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Governance Through Diversion in Neoliberal Times and the Possibilities for Transformative Social Justice

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Abstract Over the last decade the dramatic increase in the number of young people diverted from formal processing through the youth justice system in England and Wales and the equally sharp drop in the rate of youth custody suggest that the neoliberal formula for the penal governance of young people who offend has been undergoing significant reshaping. We base our findings principally on this one jurisdiction, although it is likely that our analysis is applicable in other settings. This article will interrogate the changes that are currently taking place, particularly the proliferation of 'out of court,' community-based measures of diversion and offence resolution, to develop a more fine-tuned conceptualisation of the complexities of neoliberal youth penality. With the extensive reduction in the capacity of the state to exert direct measures of institutional and community-based coercion, we accordingly seek to identify other, less overt processes which also aspire to maintain order and reproduce social relations favourable to the neoliberal project. Rather than end on a purely pessimistic note, we conclude with a brief outline of the potential for alternative, progressive strategies which seek to challenge rather than simply modify or incorporate previous modes of regulation and control.

Introduction: Diversion and a Shift in 'Sites' and 'Logics' of Governance

Meteorologists are currently much occupied with explaining the distinction between the climate and the weather; that is, the relationship between a background configuration of forces and

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conditions (climate) which is sustained over time, and the day-to-day events which constitute 'the weather.' It is the latter which tends to occupy our interest and concern and indeed impacts on us most directly, but it is the former which is more influential and, indeed, sets the rules by which the latter must operate. We hope that it is not too much of a stretch to suggest that this works well as an analogy for the changing contexts and experiences of what we now know as 'youth justice'. This is very much the terrain we wish to explore in this article, with particular reference to 'diversion'[3] and the way in which decisions at the 'front end' of the justice system are shaped by policy interests, coordinating bodies and delivery agencies and then made and instituted by practitioners.

When reflecting on the strange case of diversion in youth justice, our attention is first captured by the rapid and dramatic changes suggested by the official figures at particular periods of time (Smith 2017). So, for instance, there appears to have been something of a pendulum effect, with a substantial increase in the number of young people prosecuted from 1991 onwards, set against a relative decline in cautioning rates; whilst on the other hand, an 85 per cent decrease in the number of 'first time entrants'[4] to the youth justice system was recorded between March 2007 and March 2017 (Ministry of Justice 2018). The net effect of these changes is, on the face of it, a substantial decriminalisation of a large section of the population of children and young people in England and Wales over this latter period; and this constitutes a de facto reversal of previous policy on dealing with youth crime.

At first sight, this suggests a significant degree of volatility in official circles in ideas about how young offenders should be treated. In other words, prevailing conceptualisations of young people and their (problematic) behaviour may, on this evidence, be viewed as reasonably fluid and susceptible to short-term contingent influences. The extent to which young people in general are perceived as representing an existential threat to community stability and social order seems to be a matter of continual recalibration and revision, according to this line of reasoning. On the other hand, this seems to sit somewhat oddly with prevailing and well-established assumptions about childhood and its key characteristic; and 'risk' and how that is constituted and made manageable. We can see from recent contributions from neuroscience, for instance, that

[3] Unlike the situation in the USA where diversion usually refers to diversion from custody, in the current context of England and Wales it mainly refers to diversion from any formal contact with the youth justice system.
[4] First time entrants are defined as children or young people (aged 10-17) for whom the recorded outcome in any given year was their first experience of either a caution or a conviction.

developmental assumptions about childhood, adolescence and maturation are becoming more strongly established, rather than being called into question. Thus, childhood, is firmly identified as a life-phase characterised by a process of physiological and psychological development, during which the capacity to make rational judgements and exercise self-control are only gradually acquired, through the journey to full maturity. This evidence is supported by a body of literature which seeks to establish a range of predispositional factors which are 'associated with' anti-social and criminal behaviour (see Case and Haines 2009; Smith 2011).

According to this explanatory framework, risk assessment thus has a legitimate and continuing part to play in establishing the extent to which specific children are or are not following the expected (and normatively determined) path towards responsible adulthood. The problem to be addressed here is how such fairly authoritative narratives and justificatory accounts have adapted to, or have even been foundational to, the changing shape of practice in youth justice in general, and the substantial reduction in the level of formal processing of young people for offences, in particular. Whatever its origins, the changing shape of practice at the front end of the justice system has wider implications for the ways in which young people's deviant behaviour is understood. The shift from an approach grounded in actuarial calculations of risk (Smith 2006) and micro-management of behaviour to one which by and large appears to be indifferent to the 'early' signs of delinquency is striking, and must, one would expect, be supported by some kind of rationale, beyond simply a need to cut costs (Bateman 2017).

