

He's Just Not That Vulnerable: Exploring the Implementation of the Appropriate Adult Safeguard in Police Custody

Abstract:

This article examines the treatment of vulnerable suspects in police custody, with particular emphasis upon how the police define vulnerability in relation to adult suspects. Drawing upon qualitative data produced through observation of and interviews with COs at a custody suite in England, the article will explore why the appropriate adult (AA) safeguard is often left unimplemented. It builds upon previous research on the identification of vulnerability, but goes further by also addressing how vulnerability is defined. In discussion, this paper draws upon legalist, culturalist, and structuralist arguments to offer explanations for non-implementation of the AA safeguard.

Keywords: Vulnerability, police, PACE, custody, appropriate adult.

The Police and Criminal Evidence Act 1984 (PACE) was introduced as a legislative framework in order to regulate police powers and suspects' rights. Prior to the implementation of PACE, the Judges' Rules and the accompanying Administrative Directions governed police practice for the treatment of suspects in custody. The Judges' Rules attracted criticism for lacking enforceability and failing to protect suspects – most notably the Confait 'confessions' (see Price and Caplan 1977). Whilst the convictions were later quashed, the Judges' Rules were deemed inadequate in protecting the vulnerable (Brown, Ellis and Larcombe 1992 p.70; see also Fisher Report 1977). The Report of the Royal Commission on Criminal Procedure (RCCP) (Home Office 1981) formed the basis of PACE and the Codes of Practice, and sought to achieve 'fairness, openness and workability' (Brown 1997, p.1-2) whilst also highlighting the need for better protection of vulnerable suspects, also resulting in the introduction of the appropriate adult (AA) safeguard. This guidance on vulnerable suspects and the AA safeguard exist to ensure that suspects are protected however, practically speaking, the safeguard is not error-free.

The AA safeguardⁱ is not enshrined within PACE but rather in the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (Code C 2014) and, to a lesser

extent, the Code of Practice for the Identification of Persons by Police Officers (Code D 2010) and the Revised Code of Practice in Connection with Detention, Treatment and Questioning by Police Officers under the Terrorism Act 2000 (Code H 2014). The focus of this paper is firmly on Code C 2014, which requires that an AA be provided for those under the age of eighteen ('juveniles'ⁱⁱ), those with mental disorder or those with mental vulnerability. Those who are considered vulnerable, as per these categories, must not typically be interviewed regarding their involvement or suspected involvement in a criminal offence or offences, or asked to provide or sign a written statement under caution or record of interview, in the absence of the AA (Code C 2014, para 11.15). The AA must be independent from the police inquiry i.e. they must not be a police officer nor someone employed for, or engaged in, police work. Their role is to facilitate communication, assist and advise the suspectⁱⁱⁱ, and ensure that the police are acting fairly (Code C 2014, para 11.17). The AA is also seen to have a supportive function (Home Office Guide for Appropriate Adults 2011). Whilst the definition of 'juvenile' is clearly stated at the start of the Code, the definitions of 'mentally vulnerable' and 'mentally disordered' are provided later in the Notes for Guidance 1G where it states:

"Mentally vulnerable" applies to any detainee who, because of their mental state or capacity, may not understand the significance of what is said, of questions or of their replies. "Mental disorder" is defined in the Mental Health Act 1983, section 1(2) as "any disorder or disability of mind". When the CO has any doubt about the mental state or capacity of a detainee, that detainee should be treated as mentally vulnerable and an appropriate adult called.

Although PACE was ostensibly an improvement on the Judges' Rules, there have been problems with its implementation. A great deal of research has addressed the efficacy of the AA safeguard, particularly in relation to identification of vulnerability and implementation of the safeguard, (Bean and Nemitz 1995; Bradley 2009; Brown, Ellis, and Larcombe 1992; Bucke and Brown 1997; Gudjonsson *et al* 1993; Irving and McKenzie, 1989; Medford, Gudjonsson and Pearse 2003; National Appropriate Adult Network 2015; Palmer and Hart 1996; Phillips and Brown 1998). In Irving and McKenzie's study they recognised that custody officers (COs or CO) had difficulty in identifying vulnerability in adult suspects but claimed that the safeguard was 'working as the exigencies of the problem allow', suggesting that, if the diagnostic ability of the police could not be improved, the role

of medical and social-work staff should have greater priority (1989, p.203). Moreover, Gudjonsson et al found that ‘the police were very good at identifying the most disabled and vulnerable suspects, and ensured that an appropriate adult was called when they considered it necessary’ (1993, p.26). Both studies essentially suggested that COs were not at fault for failing to identify vulnerability – they simply lacked knowledge, training, and resources. Thus, whilst COs in England & Wales ensured that the requirements under Code C are fulfilled when vulnerability was identified; they invariably experienced difficulty in identifying vulnerability (Palmer and Hart 1996; Gudjonsson, Clare, Rutter and Pearse 1993; Irving and McKenzie 1989; Bucke and Brown 1997; Phillips and Brown 1998; Medford Gudjonsson and Pearse 2003). However Bean and Nemitz (1995) indicated that vulnerability *can* often be identified – the issue arises as a result of how COs make sense of this information. In sum, many suspects who, according to the provisions contained within Code C 2014, qualify for the AA safeguard are nevertheless interviewed without an AA present (Gudjonsson et al 1993; Irving and McKenzie 1989; Medford, Gudjonsson and Pearse 2003; National Appropriate Adult Network 2015; Robertson, Pearson and Gibb 1995; see also Bradley 2009).

