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## Against Youth Justice and Youth Governance, For Youth Penalty

### *Introduction*

“Social science creates its own objects by a process of theoretical and practical relevances and reflections. ... An important impetus behind the work ... has been the possibility to talk of alternative social arrangements – that the prime reason for investigating the social is the desire to change it. In this sense, all social reflection ... is a type of political calculation that imagines certain effects.” (Garland and Young 1983: 2)

Theorising ‘youth justice’ in England and Wales is in a bit of a gloomy state in that contemporary responses to youthful lawbreaking have been reduced to and explained away as part of an on-going neoliberal government project and/or a managerialist revolution that started in the late 1990’s. As this article will discuss, the account develops like this: New Labour’s Crime and Disorder Act 1998 (CDA 1998) swept away the ‘old youth justice’, its professional knowledge base, its occupational cultures, its diverse ways of working with young people and its adherence to the welfare principle in dealing with children. What came in its stead was a new managed national system for governing troublesome youths via penal repression: one that fetishized risk assessment, was heavily audited and was staffed by a deprofessionalised workforce working to a set of performance targets that utterly curtailed discretionary professional judgement. It was claimed that in shifting the purpose of intervention to managing risky populations and preventing re-offending, New Labour’s ‘new’ youth justice system fundamentally ruptured the relationship between *how* we deal with youth crime (i.e. the processes, procedures and provisions) and *why* we do it (i.e any higher philosophical or ethical goals). The gloomy part: because of that rupture, attempts to reform youth justice in England and Wales, including its custodial estate, will be eventually co-opted into the service of the on-going neoliberal revolution that spawned the CDA 1998 and

subsequent reforms – despite what appear more recently to be green shoots of a progressive turn in youth justice practices (Goshe 2014, Smith 2014). Within youth criminology there has developed alongside this expository tale a critical politics of youth justice broadly based on the assumption that, as currently constituted, youth justice is *unjust*. To make it more just, it would be necessary to revive and re-institutionalise the relationship between higher ethical principles of intervening in young lawbreakers' lives and what we then do to them (i.e. intentions and deeds). These principles can be summarised as: responses to youthful lawbreaking should not cause harm to children and young people (and especially should not be deleterious, as is currently the case for many young people (McAra and McVie 2015), should be child-centred and based on the best interests of the child, should take account of children's welfare needs and should protect children's rights as per the Convention on the Rights of the Child (CRC) and United Nations Declaration on Human Rights (UNDHR). In practice these principles translate to the following political calls: to raise the age of criminal responsibility (i.e. a push towards decriminalisation of some youthful lawbreakers), to end youth incarceration, to refashion our current youth justice system into one that focuses on outcomes rather than processes, is based on minimum system contact and maximum diversion and above all else ensures that children's developmental, social and welfare needs are met (Goldson and Muncie 2015). What remains curiously underdeveloped from this list, however, is the call for a non-penal response to youthful lawbreaking and by that I mean a response that is not targeted at the penal correction of individual young people or framed by and within the penal realm of criminal justice. It can be argued that, this absence is, at least in part, caused by the way our current analytical tools close off the possibility of addressing two related issues. At the level of theory, the issue is one of conceptualising 'change'. The question: what framework would enable us to delineate the necessary and sufficient

conditions of possibility for a more just or even a non-penal response to youthful lawbreaking. At the political level, the issue is of *imagining* what such a response would be.

Across the field of youth justice, there seems to be a gathering wind of change. At the level of local practice there is an expansion of diversionary schemes. At the level of central government practice there are now far fewer targets by which youth offending teams are held to account and remaining targets that are focused on producing system contraction. At the level of political discourse questions are being raised about the ‘fitness of purpose’ of the system (see Carlile 2014). At the level of practice, there are two stories coming up from the ground (Phoenix 2014, Armitage, Kelly and Phoenix, forthcoming, see also evidence given in Carlile 2014 and Kelly and Armitage 2014). The first is a narrative in which the increased diversity of responses to youthful lawbreaking has been attributed to youth offending teams, the police and local authorities being more able to fashion a locally relevant response. The second about how the dramatic drops in the numbers of young people coming into the youth justice for the first time has been caused by local police constabularies and youth offending teams working together to decrease the criminalisation of young people and divert them away from youth justice. Sitting underneath both stories is a latent recognition that ‘unnecessary’ criminalisation of young people has deleterious effect on their future lives. Yet, as will be demonstrated, current theoretical models tend to reduce the diversity and complexity of what is done as well as render irrelevant what is said about what is being done (i.e. the connection between deeds and words). Hence, what provoked me to write this article was the recognition that, at an empirical level, important shifts in practice seem to be occurring that, at the theoretical level, cannot be accounted for and, at the political level, cannot be assessed. As this article will show, fundamental questions are not capable of being fully addressed. Has ‘the system’ become ‘more just’, less ‘unjust’ because it diverts more young people and incarcerates less?

The main aim of this article therefore is not to analyse youth justice policy or work, but to provoke a debate and suggest a framework within which we might find our way out of the doldrums that marks current thinking about ‘youth justice’ – at the levels of theory, practice and politics. One of the main contentions of this article is that the gloomy state of theorising is attributable to the ways in which the field (‘youth justice’<sup>1</sup>) has been theoretically constituted within academic discourse and specifically within the ‘youth governance’ and the ‘youth justice system’ theoretical frameworks. To substantiate that contention, this article analyses both of these frameworks with reference to the domain assumptions made and the theoretical closures produced. From there I go on to suggest a critical youth penalty which I will claim does have more analytical reach and can provide the basis on which to construct a youth ‘penal’ politics that argues for a non-penal response to youthful lawbreaking.

