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Assuming Responsibility for Incarcerated Children: A Rights Case for Care-based Homes

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Abstract:

There is overwhelming empirical evidence that the rights and wellbeing of children incarcerated in penal institutions in England and Wales are inadequately protected, despite some significant rights-based litigation taken by detained children and their advocates. The removal of criminal legal aid from all prisoners, including children, and the potential future repeal of the Human Rights Act will further increase their vulnerability to rights-abuses. This article argues that that one solution to this current legal problem is to abolish penal institutions for children sentenced to custody and to place them instead in care-based homes. A rights-based case is made for this solution by conceptualising the rights of incarcerated children to argue that the State has an assumed responsibility to parent children deprived of their liberty; a responsibility that can be met only in small, care-based homes. The article concludes by setting out the Coalition Government's recent proposals to introduce Secure Colleges in the juvenile secure estate, and briefly considers whether these new institutions will facilitate the State's fulfilment of its assumed responsibility to parent incarcerated children.

The problem of children deprived of their liberty in England and Wales is less current, less pressing, than it was ten or even five years ago - at least if we measure the extent of that problem by the number of children sentenced or remanded to custody. Over the course of the last six years the rate of incarceration for the under 18s has dropped from 3029 in 2008 (a figure that had been relatively stable for much of that decade¹), to 1177 in March 2014;² a significant decrease that is hard to dismiss as either an aberration or a temporary dip.³ However, it is not possible to conclude from this trend

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¹ Prison Reform Trust/Inquest, *Fatally Flawed: Has the State Learned Lessons from the Deaths of Children and Young People in Prison* (London 2012) 17.

² Ministry of Justice, *Youth Custody Report March 2014* (May 2014), available at <https://www.gov.uk/government/publications/youth-custody-data> <accessed 27 May 2014>.

³ The reasons for the decrease have been attributed to the reduction in the numbers of children entering the youth justice system (primarily as a result of the removal of the police 'offences to justice' target which reduced the managerial pressures on the police to take action for minor or first time offences; and a more flexible system of diversion introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012) and a greater willingness by sentencing judges to use the more flexible community sentence, the Youth Rehabilitation Order. See Ministry of Justice/YJB, *Youth Justice Statistics 2011-12* (Jan 2013) ch 7 and R Allen, *Last Resort? Exploring the Reduction in Child Imprisonment 2008-11* (London 2011).

that the youth custodial system is now one that is consistent with children's rights.⁴ This is not only because the child custody figures remain troubling when viewed from a wider comparative, historical and legal context⁵ (thus indicating that custody is still not used only as a measure of last resort as required by international children's rights standards⁶); and nor is it because only certain groups have benefitted from the decrease whilst others have not.⁷ It is because these statistics do not provide any indication as to how, and how well, minors are treated *within* penal institutions when they are remanded or sentenced to custody. It is this current legal problem - the rights-consistency of child custodial institutions - that is the focus of this article.

Specifically, I wish to make a rights-based case for abolishing prison-type accommodation for under 18s and to argue instead that *all* detained children should be placed in care-based homes. Currently, the majority of children in the secure estate are placed in Young Offender Institution (YOIs) or Secure Training Centres (STCs), and only girls and the youngest and most vulnerable children are accommodated in secure children's homes (SCHs).⁸ My argument is primarily conceptual but it is supported by the empirical evidence (set out in section one) that YOIs (and to a lesser extent STCs) have failed to protect children's domestic and internationally enshrined rights. In section two, I briefly consider the reported cases where the common law and human rights have been used to challenge custody placement decisions, and I suggest that although children's rights are now litigated and better protected – in line with the developments in prison law more generally – and can provide (albeit limited)

⁴ Though it is *more* rights consistent, and policies and guidance indicate a greater level of rights-awareness. See eg Sentencing Guidelines Council, *Overarching Principles: Sentencing Youths* (2009) paras 1.3 and 11.5 and the explicit reference to the UN Convention on the Rights of the Child in the CPS guidance on prosecuting young offenders, available at http://www.cps.gov.uk/legal/v_to_z/youth_offenders/ <accessed 27 May 2014>.

⁵ England and Wales has one of the highest rates of child imprisonment in Western Europe: see House of Commons Justice Committee, *Youth Justice: Seventh Report 2012-13* (HC 339, 2013) para 54. The high point from which the current rate has dropped (2009) was itself 795% higher than the rate in 1989: Howard League for Penal Reform, 'Submission to the UN Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: 5th Periodic Review of the United Kingdom of Great Britain and Northern Ireland' (London 2013). Children are sentenced to custody for breaching community orders, for minor offences, and for failing to comply with civil orders where the behaviour itself is not a criminal offence.

⁶ Article 37(b) United Nations Convention on the Rights of the Child. On whether the statutory custody thresholds are complied with, see J Glover and P Hibbert, *Locking Up or Giving Up* (London 2009) 5, which found in the sample of cases examined 35% did not reach the Detention and Training Order statutory requirement for seriousness and persistency.

⁷ The custody rate for children whose ethnic identity is black is still two-thirds the rate of 2005 (dropping from 373 to 266 in 2013) whilst for white children it is just over a third (dropping from 2189 in 2005 to 747 in 2013).

⁸ The differences between these three types of institution is discussed below.

individual redress, they have so far proved unsuccessful in securing the type of systemic or structural change necessary for the juvenile secure estate to be more rights-consistent overall. Specifically, rights-based litigation has not led to the abolition of the type of institution that is most harmful to children: the YOI. Thus, prison-type accommodation continues to dominate the landscape of the juvenile secure estate. In section three I explain why this is a particularly *current* problem, pointing to changes in the legal environment – including legal aid reform and the potential repeal of the Human Rights Act 1998 – which will make it more difficult for children detained in YOIs to seek legal advice and remedies in relation to their treatment therein. In section four I conceptualise the rights of incarcerated children and from here I argue that detained minors have a *right* to be placed in a care based home. This right derives from the State’s assumed responsibility to parent children deprived of their liberty; a responsibility that cannot be met within YOIs but which instead requires the use of small, care-based homes. My argument therefore provides the necessary conceptual basis to support the claims of other scholars and children’s rights advocates that children should be removed from prison-type penal accommodation. I conclude the article by setting out the Coalition Government’s recent proposals to replace YOIs and STCs with Secure Colleges, and briefly consider whether these new institutions will facilitate the State’s fulfilment of its assumed responsibility to incarcerated children.

The Nature of the Current Legal Problem: The Experiences of Children in the Juvenile Secure Estate

It is not the purpose of this article to conduct a rights-audit of the juvenile secure estate in England and Wales.⁹ Nonetheless, it is helpful to set out some of the qualitative and quantitative data on children’s experiences of carceral institutions in order to provide the empirical context for the legal and conceptual arguments that follow. The evidence demonstrates that against most indicators – the United Nations

⁹ On the utility of children’s rights as an audit tool, see U Kilkelly and L Lundy, ‘Children’s Rights in Action: Using the UN Convention on the Rights of the Child as an Auditing Tool’ (2006) 18 *Child and Family LQ* 33. See also B Goldson and U Kilkelly, ‘International Human Rights Standards and Child Imprisonment: Potentialities and Limitations’ (2013) 21 *Int J of Children’s Rights* 345.

Convention on the Rights of the Child (UNCRC) and its related documents¹⁰, the European Convention on Human Rights (ECHR)¹¹, or wider notions of children's welfare or wellbeing¹² – the juvenile secure estate in England and Wales does not fare well.¹³

First, children die in detention,¹⁴ mostly as a result of suicide or self-harm - rates of which are generally high across the secure estate¹⁵ - and on occasion death occurs after the use of restraint or at the hands of another child.¹⁶ 33 Thirty-three children died in the secure estate between 1990 and 2012 including three between 2011-12.¹⁷ The inquests and investigations into these deaths reveal that the children who died were 'often very vulnerable and none received the level of support and protection they needed'.¹⁸

Secondly, children in the secure estate are subject to physical and psychological harm or intrusion from those who are charged with their care. This is most clearly the case when children are subject to restraint, which sometimes involves

¹⁰ In particular see Articles 3, 6, and 12 and the criminal justice specific provisions in Articles 37 and 40 UNCRC; UN Standard Minimum Rules for Juvenile Justice ('The Beijing Rules'), (A/RES/40/33, 1985); UN Rules for the Protection of Juveniles Deprived of their Liberty (A/RES/45/113, 1990); and UN Committee on the Rights of the Child, *General Comment No 10: Children's Rights in Juvenile Justice* (CRC/C/GC/10, 25 Apr 2007). Taken together, these standards set out the overarching principle that children deprived of their liberty should be treated in accordance with their inherent dignity and humanity.

¹¹ In particular, Articles 2, 3, and 8. The domestic courts draw on the UNCRC to interpret the ECHR for children, and thus sometimes the threshold for engagement is lower, and what is proportionate differs. See *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 WLR 148, and in the context of juvenile custody see (inter alia) *R (on the application of C) v the Secretary of State for Justice* [2008] EWCA Civ 882, [2009] QB 657; *R (on the Application of BP) v Secretary of State for the Home Department* [2003] EWHC 1963; *R (on the application of SR) v Nottingham Magistrates' Court* [2001] EWHC Admin 802.

¹² What is meant by wellbeing or welfare is fairly nebulous and context dependent. *Every Child Matters* set out five outcomes: be healthy; stay safe; enjoy and achieve; make a positive contribution; active economic wellbeing. These criteria are reflected in the definition of wellbeing in the Children Act 2004, s 10(2).

¹³ For an overview of the rights of children in England and Wales when deprived of their liberty see *R (on the Application of SR) v Nottingham Magistrates' Court* (n 11) [66] per Brooke LJ. On occasion children are detained in the *adult* not juvenile secure estate (contrary to Article 37(c) UNCRC): see Parliamentary Under Secretary of the Ministry of Justice, Jeremy Wright (HC, 10 January 2013, c. 443W) (five children were placed in adult prisons in 2011).

¹⁴ See Prison Reform Trust/Inquest, above n 1; YJB (2014) *Deaths of Children in Custody: Action Taken, Lessons Learnt*; and Inquest, *Child Deaths in Penal Custody 1990-date* (undated) http://www.inquest.org.uk/pdf/Deaths_of_Children_in_Penal_Custody_1990-date.pdf <accessed 27 May 2014>.

¹⁵ There were 1,791 incidents of self-harm in 2011-12; down 35% from 2008 but up 21% from the year before. The rate for girls is especially high (at 26%). See Youth Justice Board/Ministry of Justice, *Youth Justice Statistics 2012-13* (London 2014).

¹⁶ Gareth Myatt and Chris Greenaway respectively: Inquest (n 14).

¹⁷ Inquest (n 14).