The challenge posed by identification should be, in some senses, lessened through advances in technology. For example, the police have largely moved away from paper records and have a reliable, although not fool-proof, computer system.^{iv} Moreover, since the introduction of ‘Safer Detention’ (ACPO 2006 and 2012) all COs must perform a risk assessment when booking-in detainees (to include suspects) therefore allowing detainees to self-report any issues.^v There are of course challenges posed by the risk assessment and it should be noted that the intention of this paper is not to comment on its efficacy. That said, COs *are not* required to establish *with certainty* that the suspect is vulnerable or disordered. Rather, if the CO is told in good faith that the suspect is vulnerable, he must treat him or her as vulnerable unless there is clear evidence to dispel this notion (Code C 2014 para 1.4).^{vi} However, as this paper will illustrate, this approach is not necessarily used.

This article seeks to draw attention to the problems with PACE, particularly the ‘vulnerability’ provisions contained within Code C, with a focus on adult suspects. Comparisons will,

at times, be made between ‘adult’ and ‘juvenile’ vulnerability yet this is in relation to how the rules are applied by COs rather than how vulnerability manifests.^{vii} Whilst this article seeks to briefly build upon this by illustrating how vulnerability is identified, it will be clear that how vulnerability is defined, more so than how it is identified, poses the biggest obstacle to the implementation of the AA safeguard. This element has been largely neglected by the commentators.^{viii} The article also seeks to unpack why COs identify and define vulnerability in a particular manner, by exploring three theories of law in relation to policing. This paper will go forth on the basis that all suspects falling under the Code C definition should be provided with an AA.^{ix}

Theories of law in the context of policing

Within the literature and discourse surrounding the law in relation to policing, three main conceptions can be identified (Dixon 1997, p.1).^x The first conception is ‘legalistic-bureaucratic’ (hereafter legalist), which views police institutions as efficient bureaucracies, whereby police actions and decision can be driven and directed by ‘training, policy statements and internal regulation’ (Dixon, 1997 p1), with focus ‘only or primarily... [on] the law governing it’ (Dixon, 1997, p.1). Where problems arise, a legalist would suggest that ambiguities or gaps in the law are at fault and the appropriate response is to fill the gaps or clear-up the ambiguities with more legal regulation (Dixon 1997, p.2). By contrast, the second conception, culturalism, draws attention to the role of a pervasive and endemic (albeit not monolithic) police culture which, according to Reiner (2010, pp.119-32) includes values such as a sense of mission, cynicism, isolation, pessimism, group solidarity, suspicion, pragmatism, conservatism, racism and machismo (see also Loftus 2010). The police culture dominates to an extent that the law is ‘regarded as being, at best, marginally relevant and, at worst, a serious impediment to the business of policing’ (Dixon 1997, p.9). The third conception, structuralism, casts a critical eye upon the nature of the law itself – the focus shifts towards the elite and away from ‘petty administrators’ (McBarnet 1978, p.199) such as the police. The structuralist account seeks to situate police actions in an account of the state as a whole.

Here, it is also worth mentioning Packer's due process and crime control value systems (Packer 1968), which have informed criminal justice theory for well over 50 years, albeit not without critique.^{xi} The latter focuses on the efficient repression of criminal conduct, a value system which demands speed, finality and informality and places a great deal of trust in the police to detect and solve crime. The former, by contrast, is sceptical of the utility of the criminal sanction and places the individual, and his or her rights, at the forefront of the criminal process, and is distrusting of the state and prefers adjudicative, adversarial, formal fact-finding processes.

Whilst discussion of these theoretical constructs here has been brief, they will be explored in greater detail later when I unpack why the interpretation, rather than identification, of vulnerability may pose as big an obstacle, if not a bigger obstacle, to the implementation of the AA safeguard.

Methods

This research is based on a wider doctoral project, which deals with the identification and definition of vulnerability in police custody. Between early November 2014 and mid-January 2015 I observed the booking-in procedure, as a non-participant observer, at a large custody suite (or 'mega-suite'), noting the types of questions asked by COs and the decisions taken on the basis of the information available. This custody suite was chosen on the basis of size and practicality (links with a senior gatekeeper). Ethics approval was granted prior to research commencing on the basis that informed consent was obtained from COs and implied consent was obtained from suspects and other individuals present in the custody suite. During observation I observed the interactions between the CO and suspect and, where appropriate, asked questions of the CO when the suspect had left the booking-in desk. Consent was gained from 20 COs, 5 of which could not be interviewed for practical reasons. The interviews (semi-structured), which were conducted from mid-January to early February 2015, lasted an average of 41 minutes and were recorded and transcribed the same day. They form the basis of the analysis for this paper, whilst the observations provided context for the interview

schedule. The identification and definition of vulnerability formed the predominant focus for the interviews and included questions addressing ‘mental vulnerability’, ‘mental disorder’, when an AA may be required and the purpose of the AA. The following questions are examples taken from the interview transcripts:

What does mental vulnerability mean to you?

The term ‘mentally disordered’, what does that mean to you?

What do you think the purpose of the appropriate adult is?

What is it you look for when deciding whether an appropriate adult is needed?

