations Convention on the Rights of the Child in relation to justice. In England, the notion of a ‘child-friendly’ youth justice has also been used to critique the practices for dealing with youth crime that have their origins in the Crime and Disorder Act 1998.

Yet, exactly what does child-friendly youth justice mean? Does it necessarily ensure a more just way of dealing with youth crime or a more just response to the children and young people who populate it? This essay takes a closer look at the critique offered of the current way of dealing with youth crime, the agenda for reform and ends by suggesting that it does not necessarily mean a more just response to young people or youth crime.

## Child-friendly youth justice: the critique

There have been many different critiques of the ‘new youth justice’ established by the Crime and Disorder Act 1998. For some, it meant the de-professionalisation of an entire workforce (Pitts 2001). For others, it meant a youth justice system devoid of any higher goals or principles (such as welfare), primarily interested in preventing offending, heavily audited, managed and monitored and characterised by an obsessive focus on managing and reducing the risks of (re)offending presented by some young people (Muncie 1999, Goldson 2002, Goldson and Muncie 2006, Muncie 2006, Kemshall 2008). For these critics, there was no surprise when the new youth justice expanded, sucking scores of black, Asian and minority ethnic (BAME), working class and marginalised young men into its punitive net, if only because the standardised assessment tools conflated economic and social marginalisation and exclusion with an individualised risk of offending (Kemshall 2008).

As time would tell, many of these early criticisms were not far off the mark. The first seven years of the new youth justice saw more and more young people coming into the youth justice system for the first time – and more and more young people being incarcerated (Goldson 2009, Phoenix 2015, Bateman 2017). As the new youth justice matured, the realities became known and we saw what system expansion meant in real life. Between the years 1999-2007, there were 102 self-inflicted deaths of young people (see <https://www.inquest.org.uk/deaths-of-children-and-young-people-in-prison> accessed 1st March 2018). The use of physical restraint in custodial settings seemed to be on the rise (UNCRC 2008). All this took place against the backdrop of a raft of new civil measures (ASBOs, dispersal orders, mosquitoes and so on) in which the message was loud and clear: youth crime and ‘troublesome’ young people will be dealt with via the criminal



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justice system with little regard to the social or economic context that surrounds them. Although the last 10 years have witnessed ‘system shrink’, with fewer young people coming into the youth justice system and progressively fewer children and young people being incarcerated, the basic criticisms of youth justice in practice have remained the same.

Against this, some academics and reformers began calling for a ‘rights-based’ or ‘child-friendly’ approach to youth justice. The calls are not naive to the problematic nature of both a universalising human rights discourse and the practice of enforcement (Goldson and Muncie 2012). Nevertheless, at a time when the key criticisms of English youth justice are that it lacks ‘sympathetic understanding’ of children and young people, does not ensure their wellbeing or welfare or deal with the circumstances that surround their less than law-abiding behaviour, reminders that England is systematically and routinely violating children’s human rights (as specified in the UNCRC) serve as a useful point of resistance.

## Child-friendly youth justice: the agenda for reform

According to its advocates, how is a child-friendly youth justice more ‘just’? Framed by and within the guiding principles set out by the UNCRC and adopted by the Council of Europe, ‘child-friendly youth justice’ is a form of justice based on the recognition that, developmentally, children and young people are not adults and therefore ought not to be subjected to adult-style criminal justice processes or held to the same level of accountability for their less than law-abiding behaviour as adults, nor should the state’s responsibilities for protecting children’s welfare and wellbeing come as anything other than the principal aim of state intervention.

