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“Vulnerable by law (but not by nature)”: examining perceptions of youth and childhood ‘vulnerability’ in the context of police custody

**Abstract:** This paper, drawing upon qualitative data produced through interviews with custody officers (COs) at two custody suites in England, examines how the vulnerability of children and young people is conceptualised generally, within the criminal process, and then, more specifically, in police custody. It uses the appropriate adult (AA) safeguard under Code C to the Police and Criminal Evidence Act 1984 as the point of reference and explores, firstly, how childhood is conceptualised and, secondly, how childhood vulnerability is understood by COs. The responses of COs are perhaps indicative of a wider issue within the criminal process – the construction of youth and childhood and, accordingly, the criminal law response to children and young people. Within this paper, whilst it is accepted that childhood and vulnerability are non-static concepts, it is nevertheless contended that children and young people *are* vulnerable, particularly when facing the criminal process.

**Keywords:** custody, police, appropriate adults, vulnerability, youth

A contradiction exists, within the youth justice system, between vulnerability and transgression, and protection and punishment (see Phoenix 2008, p. 364). The recognition of vulnerability has shaped provisions within the justice system, yet the contradiction nevertheless remains (see Phoenix 2008, p. 364). The vulnerability of children and young people<sup>1</sup> arises, first and foremost, through their young age and “their incomplete ‘stage’ in the development process” (Brown 2015, p.8). This renders them innately vulnerable (see Brown 2015, p.29): they are unable to fully appreciate the nature and consequences of their actions, and are thus ‘largely unaccountable for their lives and actions’ (Brown 2015, p.8).<sup>2</sup> Although the youth justice system recognises, at least in part, the vulnerability of children and young people, the response is not straightforward (see discussion below). Further, childhood and youth are not uncomplicated concepts (again, see discussion below). The criminal justice system experiences an inherent tension between protectionist and punitive responses – it seeks to protect children and young people (in recognition of their vulnerability) but also seeks to punish children and young people where they have broken the law.

Within this paper, I explore the (often problematic) conceptualisation of vulnerability in relation to children and young people who actually, or allegedly, break the law. This is examined at what is often the first point within the criminal process – police custody. It is important to recognise that what occurs here can have a (potentially long-term) impact upon the life and liberty of the child. Before doing so, I will examine a number of inter-related matters, such as the conceptualisation of childhood, the criminal law’s response to those under the age of 18, the safeguards they attract, and the conceptualisation of vulnerability (and its interplay with transgression). Each element provides the context through which to understand and unpick how COs view young suspects. The aim of this paper is neither to make a value judgement or an assessment as to the efficacy of the youth or criminal justice systems as a whole nor to assess the efficacy or use of the AA safeguard for children or young people.<sup>3</sup> Instead, I explore, in the context of young suspects, vulnerability, using the appropriate adult (AA) safeguard as a reference point. The data illustrates this odd contradiction within the youth and criminal justice systems between protection and punishment, which is further complicated by sentiments regarding the moral decline of youth (see Cohen 2002; Pearson 1983, 2002). Whether moral decline is true or not, need not matter;

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<sup>1</sup> The term ‘child’ refers to those below the age of 15, youth refers to those between 15 and 24 (see United Nations Department of Economic and Social Affairs). Within this paper I am concerned with young suspects between the age of 10 (the age of criminal responsibility) and 17 (as at 18 a suspect is considered an ‘adult’ within custody).

<sup>2</sup> Although the criminal justice system does not necessarily view children and young people in this way – see later discussion.

<sup>3</sup> Pierpoint has explored this latter element – see Pierpoint 2000, 2001, 2006 and 2008.

vulnerability ultimately arises, at least in part, due to exposure to the criminal process, a process which is often the punishment (Feeley 1992).<sup>4</sup>

### **Childhood and vulnerability: social constructs and spectrums**

Children and young people are recognised as vulnerable because of their young age and incomplete development (Brown 2015). Yet childhood is not constant – indeed, there are often ‘significant differences... between children’ (James & Prout 1997a, xiii) and, as such, ‘[t]here is not one childhood, but many...’ (Frones, 1993, as cited in James & Prout 1997a, xiii). Notions of childhood may change according to geographical location (Boyden 1997, p. 203), or even between households (Solberg 1997). Moreover, childhood has been constructed and reconstructed throughout the ages (Hendrick 1997; see also Hendrick 2002 and 2006).<sup>5</sup> The ‘most controversial thesis’, put forward by Postman, suggests the ‘end of innocence’ (Hendrick 1997, p.58), whereby childhood is disappearing due to the influence of, inter alia, television, marketing and advertising, the increase in street violence, and the ‘replication of adult fashion for children’ (Postman 1983 as cited in Hendrick 1997, p.58). However, even if one accepts the impact of these factors on childhood, one cannot ignore the inescapable fact that children (and some young people) are dependent upon and controlled by adults (Hood Williams 1990 in Hendrick 1997),<sup>6</sup> and whilst ‘[they] are active social beings, it remains true that their lives are almost always determined and/or constrained in large measure by adults...’ (Prout & James 1997, p.29). Moreover, the conferral of rights upon children, through the United Nations Convention on the Rights of the Child (UNCRC)<sup>7</sup>, is done in a manner which seeks ‘to protect and nurture childhood’ rather than ‘encourage equality for children with adults’ (Boyden 1997, p. 199).<sup>8</sup>

Even if childhood has not changed, there may nevertheless be a perception that our view of childhood has (Pearson 1983; Pearson 2002). Further still, there are age ‘boundaries and limits to children’s activities’ (James & Prout 1997b, p.245) such as the age at which a ‘child’ can vote, get married, be left alone in the home overnight, be prosecuted, or go to school. All of this may suggest that childhood exists along a spectrum, although where a child sits along such a spectrum, with its various moving parts, may be unclear (see also later discussion). The conceptualisation of youth faces even greater complications than that of childhood because, as Brown notes, youth is more ‘subjective [in] nature’, with ‘varying ideas of where [it] begins and ends’ (2015, p.8). As such, ‘young people seemingly [occupy] a kind of development limbo in terms of accountability, autonomy and citizenship responsibilities’ (2015, p8).<sup>9</sup>