Observation and interview data were subject to collection, coding and analysis by way of grounded theory (Charmaz 2006; see also Glaser and Strauss 2009; Corbin and Strauss 2008; Gibson and Hartman 2014). The research process began with note-taking whilst I was in the field – these were later typed upon leaving the field each day. I also made memos on the basis of what I observed (field-memos) and memos reflecting the essence of, and elaborating on what was meant by, each code. I followed the guidelines set out by Charmaz (2010 as cited in Charmaz 2011, p.364). According to Charmaz, the grounded theorist must ‘conduct data collection and analysis simultaneously in an iterative process’. The grounded theorist must also ‘analyze actions and processes rather than themes and structure’, ‘use comparative methods’, ‘draw on data (e.g. narratives and descriptions) in service of developing new conceptual categories’, ‘develop inductive categories through systematic data analysis’, ‘emphasize theory construction rather than description or application of current theories’, ‘engage in theoretical sampling’, ‘search for variation in the studied categories or process’ and ‘pursue developing a theory rather than covering a specific empirical topic’ (2010 as cited in Charmaz 2011, p.364). These steps were followed within the broader doctoral work, which explores the overarching theory.^{xii} As the ‘grounded theory’ has not been explored within this paper, the approach lends itself more to thematic analysis i.e. empirical exploration rather than theory construction.^{xiii}

Identifying vulnerability in police custody

The task of identifying vulnerability is largely left to the CO. The risk assessment, which is usually carried-out upon ‘booking-in’, provides the CO with an opportunity to interact with the suspect and gauge whether he or she is ‘at risk’ or ‘vulnerable’. The risk assessment observed, whilst lengthier

than the College of Policing Authorised Professional Practice (APP) on Detention and Custody^{xiv} (2015) hereunder, broadly follows the same format:

How are you feeling in yourself now?

Do you have any illness or injury?

Are you suffering from any mental ill health or depression?

Have you ever tried to harm yourself? – If yes, how often? How long ago? How did you harm yourself? Have you sought help?

In research conducted by Palmer and Hart (1996) vulnerability was, according to analysis of interview responses, predominantly identified through observation of the suspect. Whilst this is important and should form part of the vulnerability assessment, the questions asked during the risk assessment (as above) also provide a basis through which to identify mental disorder and, albeit to a lesser extent, mental vulnerability by allowing suspects to self-report any issues. Out of the 15 COs interviewed, 11 expressly stated that the risk assessment provided a good starting point, which *'brings out quite a lot of information'* (CO1 Interview). Yet, the main problem with the risk assessment is that not all the *'questions that I ask are answered frankly by all the detainees'* (CO13 Interview). Thus, the risk assessment can be used **only** as a starting point. Historic information could also be used – seven out of 15 of the COs mentioned that they took the approach that *'some people, they've been in custody that many times, you just know. I can think of several people that always have an appropriate adult'* (CO9 Interview). COs also rely on their own detection skills – every CO alluded to or expressly mentioned picking up on 'clues', which included, but were not necessarily limited to, unusual behaviour, how the suspect answered the risk assessment questions, and the reason for arrest (see also Palmer and Hart, 1996). COs also seemed to seek evidence such as the use and type of medication and/or whether the suspect lived independently or had a support worker. Thus, identification can be down to a 'sixth sense', 'hunch' or *'gut feeling'*^{xv} (CO14 Interview).

Identification can also be aided by the healthcare professional (HCP) although this resource may not be as readily available at smaller custody suites.^{xvi} All but one (CO16)^{xvii} indicated that they would discuss the decision with the HCP or seek the advice of the HCP. Moreover, it is important to recognise that whilst the HCP could be useful in identifying vulnerability, he or she could also be

used as a resource for *decision-making* where the CO had already identified vulnerability (as per the Code C definition). For example, CO1 stated that '*sometimes you might be...sitting on the fence with it and you might ask a nurse or the doctor to make that decision for you.*' The tendency of COs to await the verdict of the doctor was also noted by Brown, Ellis and Larcombe (1992) and Bean and Nemitz (1995) (as highlighted in Phillips and Brown 1998, pp.55). Moreover, the HCP was not without its problems and three COs recognised this, particularly because '*some come from mental health background; others don't*' (CO18 Interview). The HCP might also be used for decision-confirming. The following observation illustrates this point:

Suspect arrested on suspicion of criminal damage. Suspect said he was feeling anxious, has asthma, is in contact with Disability Services, has fits at night and suffers from bi-polar disorder. CO3 discussed decision not to obtain AA with HCP who stated 'I'm happy that he doesn't need an appropriate adult, if you're happy'. An AA was not provided.