Two specific arguments are made. Firstly, the two dominant approaches described here as ‘youth crime governance’ and the ‘youth justice studies’ whilst both critical of the justice meted out to young people, nevertheless remain (at the level of theory) wedded to both official political discourse on youth offending and to the political project of a youth justice system and for these reasons they struggle to conceive of the conditions which could enable a way of dealing with young lawbreakers which is other than *penal* (that is to say practices that occur mainly within criminal justice and are framed by notions of punishment). Part of this argument is made up of a critique of governmentality that exists outside the subfield of youth

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<sup>1</sup> One of the challenges in opening different theoretical spaces viz-a-viz young people and punishment is a challenge of language. To call this field of analysis ‘youth justice’ is to always and already invoke a number of problematic assumptions – such as the relationship between youth crime and the punishment of young people, or indeed, that ‘youth justice’ is not about punishing young people but doing something else. Many of these issues will be discussed later in the article. In advance of that discussion, I shall use inverted commas to simultaneously denote that field of practices and social relations that are about the punishment of young people and that the term is problematic.

justice in “Against Youth Governance” I outline this in relation to the specificities of youth justice. The other part of this argument is made in the section entitled “Against Youth Justice” which critiques the reification (in theory) of current institutional and organisational configurations of the youth penal realm in England and Wales and the policy and state determinism that marks this approach. Secondly, I argue in the final section (“For A Critical Youth Penalty”) that a turn to critical youth penalty, along with the abandoning the concept of ‘youth justice’ provides a framework that opens the space for new questions to be asked and with that for an analysis of the conditions for creating a more ‘just’ way of dealing with youthful lawbreaking.

### ***Against Youth Governance***

Since its inception, ‘the new youth justice’ (Goldson 2000) has attracted a range of academic criticisms: that youth justice policy is confused and contradictory (Muncie 1999, 2006, 2008); that it is not held together by any ‘consolidating principles’ (Goldson 2006, Goldson and Muncie 2006, Smith 2005); and, that youth justice has been excessively politicised and thus youth justice policy is vulnerable to the whims of politicians and populist calls for punishment (Smith 2007, 2011, Pitts 2001a, 2001b). The theoretical questions that seemed to preoccupy academics for the better part of the last decade and a half were simple enough: how can we account for this ‘new youth justice system’, its hybridity, its contradictory policy landscape, the seeming abrogation of welfare principle in relation to children, its punitive characteristics and its effects. The answer: by using a governmental, penal governance or youth governance approach. Hence, Muncie (1999, 2006, 2008), Goldson (2010), Haines (2009), Smith (2011), Haines and Case (2008), Kemshall (2008, 2010), Gray (2005, 2007, 2009, 2013) and a host of others drew on a range of Foucauldian-inspired governmentality

conceptual tools. They deconstructed political rhetoric and policy and analyzed how and in what ways and under what conditions ever wider populations of risky and offending young people were being both drawn into the net of youth justice and increasingly ‘responsibilised’ for their misdeeds (Gray 2007, 2009), or, alternatively subjectified under new knowledge regimes of risk (Haines and Case 2008, Paylor 2011). In a similar fashion, researchers took to task both the evidence base upon which the new system rested, especially the risk factor prevention paradigm (Haines and Case 2008) and the noted punitive effects on young people of managerialism with its targets, performance monitoring and systems of audit (Morgan 2008, 2009). They demonstrated how the combination of youth crime governance alongside the dominance of managerialist audit and risk obsession and the political mantra of intervention, intervention, intervention contributed to a massive net-widening effect drawing ever more young people into the (punitive) reach of this ‘new youth governance’ (Smith 2011). Sitting underneath many of these analyses was the (often implicit) recognition that specific ideological conditions in the 1990s provided the impetus for the changes witnessed. Namely, following the Audit Commission’s report *Misspent Youth* (Audit Commission 1996), ‘youth crime’ was constituted as THE crime problem and ‘young offenders’ as the threatening outsider to the modern and modernising project of New Labour (see also McLaughlin, Muncie and Hughes 2001).

Yet, as attractive as this framework is for understanding ‘the new youth justice’, it is not without its difficulties. Firstly, bridging the gaps between the grand theorising of governmentality and the sheer variability and diversity of what happens on the ground under the name of youth justice raises questions about the utility of the perspective. For Pitts (2009) the youth governance framework struggles to see how and in what ways some of the interventions done in the name of governance do, in fact, govern young people in the ways

suggested (i.e. in either a punitive fashion or in terms of producing prudentialised, risk calculating citizen subjects).

Secondly, and relatedly, there is some debate about the extent to which actuarialism and risk thinking did penetrate the everyday working practices of youth justice particularly in relation to youth courts and young people themselves (Field 2007, Phoenix 2010, Phoenix and Kelly 2013). At least at the level of empirical analysis, it would seem that older discourses of welfare and care have not been displaced for many of the social actors, professionals and practitioners working within the youth justice system.

