Dealing with child offenders:

An examination of some aspects of juvenile justice systems and a proposal for reform based on the needs of the individual child

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Summary:

This thesis questions the ability of the present juvenile justice system (JJS) in England and Wales to deliver justice to the individual child offender. It begins with a critique of the early development of the JJS within the historical context of the industrialisation and urbanisation of the nineteenth and early twentieth centuries. It also assesses the present approaches for processing child offenders, and the conflict which persists within the JJS between rehabilitation and punishment. This is followed by an examination of the Scottish JJS in its pre- and post-Kilbrandon reforms and the present system which continues to evolve whilst remaining focused on the child as an individual in need of help preferably provided outside the formalised court-based system. The examination of the Irish JJS again explores the divergence in approaches to child offending with the development of a diversionary programmes implemented by the Irish police to direct child offenders away from crime and where possible the formal court system. However, the Irish system also maintains more traditional interventions, including custody, for those who fail to respond. The thesis broadens to assess the extent to which the JJS itself contributes to criminality because of its inherent carceral features which are also present in wider society. It examines the potential negative carceral effects and how they may undermine attempts by child offenders to adopt more positive behaviours. The revolving door of further contact with the JJS is considered and, in some instances, this can continue into adulthood and the adult criminal justice system. The thesis concludes with a proposal for the fundamental reform of the present JJS. It advocates radical approach to child offenders which reflects the insights gained from the examination of the Scottish and Irish JJS, and the field of therapeutic jurisprudence. It proposes the use of behavioural problem solving, rather than punishment, to promote behavioural change in child offenders. It promotes recognition of the child offender as, firstly, a vulnerable child deserving of treatment by a non-criminalised system wherever possible. Such an approach, it is argued, would offer a more sustainable and effective pathway to behavioural change and encourage desistance from offending and though it would benefit primarily the individual child offender, it would also provide benefits to society as a whole.

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For my part, this thesis represents my continuing attempt to understand the criminal justice system in which I have worked for many years. I have acted for many clients and endeavoured to represent them to the best of my abilities and for the most part they have obtained a form of justice. However, I have always felt that the system often failed to address the needs of child offenders if we really do think that they are children and not just little adults. As such, this thesis represents my exploration of some of the ideas and concepts which I feel have a contribution to make to the wider reform debate. I am sensible enough to know that change in criminal law is slow but in producing this work I hope that I have added something to the mix and may add more in the future.

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Introduction

a. Thesis scope

This thesis is based on an accumulation of personal experience, and the concerns which have developed, during some 30 years of criminal defence practice as a solicitor in the English Midlands. It is focused exclusively on one area of that legal practice: the juvenile justice system (JJS) as experienced through the lens of a criminal law practitioner. In that context, the discussion which follows examines the development over time of the relationship between the JJS and the child offender and, in particular, how far the child offender is recognised and treated as an individual child. It begins with an outline of the JJS, as it was initially conceived, and its development through the nineteenth and twentieth centuries. It examines the attempts to provide a more child centred approach to juvenile justice. It is argued, however, that the developments to date still echo the old notion that children are to be viewed merely as little adults and need to be processed through a quasi-legal system. This thesis, however, puts forward the argument that the whole concept of a JJS is outdated and that the present system does not bring about the desired change in the behaviour of those who come into contact with it. The golden thread running through this thesis is a call for a more holistic, more therapeutic response to criminalised childhood behaviour rather than the mere reformulation of the existing JJS. It is further argued that such a repurposing of the system is necessary if we are to create a truly just JJS which is fit for purpose in the twenty-first century.

This thesis is underpinned by a wide personal experience in criminal defence practice, and this experience has reinforced the fact that it remains the case that child offenders provide the foundational client base of most traditional small and medium sized urban criminal law practices. Whilst many child offenders successfully exit the JJS never to return, some continue with their offending behaviour into adulthood. Some also continue to interact with the JJS when they have their own families, producing a second, or even a third, generation of young offenders. Why this happens is troubling and has prompted this thesis. Despite its stated aims, purpose, and structure, and its more child centred approach, the present JJS continues to provide a steady stream of new entrants and reoffenders.

It is necessary in the examination of any complex system, such as the JJS, to consider the context within which it developed. This thesis therefore begins by examining the historical factors that contributed to the development of the present JJS. This section also seeks to highlight the early conflict at the heart of the JJS, the conflict between the desire to punish and

deter offending, and the desire to recognise the vulnerability of child offenders and provide opportunities for their rehabilitation. To add further context there is an examination of aspects of the juvenile justice developments in nearby jurisdictions in Chapters 5 and 6. These chapters consider aspects of the JJSs in Scotland and Ireland as they share many similarities to England and Wales and yet their systems have developed in very different ways. The chapters assess the different approaches taken in Scotland and Ireland to juvenile justice and consider the possibilities they might offer for the reform of the JJS in England and Wales.

This thesis's main argument is that the present system is not succeeding and in Chapter 7 the problems with the current JJS are laid out, in particular, the potential harmful effects on child offenders. It is further argued that these negative effects arise as a direct result of the procedures and processes of the JJS itself.

The thesis concludes in Chapter 8 with a proposal for reform, one which reflects the writer's view that it is time to refocus the JJS on the individual child offender as a child with unwanted behavioural traits, rather than a proto criminal who must be labelled and processed. Though the roll out of the Child First approach, as discussed in Chapter 4, continues, the present JJS in England and Wales still reflects a legalistic approach. This thesis argues that a complete and fundamental reset of the JJS is necessary. It envisages a JJS in which the concept of criminality, and the label of criminal, is removed from the individual child save in the most extreme instances. In this new system the individual child is viewed as a child who requires help and support to modify his behaviour. The use of the term 'individual child' is intended to reflect the focus of this thesis on each child who comes within the ambit of the JJS and whose treatment, as he is processed through it, has implications not just for him but also wider society.[1] This process should be as individual as the child himself.

As noted above, personal experience has been the catalyst for this research, along with a desire to elucidate the effects of the processing, or treatment, of child offenders on the children themselves. In essence, this thesis has been designed to answer two questions which have arisen from professional practice and experience:

1. whether it is time to refocus the JJS on the individual child offender, and,

[1] The personal pronoun 'he' is used throughout this thesis to refer to the individual child irrespective of sex or gender on the basis of English grammar and the Interpretation Act 1978. Section 6 of the Act states inter alia that 'In any Act, unless the contrary intention appears … words importing the masculine gender include the feminine … words importing the feminine gender include the masculine … words in the singular include the plural and words in the plural include the singular'.

2. how it might be possible to refocus the JJS more effectively on the child offender as an individual child.

These questions form the spine of the thesis's argument. This thesis is not a plea for liberal treatment of child offenders; it is rather an attempt to synthesise the outcome of the research undertaken and explored in the following chapters with personal experience, and from this to put forward some possibilities for meaningful reform. It draws on juvenile justice concepts, combined with 30 years of criminal defence practice, to produce a proposal for reform which recognises the everyday realities of child criminality, and the present JJS. Simply, the aim of this thesis is to consider how a JJS might provide just that, justice. It offers ideas for how this might be achieved through reform of the JJS and makes a further contribution to the never-ending debate that this area of study produces. To that end, the thesis's conclusion endorses a proposal for reform of the JJS, namely a resetting of its purpose, in which the main aim is the betterment of the individual child. Accordingly, this thesis is premised on the idea that any study of JJSs must encompass more than the law, legal procedure, and processes. It must recognise the wider societal context in which they function. No JJS should operate in a legal vacuum outside of society and this has led to the consideration of non-legal research. Such research provides insights into the relationship between child development and criminalised behaviour and how to address it.

Criminal defence practice mostly involves representing child clients detained or attending voluntarily at police stations or appearing in the Youth Court and occasionally at the Crown Court in the most serious of cases. The conundrum that strikes many practitioners is that irrespective of their professional efforts to aid them, most criminal clients cease offending, by maturing, by dying, or, in a minority of cases, being locked up for a very long time. It is suggested in this thesis that most criminals, especially child offenders, would be more effectively dealt with by 'treatment' in a non-criminalised process designed to improve their behaviour. Although this is not a popular view with the public, there has been a steady reordering of the JJS, with the expansion of the Child First approach which has endeavoured to place the needs of the child at the forefront of any interventions. For many politicians, however, and for the media in general, prosecution and punishment remain an essential element of the criminal justice system, albeit modified for child offenders. This begs the question of why society demands the retention of such punitive ideas and processes for children accused of criminal behaviour while, at the same time, in other contexts, it emphasises their vulnerability to abuse and their need for protection.

This thesis aims to consider the on-going conflict between rehabilitation and punishment. Although the Child First approach is widely accepted this does not always feed through into the JJS in practice. As noted, the Child First approach though admirable, nevertheless, is still driven through the prism of identified criminal behaviour, even though research indicates that certain aspects of the legal process itself promote further criminality. The original contribution of this thesis rests on an alternative perspective, one that asserts the view that child offending behaviour must be assessed in the context of the family environment, that its identification as unwanted criminalised behaviour adds little to the process. It is argued that such behaviour could be more successfully addressed by behavioural problem solving (BPS) to aid the individual child's development, rather than by any notion of punishment.

b. The scope of the research

To answer the two thesis questions noted above, this thesis draws on research from a wide range of disciplines. It covers a number of aspects of juvenile justice, including historical development, present day application and processes in the JJS in England and Wales, and the alternative routes taken by JJSs in nearby jurisdictions. In addition, it examines the contribution made by both the JJS and wider society to continuing childhood criminality. The JJS remains a political issue that most mainstream politicians often seem unable to address, except by reference to the already well-trodden paths of denouncing child offenders and advocating the need for strong measures. This thesis necessarily touches on a wide number of contentious areas within juvenile justice, though it is beyond the scope of this thesis to address all the controversial areas of discussion that engage many involved in juvenile justice practice. The areas selected for examination have been chosen as being the ones most relevant to the thesis's argument for a more holistic and therapeutic response to the recurring criminality of some children. One issue of particular concern is the multi-generational nature of much criminality as exemplified by the simple fact that many current child offender clients of the writer are the children, and in a few cases the grandchildren, of now adult former child offender clients. This thesis highlights the need to consider even more radical reform in the light of the apparent failure by the JJS to deal effectively with child offending behaviour. There remains a need to stop not only the revolving door of child offenders but also the intergenerational revolving door of child offending within families.

c. <u>The structure of this thesis and an outline of the chapters</u>

Having established the aims of this thesis, it is appropriate to continue with an outline of its structure, noting the various aspects considered in the individual chapters which are designed to progress the thesis argument to its conclusion.

Chapter 1 details the methodology adopted to pursue the thesis questions. A qualitative approach has been adopted that enables selected aspects, pertinent to the thesis questions, to be critically examined and assessed. This qualitative approach is also blended with action research in a professional participatory role combined with the knowledge base developed because of that professional involvement. This positionality, straddling the JJS as both academic observer and practicing participant, allows the writer to offer arguments that are a unique mixture of academic research, leavened by lived experience, and real-world engagement with the system.

Chapter 2 explores the original concept of the age of criminal responsibility (ACR). It defines the chronological age from which a person has responsibility for his acts under the criminal law, and the weaknesses of such a concept when it is applied without reference to maturity or capacity. This thesis argues the case for a personalised system which could address the needs of the individual, an alien approach to a JJS which is objectively focused solely on age. The chapter focuses on the historical development of the ACR, including the concept of *doli incapax*, and outlines its progression from a purely chronological age-based threshold to a more nuanced capacity-based one. This chapter is a fundamental part of the thesis since it outlines one of the most basic foundations of the present JJS.

