Juvenile "accountability": An Overused Argument.

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by

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“Accountability” is a loaded word for juvenile practitioners. It is certainly used frequently by both juvenile lawyers and the court. Perhaps part of the allurement of “accountability” is its evocation of familiar and axiomatic legal principles like duty, fairness and responsibility. But in the context of juvenile law, ‘accountability’ connotes the idea of moralistic parental reproval, a cultural archetype so ingrained in our history that it dates back to the colonial period. “Accountability” appears in a number of federal and state programs, state juvenile codes and peer-reviewed articles on juvenile law and practice. Those of us who have worked in juvenile court know that arguments to “hold the child accountable” are both persistent and expected. Juvenile accountability is a broad enough argument to bolster a variety of recommendations, including placement choice, restrictions on familial or social contact, financial liberty and even the ability to engage in romantic relationships. More to the point, alluding to “accountability” focuses attention on the actions of the child, rather than the responsibilities of the agencies entrusted with the child’s care.

Continued reliance on the widespread argument to hold minors “accountable” is misplaced. Rhetorically, it is vague and circuitous, and refers only to a legal principle which should guide all decisions, not just those involving children. More troubling is the idea of framing juvenile law generally through the paradigm of “accountability”. This method casts juvenile law in a punitive light, and alludes to a troubling moral superiority reminiscent of the juvenile courts of the early 20th century. If the juvenile court couches its rationale in holding children accountable for their actions, it reinforces the idea that the court is fundamentally opposed to the children it serves. Using “accountability” as the sole guidepost for the court also characterizes juvenile law as non-deterministic, meaning that the minor is viewed as the primary and sole cause of the consequences. External influences such as poverty, trauma, abuse and peer pressure are given far less attention. Vice versa, the structural effect of using the ‘accountability’ argument improperly restricts the court’s factual inquiry to a narrow area of the minor’s conduct. This is opposite of the widespread understanding that the juvenile court should use a much broader inquiry to flush out the complexities and dynamics of a juvenile case.

1 The views and opinions expressed in this article are solely those of the author and are not connected or reflect the position of the National Council of Juvenile and Family Court Judges.
3 See, 42 U.S.C. 3796ee (2014) (Juvenile Accountability Block Grants Program); See e.g., Virginia Dept. of Criminal Justice Services, Juvenile Accountability Block Grant, Prgram Description (2014), available at, https://docs.google.com/document/d/1JvX4kc1QATruGXXbmeCDLAj6LEx35oth2E5amsicJVw/edit
Semantically, “accountability” is a ubiquitous, if not vague, term. The political theorist Schedler notes that accountability is “…an underexplored concept whose meaning remains evasive, whose boundaries are fuzzy, and whose internal structure is confusing.” Though lawyers think of ‘accountability’ in terms of legal duties and responsibility, the colloquial understanding of ‘accountability’ also alludes to a moral responsibility. These two concepts, morality and responsibility, become dangerously intertwined when legal actors attribute moral accountability to a child’s behavior, particularly when the idea of the child exercising independent ‘choice’ is uncertain.

Independent choice is a integral point in the accountability discussion. Indeed, how many times have we spoken to clients and asked them to make ‘better choices’? Accountability has always been tied to the idea of free choice, the ability of an actor to independently decide between two or more options. Implicit in free choice is the understanding that the actor, in this case the child, will be held responsible for the consequences of his choice. Thus if a six-year old child who is free from compulsion or influence, makes an independent decision to steal a piece of candy, we take for granted that the child has considered the consequences of her action. In such a situation we have no problem holding her accountable for that decision because her accountability is consistent with her experience and developmental status. We assume that we have warned the child before not to steal candy, and instilled in her a fear of punishment, and that her decision to steal the candy took into consideration the deterrent factors (which were unsuccessful). This is the sort of accountability juvenile practitioners should envision. It is a source of individual responsibility which considers experience, developmental status and mental ability.