### **Rights and responsibilities, safeguards and security**

Not only are there multiple meanings of childhood within the sociological literature, the criminal law (and the law more generally – see, for example, King & Piper 1990) responds to childhood and youth in a complex manner. On the basis of the UNCRC, states must set a minimum age of criminal responsibility and ‘provide minimum guarantees for the fairness and quick resolution of judicial or alternative proceedings’ (Art 40 UNCRC<sup>10</sup>). The age of criminal responsibility seeks to reflect how children and young people understand and can be accountable for their actions. Under English law, until

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<sup>4</sup> Although it should be noted that the youth justice system is becoming increasingly less punitive – see Bateman 2015.

<sup>5</sup> Newburn also discusses the history of childhood and the developments herewith (1997).

<sup>6</sup> For example, individuals below the age of 18 are typically unable to apply for Jobseeker’s Allowance or Housing Benefit. As such, they can experience economic dependence.

<sup>7</sup> The UNCRC is an international human rights treaty and sets out various rights (civil, economic, political, social, health, and cultural) of children. States that ratify it are bound by it in international law.

<sup>8</sup> Yet there are difficulties in implementing children’s rights where the geo-political area does not subscribe to the same attitudes, cultural ideals and politics (Boyden 1997, p.203). Hanson (2016) has highlighted some of the problems with the UNCRC.

<sup>9</sup> This will be seen later in the paper.

<sup>10</sup> It is worth noting that the United States has still not ratified the UN – see UN Children’s Rights BlogSpot.

the implementation of the Crime and Disorder Act 1998 (hereafter CDA 1998), this minimum age was set at 14 through the common law presumption of *doli incapax*.<sup>11</sup> This rebuttable presumption deemed children under the age of 14 as ‘incapable of evil’ provided they did not realise that their actions were ‘seriously wrong’. The presumption could be (and was) overturned; further, the age of criminal responsibility was still set at ten. Thus, children as young as ten<sup>12</sup> can be, and are arrested, detained, questioned, prosecuted, and convicted for offences, whether minor or serious.<sup>13</sup>

Whilst the age of criminal responsibility may be high in comparison with other jurisdictions,<sup>14</sup> therefore perhaps not adequately reflecting the vulnerability of children and young people, more recent trends (since 2008) have seen a reduction in first-time entrants to the youth justice system, and a decline in imprisonment, due to shifts in ‘legislation, policy and practice’ (Bateman 2015, p.2). Within the justice system more broadly, children and young people are afforded certain rights and entitlements. As a starting point, the UNCRC requires that states respect the rights of children who are accused of breaking the law and provide them with the right to legal assistance and fair treatment (Art 40). In the English criminal justice system, additional protection may be provided by, for example, the diversion of cases out of the system or a decision not to prosecute. Children and young people may also avail of a youth caution (s 66ZA and 66ZB Crime and Disorder Act 1998, inserted by s 135(2) Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO 2012)<sup>15</sup> and those below the age of 18 (i.e. between the ages of ten and 17) are typically tried in a Youth Court. Children and young people may also be able to give evidence via live-link (one of the special measures contained within the Youth Justice and Criminal Evidence Act 1999; see Police and Justice Act 2006, s 47<sup>16</sup>). Safeguards are also available prior to prosecutorial decisions and trial: during the police investigation, a ‘juvenile’, namely, someone aged 17 or below,<sup>17</sup> must be provided with the support of an AA (Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (Code C 2014)).<sup>18</sup> Children and young people are recognised as vulnerable because whilst ‘often capable of providing reliable evidence’, they may ‘without knowing or wishing to do so, be particularly prone in certain circumstances to provide information that may be unreliable, misleading or self-incriminating’ (Code C Note 11C).

In order to contextualise CO interpretations of vulnerability, the provisions on the AA safeguard will be explored herewith in greater detail. The AA safeguard was introduced in 1986 as part of the legislative framework of the Police and Criminal Evidence Act 1984 (PACE), which sought, along with its Codes of Practice, to regulate police powers and suspects’ rights<sup>19</sup> (see Dehaghani (2016); (2017a); (2017b) for greater discussion). For children and young people, the AA can be either the parent, guardian or, if the child or young person is in the care of a local authority or voluntary organisation, a person representing that authority or organisation; a social worker of a local authority; or another responsible adult aged over 18 who is not a police officer or employed by the police (Code C, para 1.7). An AA must be present with the child or young person during interview or for the signing of written statements (Code C para 11.15, unless paras 11.1 or 11.18 to 11.20 apply), for charging (Code C para 16.1), cautioning (Code C paras 7 & 10.12), the taking of samples (such as fingerprints, photographs and DNA), intimate searches (see Code C Annex A para 2B), and when warnings in relation to adverse

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<sup>11</sup> For discussion see Bandalli 1998. For recent discussion see Fitz-Gibbon 2016.

<sup>12</sup> Although the Age of Criminal Responsibility Bill seeks to raise this to 12.

<sup>13</sup> Perhaps the most well-known case is that of Robert Thompson and Jon Venables, for the death of the two year-old James Bulger in Bootle, Liverpool in 1993. This will be discussed in greater detail later.

<sup>14</sup> See CRIN 2016.

<sup>15</sup> They may however no longer avail of reprimands or warnings (these were abolished in April 2013 by virtue of s 135 (1) LASPO 2012).

<sup>16</sup> This is at the discretion of the trial judge – see *R. (on the application of C) v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin); [2010] 1 All E.R. 735.

<sup>17</sup> This was previously set at 16. This will be discussed below.