In the context of recent history in England, this translates into a call to make youth justice more welfare oriented and more aware of children’s unique developmental status. Take, for instance, the National Association for Young Justice briefing report (Bateman 2012) or the Ministry of Justice’s (as yet not implemented) review of youth justice (Taylor 2016). Both documents start from an explicitly stated, philosophical position claiming that whatever else a youth justice system ought to do, it must ensure the well-being and welfare of the child. They state further that a child-friendly youth justice system must be separate to adult criminal justice, be focused on securing the best possible future for the child, be aware of the child’s human rights and not be concerned with retributive or vengeful forms of punishment. A child-friendly youth justice would also actively work for the

social inclusion of all children and against the social injustices that children experience – whether or not these exclusions and injustices are based on gender, class, ethnicity, geography and so on. In keeping with the UNCRC, a child-friendly youth justice would ensure that all the processes and procedures that children experience in the justice system do not alienate them but seek to ensure their active participation. Finally, in a child-friendly youth justice, there would be no place for custodial sentences. For many, the most effective way of producing a child-friendly youth justice might also be to simply raise the age of criminal responsibility to 18 years.

In other words, whatever else a child-friendly youth justice system should be, it ought to strive to do no harm and, at a minimum, ensure the protection, well-being and welfare of the children, qua children, that it is responsible for. It is, therefore, a form of justice that treats children as children first and as offenders second. This is not without precedent in the UK. Since Welsh devolution, there have been several reforms to Welsh youth justice practice that claim to treat young lawbreakers as children first and offenders second and put their welfare as a top priority (Haines 2010, Case and Haines 2015). Generally, however, child-friendly youth justice is a form of justice that assumes a greater role for welfare agencies as well as other mainstream children’s and young people’s agencies – such as education, youth work, and social services.

## Is a child-friendly youth justice necessarily more just?

Given the well-known deleterious effect of contact with the youth justice system – as currently configured (McAra and McVie 2007) – very few people would argue against creating a youth justice system that is somehow more ‘child-friendly’ according to the criteria above. Yet, would a youth justice system oriented to welfare and children’s services be, in and of itself, better, less harmful or more just? Or do other issues also need to be considered?

## How differently would welfare-oriented child-friendly youth justice be organised at the local level?

At this level of organisation, youth justice already relies on a separation from both adult justice organisations and processes and from mainstream, statutory children’s services. Children’s services input is still most commonly provided by staff (including trained social workers) located within youth offending teams

though this model is now less dominant than it was. In this context what does the call for a child-friendly youth justice mean? Perhaps it means an organisational form in which the currently separate youth justice system is folded into statutory children's services? What would this look like in terms of the organisation of professional knowledge and expertise? One possibility – already in use in some areas – is for youth justice workers to work within children's services but nevertheless be a specialist area. A slightly different configuration might be to abolish the youth offending team structure altogether and fully integrate it within children's services. Whatever the case, it is very likely that those working with children and young people being dealt with in the youth courts are likely to remain professionally and practically distinct from other social workers or youth workers. Much of this is likely to be driven by the work required by the youth courts vis-à-vis risk assessments, pre-sentence reports, and other court work. In other words, organisational configuration alone is not likely to produce a more welfare-oriented or just response to youth crime given that much of the work of those working with young offenders is shaped by the demands and processes of the youth court. Hence, a second assumption is that in addition to organisational change there would need to be a change in the practices (if not the structures) of the youth court so that it, and the sentences it passes, would be more attuned to individual children's welfare needs, qua children, rather than to risk or the prevention of offending.

Organisational and court changes such as these are not without historical precedent in the UK. The 1933 Children and Young Persons Act required courts to have regard to children's welfare. The 1969 Children and Young Persons Act introduced care orders and supervision orders explicitly to ensure the well-being and welfare of young people who had come to the attention of the police and courts. Throughout the 1980s there was a gradual restriction of the use of custodial sentences for children and young people. Yet it was also during this time period that these supposedly more welfarist oriented practices of dealing with youth crime came under considerable critique as being a less than just response to young people – from both left and right of the political spectrum. Those on the left claimed that the supposedly more welfarist form of youth justice facilitated the expansion of a cadre of professionals who widened the net of social control through institutionalising highly particularised forms of class and gender-based normalising gazes (Donzelot 1979, Cohen 1985). The critique then was that welfare interventions were little more than the velvet glove of oppression, as the expansion of social control was targeted at marginalised, oppressed poor