¹⁸ As reported by Prison Reform Trust/Inquest (n 1) 1.

the use of pain-infliction techniques,¹⁹ sometimes the use of handcuffs,²⁰ and sometimes results in injury.²¹ In 2011-12, there were 8,419 incidents of restraint involving children in prison, an average of 702 incidents involving 474 children per month;²² more than in 2008-09 when the custody rate was much higher. Proportionately, children from black and minority ethnic groups are more likely to be restrained, as are young children and girls. In addition to the use of restraint, until May 2014 incarcerated children were subject to routine strip-searching.²³ This meant, as Andrew Neilsen noted, that on their first day in custody vulnerable children, some of whom will have been victims of sexual abuse, were required to undress in front of two adults.²⁴

Thirdly and more generally, children experience penal institutions as violent and harsh. This is partly due to the physical environment, particularly when children are placed in segregation units where they may not receive education or purposeful activity and sometimes have little time outside of their cell.²⁵ Despite the drop in the custody rate, some institutions now rely to an even greater extent on segregation.²⁶ Violence can also come from other young people, and in some institutions children experience a great deal of assault and bullying.²⁷ The distance of many incarcerated

¹⁹ Ministry of Justice, *Use of Restraint Policy Framework for the Under 18s Secure Estate* (London 2012) para 17 ff. Pain-inducing techniques were used on children in STCs six times in 2009-10 and five times in 2010-11 (see Children's Rights Alliance for England, *The State of Children's Rights 2012* (London 2012) 37). Data is not collected for the use of restraint in YOIs and SCHs (but the Prison Reform Trust/Inquest (n 1) notes that SCHs do not use pain induction techniques and nor, anymore, does Hassockfield STC. On the (il)legality of previous STC rules relating to the use of pain-inflicting restraint for the purposes of good order and discipline, see *R (C) v SSJ* (n 11).

²⁰ Prison Reform Trust/Inquest (n 1) report that between 2006-10 children in Hassockfield STC were restrained using handcuffs on 57 occasions. See also Ministry of Justice, *ibid*.

²¹ Prison Reform Trust/Inquest (n 1) 25.

²² Ministry of Justice/YJB (n 3).

²³ 43,960 incidents of strip-searching took place in the 21 months up to December 2012. See E Allison, '43,000 strip-searches carried out on children as young as 12' *The Guardian*, 3 March 2013. Strip-searches will now be risk based: see Lord Faulks, HL Deb, 6 May 2014, c338W and the revised PSI 16/2014, available at <http://www.justice.gov.uk/offenders/psis> <accessed 27 May 2014>.

²⁴ A Neilson, 'Trial to curb strip searching in youth custody', *Children and Young People Now*, 13 June 2013, available at <http://www.cypnow.co.uk/cyp/news/1077571/trial-curb-strip-searching-youth-custody> <accessed 27 May 2014>.

²⁵ On legal challenges to segregation see *R (on the Application of BP) v SSHD* (n 11) and *MA v Independent Adjudicator* [2013] EWHC 438 (Admin); and on the related issue of loss of association see *KB v Secretary of State for Justice* [2010] EWHC 15 (Admin). On how children experience segregation, see Howard League for Penal Reform, *Life Inside 2010: A Unique Insight into the Day to Day Experiences of 15-17 year old Males in Prison* (London 2010) 20, available at: <http://www.howardleague.org/publications-youngpeople/> <accessed 27 May 2014>.

²⁶ In Ashfield YOI, there were 188 incidents of segregation in 2008 compared to 377 in 2011: Crispin Blunt, HC Deb, 12 March 2012, c100W.

²⁷ A key concern expressed by children involved in the Howard League for Penal Reform's UR Boss campaign. See also T Bateman, 'Children Imprisoned in England and Wales Less Likely to Feel Safe

children from their family and friends exacerbates these problems because visits, continuing relationships, and the support that comes with them are made more difficult.²⁸

Finally, the State's obligations fall short of those owed to comparable groups of children not in the secure estate. For example, minimum standards for educational activity are much lower. Only 15 hours per week are required in some types of accommodation,²⁹ and in practice some children receive only 11.³⁰ Resettlement provision for juveniles leaving the secure estate is also not comparable to the support provided to children leaving other types of state care.³¹ Both of these factors (poor education and resettlement support) contribute to the high re-offending rate for detained children which remains consistently at around 70%.

Different Institutions, Different Experiences

The picture, therefore, is bleak, and it is also complex. Children sentenced to custody are often highly vulnerable, having suffered significant prior disadvantage.³² For some children, incarceration compounds, rather than causes, some of the harms they experience. Further, not all of the problems are confined to YOIs and STCs but exist throughout the secure estate, including in secure children's homes.³³

Acknowledging these nuances does not however negate the fact that YOIs (and to some extent STCs) are especially detrimental to children's rights and wellbeing. Both are penal institutions governed under the Prison Act 1952 and related rules³⁴ and inspected by HM Inspectorate of Prisons. Although inspection reports show marked differences between individual institutions,³⁵ they nonetheless

in Young Offender Institutions than Secure Training Centres' (2014) 14 Youth Justice: An Int J 93; Prisons and Probation Ombudsman for England and Wales, 'Learning Lessons Bulletin: Fatal Incidents Investigation Issue 3: Child Deaths' (London 2013).

²⁸ The YJB has dropped its target of placing children within 50 miles from their home. For the effect this has on children, see Howard League (n 25).

²⁹ 15 hours are required in YOIs, 25 in STCs, and 30 in SCHs. See Ministry of Justice, *Transforming Youth Custody: Putting Education at the Heart of Detention* (Cmnd 8564, 2013) 8.

³⁰ Centre for Social Justice, 'Prisons Failing to Educate Young Offenders, warns CSJ' (1 May 2013).

³¹ Children Act 1989, ss 23A-24D. See further K Hollingsworth, 'Securing Responsibility, Achieving Parity? The Legal Support for Children Leaving Custody' (2013) 33 Legal Studies 22.

³² J Jacobson, B Bhadwa, T Gyateng, G Hunter, and M Hough, *Punishing Disadvantage: A Profile of Children in Custody* (London 2010).

³³ Self-harm is higher amongst girls (even though girls are not placed in YOIs) and restraint is used proportionately more against girls and younger children (who are prioritised for placement in SCHs).

³⁴ Prison Service Orders/Instructions (see PSI 1600), the YOI Rules 2000, and the Secure Training Rules 1998. Guidance and targets are also set by the YJB and Ministry of Justice.

³⁵ Compare eg Warren Hill (which received a relatively positive inspection) and Feltham (where the levels of violence are 'unacceptably high', where many children are hungry and frightened and have no

reveal serious systemic failings.³⁶ The problems in YOIs have been identified as stemming from the size of the institutions, the high staff-child ratio,³⁷ and other structural issues deriving from the use of adult-designed systems that are not appropriate for young people.³⁸ STCs are used for younger and more vulnerable children³⁹ and each accommodates between 50-80 minors with a staff-child ratio of 1:3.4. Although all STCs have received quite positive inspections in the past year, they have a well-documented history of over-reliance on unlawful restraint⁴⁰ and some continue to use pain-inducing techniques.⁴¹ In contrast, secure children's homes are small,⁴² care-based institutions run by local authorities and subject to regulations made under the Care Standards Act 2000 and inspected by OFSTED. They are safer for children,⁴³ have better educational outcomes,⁴⁴ and overall the reported experiences of children are positive.⁴⁵ This appears primarily to be because the units are small and members of staff are able to foster good relationships.⁴⁶

Most of the evidence suggests that when children are deprived of their liberty in England and Wales, their rights and wellbeing are much better protected in SCHs than in YOIs (with STCs being historically poor but improving). And yet, care-based

confidence in staff to keep them safe). Those institutions that did better against the measures used by the Inspector (safety, respect, purposeful activity, and resettlement) were smaller, had better – friendly and more individual - relationships between staff and children, had social workers and language and speech therapists on site, and provided children with education and work that was stimulating and challenging. See the reports on <http://www.justiceinspectorates.gov.uk/hmiprison/> <accessed 3 June 2014>.

³⁶ Relating to safeguarding and self-harm, bullying, routine strip-searching, long periods spent in cells, poor food, not enough time for exercise, and poor record keeping; all of which reiterates the data presented above, most of which relates to YOIs. See generally E Kennedy, *Children and Young People in Custody 2012–13: An Analysis of 15–18-year-olds' Perceptions of their Experiences in Young Offender Institutions* (London 2013).

³⁷ Usually 1:15 (eg 4 officers on a wing of 60 children).

³⁸ Including inadequate child specific training (Howard League (n 5)), the systems of rewards and sanctions, and the monitoring of self-harm and suicide (Prisons and Probation Ombudsman (n 27) paras 3.3 and 3.2 respectively).

³⁹ Boys aged 12-14, girls up to 18, and vulnerable boys with greater needs aged 15-17.

⁴⁰ See *R (C) v SSJ* (n 11) and *R (on the Application of the Children's Rights Alliance for England) v Secretary of State for Justice* [2013] EWCA Civ 34.

⁴¹ A new system of 'Minimising and Managing Physical Restraint' is to be introduced for STCs and YOIs.

⁴² Usually accommodating between 6-40 children, with a high staff-child ratio.

⁴³ There are fewer deaths (only one in the last 20 years: see Howard League for Penal Reform, 'Future Insecure: Secure Children's Homes in England and Wales' (London, undated)) and children report feeling safer (OFSTED, *Life in Secure Care: A Report by the Children's Rights Director for England* (London 2009) and YJB/NCB, *A Review of Safeguarding in the Secure Estate 2008* (London 2008)).

⁴⁴ See D Ellicott, 'The Effectiveness of Educational Provision for Young People in Secure Children's Homes' (NTU Alternative Futures Conference 2013), available at <http://www.securechildrenshomes.org.uk/the-effectiveness-of-educational-provision-for-young-people-in-secure-childrens-homes/> <accessed 28 May 2014>.

⁴⁵ OFSTED (n 43).

⁴⁶ YJB/NCB (n 43).

institutions are the exception rather than the rule.⁴⁷ Only those children who fit an appropriate image of ‘child’ – one who is vulnerable, needy, or especially young – are placed in an SCH rather than a YOI or STC. This is reflected in the groups who are given priority for placement in SCHs (girls, younger boys, and boys at risk of suicide, self harm or who are otherwise vulnerable) and in the (non statutory) criteria that governs individual placements.⁴⁸ Prioritising the youngest and most vulnerable children for care-based homes is ostensibly justifiable when budgetary constraints mean there are not enough beds to go round.⁴⁹ However, since the custody rate has dropped it has become obvious from the YJB’s commissioning decisions that the use of prison-type accommodation over care-based homes for the majority of children is not (only) due to financial restraints. Rather than fill empty SCH beds with children from YOIs or STCs, the YJB has instead consistently reduced the number of places it commissions in children’s homes.⁵⁰ It has maintained that this is not a response to public sector cuts, but because its ‘sweeps’ of the secure estate failed to find ‘vulnerable’ children in YOIs who should instead be placed in SCHs.⁵¹ Such claims are hard to believe given the evidence of self harm and suicide. However, it is clear that entitlement to a place in a care-based home in England and Wales is coupled to notions of ‘vulnerability’, and those who fall outside its narrowly defined parameters, because they are too old, too male, too mature, or too resilient, are subject to a penal regime that is, in fundamental ways, indistinguishable from that used for adults.

The Current *Legal Problem*: The (F)utility of the Law and Human Rights for Children in the Secure Estate: Challenging Placement Decisions

⁴⁷ In 2012-13, 74% of children were held in YOIs, compared to 14% in STCs and 8% in SCHs: see Ministry of Justice/YJB (n 15) 41. Girls are no longer held in YOIs.