<sup>18</sup> The Code also requires that the mentally disordered and the mentally vulnerable be provided with an AA (Code C 2014).

<sup>19</sup> They provided, or at least enshrined in law, numerous police powers.

inferences are given (Code C para 10.11, para 10.11A).<sup>20</sup> In addition to the AA safeguard, investigating officers are urged to take special care when questioning children and young people and must also seek corroboration of facts wherever possible (Code C Note 11C). It is imperative that the AA is independent from the police inquiry – he or she cannot be a police officer nor someone employed for, or engaged in, police work. His or her intended role is to facilitate communication, assist and advise the child or young person, as well as ensure that the police are acting fairly (Code C 2014, para 11.17). The AA must also support the child or young person and ensure that the child or young person understands and is able to enforce his or her rights (Home Office and National Appropriate Adult Network 2011; see also National Appropriate Adult Network undated). Since 1999, there has been a statutory obligation placed on the Youth Offending Teams to provide AA services to children and young people brought into police custody (see CDA 1998 s38(4)).

Whilst the provision of AAs for children and young people may not necessarily be of itself problematic, there have been issues raised with the AA safeguard more generally. Questions have, firstly, been raised with regard to the AAs contribution during police interview (Medford, Gudjonsson & Pearse 2003, p.253): in some circumstances the AA may not even be ‘appropriate’ (Hodgson 1997, p.786-7). AAs may lack training (this is particularly true for parents and guardians although may also be true for social workers) and/or may fail to convey empathy or may fail to understand their role (Hodgson 1997, p.786-7) to the extent that ‘the vulnerable suspect who is attended by an appropriate adult may not be placed at an advantage over those who are not’ (Hodgson 1997, p.790). Yet all is not lost – the AAs presence can increase the likelihood that a legal representative will be present, may encourage said legal representative to take a more active role, and may encourage the police to use less interrogative pressure (Medford, Gudjonsson & Pearse 2003, p.253). Undoubtedly, some individuals may not fully welcome the presence of an AA or may not fully understand the purpose of the AA’s presence. Moreover, one cannot ignore the inescapable fact that a child or young person’s need for an AA derives from the unjust criminalisation of children and young people: if the age of criminal responsibility were set much higher (i.e. at 18), the need for an AA would not arise.<sup>21</sup> In sum, the requirement for protection within the youth justice system arises *because of* criminalisation. As I will highlight later, removing children and young people from the youth justice system would negate the need for safeguards.

Since the inception of PACE, the age requirements for the AA safeguard have changed. Prior to 2013 suspects below the age of 17 (i.e. 16 and below) were provided with AAs whereas those aged 17 were treated as adults when in police custody and, as such, were not automatically provided with an AA (this is particularly unusual as those age 17 were treated as children during the other stages within the justice system). In 2013, the provisions for ‘juveniles’ in police custody were extended to 17 year olds as a result of *R (on the application of HC) v The Secretary of State for the Home Department, The Commissioner of Police of the Metropolis* [2013] EWHC 982 (Admin).<sup>22</sup> In this case, HC successfully argued that the failure of the police custodial system to recognize him as a ‘juvenile’, when brought into police custody under suspicion of committing a criminal offence, breached his right to a family life under Article 8 of the European Convention on Human Rights (ECHR)). When HC was brought into custody he was considered an adult (at 17 years old) and therefore had ‘no unqualified right to let his mother know what had happened, nor did his mother have a right to speak to him’ (at para 2). According to Moses LJ:

If 17-year-olds are treated as adults, the police retain the right, as in this case, to refuse contact between such a 17-year-old detainee and his parent or appropriate adult. This is hardly a

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<sup>20</sup> The safeguard also applies to those deemed ‘mentally vulnerable’ or ‘mentally disordered’ – see Code C 2014.

<sup>21</sup> Unless, of course, the 18-year-old was considered ‘mentally vulnerable’ or ‘mentally disordered’ – see Code C.

<sup>22</sup> This has since been given effect by legislation – see Criminal Justice and Courts Act 2015 s 42. *R (on the application of HC)* has ensured that the provision for AAs corresponded with other aspects of the youth justice system such as the age threshold in the Youth Court.

promising introduction for a 17 year-old to the criminal justice system. It merely reinforces the 17 year-old's vulnerability in the face of an intimidating criminal justice system. It undermines the very purpose the youth criminal justice system is designed to achieve (at para 93).

Thus the vulnerability of the 17 year-old, according to Moses LJ, was reinforced by an 'intimidating criminal justice system'. Yet, Moses LJ went on to explain that HC's vulnerability arose from a lack of awareness due to 'youthful arrogance' (see para 94). Moses LJ's judgment supports the main contention of this article: custody, and contact with the criminal justice system, creates or exacerbates vulnerability. Although the courts may be willing to accept the vulnerability of young people, COs as will be evidenced, do not.

### **Precarious positioning: vulnerable or villainous?**

The relationship between youth and vulnerability is further complicated when children and young people 'behave problematically' (Brown, 2015, p.9), with the effect that their vulnerability may be called into question.<sup>23</sup> The interplay between vulnerability and transgression is intricate. As Brown notes, 'when young people behave problematically, questions inevitably arise about their responsibility for their actions and the ways in which their circumstances (or vulnerabilities) determine their accountability for their transgressions' (Brown 2015, p. 9). Therefore, not only can one's vulnerability be alerted to through one's transgressions, one's vulnerability could similarly be called into question through one's transgressions. Vulnerability rests largely on a 'performance' (see Brown 2015), which may become strained when a child has allegedly or actually committed a criminal offence, particularly one which is serious (see Fionda 2005).<sup>24</sup> A dichotomous depiction arises: children are either innocent victims or young deviants (Kitzinger 1997, p.197; see also Fionda 2005). The former is vulnerable; the latter is not. Yet, rather than being invulnerable, children and young people who have committed a criminal offence may actually be *more vulnerable* than those who have not. For example, Goldson has noted:

It is undoubtedly the case that the core business of juvenile/youth justice systems worldwide is to process those children who are routinely exposed to poverty, abuse, inequality, ill health, poor (or lack of) housing and educational disadvantage, as well as rule breaking (Goldson 2000b as cited by Muncie 2006 p. 786; see also Goldson & Muncie 2006 p.222; Goldson 2000).