Here, then, we suggest that the example of diversion might provide a case study and a context for an exploration of the changing rationalities of youth justice and beyond that the socialisation of young people in a changing and increasingly neoliberal economic climate. Typically in the context of youth justice in England and Wales, the idea of diversion has been associated with decisions and actions taking place in the pre-court phase of the justice process, being associated in turn with minimising intervention in the case of relatively minor or uncontroversial offences. In this respect, the youthfulness and supposed immaturity of those involved in the offending behaviour is a relevant consideration. Children are considered to be inherently less responsible and less accountable than adults, and therefore eligible for a less punitive form of intervention. Although, on the face of it, this provides a straightforward, even common-sense rationale for not invoking the full force of the legal process, it also leads

inevitably to the question of why this process should be susceptible to the dramatic and rapid changes in practice outlined above.

At the level of practice, we have observed the replacement of 'formal' interventions (warnings then cautions, and prosecutions) with what appears to be a significant increase in police-initiated informal actions, in the form of community disposals, or referral to diversionary panels and programmes at arm's length from the justice system. At first glance, recent developments suggest quite a disparate pattern of practices in youth diversion, captured explicitly by Kelly and Armitage (2015) in the phrase 'diverse diversions.' The emergence of a range of approaches is reflected in their study of two different sites, where, alternatively 'restorative' and 'welfare-led' diversionary interventions appear to prevail; and this is supplemented by evidence of minimum intervention and 'offender management' strategies (Smith 2017), which seem to prioritise efficiency and simplicity at the expense of more considered strategies. Here, then, we might speculate that it is difficult to determine any degree of coherence in the thinking which underpins these ostensibly very different approaches, where the dominant themes appear to be captured in the notions of pragmatism and localism.

Overall the diverse conceptualizations of diversion currently in vogue in England and Wales suggest a lack of clarity and a degree of murkiness about the prevailing intervention logic which underlies youth justice policy and practice. Such local adaptations suggest a degree of 'relative autonomy' (Poulantzas 1974) in applying legal and regulatory mandates. However, policy driven outcome measures and success criteria remain constant and these are perhaps indicative of common ground and a point of convergence at the level of diversionary practice. This leads us to speculate that new style diversion may coalesce around a move away from coercion towards cheaper and less direct mechanisms for promoting conformity and asserting 'soft' control.

Redrawing the Boundaries, Redefining the 'Field'

Over the last two decades the scope of criminological research on the sociology of punishment has dramatically expanded and increasingly attention has been drawn away from universalising, grand narratives about the state's role in manufacturing penality to focus on 'more fine-grained' and 'detailed, action- level accounts' (Garland 2018: 13–14). Hence Wacquant's (2009)

depiction of neoliberal statecraft, whereby repressive, penal measures, particularly imprisonment, are used to manage the high levels of social inequality created by its contentious economic strategies, does little to capture the nuances of youth penality in action where there has been a significant drop in both the number of young people appearing in court and entering custody. From 2007-17, there was a 79% decline in the number of children and young people arrested for indictable offences in England and Wales; there was a 72% fall in the number proceeded against in court; and there was a 75% fall in the number of 'proven offences' committed by children and young people (Ministry of Justice 2018: 6–7 and 20). The consequential decline in the numbers entering custody is of a similar scale, with an average of 'just under 870' children or young people locked up in March 2017, compared to an average of approximately 2,900 at the same point ten years previously (Ministry of Justice 2018: 31).

We should note at this point, though, that these aggregate figures do disguise an increasing concentration of black[5] young people at every stage in the justice process; with the proportion locked up by March 2017 being two-and-a -half times more than would be expected from the general population figures (Ministry of Justice 2018: 34). These trends originate at the door to the justice system with black young people being less likely to be diverted from the justice system, attributable in part to the lack of trust they place in a system which they experience as endemically oppressive (Sabbagh 2017). A 'slimming-down' of youth justice (Bateman 2017: 4) also appears to have been happening in the USA with decreases in both the rates of arrest and custody except for black young people (Goshe 2015, 2018) and so here, too, Wacquant's (2009) analysis of the penal state on the one hand fails to theorize the current complexities of youth justice; whilst, on the other, his comments on the racialization of criminal justice do carry weight. We will return to this issue later in the article.

The 'diversionary impulse' evidenced in the previous section suggests that the neoliberal formula for the penal governance of young people who offend has been reshaped. The new penal landscape combines a hybrid mix of 'risk' and 'need' logics to create a disparate repertoire of interdependent penal-welfare measures, which enact what McAra (2017a: 772) conceptualizes as 'compassionate' and Gray (2013: 530) as 'therapeutic' penal governance. Following Hannah-Moffat and Maurutto's (2012: 202) argument, the latter distorts widely held notions of the 'parameters of punishment' and in so doing extend the possibilities for social regulation. To

[5] This refers to all Black, Asian and Minority Ethnic (BAME) groups.

appreciate the dynamics of this new blueprint in action, it is useful to explore how the problematization of young people who offend and the constitution of 'effective practice' have been reformulated to support the recent proliferation of diversionary programmes that have appeared on the youth justice scene.