Semantic and social science research also reflect the understanding that choice is not a binary concept. That is, choice cannot be understood as a simple yes-or-no self-inquiry. The six-year old’s decision to steal a piece of candy is a complex process. Likewise, choice can be influenced by a number of factors, or supplanted entirely. A decision which is influenced by internal and external limitations, but remains rational to the actor, is referred to as bounded rationality. That is, a choice which may not be the best, but is generally preferable. Children make these sorts of decisions all the time. What seems rational to a child can cause an attorney (and the court) to shake their head in puzzlement. But in part, this is because we are not considering the decision within the bounds of the child’s limited rationality.

A classic example of misunderstanding bounded rationality is a court asking a minor why they have run away from placement, and then rebuking a minor for their decision. The minor’s decision was only ‘rational’ to the minor at a specific, ephemeral point in time. The minor in all

6 T.S. Scanlon, What We Owe Each Other 270-274 (1998)
likelihood recognizes the wrongfulness of their decision, but at the time, running away may have seemed like a highly rational choice given the circumstances. This is not a product of malice, but a reflection on the child’s environment, and the different decision making process in children. An experienced delinquent might consider the risk of being caught, but not the danger inherent in homelessness. Likewise a savvy foster youth might strategize where to stay while on the run, but not assess at a higher level, the danger in such places. Essentially, the court is finding fault in the mental process which drove the minor’s decision to run away. This is not helpful and appears rightfully unfair to the child. A better question might be: How did you decide to run away?

Bounded rationality requires us to have flexible understanding of choice, especially when it comes to children. Essentially, a court should consider the independence of choice by looking at juvenile accountability in broader terms. Initially, a court should always be aware of the differing mental process that children go through when making their own decisions. A court should also consider the level of influence on decision making, including the internal influences of trauma and stimuli-aversion. Finally, the court should consider the cognitive limitations of the child. Decision-making is a complex task requiring a substantial amount of working memory. One of the primary factors in measuring bounded rationality is the “…limitation on the organism’s ability to plan long behavior sequences, a limitation imposed by the bounded cognitive of the organism as well as the complexity of the environment in which it operates.” Mental limitations of a child affect the independence of the child’s choice, and are relevant when determining ‘accountability’.

A good example of these principles in action is again, the question of placement. Some of the most challenging conversations for children’s counsel and juvenile courts are discussions about out-of-home care. Within the limitations of the child’s mind, the primary considerations are separation from family, friends and school. These are also the most immediate and recognizable negative effects of placement. Both the juvenile court and child’s attorney can help a child see the benefits in out-of-home placement by tracing out a positive sequence of events occurring in the future, which can be difficult for minors to envision. This process can also help shoulder some of the cognitive burden a minor faces when considering legal options. Long-term planning, and consideration of multiple and variable consequences are inordinately difficult when a child’s sequencing ability is not fully mature. For a child operating within bounded rationality, speaking with a court can be like playing a chess game while only being able to see one move in advance...inordinately frustrating. From the child’s perspective, he keeps losing pieces to a smarter, more powerful player.

Another consideration are the semantic problems in the widespread use of accountability. When the term “accountability” is used in juvenile courts it is anything but flexible. Accountability in rhetoric tends to take on an ‘all-or-nothing’ definition. Arguments to “hold the child accountable by X” create a false dichotomy. The proponent of accountability restricts the

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11 Bryan D. Jones, supra, no. 8 at 301.
court to one of two options, either the court holds the child accountable or it doesn’t. Further, the rhetorical use of ‘accountability’ assumes that the child had the freedom of choice which allows the court to hold the child completely responsible for all of their actions. In essence, the rhetorical use of this phrase acts as constructive evidence of intent. By saying “we should hold the child accountable” what we are really saying is, “the child’s mental state requires us to hold him responsible for all consequences of his well thought out actions.” This requires the court to assume that the child had the same sense of premeditation as an adult, which is often incorrect.

