

ORIGINAL ARTICLE

Power in the courtroom: Judicial perspectives on care-experienced girls and women in court

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Abstract

This article focuses on rarely heard judicial perspectives, and the little explored challenges facing care-experienced girls and women in court. Drawing on semi-structured interviews with judges and magistrates, it reveals how the court process may be a disempowering and inadequate process for both the powerful and the powerless. Using the four elements of procedural justice as a lens to explore this – voice, trust, neutrality and respect – we highlight the immense challenges of achieving these goals for those with histories of being stigmatised and marginalised. In searching for solutions, the concept of ‘judicial rehabilitation’ enables consideration of how we might rehabilitate our systems and imagine a more hopeful approach to justice.

KEYWORDS

care-experienced, courts, girls and women, judiciary, power

1 | INTRODUCTION

Life-changing decisions are frequently made in the family and criminal courtrooms of England and Wales. Yet little is known about the perspectives of the judiciary in cases involving care-experienced¹ girls and women who cross over between court systems. This article shares rarely heard views from the judiciary, illuminating novel insights about both the challenges of supporting care-experienced girls and women in court, and the limits of achieving justice for those

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previously cared for by the state. These insights are considered in the context of the current focus on procedural justice and in particular the key concepts of voice, neutrality, respect and trust (Hunter & Jacobson, 2021). While important goals to aspire to, achieving them for relatively powerless individuals in court poses serious challenges in practice. This leads us to question how far efforts to improve justice might interact with past experiences of state harm.

The issues raised have wider international relevance, and the need to improve support for those with care-experience in court has been highlighted across jurisdictions – although there has been little attempt to explore this through a gendered lens. In the USA, Bilchik & Nash (2008) argue that judicial leadership is critical in promoting a collaborative court model for juvenile justice courts where both the needs and deeds of ‘crossover children’ are addressed. In Australia, Baidawi & Ball (2022) observe the comparative lack of support available to children in residential care to engage with legal processes, compared with that for children living in family homes. Meanwhile, in England, the Youth Justice Legal Centre (YJLC) (2023) recently launched a much-needed guide, *Dare to care*, aimed at helping criminal lawyers in England to better understand the relevant legal framework, reduce unnecessary criminalisation in care and achieve better outcomes.

Focusing on interviews with eleven members of the judiciary, part of a wider study involving 94 interviews with care-experienced girls and women in the community and in custody, and various professional groups, this article explores several interlinked themes. It begins by highlighting negative gendered judgments and the challenge of neutrality. These judgments may have an impact across the life course and corresponding system-contact may impact girls and women at different points, sometimes in cyclical ways. Meanwhile, the problem of our disjointed court systems poses particular difficulties for those who traverse both the family and youth/adult criminal courts, and can create cumulative disadvantage while diminishing trust.

This leads us to explore issues of power and powerlessness in court. Care-experienced girls and women in trouble, often failed by multiple systems, are likely to feel disempowered by court processes and occupy the most powerless position in court. Yet, even relatively powerful judges and magistrates may share feelings of frustration and powerlessness in terms of what can be achieved within the courtroom. Our final theme concerns the persistent problem of communication and voice (Young Advocates for Youth Justice (YAYJ), 2022). The challenges highlighted lead us to consider how far our systems might be improved, with the concept of ‘judicial rehabilitation’ (McNeill, 2018) enabling us to imagine a more hopeful and supportive approach to justice.

2 | CHARTING SOME COMPLEX TERRAIN: PROCEDURAL JUSTICE VERSUS STIGMATISATION AND MARGINALISATION

A brief journey into the history of youth justice quickly reveals that competing perceptions of children as troubled or troublesome, deserving or undeserving, have long endured (Goldson, 2020), with care-experienced girls particularly likely to be seen as undeserving (Fitzpatrick et al., 2022). Such conflicting perceptions also emerge in our disjointed legal system, as highlighted by the former President of the Family Division, Sir James Munby. Noting how cases involving children are spread across the jurisdictions, Munby (2017) called for an expanded family court focused on whole families and problem-solving, rather than punishment.

Problem-solving has also been explored in relation to the youth court. Within this context, Hunter & Jacobson (2021) discuss Tyler’s (2008) four key aspects of procedural justice: voice, neutrality, respect and trust. Voice involves individuals having the chance to tell their story and

feeling that those in authority will listen. Neutrality involves those in authority being viewed as neutral decision makers who will act without bias. Respect involves people needing to feel respected and treated with courtesy by those in authority, and believing their issues will be taken seriously. Finally, trust links to individuals believing that their views will be listened to and considered by those with trustworthy motives (Tyler, 2008). We find these elements helpful to focus on, and consider them relevant to adult courts too, because they chime directly with some of the concerns of those with lived experience of care. For example, a key recommendation from the Care-Experienced Conference (2019) was that individuals want to be treated with respect far more than they are.