Interaction 52

Whilst a suspect's self-report cannot be used in isolation, it can be combined with information from previous custody records, the custody officer's own interpretation of the suspect as well as the advice given by an HCP and other information available to the CO (see Palmer and Hart 1996, p.28). Applying the 'benefit of the doubt' test explained above, the CO should err on the side of caution and implement the AA safeguard unless there is clear evidence to prove that the suspect is indeed not vulnerable (see also Brown, Ellis and Larcombe 1992, p.78). Although there are challenges to identification, there are also numerous resources available through which the CO may identify vulnerability in adult suspects. The CO no longer has to rely on mainly observation alone – he or she can ask the HCP to examine the suspect for evidence of mental vulnerability or mental disorder, or can rely on the information provided by the suspect upon booking-in. By my own estimation, a significant number of suspects brought into custody could be considered mentally vulnerable or mentally disordered. However COs did not always implement the safeguard where the suspect *had been* identified as such. As Bean and Nemitz have noted, 'it is not... a question of the CO being unable to detect mental disorder, they seem to do that well enough. It is more a question of what they think should happen to the mentally disordered once detected' (1995, p.48). In the following section

custody officers' definitions of vulnerability will be explored and unpacked. This is vital to understanding why the identification of mental vulnerability and, more poignantly, mental disorder does not automatically lead to implementation of the AA safeguard.^{xviii}

Defining vulnerability for the AA safeguard

The above section explains how vulnerability can be identified; however, the definition of vulnerability is of equal, or perhaps even greater, importance. Vulnerability is difficult to pin-down and its 'exact meaning and parameters...remain somewhat elusive' (Munro and Scoular 2012, p.189). Vulnerability for the purposes of the AA safeguard can be broadly defined and, as such, the parameters are not necessarily clear. However a definition is nevertheless available (see Code C 2014, as above). How COs define and interpret the 'vulnerability provisions' goes some way to explaining why, even where vulnerability is identified, the safeguard remains unimplemented.

COs do not necessarily use the answers given by the suspect to make their decisions on whether to invoke the AA safeguard. Rather, they seem to view certain conditions as being less worthy of attracting the safeguard than others. Citing the example of depression, eight out of 15 COs stated at interview that simply presenting with depression alone would be an insufficient basis upon which to implement the safeguard. A degree of scepticism was apparent – three COs went so far as to say that depression resulted from boredom, was caused by the detainee's lifestyle, or was simply an over-used term. For example, CO16 stated that, *'I hear people come in and say they've got anxiety and depression and I think, "No you haven't, you're just struggling with life like most people do"'*. Reassessing the findings of Gudjonsson et al (1993) and Irving and McKenzie (1989), it could therefore be suggested that COs do not necessarily find it difficult to identify depression; rather they do not believe that in such instances the safeguard should be used. Schizophrenia (the most correctly identified vulnerability according to Gudjonsson et al (1993, p.26)) was not necessarily any different – 10 COs interviewed expressly stated that this mental disorder wouldn't necessarily constitute

grounds for the safeguard, but instead it depended on *'where they are in their schizophrenia... [If] they're not having an episode then I don't see the need for an appropriate adult'* (CO14 Interview). These findings lend support to Bean and Nemitz's assertion above (1995).

Perhaps the biggest concern for COs was whether the suspect was behaving 'normally' and presented well. This was closely tied with whether the suspect was taking their medication, which had an impact on *'whether or not they function'* (CO4 Interview). 10 COs interviewed expressly mentioned that they take into account whether the suspect is medicated or 'managing their illness.' In essence, the belief is that someone who has, for example, schizophrenia but who is on medication isn't actually, at least at the time, mentally vulnerable or disordered – taking one's medication results in 'normality', and those who are 'normal' do not require an AA.^{xix} This also links in with a very stark perception of the *genuinely* vulnerable suspect – someone who was 'abnormal' or even 'childlike'^{xx} (see also Palmer and Hart 1996). For example, even *'if they can't read and write, [that] doesn't necessarily say to me that they need an appropriate adult because they can be mentally sharp enough to be an adult...'* (CO12 Interview), whereas those who have *'learning difficulties... might have a mental capacity that isn't of an adult, it might be more in the juvenile range'* (CO3 Interview). As such, suspects with mental disorder or mental vulnerability who 'present well' do not necessarily require an AA.

The focus was however firmly placed on 'understanding' – the *'concern is that they won't understand the processes or they mightn't understand the questions that are put to them'* (CO20 Interview). This is supported by the typical response in relation to the purpose of the AA safeguard, which was to facilitate communication or to help the suspect understand what was happening (see also Palmer and Hart 1996). The AA was also seen as a useful tool to encourage the suspect to open up about his or her medical conditions thus enabling the COs to fill gaps in the risk assessment. Potential delay caused obtaining an AA may provide COs with a disincentive; however, such a delay may be worthwhile, particularly where the suspect has difficulty understanding concepts, questions, and answers. In these circumstances, the presence of an AA may assist the police in their investigation.

Suspects with, for example, poor literacy skills, learning difficulties, and/or mental disorder will be provided with an AA if, and typically only if, their condition impacts upon their understanding of the investigative process.

Whilst it may be argued that a suspect with depression, for example, may not *require* an AA, the Note for Guidance 1G dictates that a suspect with *any* mental disorder must be provided with one.^{xxi} On this point it should be noted that ‘mentally disordered’ persons may be considered ‘vulnerable’ or ‘at risk’ as they may be ‘unduly influenced by short-term gains (e.g. being allowed to go home) and by the interviewer’s suggestions’ (Gudjonsson 1993, p.121 as cited in Gudjonsson, Hayes and Rowland 2001, p.77). Mentally disordered suspects who, whilst able to communicate effectively, may feel pressurised within the custodial environment thereby further exacerbating their already fragile mental state. COs are ostensibly ignoring the categories in isolation i.e. that mental disorder and mental vulnerability are two distinct categories. This casts doubt upon police compliance with Code C. Two questions can be asked – *are* COs actually ignoring the guidance under Code C? And if so, *why*? Within the following sections I will revert back to theory in order to offer explanations as to why COs may approach vulnerability in the manner explored above.

