Can the Children's Court Prevent Further Offending?\(^1\)

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The Children's Court

In the preceding twenty years there has been a restructuring of the legal and ideological basis of the state's response to marginal, 'at risk' and offending young people. The state's responsibility for 'at risk' young people had primarily been expressed through child welfare legislation. Child welfare statutes in each of the states provided a wide-ranging ability to intervene in the lives of young people. In the past, the stated rationale for intervention was welfare of the child. The implementation of this legislation was frequently coercive. Children appeared before courts charged with criminal offences and in many cases non-criminal offences (for example uncontrollable, in moral danger). It was rare for children to be legally represented and many children were placed in custodial institutions. The child welfare

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bureaucracies were vested with substantial discretionary authority, which was not subject to review in court.

The move for reform of the Children's Court gathered momentum during the 1960s and 1970s. The call was not for rehabilitation for offenders (or those 'at risk') but for justice; children should only be charged for actions that adults too could be held accountable for. Reformists demanded that if children were charged, they should be accorded similar legal rights and responsibilities to adults, although the sanctions of the criminal law should be slightly modified (Morris et al. 1980).

It is ironic that both the child savers who campaigned for the introduction of Children's Courts in the early twentieth century and the reformers of the 1970s placed great faith in the court system as a method of effectively transforming the treatment of young people in our society. The proponents of the justice model strongly believed that the court system could protect children from the predatory practices of the welfare bureaucracies and police forces.

The welfare or needs approach has given way to a justice or 'just desserts' model. In some jurisdictions this transformation has been embodied in legislation. In other states change has occurred through daily practice. The courts have been 'legalised'. This change without legislation has been possible because Australian Children's Courts were modified adult summary courts, rather than specialist welfare tribunals (Seymour 1985, 1988). The core elements of the adult criminal justice system had always remained embedded in Australian Children's Courts. The change in the knowledge or ideology of the correctional professionals changed the language within which they justified their professional intervention. No longer do courts justify their intervention primarily on the basis of the needs of the child, but instead deal with children according to their alleged deeds.

The consequences of the shift from a welfare to a due process approach may be summarised as:

- the courts have been legalised—legal representation is now accorded as a matter of practice;
- there has been a trend towards decarceration with the closure of many old children's homes;
- offenders and 'at risk' young people are no longer a major priority for child welfare departments. Resources have been concentrated in child protection.

The consequences of decarceration and the focus on child protection have not been entirely positive.

There has been a process of re-labelling where the same poor disadvantaged young people appear before courts—but more often than not are charged, not with the status offences of old, (though this still occurs too frequently), but with petty criminal offences and crimes of poverty. The problems of disadvantaged young people are now dealt with by way of neglect and by policing. Children are still ejected from families or forced to leave because of problems within the family. These teenagers are abandoned by the state to live in abject poverty. Rather than providing potential, opportunity and support, intervention is restricted until the child commits a petty crime or, by virtue of their public presence of the streets, is harassed, moved on or arrested by police for public order offences. For young people the reality is that the child welfare and juvenile justice system has moved from a half-hearted commitment to child saving to child blaming.

In sum, the net effect of changes in legislation and practice has been to increase the importance of the court. 'Reformers' dismissed the possibility of rehabilitation.
They assumed that the introduction of due process rights would constrain the (mis)behaviour of the child welfare authorities and the police. For those advocating a tougher stance the court is also of importance for it is through the sentencing practices and the power of the court that this stance will be implemented.

Children, Courts and Offending

Given the centrality of the court and its supposed role of dealing with, and responding to, crimes committed by juvenile offenders, it is useful to assess its operation. Whilst there is no shortage of literature and research on the juvenile justice system, there is a dearth of material about how the processes and institutions of juvenile justice are experienced by the individuals around whom the whole edifice is constructed. For this, and other reasons, the author recently undertook a study of how children understood and experienced the court system. The research was based on in-depth interviews with children immediately after their court appearance.