Chapter 3 examines the historical context of the nineteenth century as a promoter of change in all facets of society, including juvenile justice. In particular, the chapter focuses on the societal effects of industrialisation and urbanisation combined with the challenges to the established social order that resulted from the general upheaval of this period. It was a time of reform in many areas, including the criminal law. This reform encompassed both procedures and processes and led to the creation of a JJS in England and Wales and the establishment of a separate and distinct juvenile court. In the context of the thesis's argument, the changes introduced during this period formed the basis for the modern JJS, and the present JJS still retains many aspects of this nineteenth century system in its presentation. The physical court environment, for all its cosmetic reforms, still functions as a criminal court in daily practice and the effects of this on the treatment of child offenders are discussed.

Chapter 4 contributes to the thesis's argument by investigating aspects of the present JJS through the lens of the writer's professional experience in the English Midlands. The methodology underpinning this thesis flows from the writer's participation and the insights gained from daily criminal law practice. This chapter begins its analysis at the point of first contact, and critically analyses how a child suspect is processed at the police station towards, or away from, the court system. It also considers how the system works in partnership with other bodies and agencies in the justice system. Major focal points for discussion in this chapter are the police station environment, and the use of diversion, through out-of-court disposal. This aspect of first contact with the system is developing apace with the increasing influence of the Child First approach though it still requires a criminal justice element to initiate the process. The chapter concludes by considering how statute law has begun to show potential to promote a form of behavioural treatment in relation to one of the biggest challenges in childhood criminal behaviour, the possession and use of knives.

Chapter 5 uses the Scottish JJS as an example of an alternative route taken by a neighbouring justice system. It is a system which is significantly different to that in England and Wales and presents as much more focused on a holistic response to childhood criminality. The chapter examines the historical factors which led to this outcome, especially the Kilbrandon Report and the reforms it promoted in Scotland. It also considers the effects of devolution on the legal system, both nationally and regionally, in Scotland. The modern iteration of the Scottish JJS is discussed and its Children's Hearing system is assessed with regards to its success, or failure, to meet the challenge of child offending as a welfare and family issue. The Scottish JJS cannot be ignored in answering the thesis's questions noted above. It represents an example of a reordered JJS that offers support to the thesis's argument that fundamental reformation can be implemented, and a more therapeutic response offered to childhood criminality.

Chapter 6, in a similar vein to the previous chapter, examines the JJS in Ireland. It contributes to the thesis because it also offers an alternative route taken by a system that has shared roots with that in England and Wales. It arose in the same historical context but following independence from the United Kingdom diverged, for example, with the adoption of a radical first tier diversion programme for child offenders. This is especially interesting because it is a programme that functions at the point of first contact, the point at which there is the greatest opportunity to engage with a child offender. The chapter considers the reliance of the Irish JJS on the Garda Siochána (the Garda) or Irish Police Service to provide this primary level of intervention. It is managed and implemented by the Garda through the Garda Diversion

Programme. This programme is used, along with the Children's Court, to provide an alternative method of dealing with child offenders through a triage system which seeks primarily to avoid entry into the JJS and the attendant stigmatisation. In the context of the thesis's argument, this chapter demonstrates how a successful diversion programme can be implemented at the earliest point of contact while still retaining the options associated with a traditional JJS for those child offenders who fail to respond and remain involved in criminal behaviour.

Chapter 7 assesses the effects of the JJS itself on the child offender. It broadens the examination of JJSs beyond the overt procedures and processes that represent their visible manifestation. It focuses on the inherent carcerality of the system and its role as a promoter of criminality. This chapter explores how a JJS, although in pursuit of the desired positive outcomes, also has the potential to produce unintended negative consequences. It is argued that the system, through its own functions, procedures, processes, and controls, may induce unwanted or further criminalised behaviour in the very children it is intended to help. Carceralism, it is argued, is inevitable in all JJSs. This chapter assesses whether its side effects must be accepted or whether they can be mitigated by the implementation of a more therapy focused system which is less dependent on juvenile justice architecture and processes.

Chapter 8 draws the two strands within this thesis, the individual child offender, and how he might be dealt with in a better way, together. It focuses first on the individual child, examining the contribution of childhood traumas and adverse events, and their long-term behavioural effects, particularly on a child's maturation and emotional development. Such adverse childhood events are a common feature in the lives of many child offenders and their effects often ripple out into adulthood with generational consequences. Unfortunately, the possibility and potentiality of adverse effects arising from these events is rarely acknowledged or considered, for example, in the Youth Court when a child offender is addressed by a District judge or bench of trained lay Magistrates. The default setting kicks in, and even the prospect of understanding or empathy seems beyond them, or, at least, beyond their ability to express. Wexler and Winick highlighted the potential for legal systems to produce negative consequences for individual defendants that need to be mitigated. In practice this mitigation seems very difficult to achieve and the progress made through the adoption of the Child First approach, in the areas of police intervention, has not cascaded down into the wider judicial system.

In the light of these problems and difficulties, this final chapter addresses the second focal point, how these problems might be overcome, and how the individual child offender might be dealt with in a better way, by reform of the JJS. A proposal is put forward for a radical reform of the JJS, one which moves beyond merely advocating a more consistent, or an enhanced version of the Child First approach. It proposes, instead, a fundamental reordering of the JJS, including a reform of the procedures and processes for dealing with childhood offending. This reform would require a complete departure from our present punitive approach to child offenders and a move towards a more therapeutic approach. As noted above, the starting point advocated for this reform is BPS which is presented as a logical solution to the problems inherent in the present JJS in England and Wales. It is an approach to child offending behaviour based on aspects of therapeutic jurisprudence. The concept was developed first in the late nineteenth century in the United States, with the creation of a JJS in Chicago and the contribution of Julian Mack, and the quasi-therapeutic jurisprudence court model developed in Florida in 1899 to address drug-related crime.[2]

It is posited in this discussion of the JJS in England and Wales, and its effects on child offenders, that only by such radical reform can child offenders be protected from the negative consequences which are associated with engagement with the JJS at present. The chapter continues with an exploration of the implications of such a reform for all those involved in the JJS, including legal professionals, the lay judiciary, police, the child offenders, and their families. It concludes with the argument that everyone would be better served by such reforms and that wider society would be the ultimate beneficiary of a more just, more realistic, and a more humane approach to child offending behaviour.

[2] Julian W Mack, 'The Juvenile Court' (1909) 23 Harvard Law Review 104,

Chapter 1

Methodology

1.1 Introduction

This chapter has three purposes. The first is to outline the scope of the research undertaken, and the form of blended methodology which has been adopted in this thesis. The second is to establish the writer's positionality in order to justify the nature of the research undertaken, to recognise the areas of potential bias, and to outline the steps taken to mitigate it. The third is to ensure that each of the following chapters adds another 'brick in the wall' to the thesis's argument which buttresses and supports that purpose. Together these purposes combine to develop the principal point of this thesis that there is a need for reform of the present juvenile justice system (JJS) that goes beyond an improvement of the present system and encompasses a new approach to dealing with child offending behaviour.

In order to create an appropriate methodology to reflect the ambition of the thesis, and its uniqueness, a variety of methodological theories and approaches were considered and synthesised to interpret, and to analyse, the research material. This chapter lays out the rationale behind the unique blended approach that was created by combining an element of lived criminological experience with a reflective element based on the writer's lived experience of the ideas discussed and the research undertaken. Together these elements serve to justify and validate the resultant body of work.

1.2 Methodology

In this chapter, the word 'methodology' is used to describe 'the theoretical analysis of the methods and principles associated with contribution to knowledge being made in the research' and as such does not set out to provide solutions and is not the same as the research method adopted.[3] It explains how the research undertaken generates the 'theory and clarifies the analysis' which has contributed to the development of the thesis's argument.[4] The methodology underpins the research undertaken, and the conclusions reached, and it is essential, therefore, to justify the methodological approach adopted. The steps taken to that end will be examined below to demonstrate that the thesis has the necessary academic integrity to support the conclusions reached. Lived experience is an important element in the methodological approach

[3] Jack Whitehead, *Living theory research as a way of life* (Brown Dog Books, Bath 2018) 159.
[4] ibid 159.

adopted but it has been added to, and supported, by the research which was undertaken. Together, they provide a golden thread of research, analysis, and lived practical experience, which is used to construct a holistic argument which culminates with a proposal for reform of the JJS.

1.2.1 The first step: The scope of the research

This thesis draws on a wide range of material and research from a variety of perspectives and disciplines. It covers a number of aspects of juvenile justice, including historical development, present day application and processes in the JJS in England and Wales, and the alternative routes taken by JJSs in nearby jurisdictions. In addition, it examines the contribution made by both the JJS and wider society to continuing childhood criminality. The JJS remains a political issue that most mainstream politicians often present as unable to address, except by reference to the already well-trodden paths of denouncing child offenders and declaiming the need for "tough' measures. However, although this thesis inevitably draws on a wide variety of topics within the criminal law and the JJS, it is beyond its scope to address all the contentious areas of discussion that engage the many individuals involved in juvenile justice practice. The areas selected for discussion within the thesis have been chosen as those being most relevant to the thesis questions and because they are the issues that, by their constant recurrence, have most troubled the writer during many years of legal practice, primarily a recognition of the generational nature of the criminality which underpins many criminal law firms. The issues chosen highlight, if not the failure of the JJS, at least the need to consider further reform. This reform, it is argued, should primarily focus on the individual child and his need for treatment rather than on the legal process.

1.2.2 The second step: defining positional axiology

Devising a methodology presents a unique opportunity to review one's own role as a researcher in the context of the thesis questions and the purpose of the work. In essence, the ideas that are researched reflect the values of the researcher in relation to his starting point and this can be expressed as an individual's axiology, that is, what is deemed of value in the research. This is important because those values affect how an individual conducts research and the value that he places on the research outcomes and conclusions. Without a defined axiological position, research lacks a grounded philosophical position, has no fundamental purpose, and is no more than a narrative without conviction.

In this thesis, the aim is to examine and offer a reasoned argument in relation to problematic aspects of the JJS in England and Wales that continue to trouble the writer as a professional participant. In an academic context, it is necessary if the outcome of the research is to have credibility, to address those questions in a structured approach that validates the outcomes and conclusion. This chapter sets out the methodology which has been chosen to meet these criteria so that that the thesis has merit and that it makes a valid contribution to the juvenile justice debate. In determining such a methodology, it was essential to acknowledge the values already inculcated in the writer, which influenced the aims of this thesis, and their consequential effects on the research and its outcomes.

The axiology of this research is also important as it highlights the internalised judgements or values made by the researcher during the research process. The initial axiological step involved determining whether the research aims were designed to explain, to predict, or to understand. In this thesis, the research undertaken incorporated all three aims in order to ensure that the research results comprehensively answered the thesis questions.