A legalist interpretation – ambiguity breeds confusion?

This section explores the contention that the interpretation of vulnerability (and thus the identification) derives from a misunderstanding of the terms ‘mental vulnerability’ and ‘mental disorder’, which results from ambiguities or gaps in the guidance. COs often reiterated that they were ‘*not mental health practitioner[s]*’, adding that they ‘*don’t feel knowledgeable enough in relation to identifying mental health issues*’ (CO18 Interview). COs had a tendency to discuss learning difficulty in the same vein as mental health^{xxii} and readily admitted to a lack of knowledge of mental health and learning difficulties (see also Palmer and Hart 1996; Gudjonsson *et al.* 1993).

It could be suggested that COs may not understand (1) how these terms translate into innate conditions or situational factors or (2) the various distinctions between certain conditions. Code C is

then arguably flawed by not providing the definitions from the outset, and in a clear and comprehensible manner. This lack of clarity is demonstrated by the custody officers' responses at interview:

'Even when you've got that detail, there's nothing at the end of it that you can say 'right, the boxes are ticked', if you get "yes" for this, appropriate adult, if you get "no" for this, appropriate adult.'
CO3 Interview

However, where guidance is sufficiently clear, an AA may be obtained for an adult suspect, regardless of other factors.

'Anyone that is on the autistic spectrum, our rule book says, "They will have an appropriate adult" so... no matter how serious or mild you would get an appropriate adult.'
CO9 Interview^{xxiii}

By contrast, where guidance does not stipulate the exact criteria, it is left to the CO to make assumptions regarding what is required:

'If somebody booked into custody said that they suffered from schizophrenia, I wouldn't automatically say, "Right appropriate adult for you then", because it might be that they suffer from schizophrenia but they take medication for it, they're compliant with that medication and they're fit to be dealt with.'
CO9 Interview

It was apparent during observation and interview that COs were trying to gauge the suspect's capacity i.e. whether the suspect was 'mentally vulnerable'. The Note for Guidance 1G (as mentioned above), is structured in a manner which may lead COs to neglect mental disorder, as the last sentence refers to mental vulnerability only.^{xxiv} Other elements within Code C are also ambiguous or unclear, and further suggest that the vulnerable adult suspect is solely a mentally vulnerable suspect. For example, Code C suggests that a vulnerable suspect may be unable to understand the significance of what is said (see Annex E Note for Guidance E1 in combination with para 3.19). Moreover, whilst the Annex cautions that vulnerable suspects may provide self-incriminating, unreliable or misleading information, it does not explain the rationale behind this statement. As such, Code C suggests that (adult) vulnerability equates to a lack of understanding or capacity (i.e. mental vulnerability). This ostensibly translates, for COs, as something caused by a mental disorder (or at the very least a recognised mental health condition). The effect of ambiguity can also be seen when addressing the

approach taken towards ‘juveniles’, compared with that to vulnerable adults:

‘Juveniles that you wonder whether or not really do need somebody sat with them; we have no discretion on that. Adults you do have that subjective discretion...’ (CO3 Interview).

The rules for ‘juveniles’ operate in a more ‘inhibitory’ manner (see Smith and Gray 1983) i.e. discretion cannot be read into them.^{xxv} This could potentially arise firstly because the term ‘juvenile’ does not require interpretation (whereas ambiguities can be exploited in relation to vulnerable adults). Moreover, the definition for adult vulnerability is not provided at the beginning of Code C, as it is for ‘juveniles’. This may be symbolically significant as it suggests that the safeguards for adults are of lesser importance compared with ‘juveniles’. To further this point, the definitions of mental vulnerability and mental disorder are contained in the Notes for Guidance, which, as Zander notes, assume an even lower status than the Codes ‘in terms of their authority’ (Zander 2013, p.369). Interestingly, the Annexes ‘are stated to be part of the Codes’ (Zander 2013, p.369), thus raising the question why the definition of adult vulnerability is not contained within the Code or, at the very least, the Annex. Whilst, as Zander notes, there is very little practical difference between the Notes for Guidance and the Code (2013, p.369), this does not seem to translate to police practice. Furthermore, there is a statutory duty imposed upon Youth Offending Teams to provide an AA for all ‘juveniles’, under the Crime and Disorder Act 1998 s 38 (4) (a). However, a similar duty does not arise in relation to adults. Thus, on the basis of a legalist argument, guidance, either through Code C or additional internal regulation (such as the College of Policing APP), would result in greater compliance.

Whilst a statutory duty to provide an AA to vulnerable adults may improve implementation, this may not necessarily ensure that every vulnerable adult is provided with an AA. Moreover, the ‘ambiguities’ in the law do not hinder the custody officer’s understanding of vulnerability. COs *are* often provided with information on whether the suspect has, for example, a mental health problem, personality disorder, addiction, or learning disability (i.e. a mental disorder) (see Mental Health Act 1983: Code of Practice, p.26) or a difficulty understanding the significance of what is said to them, of questions or of their replies, whether caused by a medical condition or otherwise (i.e. a mental vulnerability).^{xxvi} Whilst not explicit in the guidance, COs were seemingly aware that a suspect with,

for example, depression is vulnerable as per the Code C guidance. It is instead how COs *utilise* this information that results in non-implementation of the safeguard. Thus, caution should be exercised when suggesting that a change in the law would produce compliance with the AA safeguard.