Thirdly, there are the general problems associated with a governmental perspective. As noted by Carlen (2002), McKee (2009a, 2009b) and Stenson (2005) studies in governmentality are precisely that – studies in which the object of analysis is *governmentality* and as such many governmentality studies are functionalist and totalising in their logic. What this means is that current youth justice practices and policies are analyzed in relation to how and in what ways they contribute to, or are just another part of, the ongoing neo-liberal project of reordering the social in ever changing, precarious and insecure social, economic and political conditions (Phoenix and Kelly 2013). Such a perspective becomes totalising because the logic produces an analysis whereby regardless of the intentions of politicians and policy makers, the actions of practitioners, the organisational configuration of youth justice or the broader economic, ideological or social conditions, each practice or policy has the effect of bringing more and more at risk, risky, troublesome and troubled youths closer into the subjectifying processes of governance and more public services subjected to market logics (as an example, please see Richards 2014).

Fourthly, and importantly for the purpose of this article, a governmentality framework closes off the theoretical space to analyse the conditions in which change is possible. This is because changes or contradictions in the trajectory of policy and practice (i.e. those that are



not easily understood as being aligned to neo-liberal governmentality) have been conceptualised as a by-product of the *never quite complete* project of governance. So, for instance, Rose's (2000) notion of governing-at-a-distance has been used to prise open a space for situational analyzes of both the variability of criminal justice practices that exist across the country as well as the gaps that exist between policy, rhetoric and actual practices. Thus, and in relation to last decade's New Labour Community Safety agenda, Stenson (2005) and in relation to youth justice Kemshall (2008) and Gray (2013) demonstrated that any project of governmentality is by nature contingent because the realities of political agency at the local and regional level, and the inherent bargaining, negotiating and settlements made within multi-agency partnership mean that no specific political outcome is assured.

Contingent, contested, volatile as government may be, and again for the purposes of this article, the theoretical space for analysing the conditions of change remains closed off. Introducing contingency does not displace the teleological or functionalist logic. Instead of being constituted as absolute, governmentality is constituted as always in an emergent state. It is always and already in process. The revolution is permanent. Thus, by definition, it is not possible to conceive of a state response to youthful lawbreaking (which within the governmentality framework is conceived as being part of the governmental project) that is beyond or outside governance. All change to practices and policies will, ultimately, become subsumed into governance *because youth justice itself is subsumed with governance*. It logically follows, therefore, that if the current unjust configuration of youth justice is accounted for as a process of youth governance, then at the level of theory it is impossible to distinguish or analyze the necessary or sufficient conditions in which a more just response could be established, much less imagine what the contours of that response might be.

There is a further difficulty posed by the governmentality framework. One of the long standing challenges of social theorising is how to account for any gaps that appear between

what social actors claim about what they do and what is actually done – or to put it more succinctly, the gap between intentions and action (see also Cohen 1983 and Carlen 2002). In relation to youth justice, and as noted in the introduction, there are emerging practice-based stories about progressive changes driven by practitioners (i.e. social actors) in doing youth justice work. There are also on-going narratives about the impact and effects of managerialism on how youth offending team workers, in particular, do their job (Phoenix 2010, Phoenix and Kelly 2013). However, a governmentality frame of reference deals with the gap between intentions and actions by simply bracketing off the issue of intentions and instead focusing on the mentalities and rationalities of governing. When applied to a substantive field, this means that the space is closed off in which to ask whether, how and to what extent social actors have a role to play in producing change. So, within the youth governance framework, these narratives about change are rendered less relevant than political rhetoric and therefore the space is foreclosed in which to use them to understand what their role may be in the politics of institutional change.

In the end, the governmentality framework when applied to youth justice ultimately constitutes the field of analysis (i.e. the organisations and social actors) as overdetermined by political rhetoric and government strategies that exist for the purpose of aligning government with neo-liberal economics. Not only do the empirical realities of diversity and complexity challenge this construction, but as stated above, more just responses to youthful lawbreaking remain theoretically occluded as the only change that is possible is change that functions to extend the grip of government. The argument made towards the end of this article is that in order to delineate the conditions for a more just response to youth crime, a framework must be developed that is able to move beyond logics of governmentality. The framework needs to take in account the everyday lived realities of organisations and the actors that comprise them as well as the broader field of social relations between the penal and non-penal realms -

not just neo-liberal political strategy and rhetoric and/or the relationship between economic changes and problematics of government. Perhaps most importantly, and as will be argued below, it will require a framework that is capable of theorising the relationships between social institutions (i.e. political, economic, social and ideological), bureaucratic organisations (i.e. Youth Justice Board, Ministry of Justice, youth offending teams, schools, police and so on) and social actors at various levels in those organisations, institutions and bureaucracies in a way which also is cognizant of their relative power.

### *Against Youth Justice*

In contrast to the youth governance approach, there is a second dominant approach that one that does focus on the relationships between organisation in youth justice and government. For the purpose of this article, I will call it the ‘youth justice system’ approach. Before describing it, a few comments might be helpful. First, unlike the youth governance approach, this perspective is not constituted by the application of theoretical models and concepts developed elsewhere and for other purposes. Second, in writing of a ‘youth justice system’ approach, I am making an analytical statement. The approach or perspective described below is formed by a set of conceptual assumptions and lines of demarcation. Any specific study may only be based on some of them, rather than all of them. The youth justice system approach is, in short, a way of conceptualising how a range of studies have constituted a specific object of analysis.