The axiology spectrum provides scope for a researcher's own positionality to be acknowledged. It contains various defined standpoints, for example, positivism, realism, pragmatism, and interpretivism. Each of these standpoints enable the researcher to locate his perspective. This is a necessary foundational point of reference for research. As regards the examples mentioned, positivism and its objectivist perspective on value free judgement was deemed the least appropriate choice for the stance in this thesis, being more relevant to quantitative research. Similarly, realism can be classified as value laden because the researcher is subject to societal views and cultural experiences that effect the outcomes irrespective of the research being qualitative or quantitative. Pragmatism was chosen as a more appropriate stance for this thesis as it is a standpoint which has both objective and subjective features. It also complements the blended methodology adopted and is consistent with both qualitative and quantitative research. For the proposed research in this thesis, interpretivism also met the intended purpose as expressed in the thesis questions. It is a value orientated position and recognises that the researcher is an active participant in the research as envisaged in this thesis and is subjective in that respect. When pragmatism and interpretivism were combined they provided a new fused standpoint, one which correlated well with the blended methodology approach adopted, and which enabled the research to be undertaken, and the thesis itself to progress in a meaningful way. In essence, this initial thinking phase recognised that these positional values were crucial to conceptualising the nature of an appropriate methodology.

1.3 Devising a methodological approach

The scope of the research having been outlined, this discussion now sets out the methodological framework adopted to facilitate the research, its analysis and interpretation, and to validate the conclusions reached. This thesis relies on a range of sources and materials that reflect a qualitative methodology. The research materials chosen enabled an analysis of aspects of the societal consequences at both a community level and, more importantly in relation to the focus of this thesis, on an individual child offender. Both levels of analysis were used to illustrate the development of juvenile justice processes and the reforms that have already been implemented.

The methodology involved research centred on a doctrinal approach combined with a socio-legal perspective, and a contextualised historical base. Together these have been used to construct the foundation for the main argument of this thesis. This, generally legal, research encompasses statutes and judicial decisions together with a consideration of selected legal concepts, theories, historical developments, and reformist ideas. These highlight key legal concepts that can be problematic, and which bedevil JJSs based on criminal law. This is most obviously demonstrated by ascribing criminal responsibility to a child, his consequent exposure to the juvenile justice process, and the socialisation problems and challenges associated with criminalised individuals, irrespective of the age chosen for criminal responsibility. The research undertaken necessarily includes primary and secondary sources. The former establish the legal basis for children to be defined as criminally responsible for their actions and the latter illustrate the wide range of opinions and challenges to the traditional age of criminal responsibility (ACR).

The research materials whether in book form, in journals, in reports or in media articles, are used to highlight the breadth of opinions surrounding child offending. These research materials illustrate how the older, more simplistic, understanding of childhood criminality has been somewhat tempered by a more modern and nuanced appreciation of the maturing child. Research is also included which questions the fundamental basis of the JJS and asks whether challenging behaviour needs to be even classified as criminal, advocating a more balanced and child focused assessment recognising challenging behaviour as part of the normal development pattern for some children.

However, such a qualitative methodological approach, while providing a great deal of material and analysis, did not give sufficient expression to the writer's own professional knowledge and involvement with the JJS. To incorporate this required a more nuanced methodology and led

to an examination of other methodological approaches to determine how best to utilise the writer's own contribution as both researcher and research resource. This process is laid out below to validate the blended methodology which arose, and which maximised the utilisation of the writer's lived experience.

The research material selected offered the potential for several methodological approaches and, it is suggested, the one adopted demonstrates its appropriateness by the arguments detailed in the following chapters, the conclusions reached, and the reform proposed. The blended methodology approach facilitated the exploration of the thesis questions in a unique way. It permitted the best endeavours of the writer to be applied to the research materials and has produced justifiable and reasoned conclusions to those questions. In describing the methodology adopted, this chapter references and justifies the theoretical perspective taken and the research methods used to ensure both the credibility and analysis of the research material, and, importantly, the conclusion reached, including the proposal for reform detailed in the final chapter.

The areas of research were also selected to highlight a progression from basic concepts, via historical developments, through to the procedures and practices in the present JJS. The aim was to identify an appropriate research methodological approach and to formulate a working framework within which the proposed research could be undertaken. It was essential to devise a research framework in which to conduct the necessary analysis and interpretation to ensure that the adopted approach was valid and justifiable. This involved surveying the potential methodology approaches that would enable the writer's own knowledge base to be a major vector through which the analysis and conclusions could be validly filtered. This confirmed that the blended methodology concept was the most appropriate as it enabled this thesis's prime motivator, the writer's personal experiential knowledge base, acquired as a criminal defence lawyer over a period of 30 years, to be utilised. Continuing criminal defence practice means that this action-research continues and so, it is argued, it was, and remains, a unique living-experience resource that is invaluable in researching, contextualising, and teasing out the essential components to produce cogent analysis, arguments, and conclusions. The blended methodology which emerged for this thesis was dictated by two factors, the focus on the research questions, and the challenge posed by the need to distil the continuing lived experience of the writer so that it could be incorporated as a valid part of the research framework.

1.3.1 Qualitative research and real-world experiences

The decision to adopt a qualitative methodology was straightforward and was born of a recognition that this thesis would have to focus on the fundamental concepts of juvenile justice, such as the ACR, before moving to consider JJSs in action, and to developing a reform proposal. A qualitative methodology describes the phenomenon subject to investigation, in this instance, how childhood offenders are processed by reference to a reality that 'is socially constructed, complex and ever changing' and is 'based on recognition of the subjective, experiential life-world of human beings'.[5] As a methodological approach, it is readily applicable to answering the thesis questions though it is subject to differentiating modes, for example, different ontological and epistemological standpoints as noted below.

In the context of this thesis, a qualitative methodology rests on the understanding that research can reveal experiences that contribute to a depth of knowledge, often because of the implicit subjectiveness of the researcher and the participants. This subjectiveness enables a more realistic appreciation of the consequences of systems and processes to be described and appreciated in the context of research designed to promote reform. The objection that this approach is open to subjectiveness and anecdotal bias, because of a reliance on lived experience of the systems and processes being researched, is valid to a degree. The conundrum of choice and positionality was considered in formulating an appropriate methodology by the writer. However, the same subjective element can arise in quantitative research, as bias is a phenomenon in both approaches, as no choice is truly objective unless it is random. Quantitative research is premised on objective research and rests on the assumption that the system or process subject to research can be measured, described, and analysed objectively by the researcher. It facilitates research that produces outcomes that are susceptible to examination by objective or passive assessment. Essentially, quantitative research 'is objective and singular with the researcher being independent from the subject being researched and is thus unbiased' and can be contrasted with qualitative research that is the opposite with results that are not 'accurate or reliable' in an objective sense.[6] This contrast between qualitative and quantitative research reflects the positionality of the researcher as, in the latter case, the research material

[5] Arthur Sloan and Brian Bowe, 'Phenomenology and hermeneutic phenomenology: the philosophy, the methodologies and using hermeneutic phenomenology to investigate lecturers' experiences of curriculum design' (2014) 48 (3) Quality & Quantity 1291, 1295.

[6] Nevan Wright and Erwin Losekoot, 'Interpretative Research Paradigms: Points of Difference' (2012) European Conference on Research Methodology, 416, 420. <https://www.scirp.org/(S(351jmbntvnsjt1aadkposzje))/reference/ReferencesPapers.aspx?ReferenceID=1903633 > accessed 6 June 2021.

generated is not influenced directly by him. Such research is outside the active participation of the researcher who would act as a dispassionate observer and reporter of the identified and objectified phenomena, in this thesis, the criminal law concepts together with the aspects of the JJSs examined. Evidently this latter approach would not have been appropriate whereas the former, qualitative approach, offers an inroad into developing the necessary blended approach adopted in this thesis.

1.3.2 Ontological research and the objective real-world

As this thesis is premised on the writer's own lived experience as a major contributor to the methodological approach, it was essential to accept and factor-in the inevitable subjective bias element. The professional experiences undoubtedly, and quite properly, informed the identified research questions but they did not limit the parameters of the research because the potential subjectivity bias for self-serving outcomes was acknowledged. In essence, the research questions relate to observable processes that are objectively discernible and, therefore, raised no unaddressed bias that might have skewed the outcomes. The assessment of the research questions ontologically, that is by reference to the description 'of what exists, what is in reality and what is real',[7] would have contributed to the thesis but would have been self-limiting. In the context of the thesis, it would illustrate how child offenders are dealt with and describe the processes discernible by reference to the legal rules and procedures that operate in the JJS. Superficially, the research focus would have been a study of what existed within the JJS and, although such an ontological approach would no doubt have yielded results, as regards the reality of the system, its form and function, it would not have delivered the aims of the thesis. The reality described, the ontological realism of the system, would have produced research leading to valid answers, albeit restricted ones, to the thesis questions posed. However, the purpose of this thesis is to contribute answers to those questions that involve more than a dry assessment and discussion. Rather, the research methodology had to reflect the professional lived experience of the writer as interpreted through the prism of ontological research. Such research would acknowledge the lived experience component as contributing to the description of the reality of the JJS in action. Unfortunately, it can be suggested that formulated in this way, the research would represent and be filtered through the writer's perception of the reality

[7] James Hiller, *Epistemological Foundations of Objectivist and Interpretivist Research* in Barbara L Wheeler and Kathleen Murphy (Eds.) 'Music Therapy Research' (Barcelona Publishers 2016) 99.

described. This suggestion can be countered by stressing that the thesis necessarily demanded a wider blended methodology that incorporated this subjective element to make it purposeful.

The extent of this elemental disjuncture prompted recognition of the risk of an idealistic interpretation being applied to the research, although this is similarly flawed as all self-serving descriptions are subjective. As noted by Hiller

> 'reality is open to all varieties of interpretation—there are no fixed laws about how reality may be or how it may be experienced. Further, in opposition to the realist perspective, in idealism it is precisely our consciousness that brings reality into being'.[8]

The ontological approach while descriptive therefore fails to progress the research sufficiently because it lacks the depth of analysis to describe the validity of the research produced by an observable methodological approach. This limitation can be addressed, however, by examining the research and its justification by reference to the idea that it is part of a process of revelation which validates both the research and the conclusions reached.