A simple misunderstanding, caused by ambiguities or gaps in guidance, does not explain why, for example, information provided by the suspect is often discounted. As noted above, the CO may obtain an AA where it is beneficial to the risk assessment or to police objectives. Thus, another explanation can be offered – COs use the rules in order to suit the purpose for which they require them, cutting the corners to get the job done (Holdaway 1983, p.8).

The definition of vulnerability – a product of police culture?

Within this section I will explore the contention that the law is either subordinate or a serious impediment to the function of policing (see Dixon 1997, p.9). The rules I am concerned with here are contained within Code C, which is viewed as the CO rulebook – it sets out their powers, duties, and responsibilities. For culturalist and interactionists, police actions are a result of (sub)culture (Holdaway 1979; 1983). For example, CO16's above quote, in relation to depression and anxiety, indicates a level of cynicism. CO16 went further to suggest that a number of diagnoses occur because GPs are busy and want to get rid of people. As such, *'before that person even walks in, you can have a good description of them... of where they live and you can probably pre-empt most of the answers that they'll give you on the risk assessment in relation to which GP they're under.'* As a result, CO16 was distrusting of the answers and dismissed them for this reason. This approach is indicative of pessimism and suspicion and may go some way to explain why some suspects are not provided with an AA. A number of the above quotes (CO4, CO9, CO12, CO13, CO14 and CO20) may also suggest a level of pragmatism. For COs the AA facilitates understanding and, as such, the only suspects who require an AA are those who illustrate a lack of capacity or understanding. This can be either to facilitate the investigation or for the purposes of risk assessment. The approach is therefore to deal

with matters with the least fuss possible. Thus, the manner in which vulnerability is identified and defined may be influenced by cultural values and norms.

It is important to note that, for the culturalist, the rules are not obsolete, rather ‘re-worked, refracted in one direction or another...’ (Holdaway 1989, p.65) and the police see value in having “a good story to ‘cover your ass’” (Reiner 2010, p.209).^{xxvii} A breach of the requirement to provide an AA for a vulnerable suspect can result in exclusion of evidence at trial under s 76 PACE, which, of course, requires that the case reaches the courts. This, coupled with the low visibility of decisions, has the effect that the rules can give way to police objectives. Thus, implementation of the rule may not be the only way to cover one’s ass. The exclusionary rules of evidence (discussed above) form part of this, as the following excerpt illustrates:

‘Well, ultimately, if a case goes to Crown Court or Magistrates Court and it comes down to a technical issue of does this person understand what they were doing, and would they have said that had they had an appropriate adult sitting next to them? It could all be lost on that.’

CO12 Interview

The chance of the case getting to trial (and the implications should the case get to trial) is undoubtedly taken into account as part of this ass-covering approach. Legal rules are malleable and can be moulded and shaped to suit the police and their objectives. In this regard, COs can most definitely be viewed as ‘facilitators’ rather than ‘doorkeepers’ (McConville, Sanders and Leng 1991, p.55)^{xxviii} i.e. they facilitate the police objective of interviewing and evidence-gathering more so than protecting the suspect’s due process entitlements.

Yet, the above quote not only suggests a potential police objective, it also suggests that the courts have a role to play in ensuring that the safeguards are implemented. Within the following section I will explore the structuralist approach and will argue that at least part of the problem derives from the judicial response to CO non-implementation of the AA safeguard.

The structuralist contention, as aforementioned, argues that the problem lies, not necessarily with the police, but with the judiciary and political elite (McBarnet, 1978, p.199). The importance of the judicial and political elite will be explored in this section. Whilst breach of Code C cannot result in civil or criminal proceedings against the CO (see PACE s 67 (10)), a potential ‘remedy’ can be sought through exclusion of evidence at trial under ss 76 and 78 of PACE. According to Zander, ‘judges have often been prepared to rule that a breach of a provision in a Code results in evidence being held to be inadmissible or results in the conviction being quashed’ (2013, p.369). Thus, under the exclusionary rules of evidence defence counsel may argue that, in the case of a suspect with depression for example, the decision *not* to obtain an AA has resulted in a breach of Code C and, therefore, evidence should be excluded at trial. Yet, the courts may not always exclude evidence upon finding a breach of Code C (see Mandlestam 2013, p.505; see also Zander 2013, p.473). The focus for the courts is reliability (s 76 (2) PACE) or unfairness (s 78 PACE)^{xxix}, not simply breach of guidance. Moreover, in addition to the focus on reliability, the courts ostensibly take a similar approach to COs i.e. they focus on capacity. For example in *R v Law-Thompson* [1997] Crim.L.R. 674 CA the appellant, a young man with Asperger’s Syndrome and high performing autism (but with an IQ of 150), was convicted of the attempted murder of his mother. Whilst he was provided with a solicitor, an AA was not present at interview. He was deemed not to have any issues with understanding or communication and, seemingly on this basis, and regarding the circumstances of the case, the Court of Appeal rejected the submission that the trial judge should have excluded the evidence. Moreover, the courts have condoned the police approach in other cases (see *Mark Andrew Stanesby v Director of Public Prosecutions* 2012] EWHC 1320 (Admin) 2012 WL 1469169; *R. v Foster (Geoffrey Andrew)* [2003] EWCA Crim 178). The judicial response is, therefore, not unproblematic.