Further, the use of ‘accountability’ as a rhetorical device encourages over-simplifying a case through “dualism.” Dualism is the separation of phenomena into two opposing categories, a practice which is prevalent in the system. The law tends to boil down questions into dualist constructions which make analysis legal and procedure efficient, such as guilty or not guilty, true or false, complaint and response etc. The frequent use of accountability as a rhetorical device encourages a court to categorize juveniles into two groups: those who bear complete responsibility, and those who have none. This is precisely the opposite of the socially broad, holistic analysis the juvenile court is supposed to conduct. Over-emphasizing juvenile accountability shifts the court’s analysis from a multi-dimensional to a one-dimensional inquiry. Instead of looking at the profusion of factors which have shaped a minor’s decision-making process, rhetorical ‘accountability’ looks only at the conduct and the child. Essentially, this sort of inquiry is thoroughly non-deterministic. It assumes that the choice originated from the child, and only the child, rather than allowing for external causes.

An additional problem with the generic use of “accountability” is bias. The connection between morality and choice is complicated by the mistaken perception of adulthood and maturity. A 6 foot tall 200 pound varsity football player may look like an adult, but his adolescent brain is far from complete.12 Likewise, a teenager may present as highly functional with adult-like behaviors and mannerisms, but not have a complete grasp of adult-decision making. It is important for both juvenile courts and children’s counsel to remember that children are in a socialization process of learning to act like adults by mimicking adult behavior. This sort of situation plays havoc with our innate bias to treat people as they appear. In fact, many cognitive abilities we associate with responsibility are underdeveloped in children. Impulse-control, in particular, provides the breathing room for children to consider complex decisions, and is notoriously diminished in adolescents. Similarly, “goal-directed behavior” which we commonly associate with adulthood and the ‘acceptance of challenges’ (such as openness to long-term treatment) is emergent in the teenage brain.13 Bias may cause us to believe that because a child appears adult, she made an adult choice. However, the common conception of ‘accountability’ used in juvenile court is irreconcilable with these cognitive limitations.

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Finally, there is the contrast between the way we want children’s brains to work, and the way they do work. All adults would like children to make informed, mature choices. It would result in a much safer, more protective world. But scholars have known for some time that trauma, mental illness, substance abuse and socialization can affect a child's conduct in subtle and unrecognizable ways. The only time we reconsider the use of accountability seems to be when the presence of mental illness is incontrovertible. This is unfortunate as it plays into common stereotypes of mental illness in both children and adults. As aptly summarized by Patrick Corrigan of the University of Chicago, the representation of the mentally ill in media generally falls into three categories, “...people with mental illness are homicidal maniacs who need to be feared; they have childlike perceptions of the world that should be marveled; or they are rebellious, free spirits.” In any of these categories, mental illness is depicted as recognizable to the layman, which is clearly not the case for all youth. Many children who are mentally ill are quite intelligent, and many more are socially adept, loquacious and affable. More to the point, a child’s decision-making process is already altered from our normative understanding because of development. A child does not need to be mentally ill for the juvenile court and counsel to critically think about accountability.

As children’s counsel, we know that the concept of ‘choice’ is vastly different for our clients. A child’s limited array of options is dwarfed by the spectrum of adult liberty. Options an adult takes for granted; such as removing himself from a home, may prove impossible for a child. Children from impoverished communities or rural environments, are especially vulnerable to an isolation which fatally limits their range of options, including escape from environments which teach anti-social behaviors. Juvenile dependents are severed from their familial support system. When coupled with trauma, and the inability to speak or visit with their close relatives, children resort to behaviors which we label as unacceptable, though we provide them few alternatives. These environments restrict the choices available to children, forcing them to fall back on cognitive decision-making systems which are neurologically incomplete.

What does this all mean? As juvenile lawyers, we understand the profound effect language has on perception, both by our client toward the court process, and from the bench toward our client. This is why minor’s counsel must safeguard the semantic rules of their courtroom by not letting terms like “accountability” be used without limitation. Juvenile practice is a complex and individualized process. Juvenile law does not respond well to shortcuts or stereotyping. Letting a court refer to a minor’s conduct as something for which he should bear full accountability signals to the minor that his choice was wrong, his conduct was wrong, and he alone is the cause of the problem. It eliminates further discussion of mitigating factors which

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15 See, Broome et.al., supra note 5.
also shaped his choices. Ultimately, it sends the message that we care little for the minor, and more about what he has done.