To further illustrate this point, a recent report produced by the Howard League for Penal Reform found that children between the ages of 13 and 17 who are in care are around 20 times more likely to be criminalised than non-looked after children (Howard League 2016).

The nature of child and youth vulnerability therefore exists in a precarious space where children and young people are recognised as being vulnerable due to their relative immaturity, lack of development, and limited understanding of consequence, yet may also be recognised as autonomous free-willed agents, through alleged or actual criminality. Whilst on the one hand the criminal justice system affords children and young people protection, it was, until 2008, responding in a punitive manner,<sup>25</sup> (or what Goldson and Muncie have referred to as the 'punitive turn' (Muncie 2008; see also Goldson 2002; Goldson & Muncie 2006; Muncie 2006)), which led to an 'increasing tendency to responsibilize

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<sup>23</sup> This is in marked contrast to the approach taken towards children as victims and witnesses. Lord Judge, in the Annual Law Reform Lecture of the Bar Council in 2013, suggested that, in the future, children may no longer have to give evidence as witnesses to or victims of a crime – see Lord Judge 2013.

<sup>24</sup> See above in relation to *doli incapax*.

<sup>25</sup> As Muncie has noted, the criminal justice response may favour 'punitive values' rather than 'protection and support' (Muncie 2008, p.110).

children' (Muncie 2006, p.771)<sup>26</sup> across the USA, England and Wales, and Western Europe (Muncie 2008, p.110)). As noted above, there has been a shift, between 2008 and 2015, away from punitiveness (although, as Bateman notes, these shifts were undoubtedly 'driven by financial imperatives' (2015, p.2)).

Whilst perhaps overused and dated, the prosecution of Robert Thompson and Jon Venables' prosecution for the death of the two-year old James Bulger still serves as a symbol of childhood and (in)vulnerability within the criminal justice system. Thompson and Venables, although only ten years old at the time of the offence, were tried in an adult court and were subjected to mass media scrutiny and vilification. Although they had barely reached the age of criminal responsibility, Thompson and Venables were tried as adults in the Crown Court – their 'capacity for violence and evil transcended childlike behaviour and thrust them into the realm of corrupted adulthood' (Fionda 2005, p.29).<sup>27</sup> It was later held that the decision to try the two boys as adults violated their right to a fair trial under Article 6(1) ECHR as they were unable to fully participate in the proceedings. Yet, the court dismissed their claim that the punitive nature of their sentences violated their rights under Article 3 ECHR (the right not to be subjected to inhuman or degrading treatment). Their claims under Article 5 (the right to liberty and security)<sup>28</sup> and Article 14 (the right to equal treatment under the law) were also dismissed (see *V v United Kingdom* Application No. 24888/94 (2000) 30 E.H.R.R. 121; see also *T v. United Kingdom*, Application No. 24724/94). The strikingly punitive nature of the proceedings against the two ten-year-old boys was driven by mass hysteria within the public domain and the case had a deep and lasting impact upon the public consciousness. Yet the 'level of horror expressed in popular discourse at the time' derived from the erroneous construction '[t]hat Venables and Thompson were the rule and not the exception' (Fionda 2005, p.29), with the case triggering a 'moral panic' (see Cohen 2002). Such a phenomenon is not uncommon: indeed, "the United Kingdom suffers periodic 'moral panics' about youth crime" (Muncie, Hughes & McLaughlin 2002, p.21). Bound-up with this notion is the alleged decline of morality and innocence within the young population (see Pearson 1983, 2002). Whilst for Pearson this is largely a myth, as Postman (1983 in Hendrick 1997) proposed, childhood and youth may well be undergoing change.<sup>29</sup> Further, as Elkind noted, as early as 1988, children have been forced to grow up hurriedly, with many external pressures applied by adults (such as intellectual and educational attainment, organised team sports, exposure to sexuality through the media, and the use of the internet) (1988). Educational pressures seem to be increasing to the extent of reaching 'crisis point' (Telegraph 2015);<sup>30</sup> the use of internet and technological devices (such as tablets) is increasing amongst children and young people (Telegraph 2013; The Guardian 2014); and young children are likely to face mental health crises (The Guardian 2014), with teenage girls facing worrying levels of mental ill health due to early sexualisation, body image worries, stress at school, and bullying both on and offline (Telegraph 2016). Thus, children are perhaps becoming more vulnerable as their innocence is being fettered away.

It is also worth noting that the lived-experience of a child or young person may not be one of vulnerability and, indeed, some of them may reject this label (Brown 2015, pp.135-136).<sup>31</sup> Whilst this is important to recognise, it is the coming into contact with the criminal justice system that results in vulnerability or, as highlighted by Moses LJ above, reinforces vulnerability. Thus, even where the child or young person self-identifies as 'not vulnerable', the punitive nature of the criminal justice system, and the unequal power relations within police custody (see Hodgson 1994, p.90) may nevertheless result

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<sup>26</sup> Muncie is using Garland's concept of responsibilisation (see Garland 2001). Increasing responsibilisation is seemingly part of a greater neo-liberal agenda and applies not only to youth justice (see Liebenberg, Ungar & Ikeda 2015; Phoenix & Kelly 2013) but also other areas such as sex work (see Scoular & O'Neill 2007).

<sup>27</sup> See Fionda 2005 for greater discussion. See also Newburn 1997.

<sup>28</sup> They argued that sentence handed-down by the Home Secretary violated Articles 5 and 6 ECHR.