The Rediscovery of Welfare Thinking?

The rise to prominence of diversionary programmes not only reflects changes in the core sites of targeted penal governance, it also signals variations in the rationalities for the social regulation of young people who offend. The fulcrum of diversionary programmes is the decision-making forums in which it is decided what type of scheme young people will join. The official guidelines (Ministry of Justice 2013: 16) simply state 'there is no "prescription" on how this should be done, and it should be based on the structures best suited to the local area'. In response to this a diverse set of arrangements have emerged throughout England and Wales to facilitate joint decision-making with representation from at least the police and youth offending teams (YOTs), although in some areas other social service providers may also be involved. The inspection of out-of-court disposals (Criminal Justice Joint Inspection 2017: 49) found that three-quarters of the teams they reviewed had such arrangements in place.

The Youth Justice Board recommends that all decisions about out-of-court disposals should be preceded by a full assessment, preferably using one of their risk assessment instruments (Criminal Justice Joint Inspection 2017).[6] In recent years this has changed from Asset to Asset Plus and the differences between the two assessment tools illustrate the shift in thinking that now shapes the governance of young people who offend[7]. Asset, underpinned by Farrington's (2000) 'risk factor prevention paradigm' (RFPP), was the key assessment tool of the Labour government's (1997-2010) flagship youth justice legislation which set out to identify the individual and social factors that increased young people's risk of offending and advocated early intervention to 'nip offending in the bud' (Case and Haines 2009; Turnbull and Spence 2011). In this process young people's social welfare difficulties became viewed as pathological, individual

[6] 'Only 12% of YOTs said that they never undertook an assessment before the disposal was given' (Criminal Justice Joint Inspection 2017: 49).

[7] The recent inspection found that most YOTs had developed their own simplified version of Asset Plus which was less onerous to use with low level offenders (Criminal Justice Joint Inspection 2017: 37). Nevertheless, a similar way of thinking underlies all such tools.

deficits in need of correction to avoid the likelihood of offending. The conflation of 'need' and 'risk' in this way, coupled with the focus on early intervention, legitimised excessive criminalisation as increasing numbers of young people who offended were sucked into the youth justice system, subjected to more intrusive forms of correctional interventions and hastily driven towards custody (Goldson 2010).

The rationalities which inform the current 'diversionary impulse' are different to those of their predecessors. While Asset was informed by the RFPP, Asset Plus is guided by a new 'regime of truth' (Foucault 1980), namely desistance theory and research (Youth Justice Board 2016a). This focuses on why people stop offending and while it was mainly developed in relation to adult offenders, in this new era it has acquired a more holistic 'child-centred' orientation. This reflects a return once again to a welfarist mindset as the focus of this 'child-centred' take on desistance is on addressing 'the needs of the whole child, not just those needs most directly linked to offending behaviour' (Criminal Justice Joint Inspection 2017: 6). This way of thinking becomes even more poignant as official documents repeatedly point out that the dramatic drop in 'first time entrants' has meant that those young people remaining under the orbit of the youth justice system have exceptionally complex welfare problems which require intensive therapeutic intervention (Taylor 2016). However, the overarching difference in thinking is that while the RFPP which guided Asset focused on deficits, the desistance focus in Asset Plus places the spotlight on the 'foundations for change' by building on young people's strengths, motivation and resilience to stop offending (HMI Probation 2016; Youth Justice Board 2016a). Asset Plus 'is designed to be scalable to individual case circumstances' (Criminal Justice Joint Inspection 2017: 37) in the context of out-of-court disposals, although in practice some YOTs have found it 'too onerous' in this context. Asset Plus is thus identified as the frame of reference by which the influential inspectorate judges the adequacy of formal assessment practices in the context of diversion.

While Asset Plus is heavily dependent on desistance thinking, it remains primarily an offence focused tool. Hampson's (2018: 30) study suggests that AssetPlus has been of only limited effectiveness in terms of shifting the focus of assessments away from risk and towards 'desistance' based models of intervention, suggesting that inspections of practice have themselves sent 'mixed messages' to practitioners: 'how can they pursue a desistance-based agenda if the criteria upon which they will be judged by the inspectorate is still (for general

inspections) firmly risk-focused?' This is underlined by the prominence given to offence related factors, such as the seriousness and circumstances of the offence and the young person's offending history, in the guidelines which advise the police and YOTs what to consider when deciding upon the most appropriate out-of-court disposal (Ministry of Justice 2013: 16–17). It is therefore not surprising that the inspections of desistance and out-of-court disposals found that actual knowledge of desistance theory was limited among practitioners and not fully embedded into their work (Criminal Justice Joint Inspection 2017; HMI Probation 2016). Therefore, in practice it seems that the RFPP and desistance thinking were conflated such that a toxic mix of needs and deeds prevailed, and young people's welfare needs remained individualised, medicalised, pathologised and dematerialised with a heavy emphasis on linking risk of offending with deficiencies in mental health, educational attainment and communication skills (Taylor 2016). Meanwhile, the structural constraints that block young people's pathways out of crime are downplayed because, while both the RFPP and desistance theory recognise the social context of offending, they seek solutions through correcting 'individual' deficits and/or building 'individual' strengths.