The research found that children misunderstood and misconstrued much of what occurs in court. Worse still, it found that the processes and structures prior to, during and subsequent to court, acted to prevent children from participating in the court. Formally and informally, they were pressured into passivity and relegated to the status of objects to be dealt with by the court. The research provides a comprehensive insight into the court through the eyes of the child (O'Connor & Sweetapple 1988).

For the purpose of this paper, the most important finding was that children's experiences and understanding of court had little or nothing to do with the offences they had committed. For the child, and indeed it seems for the adults who dealt with them, the focus of the court was its sentencing function. This is not conducive to the court playing a role in preventing further offending. It is useful to briefly examine the way in which the offence disappears in the court process.

Children come to court de-powered by their belief about police treatment of young people, by actual or threatened physical and/or psychological police violence, and overstated warnings about their likely sentence.

Given the threats, it is not surprising that even prior to entering the court their expectations of court centred on sentencing. Their expectations of sentence were out of all proportion to the crime(s) committed. For example, many first offenders imagined that they would be sent to the proverbial 'home'. Even when children did not expect to be locked up, their expectations of court were still tied to notions of sentencing. Court was a place to which they were brought to be dealt with rather than a place of inquiry into the allegation against them or a place in which the alleged wrong could be put right. They approached court from a relatively powerless position. They had few expectations that they could have any impact upon the court proceedings or the outcome. Court was merely a place where they would be acted upon by others regardless of their feelings or beliefs.

Expectations of sentence out of all proportion to the crime committed resulted in children entering the court precinct awed by the court. The expected sentence rather than their misdeed(s) and the events surrounding their misdeed(s) was focal. Similarly their expectations of the actual process of court provided a script in which they played but a marginal part. They expected to participate in the most limited and peripheral of ways. Children, it seems to them, should be seen but not heard.

In describing their actual experience in court the children portrayed themselves as passive participants in the court; not just standing and sitting on command but being 'talked about' and 'talked at', talked down to and threatened. Although they were physically present while they and their futures were being discussed, the children were rarely involved in this dialogue either by direct communication, or indirectly, by instructing their lawyer during their court appearance. At no stage did their accounts reveal any meaningful dialogue
between themselves and the other court participants either. If the children spoke at all in the
court they did so at the behest of the magistrate—that is, they spoke only when they were
spoken to, they answered questions but they never initiated dialogue.

So it is not surprising that their court appearance was described as an event—primarily
as an outcome—rather than a process. Their accounts embodied scant recognition that their
case had been subject to detailed consideration or inquiry by the court and there was little
mention either of detailed explanations by their advocate of the background to the offence.

Even when they recognised their own passivity in the face of the court, the children did
not bemoan the fact that they have been 'dealt with', 'handled', and processed quickly. The
unexpected 'leniency' of the sentence appeared to be one reason for this. Although the
brevity of the court appearance frequently contrasted with the child's initial expectations of a
detailed consideration of the case, any resultant dissatisfaction with the length of the court
appearance was far outweighed by the relief engendered by the perceived leniency of the
sentence.

The inability of children to participate in the court process enhances the potential for
injustice and reduces the potential for the court to focus on the offence. The extent of direct
participation in the court process, for the children interviewed, was limited to a few phrases,
primarily 'yes' or 'no'.

The questions addressed to the child frequently only allowed such answers. This was
the case whether they desired to say more or not, or whether or not they were legally
represented. The ramifications of this approach by magistrates and other court participants
would not be so dire if every child was adequately and sympathetically represented by a
lawyer. But this is often not the case. Undoubtedly some children's advocates did take
adequate instructions from their clients and did put the child's perspective before the court.
In most cases, however, lawyers took inadequate instructions, constrained as they were by
the overwhelming workload and their lack of familiarity with children. The seeming
impossibility of acquainting the magistrate with the full facts surrounding the commission of
the offences made Tom, sixteen years, very frustrated. He had pleaded guilty to stealing
food worth $14. He was homeless, had no form of income and was hungry. He was angry
that this did not come out in court:

Tom: He should have known I only took it for food.
Q: Why didn't anyone say anything do you think?
Tom: I don't know, they're probably too stupid.
Int. Why didn't you say anything?
Tom: Because I had to sit there and listen because I'm not allowed to
speak unless I'm told.
Q: Would you have liked to have told the magistrate?
Tom: Yeah. If I had a chance.
Q: And you didn't get a chance.
Tom: No.... It would be better if you were allowed to speak in court instead of
sitting there and listening.