<sup>29</sup> '[G]rowing up' is certainly becoming more complicated (Newburn 1997, p.651).

<sup>30</sup> Parents recently protested the introduction of primary tests for children as young as seven (BBC 2016).

<sup>31</sup> Similarly, such labelling may be part of neo-liberal state encroachment (Munro and Scoular 2012, p.189; see also Brown 2015). The term 'vulnerability' is therefore not unproblematic however due to its use within Code C it will be continue to be deployed within this paper.

in vulnerability.<sup>32</sup> Evans, for example, has noted how ‘the very fact that juveniles are arrested and detained for questioning by the police may render them psychologically vulnerable’ (1992, p.26). Moreover, as Kemp has noted, the ‘net-widening’ effect of police performance targets results in more children and young people being brought into custody rather than matters being dealt with outside of custody (2014, p.283).<sup>33</sup> This provides further support to the contention that children and young people are perhaps *more* vulnerable to being criminalised when compared with adults. Young suspects are also less likely to request legal advice (see Kemp, Pleasance & Balmer 2011), thus potentially further exacerbating their vulnerability. However, more recent developments paint a perhaps more optimistic picture with the abandonment of policies founded on targets and a move towards greater diversion of children and young people out of the formal system (see Bateman 2015): ‘the indicator that replaced [the ‘offences brought to justice’ target] had a converse impetus, encouraging the police to respond in an informal manner to children who had had no previous contact with the youth justice system’ (Bateman 2015, p.11). The interplay between childhood and youth, and vulnerability is therefore complex due to myriad factors. Below I will explore the extent to which these factors may impact upon the recognition of child and youth vulnerability by COs, based upon primary research.

### **The research project: methods and methodology<sup>34</sup>**

Interviews with COs were conducted as part of a study into how vulnerability was identified and defined by COs (for the purpose of the AA safeguard). The initial focus of the study was adult vulnerability; however, discussions regarding the vulnerability of young suspects inevitably arose both during observations and at interview. I observed the booking-in procedure as a non-participant observer at one large custody suite and one medium sized custody suite between November 2014 and January 2015, and April 2015 and June 2015 respectively. Ethics approval was granted prior to research commencing and consent was obtained from a total of 31 COs (N=20 and N=11 at Sites 1 and 2 respectively). Towards the end of the research period I conducted semi-structured interviews (N=15 and N=8 at Sites 1 and 2 respectively). Interviews lasted an average (mean) of 41 minutes (at Site 1) and 43 minutes (at Site 2). Interviews were carried out in interview rooms, were recorded using a Dictaphone, and were transcribed each day upon leaving the field. Observation and interview data were collected and analysed using a grounded theory approach (see Charmaz 2006; Gibson & Hartman 2014; Glaser & Strauss 2009) although this paper accords more with thematic analysis, which is inherently derivative upon the process of grounded theory without the resulting theoretical construction.<sup>35</sup> Data was coded using NVivo10 following a grounded theory process.

Whilst this paper relies on interview data, the observations allowed me to see how COs interacted with suspects and detainees and guided the interview schedule. During observations it transpired that COs viewed the AA safeguard for adult suspects as somewhat discretionary whereas the safeguard for ‘juveniles’ was, by contrast, mandatory. Yet, as this paper will explore, COs often rejected the inherent vulnerability of young suspects. At interview, COs were asked to explain their views on the use of AAs for ‘juveniles’. Moreover, if required, they were asked to explain why they took a different approach between ‘juveniles’ and adults.<sup>36</sup> Thus at interview they were asked whether they perceived ‘juveniles’ as vulnerable and to explain, or elaborate on, their answer.

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<sup>32</sup> I have relied on, at least in part, this argument elsewhere (addressing adult suspect vulnerability) see Dehaghani (in press). There are some parallels between the arguments set out within these two papers.

<sup>33</sup> Kemp also highlighted the concerns about the police response to inappropriate complaints made by children’s care home staff – see Kemp 2014, p.283. See also Howard League 2016. Whilst the ‘offences brought to justice’ targets were abolished, Kemp has highlighted their enduring impact on police practice (2014).

<sup>34</sup> See Dehaghani (2016) for greater discussion on methods.

<sup>35</sup> As Charmaz has noted, grounded theory can lead to theory construction of ‘sharpened thematic analyses’ (2006, p. 366).

<sup>36</sup> Some COs explained this of their own volition.

The discussion below addresses how COs conceptualise childhood and youth vulnerability, exploring the nuances within these conceptualisations. Even though there is a slight separation, there is much overlap between the themes, illustrating just how complex vulnerability can be and how one's vulnerability status may involve consideration of a range of different factors.

### **The interplay between age and vulnerability**

There is in some senses a 'spectrum' in relation to child and youth vulnerability: the younger the child, the more vulnerable he or she is generally deemed to be. There was a distinction between children (typically those between 10 and 13 or 14), and young people (those aged 14 or 15 and above). The Howard League has commented on this stating that '[t]here appears to be a "tipping-point" around the age of 13 at which time these children lose society's sympathy and rather than being helped they are pushed into the criminal justice system' (Howard League 2016). Bateman has also highlighted that older children (aged 15-17) are more likely to come into contact with the police (2016, p.20). 'Juveniles' were sometimes even referred to as 'young adults' – as CO22, for example, stated, 'they're classed as juveniles, I personally think that they're young adults (CO22 Interview).<sup>37</sup> As noted above, youth is certainly more complicated than childhood. Those aged 15, 16 or 17 were viewed as 'very streetwise children who are not vulnerable in any way, shape or form', other than their age, which meant that 'you have to give them certain allowances' (CO28 Interview). Age was ostensibly the only thing that resulted in vulnerability. However, it was also viewed as distinct from vulnerability. For example, CO24 stated that 'I know age is different to vulnerability' (CO24 Interview).