⁴⁸ ‘Vulnerability’ is no longer explicitly used to structure placement decisions but the relevant factors map on to the concept nonetheless. These are the child’s welfare as ‘a priority’, risk factors, risk of harm to the child herself and to others, previous history in the secure estate, specific needs, co-defendant/gang related issues, and the availability of beds: see <https://www.justice.gov.uk/youth-justice/custody/placing-young-people-in-custody/placement-decisions-and-reviews> <accessed 18 July 2014>.

⁴⁹ The average place costs £215,000 per year in an SCH, £160,00 in an STC, and £60,000 in a YOI. Ministry of Justice, above n 29.

⁵⁰ From 297 a decade ago to 138 in just 9 homes in April 2014: see YJB announcement, reported on Community Care, available at http://www.communitycare.co.uk/2014/02/12/youth-justice-board-reduces-secure-childrens-home-beds/#.U4X3Ji_wumE <accessed 28 May 2014>. Also see *R (on the Application of Secure Services Ltd and Others) v Youth Justice Board and Others* [2009] EWHC 2347, [63] and the Justice Committee (n 5) para 81.

⁵¹ *ibid.*

Given the differences between the three types of institution it is unsurprising that children and their advocates have turned to the courts to challenge issues relating to placement. What the limited amount of case law suggests is that although children have successfully used common law judicial review principles to overturn individual placement decisions, human rights arguments have been less useful. Two reported decisions - *R (on the application of SR) v Nottingham Magistrates' Court*⁵² and *R (on the application of ML) v Youth Justice Board*⁵³ - are used to exemplify this point.

In *SR*, a 16-year-old boy challenged the decision to remand him to custody rather than to local authority care (and thus placement in a secure children's home).⁵⁴ At that time, 15-16 year old boys were only remanded to local authority care if they were vulnerable.⁵⁵ The district judge had held that although *SR* was 'very needy' and an 'emotionally damaged young man', he was not vulnerable 'because he was neither emotionally nor physically immature in comparison with the average 16-year-old boy'.⁵⁶ *SR* challenged this decision and was successful but only because there had been a breach of a procedural legitimate expectation, not because the decision was wrong per se. Similarly, and more recently, *ML* successfully argued on procedural grounds (failure to consult) that the decision to transfer him from an STC to a YOI was unlawful. However, his claim that the decision disproportionately restricted his Article 8 ECHR rights was rejected even when his best interests were ostensibly treated as a primary interest.⁵⁷

Although caution should be exercised in drawing conclusions from limited case law,⁵⁸ the decisions in *SR* and *ML* highlight two important limitations of the law and practice in relation to placement decisions. First, *SR* demonstrates that vulnerability is narrowly understood as immaturity and risk of self-harm and that it is a *relative* concept only. This perpetuates the social and legal construction of children in YOIs

⁵² *SR* (n 11).

⁵³ [2013] EWHC 3083.

⁵⁴ On remand placements, historical and current, see K Hollingsworth, 'Youth Justice Reform in the Big Society' (2012) 34 J Social Welfare and Family L 245.

⁵⁵ See Children and Young Persons Act 1969 as amended by the Criminal Justice Act 1991 and the Crime and Disorder Act 1998, a 'confusingly complex set of provisions' (*R on the application of (VA a litigation friend) v Lewisham Youth Court v Director of Public Prosecutions* [2011] EWHC 1193 (Admin)). See further Hollingsworth, *ibid*.

⁵⁶ *SR* (n 11) [22], [23].

⁵⁷ In line with *ZH (Tanzania)* (n 11).

⁵⁸ But see also *R v Secretary of State for the Home Department, ex parte J; R v Same, ex parte B* (The Independent 20 July 1998) and the issues highlighted in *Scholes v Secretary of State for the Home Department* [2006] EWCA Civ 1343, especially [71]. Unreported and settled cases might present a different picture.

as *not* vulnerable even though they are likely to have suffered earlier disadvantage and be very troubled.⁵⁹ Secondly, these cases suggest that the ECHR is of limited utility in challenging placement decisions because the content of the rights is narrowly construed and the threshold for engagement high. The apparent rights-compatibility that is thus implied not only deprives the child of a remedy but also confers a legitimacy on YOIs that the empirical evidence suggests is absent.⁶⁰

Legal challenges that have been more systemic in nature and aimed either directly at the lack of SCH places (the commissioning of beds by the YJB) or indirectly (the criteria used for prioritisation between groups) have similarly been unsuccessful on rights-based grounds. In *SR* again, it was argued that the statutory framework that then governed remand was discriminatory in favour of girls. At that time, all girls aged 12-16 were remanded to local authority care and 15-16 year old boys were placed in an STC or YOI *unless* they could show they were vulnerable ‘by reason of his physical or emotional immaturity or a propensity of his to harm himself’ (and a place was available).⁶¹ The court held that the statutory framework *was* discriminatory but this was justified because otherwise older girls would be held either in adult prisons or a long distance from home in breach of Article 8 ECHR. The court dismissed an argument made by SR’s counsel that the lack of available places in SCHs sufficient to accommodate *all* vulnerable children of both genders had resulted partly from legislative changes that led to an increase in the number of younger children being placed on remand (thus taking up the available SCH beds). Lord Justice Brooke stated that ‘[i]n a democratic society, if our elected representatives believe that it is desirable or expedient to detain more children, and younger children, in secure accommodation than was previously thought desirable or expedient, that is a choice they are entitled to make’.⁶²

The court was similarly unwilling to overstep its institutional limits in *R (on the Application of Secure Services Ltd and Others) v Youth Justice Board and Others*⁶³ when the YJB’s decision to decommission beds in two secure children’s

⁵⁹ For evidence see again Jacobson and others (n 32) and Prisons and Probation Ombudsman (n 27).

⁶⁰ See D Scott, ‘The Politics of Prisoner Legal Rights’ (2013) 52 *Howard J Criminal Justice* 233, 236-37. On the centrality of humane regimes and procedural justice to legitimacy within prisons, see JR Sparkes and AE Bottoms, ‘Legitimacy and Order in Prisons’ (1995) 46 *British J Sociology* 45.

⁶¹ See n 55. Those provisions have now been replaced by the Legal Aid, Sentencing and Punishment of Offenders Act. This Act allows for ‘remand to youth detention accommodation’, which can be an STC or a YOI.

⁶² *SR* (n 11) [103].

⁶³ *Secure Services* (n 50).

homes in London was subject to judicial review. It was claimed, *inter alia*, that the reduction of places in SCHs would result in more vulnerable children being accommodated in YOIs and thus exposed to a risk of significant harm in breach of Articles 2, 3, and 8 ECHR. Specifically, it was argued that when read in accordance with Articles 3 and 6 UNCRC⁶⁴ the positive duty on the state to detain a vulnerable child in suitable accommodation constituted a ‘primary duty’ to put in place a legislative and administrative framework that deterred such breaches of their rights; it was not only an aspect of the positive duty to take operational decisions where there was an identified significant risk to a specific child. However, Sir Thayne Forbes held that the claimants did ‘not come anywhere close’ to establishing that the decision not to award the contracts engaged or breached the state’s duties under the ECHR and that ‘in any event, no breach can be demonstrated without establishing that (i) the YJB’s demand calculation for SCH places is flawed; (ii) children who could *only* have been appropriately placed in a SCH will not be placed elsewhere and (iii) in general terms, conditions in STCs and YOIs are such as to breach Articles 2, 3 and 8 ECHR’.⁶⁵ The court held that they had not.

We can conclude, therefore, that although the domestic courts have accepted ‘that individual cases have shown breaches of rights’ in YOIs⁶⁶ and that SCHs are preferable to YOIs,⁶⁷ it has not been accepted that ‘the normal conditions of detention in STCs and YOIs ipso facto amount to breach of any [ECHR] Articles in question’.⁶⁸ Only children who are sufficiently vulnerable are placed in SCHs; a welfarist rather than a rights-based approach.⁶⁹ Thus the continued use of YOIs for the under 18s remains lawful and the courts instead expect children whose rights (legal or human) have been or might be infringed within a YOI to litigate individually. However, doing so depends on having access to a system of law that is able to protect those

⁶⁴ The best interests provision and the obligation on states to ensure to the maximum extent possible the survival and development of the child.

⁶⁵ *Secure Services* (n 50) [112].

⁶⁶ *ibid* [111].

⁶⁷ *SR* (n 11).

⁶⁸ *Secure Services* (n 50) [111].

⁶⁹ See S Bessell and T Gal, ‘Forming Partnerships: The Human Rights of Children in Need of Care and Protection’ (2009) 17 *Int J Children’s Rights* 283; J Waldron, ‘The Role of Rights in Practical Reasoning: “Rights” versus “Needs”’ (2000) 4 *J Ethics* 115, 131: ‘Both rights and needs amount to a demand that certain interests be attended to; but only rights-talk presents those interests in the voice of one who would be a fully-fledged member of society, who is not going to go away, and who expects to be taken seriously as an enduring source of continuing demands’.

rights, something which recent and proposed legal developments are likely to undermine.

The *Current* Legal Problem: Incarcerated Children and Access to Justice

The potential and actual threats, to access to justice for incarcerated children come from two sources: reform to the system of legal aid and the future repeal of the Human Rights Act 1998.

Legal Aid Reform

The first and so far most significant limitation to access to justice for incarcerated children results from the 2013 legal aid reforms.⁷⁰ For prisoners of any age, criminal legal aid is now restricted to ‘liberty cases’,⁷¹ meaning that for most detained children (who lack access to their own financial arrangements) legal advice and representation in relation to treatment and sentencing matters will no longer be available.⁷² Instead, children, like all other prisoners, are expected to rely on judicial review, complaints to the Prisons and Probation Ombudsman (whose decisions are not binding), and the internal prisons complaints systems. The reforms have been subject to immense criticism (including from the Joint Committee on Human Rights⁷³), much of which applies with added force in the case of children.

The first criticism that can be made of the reforms is that individuals in prison are amongst the most vulnerable in society and the condition of imprisonment leaves them open to rights infringements that would not occur in the outside world. This is even more true for children who are not only likely to be physically weaker and psychological less robust than adults (though of course this varies on an individual

⁷⁰ See Legal Aid, Sentencing and Punishment of Offenders Act 2012, Part I, and the relevant regulations (The Criminal Legal Aid (General) Regulations 2013, SI 2013 No 9 amended by Criminal Legal Aid (General) (Amendment) Regulations 2013, SI 2013 No 2790). See also Ministry of Justice, *Transforming Legal Aid: Next Steps* (London 2013).

⁷¹ Cases that engage Articles 5(4) or 6 ECHR; eg parole hearings or disciplinary hearings that lead to an increase in sentence. On the importance of legally aided legal advice to children facing a deprivation of liberty, see *S v Miller* [2001] SC 977.

⁷² Treatment matters include educational provision, food, incentives and privileges, correspondence, treatment from staff (such as bullying), visits, behavioural courses, and mother and baby unit placement. Sentencing matters relate eg to resettlement provision or the use of segregation/loss of association.