1.3.3 Epistemological research and knowledge theory

Having considered the ontological perspective, and its limitations in the context of this thesis, there are similar constraints when formulating a sympathetic methodology considered from an epistemological standpoint. In the context of this thesis, an epistemological methodology would elucidate the thesis questions from the perspective of 'how we come to know that which we believe we know'[9]. As Hiller observed, as with an ontological standpoint

> 'a researcher might approach the pursuit of knowledge through a range of different epistemologies. Each epistemology rests on its own variety of assumptions (theoretical beliefs) regarding the nature of the relationship between a researcher and the subject(s) of research—between the knower and the known'.[10]

Epistemological research is a catchall description that encapsulates the objectivist nature of the research process and includes positivism and post-positivism. These two varieties represent research perspectives that credit the researcher with control of 'all possible variables and interactions in order to explain the nature of the cause–effect relationships witnessed'.[11] They are two facets which express the scientific approach of investigation and analysis of an

[8] ibid 99.
[9] ibid 100.
[10] ibid 100.
[11] ibid 105.

observable reality. Positivism has relevance to the research questions because it offers an explanation to those questions based on observation of 'mechanistic cause–and–effect events [that] occur predictably'.[12] This suggests that such research can lead to predictions because it involves

> 'objectively and systematically observing, describing, and analyzing specific aspects of reality [which] leads to facts—the way things are—that are value–neutral; that is, research processes and results are uncontaminated by a researcher's values, perspectives, or opinions'.[13]

It is obvious that any predictions drawn would be susceptible to the limits of the researcher to be objective. This limitation can be expressed as post-positivist because it is a recognition that the objective reality of the processes and procedures examined is inevitably 'deficient' and should be 'considered incomplete and imperfect and will (and should) be revised in light of new evidence'.[14]

In pursuing an appropriate methodology for this thesis, it is essential that the participatory knowledge through criminal defence practice is incorporated, otherwise the rationale for the research is removed from the project. The research undertaken must be processed and presented through this lens to be validated in terms of the thesis, effectively a constructivist perspective. This methodology enables the research material to be assembled and interpreted with reference to the writer's lived experience as a criminal defence practitioner. It also permits an interpretative process to be applied to research undertaken in relation to the aspects of juvenile justice examined. In this way, the 'reality' described represents a valid viewpoint albeit one that is very much 'individualized, and socio–historically context specific'.[15] Guba and Lincoln observed that this process is 'linked so that the 'findings' are *literally created* [*sic*] as the investigation proceeds'.[16] This leads to the recognition that this form of relativism, involving 'specific co-constructed realities', produces meaningful realities or analysis that can be viewed through the prism of contextually grounded interpretations and can validly be used to contribute, in this thesis, to the juvenile justice debate.[17]

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[12] ibid 105.
[13] ibid 105 referencing Mats Alvesson and Kaj Sköldberg, *Reflexive methodology: New vistas for qualitative research* (Sage 2009) and Nick J Fox, *Positivism* in Lisa M. Given (Ed.), The Sage encyclopedia of qualitative research (Sage 2008).
[14] ibid 106 referencing Denis C Phillips and Nicholas C. Burbules, *Postpositivism and educational research* (Rowman and Littlefield 2000).
[15] ibid 111.
[16] ibid 112.
[17] Egon G. Guba and Yvonna Lincoln, *Paradigmatic controversies, contradictions, and emerging confluences* in Norman K. Denzin and Yvonna. S. Lincoln (Eds.) The Sage handbook of qualitative research (Sage 2005) 258.

This synergy creates a dynamic between the two research perspectives that must be recognised. It is an intersection between the researcher and the researched so that the research produced can be encapsulated as 'objective versus interpretive knowledge or distantly observed versus relational knowledge'.[18] In this thesis, the writer's professional involvement with the processes and features described and experienced, albeit through the perspective of representing child defendants, necessarily colours both the methodology and its selection and research outcomes. There is therefore throughout the thesis, an acknowledgment that that professional involvement with the JJS has contributed to the design of the research, both in settling the thesis questions and the parameters of the research undertaken to promote the reform detailed in Chapter 8. A more focused methodological approach would encompass the fact of the locus of the generated research as this also forms a fundamental plank of the positionality of the researcher as he develops and perceives his own unique standpoint.

1.3.4 Phenomenological research and interpreting events

The researcher's environment also contributes to the research exploration as described by the concept of phenomenology. The research underpinning this thesis relates to experiences and events as they impact on the individual child offender in the JJS. Understanding these phenomena calls for an interpretative approach known as phenomenology. It recognises the need to examine the lived reality of the researcher and the researched by reference to the locus of the production of the research material. It is effectively self-reflective of the knowledge base of the researcher in the context of this thesis and recognises that the writer's 'understanding' has been formulated through the medium of criminal defence practice. It cannot and should not be separated and permits the research output to be analysed through this prism, to be expressed in the following chapters, and to be justified as a valid contribution to the juvenile justice debate. The phenomenological research descriptor reflects the writer's research material as an 'understanding of *lived experiences* and the meanings that emerge' and which have contributed to their exploration through the framework of everyday life.[19] In this thesis, this can be described as a *lifeworld* that has developed because of participation in criminal defence practice and identified as the active dynamic that has driven this present work.[20] Hiller encapsulates this dynamic as a

[18] Hiller (n 7) 100.
[19] Hiller (n 7) 115.
[20] Hiller (n 7) 115.

> ‘context wherein an individual has meaning as a person as the result of enculturation and wherein meanings are made through perceptions, cognition, and language surrounding phenomena and experiences’.[21]

This methodological approach accepts that the intuited ideas about the research material can arise through subjective examination which is nevertheless rigorous and validated because it occurs within the context of the writer’s disclosed *lifeworld*. This is objectively reflective of experienced phenomena and can be applied as a valid research tool because it facilitates self-analysis and development and enables the research questions to be examined and answered. As an approach, phenomenology acknowledges the reality that every researcher is reflective of his cultural foundations. Consequently, every research project must inevitably be

> ‘filtered through a particular lens, limiting what and how we see, hear, touch, feel about, and make meaning of experiences. Significantly, the language we use to describe our experiences to ourselves (and to others) influences the character and the very nature of what we experience’.[22]

The self-knowledge of this perception locus, that is the element of subjectivity, means that such researchers are strong in

> ‘orientation to the object of study *in a unique and personal way* —while avoiding the danger of becoming arbitrary, self–indulgent, or of getting captivated and carried away by … unreflected preconceptions’.[23]

It is evident that lived experience and phenomenology methodologies overlap and, as descriptors, can be used interchangeably. Although as a concept phenomenology originates from philosophy, it provides a methodology that ‘allows for the unearthing of phenomena from the perspective of how people interpret and attribute meaning to their existence’ and provides a useful approach to understanding an individual’s lifeworld.[24] The German philosopher Edmund Husserl described this approach as discovering the essence of a phenomenon as emerging from the thing being considered. This idea was developed further by Martin Heidegger as interpretive phenomenology or hermeneutics, again terms that can be used interchangeably, though the latter has more relevance to the methodological essence adopted in this thesis. The origin of hermeneutics relates to biblical scholarship and the art of

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[21] Hiller (n 7) 115 referencing Catherine Adams and Max van Manen, *Phenomenology* in Lisa Given (Ed.) The Sage encyclopedia of qualitative research (Sage 2008).
[22] Hiller (n 7) 116.
[23] Hiller (n 7) 117 referencing Max van Manen, *Researching lived experience: Human science for an action sensitive pedagogy* (State University of New York Press 1990) 20.
[24] Julie Frechette, Vasiliki Bitzas, Monique Aubry, Kelley Kilpatrick and Mélanie Lavoie-Tremblay, ‘Capturing Lived Experience: Methodological Considerations for Interpretive Phenomenological Inquiry’ (2020) 19 International Journal of Qualitative Methods 1, 1.

interpretation and of understanding. As a methodology, the approach was applied in the humanities where

> 'researchers deal with texts, which need to be interpreted and understood rather than explained by laws of nature. A text wants to say something and has an embedded meaning that addresses us'.[25]

This reinforces the idea that the lived experience or phenomenon has a value beyond just its experience per se and stresses how hermeneutics focuses on interpretive phenomenology. It serves 'to illuminate interpretations of meaning' that arise from human experience or a text, or other sources which have significance, through lived experience in acquisition and application.[26] Heidegger suggested that 'phenomena are mostly hidden, covered in multiple layers of forgetfulness', a description which resonates with experience of the observable Youth Court where child offenders are dealt with in a closed environment and processed out as speedily as possible.[27] The application of this approach is evident in criminal justice processes where the veneer of the outward presentation of the system belies the internal processes and agendas. When examined, for example in Chapters 4 to 7, these internal phenomena seem far removed from the intended purposes on the individuals processed or the perception by the public. This 'hiddenness', for example, of carceralism as discussed in Chapter 7, must be discovered and exposed to the light. It has been observed that, for Heidegger, these features, or phenomena 'can only be unveiled ontologically through *Dasein*, a phenomenological concept denoting an interpreting entity such as a human being'.[28] The relevance to the methodology adopted in this thesis, is that the Heideggerian *Dasein* approach gives support to the use of lived experience as a valid methodology. In relation to the research undertaken, it demonstrates that, for example, a process being researched such as carceralism, shows itself for what it is by being experienced subjectively, and therefore validates lived experience as part of the blended methodology adopted. As an investigatory approach, it stands in contrast to the Cartesian approach that rests on a rationalist understanding that an individual discerns understanding and knowledge from his own internal mental awareness or state. This simple contrast explains the attractiveness of the *Dasein* approach that it 'is not possible to dissociate others from being; the individual level of analysis can never be devoid of the social dimension that inhabits it'.[29]

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[25] Fredrik Svenaeus, *Hermeneutics* in Ruth Chadwick (Ed.) Encyclopedia of Applied Ethics (Academic Press; 2012) 574, 579.
[26] Frechette, Bitzas, Aubry, Kilpatrick and Lavoie-Tremblay (n 24) 2.
[27] Frechette, Bitzas, Aubry, Kilpatrick and Lavoie-Tremblay (n 24) 2.
[28] Frechette, Bitzas, Aubry, Kilpatrick and Lavoie-Tremblay (n 24) 2.
[29] Frechette, Bitzas, Aubry, Kilpatrick and Lavoie-Tremblay (n 24) 2.

As a methodological approach, hermeneutics is focused on the interpretation of meaning and, it has been observed, this is explicit in 'the hermeneutic definition of lived experience'.[30] Gadamer describes the effect produced as 'like a yield or result that achieves permanence, weight, and significance from out of the transience of experiencing'.[31] He stressed that such a lived experience 'makes a special impression that gives it lasting importance',[32] though it has been noted that a simple account of it is merely descriptive and 'it must contain an interpretation of significance' for the individual involved.[33] The lived experience that has contributed to this thesis has certainly, it is argued, met that requirement. As a contribution to this thesis's blended methodology, lived experience as conceptualised through the hermeneutic lens has, as observed by Ricoeur, two dimensions that add to its value as a research source, a chronological sequence of events and the construction of 'meaningful totalities out of [those] scattered events'.[34] This double requirement lifts the simple experience of a phenomenon to a more reflective and fully rounded lived experience that can be utilised as a research resource and validates the writer's standpoint in this thesis.

1.3.5 Lived experience and phenomenology

The concept of lived experience as a methodological approach enables the research material to be analysed in relation to the thesis's primary plea to focus on the individual child offender. It also enables the lived experience of the writer to be utilised to promote a reformist mantra and the conclusions and reform proposal detailed in Chapter 8. Without this aspect of the blended methodology the content and purpose of this thesis would not be complete and would have failed to deliver the contribution to the juvenile justice debate envisaged by the writer. Nevertheless, it is accepted that lived experience as a methodology has an inherent potential for bias that must always be acknowledged. It was essential, however, to own this aspect of the approach because, as Hiller suggests, too often

> 'the reasoning behind objectivist approaches to data gathering and analysis is left largely unexplained and readers are to simply accept that sound philosophical and theoretical foundations were applied'.[35]

[30] Frechette, Bitzas, Aubry, Kilpatrick and Lavoie-Tremblay (n 24) 3.
[31] Hans-Georg Gadamer, *Truth and method* (Continuum Publishing 2004) 53.
[32] ibid 53.
[33] Frechette, Bitzas, Aubry, Kilpatrick and Lavoie-Tremblay (n 24) 3.
[34] Paul Ricoeur, *Hermeneutics and the human sciences: Essays on language, action, and interpretation* (Cambridge University Press 2016). 240.
[35] Hiller (n 7) 101.