The four elements of procedural justice are important aims to aspire to for improving communication in court and faith in our justice systems. However, a recent report from the YAYJ (Young Advocates for Youth Justice (YAYJ), 2022) highlights something of the scale of the challenge:

Children and young people strongly associated courts with injustice, believing that although the judge sits and listens, they have already made their decision based on stereotypes. (p.18)

This immediately calls into question perceptions of neutrality. Moreover, research on the perspectives of care-experienced girls and women highlights how establishing respect and trust may be particularly challenging for those who have long since lost trust in those in positions of power (Care-Experienced Conference, 2019; Fitzpatrick et al., 2022). Furthermore, Hunter & Jacobson (2021) note difficulties in supporting engagement for children with speech, language, communication or mental health needs. This is particularly pertinent given the over-representation of neurodivergent children in the youth justice system, with Day (2022) highlighting how disabling and criminalising systems may unintentionally label, stigmatise and harm these same children.

Hunter & Jacobson (2021) further note: 'Problem-solving courts are focused on outcomes and rehabilitation ... to tackle the problems that underlie offending' (p.7). While achieving this goal is undoubtedly a challenge, the focus on rehabilitation is important because too often efforts in this area have been inadequate.

This leads us to consider the innovative model of rehabilitation proposed by McNeill (2018). In this model, personal rehabilitation, which places responsibility for change with the individual, only tells one part of the story (in fact just a quarter if the model is taken literally). McNeill argues that social, moral and judicial rehabilitation make up the other constituent parts of any understanding of (re)habilitation. The clear implication is that it is not just the individual who must change, but the wider system that requires rehabilitation too. With our focus on judicial perspectives here, McNeill's discussion of judicial rehabilitation is particularly relevant given its focus on more hopeful futures for those with criminal justice contact. While the principles underpinning procedural justice (Tyler, 2008) provide a valuable lens for thinking through power in the courtroom at the front end of the sentencing process, the focus on 'judicial rehabilitation' enables a consideration of relinquishing power at the back end of the process post-punishment:

... (J)udicial rehabilitation is a kind of 'passport control'. It concerns ... a process of formal, legal de-labelling in which the status of the (once-degraded) citizen is elevated and restored. This is a duty that the punishing state owes to those citizens who have settled their debts (whether by losses or by contributions); it signifies and secures the end of punishment. (McNeill, 2018, pp.16–17)

The type of legal reform alluded to above could arguably include wiping minor criminal records obtained in care which would fit well with the element of trust and respect highlighted as crucial to procedural justice (Hunter & Jacobson, 2021). This would also fit with the wider evidence base and now official recognition (Department for Education (DfE), Home Office (HO) & Ministry of Justice (MoJ), 2018) of the unnecessary criminalisation that occurs in some care settings. Moreover, it would begin to address the specific challenges experienced by women with criminal records, who may face significant barriers to employment, including gendered stigma and demonisation (Sharpe, 2024; Unlock, 2021).

3 | METHODOLOGY

This article reports findings from interviews undertaken for a Nuffield Foundation-funded study. Fifty-four interviews took place with care-experienced women in prison and care-experienced girls and young women in the community with youth justice system contact. A further 40 interviews were undertaken with various professional groups, including eleven with members of the judiciary. It is our interviews with the judiciary that are the focus of this article, and we believe these interviews deserve detailed attention for several reasons. Judicial perspectives are rarely heard in research, and can be very difficult to access. With disruption caused by Covid-19, it took over a year to gain approval to conduct these interviews from the Judicial Office. Yet even with a relatively small subsample of eleven, it became clear that listening to, and learning from, the 'view from above', could help to illuminate some of the wider disadvantage faced by those who are structurally positioned 'below' (cf. Scraton, 2020). Moreover, the specific context of our wider study enables this to occur not only at the intersection of the care and criminal justice systems, but also through a gendered lens.

This research was approved by the Lancaster University Ethics Committee, the Judicial Office and HM Prisons and Probation Service's National Research Committee. The British Society of Criminology's (2015) Statement of Ethics requires researchers to 'strive to protect the rights of those they study, their interests, sensitivities and privacy' (p.5). We were acutely aware of this responsibility and maintained a flexible, respectful and non-judgmental approach throughout. Our methodology was guided by insights from feminist criminology, particularly with regard to reflexivity within the research process, a commitment to social change, and gaining perspectives from those rarely heard (Burman & Gelsthorpe, 2023).