⁷³ House of Lords and House of Commons Joint Committee on Human Rights *The Implications for Access to Justice of the Government's Proposals to Reform Judicial Review: Thirteenth Report of Session 2013–14* (HL Paper 174, HC 868, 2013). See also P Kaufmann and T Owen, ‘The Price of Dignity and Liberty: Legal Aid for Prisoners’ [2013] European Human Rights L Rev 482.

basis), but who are also likely to have suffered a range of disadvantages prior to incarceration that compound those vulnerabilities.⁷⁴ Moreover, children are living outside their family home and thus away from those people who would ordinarily be expected (both legally and socially) to protect their rights.⁷⁵

Secondly, there are specific legal issues at stake for children in and leaving custody that are unlikely to be resolved without legal advice.⁷⁶ A key matter is children's resettlement and the use of the Children Act 1989 to secure local authority support when the child leaves custody. Given (amongst other things) the complexity of the statutory eligibility criteria, detained children are unlikely to realise that upon leaving custody they may become a 'child in need' or a 'care leaver' under the Children Act 1989, and that such a status imposes significant duties on local authorities (which can include, for example, a duty to provide accommodation). Furthermore, even if a child has the requisite knowledge, the primary mechanism available for seeking redress – the *prison* internal complaints systems – relates only to the duties of the penal institution and provides no remedy against a local authority.

Thirdly, like adult prisoners, detained children cannot access free sources of legal advice such as the Citizens' Advice Bureau and, as Evans notes, there is limited and highly controlled access to legal sources on the internet.⁷⁷ Moreover, numerous studies show that children in prison are more likely to have low literacy skills, low IQ, special educational needs, and low educational achievement, which means that their capacities necessary to articulate a complaint, and to understand the legal issues at stake, may be lacking.⁷⁸ Many detained children are simply not equipped to act on their own behalf.⁷⁹

⁷⁴ Jacobson and others (n 32).

⁷⁵ On which see the discussion in section four below.

⁷⁶ The same is true in relation to liberty cases, where the effect of a short extension to a child's sentence following a disciplinary hearing can have long term consequences in terms of the duties owed to him by the local authority, if the effect is to disqualify the child from 'care-leaver' status. See *R (on the application of M) v Chief Magistrate* [2010] EWHC 433 (Admin).

⁷⁷ M Evans, 'Prison Law Funding under Threat from Transforming Legal Aid 'Reforms'' (2013), available at <http://www.lag.org.uk/magazine/2013/05/prison-law-funding-under-threat-from-transforming-legal-aid-%27reforms%27.aspx>, <accessed 30 May 2014>.

⁷⁸ See, inter alia, Jacobson and others (n 32) and Youth Justice Board, *Barriers to Engaging in Education, Training and Employment* (London 2006), which reported that 25% of children in the youth justice system have identified special educational needs, 46% are rated as underachieving at school and 29% have difficulties with literacy and numeracy.

⁷⁹ On the need to provide children with special assistance in criminal proceedings, see *V v United Kingdom* (1999) 30 EHRR 121; *R (on the Application of K) v Parole Board* [2006] EWHC 2413 (Admin); [2006] All ER (D) 75; *R (on the Application of HC) (a Child, by His Litigation Friend CC) v the Secretary of State for the Home Department; the Commissioner of Police of the Metropolis* [2013]

Finally, prison internal complaints mechanisms are an inadequate substitute for legal advice.⁸⁰ They lack the necessary independence and are *perceived* as less independent by children, who also see the complaints system as selective and slow and who fear reprisals if they bring a complaint.⁸¹ In a judicial review brought by the Children's Rights Alliance for England in 2013, it was reported that only 2% of the children subject to the unlawful regime of painful restraint that was used in STCs until 2008 used the internal prison mechanisms to make a complaint. This suggests that detained children neither trust nor understand the internal complaints processes.⁸² These findings are compounded by evidence that children in general do not have a sophisticated or well-developed understanding of their human rights and may not recognize that the treatment they have suffered constitutes a rights abuse. And, where it is so recognized, the research evidence also suggests that children feel unable to stand up for themselves.⁸³ Furthermore, complaints are backward looking and do not help children to achieve support in relation to securing future rights, such as placement changes or resettlement. Finally, complaints may not be taken seriously when the coercive backdrop of the threat of legal action is absent.⁸⁴

Despite the many criticisms that have been leveled at the legal aid reform for restricting access to justice and despite the detrimental impact it is likely to have on the rights protection of detained children, the provisions have not (yet) been found to be unlawful. In March 2014 the Howard League for Penal Reform and the Prisoners' Advice Centre were refused permission to challenge the amendments to criminal legal aid for prisoners.⁸⁵ The High Court dismissed all of the identified grounds of review⁸⁶

EWHC 982 (Admin). Parents may be unable to help and, like other sources of support (such as helplines), lack legal expertise.

⁸⁰ See the Joint Committee on Human Rights (n 73).

⁸¹ Office of the Children's Commissioner, *Why Are They Going to Listen to Me? Young People's Perspectives on Complaints Systems in the Youth Justice System and the Secure Estate* (London 2012) 24ff.

⁸² CRAE (n 40).

⁸³ On both of these points see M Ruck and others 'Adolescents' and Children's Knowledge About Rights: Some Evidence for How Young People View Rights in Their Own Lives' (1998) 21 J Adolescence 275; C Goodwin-De Faria and V Marinos, 'Youth Understanding & Assertion of Legal Rights: Examining the Roles of Age and Power' (2012) 20 Int J Children's Rights 343. On the impact of prior maltreatment and spending time in care on children's understanding of rights see M Peterson-Badali, M D Ruck, and J Bone, 'Rights Conceptions of Maltreated Children Living in State Care' (2008) 16 Int J Children's Rights 99.

⁸⁴ N Whitty, 'Human Rights as Risk: UK Prisons and the Management of Risk and Rights' (2011) 13 Punishment & Society 123.

⁸⁵ *R (on the Application of the Howard League for Penal and Reform and the Prisoners' Advice Service) v the Lord Chancellor* [2014] EWHC 709 (admin).

including the substantive issue that the reforms restricted access to justice in contravention with the common law and Article 6 ECHR.⁸⁷ There was no discussion in the judgment of the specific impact on children and for the time being the regulations remain in place.⁸⁸ Thus, instead of having access to lawyers for advice regarding their treatment in detention, as noted, children are expected to rely on internal prisons complaints systems, complaints to the Prisons and Probation Ombudsman, and judicial review. In addition to the limitations of internal complaints mechanisms that have already been outlined, judicial review also fails to provide a suitable alternative because of the strict time limits to bring a claim (three months), the requirement that children have a litigation friend, and because firms with judicial review legal aid contracts are limited in the number of cases they can bring a year ('matter starts'), making it difficult for them to absorb additional prison-related cases into their workload.⁸⁹ None of the alternatives to criminal legal aid are therefore sufficient.

Human Rights Act 1998: RIP?

The second (potential) limit to access to justice for detained children arises if the Conservative Party are elected with a majority in 2015 and repeal the Human Rights Act 1998 (HRA).⁹⁰ Although, as noted above, the common law has been of greater utility to incarcerated children than the ECHR, where HRA challenges have been successful the impact has been significant.⁹¹ In addition, the availability of the HRA as the basis for litigating rights has a wider, indirect effect. Whitty has argued that even though prison environments may not be 'saturated with rights discourses' and even though judges are not inevitably the 'defenders of prisoners' rights', the increase in human-rights based litigation, even when it is unsuccessful, has had an important systemic impact by increasing and broadening the scope of legal risk within the prison

⁸⁶ Including adequacy of the consultation process, irrationality, fairness, and a breach of the Lord Chancellor's duty to protect the rule of law under the Constitutional Reform Act 2005.

⁸⁷ The court relied on *R v Lord Chancellor ex parte Witham* [1998] QB 575, 581; *Airey v Ireland* (1979-80) 2 EHRR 305; and *Hooper v United Kingdom* [2005] 41 EHRR 1 to support its conclusion that legal aid was not, in most cases, a component of the right to access to justice.

⁸⁸ The challenge was probably premature; another is likely to be brought when or if it results in unfair decision-making in relation to a particular child.

⁸⁹ See the evidence from the Association of Prison Lawyers to the Joint Committee (n 73).

⁹⁰ A Travis, 'Conservatives promise to scrap the Human Rights Act after next election' *The Guardian*, 30 September 2013.

⁹¹ The litigation involving the unlawful use of restraint in STCs is one of the clearest examples: see n 11 and n 40.

sector.⁹² Managerial controls now use rights-based measures in order to avoid litigation that is costly in financial and reputational terms,⁹³ thus helping to secure rights compliance and rights consciousness within the prison sector.⁹⁴ Therefore, even though the HRA has not provided a panacea for detained children - and as noted above it has certainly not led to an abolition of YOIs or STCs – it can nonetheless improve directly and indirectly the way children are treated in custody. Its repeal, especially when combined with the restrictions on legal aid, is likely to diminish further the rights and wellbeing of children in YOIs.

Assuming Responsibility for Incarcerated Children: A Rights Case for Care-based Homes

One solution to the current legal problem facing children in YOIs is for care-based homes to be extended across the entire juvenile secure estate. So far, this has proved unattainable both politically and legally. As the preceding discussion has shown, there is no ‘right’ to a certain type of secure accommodation in domestic law. UN Rules do require the use of small, open units⁹⁵ but even the existence of a relevant international standard does not guarantee its protection in English law, not only because of limitations in enforceability but because such provisions raise ‘unresolved conflicts of a theoretical nature’.⁹⁶ Specifically here, on what basis can we justify special treatment for all under 18s and not those who have reached adulthood, where the factors that are ordinarily drawn on to differentiate the two groups (vulnerability and capacity) are even less distinct in criminal justice than elsewhere? Theorising the conceptual basis underpinning the claim for care-based homes addresses this by allowing a coherent justification to be given for treating *all* children, regardless of their age or gender, differently (and preferentially) from all adults even though there may be few differences empirically.⁹⁷ Drawing on theorisations of children’s rights

⁹² Whitty (n 84).

⁹³ What Whitty refers to respectively as ‘legal risk’ and ‘legal risk +’.

⁹⁴ Though on the narrowness of how rights are understood in managerialist systems see A Liebling and B Crewe, ‘Prisons Beyond the New Penology’ in J Simon and J R Sparkes (eds), *The Sage Handbook of Punishment and Society* (London 2013).

⁹⁵ Rule 30, Rules for the Protection of Juveniles Deprived of their Liberty (n 10).

⁹⁶ Beijing Rules (n 10) and K Hollingsworth, ‘Theorising Children’s Rights in Youth Justice: The Significance of Autonomy and Foundational Rights’ (2013) 76 *Modern L Rev* 1046, 1048, and generally see L Ferguson, ‘Not Merely Rights for Children but Children’s Rights: The Theory Gap and the Assumption of the Importance of Children’s Rights’ (2013) 21 *Int J Children’s Rights* 177.

⁹⁷ For a theorization that considers the implications of the child’s status as *future* rights-holder to her rights in criminal justice, rather than the child’s present rights status (as here), see Hollingsworth, *ibid*.

also explains the content of the right: why *care* and *home* are more than linguistically important. This then provides a theoretical foundation for the development of a new domestic legal right for incarcerated children: the right to a care-based home.