Tom received a suspended sentence and was warned that if he re-offended he would
be incarcerated. He left court, theoretically in the care of the state, with no food, no money
and nowhere to live.

Tom's anger and frustration marked him as rare amongst the children who were
interviewed. Most children, even though they recognised the desirability of being able to
address the court themselves, felt no such negative emotion when this ability was effectively
denied them. Most children were passive in the face of the court process; satisfied with the
representations of their lawyers. Their lack of familiarity with the legal process had left them
without a full appreciation of the ambit of the lawyer's role. They believed themselves well
served by the lawyer's plea for mercy, and the mitigation of the sentence they had expected.
The dynamics of power from the point of apprehension to disposal in court systematically strip from the child any capacity to assert themselves in the courtroom context. The court processes are structured so that participation by children is effectively, if not intentionally, precluded. Ironically many of these processes—such as legal representation by rostered duty solicitors—were developed to prevent injustice, to address the structural imbalance between defendant and prosecution. In many cases, however, legal representation simply reinforces the child’s disadvantaged and dependent position and, at the same time, allows the court to proceed under the fiction that the child’s wishes and interests are represented. In the end, the child is rendered compliant by the court and its officers:

Q: Did you feel that people wanted you to keep quiet in court?
Brett: Yes.
Q: Why?
Brett: Well, I was told by solicitors and several other people to make a good impression on the judge, which we were trying to do.
Q: And being quiet would help with this impression?
Brett: Yes.

The process of the court, the reliance on threat and warning, the restrictions on the ability of the child to participate in the proceedings undermines any potential of the court to respond in an effective way to juvenile offending. The process of the court from the point of apprehension to the point of disposal serves to shift attention from the offence, the context in which it emerged, and the consequences for the victim to the determination of the child’s fate. In many cases this concern is misplaced since few children are at risk of being institutionalised at their initial appearances. Rather than the court attending to what the child can realistically do to right the wrong that has been done, a superficial pre-decided charge is acted out in which the child’s fate is considered.

So the victim rarely sees the offender and the offender rarely sees the victim. Both remain ignorant of the other, of the other’s potential suffering. The child does not encounter the hurt of the victim, nor have to grapple with making recompense in a meaningful way. The victim never sees the offender, never has to enter the offender’s world, never has the comfort of knowing that the offender who violated their privacy—far from being a violent thug—is most likely a somewhat pathetic young person from their own neighbourhood.

Children’s Courts are not about offending, they are about power. The commission of an offence represents, in part, a breach of the structures of power in our society. Offences by children are interpreted and dealt with as challenges to the patterns and processes of authority and domination in our society. The processing of juvenile offenders, including sentencing, seeks to reinstate or reinforce the normal relations of power. It is only in this context that the language and practice of threat is explainable. It is only in this context that the maintenance of images of excessive punishments, of homes, are functional. If the focus were on the offending behaviour, the language of juvenile justice practice would relate to the breach of social harmony, of social relationships, of putting right the wrong, of reparation, rather than punishment.

**Can Children's Courts Prevent Furthering Offending?**

In the context of the argument that the Children’s Court and juvenile justice system are only peripherally concerned with the offending, this is indeed a novel question. The answer that logically follows from our analysis is that, to the extent that courts continue to de-power children, then their ability to prevent or affect further offending is limited.