Constitutive of the youth justice system approach are the following conceptual assumptions. Firstly, youth justice is a system which, in effect, exists in isolation to other governmental systems (such as adult criminal justice or mainstream education, for instance) and can be examined in its own right but, as a system, is ultimately determined by

government policy and political and policy rhetoric (i.e. the rationalities and justifications made by policy makers and politicians). Or, to be more specific, a youth justice system approach is one that constitutes political rhetoric and governmentally determined performance targets as *the* determining factor shaping the actual bureaucracies, organisational configurations, occupations cultures, social actions of practitioners and the actual outcomes for young people. Secondly, it is also assumed that inasmuch as this system *currently* is characterised by punitiveness or irrationality (Goldson 2015), it *also* has the potential to become more caring and welfarist based *if only* the correct policies and political conditions could prevail. These assumptions can be seen in the how the following empirical observations have been explained. Since 2006, first time entrants [i.e. those young people entering the youth justice system for the first time] dropped substantially (see figure 1). The numbers of young people being incarcerated has also dropped by a dramatic amount (see figure 2).

[Figures 1 & 2 about here]

Many Youth Offending Teams have shrunk in size. Across England and Wales, there has been an expansion in the use of schemes that divert young people out of youth courts. Political rhetoric about youth crime seems to have cooled down (Loader and Sparks 2010).

As stated above, the baseline conceptual assumption of a youth justice system approach is that the system can be analysed *as a system*. Therefore, the theoretical question that the above empirical observations prompts is how we can account for what appears to be a diminution of the youth justice realm. In keeping with the way in which the system has been conceptualised (as a reaction to political rhetoric and government targets and as a managerialist bureaucracy (see Pitts 2001)), the explanations are sought in relation to intended and unintended consequences of changes to government policies and managerialist

systems of audit and control. So, for instance, Morgan (2008, 2009) challenged the Youth Justice Board's explanation that the dramatic drop in the numbers of first time entrants was a result of the success of early intervention schemes by arguing that it was more likely a result of the increased use of out-of-court summary disposal (such as penalty notices for disorder) particularly as it coincided with the change of emphasis regarding the offences brought to justice target. In a similar vein, Bateman (2006, 2011, 2012) in his various explorations of the trends in the numbers of young people being incarcerated in England and Wales posits that the cause is likely to be found in the combination of a changing political climate and the types of performance targets that are set. More recently and in relation to the massive drop in the numbers of first time entrants and young people in custody, Bateman (2014) made the case that it was the confluence of three main factors: that youth crime has dropped since 2008, that youth crime and justice has been depoliticised in the face of the ideology of austerity and the Coalition government's drive to cut public spending, and that the first time entrants target has had a genuine effect. More recently, Goldson (2015) has explained the rise and fall of rates of youth incarceration in relation to "the deliberate and calculated politicisation or depoliticisation of youth crime" (Goldson 2015:171). In order to make this case, Goldson describes the recent history of party political rhetoric about crime control and youth crime (as expressed in political manifestos), political constructions of young offenders and youth crime (as expressed in a variety of key political speeches) and political economic choices (especially in relation to choices made about public spending) . He demonstrates how a hardening of political climate in relation to youth crime and punishment led to an increase rates of incarceration. He also shows how a shift in political priorities and, in particular, the rise of austerity measures, is capable of producing a reduction in rates of incarceration.

It is not my intention to challenge the veracity of these claims. All of them are compelling when taken on their own terms. Nor is it my intention to discuss in anything other

than passing the tautology of describing a system as being comprised of a political realm and then using that political realm to account for any observed changes. Rather my intention is to raise a set of conceptual issues. Firstly, although a line of demarcation is drawn between policy (broadly speaking) and the youth justice system, there is little internal differentiation made about the system and its responses. Thus, policing of youth crime is not analytically distinguished from sentencing cultures of youth court magistrates or occupational cultures of youth offending team workers or from, for instance, the relative power of the Youth Justice Board in determining practitioners' actions versus practitioners' capacity to act in accordance with a set of professional ethics or politics. To put it another way, there is little or no attempt to distinguish how central government performance targets differentially impact local youth offending teams, the police, the Youth Justice Board, youth courts, or even local schools. This lack of internal differentiation at anything other than the most basic descriptive or empirical level forecloses space in which to examine the *relative* power and roles of the different organisations that comprise youth justice (as well as those formally sitting outside this realm), the agency of practitioners, and how contradictory bureaucratic and institutional priorities are resolved within specific dynamics of power. Instead, the system is reified.

In constructing the new youth justice as a discrete system that can be theorised and analyzed as such, many commentaries and studies start by locating youth justice in its wider social and economic conditions only inasmuch as any specified wider conditions are also traceable within youth justice<sup>2</sup>. This enables questions to be asked about the characteristics of

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<sup>2</sup>There are notable exceptions however, including recent work by Ros Fergusson (2013) looking at the links between the criminalisation of young people and youth unemployment as well as Muncie's (1999) earlier attempts to analyze the wider ideological and political conditions that made the CDA 1998 possible.