Eleven semi-structured interviews with members of the judiciary in England were conducted between November 2020 and January 2021. Seven judges and four magistrates were interviewed, including six women and five men. All but one participant identified as white British. Participants were aged between 50 and 69 years and had between five and 27 years' experience as a judge or magistrate. There was varied experience of working in different court settings. Seven participants worked in the family court, five worked in the youth court, three worked in the Crown Court and six worked in the magistrates court. Some participants were dual-ticketed and working across different courts, hence the figures above add up to more than eleven.

Interviews focused on key challenges and good practice in cases involving care-experienced girls and women in court, and included questions on information sharing, knowledge about 'care' issues, support for girls and women, and how 'complex vulnerabilities' might be addressed in court. Participants were also invited to reflect on how practice with girls and women might be improved.

We did not identify any notable differences in responses from our participants by gender, although in a larger sample this may, of course, be different. In terms of general responses, there

were some inevitable differences linked to specific roles and court setting which affected which questions participants could respond to. For example, some who worked only in the family courts felt less well placed to comment on the criminal courts. Aside from some of the nuances presented below, there seemed to be more similarities than differences in viewpoints of judges and magistrates in relation to the themes we focus on.

Due to restrictions arising from the Covid-19 pandemic, eight interviews were carried out online using Microsoft Teams, and the remainder took place over the telephone – with the approach taken dependent on the participant's preference. Interviews ranged between 36 and 73 minutes, with an average of 47 minutes. All interviews were fully transcribed, and anonymised to protect identities, and inputted into NVivo 12 for thematic analysis. Following team discussions of emerging themes, a detailed analytic framework of nodes and subnodes was created (Woolf & Silver, 2018). Each team member participated in coding transcripts, which led to further discussion and refinement of the overarching framework for analysis.

4 | NEGATIVE PERCEPTIONS OF GIRLS AND WOMEN AND (IN)APPROPRIATE REPRESENTATION: THE CHALLENGE OF NEUTRALITY

Various challenges were highlighted during interviews, with negative perceptions emerging as a key theme from the outset. The commonality of care experience in court also emerged in various interviews, reflecting the wider evidence base. Fewer than 1% of all children in England are in care, but two-thirds (66%) of children in secure training centres and young offender institutions have been in care at some time in their lives (Prison Reform Trust, 2024). There is nothing inevitable about these shocking figures. Justice-system over-representation is particularly intense for care-experienced girls and women (Ministry of Justice, 2012), and also for those from Black and other minoritised backgrounds, with limited research on their needs (Fitzpatrick et al., 2024; Hunter, Francis & Fitzpatrick, 2023).

As Judge 4 put it: 'In the youth court I'd say the majority of young women who we see have been ... in the care system'. Others highlighted the problem of lifelong system contact:

(Y)oung women that have been in care are used to the system and so either are resigned to their fate you know, 'the system's messed on me all my life, it's going to continue to do so, so what are you going to do to me this time'? Or become quite aggressive. (Magistrate 3)

Furthermore, negative gendered judgments (cf. Young Advocates for Youth Justice (YAYJ), 2022) could interact with a care status to add an additional layer of disadvantage. Care-experienced girls and women were variously perceived as more 'difficult to engage', 'disrespectful', 'dismissive' and 'aggressive'. Such perceptions inevitably impact the ability to establish respect in court:

[Looked after girls] ... they tend to be disengaged ... they have their own protective shell, and they are very difficult to get through to ... In my experience girls in the youth court are worse than boys ... much harder to engage ... far more dismissive ... have a tendency either as a defence mechanism or because it's how they feel to be disrespectful. (Judge 6)

Such comments were echoed by others, but equally there was recognition by some, and empathy with, the frustration that girls feel when in an inadequate care system, when moved a 'horrific' number of times (Judge 4) and when unnecessarily criminalised for minor offences that would be unlikely to come to court if they were not in care (Youth Justice Legal Centre (YJLC), 2023). One magistrate noted that already frustrated girls were often further alienated by the court process.

One area where the judiciary could apply their power in court was to ensure that care-experienced girls were appropriately represented, although getting an allocated social worker to attend court could be a challenge:

I do better now because I resorted to 'well if I'm not getting the allocated social worker, I'll have the head of service' ... I don't do it willy nilly but if there is a child who actually appears to be completely abandoned by everything. (Judge 6)

Another participant suggested that social workers often lacked confidence in court and knowledge of criminal justice. In this sense, they felt that care-experienced girls could be impacted by the failings of the system and the professionals around them. Relatedly, one magistrate highlighted what can happen when a child is accompanied by a carer from the children's home where they live:

It's very difficult if ... there isn't a good relationship between the looked after child and the person that's come with them. Because as well as engaging with the youth, we would ask ... the carer questions as well ... If there's a breakdown in relationship the body language between them can ... you know speak volumes ... and of course again often the age of the carer. Sometimes they're not a lot older than the youths themselves. (Magistrate 4)

Important issues are highlighted here about who is likely to be accompanying girls and how this may be perceived in court. Furthermore, there can be a troubling tension when the carer accompanying a child may also have been a 'victim' in the home which can create competing concerns between looking after girls but also protecting staff. This will inevitably affect the actual and perceived power dynamic in court and this links to the principles of neutrality and trust (Hunter & Jacobson, 2021; Tyler, 2008). Such circumstances raise serious question as to how far girls and women will genuinely feel that they can tell their story and that those in authority will listen and act without bias. Moreover, negative gendered judgments and inappropriate representation in court may interact with a lack of contextual detail in our disjointed court systems to create cumulative disadvantage.