It is also crystal clear that attempts to 'toughen up' the system through harsher policing and penalties will fail to prevent further offending. As deterrents to juvenile crime, these
solutions have been tried and have demonstrably failed. The children interviewed in the
court study were clearly not deterred from committing misdemeanours by their images of
rough policing and excessive punishments.

This is not a time to be defeatist, to assert that nothing will make any difference. Nor is
it a time to discount the importance of crimes of children and their impact on their victims
and the community. It is possible to envisage a court and juvenile justice system that can
facilitate the prevention of further offending.

Elsewhere the author has proposed a framework for a fundamental reorientation of our
approach to responding to juvenile offending (O'Connor & Sweetapple 1988). This paper
will conclude by summarising the key elements of this approach and by speculating about
potential roles for the court in this context.

Respect for children

The starting point must be a reassessment of the manner in which we relate to children and
young people. It has never been appropriate to be fundamentally disrespectful of children.
It is not now. The dynamics of power and domination which underpin adult relations with
children must be reconstructed. The logic and language of threat have no place in the
development of socially equitable relationships. A respect for children necessarily entails a
recognition of them as citizens with rights and responsibilities. The legal rights theoretically
made available to persons charged with criminal offences should be respected in practice.

Nature of juvenile crime

It is also necessary in constructing responses to juvenile crime that we respond to its reality
rather than to the myths that surround it. All crimes are not of equal severity and it is clear
that the nature of juvenile crime differs from adult crime in terms of the value of property
involved and the lower incidence of crimes of personal violence (Mukherjee 1985). Juvenile
offending does not inevitably lead to an adult criminal career. For whatever reasons, most
children age out of crime (Seymour, cited in O'Connor & Tilbury 1986).

Responding to the crime, not the breach of power relations

Responses must focus on the nature of the crime and the context in which it emerged, rather
than the current practice of responding to the breach of the dominant relations of power.

Reconciliation, not denunciation and intimidation

In moving from a response generated by the dynamics of power to one generated by a focus
on the crime, the language of threat and intimidation must be abandoned. Threats are both
dishonest and ineffective. They remove the focus of the justice system from the experience
of victim and offender. The response to juvenile crime should be oriented by a concern to
reconcile victim and offender, to put right the harm that has been done.

The necessity of reconciliation is especially important for juveniles because their crimes
are primarily committed in their local community. Crime is prevented not by threat and
intimidation but by the fabric of social connectedness between people, their community and
their physical environment. Alienation or disconnectedness provides the basis for breach of
social norms.

Informality

The call for reconciliation is in part a plea for informal rather than formal processing of
juvenile offenders. The research calls into question the utility of formally charging young
people and bringing them before the court. It achieves little for the child offender, victim or
the community. The language and logic of a criminal justice model as it currently exists separates offender, victim and crime.

*Taking the life conditions of youth seriously*

If we take seriously the pain experienced by the victim, we also must take seriously the life conditions of young people. The societal concern with controlling and depowering young people has been discussed above. The manifestation of this power imbalance is evident in the extent of physical, sexual, social and psychological abuse. The increasing level of misery experienced by youth also needs to be considered.

The level of child poverty in our community has increased dramatically. In 1972-73, it was estimated that 231,800 children (7.2 per cent) lived in poverty after incomes were adjusted for housing costs. The corresponding figure in 1985-86 was 684,000 children or 17.5 per cent of Australian children (Whiteford 1987). These figures of course relate to those children living in families. The Human Rights and Equal Opportunity Commission of Inquiry into Youth Homelessness found that large numbers of young persons are homeless.

The level of poverty, suffering, and abuse must not be ignored in responding to juvenile crime. For a considerable number of the children interviewed for this research, offending was a direct or indirect result of misery, oppression in the home, and the lack of the legitimate source of income or accommodation outside of the home. Offending is an inevitable consequence of being forced to live on the street.

It must always be remembered that one reaps what one sows. Unfortunately more and more children are forced to live in poverty, are subject to violence in the home and are denied access to meaningful participation in the labour market. The cost of this structural violence towards youth will one day have to be repaid.