Justifying Age-specific Rights: Children's Citizenship and Incarceration

The special treatment of children as a distinct group of rights-holders is often justified by pointing to their greater physical or psychological vulnerability or relatedly, as in the preamble of the UN Convention, their physical and mental immaturity when compared with adults.⁹⁸ However, physicality-derived justifications for age-based boundaries are, says Archard, arbitrary and unreliable:⁹⁹ vulnerability and immaturity vary, not only between persons of the same age but temporally across an individual's lifetime;¹⁰⁰ and neither necessarily diminish according to a particular chronology. Furthermore, where vulnerability and immaturity are drawn on to justify a particular right, the strength of the claim may be lost or undermined in the face of conflicting (empirical) evidence. For example, if it can be shown that many adult prisoners are (empirically) highly vulnerable or conversely that some incarcerated children are very mature (or at least constructed as such¹⁰¹), then the case for a *distinct* penal regime for minors, such as the use of care-based homes, is weakened.

This does not, however, necessitate a rejection of age as an appropriate basis on which to confer special rights on children.¹⁰² Age is significant because of its relationship to citizenship and, when citizenship is conceptualized, a clear demarcation between adults and children emerges. When this is applied to the context of incarceration (because it is as citizens - as political actors not moral agents - that we are held criminally responsible), the attribution of a uniquely *children's* right can be justified. This conceptualization also provides a foundation for the interests that I assert should be protected by this right.

⁹⁸ In relation to children in prison, see para 2 of the United Nations Rules for Juveniles Deprived of their Liberty (n 10).

⁹⁹ See D Archard, *Children: Rights and Childhood* (London, 2004) pp 85ff and E Buss, 'What the Law Should (and Should Not) Learn from Child Development' (2009) 38 *Hofstra L Rev* 13.

¹⁰⁰ Martha Fineman describes vulnerability as a universal, inevitable, and enduring aspect of the human condition. See 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale JL and Feminism* 1.

¹⁰¹ See eg *R v Wellington* [2012] EWCA Crim 1696.

¹⁰² See eg R Dixon and M Nussbaum's 'unique vulnerability' (I will return to this below) in 'Children's Rights and a Capabilities Approach' (2012) 97 *Cornell L Rev* 549; Andrew Franklin-Hall's life-stage approach in 'On Becoming an Adult: Autonomy and the Moral Relevance of Life Stages' (2013) 63 *Philosophical Q* 223; or Emily Buss's concern with children's potential (n 99).

Conceptualising Children's Citizenship

Citizenship is a highly contested concept but at its core it denotes community membership and equality in civic participation.¹⁰³ It is a concept that carries importance because of what it signifies about inclusion/exclusion and because of its relationship to the formal attribution of rights.¹⁰⁴ It implies (legally and culturally) equality, belonging, value, and reciprocal responsibilities; it confers a status that determines the rights *and* worth of groups and individuals within that community. It is for this reason that some traditional ideas of citizenship are criticised for privileging the position and experience of particular groups and conferring on them the status of 'citizen' to the exclusion of others.¹⁰⁵ This is most clearly the case in relation to the 'core' meaning of citizenship as political citizenship, which denies membership to those - including children - who cannot vote or stand for public office.¹⁰⁶ It is evident too in extended versions of citizenship, including TH Marshall's classic tripartite articulation of civil, political, and social citizenship rights,¹⁰⁷ where the position of children as 'partial' or 'demi-citizens' is further entrenched by the broadening of the conditions of 'full' membership.¹⁰⁸

One response to the exclusion of children from many aspects of citizenship has been to redefine the concept to take account of their own experiences and understandings of its meaning. Ruth Lister, for example, highlights the centrality to

¹⁰³ Duff defines it as 'equal, mutually respectful participation in the civic enterprise': RA Duff, 'Responsibility, Citizenship, and the Criminal Law' in RA Duff and SP Green (eds), *Philosophical Foundations of Criminal Law* (Oxford 2011) 119.

¹⁰⁴ Easton describes citizenship as 'Janus-faced': by conferring rights regardless of characteristics such as race or sex it implies equality and universalism, but simultaneously it excludes those defined as 'non-citizens': S Easton, 'Constructing Citizenship: Making Way for Prisoners' Rights' (2008) 30 *J Social Welfare and Family L* 127.

¹⁰⁵ However, even for those groups who are 'insiders' and enjoy the status of citizen by virtue of political rights, the purported universality of citizenship (its disregard for gender, race, class) can act as a mask for social inequalities and social injustice; *meaningful* citizenship remains elusive: see I Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99 *Ethics* 250.

¹⁰⁶ On the consequences of this for children's ability to influence political debates and have their interests taken into account see A Nolan, 'The Child as "Democratic Citizen": Challenging the Participation Gap' [2010] *Public L* 767.

¹⁰⁷ TH Marshall, *Citizenship and Social Class and Other Essays* (Cambridge 1950).

¹⁰⁸ eg by conceptualising the citizen as worker. For similar feminist critiques, see S Walby, 'Is Citizenship Gendered?' (1994) 28 *Sociology* 379; A Phillips, 'Citizenship and Feminist Theory' in G Andrews (ed), *Citizenship* (London 1991) 78; C Pateman, 'The Patriarchal Welfare State' in C Pateman, *The Disorder of Women* (Cambridge 1989).

children of citizenship as the fulfilment of obligations and responsibilities.¹⁰⁹ And, when understood as ‘citizenship in practice’, the many contributions that children make to public life (for example through formal structures such as youth councils, via proxies, during collective consultation processes, and in everyday activities in public spaces such as schools¹¹⁰) can evidence children’s citizenship and strengthen their claims to ‘insider’ status.¹¹¹ However, this type of extended *cultural* definition can conceal important age-based differences that affect how children enjoy the benefits and are able to meet the obligations of citizenship.¹¹² It also obscures a point I will return to below: restrictions on children’s political and social citizenship mean that *conceptually* (and, for many, empirically¹¹³) children’s lives are lived in the private sphere to a much greater degree than are the lives of adults.

Within the criminal justice context it is particularly important not to mask children’s exclusion from many of the core elements of political and social citizenship by adopting a ‘difference-centred’¹¹⁴ or cultural approach to citizenship. A more inclusive definition of citizenship can be (mis)appropriated – as it was by New Labour - to defend the subjection of young children to accountability before the criminal courts.¹¹⁵ A narrower, liberal rights-based approach to citizenship that highlights children’s *exclusion* is taken here because it is within the space between partial and full citizenship that the State’s obligation to provide differential and special treatment to incarcerated children emerges and provides the basis for normative rights-claims that are not dependent on empirically determined and individually variable characteristics.

Citizenship and Incarceration

¹⁰⁹ For a nuanced account of children’s citizenship, see R Lister, ‘Why Citizenship: Where, When and How Children?’ (2007) 8 *Theoretical Inquiries in Law* 693 and R Lister, ‘Unpacking Children’s Citizenship’ in A Invernizzi and J Williams (eds), *Children and Citizenship* (London 2008).

¹¹⁰ EKM Tisdall, JM Davis, and M Gallagher, ‘Reflecting upon Children and Young People’s Participation in the UK’ (2008) 16 *Int J Children’s Rights* 419.

¹¹¹ Although children’s participation in policy processes may remain tokenistic. See Tisdell and others *ibid*; M Arnott, ‘Public Policy, Governance and Participation in the UK: A Space for Children?’ (2008) 16 *Int J Children’s Rights* 355 and R Hinton, ‘Children’s Participation and Good Governance: Limitations of the Theoretical Literature’ (2008) 16 *Int J Children’s Rights* 285.

¹¹² See Young (n 105) 257 and Lister (n 109).

¹¹³ See S Holloway and G Valentine (eds), *Children’s Geographies: Playing, Living, Learning* (London, 2000) cited in G Hallden, ‘Children’s Views of Family, Home and House’ in P Christensen and M O’Brien (eds), *Children in the City: Home Neighbourhood and Community* (London 2003).

¹¹⁴ Lister (n 109).

¹¹⁵ See especially the rhetoric of New Labour, captured best in Home Office, *No More Excuses: A New Approach to Tackling Youth Crime in England and Wales* (1997, Cmnd 3809).

I focus on citizenship because my starting point when thinking about criminal responsibility is that we are held accountable as citizens for engaging in behaviour that has been politically defined as a public wrong.¹¹⁶ The importance of highlighting the ‘political character of crime’¹¹⁷ – that crime and criminal justice systems exist solely within political systems – is that it draws attention not only to the responsibility that is owed *by* us but also the responsibility owed *to* us by the political community (represented by the State) that is calling us to account.¹¹⁸ Reciprocity is therefore central to the criminal responsibility of citizens.¹¹⁹ There are multiple ways in which this reciprocity can be manifested within a system of criminal justice. For example, for Duff it gives rise to a ‘moral bar to trial’ if an individual or group has been legally and effectively excluded from the benefits of citizenship;¹²⁰ or it can be used to further support the idea of a ‘hardship defence’;¹²¹ it might inform sentencing;¹²² or it could be translated into a reparatory obligation to redress the ‘secondary pains of punishment’.¹²³ The particular focus here is narrower; it considers the significance of reciprocity for one particular group: children deprived of their liberty.

Historically, the reciprocity in the relationship between prisoners and the state was, in citizenship terms, typically conceptualised as absent: incarceration constituted ‘civic death’.¹²⁴ However, even during the nineteenth century, prisons were locations to reform and ‘mould’ citizens who remained partially within the political

¹¹⁶ A Ristroph, ‘Responsibility for the Criminal Law’ in RA Duff and SP Green (eds), *Philosophical Foundations of Criminal Law* (Oxford 2010) 107. See also RA Duff, ‘A Criminal Law for Citizens’ (2010) 14 *Theoretical Criminology* 293; Duff (n 103); M Dubber, ‘Citizenship and Penal Law’ (2010) 13 *New Criminal L Rev* 190. A citizen-focused account of punishment is usually associated with a social contract approach: see (inter alia) A Goldman, ‘Toward a New Theory of Punishment’ (1982) 1 *L & Philosophy* 57; Easton (n 104) 129; *Hirst v UK* (no 2) Application No 74025/01 (6 October 2005) [50].

¹¹⁷ Ristroph, *ibid.*

¹¹⁸ See Ristroph (n 116) 109: ‘an account of criminal responsibility must not rest with attributions of responsibility for individual criminal acts; it must address collective responsibility for the criminal law itself’.

¹¹⁹ See Duff and Ristroph (n 116).

¹²⁰ Such as black South Africans in the Apartheid regime. See RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford 2007) 191ff; and see also V Tadros, ‘Poverty and Criminal Responsibility’ (2009) 43 *J Value Enquiry* 391.

¹²¹ See R Delgado, ‘Rotten Social Background: Should the Law Recognise a Defence of Severe Environmental Deprivation’ (1985) 3 *L and Inequality* 9; B Hudson, ‘Punishment, Poverty and Responsibility: The Case for a Hardship Defence’ (1999) 8 *Social and Legal Studies* 583.

¹²² L Crocker, ‘The Upper Limit of Just Punishment’ (1992) 41 *Emory LJ* 1059.

¹²³ C Harding and R Ireland, *Punishment: Rhetoric, Rule and Practice* (London 1989); Hollingsworth (n 31).