The Therapeutisation of 'Effective Practice'

What is constituted as 'effective practice' in the current diversionary climate? Drawing on the research of McAra and McVie (2010), the 'effective practice' guidelines stress the value of diverting young people from formal processing by the criminal justice system for low level offending because it supports positive social development and avoids criminalization (Youth Justice Board 2016b). The minimalist diversionary programmes of the 1980s advocated radical non-intervention (Smith 2014). But the newly rediscovered diversionary programmes support intensive therapeutic interventions (Kelly and Armitage 2015). The Youth Justice Board guidelines (2016b: 5) advise:

> in working with young people using programmes, the evidence is that support should be therapeutic… aiming to respond to individual needs and risks, but also build on the strengths of the young person.

Hence, young people are not abandoned but diverted into individually tailored therapeutic services to address social skill, mental health, substance misuse and educational difficulties

(Youth Justice Board 2017). Some of these services, e.g. youthwork, are universally available to all children, but increasingly with the cuts in public spending, they are targeted at those presenting the greatest needs and risks (Turnbull 2016). This is evidenced by the recent Ministry of Justice and Youth Justice Board (2017) audit of youth crime prevention initiatives which found that 89% of YOTs were involved in the delivery of a wide range of such targeted interventions.[8] The inspection of out-of-court disposals (Criminal Justice Joint Inspection 2017: 14) similarly found that a substantial proportion of YOTs' interventions centred on the provision of therapeutic diversionary support and so concluded that 'in view of the importance of this work' it would be included 'in its next programme of performance inspections of youth offending work.'

Apart from therapeutic interventions, restorative approaches are also popular and are a key element of several diversionary programmes (Ministry of Justice 2013: 10). However restorative practices are open to the same type of criticisms as desistance interventions because of the way they focus on individual change by confronting young people with the consequences of their offending while bypassing the effects of broader social constraints (Cunneen and Goldson 2015; Gray 2005). Interestingly, while the use of restorative justice is heavily promoted in diversionary programmes, the inspection report on desistance (HMI Probation 2016: 35) was highly critical of the way in which it is delivered, arguing 'that overall restorative work was delivered effectively in less than one-third of cases.'

However, the overriding theme which permeates all the official rhetoric on 'effective practice' in diversionary programmes was that of 'engagement' or ensuring that young people actively participate in the change process. This is illustrated by the 'effective practice' guidelines (Youth Justice Board 2016b: 1) which state:

> To affect real change and prevent reoffending, working with young people requires more than their passive attendance at appointments….to be effective these (programmes) require the young person to be engaged, able and motivated to change.

It would appear that through this emphasis on engagement the constitution of 'effective' interventions remains faithful to the neoliberal creed of responsibilisation by motivating young

[8] This survey defined prevention both as diversion from offending for those on the cusp and 'targeted' diversion from the youth justice system for low level offending.

people to take responsibility for transforming themselves into crime-free and conforming citizens (see Phoenix and Kelly 2013).

Delivering Diversion

The era of what Cunneen, Goldson and Russell (2017: 4) describe as 'penal moderation' has been marked not only by a dramatic increase in the numbers and types of diversionary programmes, but also by changes in the way such programmes are delivered. Gray (2013: 518) argues that YOTs can be theorised as 'assemblages of penal governance in action' and in recent years these assemblages have been forced to undergo significant remodeling to accommodate the cuts in public spending and the shifts in the problematisation and management of need and risk previously outlined.[9] The present authors recently completed research on changes in the design and structure of YOTs where we found that three main service delivery models had emerged which we described as 'offender management,' 'targeted intervention' and 'children and young people first' (Smith and Gray 2018). These models should be regarded as 'ideal types.' and flexibly conceptualized, as no YOT was completely devoted to any one model to the total exclusion of the other two. However, each model interpreted how diversionary programmes[10] should be delivered based on their underlying principles and modus operandi rather than in relation to the research evidence on the criminalising effects of entry into the formal youth justice system (Bateman 2017; Smith 2017).