In this chapter's examination of the methodologies discussed it is also appropriate to mention the distinction between objectivist research and interpretive research. The former rests on a realist ontology of describing and analysing the reality of the aspects of juvenile justice and the JJSs considered. The latter rests on the idea that

> 'all knowledge is grounded in our particular experiences; it is subjective and bound to the natural contexts in which we enact our lives and is thus ontologically *relativist* '.[36]

This resonates with the lived experience approach noted above and requires an acceptance, as argued by Pascal, that, 'In order to understand a situation … researchers must understand the *meanings* [*sic*] the situation holds for the participants, not just their behaviors [*sic*]'.[37] As Hiller similarly recognises, it is an approach tinged with subjective experience that represents

> 'the fullest, most open, most active kind of consciousness, and it includes feeling as well as thought … [that enables] radically different conclusions to be drawn from diversely gathered and interpreted observations'.[38]

This emphasises how lived experience as a methodology facilitates the interpretation of research material through the fulcrum of participatory knowledge. It also places a burden on the researcher to remain alert as to the nature of the conclusions drawn from such research because lived experience can lead individuals to subjectively 'interpret the world'.[39] There is therefore a need to exercise caution as lived experience is reflective of the 'representation and understanding' of the researcher's 'experiences, choices, and options and how those factors influence …[the] perception of knowledge'.[40] It is argued that though this recognises a potentially limiting factor in relation to the research outcomes, it does not completely undermine the approach, as the conclusions drawn are always subject to this caveat. From the point of view of the thesis's research questions, this subjectivity is a positive attribute and reflective of the writer's own generated knowledge constructions which have developed from professional participation in juvenile justice practice. In this thesis, lived experience embodies the contextual meanings and experiences derived from that participation involving client child offenders. It represents the unique standpoint that gives this thesis its rationale.

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[36] Hiller (n 7) 103.
[37] Celine-Marie Pascale, *Cartographies of knowledge: Exploring qualitative epistemologies* (Sage 2011) 23.
[38] Raymond Williams, *Keywords: a vocabulary of culture and society* (Oxford University Press 1983) 127.
[39] Anna Wierzbicka, *Experience, evidence and sense: the hidden cultural legacy of English* (OUP 2010) 31
[40] Ian McIntosh and Sharon Wright, Exploring What the Notion of for Social Policy Analysis' (2019) 48 (3) Journal of Social Policy 449, 454 referencing Robin M. Boylorn, '*Lived Experience'* in Lisa M. Given (Ed.), The Sage encyclopedia of qualitative research (Sage 2008) 490.

Phenomenology is associated with lived experience because of its inherent reliance on reflection. It encompasses the ideas of 'the intelligibility of lived experience' and it has been observed that 'the association is so close that saying that the focus of the research is on lived experience can be a byword for it being 'phenomenological'.[41] It represents an attempt to understand the world as immediately experienced, without being conceptualised, categorised or reflected on, with the intention of 'gaining a deeper understanding of the nature or meaning of everyday experiences'.[42] This highlights that it has a wider contribution to the juvenile justice debate because, as McIntosh and Wright recognise, phenomenology 'is fundamentally rooted in the description, analysis and interpretation of lived experience'.[43] It must however remain balanced, as it can become 'a quite single-minded effort to identify, understand, describe and maintain … subjective experiences'.[44] A risk that has been noted and accounted for in the blended methodology adopted.

It is recognised that the identified lived experience of the writer is fundamental to this thesis and to the blended methodology adopted. However, even though it is an important element in the methodology, it must, nevertheless, be held in check, and moderated by academic rigour and reflection to ensure an overarching objectivity to both the research and the thesis conclusions. The risk of bias because of the writer's continuing participation in the JJS is evident and need not be detrimental. The devised research framework ensures that the research undertaken, its evaluation and the conclusions drawn in answer to the thesis questions are academically justifiable and defendable. The identified potential bias, and consequential subjectivity, can thus be seen as both a weakness and a strength. With this acknowledgment of the inherent subjectivity that such participation creates, the blended methodology as outlined and adopted permits the thesis's contribution to the wider juvenile justice debate to be validated whether it is described as lived experience or action research as discussed below.

1.3.6 Action research and practitioner research

Action research is a refinement to the broader termed practitioner research which is a more generalist term encompassing 'practitioners who do research' and includes professionals whose

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[41] McIntosh and Wright (n 40) 454 referencing Robin M. Boylorn, '*Lived Experience'* in Lisa M. Given (Ed.), The Sage encyclopedia of qualitative research (Sage 2008) 490.
[42] Max van Manen, *Researching lived experience,* (Left Coast Press: Walnut Creek 2015) 9.
[43] McIntosh and Wright (n 40) 457.
[44] Michael Crotty, *The Foundations of social research: meaning and perspective in the social world* (Sage 1998) 83.

knowledge and practice is enhanced by continuing professional development.[45] It is a form of research that aims to change and improve three elements of a professional's life, their 'practices, their understandings of their practices, and the conditions in which they practice'.[46] In the more refined definition, action research 'is intimately linked with the idea and goal of 'change' and improvement'.[47] In the context of the writer's credibility, action research represents a movement to close 'the gap between the *roles* of theorist and practitioner … [and to] give practitioners intellectual and moral control over their practice'.[48] Though it has been criticised as lacking academic rigour, the opposite argument has been made, for example by Godbey who suggested that it 'can be seen as more authentic and more directly representative' by its emergence through direct research involving a participant researcher.[49]

Action research therefore provides an opportunity to widen the range of contributors to academic debate so that research can draw on the unique and specialised knowledge base of participant researchers. Gustavsen claims that action research incorporates aspects of critical thinking, democratic practice, and liberationist thinking that 'originated from the assumption that theory can be expressed in action and 'ways of doing'.[50] Banks emphasises that

> 'the action researchers' professional capacity [is] central to the process, for the researcher must seek to merge their own professional perspective … in order to develop the kind of understanding that validly resolves the practical problem under examination'.[51]

In effect, action research is conducted by individuals on themselves and their lived experience of a particular environment. As in this thesis, the research is 'on their own work, with the aim of improving their life conditions', so that those involved are not 'objects of research' but 'knowing agents' and participants in the research process.[52] In this sense, action research enables the use of the writer's personal knowledge reservoir of the JJS in England and Wales

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[45] Peter Jarvis, *The Practitioner-Researcher: Developing Theory from Practice* (Jossey-Bass, 1999) xi.
[46] Stephen Kemmis, 'Action Research as a Practice-Based Practice' (2009) 17 (3) Educational Action Research 463, 468.
[47] Andrew P. Johnson, *A Short Guide to Action Research* (Pearson 2012) 16.
[48] Kemmis (n 46) 468.
[49] Samantha Godbey, *Action research as inquiry for education students* in Samantha Godbey, Susan B. Wainscott and Xan Goodman (Eds.) Disciplinary applications of information literacy threshold concepts (Association of College and Research Libraries 2017) 228.
[50] Bjørn Gustavsen, *Theory and practice: the mediating discourse* in Peter Reason and Hilary Bradbury (Eds) Handbook of Action Research: Participative Inquiry and Practice (Sage Publications 2002) 17.
[51] Cyndi Banks, *The Other Cultural Criminology: The Role of Action Research in Justice Work and Development* in David Gadd, Susanne Karstedt and Steven F. Messner (Eds.) The SAGE Handbook of Criminological Research Methods (Sage 2008) 478.
[52] Robin McTaggart, *Participatory Action Research: International Contexts and Consequences* (State University of New York Press 1997) 39.

to be utilised and to provide a major contribution to this thesis. It permits the research material to be assessed with conclusions drawn that can be self-validated because of the lived experience of the participant researcher. The professional knowledge reservoir promotes critical reflection that is essential to produce justifiable analysis because, as Banks notes,

> 'action research has the capacity to produce the kind of grounded theory that is developed from qualitative research studies by merging practice with appropriate theoretical frameworks'.[53]

This endorses the concept of a blended methodology because the usefulness of action research flows from its approach to a subject which is more than an objective review but is, instead, 'flexible and creative' in its function.[54] Cumulatively, this conjoining of theories, including active action research, 'contributes to the knowledge produced' and the challenges made to existing interpretations.[55] Such reinterpretation of research promotes the identification of new understandings, and solutions to the problems and failings within the system, or the processes being studied. Critical research, filtered through action research, leads to existential solutions to be proposed because of the bedrock of the lived experience-cum-action research paradigm. In this thesis, for example, the reform proposal set out in Chapter 8, although unlikely to be adopted, can be argued successfully because of the blended methodology adopted. The proposal reflects the methodology, including the action research pathway and the critical analysis inherent in the process in examining the aspects of juvenile justice considered. Action research serves to open channels of debate that resonate with this thesis as described above. It is fully warranted as part of a blended methodology and offers the possibility of developing 'action strategies to improve a situation in some meaningful manner'.[56] The reliance on the contribution of action research is evident throughout this thesis, with the writer's own lived experience borne of professional practice being the major vector used 'to identify a problem which [was] then researched' and developed as part of the thesis argument.[57]

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[53] Banks (n 51) 477.
[54] Richard Winter, *Managers, spectators and citizens: Where does 'theory' come from in action research* in Christopher Day, John Elliott, Bridget Somekh and Richard Winter (Eds) Theory and Practice in Action Research (Oxford Symposium Books 2002) 27.
[55] Banks (n 51) 477.
[56] McTaggart (n 52) 39.
[57] Lesley Noaks and Emma Wincup, *Criminological Research: Understanding Qualitative Methods* (Sage Publications 2004) 16.

1.4 A blended methodology

The above exploration of methodologies demonstrates how the methods and principles applied in research can be utilised and conclusions drawn within an adopted methodology that gives scope and direction to such research. In this thesis, the blended methodology adopted ensures that the research material has a clear relationship to the writer as both a criminal defence practitioner and a researcher. The axiological starting point required research which included the three basic processes of explaining, predicting, and understanding. This guaranteed that the resultant work was sufficiently comprehensive to answer the thesis questions in a way that remained true to the writer's positionality as an active researcher-cum-participant.

The axiology of any researcher is fundamental to understanding the research process and it is acknowledged that personal judgements and values have influenced the design of this thesis's research. The research methodology is indicative of an attempt to explore, clarify and explain selected aspects of juvenile justice and propose a reform. In this thesis therefore, it is acknowledged that the research is grounded on axiological realism, as it has arisen in the context of the writer's internalised values. These ought not to be filtered out as to do so would denude this thesis of its purpose. This work is also a product of axiological interpretivism which flows from professional participation in criminal defence practice which means there cannot be total objective separation from the research material and output. Such inherent subjectivity has value as the research driver and, as it has been acknowledged throughout the thesis, it is not fatal to the interpretation of the research material and the conclusions reached. In this thesis, the writer has striven to acknowledge the subjectivity by identifying it and seeking to adopt a balanced position, axiologically, of interpretative pragmatism. This approach ensures the thesis is of value and contributes to juvenile justice reform. It is the recognition of the mix of research material and the writer's professional lived experience that sets the methodological compass of this thesis towards the phenomenological axis.