¹²⁴ Easton (n 104). Within the USA the idea of civic death is even more pervasive: see M Gottschalk, ‘The Carceral State and the Politics of Punishment’ in J Simon and J R Sparkes (eds), *The Sage Handbook of Punishment and Society* (London 2013) 221-22; L Wacquant, ‘Deadly Symbiosis: When Ghetto and Prison Meet and Mesh’ (2001) 3 *Punishment and Society* 95, 119-20.

community,¹²⁵ at least in contrast to the completely exclusionary forms of punishment that went before.¹²⁶ Vaughan has thus described prisoners as ‘conditional citizens’ who exist in a liminal state between inclusion and exclusion:

The relationship between punishment and citizenship is then conditional in two senses: the first is that one’s claim to citizenship is granted only if one abides by an accepted standard of behavior and punishment may be imposed if one does not live up to this standard; second, while undergoing this punishment, one is no longer a full citizen yet neither is one completely rejected. Instead one occupies the purgatory of being a ‘conditional citizen’.¹²⁷

Although incarceration necessarily entails *some* restriction of citizenship (as Vaughan notes some privileges must be forgone and inclusion within the citizenry cannot be total if prison is to be effective¹²⁸) the state retains obligations to prisoners as (conditional) citizens; reciprocity is not totally lost. This is reflected in the obligation to rehabilitate offenders (for example)¹²⁹ and also in Lord Wilberforce’s classic statement in *Raymond v Honey* that a convicted prisoner, ‘in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication’.¹³⁰

Since this statement was made in 1983 there has been significant progress in the development of prisoners’ rights in England and Wales¹³¹ but nonetheless disagreements continue about how far citizenship rights extend into penal institutions.¹³² For Goldman, it is the least restriction of rights ‘necessary for

¹²⁵ Garland links modern punishment to the extension of the franchise to working class men and the need to reform law-breakers into potential holders of public office. Described in B Vaughan, ‘Punishment and Conditional Citizenship’ (2000) 2 *Punishment & Society* 23.

¹²⁶ Namely, execution or transportation.

¹²⁷ See Vaughan (n 125) 26.

¹²⁸ *ibid.*

¹²⁹ Vaughan (*ibid.*) suggests that ‘reform’ of prisoners has developed in line with changing ideas of citizenship.

¹³⁰ *Raymond v Honey* [1983] 1 AC 1, 10. See also V Stern, ‘Prisoners as Citizens: A Comparative View’ (2002) 49 *Probation J* 130.

¹³¹ See L Lazarus, *Contrasting Prisoners’ Rights: A Comparative Examination of Germany and England* (Oxford 2004); D van Zyl Smit, ‘Punishment and Human Rights’ in J Simon and R Sparkes (eds), *The Sage Handbook of Punishment and Society* (London 2013); Scott (n 60); Kaufmann and Owen (n 73).

¹³² Perhaps most obviously in relation to the right to vote: see especially *Hirst v UK* (n 116), and *inter alia*, S Fredman, ‘From Dialogue to Deliberation: Human Rights Adjudication and Prisoners’ Rights to

maintaining acceptable community relations amongst citizens, until full return to community membership and full restoration of rights is achieved',¹³³ whereas van Zyl Smit draws on Kelk's concept of 'rechtsburgerskap' (the 'citizenship of rights') to argue that civil rights should not be understood in a narrow sense but as 'all the human rights that inhabitants of modern democracies enjoy, whether they are citizens in the narrow legal sense of not'.¹³⁴ From here, he identifies the limit of the restriction of rights as being the prohibition on degrading and inhuman behaviour. Such rights (the prisoners' rights *qua* 'conditional citizen') also extend to incarcerated children of course, albeit the content or threshold for engagement may be adapted.¹³⁵ But what is not captured by this citizenship analysis of prisoners' rights is how, conceptually, children *already* exist in a liminal place between inclusion and exclusion: they may become conditional citizens when they are incarcerated but they also *enter* prison as partial citizens. This must also be taken into account in order to understand the rights of detained children.

Taking Account of Children's Citizenship: The Right to be Parented

The differential status of children *qua* citizens, and the relevance this has to their rights when incarcerated, is properly taken into account when it is recognised that the space between children's partial citizenship and the full citizenship rights enjoyed by adults is not a void; it is filled by the duties that parents have to their children. Theoretically¹³⁶ and legally¹³⁷ parents are the primary duty-bearers of many children's rights. These rights are founded in the parent-child relationship, a relationship that is fundamentally different from the 'public' relations between citizens.¹³⁸ The

Vote' [2013] Public L 292; D Cheney, 'Prisoners as Citizens in a Democracy' (2008) 47 Howard J Criminal Justice 134.

¹³³ Goldman (n 116) 68.

¹³⁴ See van Zyl Smit (n 131) 406ff. See also the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners and the 2006 European Prison Rules which states in Rule 1 that 'All persons deprived of their liberty shall be treated with respect for their human rights'. On the relationship between citizenship and human rights, see A Kesby, *The Right to Have Rights: Citizenship, Humanity and International Law* (Cambridge 2012).

¹³⁵ See eg Moses LJ in *R (on the Application of BP) v Secretary of State for the Home Department* (n 11) [27].

¹³⁶ See generally the collection of essays in D Archard and C Macleod, *The Moral and Political Status of Children* (Oxford 2002).

¹³⁷ In international law, see especially Articles 3(2) and 5 UNCRC. For the range of rights and duties of parents to their children in domestic law see A Bainham and S Gilmore, *Children: The Modern Law* (4th edn, London 2013).

¹³⁸ See MG Dietz, 'Citizenship with a Feminist Face: The Problem with Maternal Thinking' (1985) 13 Political Theory 19, 31: 'It [the relationship between parent and child] is not analogous to the

obligation that parents have to their children and the rights they protect can therefore be conceptualised as ‘private’ in order to differentiate them from citizenship rights against the State and our obligations to other citizens, *qua* citizen. This does not mean, however, that such rights are beyond public concern. As Dietz notes:

Family practices, control over family property, the rights of children, the nature of schooling . . . all of those things, whether we like it or not, are potentially open to political control and may be politically determined. Even the decision to allow them to remain ‘private’ – that is, left in the hands of mothers, fathers, and individual citizens – is ultimately a political one.¹³⁹

The obligation on parents to protect the ‘private’ rights of children is the *quid pro quo* of family privacy: the state does not interfere in the upbringing of children provided certain minimum standards are met.¹⁴⁰ The limits of parental freedom – what the basic requirements of parenting are - are therefore the proper subject of debate within the polity.

One way of determining the scope and nature of parental duties is to look at existing laws and policies.¹⁴¹ Additionally, a normative approach can be taken to provide a benchmark against which the adequacy of such laws, policy and practice can be measured. Dixon and Nussbaum, for example, draw on the capabilities approach to justify and articulate the restrictions on parental freedom, arguing that parents should not act in a way that would limit one of the child’s ‘central capabilities’.¹⁴² What is particularly important about the ten central capabilities that

relationship among citizens . . . The mother and child are in a radically different relationship in terms of power and control’. See also Young (n 105).

¹³⁹ *ibid* 27. See also B Mayall, ‘The Sociology of Childhood in Relation to Children’s Rights’ (2000) 8 *Int J Children’s Rights* 243, 247: ‘What happens to women and children at home is structured by public theories and policies; and what happens in the private domain affects the public domain’.

¹⁴⁰ The state has an interest in parents protecting the rights of their children in order to provide future good citizens and ‘the reproduction of its institutions, and their social, political, economic and cultural preconditions’. Archard and Macleod (n 136) 14. See also J Donzelot, *The Policing of Families* (Robert Hurley tr, Baltimore 1977) and R Dingwall, J Eekelaar, and T Murray, *The Protection of Children: State Intervention and Family Life* (Oxford 1983).

¹⁴¹ eg legislation criminalizing child neglect or requiring parents to ensure their child’s attendance at school. The possible introduction of a so-called ‘Cinderella law’ is a recent example of public debate on this issue. See O James, ‘Emotional Child Abuse has to be Banned – the Science Backs it Up’ *The Guardian* (31 March 2014).

¹⁴² Dixon and Nussbaum (n 102) 557. A capabilities rights based approach focuses on achieving for all people ‘the freedom to be and to do what she has reason to value’: see eg A Sen, *Inequality Re-*

Nussbaum has identified in her ‘partial theory of social justice’¹⁴³ is that they go beyond those interests we might expect to see, such as life and health (and the provisions needed to support both), to include highly *relational* capabilities, the development of which depend upon interactions and intimacy with others. For children, this is significant because it maps on to the emphasis that they themselves place on ‘interdependence and reciprocity, rather than lonely autonomy, as central values’.¹⁴⁴ It is also important to my argument because of my focus on the rights and duties between parent and child: the intimate relationship that for many children is central in their life.¹⁴⁵

Two of Nussbaum’s central capabilities are of most relevance here: (i) emotions (which include attachment, being able to give and receive love and care, ‘not having one’s emotional development blighted by fear and anxiety’) and (ii) affiliation (being able to live with and toward others and to show concern for other human beings, engaging in social interaction, empathy).¹⁴⁶ These are capabilities that are particularly fertile¹⁴⁷ and particularly fragile during childhood, and they depend (says Nussbaum) on the ‘supporting forms of human association’ (crucial for the development of emotions) and ‘protecting institutions’ (‘that constitute and nourish affiliation’).¹⁴⁸ These are, in short, capabilities that for children are nurtured primarily by those carrying out the parental function within the ‘protecting institution’ of the family. This is not to ignore the reality that some parents do not do this well or that families can be places of harm for children; I am not claiming that this is the lived experience of *all* children. Rather, I am making a politically normative claim based on a general observation about the conditions within which children and young people thrive. Thus, taken together with the provision of the basic resources to protect the child’s life and health, the fostering of these two capability-based interests – emotions and affiliation – I refer to as the child’s ‘right to be parented’.

examined (Harvard UP 1992); A Sen, *Development as Freedom* (OUP 1999); M Nussbaum, *Frontiers of Justice: Disability, Nationality and Species Membership* (OUP 2007); M Nussbaum, *Creating Capabilities: The Human Development Approach* (Belknap Harvard 2011).

¹⁴³ M Nussbaum, ‘Capabilities and Human Rights’ (1997) 66 *Fordham L Rev* 273.

¹⁴⁴ Mayall (n 139) 254.

¹⁴⁵ *ibid.*

¹⁴⁶ Nussbaum (n 143).

¹⁴⁷ Nussbaum draws on Jonathan Wolff’s idea of ‘fertile functioning’. That is, if these capabilities are developed in childhood they pay dividends throughout later life.

¹⁴⁸ Nussbaum (n 143).

The Assumed Responsibility to Parent Incarcerated Children

The articulation of the child's 'right to be parented', with its conceptual basis derived from the (partial) citizenship status of children and its content founded in a capabilities approach, is crucial when it comes to examining the rights of children *qua* prisoner. This is because the restriction on the child's right to be parented that occurs as a result of imprisonment (the forced separation and prohibition of day-to-day contact necessarily prevents parents from meeting many of their child's physical, emotional and affiliative needs) is beyond the legitimate restriction of *citizenship* rights that occurs when we are punished *as* citizens. Limiting the child's *private* right to be parented disrupts the reciprocity of the accountability relationship, creating an 'obligations gap' where the duties owed to the child by the parent cannot be fulfilled.¹⁴⁹

How then can the reciprocity be restored? One option would be to consider whether the protections afforded by Article 8 ECHR are sufficient to mitigate the impact on the ability of parents to fulfil their duties, for example by placing the child in secure accommodation close to her home and allowing frequent visits and phone calls. However, even if the proportionality scales were heavily weighted in favour of the parent-child relationship, it is nonetheless a qualified right that can be restricted. Moreover, relying only on Article 8 fails to recognise adequately the child's differential citizenship status: this is not simply about protecting an existing relationship from state interference (as it is for adult prisoners or for the child's other relationships), it is about the differential source of the responsibility, a different *type* of right: *duties* are owed *to* children *by* their parents, whether these have been met in practice or not. The obligations gap' is not met by Article 8.