*A meaningful court system*

If we are to take crime seriously then we must also take court seriously. It goes without saying that taking court seriously embodies the creation of a meaningful court system. This necessarily involves ensuring that children's legal rights are safeguarded, that the proceedings are conducted in a manner which is understandable to the child and that the child has the real ability to participate meaningfully in the court process and finally, that sentences are proportionate to the crime and are reconciliatory rather than punitive in function and orientation.

The importance of developing, respecting and enforcing procedural safeguards should not be underestimated. In addition, it is possible to speculate on ways in which the preventative role of the court could be enhanced by utilising its symbolic role. For the community, young people, young offenders and their victims, courts are at the centre of state sanctioned responses to juvenile crime. Indeed their actual location in the juvenile systems means that Children's Courts potentially can have an informed overview of juvenile offending and its context.

On the whole, Children's Courts are locally based. The officers of the court:

- see the children appearing and re-appearing;
- see families appearing and re-appearing;

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2 Despite the myth of affluence, a higher proportion of Australian children live in poverty than in other developed western economies. Only the United States of America has higher levels of child poverty.
• can identify the specific areas of local communities where juvenile offending may be a problem;
• know of the local resources (or lack of resources) available to young people; and
• the surrounding social and economic context.

Children's Courts are invested with significant legal power and authority. In combination, their actual power and authority, the acceptance of this by the community and their overview of offending patterns in a community, potentially provides the court with a pivotal position in the development of local strategies to prevent juvenile crime. The court can act as mentor and catalyst.

Currently the court process decontextualises and individualises the pattern of activities and occurrences which results in a child being charged with a criminal offence. Our criminal law primarily focuses on specific events. No-one's—let alone children's—behaviour is made up of discrete, disconnected, and de-contexted events. Behaviour occurs in a context, is continuous and interwoven with the vicissitudes of the social and physical environment. Yet the process and focus of the court on the whole ignores this. The court is separated from the social context that surrounds it and so too are the children who appear before it.

Individual Children's Courts process hundreds, and sometimes thousands, of children a year. Yet the potential common links between these children are ignored. The court closes its collective eyes to the common local social factors which might give rise to offending by children.

The traditional means by which courts seek to inform themselves of the background to offences by individuals is through some form of 'social inquiry' report. These reports seek to mitigate penalty by explaining the factors giving rise to the offence or offences. On the whole these reports medicalise problems or account for them in terms of psychological factors or family dynamics. The report might note the individual's lack of employment, their illiteracy or their family's poverty. Unfortunately, the common themes in these reports across cases are rarely noted by the court. If the court were oriented to the prevention of further crime instead of accepting the individual accounts of poverty, isolation, family violence and so on, the question of 'why' and 'what can be done' could usefully be asked.

Let us imagine that the court used its powers to 'cause investigations to be made' in a different way. Imagine if the court sought a report on the common social factors that gave rise to the fact that it regularly processed many children for street offences. Imagine if the court sought a report on why so many of the children it dealt with were illiterate. Perhaps the local principal might be called at the time of sentencing to ask why so many children wagged school. What could his school do to remedy the problem of school non-attendance? On another occasion, a representative of local government might be called to explain why there were so few recreational activities for young people in their locality.

We should use the traditional processes of the court to inquire into the real causes of local juvenile crime. Such an approach would contextualise juvenile offending. It would call to account not just the individual offender but those whose omissions may have contributed to the context which gives rise to crime. Armed with such information, the court would be in a position to facilitate the prevention of juvenile offending. The court could act as a catalyst, prodding the community and its local institutions to develop responses which could reduce crime.

In conclusion, the path towards fair and humane treatment of children is far from clear. It is littered with the carcasses of old ideas and attitudes about children. The challenge that faces us is the development of respect for children. A juvenile justice and Children's Court system that is respectful of children as people and that seeks to identify the causes of juvenile crime and develop local responses to those causes may indeed play a role in preventing further offending.
Select Bibliography