In the same vein, the recognition of the inevitability of interpretation does not lessen the validity of the research and conclusions reached in this thesis. All research, whether qualitative or quantitative and whatever the parameters of its design, necessarily 'requires a further degree of interpretation which will be limited by the observer's understanding of the context'.[58] The steps

[58] Wright and Losekoot (n 6) 420.

of regression must be acknowledged and reflect a hermeneutic process that has been described in a somewhat convoluted way as

> ‘the interpretation of the meaning of what has been said, and this interpretation is from the observer’s interpretation of what the originator of the text [meant] to communicate limited by the observer’s interpretation of the originator’s life world.’[59]

This regressive interpretation is not fatal to the validity of the research, or the conclusions reached, although it is necessary to accept that the researcher ‘no matter how hard [he] attempts to be unbiased, is limited by [his] own life world’.[60] It is also necessary to accept that those who ‘read the findings will themselves be interpreting from their own life world and additionally will have their own preconceptions and biases’.[61]

Applying this blended approach has enabled the range of research material to be structured and developed towards a logical concluding chapter without sacrificing internal consistency in the development of the thesis as a unified work. This is important because of the progression of the thesis which commences with an assessment of aspects of juvenile justice, in terms of legal concepts and developmental history in Chapters 2 and 3. The thesis is further expanded and developed with the examination of processes and procedures in Chapters 4 to 6. The final section of the thesis moves the developmental argument beyond the existing visible JJSs to consider the shadow of carceralism and to expound a proposal for reform in Chapters 7 and 8. In effect, the chapters detail thematic research that is a qualitative approach to examining and analysing those aspects selected together with subjective assessments and interpretation. As argued above, subjectivity is not fatal to the research because it is an inherent quality of the research output as the active researcher is intimately involved in the selection of the research materials and analysis. There is a declared interest beyond the mere selection of material and as in this thesis, the researcher must be seen as a participant with a subjective effect on the research outcomes beyond the more objective and non-participatory researcher. This is a highly relevant disclosure in this thesis because it provides the main driver for it and falls within the active research and lived experience approaches that form part of the adopted blended methodology.

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[59] Wright and Losekoot (n 6) 420.
[60] Wright and Losekoot (n 6) 420.
[61] Wright and Losekoot (n 6) 420.

1.5 Conclusion

In explaining the thesis's methodology, this chapter has examined the various approaches considered to arrive at the blended methodology adopted. The identified axiology, focused on the positionality of an active researcher-cum-participant, was the fulcrum to this process because it identified the personal values which prompted this thesis. As noted above, without this defined axiology, the research would not have had a grounded philosophical position. The development of a methodology flowed from this grounding and led to research within a qualitative methodology framework designed to facilitate the investigation, assessment, and analysis of the material in relation to the thesis's argument.

In clarifying the nature of the relationship between the researcher and the research material, the nexus between the two is unambiguous. The writer's personal or lived experience, whether described as such or as action research, had to be the prism through which the historical, developmental, and procedural aspects of the JJSs were examined and understood. This uniqueness had to be given due weight in the revealed methodology as it underpins the thesis, as illustrated in the thesis questions which stemmed from concerns arising directly from professional practice. This positionality gave form to the thesis's thematic progression which is mapped out in the succeeding chapters. The reform proposal is its culmination. Each intervening chapter represents a progression towards this end, and each demonstrates a strand of personal exploration and interpretation that adds an essential layer to the complete work.

The methodologies discussed above have all been added to form the blended methodology that has been applied in this thesis and the identified phenomena, whether expressed as concepts, ideas, or system processes within a particular JJS, have been interpreted through the writer's positionality as an action researcher. To do otherwise would be to negate the entire process's value as research as the locus of the production of the research material is fundamental to the conclusions reached. Phenomenology whether expressed as interpretative or hermeneutical illuminates the value of personal lived experience, and the knowledge developed through it, which can then be brought to bear in offering analysis and conclusions to questions. Without the original element of interpretation provided by this creative combination of methodological approaches, this thesis would be bereft of its unique element. Indeed, the application of any single approach would have undermined its purpose, integrity, and value, as a contribution to the juvenile justice debate in its widest ambit. The blending of several different methodological approaches for this thesis has benefitted both the writer and, hopefully, the resultant thesis.

The next chapter

This chapter has set out the blended methodology adopted and the underlying reasons that validate its use for the purposes of this thesis. The next chapter takes as its starting point the ACR which, it is argued, is the main stumbling block preventing a more holistic response to childhood criminalised behaviour. It begins with an exploration of how the ACR came into being, its historical development, and the conundrums that have arisen from it. It is argued that the ACR is a far too simple an arbiter for winnowing the children who are legally responsible for their acts from those who are not, since the only factor it takes into consideration is their chronological age. In the light of this discussion the question is posed as to whether the ACR remains defendable in the modern world.

Chapter 2

The age of criminal responsibility

2.1 Introduction

At its simplest the age of criminal responsibility (ACR) determines whether a child passes the threshold test for having criminal responsibility for his acts or not. This chapter argues that while it has stood the test of time as an easily applied gateway to the juvenile justice system (JJS), the ACR, as a fundamental concept, immediately militates against treating a child as an individual, and is now no longer tenable in the light of the modern understanding of childhood development.

This chapter is therefore not intended to be a rehearsal of practice and procedure in the JJS in England and Wales. Its purpose is to explore the limitations that the ACR places on the JJS in ascribing criminal responsibility to individual children, and the specific features of the JJS that are ripe for reform as envisaged by the thesis's argument. It is contended that the ACR, at present fixed at 10 years of age in England and Wales, exposes the arbitrary nature of the present JJS which, by using a set age, fails to take account of the actual maturity, or immaturity, of the individual child. On attaining 10 years of age a child is considered responsible for his acts under the criminal law and he can be subjected to a police investigation, prosecution and be convicted of a criminal offence.[62] The effect on the life chances of children whose behaviour is deemed problematic after they cross this age threshold raises important and fundamental issues relating to the reform agenda implicit in this thesis's argument. Accordingly, this chapter examines the following key areas to reach a conclusion regarding possible reform of the ACR:

1. whether the basic concept of an ACR is valid given that this concept is based on the illogical assumption that a particular set age can be said to mark the acquisition of legal responsibility by a child for his behaviour.
2. the implications of an ACR for the rehabilitation of children whose behaviour is viewed as criminal.
3. the consequences of the demise of *doli incapax* (the *doli incapax* presumption), both in the context of notorious cases such as those of Thompson and Venables, and Bell, and in the cases of child defendants in general.

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[62] Children and Young Persons Act 1933, (as amended) s50.

4. the need for reform of the ACR concept from a fixed chronological age to one where the child's level of emotional development is used to determine criminal responsibility. Such a redefinition would enable those children who reached this capacity threshold to be processed by the JJS while those who did not would be dealt with outside it.
5. the continued importance of the ACR in the JJS.
6. the reinvention of the *doli incapax* presumption.

2.2 <u>The basic concept of an ACR</u>

All of us, whatever our age, have an ability to act in our environment, with independent agency to a greater or lesser degree, to interact with others and our surroundings. The consequences of our interactions are a function of our capacity to perceive and understand the potential outcomes and act on them or not. Some of us will act in ways that contravene the criminal law and, providing we have criminal responsibility, unless there is evidence to the contrary, we will bear the legal consequences through the criminal justice system. Everyone who acts voluntarily in some way in their environment is responsible for the consequences, for example, the five-year-old knocking over an unguarded heat source that leads to a house fire and causes injuries to those present, or the householder who attempts to reconnect the electricity supply that leads to a house fire. Clearly, the infant cannot be held responsible in law for his actions, but the householder can and should be**.** The difference is that the householder, as an adult, has prima facie criminal responsibility for his acts.

The initial issue for the JJS is where and how to draw the line with children and how to determine whether or not an individual child is responsible in law. Criminal responsibility is a concept that is easy to impute but not always easy to justify and this is especially true where children are concerned because they are at the younger end of the age spectrum. It must be considered whether the present ACR is anything other than an arbitrary point and whether it is reasonable for criminal responsibility to be imposed at any one chronological age. It is certainly a contentious legal area. Children are not fully developed intellectually and have limited cognition and capacity. Wishart asserted that they should be 'deemed irresponsible for they lack core rationality',[63] and this is supported by recent neuroscience research showing 'huge

[63] Hannah Wishart, 'Young Minds, Old Legal Problems: Can Neuroscience Fill the Void? Young Offenders & The Age of Criminal Responsibility Bill—Promise and Perils' (2018) 82 (4) Journal of Criminal Law 311, 315.

individual variability in the timing of development of children's brains'.[64] It is argued therefore that without capacity there can be no responsibility. However, in the present JJS there is no recognition of this link between capacity and responsibility, merely de facto acceptance of a fixed ACR.

2.2.1 A fixed ACR

The direct effects of a fixed ACR are twofold. Firstly, it assigns responsibility to individuals for their acts, and secondly, where the act is deemed a criminal act, a legal procedure is set in motion to process them. The imputing of responsibility is a difficult decision in relation to adults and it ought to be even more difficult in relation to children. Deciding children are criminally responsible means that they can be processed through the JJS in England and Wales. It is a system, it is suggested, which is ill equipped to focus on them as individuals and presents in practice as one more focused on processing them as quickly as possible.

In this chapter, the initial need is to decide whether an individual child is responsible, and then whether he can, additionally, be considered criminally responsible. The first limb of responsibility focuses on the child's development and the recognition that each child is unique. An individual child's development spectrum depends on various factors, including family circumstances, educational opportunities together with externally imposed societal values of behaviour and socio-cultural bias. The nebulousness of these factors and the potential for individual variation is highly problematic when discussing behavioural responsibility, let alone criminal responsibility. The acquisition of responsibility by a child is gradual. He progresses up a scale of competence in his behaviour with maturity. It has been noted that

> 'although adolescents may demonstrate adult-like levels of maturity in some respects by the time they reach 15 or 16, in other respects they show continued immaturity well beyond this point in development'.[65]

This is demonstrated by an individual's ability to formulate a course of action, to understand its potential consequences and to decide to do it. Babies do not have responsibility because they are not sufficiently developed to function independently. People with dementia similarly lack responsibility as their competencies have diminished and, in many cases, they function as

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[64] Terry McGuire, The age of criminal responsibility (2016) Briefing Paper No. 7687 House of Commons Library) 3.

[65] Laurence Steinberg, Elizabeth Cauffman, Jennifer Woolard, Sandra Graham, Marie Banich, 'Are Adolescents Less Mature Than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"' (2009) 64 (7) American Psychologist 583, 578.

babies, physically and mentally. During childhood there is a steady acquisition of maturity, and most individuals eventually reach an adult decision-making capacity enabling them to function as autonomous individuals.

Responsibility develops because of cognitive, emotional, and social factors. This process is often aided or hindered by the reactions of those around an individual child to his behavioural experimentation. Sometimes, such experimentation may be perceived negatively as anti-social behaviour, rather than being viewed more positively as boundary exploration. In some individual children these prosocial learning pathways promote 'changes in memory, communicative capacity, social orientation, and disposition' that can lead individual children towards unacceptable and potentially criminal behaviour.[66] More importantly, they produce a heightened propensity towards suggestibility, a major factor in childhood group offending behaviour, though this is balanced with 'significant increases in the ability to engage in logical thinking and problem solving between the ages of approximately 11 and 15 years'.[67] This balance between competing positive and negative features in the child's emotional development highlights the thin behavioural line whereby some children cross into criminality. Patterns of co-dependency develop so that they 'find increasing pleasure in interactions with peers rather than adults' and this 'accelerates during the period between 10 and 14 years of age'.[68] They find themselves in a social whirlpool where their development is affected by their desire for peer approval from like-minded individuals who are equally lacking in maturity and, importantly, the 'appropriate means of judging the appropriateness and/or suitability of behaviour'.[69] This is a period when a vulnerable, developing child is ripe for behaviour that easily trips into criminality, and yet it is a period when the responsibility threshold is crossed, with no reference to his competence or even his common sense.