Instead, I wish to argue that reciprocity is restored when the State *assumes responsibility* to parent incarcerated children; a responsibility owed to *all* incarcerated children regardless of the quality of parenting they have previously enjoyed. To make this case we must return again to the inter-relationship between the political community and the child's 'private' right to be parented. It was noted above that where the limits of family freedom lie - the minimum standards required of parents - is properly a matter of public concern. But within those boundaries there is

¹⁴⁹ Again, to reiterate, this is not to suggest that all incarcerated children *have* received this type of parenting prior to entering detention, but that (according to my argument) legally, conceptually, and normatively, parents (or other primary carers) are expected to have done so.

considerable freedom for parents to decide how to raise their children. In some circumstances, for example in the use of physical chastisement or in relation to restricting another's liberty, the State affords children less protection vis a vis their parents than is the case as between other citizens. This exemplifies a wider point: that children's exclusion from full participation within the polity, their lack of full citizenship rights, subjects them to decision-making that is potentially contrary to their interests *as a group* and which increases their vulnerability to the actions and decisions of others (potential physical harm, in relation to parental discipline for example). This occurs in other ways too. For example the limitation of social citizenship rights, including the right to work full-time, means that children are economically dependent on adults to feed, house, and clothe them, regardless of the child's own capability to do so. Thus, children's status as partial citizen means that they are *uniquely* vulnerable to the actions and decisions of others in a way that adults are not.¹⁵⁰

Furthermore, because it is a dependency embedded in legal and political structures, it can be deemed to be state-sanctioned. This has led Dixon and Nussbaum to argue that the state 'should *assume* [my emphasis] responsibility for protecting children from the consequences of the special vulnerability it creates in relation to the decisions of others – by insuring them against the risk that their parents (or legal guardian) will turn out to be unable, or unwilling, to take reasonable steps to protect their [needs].'¹⁵¹ For Dixon and Nussbaum, this 'insurance', or assumed responsibility, approach justifies the prioritisation of children's claim for welfare/socio-economic rights. It can also be seen to underpin the power conferred on local authorities in England and Wales to assume parental responsibility and become the 'corporate parent' when parents fail in their duties to their child.¹⁵² I wish to make a similar argument: when children are incarcerated and parents are prevented from fulfilling fully their parental obligations, then the State must assume responsibility for doing so; children thus acquire a right to be parented which is enforceable against the *State*. It is this additional responsibility that provides the necessary reciprocity to meet the obligations gap.

¹⁵⁰ A Nolan, *Children's Socio-Economic Rights, Democracy and the Courts* (Oxford 2011); see also Dixon and Nussbaum (n 118).

¹⁵¹ Dixon and Nussbaum (n 102) 576.

¹⁵² The nomenclature is important: it demonstrates that these are not state functions per se, but parental functions *taken over* by the state.

Currently, the extent to which the State ‘assumes parental responsibility’ for detained children in England and Wales is narrow. First, although some elements of the ‘right to be parented’ are clearly met when children are incarcerated – basic physical needs such as food, health care, and shelter are provided for example¹⁵³ - this does not signify the assumption of *parental* responsibility. Instead, it is a duty owed to adult prisoners as well, who are equally prohibited by detention from meeting their own basic needs.¹⁵⁴ A failure of the State to assume responsibility to do so instead would constitute degrading and inhuman behaviour, breaching the reciprocity owed to any incarcerated person.¹⁵⁵ Secondly, an attempt last year to persuade the Court of Appeal that the State *legally* assumes parental responsibility for incarcerated children was rejected. The argument was made in an unsuccessful judicial review brought by the Children’s Rights Alliance for England (CRAE), which sought to establish a duty owed by the Secretary of State for Justice to inform children who had been detained in STCs when the system of unlawful restraint was in place that they may be entitled to a tortious remedy.¹⁵⁶ Lord Justice Laws held that:

[the] State’s relationship with the trainees is not analogous to the parent/child . . . the STC did not assume parental responsibility for the children. Parental responsibility remained with their parents and, in the case of children who were the subject of a care order, with the designated local authority . . .

My argument is not that the State should necessarily assume *legal* parental responsibility for all incarcerated children;¹⁵⁷ rather, it is that *conceptually* children have a right to be parented and that the State assumes responsibility for this right when it deprives a child of his liberty. The State’s assumption of this responsibility need not give rise to specific legal remedy (as was argued in *CRAE*) but it should

¹⁵³ Though whether these are adequate is questionable (see the data in the first section above).

¹⁵⁴ Nolan (n 150) 19.

¹⁵⁵ See eg *Kalashnikov v Russia* (2003) 36 EHRR 34. van Zyl Smit (n 131) 407 notes that the translation of what are in effect social and economic rights into prohibitions on ‘degrading and inhuman behaviour’ provides a way to sidestep ‘less eligibility’ arguments (the ‘less eligibility’ approach requires that prisoners do not have higher living standards, or receive better health care or education, than those outside of prison).

¹⁵⁶ *CRAE* (n 40).

¹⁵⁷ Though I do think the law should be changed so that all children deprived of their liberty and not just those on remand are treated as ‘looked after’. See Hollingsworth (n 31) and the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 104.

require a political and economic commitment to restructure the juvenile secure estate. Specifically, this duty requires the use of care-based homes for all incarcerated children.

The Case for Care-based Homes

The primary purpose of identifying the child's 'right to be parented' is to foreground the obligations owed by parents to their children: the element of children's rights that fills the space between their partial citizenship and the full citizenship rights that adults enjoy; a type of right that cannot legitimately be restricted by imprisonment. In determining the content of this right, I identified two of Nussbaum's central capabilities as especially important in childhood – emotions and affiliation – and which require 'supporting forms of human association' (usually primarily from parents) and institutions that 'constitute and nourish affiliation' (usually primarily within families). Where parents are unable or unavailable to nurture the child's affective/affiliative capabilities and the child is removed from the institution of the family, the State's assumed responsibility requires the provision of alternatives. Specifically, I argue it requires the provision of *caring* relationships within a *home*.¹⁵⁸

I draw attention in particular to 'home' because as a concept it captures much more than the mere provision of accommodation or shelter. Lorna Fox has described 'home' as 'housing + x', where the x factor encompasses intangible emotional, social, cultural, and psychological qualities such as security, reciprocity, identity, memories, privacy, and safety.¹⁵⁹ These are qualities that facilitate the development of emotions and affiliation in children, and their articulation helps us to understand the close relationship between home, parenting¹⁶⁰ and children's development and wellbeing.¹⁶¹ As a concept, 'home' has limited significance in English law.¹⁶² Nonetheless the presence of children has, in some private law disputes, transformed a 'house' into a

¹⁵⁸ This is an obligation that should be owed to all children and in England and Wales where the State intervenes in other contexts where parents are not fulfilling these duties (such as care and protection) then children are placed within either families (foster carers) or in children's care homes.

¹⁵⁹ L Fox, *Conceptualising Home* (Oxford 2007). See also J Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Oxford 2013). On the importance to children of reciprocity in family/home see P Allat, 'Conceptualising Parenting from the Standpoint of Children: Relationship and Transition in the Life Course' in J Brannen and M O'Brien (eds), *Children in Families: Research and Policies* (London 1996).

¹⁶⁰ Children themselves also recognise the nexus between parenting and home: see Allat (n 161).

¹⁶¹ See the review of the literature in Fox (n 159) ch 9.

¹⁶² Fox (n 159) 143.

‘family home’ worthy of special legal protection.¹⁶³ However, the legal recognition that home is central to children’s lives that emerges in these cases is absent when considering the nature and function of juvenile secure accommodation.

There are crucial differences between the family home and a carceral home of course. Being placed in detention is a temporary condition (hopefully) for most children, so the stability and memory association may be less than in other types of home. Further, Hallden has found that for children an important part of the ‘home’ is its role as a place of safety to return to when exploring the outside, or the strange.¹⁶⁴ For children in custody, the ‘home’ in which they are accommodated is paradoxically both the outside world and the inside; it cannot therefore provide a haven from the ‘strange’. Similarly, we may be cautious in advocating for ‘homes’ for detained children where the ‘home’ is a location of identity-development.¹⁶⁵ It is perhaps not, therefore, always possible or desirable to detain children in accommodation that embodies the wider qualities of a ‘home’. Should we therefore reject as irrelevant the concept of a ‘home’ for detained children? I argue that we should not. This is because it is inevitable that any place a child lives will shape him in some way in terms of his memories, his identity, his self-worth, and his self-esteem, regardless of its quality or nature; just as it is likely that a child will form attachments to anyone meeting his basic needs.¹⁶⁶ This highlights the need to imbue these key concepts – parenting, care, and home - with positive normative values that can provide a basis for structuring the juvenile secure estate in a way that is consistent with the right of the child to be parented.

Although it is impossible to ‘legislate for love’ or provide for incarcerated children the type of parenting and home that the best families provide, it is possible to develop structures and institutions that are most likely to provide ‘care’ and ‘home’ in the positive, normative sense described above. To do so, the secure estate in England and Wales must abandon the institutions (YOIs) that foster relationships of control

¹⁶³ *ibid* 462.

¹⁶⁴ Hallden (n 113).

¹⁶⁵ The dangers of labelling, including self-labelling, are well recognised in the criminological literature.

¹⁶⁶ See Camilla Batmanghelighj’s evidence in *R (The Children’s Rights Alliance for England) v Secretary of State for Justice* [2012] EWHC 8 (Admin) [90]: ‘Children in custody rely for their daily wellbeing on prison staff. As young people have developmental affiliative needs, they are more likely to be in a situation where they have parental transference, seeing prison staff as parental figures on whom they are reliant’.

and dominance,¹⁶⁷ where children are fearful and anxious,¹⁶⁸ and where the regimes ‘destroy the potential to build positive attitudes towards and within social relationships’¹⁶⁹ and instead use only secure children’s homes, where most children feel safe, have a sense of belonging, feel listened to, and which have the potential to feel like family, and like home.¹⁷⁰

The Future: *plus ça change*. . . ?