'Offender management' teams adopt a managerialist approach to young people who offend, which in the context of out-of-court disposals focuses on preventing the likelihood of further offending to forestall entry into the formal youth justice system. Such teams continue to draw heavily on the routinised elements of formal processes where, for example, standardized risk-based models of assessment are still more easily applied, despite the official support in Asset Plus for a positive, strength based problematisation of risk and need inspired by desistance theory (see McNeill 2018). This means that young people's welfare needs remain of relevance only to the extent that they act as indicators for intervention, as need and risk of offending continue to be conflated. While many of these teams have developed partnerships with a range

[9] This argument draws on the work of Hannah-Moffat and Maurutto (2012).
[10] See Smith and Gray (2018) for a fuller discussion of the methodology. The data set used to analyze how the different models undertook diversion are drawn from this research.

of social welfare providers to address needs, they remain in thrall to a risk-orientated, problematizing mindset which individualizes and pathologizes the problems of young people who offend. So, for example, educational underachievement is seen to reflect individual deficits in young offenders' personalities rather than having any association with the decline in educational resources arising from cuts in public spending. The principal drivers of 'offender management' teams are compliance with formal expectations, standardized measures of performance and defensible practice. They will take an essentially procedural approach to diversion: 'young offenders are assessed and, where possible, referred on to alternative interventions at the point of arrest, in order to divert low-risk or first-time offenders away from the justice system' (Morris 2016: 10). The content of such interventions is of little or no concern from an 'offender management' perspective.

On the other hand, whilst the work of 'targeted intervention' teams is likewise centred on addressing the risks associated with young people's offending, they nonetheless think more holistically and proactively about the interrelationship between youth crime and young people's underlying problems. These problems will form the focal point for intervention. 'Risk from' and 'risk to' young people are likely to be conflated, and these teams tend to adopt a more interventionist approach, even in the more restricted domain of out- of- court work. They may be co-located and intervene collaboratively with a wider set of other youth support services which target different aspects of young people's social welfare problems, including substance misuse, poor educational attainment and family conflict. While retaining an interest in the RFPP, targeted intervention teams may subscribe to desistance thinking and thus give greater attention to building young people's strengths rather than dwelling on their deficits. A typical 'targeted' diversion programme is described as being 'designed to provide beneficial outcomes for young people, address underlying offending behaviour, as well as aiming to reduce incurred service and Criminal Justice System costs' (Tyrell et al. 2017: 5). The focus of intervention is principally on offending behaviour, and its scope is clearly circumscribed by the restricted spending framework which currently prevails.

'Children and young people first' (CYPF) teams[11] view themselves as pursuing a distinctly different, 'child-friendly' and progressive approach to young people who offend, which is explicitly guided by the *1989 United Nations Convention of the Rights of the Child*.

[11] These teams are informed by the 'positive youth justice' movement. See Haines and Case (2015).

Young people who engage in crime are seen essentially as children whose problems are viewed holistically such that the dynamic interaction between the psychological and the social are given prominence. Diverting young people who offend from the formal youth justice system to avoid criminalisation and stigmatisation is prioritised and is accompanied by inclusionary type interventions which support them to access the mainstream, universal social services to which all children are entitled. Overall CYPF teams aim to provide holistic, integrated, universal support to meet all the complex social problems that young people who offend frequently face. A typical 'children first' diversionary programme (see Byrne and Case 2016) is the one run by the Surrey Youth Support Team (now part of Surrey Family Services). This aims to support vulnerable young people to make a smooth transition to adulthood by focusing intervention on their welfare problems, including the circumstances surrounding their offending, without further contact with the criminal justice system. Much emphasis is placed on restorative style interventions which seek to restore young people's relationship with family and the wider community as well as repairing harm to victims.

Neoliberal Youth Penality in Action

For each of the above models to be able to find their place in the broader framework of acceptable and justifiable forms of practice within the current ethos of neoliberal governance, we must find and articulate some common strands of justificatory logic, which can both be called upon to support ostensibly very different approaches and at the same time demonstrate a degree of coherence and consistency with the wider social context. The 'diversionary impulse' can be likened to a jigsaw puzzle held together by three core dynamics, that is the rediscovery of welfare thinking, the therapeutisation of 'effective practice' and the appearance of new modes of delivery. So, what do these dynamics tell us about the complexities of neoliberal youth penality in action? First, the style of regulation has changed, second the state remains sovereign despite circumstantial evidence to the contrary, and, finally, racialised bifurcation is at play because while regulatory strategies have become more benign for some young people who offend for others they remain as punitive as ever.

Therapeutic penal governance

Earlier we discussed how most young people in England and Wales who offend end up on informal (e.g. triage) or formal (e.g. caution) out-of-court disposals. On the surface the significant increase in diversionary measures appears to be very progressive (Bateman 2017). It seems to suggest that lessons have been learnt from the research evidence on the dangers of criminalisation arising from contact with the youth justice system (McAra and McVie 2010). However, as Moore (2011) argues in relation to the specialised treatment courts in the USA and Canada, beneath the progressive veneer lurks more insidious forms of social control. Diversionary programmes do not divert young people who offend away from the 'criminological gaze' (McAra 2017a: 784). Instead they are diverted into a range of therapeutic style welfare interventions comprising varying degrees of intensity which act as smokescreens for more refined, subtle and invisible forms of surveillance and social regulation (Kelly and Armitage 2015). Therapeutic penal governance also expands the range of disposals available to watch over 'problematic' young people before resort to more expensive punitive sanctions. In one sense, interventionist diversion has taken Cohen's (1985) fishing net metaphor of 'net widening' and 'mesh strengthening' to a more sophisticated plane.