the system and how and in what ways it is unique or distinct from adult criminal justice or from previous or other ways of responding to youth crime. However, and at the same time, treating youth justice as though it is a coherent system and as though it has some type of monolithic character flattens the previously mentioned complex and highly diverse field of social relations, bureaucratic organisations, social actors and the ways in which power infuses these relations and treats youth justice as though it has an external reality to the one constituted in the process of theorisation. In short, it is as though there is something ‘out there’ called a youth justice system that can be studied as such without acknowledgement of the relationship between the theoretical construction we as academics adopt and the empirical realities discussed. With that, the study of how we might deal with youthful lawbreaking becomes trapped within a ‘now-ism’ that brackets off fundamental change and thus forecloses the space in which to distinguish the conditions of possibility for change. At the level of politics, this translates to the assumption that the current institutional and organisational configuration will remain at least for the foreseeable future (such as, for instance, youth courts, youth offending teams, community punishments for young people) and that a critical point of political intervention concerns how to make that system more compassionate, more welfarist, more just, more child centred, more caring. To put it another way, the focus is limited to identifying the principles and performance targets that are capable of producing a more caring, compassionate or ethical criminal justice response *because governmental policy and targets are seen as determining the shape and quality of the system*. It comes as no surprise, therefore, that critical youth criminologists have been calling for a youth justice system that is framed by and fulfils England’s and Wales’s obligations under the CRC or the UNHRC (see, for instance, Goldson 2006, Goldson and Muncie 2015) instead of, for

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example, calling to abolish it altogether. In other words, once the system becomes the object of analysis, the politics that follows is necessarily a politics of reform.

There is one other important point of theoretical closure to discuss, one which the youth justice system approach shares with the youth governance approach. The approach closes the space in which it is possible to glimpse the role that practitioners have to play in maintaining (or changing) the system. There is a lack of analytical demarcation made between on the one hand the actual bureaucracies, organisational configurations, occupational cultures that might comprise the system or the government targets and audit measures and on the other the social actions of the individuals youth justice workers. Apart from Souhami's (2007, 2014), Canton and Eadie (2002), Baker (2005) and Field (2007) there have been few, if any, theoretically informed empirical investigations that have focused on youth justice occupational culture, youth justice practice or indeed the social relations between various levels of bureaucratic organisations (for instance, the youth justice board, youth courts and youth offending teams) even though it is now more than a decade since the CDA 1998 was passed. This lack of general delineation or demarcation is seen most clearly in the suggestion that one possible explanation for system contraction is growth of professional confidence to act differently (i.e. in non punitive ways) following governmental policy to reducing the performance targets and audit measures. The explanation runs: there has been an increased use of diversion because youth offending team workers and police are able to operate with more discretion now than before. Logically speaking, such an explanation only makes sense if part of that explanation also posits that youth offending team practitioners are working within a particular type of *ethical* and *moral* space such that their intention is to mitigate what are understood by practitioners as being the harms of penal repression of young people. In other words, giving practitioners increased discretion alone will not necessarily, in and of itself, create a less punitive outcome, system contraction or a more compassionate youth



justice response. Indeed, it could, under certain ideological and economic conditions create a *more* punitive outcome. For instance, if the dominant practitioner-based explanation for youth crime is moral pathology (i.e. some young people are morally inclined to commit crime and all that can be done is to exclude them from civil society) and the economic conditions facilitate an expansion of private youth custodial facilities which because of economy of scale means that the cost of incarceration is relatively cheap, then there is no logical reason why increased professional discretion would necessarily result in anything other than increased use of custody because those authoring pre-sentence reports to the court may well recommend custody far more often. In addition to the other theoretical closures described about, constituting youth justice as a system that is determined by policy and governmental targets necessarily forecloses the space in which to think about practitioners' roles (and intentions) in bringing about institutional change.

### ***For a Critical Youth Penology***

The preceding sections made the case that, as currently constituted, the field of youth justice studies is not in rude health. The framework for scholarship and research is such that possibilities for the *development* of theory (and from that, of practice and policy (Hirst 1979)) have been shut down, are self-limiting and hugely pessimistic. The critical point of closure in both instances is seen most clearly in relation to the lack of analytical tools to address important questions raised by some of the recent changes in quantity and quality of the punishment of young people. Is it more just to respond to youthful lawbreaking through out of court diversion schemes? Do fewer first time entrants signify a move to a more (or less) just way of dealing with young people? Do the changes in the shape, size, structure of youth justice signify anything beyond small shifts in sentencing practices, multi-agency

relationships between police and youth offending teams and local authorities, or indeed any other aspect of the relations between (or even within) any of the formal organisations tasked with delivering our current penal responses to young people? Both analytical frameworks open the space to describe connections between law, government policies (including governmentally driven targets and performance indicators) and what we might call, for the moment, the field of youth justice. But, my argument is that they do so in a way that lacks explanatory power or, at times, vision. In the preceding sections, I have detailed and demonstrated how both frameworks close off the space to conceptualise change mainly because both proffer arguments that are ultimately based upon on a functionalising and teleological logic (most especially the youth governance perspective) and/or policy and political reductionism and determinism. In critiquing these perspectives for their policy and political determinism though, I am not suggesting that the state, government or politics is not relevant. Likewise to make the case that there is a connection between these two realms (state, government and politics and youth justice) is not the same as spelling out whether it is a necessary and/or causal connection. In any case, both of these approaches (claiming there is no connection and being unable to delineate the necessary or causal connection) oversimplify the issue of imagining and analysing the conditions of possibility for fundamental change (i.e. a non-penal response).