Some COs, whilst not aware of the case, commented on the change to the Codes of Practice, which occurred in October 2013 as a result of *R (on the application of HC)*, as discussed above.<sup>38</sup> For example, CO27 thought that the cut-off point was 'far better being eighteen than seventeen' (CO27 Interview). Similarly, CO30 felt that the threshold was sensible as it coincides with 'the vast number of other things in society, which you can and can't do' (CO30 Interview). It was also viewed as unusual, particularly in the instance of a suspect who 'two days before their 18<sup>th</sup> birthday' will require an AA but 'then two days later on their 18<sup>th</sup> birthday... [they] don't need one', particularly where one's mental capacity was no different two days prior (CO24 Interview). Yet, not all who discussed the change were in agreement with it. CO16 commented on how it was 'daft' to change the age from 17 to 18 because a number of young people:

[A]re fine, at work, have kids, no intervention from social services, social care or anything. They've sorted out their own care, they've just finished work for the day and yet we get them an appropriate adult here. And yet for the other 23 hours in the day they're treated like adults by the government, by the state, by everyone around them. And yet they come in here and we give them an appropriate adult (CO16 Interview).

A young person's ability to act autonomously and to embody 'adult' traits such as having his or her own children and going to work undermines his or her vulnerability. Further, this quote also suggests that vulnerability is not necessarily bound with age: it is tied instead to capability, or, rather, incapability. Similarly, CO1 stated that young suspects were 'old enough to get married and all sorts of things in society but you can't sit in a police station and ask why you've been nicking from Sportsworld or something like that...' (CO1 Interview).<sup>39</sup> The law, therefore, responds in unusual ways to youth vulnerability: it provides young people with the opportunity to get married (with permission) or to go

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<sup>37</sup> The term 'young adults' was reiterated by CO1.

<sup>38</sup> The Policing and Criminal Justice Bill seeks to 'create legislative consistency' in this regard (see Queens Speech 2015).

<sup>39</sup> 'Nicking from Sportsworld' could be an indicator of being poor or disadvantaged i.e. a vulnerability – see Muncie 2006, p.22.

to work but also seeks to protect them when they come into contact with the criminal justice system.<sup>40</sup> As noted above, whilst children are recognised as innately vulnerable on account of their young age, this may vary as they approach ‘adulthood’, particularly as young people are seen as being “at a more advanced ‘stage’” (Brown 2015, p.29). Those, particularly towards the ‘end’ of the ‘childhood spectrum’, may therefore dangle in some sort of pre-adult/post-child ‘limbo’ (see Brown 2015, above) because they begin to take on additional responsibility and are afforded greater autonomy. It is worth also noting, before delving further, that gender and race may also impact upon the perception of vulnerability. Whilst such factors were not mentioned explicitly by COs at interview in relation to young suspects, Bateman has highlighted that girls are less likely to come into contact with the justice system (2015, pp. 22-23) and BME children are more likely to be over-represented within the youth justice population (2015, p. 23).

### **Transgression, knowledge and ‘performing’ vulnerability**

Vulnerability and transgression have a somewhat uneasy relationship. This interplay was evident in the responses of COs. With regard to the age threshold for the AA safeguard, CO30 felt that ‘some 14 year olds... are more switched on and street-wise than 18 year olds so I don’t think that you can definitely say that *‘you need one and you don’t’* (CO30 Interview).<sup>41</sup> Further, a 17-year-old who:

comes into custody and [has] got a rap-sheet as long as their arm. You’d say, “Why all of a sudden are we providing these young men with an appropriate adult when, you know, for the last twenty years, thirty years, we haven’t?” (CO4 Interview).<sup>42</sup>

These young suspects are viewed as ‘young men’<sup>43</sup> rather than children, thereby disputing their vulnerability. Their evidenced recidivism (i.e. having a ‘rap-sheet as long as their arm’) disputes this vulnerability further. In essence, they are unable to ‘perform’ vulnerability (Brown 2015). This is reiterated by CO31’s statement – he thought it was a ‘bizarre situation where we have people who have served a number of times in prison who come in and are arrested and need an appropriate adult, just because of their age, not because of any lack of understanding’ (CO31 Interview). CO22 also mentioned that ‘we will have people at 15 years come in who are very bright and clearly don’t need appropriate adults, they understand exactly what is going on, they’ve been through the system so many times, it’s incredible’ (CO22 Interview).

The discussion thus far would suggest that children are viewed as indisputably vulnerable by COs (and young people are not). However, a child’s vulnerability may be called into question by knowledge and transgression, to the extent that even children as young as ten were viewed as ‘very, very streetwise and know the system very, very well’ (CO29 Interview). ‘Knowledge’ is therefore gained through exposure to the criminal process and it is this exposure (and knowledge) which mounts an effective challenge to perceived vulnerability, or the ability to adequately ‘perform’ vulnerability. As Hendrick has noted, experience can challenge the perception of innocence (2002, p. 28; 2006; see also May 2002, pp.98-114); indeed, ‘the concept of juvenile delinquency focused upon the perceived conflict between “Innocence and Experience”’ (Hendrick 2002, p.28; Hendrick 2006). In the case of recidivists, COs may be aware that the young suspect has previously been in custody and therefore has ‘experience’. Whilst it may not impact upon the use of the AA safeguard, it may impact upon the general treatment of the child or young person in custody; as Kemp and Hodgson have noted, being a recidivist may mean that the child or young person is essentially treated as an adult (2016, p.169).

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<sup>40</sup> This, in my view, is not unsurprising or problematic because vulnerability, as aforementioned, can be exacerbated by contact with the criminal process.

<sup>41</sup> 18 year olds could indeed be vulnerable and the cut-off of 17 could be viewed as arbitrary.

<sup>42</sup> Vulnerability is therefore also bound-up with knowledge and understanding (as explored above and as will be explored later) – see also Kemp & Hodgson 2016.