Further still, this ‘remedy’ requires that the case reaches the courts. The sobering reality is such that this may be unlikely given the vast number of guilty pleas. It is thus not only the court’s response that has been problematic – the practical operation of the criminal justice system may also impede the implementation of suspects’ rights. This in turn creates a lack of accountability – breaches are typically revealed only where the case reaches the courts.^{xxx} Moreover, evidence acquired through

breach may not necessarily be excluded (s 76 (4) PACE) unless caught under s 78 and the case can nevertheless still be won (see McBarnet 1981, p.67-68). The relative dearth of admissibility cases on the basis of a breach of the requirement for an AA also indicates a problem with this ‘enforcement mechanism’.^{xxxix} And what’s more, the courts seem to display a reluctance to criticise police officers. For example in *Glaves* [1993] Crim LR 685 Owen J excused the police stating that it is ‘not always easy... to have every item of the Code in mind... It is of no consolation to the public at large that the police may be criticised’. Further, the jury direction under s 77 PACE is restricted to those deemed ‘mentally handicapped’ – the recommendation made by the RCCP to extend this to the mentally ill or otherwise mentally disordered was ignored (see RCCJ 1993, p.59). Thus, ‘it is not just police practice but the formal law... which deviates from the ideals of legality...’ (Mc Barnet 1981, p.31).

The Problem with PACE: Conclusions

With regard to PACE more generally, Dixon has noted that there are ‘several problems with judicial responses’ (1997, p.174). Further still, there is not merely one problem with PACE, there are many (see for example Reiner 2010, p.216-7). This is also true in relation to vulnerability and the AA safeguard. In light of the empirical findings and considering the fundamental flaws with PACE and Code C, it may be argued that it is not simply the COs who are at fault, it is also the rules (i.e. the wording and status of the Code C vulnerability provisions), the cultural aims and values, the judicial response, and the structure of the criminal process that are to blame (see McBarnet 1981, p.155). The structure of the law and the criminal process provide COs with the discretion (or incentive) not to implement the safeguard. It is thus not simply the law enforcement agencies that “veer in practice towards ‘crime control’” (McBarnet 1981, p.4);^{xxxiii} the law in books also provides essential insights into why the police (for personal or professional purposes) may manipulate the safeguards (McBarnet 1981, p.32).

By engaging with the custody officer's interpretations of vulnerability, as above, a common theme emerged – COs focus mainly on mentally vulnerability, largely ignoring mental disorder as a distinct category. It is unclear whether COs exploit the definitional ambiguity or whether such ambiguity is intentional in order to allow for interpretation. Nevertheless, the law and the judicial response may allow the aim of crime control (i.e. convicting offenders or efficiency)^{xxxiii} to be placed above the means (i.e. safeguarding vulnerable suspects or due process entitlements) (see McConville, Sanders and Leng 1991).

In order to understand why the AA safeguard may not always be implemented, one must consider how vulnerability and the AA safeguard are regarded by COs and why vulnerability is interpreted or constructed in a particular manner. In contrast with previous studies, the issue is not always identification; instead the problem lies equally (or perhaps more so) with definition and interpretation.^{xxxiv} This article has aimed to illustrate how ambiguities exist in law and then are left open to interpretation by the police, according to their (cultural) aims and objectives. Yet, this approach is not necessarily reprimanded by the courts. Steps may, however, be taken to ensure that vulnerable suspects are protected – the Code C 'vulnerability' provisions could be re-drafted to improve coherency, decisions could be more readily visible and open to challenge, penalties for a breach could move beyond mere exclusion of confession evidence, and COs could be encouraged to have faith in the suspect (and in the notion of vulnerability), rather than approaching this matter with suspicion, cynicism, and scepticism. Even with that, the structure of the criminal process, which allows for guilty pleas, may operate as a bar to effective safeguards. As a word of caution, employing one explanation may not necessarily solve the problem for the issue does not exist in isolation but occurs within a criminal *process*. The problem is multi-faceted and involves legalist, culturalist, *and* structuralist insights. These insights and explanations each overlap – it was indeed difficult to separate them within the above discussion. The aim is not to '[slip] into the naïve meccano model of theoretical formation' (Dixon 1997, p.267) but instead to unpack each element. Only then are we perhaps closer to solving the AA problem.

Notes

ⁱ The AA is not however without its flaws. The AA may add little to the police interview (Medford, Gudjonsson and Pearse 2003, p.253) and, in some circumstances, may not even be ‘appropriate’ (Hodgson 1997, p.786-7). Moreover, some AAs exhibit a lack of training, empathy or understanding of their role (Hodgson 1997, p.786-7) to the extent that ‘the vulnerable detainee who is attended by an appropriate adult may not be placed at an advantage over those who are not’ (Hodgson 1997, p.790). That said, their presence can increase the likelihood that a legal representative will be present, may decrease interrogative pressure and may encourage the legal representative to take a more active role (Medford, Gudjonsson and Pearse 2003, p.253).

ⁱⁱ This is the term used in legislation. The terms ‘child’ or ‘young person’ may be more appropriate. See Pierpoint (2001, 2006, 2008) for a discussion of AAs and young suspects.