There is a further issue, however. Describing the relationships within this field is not the same as *explaining* them. To do that requires a theoretical perspective that locates the described relationships in their broader context of social relations (economic, ideological, political and social). So, the issue at the heart of this article: how can a theoretical space be opened in which it is possible to glimpse the conditions of possibility for change, such as responding to youthful lawbreaking in non-penal ways? To do so means thinking in fundamentally new ways about youth justice. The rest of this section makes the case that one

way to achieve this would be to develop a critical youth penalty from a bricolage of concepts drawn from penalty (as in the sociology of punishment), youth studies and critical criminology. The argument is made by addressing the following three questions: Why penalty? Why critical? Why youth?

### *Why Penalty?*

The starting point for the development of a critical youth penalty is to abandon the concept of youth justice altogether, if only because the concept will always and already be tied to its empirical referent i.e. state penal responses. Once that concept is abandoned, then it is possible to draw on the notion of penalty as developed within the sociology of punishment. Here, the theoretical space is opened to define the field of study as the totality of those practices and social relations that make up the social phenomenon of the ‘punishment<sup>3</sup>’ of young people and to recognise that these social relations have their own conditions of existence. Such a field of studies is analytically distinguished from the social phenomenon of youth crime and should not be constituted as a negative response by the state to youthful lawbreaking (Garland and Young 1983).

Having defined the object of analysis as the practices and social phenomena of ‘punishment’, or what might be called the youth penal realm, it is not to see it as a coherent singularity (Garland 1983). As discussed above, it is comprised of different institutions, organisations, practices and relations - all of which are supported by any number of agencies

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<sup>3</sup> One of the original lines of demarcation drawn within the sociology of punishment is between ‘penology’ and ‘penality’ wherein ‘penology’ refers to the study of the justifications and philosophies of punishment (such as rehabilitation, retributivism, deterrence and so on) alongside the study of the techniques of punishment (see Carlen and Collison 1980 and Garland and Young 1983). As I use the term penalty and punishment in the rest of this article, I am drawing the same distinction.

and wherein a variety of discourses circulate about intervention, about children, families, morality, community, authority, gender, poverty and so on. And, each of these organisations and agencies (youth offending teams, youth courts, children's homes, secure units, social work teams, schools, families) are all located within their own material contexts – meaning that they have different capacities to access economic, legal, political or other types of resources to produce a penal (or social) effect. Whilst the youth governance and the youth justice system frameworks for analysis have opened the space to think through the various ways in which governmental objectives impact specific practices, by shifting the object of analysis to the youth penal realm the space is opened to see the types of control and power that operate across different institutions and agencies (state, local authorities, youth offending teams, courts, youth justice board, education, social services and so on) wherein the objectives are tensioned against each other and to what effect.

It should be clear from the preceding paragraphs that in order to develop an analysis of the conditions of possibility for change, it is desirable to analyse the conditions of possibility for the current configuration. Some of that analysis will be empirical (see for instance Armitage, Kelly and Phoenix forthcoming). So, the answer to 'why penalty' is that the concept permits the analytical focus to be shifted away from young people, the system and state responses to youth crime and takes as the primary object of analysis what might be called 'the power to punish' young people. So the call is for a critical youth *penalty* in order to, precisely, open that space in which it is possible to theorise, analyse and investigate not just specific practices of punishment (Youth Rehabilitation Order, diversion schemes, restorative justice orders and so on) but *why and how* those practices (and the punishment of young people) takes the form that that they do and no other form.

*Why critical? Why youth?*

Logically speaking, in order to imagine a non-penal or indeed even a more just response to youth crime and/or young people in trouble with the law, there first has to be frame of reference in which it is possible to articulate the unjust nature of contemporary responses. In keeping with penality or critical criminology, a critical youth penality might begin with the domain assumption, borrowed from Carlen (2013), that in societies marked by profound material and cultural inequalities, the ideals of justice are not capable of being realised. Two of those ideals are simply expressed as: equal protection under the law and equal treatment by the law. This is a call for critical *youth* penality because the material conditions subverting these ideals of justice for young people and for adults are both fundamentally different and yet fundamentally similar. As with adults, those punished for their illegal misdeeds tend to be the already marginalised, as social processes of criminalisation occur with existing class based structural inequalities. Hence, it is those who commit crimes of the street rather than the suite that populate our penal realms (see Wacquant 2001) – even though, arguably, the crimes of the powerful have far more reaching effects on wider groups of people (e.g. especially environmental crime, state crime and white collar crime). ‘Youth’, however, is not merely an age category. It is also a category of social differentiation that brings with it structural inequalities of its own (see for instance Cote 2014) that then articulate with processes of victimisation and criminalisation. Hence, it could be argued that current responses to youthful lawbreaking are fundamentally unjust because they target the lawbreaking of young people already marginalised by class, gender and cultural inequalities whilst simultaneously practising a form of radical non-interventionism regarding the crimes, particularly of violence and gendered sexual violence, committed against them (see, for instance, accounts of the criminalisation of young girls and women who are being sexually exploited (Phoenix 2012)). In this regard, the state has abrogated its responsibilities to offer

*equal* protection under the law for their experiences of victimisation whilst disproportionately holding them to account for their illegal misdeeds (see also Carlen 1996 and the concept of asymmetrical citizenship in the context of youth homelessness).