5 | CONTEXT MATTERS IN DISJOINTED COURT SYSTEMS: AN ABSENCE OF TRUST?

The disjointed nature of the court system (Munby, 2017) was clearly highlighted by participants:

(T)he main problem is the inability of the two jurisdictions to talk to each other ... There are huge problems with cross jurisdictional conversations and the two limbs of the justice system, crime and family, seem to operate in isolation and I think that that mirrors ... what happens on the ground ... Highly experienced youth justice

teams that I only know about because of sitting in crime, and the social work and care focused experienced teams seem to operate separately. (Judge 7)

Lack of trust in disjointed court systems was also reflected to some extent in the perceived disjointed priorities and agendas of different agencies involved in the court process. For example, one participant highlighted:

a disconnect between the youth offending services that want one result and social services that are prepared to fund a particular result. (Judge 2)

The lack of faith in different agencies to work together raises questions about why girls and women should have trust within the court process if key actors within court struggle to trust in it themselves.

Moreover, the challenges of having cross-jurisdictional conversations and of information-sharing across courts were noted particularly by 'dual-ticketed' participants who had experience of different court contexts:

I only have a context for a lot of this because I'm also a Judge in the family court as well as in the youth court and magistrates court, I can actually because I've got tickets in both jurisdictions contextualise what is going on rather better perhaps than some other Judges may be able to do. (Judge 1)

Clearly the flow of information between the courts and cross-jurisdictional communication can be highly problematic. Indeed, key contextual information may be missing in the youth or adult criminal courts. For example, details of prior care experience for women appearing in the criminal court will not necessarily be available unless someone asks for it:

All I see is what's put in front of me as the Judge which is by definition a very often incomplete picture. (Judge 1)

Yet a lack of contextual information provided in the criminal courts inevitably limits the ability of those in court to make connections between stories of the past and present. This highlights how disadvantage may be compounded in disjointed systems and lead to a lack of appreciation of how past trauma and care experience (perhaps previously discussed in the family court) may influence an individual's current behaviour. This can perpetuate the individualisation of offending. Yet against this backdrop of a lack of contextual detail, there was also recognition that the behaviour of those in care is often viewed 'under a microscope', increasing the likelihood of children being unnecessarily criminalised and coming to court (Youth Justice Legal Centre (YJLC), 2023):

Children in care are subject to the scrutiny of independent adults which other children aren't. (Judge 2)

The same participant observed that, while girls in care were at increased risk of coming to court, the specific training provided to judges in the criminal courts on 'care' issues was 'peripheral' and 'pitiful'. This is deeply concerning not least because of the power that the judiciary hold in handing

out punishments with potentially lifelong consequences, which may be felt particularly acutely by girls and women (Unlock, 2021).

Those exercising such power must be fully informed about wider contextual matters to avoid bias and maintain neutrality in a court setting where ‘offending’ risks become the key focus in an absence of wider understanding. Without this, the court risks being perceived as an uninformed site of power and decision making that is such a world away from the reality of girls’ and women’s lived experiences that efforts to encourage ‘voice’ and ‘trust’ in court become merely academic.

The issue of ensuring that adequate training is provided highlights another potential site for judicial rehabilitation (McNeill, 2018). Here the power of storytelling, that involves listening to, and learning from, those with lived experience, could form an invaluable part of future judicial training. Making such training mandatory could also support efforts to reduce the often-vast distances in court between those with and without power.

6 | TOO LITTLE TOO LATE? POWERLESSNESS IN COURT

While the judiciary may reasonably be described as ‘an elite’ (Minson, 2020, p.62) who hold power in the courtroom, they nevertheless may feel the weight of responsibility in their role when dealing with cases involving care-experienced girls and women in trouble. This certainly came through strongly in some of our interviews. Indeed, the emotional labour performed by judges and magistrates may be considerable, and there are tensions between balancing presentations of neutrality with empathy (Barry et al., 2023):

... Although I’m a Judge I’m also a human being. (Judge 2)

I lay awake at night still now after all these years ... your heart bleeds it really does.
(Magistrate 4)

With the limits of their roles clearly recognised, the wider context where other systems were under-resourced leaving the judicial system to pick up the pieces inevitably created frustration. This was highlighted in relation to supportive, yet under-funded, voluntary sector services in the community:

So there are some really good charities ... but they struggle. They struggle because we’re not prepared to shift from this system where we wait ‘til the car crash has happened’. (Judge 3)

Such comments link to the decimation of welfare support in the community under a succession of austerity-focused governments.