ⁱⁱⁱ The term ‘detainee’ refers to someone who has been detained in police custody (this can be for a number of reasons). A ‘suspect’ has been arrested on suspicion of committing a criminal offence – this term is problematic as it suggests that reasonable suspicion has been established (see McConville and Hodgson, 1993, p.168).

^{iv} However, some forces may still use paper records (see for example Skinns 2010, p.84). Reliance on the computer system could result in false positives (e.g. where the suspect had been provided with an AA on a previous occasion but may not require one in this instance) or false negatives (e.g. where the suspect’s need had not been identified in the past but on the current occasion he or she requires an AA). In my view the former is less problematic than the latter.

^v The College of Policing APP has superseded ‘Safer Detention’. In the force studied, custody officers were not aware of the new guidance.

^{vi} It is worth noting that the requirements of ‘clear evidence’ and ‘good faith’ have not been defined.

^{vii} Whilst COs likened vulnerability to juvenility, this should be cautioned against in relation to adults as this risks infantilising adults with mental disorder or mental vulnerability.

^{viii} For example, Michael Zander, one of the most well-known PACE commentators, has failed to address the flawed definitions contained within Code C (see Zander 2013).

^{ix} Police custody can result in, or exacerbate, vulnerability as it is a space where the police have the upper hand ‘through physical, territorial and information control’ (Hodgson 1994, p.90). Thus, whilst a suspect may not be vulnerable outside of police custody, he or she may well be vulnerable by virtue of being brought into police custody. Vulnerability may also extend beyond the Code C definition.

^x The following terms are used in the socio-legal sense, as used by Dixon (1997).

^{xi} See for example Griffiths (1970); Macdonald (2008); and Aviram (2011).

^{xii} There were some theoretical constructs in mind at the time of data collection such as those discussed in this paper. The data was not made to ‘fit’ the theory and I approached the research with an ‘open mind’ rather than an ‘empty head’ (see Dey 1993, p.63).

^{xiii} As Charmaz has noted, grounded theory can lead to theory construction of ‘sharpened thematic analyses’ (2011, p.366).

^{xiv} This is a resource for national guidance on matters concerning police operations.

^{xv} On this point see also Loftus (2010, p.123).

^{xvi} This is, of itself, not unproblematic. For example, the HCP must be a clinically qualified person but may be a paramedic, a nurse, or a doctor. The HCP isn’t necessarily an expert in mental health. This may present some issues when he or she is assisting with assessing vulnerability.

^{xvii} CO16 was seen to use the HCP during observations.

^{xviii} There are other factors that will not be discussed in this paper.

^{xix} Medication may arguably be used as ‘clear evidence’ to dispel the notion of vulnerability – see above.

^{xx} Again, this links-in with the various (mis)conceptions of mental illness.

^{xxi} See also page 3.

^{xxii} A learning *disability* is classed as a mental disorder (see Mental Health Act 1983: Code of Practice, p.26).

^{xxiii} Not every custody officer was aware of this guidance – there were many discrepancies in knowledge.

^{xxiv} This last sentence refers to a specific circumstance – where the custody officer has doubt about the mental **state or capacity** of a suspect, he or she should be treated as mentally vulnerable and an AA should be called (thus failing to mention mental disorder).

^{xxv} See Ericson (2007) for discussion on rules in policing.

^{xxvi} There is certainly scope for arguing that the guidance under PACE is insufficiently clear with regard to terminology.

^{xxvii} See also Loftus (in the context of domestic violence) (2010, p. 132).

^{xxviii} It should be noted that McConville, Sanders and Leng are considered structuralists (see Dixon 1997).

^{xxix} At the discretion of the trial judge.

^{xxx} There are, of course, cases where the conviction has been quashed as a result of the non-implementation of the appropriate adult safeguard. However, a number of these cases involved ‘juveniles’ (*R v Fogah* (1989) 90 Cr App R 115; *R v. Weekes* (1993) 97 Cr.App.R. 222, [1993] Crim.L.R. 211, CA; CA; *R v Glaves* [1993] Crim.L.R. 685, CA) or there were also other circumstances taken into account when considering the reliability of the evidence (*R v Aspinall* [1999] 2 Cr. App.R. 115; [1999] Crim.L.R. 741, CA). See also *R v Kenny* [1994] Crim.L.R. 284 CA and *R v Ham* (1997) 36 B.M.L.R. 169, *The Times*, December 12, 1995. Unfortunately there is insufficient space to comment on these cases. It should be noted that, contrary to Zander’s assertion, failure to provide an AA in the case of *Ham* was found to be in breach of Code C (see Zander 2013, p.473).

^{xxxi} During observation, almost all suspects booked-in could have been considered vulnerable in some manner.

^{xxxii} It should be noted that due process and crime control are not dichotomous (see Packer 1968).

^{xxxiii} It depends on what is meant by crime control (see Duff 1998; McConville, Sanders and Leng 1991; 1997; and Smith 1997).

^{xxxiv} Although it is debatable that custody officers have read and digested the vulnerability provisions under Code C. Vulnerability may be difficult to ascertain without expert assessment (see Gudjonsson, Clare, Rutter and Pearse 1993). It should also be borne in mind that the police may have particular objectives and it may, therefore, be problematic to allow them to decide who, by their estimation, requires an AA. Whilst providing an AA to all suspects may be impracticable (for a range of reasons), it could be suggested that rather than interviewing the ‘vulnerable’ suspect, the police could seek evidence through other means.

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