In addition to the normal responsibility for behaviour, and its consequences, that an individual bears, the ACR brings an additional level of responsibility to children aged 10 years or older. The child now is considered not only responsible for his actions but also criminally responsible and he may be held liable in law for any criminal behaviour. Where this legal line is drawn is a societal question which varies between different countries, and even within countries where there is more than one criminal justice system, as is the case in the United Kingdom (UK).

[66] Michael E Lamb and Megan PY Sim, 'Developmental Factors Affecting Children in Legal Contexts' (2013) Youth Justice 13 (2) 131, 135.
[67] ibid 135.
[68] ibid 135.
[69] ibid 136.

Defining *criminal* r*esponsibility* in this context is difficult. In the UK, it is a legal question without a 'direct, alternative definition in the fields of psychology or mental health and, at best, it is understood as a composite of various threads of cognitive and behavioural functioning'.[70] It is, however a concept that ought to be the key factor when determining whether a child should be subject to the JJS or excluded due to a lack of criminal responsibility. It is therefore vitally important for this thesis that this concept is more fully defined.

2.2.2 Defining the concept of criminal responsibility

Whether a child has criminal responsibility for his acts is not a subtle question in the JJS and is not couched in degrees of responsibility, rather it requires a simple yes or no determination to the question. In practice, it is decided by age and no further investigation is required to justify the involvement of the JJS. Common sense, however, a reliable resource that is often overlooked, suggests that this simplistic approach fails to acknowledge individuality. Outside of the police station or courtroom, it is readily acknowledged that

> 'certain characteristics need to be present before an individual can be held responsible for his/her actions (or negligence) and such responsibility is a prerequisite for a conviction'.[71]

This more nuanced approach defines responsibility by an external assessment of a child's internal development and his acquisition of capacity by maturing and developing as a person to the point where he can 'be deemed culpable (i.e., blameworthy or responsible) for an offence'.[72]

The concept of criminal responsibility is self-defining, but it remains difficult to describe. These difficulties are usually overcome by reference to similar concepts such as culpability, capacity, and maturity. As labels, these have meaning and help to evidence the gap in the JJS's use of the phrase *criminal responsibility*. The use of the phrase by the JJS is much less exact when compared to the definition that attaches to it when it is used in other spheres, such as child psychology. This is illustrated by the contrast in the everyday use of the phrase by, for example, the Youth Court, and its use within an individual child focused assessment by a psychologist. The non-legal understanding of criminal responsibility suggests a child is criminally responsible or culpable if he 'has 'criminal capacity', which includes two inherent

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[70] Anthony L Pillay and Clive Willows, 'Assessing the criminal capacity of children: a challenge to the capacity of mental health professionals' (2015) Journal of Child and Adolescent Mental Health 27 (2) 91, 91.
[71] ibid 92.
[72] ibid 92.

component abilities' of cognition and conation.[73] The first, cognition describes the mental processes that promote the acquisition of knowledge and understanding leading to increased self-awareness, perception, intuition and reasoning. The second, conation, builds on the first and describes the psychological process which facilitates activity and change in the developing child and which manifests in behaviour such as desire, volition, and assertiveness. Together they contribute to the maturing of the individual child towards adulthood, albeit without a clear route map, so that, along the way, behaviours are tested and, occasionally, difficulties occur that lead to involvement with the police and the JJS. These maturing processes raise interesting questions relating to the degree of responsibility of an individual for the purposes of the criminal law. For example, Pillay and Willows question a child's abilities to comprehend 'wrongfulness' and to control his 'behaviour in accordance with such an understanding. If one or both are lacking, then the accused cannot be held criminally liable'.[74]

This separation of capacity and responsibility suggests that the absence of the former demonstrates that a person lacks the latter and cannot be criminally responsible. This supports a view of child development in which children develop the ability to make decisions that reflect their individual understanding of the relationship between their thoughts, actions, and consequences. This ability normally becomes more complex and nearer to that of an adult as they progress towards maturity. As Fowler and Kurlychek observed, 'although the basic understanding of principles may be intact by age 15 or 16, youths do not have the psychosocial maturity to make reasoned decisions in actual social situations'.[75] Even at this higher age range, it is argued that children's 'decision-making is impacted by a short temporal focus, making them less likely to understand long-term consequences'.[76] Youth Court practice supports the observation that child offenders 'are more likely to act on impulse than reason and to be highly influenced by their peers and social circumstances'.[77] This latter point is all too often witnessed by criminal defence lawyers whose clients, when pressed, find it hard to offer any insights as to why they acted as they did.

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[73] ibid 92.
[74] ibid 92.
[75] Eric Fowler and Megan C. Kurlychek, 'Drawing the Line: Empirical Recidivism Results From a Natural Experiment Raising the Age of Criminal Responsibility' (2018) 16 (3) Youth Violence and Juvenile Justice 263, 265.
[76] ibid 265.
[77] ibid 265.

The difficulty in assessing the extent of a child's capacity in relation to criminal responsibility is evident, as McDiarmid noted, though it 'is deceptively easily stated' the concept of criminal responsibility 'is, however, rather more complicated'.[78] In particular, she observed that the

> 'core set of understandings which are required as the basis on which to impute criminal responsibility is complex, a key point which must be properly recognized in setting or changing the minimum age of criminal responsibility'.[79]

The ideas relating to the concepts of capacity and responsibility and their relationship to criminal responsibility are complex because children are in a process of development. The JJS finds such complexity problematic and so, for that very reason, it is effectively ignored. The reform agenda considered in this thesis recognises the importance of the ACR as the entry point to the JJS. In its present form, it has no direct relationship to the individual child save as a most basic age gateway rooted in an outdated understanding of child development. The experience of the criminal defence practitioner all too readily confirms the broad range and variability in the abilities of child defendants and this everyday experience reinforces the need for reform based on a better understanding of childhood development. It also raises questions as to the purpose of an ACR in relation to children.

2.3 The purpose of an ACR

As noted, in England and Wales, the criminal justice system applies to everyone who is at least 10 years old.[80] Below this age, a person cannot commit a crime though of course he may commit an act that if committed by someone aged at least 10 might lead to a criminal prosecution. An ACR is a straightforward, if clumsy, way of deciding where to draw a procedural line and though it has a long history its future is questionable, at least in its present form, hence the call for reform put forward in this thesis for a more individually tailored JJS.

2.3.1 The child as a child defendant or an individual child

There is a growing demand for a more child centred JJS to determine the appropriate procedural pathway to be taken in response to unwanted criminal behaviour by children. As noted by Elliott, 'criminal responsibility should only be imposed on individuals who have the capacity

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[78] Claire McDiarmid, 'An Age of Complexity: Children and Criminal Responsibility' (2013) Youth Justice 13 (2) 145, 144.
[79] ibid 146.
[80] Children and Young Persons Act 1933, (as amended) s50 introduced the fixed 8 years as the ACR and was amended to 10 years by Children and Young Persons Act 1963, s16.

and freedom to choose' to act.[81] The present ACR ignores the individual and sees the child offender as someone 'who we can regard as responsible for a crime' and that 'punishment is in itself a rightful response'.[82] This is a view that still has supporters but it fails the litmus test of fairness to the child offender and does not seem a proportionate response within the present JJS. A more individually focused approach would acknowledge the fact that responsibility can be, and should be, graded by reference to a spectrum of increasing maturity which would then lead to a spectrum of lesser or greater punishment. So, for example, accepting a child aged 10 years has criminal responsibility, there would continue to be instances of a 'principled distinction to be made between adult and child murderers' with youthfulness being seen 'as an 'overriding mitigating factor'.[83] The 'degree of responsibility and moral development at the time the crimes were committed' is relevant to the prospects of rehabilitation, so that, the younger the child offender the less culpable he should be held.[84]

In essence, a reformed JJS would recognise that responsibility in children develops at varying rates and that this should be taken into account, since they also possess 'an ability to mature and develop with a rapidity and comprehensiveness that is very unlikely in an adult'.[85] Effectively, the argument for reform favours the younger child defendant, as one more malleable to rehabilitation and raises the prospect of less culpability attaching to him and, perhaps, a reduction or elimination of the negative consequences of prosecuting children. The use of an ACR in the JJS rests on the fiction that children who are responsible in the general sense of the word, as the causal agents for criminal acts, should be dealt with on that understanding.

Of course, the question whether the JJS should refocus on the individual rather than operate with such a simple age gateway is not easily resolved. Outside the JJS, the concept of an ACR as an age gateway is overlaid by modern understandings of child development, but there remains an attachment within the general population to the traditionalist cultural totem of 'prosecute and punish'. At present, politically, there is no real appetite within the UK Parliament to reform the ACR and, as it is highly unlikely that it would be a popular reform,

[81] Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' (2011) 75 Journal of Criminal Law 289.
[82] David Gurnham, 'The moral narrative of criminal responsibility and the principled justification of tariffs for murder: Myra Hindley and Thompson and Venables' (2003) 23 (4) Legal Studies 605, 609.
[83] ibid 615 referencing Woolf LJ in *Re Thompson and Venables (tariff recommendations)* [2001] 1 All ER 737, 740.
[84] ibid 615.
[85] ibid 616.

the government would probably prefer not to risk angering the electorate. Accordingly, the easy-to-understand present model with its ACR is highly likely to continue.

However, even if the ACR is retained, for self-serving reasons by politicians, in the wider legal canon, it appears hugely anomalous when contrasted with other civic and legal responsibilities. A child as a person under 18 years is prohibited from contracting certain legal agreements, for example, buying land or property in his own name, or consenting to various other forms of behaviour, for example, sexual intercourse under 16 years. There is an acceptance of the need to protect children and prohibit acts. However, this protective approach seems to be withdrawn from the child who does not conform to social norms of behaviour, and it seems that the more serious the behaviour the greater the punishment. Hoffmeister observed the dissonance, in these two approaches to childhood; 'to treat adolescents suddenly as "children" in the legal sense, and to combine this with serious consequences according to criminal law' when a magic age is reached.[86] This irrational approach is better explained by socio-economic factors that have fed into the debate about how to treat childhood criminality. It is an approach that has little to do with 'the evolving capacities of the child', and it is certainly not based on the ideas that 'childhood is not a single fixed, universal experience',[87] and that each child is unique.

2.3.2 Protecting the child defendant and *doli incapax*

In the present JJS in England and Wales, the ACR serves one purpose only, to provide a baseline, set at 10 years old, below which no child can commit a crime and be held criminally responsible, he is *doli incapax*, that is without capacity. The ACR has not always been so simplistic in its approach and until its removal, a rebuttable presumption existed which covered a companion class of children aged between 10 and 14 years. These older children were considered *doli incapax* unless the presumption was rebutted by evidence to the contrary. This evidence had to demonstrate, to the required criminal law standard of proof, that the individual 'child was, in terms of his/her understanding, capable of the wrongfulness required to constitute a criminal offence'.[88] The rebuttal evidence was related to the child's maturity and was

[86] Lilian Hoffmeister, '14 to 18 Year Olds as 'Children' by Law? Reflections on Development in National and European Law' (2005) 16 Journal of Psychology & Human Sexuality 63, 66.
[87] Geraldine Van Bueren, *Child rights in Europe: Convergence and Divergence in Judicial Protection* (2007) Council of Europe Publishing 107.
[88] McDiarmid (n 78) 148.