By contrast, and in a slightly different context, there was also recognition of the possibilities for affecting change and using their power to prevent what they deemed to be unnecessary criminalisation cases. Judge 2 talked about using an absolute discharge as a way of expressing disapproval for cases that they thought shouldn’t even have come to court, such as ‘petty shoplifting’:

[Absolute discharge is] the strongest message that I’ve found that I could give to prosecutors and the police. Don’t bring this type of case because if you do there’s going to be no penalty ... It is the ultimate sign of a court’s disapproval. (Judge 2)

However, the power to express disapproval can only go so far. Regardless of the power to criminalise, a vulnerable woman spared a sentence will not necessarily receive any practical support in the absence of that sentence. While the judiciary might be able to use their position to challenge the system, they are still ultimately bound by its confines. Small ‘victories’ might be achievable, but wider systemic change is required. This further reinforces the case for rehabilitating the courtroom (McNeill, 2018). Indeed, recent efforts to develop problem-solving courts, and particularly the piloting of specialist women’s courts, which focus specifically on women’s needs, offer some hope for a more supportive experience (Centre for Justice Innovation (CJI), 2021). Based on our interviews, such efforts to reimagine the court space are much needed.

Care cases going through either the family or criminal courts were variously described as ‘frustrating’, ‘depressing’ and ‘soulless’ by participants, and some felt that efforts to assist were in vain by the time cases came to court:

... (O)ften by the time the cases come to [family] court, it’s too late ... once a case is in the court ... to what extent can you do anything that might improve things. (Judge 3)

The point that supportive services should come much earlier was echoed across different jurisdictions, with some highlighting a lack of faith in the criminal justice system:

... (T)here are some cases you deal with where you know the only sentence you’re really likely to be able to pass is a custody based sentence ... And it can be a fairly soulless exercise ‘cos ... they’re not really likely to get much assistance or support once they’re locked up ... (B)y the time they get to that situation in the criminal court, it’s almost too late, even though they may still be young enough to be within the care system. (Judge 5)

For some, court interventions often happened too far down the line for individuals, leaving the judiciary powerless to help. Moreover, participants highlighted a tension between competing concerns over welfare and justice (Goldson, 2020) when dealing with care-experienced girls and women. Even where vulnerabilities among defendants were clearly recognised, some felt unable to help in a meaningful way:

... (T)he reports sort of deal with that [self-harm] but it’s you feel as though you are powerless in a sense. What can you as a Judge do about it? You’ve only got a certain number of tools at your disposal to sentence. (Judge 2)

This sense of powerlessness also related to the lack of follow-up with girls in court. Having professionals working in silos without a holistic overview leads to lack of knowledge about long-term outcomes (including what works) unless girls return to court. This theme was echoed in our interviews with other professionals, including prison staff who commented that they remain unaware of what happens to women who leave the prison gates – unless they return to prison:

... To stop young girls in the care system falling into criminal ways ... they should have a proper mentoring system, but ... that’s the part of the system I have no control over. So my role as the Judge finishes when I make the final care order. (Judge 5)

While the judiciary have the power to have a major impact on the lives of individuals in their courts, a sense of powerlessness also emerged among some, and in certain cases a sense that their power was not correctly placed. However, if those who hold power in the courtroom can be left feeling powerless by the court process, where does that leave those who are under scrutiny in court? Even before they enter court, care-experienced girls and women in conflict with the law are likely to be drawn from the poorest, most deprived and disadvantaged sections of the community (Fitzpatrick et al., 2022). This includes on, but is not limited to, class, 'race' and geographic grounds (Carlen, 1988). From their perspective, the courtroom may be perceived as a meeting point between the powerful and the powerless (cf. Clarke & Leah, 2023). Such issues make the case for 'judicial rehabilitation' even more compelling (McNeill, 2018).