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and working-class neighbourhoods, families and young people. From the other side of the political spectrum, sentencing children and young people based on their welfare needs was called into question on the grounds that it offended young people's right to due process – particularly when such sentences were expressed in the form of indeterminate sentences. The point is a simple one: the call for a more welfarist approach to dealing with youth crime does not, in and of itself guarantee a more 'just' response to young people. Recent juvenile justice history in England and Wales provides ample evidence.

Leaving history to one side, there is the question of what a child-friendly youth justice would look like in contemporary England. At the point of writing, statutory social services have morphed into Children's Trusts that commission out children's services which are often condemned as inadequate (Toynbee 2018). The National Health Service is on the point of collapse. Years of austerity politics and budgets have seen local authority finances slashed to near breaking point (Butler 2017). Changes to educational services have witnessed the hollowing out of public sector schools with the highest ever rate of children attending fee-paying school (Council 2017). In addition, the reforms to welfare benefits such as universal credit, changes to disability benefits and the bedroom tax have further immiserated those who are already economically marginalised and excluded. These and other changes have, arguably, signified the death of Britain's post-war welfare state and its public sector (Cooper and Whyte 2017). With the uncertainty of Britain's position economically, following Brexit, there seems little prospect that the public sector will be able to provide much to ensure the wellbeing and welfare of children and young people in the justice system. In this context, shifting the organisation of youth justice into an already stretched children's and young people's services cannot, logically, ensure a more just response even with the raft of changes to how youth courts function. It may be that reform of children's and young people's services is also required.

There are more questions that need to be asked. The case of Rita might help to draw these out. In 2009, when Rita was 16, she was prosecuted and convicted of criminal damage – she had smashed the windows and

*Without fundamental social and structural change, a child-friendly youth justice is in danger of replicating the injustices that children already experience.*

headlamps, scratched the paintwork and slashed the tyres of a nearly new Mercedes-Benz. She was given a community-based sentence supervised by the youth offending team. At the time of sentencing the youth offending team recommended to the court that her sentence should include programmes to help her deal with anger, her drug and alcohol issues and that they work with her to obtain employment and/or return to education. As part of the sentence, she was required to write a letter of apology to the owner of the Mercedes-Benz. Rita failed to engage with the programmes and missed many of her YOT appointments. Within a few months, the youth offending team threatened to start breach proceedings.

Rita's background is typical of young women who find themselves involved with England's youth offending services. Having been sexually abused as a child, Rita spent her early years in and out of foster homes until she settled in a group children's home. According to social workers and teachers she was very bright but had behavioural difficulties – she was aggressive and disruptive. By the time she was 13, she was excluded from school. Soon after she developed alcohol and drug problems.

Meanwhile, what the youth offending team did not know was that 18 months before she smashed up the car, Social Services had referred Rita to a voluntary organisation that worked with young sexually exploited girls in the hope that the service could help her to stop selling sex. Since she was 15 years old, Rita had been selling sex to boys and men – usually ones she knew, or who knew her slightly older boyfriend.

I interviewed the practitioner who worked in the voluntary organisation as part of a research project looking at the links between sexual exploitation and criminalisation. During the interview, the practitioner told me about Rita, about Rita's criminal conviction and sentence and expressed concerns that social services and the youth offending team weren't working together. She told me that a few weeks earlier when she and Rita were sitting together doing a craft project, Rita told her that the week before she was arrested her boyfriend had taken her to a hotel so that she could sell sex to one of his friends. When she arrived six men were waiting for her. They took turns to rape her anally. When they were done, Rita's boyfriend drove her back to the children's home. She did not tell anyone what

had happened to her. Three days later she smashed up her boyfriend's Mercedes-Benz.