Therapeutic penal governance individualises and dematerialises the welfare difficulties faced by young people who offend (Turnbull 2016). Such young people are expected to take personal responsibility to negotiate their own needs and risks while the structural constraints that restrict their choices are overlooked. As Goshe (2015: 43) argues in the context of the USA, the therapeutic turn in penal governance 'fosters "blindness" to the structural and material causes of social problems'. Reductions in public expenditure as part of the neoliberal economic project have further reinforced the negative effects of structural disadvantage (Cooper and Whyte 2017), because the 'rediscovery of welfare' has not been backed up by increased financial support and so the welfare needs of young people continue to be neglected (Bateman 2017). This has led to severe condemnation from the UN Committee on the Rights of the Child (2016) because of the way cuts in welfare spending have had a disproportionately unjust and unfair impact on children from the poorest socio-economic backgrounds, that is those who are most likely to find themselves in contact with the youth justice system. The failure to address structural issues leads McAra (2017a: 784) to perceptively conclude that whatever principles the youth justice system pursues, the result for young people is that it is simply an assemblage for disciplining and

regulating marginality which 'reinforces class distinctions' and racial divisions; and 'places socio-economic differentiation at the heart of governance.'

Despite the austerity measures, diversionary programmes as new sites of penal governance mimic the activities of the therapeutic courts in the USA and Canada referred to earlier by providing young people with welfare support to engage and comply with out-of-court-disposals (Moore 2011). However, in the neoliberal era desistance discourses have turned upside down how compliance is understood and measured at these new sites of power, taking Foucault's (1977) analytic insights into the disciplinary attributes of the 'normalising gaze' and Rose's (2000) of the self-regulation of conduct through 'circuits of inclusion' to new levels of sophistication. The diversion process is now couched in a language of responsible self-governance which seeks to build on young people's achievements rather than to address their deficits, and as Liebenberg et al (2015: 1013) found in their research:

> …Front line workers used compliance as a means of measuring youth responsibilisation. In other words, compliance was seen as the youth's acceptance of responsibility, and was used as a measure for continued support by the system.

Not being seen to accept responsibility for making changes in their lives, in terms of visible indicators of compliance, such as 'active' engagement with change programmes, could have significant consequences for young people as it was used to justify the withdrawal of therapeutic support.

Governance at a Distance

Governmentality theorists argue that in the neoliberal era the political power of the state has been diffused to a myriad network of interrelated microsites which facilitate 'governing at a distance' (Rose and Miller 1992: 173; see also Hughes 2007). Donzelot (1979), too, has suggested that the state and ruling interests have developed sophisticated modes of transmission of the messages and techniques of control via the seemingly mundane and natural structures of everyday life, including the family, in particular. On the surface the 'diversionary impulse' appears to suggest withdrawal, of direct state regulation in the youth justice arena, and its substitution by other means of indirect and informal regulatory control of problematic groups and individuals. Whilst the moral imperatives which determine the framework for judging acceptable and unacceptable

behaviour have not changed, the processes by which desired outcomes are promoted and secured have been subject to significant modification. The dynamics of this kind of process are perhaps revealed in the way the Youth Justice Board has slackened its grip over YOTs through the relaxation of performance targets, cutting back on government funding and allowing greater flexibility in how diversionary programmes are delivered at the local level (see Bateman 2017). However, this is too simplistic an analysis of what is happening. Instead state-centred criminologists argue that while the state may exercise power through 'networked' governance it still 'retains an anchoring role in the provision of security' (Crawford 2006: 471). We need also to retain an acute awareness of the consequences of this kind of strategy for those who are left, disproportionately drawn from black communities, and increasingly beset with assumptions of intractability and inescapable labels. The debate between 'networked governance' and the 'anchoring' role of the state is played out in two key areas of youth justice.

First, while the Youth Justice Board has encouraged the flexibilization and localisation of diversionary initiatives it has not relinquished all its regulatory control over YOTs (see Youth Justice Board 2018). During the assessment process all YOTs are still expected to make use of Asset Plus which, while it has rejected the worst excesses of risk thinking, still legitimates a therapeutic dematerialising orientation to the problematisation of young people who offend (see Youth Justice Board 2016a). In 2016 this was accompanied by the setting up of the 'effective practice hub' by the Youth Justice Board (see https://yjresourcehub.uk/) where what are considered to be 'gold standard' intervention programmes are extensively promoted. Also, while performance targets have been substantially reduced, they have not been totally swept away, so YOTs remain subject to inspections, which themselves are ideologically driven and influential (Hampson 2018).