7 | COMMUNICATION AND VOICE IN THE CONTEXT OF WIDER SYSTEM FAILINGS

Having the opportunity to tell one's story (voice) and belief that this story will be listened to and considered (trust) are key aspects of procedural justice which influence individuals' engagement with the court process (Hunter & Jacobson, 2021). This may play out in different ways for those with different intersecting identities, including those from neurodivergent or racialised backgrounds. Indeed, there are considerable challenges in supporting care-experienced girls and women to believe their voices will be truly heard:

(T)hey'll say they don't want to talk or they don't want to be involved, or they feel they're not being listened to. (Judge 5)

Noting that women often said that they did not feel heard in court, one participant suggested that this is the type of comment that makes a lot of judges' 'hackles rise' because women have a lawyer to speak for them. However, it was also recognised that things may be far more complicated than that:

If you have been impacted significantly by your experience in care ... you've been made subject to child sexual exploitation, you probably think that you're worthless, you come along to court ... you might think to yourself I've had a rubbish life ... but you've maybe spent your life not saying that ... And maybe you don't say that even to your own lawyer, because you don't think it's worth saying *or you don't think that you will be heard*. So what it's about I think, it's about facilitating communication and enabling people to speak and persuading them that their voices will be heard. (Judge 7, italics added)

There are very important issues here about both enabling people to speak and persuading them that they will be heard. This might sound straightforward, but can be so challenging in practice, particularly for girls and women with extremely negative experiences in care, as is more likely for those in conflict with the law, who may have been failed, and further harmed, by the very systems intended to care for them.

Many girls and women with criminal records have past experience of trauma such as domestic abuse and/or exploitation (Sharpe, 2024), which may affect their ability to speak to, and trust, the court. The belief that they can speak freely, and will be listened to, may be especially questionable

for those who have previously been coerced into not talking by abusers and exploiters and who have learnt to survive in this way. Silence as a survival strategy can be tough to overcome, and undoubtedly creates tensions with the aim of 'giving voice'.

Given that the victimisation of girls in care may be minimised or overlooked by the authorities, in contrast to responses to their own challenging behaviour which may be unnecessarily criminalised (Fitzpatrick et al., 2022), the above issues are of serious concern. Within this context, a disempowering court process, where girls may be subject to negative gendered judgments and not provided with appropriate support, may add additional trauma.

While the judges quoted above referred to a perception among girls and women that they may not be listened to, two magistrates indicated that in fact this was a reality for some:

Girls do have specific needs and if they haven't had anybody to talk to or I'll use the word mother them for instance, you know how are they going to learn? ... (T)here are gaps in the system here with children in care. (Magistrate 4)

Meanwhile, in the disturbing quote by Magistrate 2, not having someone to listen to you was highlighted again:

I think all the abuse that happened in care homes, all the abuse that happened in foster placements, that hasn't stopped. That's still going on. It's just that I think when women report it, when girls report it, it isn't taken seriously. It's seen as 'oh you're a child in care, oh you've been hanging round these taxi drivers' ... and they're at the mercy of the person who they've reported it to, and that person just doesn't want to know ... It must be so frustrating for them not to be able to have someone to listen to them ... just because there's a stigma ... they're in care. (Magistrate 2)

Related comments were made by some girls and women in our wider study, who reported either not pressing charges due to a fear of being blamed for their own abuse, or a sense that nobody cared or believed what they had to say anyway (Fitzpatrick et al., 2022; Shaw et al., 2024). This concurs with the Independent Inquiry into Child Sexual Abuse (2022, p.353) report which highlights 'extensive failures' in dealing with the sexual exploitation of children, including a denial by officials in some areas of the scale of the problem and a flawed assumption that such exploitation is 'on the wane' (p.9). The report also found that several victims/survivors were themselves charged with, or convicted of, criminal offences which were closely linked with their sexual exploitation (cf. Shaw & Greenhow, 2021). As highlighted above, girls in care who are exploited may not only face particular stigma, but are also at the mercy of the person to whom they report the abuse. Recalling an earlier quote by Magistrate 4, care home staff may not be much older than the children themselves. The combination of issues raised here reveal how encouraging communication and trust in the authorities and in the court process may be a significant challenge.

The insights shared also further highlight the link between gendered disadvantage and care-experience. While a significant body of feminist scholarship reveals how girls and women in conflict with the law may be 'doubly-damned' (see Burman & Gelsthorpe, 2023), this can be intensified for those with care backgrounds. They may be particularly perceived as troublesome and 'wayward' – beyond enduring stereotypes of girls and women as 'the angel in the home' (see Alghrani, 2024). For starters, by virtue of being in care, they are (usually) not in the birth family home. They are therefore potentially 'risky' and unpredictable. Consequently, the additional burden of victimisation they may face is easily minimised or ignored.

The issues raised above also illuminate how some of the elements of procedural justice may become entangled with past experiences of harm and injustice, further reinforcing the need for judicial rehabilitation.