<sup>43</sup> Also note the gendered dimension to this lack of vulnerability (see also Brown 2015). See also above in relation to gender and criminalisation.

Police treatment of the young person could also depend on the young suspect's attitude (Kemp & Hodgson 2016, p.169). For example, questions were raised as to the vulnerability of a young suspect who is 'very cocksure, very in your face and everything else', particularly because the young suspect 'doesn't appear [vulnerable] at the time' (CO27 Interview). 'Streetwise' characteristics ostensibly derive from the vast amount of interaction that young suspects have with the police. Further 'a lot of other life experiences' render them 'quite able to stand on their own two feet' (CO4 Interview). It was felt that they were 'switched-on, they can understand everything that goes on' (CO4 Interview). Such abilities challenged to the perception of vulnerability. However, being 'cocksure' or 'cocky' could also *illustrate* vulnerability: the young person could be viewed as immature and therefore *in need* of safeguarding. For example, CO21 stated, 'there are some juveniles that come in that are very, should we say, cocky, they think they know it all. So maybe they need an appropriate adult to protect them from themselves in that respect' (CO21 Interview). A similar theme was found in CO14's interview:

With age comes maturity and with maturity comes knowledge and experience... We have people in here that have been in here twenty-five times, know the system better than some of the cops and you'd say risk-wise, there's no risk, there's no stress, there's no concern, it's an occupational hazard being here, whether they're 15 or 30, makes no difference. But I think with the age, there's also vulnerability in relation to arrogance, petulance, whether they say or do something that may be detrimental to the investigation and the management of their detention. You get the flippant comment, 'I'm only joking, I'm only joking'. Well, they're only joking but we have to take things seriously and the immaturity that they may be more vulnerable to saying things that, it may take longer to deal with them (CO14 Interview).

Both quotes suggest that vulnerability stems from the young person's immaturity and such immaturity requires a protective response. Yet, this protection is not from the police or the criminal process but instead from the young person him or herself.<sup>44</sup> This relates to the notion of 'youthful arrogance', as mentioned by Moses LJ's judgement in *R (on the application of HC)* (above).<sup>45</sup>

### **Thirty years ago: when children were children...**

PACE was implemented some 30 years ago. This fact emerged implicitly within discussions with various COs and also explicitly with CO13, who stated 'teenagers have come on leaps and bounds... They're far more mature than their years' (CO13 Interview). Code C was, therefore, viewed as 'anachronistic', particularly due to its failure to take 'account of how teenagers have evolved over the last twenty or thirty years' (CO13 Interview). This speaks to the notion of a 'golden age' when children were children, suggesting that COs felt that there had been a 'moral decline' or erosion of childhood since the implementation of PACE. Further, PACE has not been updated to reflect this perceived fact that children, and in particular, young people are increasing in maturity and thus no longer vulnerable. It also speaks to Postman's thesis, discussed by Hendrick, where he argues that there has been an end of innocence. Pearson (1983; 2002) would, of course, contend that this decline is merely mythical, pointing to the tendency of society, throughout the ages, to point towards a 'golden age'. It is possible that childhood is indeed changing or that childhood has never existed as a single, solid construct. Relatedly, it is also possible that the vulnerability of children and young people is changing. However, criminalisation counteracts this, leaving young suspects as vulnerable as they were in 1986 (although perhaps in a different manner).

As the title of this article suggests, children and young people were viewed as 'deemed vulnerable by law, but... not necessarily vulnerable by nature' (CO18 Interview). For CO18 the difference between children and young people, and vulnerable adults was that the former is not necessarily vulnerable, but deemed so 'just by virtue of their age' (CO18 Interview). This was implicit in many other interviews but was explicitly reiterated by CO20 who thought that juveniles were 'vulnerable by definition' (CO20

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<sup>44</sup> Links could be made here with responsabilisation – it is not the police or the criminal justice system who are potentially responsible for any errors/misgivings but rather the child or young person.

<sup>45</sup> Although Moses LJ *did* highlight how the criminal process can reinforce vulnerability (see above).

Interview) or at least viewed that way by ‘the law’ (CO20 Interview). However, an absence of vulnerability did not mean the absence of the AA safeguard. Rather, COs implemented the safeguard because it was a ‘legal requirement’ (CO3 Interview)<sup>46</sup> designed to ensure that ‘everything is being done right’ (CO27 Interview): namely, that custodial procedures comply with the law or, perhaps more accurately, that custodial procedures are being *seen* to comply with the law.<sup>47</sup> It was viewed as, moreover, ‘more for our protection than theirs’ (CO28 Interview), with only one officer (CO20) explicitly mentioning that young suspects may be unable to make their own decisions or may experience stress or fear when in custody and thus may require an AA.

It could therefore be argued that a failure to recognise vulnerability is unproblematic where the AA safeguard is implemented regardless; however, a recognition of vulnerability may impact upon how the child or young person is, more broadly, treated within custody. This stems from the fact that the law automatically accepts (or assumes) that children and young people are vulnerable by virtue of their age (their young age impacts upon their cognitive processes, which in turn impacts upon how they may handle the criminal process) and are therefore entitled to an AA. COs cannot implement the AA safeguard subject to their own discretion (as they can with adults). Given the manner in which vulnerability, in relation to childhood and youth, is interpreted by custody officers and, given the way in which the AA safeguard is implemented in relation to adults (see Dehaghani (2016)), it is advisable that, at a minimum, the current procedure continues. Some children and young people may perhaps be capable of invoking their rights, may be able to withstand the pressure (and potential trauma) of the police interview and the police custodial process, and may be able to care for themselves when in police custody. However, ascertaining this may be difficult, if not impossible, particularly during the (arguably short) interactions between the detained child or young person and the CO.<sup>48</sup> The (largely, if not wholly) misguided beliefs of the CO, in the presence of discretion to invoke/not to invoke the AA safeguard, could lead to vulnerable children and young people journeying through the initial stages of the criminal process unsupported.