Second, the government response (Ministry of Justice 2016) to the Taylor review of youth justice makes it quite clear who is in 'command and control…. within the contemporary social regulation armoury' (Crawford 2006: 471). Taylor (2016) suggested some innovative and far reaching changes to youth justice which were underpinned by a holistic welfare orientated approach not unlike the CYPF model discussed earlier. He also advocated even greater flexibility and devolution in the delivery of diversionary schemes such that YOTs would have been completely integrated into wider local authority children and youth services. However, while the government in their response accepted in principle the gist of Taylor's 'child friendly'

suggestions, it reiterated that young people 'who commit crimes must face the consequences of their actions' and that youth justice is about managing their risk of offending (Ministry of Justice 2016: 3). The Youth Justice Board was expected to continue to robustly monitor YOT standards and performance, and youth custody was to remain a crucial component of the youth justice system. Indeed, so important was this latter issue seen to be, that youth custody was taken out of the remit of the Youth Justice Board and established as a new distinct arm of HM Prison and Probation Service under the centralised umbrella of the Ministry of Justice.

Bifurcatory, Racialised Governance

Strikingly in taking its position on arguments for reform, little attention is paid by government to a crucial feature of the contemporary youth justice system. Neoliberal youth penality is simultaneously bifurcatory and racialised (see Miller and Stuart 2017). While in recent years, as noted earlier, the rate of youth custody in England and Wales has been falling,[12] it is still not being used as a 'last resort' as pointed out by the *UN Committee on the Rights of the Child* (2016) and for those young people constituted as high risk it remains the core punitive sanction (Bateman 2017). Therapeutic penal governance is only considered to be acceptable for low level offenders. The continued central importance of imprisonment for serious and persistent offending in the compendium of penal-welfare youth justice measures was evidenced by the government response to the Taylor review when it recommended that to ensure the punitive credentials of custody are maintained it be taken out of the hands of the Youth Justice Board to become a special arm of HM Prison and Probation Service (Ministry of Justice 2016). Goshe (2015: 42) similarly points out that the drop in arrests and imprisonment in the USA looks as if 'a new era of progressive reform' has dawned, but in reality these changes only skim the surface as 'harshly punitive practices remain' with the rate of youth custody continuing to exceed that in most other western countries (Goshe 2018: 2). At the same time and at the other end of the scale, we should also remain cognisant of the evidence that even where young people are 'diverted' from the justice system, they are likely to retain 'markers' which identify them as problematic and risky, and covertly impose a series of disadvantages which cannot easily be side-stepped. As Miller and Stuart (2017: 537) argue (see also Selman, Myers and Goddard in this issue):

[12] Although it is once again rising, it is too early to surmise whether this is a stable trend (Bateman 2017).

> a criminal record, even when charges are dropped, marks the conventional citizen as "criminal" making their presumed criminality *legible* to the people they encounter in everyday life.

Despite the inroads made by strength-based desistance approaches, problematising and risk orientated rationalities and technologies remain popular in youth justice policy and practice in England and Wales (Turnbull 2016). This is evidenced by our earlier discussion of Asset Plus, 'effective practice' and the government response to the Taylor review (Ministry of Justice 2016). Risk logic supports bifurcatory governance by classifying offenders into low and high risk categories with therapeutic interventions legitimated for the former and more punitive custodial options reserved for the latter (Goshe 2015). However, risk talk not only justifies bifurcatory governance, it also exacerbates the 'othering' of some groups of young people particularly those from black and minority ethnic backgrounds.

Racial stereotypes are embedded into penal practices and risk technologies such as Asset (Hannah-Moffat and Maurutto 2010). This means that black young people who have experienced high levels of socio-economic disadvantage are more likely to be assessed as exceptionally 'needy' and 'risky', and to be criminalised, even at the point of initial contact with the justice system (Uhrig 2016), which speeds up their route to custody (Webster 2018). This is because as Goddard and Myers (2017: 157) argue:

> rather than measuring innate qualities "inside" a young person, risk instruments transform negative life events that occur disproportionately in poor communities of color into an elevated risk score.

The Lammy Review (2017: 4) into race disparities in the criminal justice system across England and Wales evidenced the extent of over-representation of black youth. Contrary to their white counterparts, at the 'front end' the proportion of young black people entering the youth justice system for the first time has risen from 11% to 19% and at the 'back end' the proportion receiving a custodial disposal rose from 25% to 41% between 2006 and 2016. Similarly in the USA Goddard and Myers (2018) show how black young people are disproportionately arrested, charged and sentenced to custody. Earlier we criticised Wacquant (2009) for his failure to appreciate the subtleties of neoliberal youth penality. Nevertheless, his analysis of the 'punitive

turn' and how high levels of imprisonment has been used to manage and control marginalised and disadvantaged outcasts from the neoliberal economic project does seem to ring particularly true for black youth caught up in the youth justice system.