The requirement for care-based homes necessitates a wide network of small homes across the country, catering for different needs, ages, and genders. However, the likelihood of the secure estate being reformed in this way, even with fewer incarcerated children, is slim. Instead, in 2013 the Government proposed reform by introducing a new type of custodial institution, the secure college.¹⁷¹ Motivated by a desire to cut spending and reduce re-offending, the specific proposals include the building of a ‘pathfinder’ college in the East Midlands – to open in 2017 – that will house up to 320 young people from the age of 12 upwards. The colleges will be headed by a ‘principal’ and are purposefully large in order to be able to provide a range of educational and health facilities that are not possible (without great cost) in smaller units. The statutory basis for the colleges has been included in provisions in the Criminal Justice and Courts Bill 2013-14 but there is little detail there, or in the

¹⁶⁷ Such relationships can ‘reactivate feelings familiar to the child from the abuse relationships, that of powerlessness, shame and unworthiness’: Bessell and Gil (n 69) 291 (citing Heard and Lake, *The Challenge of Attachment for Care-Giving* (1997)). In YOIs, a care role is supposed to be filled by an allocated ‘personal officer’ but the Prisons Ombudsman has noted that they are not appointed quickly enough and ‘busy YOIs can struggle to ensure a consistent and reliable staff presence which allows for the building of trusting relationships and a supportive environment’ (n 27) para 5.2. See also a (restricted) report commissioned for YJB and reported by M Townsend and J Doward, ‘Parents Demand Inquiry into Recent Prison Deaths’ *The Guardian* (28 January 2012), available at <http://www.theguardian.com/society/2012/jan/28/teenage-prisons-death-inquiry-call> <accessed 3 June 2014>, that in YOIs 68% of respondents said they did not spend sufficient time, or any time at all, with their key worker, compared with 12% of those in a secure children’s home.

¹⁶⁸ See B Goldson and D Coles, *In the Care of the State? Child Deaths in Penal Custody in England and Wales* (London 2005) who note that “‘Caring’ for children in penal custody, especially young offender institutions, is an almost impossible task. Many child prisoners live with a spectre of fear and an enduring feeling of being “unsafe””.

¹⁶⁹ Evidence to the Justice Committee from Brian Littlechild (n 5).

¹⁷⁰ OFSTED and YJB/NCB (n 43). There is also increasing amounts of evidence emerging of the importance of the child-worker relationship in reducing offending, thus criminal justice goals would also be better secured within institutions founded on parenting and care. See Youth Justice Board, *The Summary of the Initial Report on the Intensive Supervision and Surveillance Programme* (London 2004) 33.

¹⁷¹ See Ministry of Justice (n 29) and *Transforming Youth Custody: Government Response to the Consultation* (2014, Cm 8792).

consultation documents, about how they will operate. The analysis presented here is therefore necessarily tentative.

Three aspects of the proposals are generally problematic from a children's rights perspective. First, the Government has confirmed that boys *and* girls are to be accommodated together within the Colleges.¹⁷² Given that the majority of incarcerated children are boys, it is likely that the function and operation of the colleges (including training and educational provision, and health and mental health services) will be designed to cater for young men, and the specific needs of girls may not be adequately met. Furthermore, large mixed institutions may increase the risk that girls will be sexually exploited.¹⁷³ The Joint Committee on Human Rights has called on the Government to carry out an equality impact assessment to consider the potential impact on girls of large, mixed institutions.¹⁷⁴ Secondly, the proposed legislation includes a provision empowering staff to use 'reasonable force' in fulfilling their duties, including ensuring 'good order and discipline'. This is contrary to the decision in *R (on the application of C) v Secretary of State for Justice*,¹⁷⁵ and is likely to constitute a breach of Article 3 ECHR.¹⁷⁶ Finally, the size of the colleges means there will be only a handful dispersed across the country, making the maintenance of existing family visits even harder since children are likely to be placed at great distances from home.

In addition to these three specific rights-based issues, the colleges are unlikely to be able to provide the sort of *care-based homes* required by the above analysis. Secure Colleges, like YOIs, are to be large and penal in nature.¹⁷⁷ Penal institutions that cater for a large number of children are unlikely to provide a context within

¹⁷² House of Lords and House of Commons Joint Committee on Human Rights, *Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill* (11 June 2014).

¹⁷³ In existing small mixed children's homes, the boys are younger and greater efforts can be made to keep separate girls from boys with a history or risk of sexual violence. If there were many more small care-based homes, even greater protection could be afforded to girls through careful placement decisions. In contrast, a large institution with a high number of boys may be more prone to the development of a masculine culture that fosters harmful attitudes and behaviours towards girls. The lower staff-child ratio and the greater prevalence of violence more generally in larger institutions leaves girls especially at risk.

¹⁷⁴ *ibid*, para 1.57.

¹⁷⁵ *R(C) v SSJ* (n 11).

¹⁷⁶ See the Government's spurious analysis of the decision in *C* (as set out in the Joint Committee's report, which is highly critical of this provision).

¹⁷⁷ See eg Ministry of Justice (n 29) para 62, which made reference to welcoming 'innovative methods including those with a military ethos' and noted that '[w]e will not forget that a custodial sentence is a punishment, and often essential for the protection of the public. The physical environment and regime should reflect that . . . '.

which the type of care-based relationships essential to nurture children's emotional and affiliative capabilities can be maintained. As Liebling and Crewe have noted in the context of adult prisons, penal institutions (and especially, it would seem, large ones¹⁷⁸) now rely on performance targets and managerial controls to ensure compliance with minimal educational requirements or meaningful activity, or time outside the cell, or to comply with the limits on the use of restraint and so on. Although these help to ensure compliance with some of the minimum standards required by the UNCRC or the ECHR,¹⁷⁹ they do not create an environment that fosters the building of relationships. Instead '[r]elationships with prisoners risk becoming superficial, emotionally barren and defined by the absence of trust'.¹⁸⁰ This is reflected in the proposed statutory duties of Secure College staff, which are primarily custodial (to prevent escape, prevent the commission of unlawful acts, to ensure good order and behaviour) and require only that they '*attend* [my emphasis] to [the] well-being' of the children accommodated there.¹⁸¹ Perhaps unsurprisingly, there is no mention of 'care'.

When located within the framework set out in this article, it seems that Secure Colleges will be concerned with fulfilling the State's obligations to the child as *citizen*. Like the adult offender, the child is constructed as a conditional citizen who must be reformed in order to be integrated back in to the citizenry and the Government hopes that Secure Colleges will provide a better context than YOIs for this to be achieved. This is an important element of the reciprocity that is owed to the child *qua* citizen, *qua* prisoner, to help her avoid future reoffending and to be integrated (back) into the citizenry. But Secure Colleges only partially meet the reciprocity necessary in relation to incarcerated children. The current proposals fail to recognise that the child's status as demi citizen leaves a conceptual (and sometimes empirical) space that is filled by the child's right to be parented, and that the parental

¹⁷⁸ Liebling and Crewe's critique of managerialism (n 94) 300-01 applies across the contemporary prison sector, in smaller prisons as well as larger institutions. However, it would appear to apply with force to bigger institutions where there is a larger staff and a greater distance between the managers (Governors or 'principals'), the staff and the inmates, and thus where reliance on 'tick box' managerialism is even greater because alternative cultural approaches for informal accountability may be more difficult to foster. In the context of my argument (for care homes rather than YOIs/secure colleges) it should be noted that children's homes are regulated under the Children Act and not the Prison Act.

¹⁷⁹ See again Whitty (n 84).

¹⁸⁰ Liebling and Crewe (n 94) 301.

¹⁸¹ See Schedule 3, Criminal Justice and Courts Act 2013-14. Principals of colleges are also brought within the duties under the Children Act 2004, ss 10 and 11.

responsibility to fulfil that right is assumed by the state when the child is incarcerated. To meet that responsibility, the proposals for reform need to be re-focused to better set out how they will provide incarcerated children with caring relationships within accommodation that captures the ‘x factors’ of the ‘home’. However, it is unlikely that this can be achieved within the current proposals; a fundamental rethink is therefore required.

Concluding Comments

Writing in the context of ‘special care’ in Finland, Pösö et al have argued that the use of closed institutions based on care, nurture, and education requires ‘a particular socio-cultural understanding of children, young people, problems and the role of public authorities, as well as of the interrelations between these’.¹⁸² They note that in Finland this understanding is evident from the ‘wide provision of social services to children and families with children which are universally available’.¹⁸³ Our preference for punitive, control-based models of punishment and imprisonment can in contrast be seen as a reflection of our own particular socio-cultural understanding of children, located within the pervasive neo-liberal model of responsibility and individual choice that regards children who commit the most serious offences as mature, responsible, and deserving of a penal regime that punishes rather than cares.¹⁸⁴

In this type of socio-cultural context the argument I have developed here – that the state has an assumed responsibility to parent incarcerated children – is subject to critique on the basis of ‘less eligibility’: an incarcerated child should not receive an advantage from her (chosen) criminal offending – a ‘right to be parented’ and placed in a care-based home – when other ‘non-blameworthy’ children may be living in worse homes with very poor or no parenting. However, this criticism can be met in two ways. The first is simply to refute a neo-liberal approach to punishment and to argue that children – even more so than adults – do not ‘choose’ to offend but are limited by circumstance and deserve support and not (just) punishment. Secondly,

¹⁸² T Pösö, M Kitinoja, and T Kekoni, ‘Locking up for the Best Interests of the Child — Some Preliminary Remarks on ‘Special Care’ (2010) 10 *Youth Justice: An Int J* 245.

¹⁸³ Citing H Forsberg and T Kröger, *Social Work and Child Welfare Politics through the Nordic Lenses* (Bristol 2010).

¹⁸⁴ See inter alia J Fionda, *Devils and Angels: Youth Policy and Crime* (Oxford 2005).

and less controversially, the right for incarcerated minors is one that children outside of the secure estate also should and do have. The law of England and Wales requires certain standards of parenting¹⁸⁵ and where these are not met then the State will intervene.¹⁸⁶ Sometimes this requires taking children away from their parents and, when it does, they are placed with foster parents or in care-based children's homes. Although local authorities may not *in practice* always fulfil their statutory duties to children in need, this is not a reason to entrench harsher conditions for children deprived of their liberty. The right for incarcerated children that I am arguing for – the right to be parented, underpinning the right to be placed in a care-based home when sentenced to custody - therefore mirrors that owed to children outside of the secure estate. If it does go further (for example, in terms of the normative aspects of parenting based on the capabilities approach) then this is an argument for extending the protection (re good parenting) that children *outside* the secure estate receive. In any event, it is not unusual for greater obligations to be placed on the State when it acts as parent than we place on actual parents.¹⁸⁷ This is not about providing an advantage to children in state care over those children living with their families; rather, it reflects the value we place on parental freedom to decide how to raise their children and also recognises that State actors require greater regulation than parents because (in general) they are less likely to act within the bonds of love.¹⁸⁸

The purpose of this article is not, therefore, to argue for *extra* rights for detained children, but to provide a conceptual framework to show why an existing (but so far unarticulated) type of children's right – a child's right to be parented – continues to be owed to the child when he is detained, why this right is assumed by the state, and why it should be used to shape the juvenile secure estate. Specifically, the assumed responsibility to parent incarcerated children gives rise to a further right: the right to be placed in a care-based home and not a penal institution. By conceptualising the rights of incarcerated children through a citizenship lens, an argument could be made that *all* incarcerated minors, regardless of vulnerability and

¹⁸⁵ Both in terms of child neglect laws and the criminal law more generally, but is also evident in the use of parenting orders.

¹⁸⁶ Primarily through the Children Act 1989 which includes both voluntary and compulsory measures.

¹⁸⁷ eg, whereas parents can legally physically chastise their children in England and Wales, corporate parents cannot.

¹⁸⁸ C Worrell, 'Pretrial Detention of Juveniles: Denial of Equal Protection Masked by the Parens Patriae Doctrine' (1985) 95 Yale LJ 174.

regardless of age, have a right to be placed in a care-based home because only there can the state fulfil its assumed responsibility to parent.