8 | SEARCHING FOR SOLUTIONS: REHABILITATING THE SYSTEM, PROMOTING RESPECT

Moving from the front end to the back end of our court systems, we explore below what needs to happen next and some potential solutions. Recent times have seen a move towards 'Child First' youth justice which takes us beyond stigmatising labels of 'offender' to prioritise the needs of the child (Case & Hazel, 2023). Given that the unnecessary criminalisation of children in care, has now been officially recognised by government in a cross-departmental national protocol to prevent this (Department for Education (DfE), Home Office (HO) & Ministry of Justice (MoJ), 2018), measures to make youth justice more Child First in practice particularly affect these children. This is notwithstanding the question of how far Child First approaches are being developed through a gendered lens (Staines et al., 2023).

Progress towards Child First within the criminal courts has been more fragmented and stilted than elsewhere in the youth justice system, and politically there is little appetite for the extensive reforms required for true compliance with this approach (Hollingsworth, 2023). Legal representation for children in court remains a lottery and it is 'potluck' if children get a solicitor with the specialist knowledge and skills to represent them well (Youth Justice Legal Centre (YJLC), 2023). While children need, and must be entitled to, specialist legal representation, there is no requirement for solicitors representing children in the criminal justice system, either at a police station or in the youth court, to have any specialist training (Youth Justice Legal Centre (YJLC), 2023).

In this sense, lack of knowledge among professionals may translate to poor legal representation and a disempowering court experience which intensifies feelings of powerlessness and vulnerability in court. These issues may play out in very particular ways for care-experienced girls and women, who often arrive in court with backgrounds of past trauma.

Therefore, if the courtroom has been particularly resistant to efforts to promote a Child First agenda (Hollingsworth, 2023), an obvious first step is to keep more children out of the criminal courts. This could be achieved by raising the minimum age of criminal responsibility in England and Wales, currently set at ten years and one of the lowest in Western Europe:

They are frustrating cases [involving care-experienced girls] to deal with actually ... you just don't know what the answer to the problem is and the criminal law isn't the answer to it often. You know in other jurisdictions for example the age of criminal responsibility is quite high ... It's sort of 16 or 17 ... and children that commit offences or breaches of their criminal law are dealt with not in the criminal courts but in a specialist family type court, so they're not criminalised from an early age. (Judge 2)

Indeed, a raising of the age to twelve years has been achieved in Scotland – with evidence from the Edinburgh Study of Youth Transition and Crime now proposing the minimum age be raised again to 15 years (McAra & McVie, 2023). Surely now is the time for England and Wales to follow Scotland's lead and that of many other countries.

Meanwhile, at the back end of the punishment process, a focus on 'judicial rehabilitation' (McNeill, 2018) could prompt renewed discussion about further reforming our punitive childhood

criminal records system, which may particularly affect those at risk of unnecessary criminalisation in some care settings – which itself can have lifelong gendered consequences (Sharpe, 2024). Notwithstanding some recent changes to disclosure rules, there is no doubt that more can be done. Wiping criminal records obtained in care would be entirely consistent with the process of ‘de-labelling’ described by McNeill (2018, p.17) in which the status of individuals post-punishment is elevated and restored. McNeill further describes this process as ‘a duty that the punishing state owes to those citizens who have settled their debts’ (p.17). This could certainly serve as a means of promoting respect for individuals post-punishment, albeit in a slightly different way from that envisaged within procedural justice.

There is also a need for greater communication across court jurisdictions. Developing mandatory joint training through the Judicial College for those working within the criminal and family courts offers some potential to increase understanding of the contrasting, and often overlapping, issues that can emerge in sites of justice and welfare. Listening to, and learning from, those with lived experience across court systems should be a central focus here. On this note, the recent launch of Lawyers who Care in the UK, a lived experience-led organisation committed to breaking barriers for care-experienced aspiring lawyers, offers some real hope. In addition, providing more space for the judiciary to develop specialisms could also help to improve understanding of gender-specific, age-specific and care-experience-specific injustice, as well as illuminating the potential impact of system contact across the life course.

Yet, of course, education and training can be a two-way process. One participant highlighted the importance of also improving early education and communication in the community about legal processes and what coming to court actually involves. It was suggested that judges should be actively engaged in this process:

For Judges to roll their sleeves up and get out, and go to schools or get kids in to come to the court and talk to them ... it’s so important and only a bit of that happens, and I think that’s a shame. (Judge 3)

This offers another potential approach to bridging the distance between those with the power to make life-changing decisions in court and those who live directly with the consequences.

Improved communication and collaboration across court systems could enable a more holistic vision of individual lives and a greater appreciation of key contextual matters. Such discussions are ongoing with respect to the youth court (Bateman, 2021), and we note with interest the use of court impact statements being used in one London borough to specifically highlight the potential impact of unnecessary criminalisation in care. A more holistic vision could include recognition that someone may appear as an ‘offender’ in one setting, yet as a ‘victim’ in another. Yet at another moment in time, and in another court space, they may appear as a mother. Elsewhere we have highlighted the gendered injustice that may face some care-experienced mothers in conflict with the law throughout their lives (Fitzpatrick et al., 2024).