These dynamics of under-protection and over-policing occur on the basis of many forms of social inequality (ethnicity, culture, gender, age and so on) (see for instance Walklate 1989). However, in relation to the penal realm specifically, age based material inequalities subvert the possibility of a just punishment being meaningful because young people are held to account (i.e. punished) for their actions when many of those actions are shaped by conditions over which, because they are *still children in the legal sense and at times developmental sense*, they are utterly unable to change or affect. The point I am making here is not new. It has been made on many occasions across many different jurisdictions (see also Feld 1997 and McDairmid 2013). Young people cannot change where they live in order to move to areas that are less heavily policed. They cannot leave Local Authority Care or abusive families in order to create a more stable life for themselves. They cannot claim economic benefits in order to support themselves in the face of poor schooling and youth unemployment. They have little or no choice about the circumstances in which they are raised, including their schooling and any informal exclusions from school they may experience. More fundamentally, they cannot vote for politicians whose political policies might address key issues shaping their lives, for instance, youth unemployment. Needless to say, they also cannot vote against political parties whose economic policies are based on high tuition fees for further and higher education and mass youth unemployment.

*If not punishment, then what?*

As schematically suggested above, a critical youth penalty would seem to provide the analytical frame of reference and the conceptual tools to see *well beyond* current political, institutional, organisational and social configurations of youth justice and currently configured relations between (broadly speaking) social justice, criminal justice and young people. It also provides the platform for a new youth penal politics because in recognising the conditions that shape the unjust nature of the youth penal realm, it is possible to deny that these conditions are *necessary* and from there it is possible to imagine what non-penal responses to youthful lawbreaking might be. Just as Carlen (1983) suggested in an early article looking at the right to punish, regulatory intervention need not be the same as punishment. Regulatory intervention can be compelled and can be experienced by those on the receiving end as punishing. A critical difference might be that the aim of regulatory intervention would not be *penal*. A world *can* be imagined in which regulatory interventions into youthful lawbreaking were founded on “the authoritative rectification of the particular social problems on which occasion and are occasioned by lawbreaking” (Carlen 1983:213) and carried out in truly democratically accountable (and not ‘expert’) ways. So, for instance, high levels of youth crime in areas of high unemployment and urban deprivation may, in the right circumstances, prompt public debate about urban and economic policy or even may prompt circumstances in which local and central government are held to account by panels of local community members for creating more economic or leisure opportunities for young people in the area as well as more mental health and drug and alcohol services (as well as more mental health or alcohol services if there were simply not enough in the area of deal with the numbers of young people experiencing difficulties). Of course, there are some very thorny conceptual, theoretical and political issues here. Not least of which is whether it is possible to distinguish those regulatory intervention which are mandatory (for instance, court ordered), which are individualised (for instance where a court may order a young lawbreaker

to a drug or alcohol rehabilitation centre), which may or may not be experienced as painful or harmful at the individual level from those forms of regulatory intervention which may do all these things *but also seek to intervene in the conditions of marginalisation and criminalisation which result in youth people appearing in the youth courts to begin with.*

However, my purpose is not to answer these questions. My purpose is only to open the space in which a theoretically informed discussion might take place. In the end, the main point I am making is that once the spaces are opened up in which to analyse the complexity of the youth penal realm and *explain* it, the critical imagination can be unlocked and from there new and different ways of dealing with youthful lawbreaking can be imagined *and fought for.*

### ***An inconclusive conclusion***

This article has argued that the tools that have been developed within the youth governance approach or youth criminology / youth justice studies flattens the complexity (and the specificity) of the social relations that make up the youth penal realm. They do this the service of theories of neo-liberal governmentality or managerialist bureaucracy and the result are just more stories about the burden of managerialism and audit for public sector workers in criminal justice, about how managerialism limits the capacity of the professional to foster, sustain and create the human relationships that are a necessary component of supporting young people in their process of transition to adulthood and/or the irrationality of government approaches to young people. This is mostly because, in constituting the field of study as either governmentality or the youth justice system each approach remains wedded to official governmental rhetoric and youth justice policy. Neither approach allows for a space to be opened in which it is possible to think *beyond* contemporary institutional and organisational configurations of youth justice.



It is the contention of this article that what is needed is a conceptual framework that distinguishes the specific practices of punishing young people (incarceration, diversion, community punishment – any of which can be more or less caring, compassionate, humane, mindful of the welfare of children) from the social conditions that make possible the punishment of an already marginalised, literally disenfranchised and often disproportionately victimised community. For, it is only when the analytical gaze is shifted to a more ambitious as well as more fully social and material analysis of why punishment (of young people) takes the shape that it does, that we can begin to glimpse whether fundamental change is taking place now (in relation to the dramatic decline of first time entrants and the numbers of young people on custody) as well as distinguish the conditions that would lead to a more just response. So, to provoke: a critical youth penalty opens the space for an analysis of penal responses to young people (whether those are community based or custodial) within their broader social, ideological, economic, political *and importantly organisational* context without reducing each of these contexts to either political rhetoric or the specific ways that youth punishment is organised. Perhaps it is time to develop a critical youth penalty in order to call time on youth justice, first in conceptual terms and then politically.