How would a child-friendly youth justice have helped Rita? Could it have prevented her being prosecuted? Probably not. After all, she had committed a crime. Would a more child-friendly youth justice have helped Rita to disclose to the police, the youth offending team worker or to the courts the context in which she committed her crime? Probably not, particularly given everything that is known about the struggle that adult women have to report rape, much less young women. Historically, the British Crime Survey estimates that only around 29% of rapes are reported to the police. For many, the fear of reprisal, not being believed, not believing that the police will do anything, not having enough proof all contribute to such low levels of reporting. For Rita, those struggles would have been compounded by the psychology of grooming, and by being emotionally and developmentally immature. Moreover, given that what shaped Rita's experiences of sexual exploitation were the failures and challenges of social work and educational services, providing her with more of the same in the name of a child-friendly youth justice would not have changed the outcome for Rita. What might have changed things for Rita was if her experiences of victimisation were recognised and dealt with – something that would require deep structural changes in class and gender-based violence and inequalities.

In the end, maybe a call for a child-friendly youth justice system is simply not ambitious enough? Very few people would object to making the youth justice system more attuned to children's welfare and wellbeing. Yet as a destination – a youth justice system that is more child-friendly – the ground is already ceded to the idea that the way to deal with youth crime is via criminal justice. Without fundamental social and structural change, a child-friendly youth justice is in danger of replicating the injustices that children already experience.

## Children and young people, crime and justice: some concluding thoughts

Leaving aside the UNCRC, there are two fundamental ideas underpinning the notion of justice: equal access to the law and equal protection by the law. Yet, two centuries of research have confirmed that these ideas of justice are not capable of being realised in societies structured by profound gendered, cultural and material inequalities.

Those who are routinely prosecuted, convicted and punished in criminal justice systems across the world

tend to be the already marginalised, the oppressed and the excluded. This is the case because social processes of criminalisation occur within existing classed, gendered and cultural structural inequalities (Box 2002). Hence, it is those who commit crimes on the street who populate our penal realms—even though, arguably, the crimes of the powerful have more far-reaching effects on wider groups of people ( eg especially environmental crime, state crime and white collar crime) (Hillyard 2004). In the USA, the Black Lives Matters (<https://blacklivesmatter.com/>) and Trans Lives Matters (Lourenco 2017) movements demonstrate the fatal and unjust consequences of differential policing on grounds of race and sexualities. Closer to home, there is the abrogation of the state’s duties of care in immigration detention centres (Lampard and Marsden 2016) and the (perhaps criminal) encouragement of profit and cost-cutting above health and safety in relation to housing (for instance, the Grenfell Tower Fire). These are all examples of crimes and social harms that are seldom, if ever, dealt with via criminal justice. Against this, two centuries of research confirm the over-policing of young, marginalised communities and the under-policing of the crimes committed against them – especially relevant in relation to young working-class women and young women of colour. Rita above is one of several young women whose experiences of the policing of sexual violence can only be described as a form of radical non-interventionism that coincides with the experience of being criminalised (Phoenix 2012). These dynamics of under-protection and over-policing occur based on many forms of social inequality (ethnicity, culture, gender, age and so on). (Christie 1986)

Part of the injustice of current forms of youth justice is that children and young people are held to account (prosecuted, convicted and given a court-ordered disposal) for their actions when many of those actions are shaped by conditions which, because they are children, they are legally and developmentally utterly unable to change or affect. BAME children and young people cannot move to areas that are less heavily policed. Children cannot simply leave local authority care or abusive families to create a more stable life for themselves. They cannot claim economic benefits to support themselves in the face of poor schooling and youth unemployment. They cannot vote for politicians whose political policies might address key issues shaping their lives, for instance, youth unemployment.

A truly just response to youth crime would take all of this into account and not limit itself to reforms that leave the rest of the social, economic, political and ideological context intact.

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