What would a Progressive Vision of Diversion Look Like?

So far we have provided a somewhat dystopian account of the 'diversionary impulse' (Garland 2018). However, against this rather depressing backdrop, we might reasonably ask just what the prospects for progressive change are, as opposed to a mere reordering and reframing of the logic and machinery of control, amidst an escalating programme of withdrawal of services and support mechanisms which might have benefited children who become known to the justice system. Youth justice is a messy business in which policy makers and practitioners are actively involved in interpreting how the 'needs' and 'risks' of young people who offend should be understood and what should represent 'effective' interventions to address them. This process offers considerable opportunities for challenge, resistance and negotiation (see Prior and Barnes 2011). As indicated earlier, the alternative rationales-in-action that we have previously identified (Smith and Gray 2018) can be viewed, on the one hand, as irretrievably locked in to the ethos and logic of the justice system, which is in turn inevitably geared towards problematizing and 'working on' those identified as problematic children. On the other hand, critical analysts and practitioners have continued to set out and advocate for the positive and even transformative potential of child-centred and rights-oriented forms of intervention. The most prominent of these in the UK at this point is perhaps the 'positive youth justice' model (Haines and Case 2015) which guides the 'children and young people first' (CYPF) teams we described previously.

Goddard and Myers (2018) present an inspirational account of how twelve community-based projects in the USA strive to achieve social justice for disadvantaged youth through grassroots activism. However, their work is constantly undermined by being forced to follow risk management targets set by the neoliberal state. These are difficult to subvert as they are closely monitored through performance audits and funding controls. Nevertheless, Goddard and Myers (2018) argue 'there are cracks in neoliberal governance' which the 'social justice organizations constantly exploit.' While CYPF agencies in England and Wales are public bodies, parallels can be drawn with the privatized organizations referred to by Goddard and Myers in the USA. The key question then is to what extent do CYPF agencies who claim to

adopt a progressive approach to young people who offend offer real possibilities for transformative social justice through their diversionary interventions?

CYPF teams see young people in conflict with the law as being essentially children who have the same welfare and developmental needs as all children. This problematization is non-criminalising as it does not conflate 'need' with 'risk' of offending and so recognizes that young people have wider vulnerabilities beyond offending that must be addressed. Such teams focus their assessments on the 'whole child' and in this process the effects of social disadvantage and structural disadvantage are acknowledged along with more individual issues. In CYPF teams 'effective' interventions are planned around building young people's strengths and resilience rather than tackling deficits and pathologies. This constructive approach to 'effective' practice is reinforced by the importance placed on diverting young people who offend away from the pernicious effects of contact with the criminal justice system into more inclusionary social welfare provision that should be universally available to all 'troubled' children.

CYPF agencies undoubtedly provide a positive and benevolent experience of youth justice. Unfortunately it is poverty not crime that heightens young people's chances of falling under the criminalizing remit of the youth justice system and, as McAra (2017b: 962) points out, not enough is being done to protect the wellbeing of the child by 'tackling poverty and promoting a wide social justice agenda.' From a social justice perspective, CYPF teams could therefore be criticised for implicitly accepting the definition of young people as 'the problem.' At the same time, they could be accused of providing a narrow, process led approach to diversion because they do not have the authority or capacity to challenge either the social disadvantages of the young people with whom they work, or the criminalising logic of the justice system itself. Overall, to make use of Goddard and Myers' (2018: 137) analogy, CYPF teams in England and Wales perform mainly 'lifeguarding duties' by reducing the damage of exposure to the youth justice system and improving access to welfare support services but, unlike their counterparts in the USA, are not ambitious enough 'to look upstream' to tackle 'the structural inequalities and unequal power dynamics at the root of crime and criminalization.'

The logic of engaged critical practice thus points towards four key qualities which are essential attributes of progressive and transformative interventions:

- They must be unequivocally rights-based; that is, the unquestioned guarantee of children's rights must be met as a precondition of intervention;

- Systemic inequalities, especially those grounded in ethnic differences, must be challenged at every point rather than incorporated into practice; there is no neutral position whereby embedded unfairnesses are simply 'passported' through into the next phase of intervention;
- All forms of practice must be geared towards 'inclusion', whether in community activities, education, generic health provision, or access to universal benefits;
- And, finally, none of this can be achieved without adopting a fully-fledged participatory approach to young people's part in criminal justice practices.

This way, perhaps, lies the true 'spirit of diversion.' We could expect certain consequences to follow from an unequivocal commitment to these principles, crucially including a de-racialisation of youth justice; and alongside this, a progressive trend towards 'acceptance' of young people who previously, and even with the best will in the world, have only been defined by what makes them different or divergent from the norm.

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