Although COs were asked questions in reference to the AA safeguard, their responses can also tell us about their views on childhood and youth, more generally. Their views are largely indicative of criminal justice responses more generally, and feed into (and are undoubtedly informed by) public opinion. The existence of such views may impact upon how children and young people are viewed and treated within the justice system.

## **Concluding remarks**

This article has drawn attention to the conceptualisation of childhood and youth and how this interacts with vulnerability within the context of the criminal process. Of course, vulnerability is not an easy construct to pin-down: it incorporates many moving parts. In relation to the alleged or actual criminality of children and young people, vulnerability becomes even more problematic. In Brown’s study, for example, even other young people experienced difficulty when ‘mak[ing] judgements about the vulnerability of young people who had transgressed behavioural norms’ (Brown 2015, p.133). A child or young person should not be deemed ‘invulnerable’ simply because of his or her inability to adequately perform vulnerability. Some children and young people may have, for example, become accustomed to fending for themselves, may be estranged from parents, or may simply not view themselves as vulnerable. As Gray notes, a significant number of young people in custody have suffered abuse or loss in their lives (2015: 434); an estimated two fifths of young people in custody ‘had been

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<sup>46</sup> The rules regarding young suspects and the AA safeguard can therefore be viewed as ‘inhibitory’ (Policy Studies Institute 1981).

<sup>47</sup> See n 46 above.

<sup>48</sup> As ascertained during observations, members of the Youth Offending Team seemed particularly thorough when checking whether the child or young person had been provided with, for example, regular and sufficient nutrition and hydration.

on the child protection register and/or had experienced abuse or neglect' (Jacobsen et al 2010 in Gray 2015, p. 434). Further:

14% had a parent with physical or mental health problems or learning disability; 12% had a mother/step-mother who had misused drugs or alcohol; 7% had a father/step-father who had misused drugs or alcohol; and 6% had experienced the death of a father, 4% a sibling, and 3% a mother. Additionally, just over a quarter had been in local authority care for one or more periods of time (Jacobsen et al 2010 in Gray 2015, p.434).<sup>49</sup>

These figures, based on officially recorded data, 'are likely to be significant underestimates' (Jacobsen et al 2010 in Gray 2015, p.434).

Such circumstances could actually render them more vulnerable. As Gray highlights, 'the way they [the young men in his study] reacted to their experiences was characteristically through destructive violent behaviour and/or self- destructive substance misuse' (Gray 2015, p. 435)<sup>50</sup>. Furthermore, it is entirely possible to reconcile notions of capability and self-determination with vulnerability. For example, Brown, in her study, adopted an approach which recognised young people as 'fragile' but 'also appreciated them as potentially socially skilled actors' (Brown 2015, p.18).

Whilst children and young people, and their capabilities, should be valued and recognised, this does not and should not mean that they are not vulnerable. Police custody is an unpleasant place for anyone, let alone a child or young person.<sup>51</sup> The coercive nature of custody and the criminal process creates or exacerbates vulnerability (see Dehaghani (in press)). Therefore, whether vulnerable or not prior to being brought into police custody, upon entering this sphere the child or young person becomes vulnerable. If children and young people continue to be brought into police custody, it is imperative that their vulnerability is recognised. One problem is that vulnerability does not necessarily manifest externally – those who do not appear to be vulnerable may actually be incredibly vulnerable. The COs views of children and young people are perhaps indicative of a wider problem within the criminal justice system. As Kemp's research (2014) has shown, children and young people were viewed as 'easy targets' during the OBTJ era. Such practices would perhaps have been avoided if there was a genuine recognition of vulnerability. COs views of children and young people could cloud and colour their treatment more broadly, i.e. they may be spoken to more abruptly, they may be left alone in the cell for longer, or their 'difficult' behaviour may not be disregarded (as it could with children and young people who are perceived to be 'frightened') and they may be expected to be more deferent. One notable limitation of the data is that it cannot provide any conclusions on how the perceived vulnerability of the child or young person may impact upon the broader treatment of that child or young person and/or (perhaps more importantly) on case outcomes. This could therefore be an avenue for future research.<sup>52</sup>

This paper has illustrated how vulnerability is interpreted and navigated at what is often the first (and only) stage of the criminal process. To set this in context, I first examined how childhood is/was conceptualised, how the criminal law and justice system responds to (and purportedly seeks to safeguard) those under 18, and how vulnerability interplays with or is undermined by both age and transgression. Thereafter I examined how COs in my study interpreted vulnerability in this context.

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<sup>49</sup> These figures, based on officially recorded data, 'are likely to be significant underestimates' (Jacobsen et al 2010 in Gray 2015, p.434).

<sup>50</sup> Gray, in his study, uses biographical narrative methods to highlight the experiences that negative life events have had on these three young men. The life histories of these young men highlight profound and complex vulnerabilities (see Gray 2015). On the negative life experiences of young people in custody see Grimshaw 2011.

<sup>51</sup> As Kemp and Hodgson have highlighted, custody is, of itself, perceived by young suspects as a punishment (2016, p. 149). This echoes the well-known contention that the process *is* the punishment (Feeley 1992, as above).

<sup>52</sup> The interpretation of vulnerability within police custody and within the wider justice system could also help engender understanding of how unaccompanied minors are viewed and thereby treated.

What happens at the police custody suite has the potential to impact upon the remainder of the process (supposing the process continues). As such, what COs (and other police officers) do (which is undoubtedly, at least in part, influenced by what they think) can have a remarkable impact upon the child or young person. One of two things can be done: the current narratives could be challenged and the need for protective responses highlighted; alternatively, we could seek to 'remove children and young people from the reach of the youth justice system altogether' (Goldson & Muncie 2006, p.223).

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