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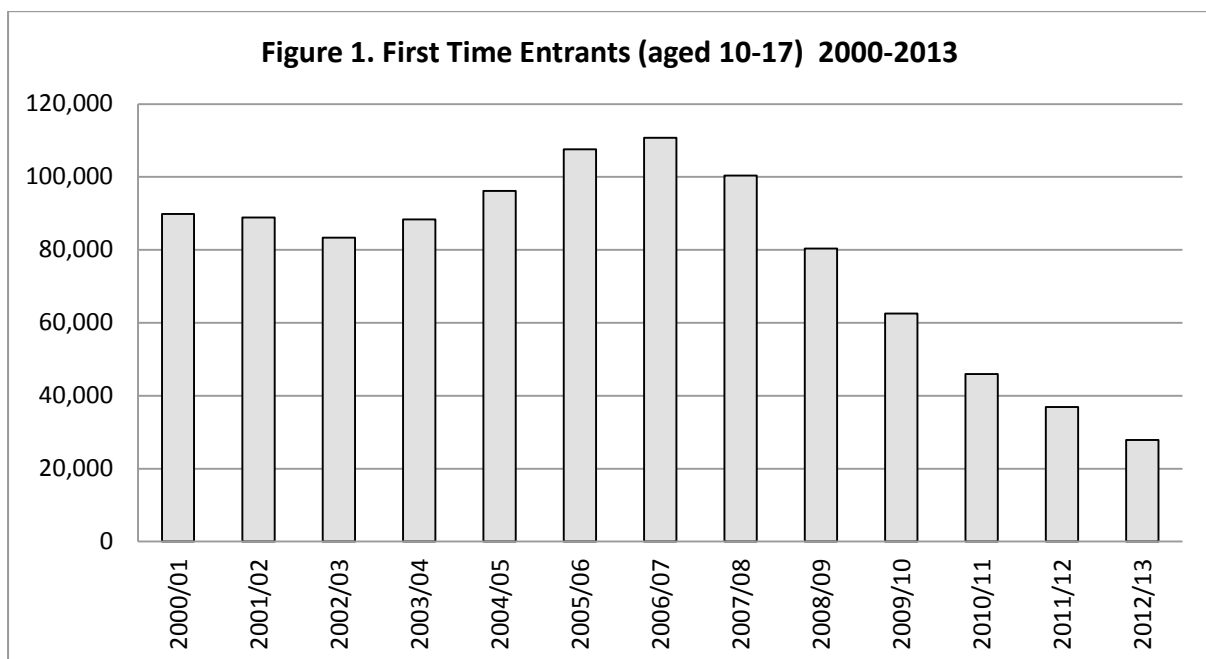
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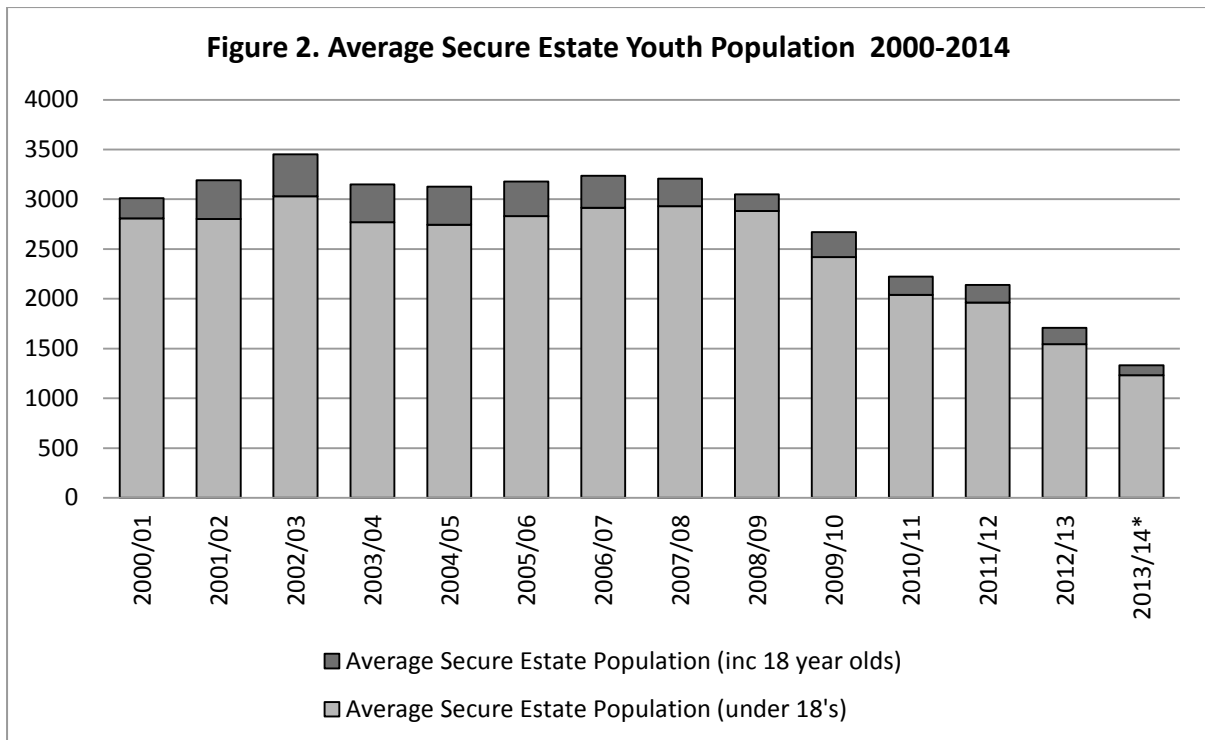
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\* Provisional data

Source: Youth Custody Report April 2014 (MoJ, 12<sup>th</sup> April 2013)