Indeed, Judge 3 highlighted how care-experienced women, who may have been victims of domestic abuse themselves, were often left ‘unsupported’ following repeated child removal:

If we are going to put them through ... court proceedings and leave them unsupported at the end of it, and it’s very often we do, then that’s a terrible system. (Judge 3)

Such comments further reinforce the need to rehabilitate our systems of justice (McNeill, 2018) and lead us to consider whether alternative court spaces might offer some hope. Despite limited

evaluation evidence of their impact (Centre for Justice Innovation (CJI), 2021), the problem-solving women's courts set up in Manchester and Aberdeen in the UK clearly offer an opportunity to explore what more specialist, supportive and informal court processes could look like. There are also lessons to be learnt from research on other problem-solving settings such as the Family Drug and Alcohol courts – which have highlighted some positive results for families, challenging the view that courts are only sites of last resort (Harwin & Barlow, 2022). Of course, tackling stigma and entrenched negative gendered judgments may require much more than just a different court space. A useful starting point might be to consider how to disentangle elements of procedural justice from wider instances of state harm – and recognise how issues of power and powerlessness in court may variously impact the promotion of neutrality, trust, voice and respect. Yet there is also an urgent need to focus on improving support in the community and maximising efforts at diversion from the justice system.

9 | CONCLUSION

Through a focus on rarely heard judicial perspectives, and the little explored challenges facing care-experienced girls and women in court, this article reveals how the court process may be a disempowering and inadequate process for both the powerful and the powerless. Using the four elements of procedural justice as a lens to explore these issues – voice, trust, neutrality and respect – we highlight the immense challenges of achieving these goals for those with histories of being stigmatised and marginalised. Promoting voice and trust may be particularly difficult for those with past experience of being failed by state systems, who may have every reason not to trust those in authority and who may have been actively discouraged from using their voice through past victimisation. One consequence is that they may present, or at least be perceived, as 'disengaged', 'dismissive' or 'aggressive' in the courtroom which can perpetuate negative gendered judgments of those with dual-system contact and diminish the likelihood of them being treated with respect.

Moreover, our disjointed court systems make cross-court communication particularly complex in cases involving those with experience of both the family court and the criminal courts. In the latter settings, the preoccupation is with an individual's behaviour, yet this must be understood within the wider context of their lives. This matters because of the past trauma that girls and women may bring with them into court and because, in certain care settings, there remains a risk that they will face unnecessary criminalisation. Yet too often the wider context remains invisible, which consequently reduces the prospects for neutrality among decision makers and perpetuates the silencing of gendered harm.

The challenges highlighted lead us to consider how our systems might be improved, and here the concept of 'judicial rehabilitation' (McNeill, 2018) enables us to imagine a more hopeful and supportive approach to justice for all involved. In particular, relinquishing state power through legal reform, including raising the minimum age of criminal responsibility, would be an entirely obvious response to vulnerable children at risk of unnecessary criminalisation by their state parent, which is entirely in line with the evidence-base in this area and has recently been achieved in Scotland. Meanwhile, at the back end of the justice system post-punishment, wiping minor criminal records obtained in care would also be entirely consistent with the now official recognition of the unnecessary criminalisation that can occur in some care settings, and the lifelong and gendered injustice that such records can create (Unlock, 2021).

Further, improving judicial training through continued development of specialisms and learning from lived experience, could support efforts to bridge the often vast distances between those

with and without power in court. There is much to be learnt from the rarely-heard voices of the judiciary, and their valuable and unique insights help to illuminate how power plays out in practice. Yet in the quest for more communication and understanding across court settings, and between key agencies and actors in court, the voices of those with first-hand experience of being under scrutiny in court should also be a key focus for attention in improving judicial training of criminalisation in care and gendered harm across the life course. We recognise that this raises new questions relating to power dynamics and expertise, and it therefore demands great care and sensitivity.

Finally, the development of alternative court spaces, such as the specialist courts for women, arguably offer some key sites for learning and reflecting on what rehabilitating the system (McNeill, 2018) might look like in practice. Ultimately, and at the system-level, perhaps one of the most hopeful aspects of the move to pilot different, improved and alternative courts is the implicit recognition that our current system is disempowering and requires serious change. Reimagining the courtroom could ultimately lead us to a radical restructuring of our wider systems of justice. It is perhaps through the development of these alternative court spaces, that offer a different lens, that we might take some inspiration and hope.

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ENDNOTE

¹We define ‘care-experienced’ as anyone with experience of being ‘in care’ at some point in their lives, including in foster, kinship or residential care who are looked after under the Children Act 1989; for example, under a court-imposed care order or a Section 20 voluntary agreement.

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