> 'proof, alongside proof of all elements of an offence (including any mental element), that the child understood that what he or she did (or omitted to do) was seriously wrong, as opposed to merely naughty or mischievous'.[89]

However, this companion class was removed by statute as part of the fallout from the Bulger case as discussed below. This change in the *doli incapax* presumption meant that the JJS in England and Wales took a new stance on the ACR, one that was in stark contrast to other similar common law-based jurisdictions which retained the second class of *doli incapax* presumption for older children. In assessing how the present system might be reformed it would therefore seem essential to consider this second form of *doli incapax* presumption, since it demonstrates, in theory at least, how to make allowances for children based on their perceived capacity to be criminally responsible, rather than merely using their age. With hindsight, it can be seen as a beacon that ameliorated the harshness of a fixed ACR and provided a glimpse of recognition that children do not mature at the same rate.[90] In practice, however, it was more a sop to the less mature child and in the Youth Court it rarely troubled the magistrates.

As a legal device, the *doli incapax* presumption has a long history. It can be traced back to Roman law with its prescribed ages for infancy and puberty which led to the development of both forms of the *doli incapax* presumption. The rationale for its development related more, however, to ideas of childhood in a societal context, and to the later rediscovery of Roman law principles during the mediaeval period, rather than any accepted limitation in a child's capacity. Nevertheless, the adoption of the idea of *doli incapax*, and its application in the law, demonstrated, to some degree, a 'benevolent approach towards children with at least some formal recognition of children's qualitative difference from adults, even if limited to cognitive ability'.[91] The application of the *doli incapax* presumption to older though still relatively young children rested 'on the ability of a child to discern right from wrong', and it offered them some legal protection.[92] Children within the ambit of the *doli incapax* presumption were considered 'incapable of mischief' and 'did not have the same understanding as adults', so that they merited some degree of protection, against the criminal law.[93] This appears an obvious corollary to childhood maturation which most parents would accept without need for further

[89] Thomas Crofts, 'Reforming the age of criminal responsibility' South African Journal of Psychology (2016) 46 (4) 436, 439.
[90] The doli incapax presumption was abolished by Crime and Disorder Act 1998, s34
[91] Ben Matthews, 'Time, Difference and the Ethics of Children's Criminal Responsibility' (2001) 5 Newcastle Law Review 65, 71.
[92] ibid 71.
[93] ibid 71.

comment. It also serves to demonstrate the division between legal procedures and common sense.

Legal theory and practice often diverge as courts, including juvenile ones, develop real world responses to theoretical issues. Although the *doli incapax* presumption held out the prospect of legal wriggle-room in determining the criminal responsibility of an individual child, because of its simplistic and limited age application, it was often treated as a momentary procedural requirement to be considered and then rebutted by prosecution evidence. Over time it became less relevant with public policy, police, and court procedures working to minimise its application for the protection of immature children. It became a tick-box exercise in the vast majority of police interviews and juvenile court cases with the latter presided over by magistrates ill-equipped to deal with preliminary legal issues and often dependent on assertive and controlling court clerks.[94] Usually, the *doli incapax* presumption was rebutted early in criminal investigations by the use of the ever-reliable question posed by interviewing police officers as to whether it was right or wrong to take sweets from a shop without paying for them. If the child agreed it was wrong, they were considered to be capable to discern right from wrong and therefore liable to be prosecuted. The demise of *doli incapax* was brought about on the whim of politicians in response to the maelstrom of media and public vitriol following the killing of a child, James Bulger in 1993. With its removal the final crumb of balance offered to child defendants was swept away. The Bulger case had huge implications for all children and its effects have continued to reverberate throughout the JJS. It also brought in its wake, the widespread demonisation of the child defendants involved so that 'The 'evil' of the crime, and that of the two boys, was projected on childhood and all children in general'.[95] The media generated a feeding frenzy, including, for example, 'The tabloid press, in what can be regarded as a thinly veiled attempt to mobilise lynch mobs, gleefully reported calls for the two to be hunted down and punished'.[96]

[94] Court clerks are now rebranded as legal advisers. They retain a strong element of control when placed with lay magistrates as to the outcomes of cases.
[95] UNICEF, Case Studies – Detrimental effect of the Media: Case Study – Bulger and the UK: the Media, the Public and the Government reaction, Undated document 3 <https://www.unicef.org/tdad/roleofstatspublicopinion3uk(1).doc> accessed 9 June 2021.
[96] ibid.

2.4 The demise of the *doli incapax* presumption

The *doli incapax* presumption became the focus of political intervention due to several factors that culminated in its abolition by the Crime and Disorder Act 1998.[97] During the 1980s and 1990s, to demonstrate strong law and order credentials, the two main political parties in the UK, Labour and Conservative, promoted policies designed to demonstrate their *tough on crime* mantras. The Labour Party took the prize by abolishing the *doli incapax* presumption for children aged 10-14 years, an achievement that meant a child aged 10 years went 'from being presumed criminally incapable to being as fully criminally responsible as an adult'.[98] The movement to remove the *doli incapax* presumption was precipitated by the terrible circumstances of the murder of James Bulger aged 2 years on 12th February 1993. The calls for change mounted when the political agenda caught the scent and focused on the *doli incapax* presumption as a public relations sound bite. It resulted in the loss of a legal presumption that had been designed specifically to protect children like Robert Thompson and Jon Venables, the two 10-year-olds who were accused in the Bulger case.

2.4.1 The Bulger case and its aftermath for Thompson and Venables

Two boys, Robert Thompson and Jon Venables, were charged with the murder of James Bulger, and were convicted after a Crown Court trial before a jury on 24th November 1993. They were sentenced to be detained 'during Her Majesty's pleasure', the mandatory sentence in the case of young offenders convicted of murder.[99] After sentencing the boys, the judge speaking in their absence, remarked that how 'two mentally normal boys aged 10 of average intelligence committed this terrible crime [was] very hard to comprehend'.[100] They were released after 8 years, a decision that took account of psychiatric evidence indicating positive reform in both boys characters while in secure units. However, while Thompson has not been involved in any further offending behaviour, it is noteworthy that subsequent criminality by Venables suggests that there has been longer term behavioural consequences for him which seemingly remain unresolved.

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[97] Crime and Disorder Act 1998, s34. This section states that 'The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished'.

[98] Thomas Crofts, 'Lagging behind Europe: the criminalisation of children in England' (2008) 2 Humanitas Journal of European Studies 1, 1.

[99] Children and Young Persons Act 1933, s53(1). This provides that in lieu of life imprisonment or a death sentence a person under 18 be detained during Her Majesty's pleasure.

[100] *R v Secretary of State for the Home Department, Ex parte V and R v Secretary of State for the Home Department, Ex parte T* [1997] UKHL 25.

As today with very serious cases, the Bulger trial was heard before a Crown Court rather than a Youth Court. This procedural requirement meant that the mandated court protection for child defendants was set aside and Thompson and Venables were exposed to an adult court environment and procedures which were not age appropriate. Bradley recognised the problems that this created, particularly the difficulty such children face in meeting the basic requirement of child defendants, that they must have the capacity to participate and engage with the trial process. She observed that this case demonstrated the impossibility of achieving the 'fair trial' ideal for the child defendants while also attempting to meet the needs of the bereaved parents for justice for their child.[101] The two perspectives were irreconcilable and this became plain, as regards the boys by their behaviour in court and their 'limited engagement', with Bradley noting that 'Venables cried throughout the trial and Thompson passed the time making shapes with his shoes'.[102] It showed the disconnect between the courtroom practice and the children to the point that the hearing could have been in their absence and proceeded as a fact-finding tribunal, save for the need for a public spectacle to be reported second hand by the media. The court recognised 'the paradox of attributing criminal responsibility to people who required a play area for use during breaks'.[103] The horrified public reaction to this crime, when mediated through the news media and the political agenda, provoked a demand for a change in the legal system that would allow these two children to be punished. This demand was subsequently sated by the statutory abolition of the *doli incapax* presumption. It was a piece of political window dressing designed to show that the law and the politicians involved were 'tough on crime' and criminals, even child criminals aged as young as 10 years.

The effectiveness of processing serious child offenders in this way can be judged by the regularity of media stories relating to Robert Thompson and Jon Venables. The latter was sentenced to 40 months imprisonment on 7th February 2018 for various child abuse image offences, with Edis J. in sentencing observing that the case was

> 'unique because when you were 10 years old you took part in the brutal murder and torture of James Bulger. That was a crime which revolted a nation and which continues to do so'.[104]

[101] Lisa Bradley, 'The age of criminal responsibility revisited' (2003) 8 Deakin Law Review 73, 76.
[102] ibid 76.
[103] ibid 77.
[104] Gary Stewart, 'This is what the judge told Jon Venables as he sent him back to jail' *Liverpool Echo* (Liverpool, 8 February 2018).

Thompson and Venables will always be remembered for the horror they engendered through the killing of James Bulger; they will remain forever in the public memory as monsters. The Bulger case is a warning of the dangers of processing young children through a criminal justice system, deprived of the *doli incapax* presumption. The public disquiet and media focus meant that it was inconceivable that it could ever have been otherwise. It was a prime example of 'playing to the gallery', a factor that cannot be minimised or underestimated in this thesis, as in some cases, such as this one, the system could not countenance anything else.

2.4.2 Thompson and Venables contrasted with Mary Bell

The opprobrium generated by the Bulger case was unprecedented. It was due in part to the repeated use of CCTV stills by the news media which showed the child victim being led by the hand from the shopping centre, from where he was taken, to his death. Curiously, very young child-killers such as Thompson and Venables, arguably cause more public disquiet than adult multiple murderers, such as Fred and Rosemary West or Dennis Nilsen. It is a psychological need, to distinguish such children from 'normal' children, and to mark them as '*other*', to provide distance to validate their shunning as 'evil'.

The Bulger case was not the first high profile case in which a child was involved in a killing. For example, in 1968 Mary Bell, aged 11 years, was acquitted of murder, and convicted of the manslaughter of Martin Brown, aged 4 years, and Brian Howe, aged 3 years. The treatment of Bell, however, was noticeably less venomous in part because she was a girl. Like Thompson and Venables, she had endured difficult home circumstances. However, unlike Thompson and Venables, she was noted as defiant during her trial; she bandied words with the prosecution and seemed untouched by remorse. She was described as 'extraordinarily pretty' and 'a beautiful icon of evil'.[105] The media recognised that she had had a 'devastating childhood herself, her increasingly despairing cries for help had gone unheard. After the trial, she was named both monster and victim'.[106] Bell was detained for 12 years during which she was sexually abused by other children and staff. On release, she was given a new identity. She lived anonymously until 1998 when an ill-judged collaboration with a writer, Gitta Sereny, led to the publication of a book about her case from which she benefitted financially.[107] In the book, Bell recalled the trial at Newcastle Assizes and on asking about the jury being told that they were

[105] Nicci Gerrard, Richard Brooks, Jonathon Calvert, Lucy Johnston and Andy McSmith, 'The mob will move on, the pain never can' *The Observer* (London, 3 May 1998)
[106] ibid.
[107] Gitta Sereny, *Cries Unheard: the Story of Mary Bell* (Macmillan 1999).

'The people who decide what's going to happen to you' and I said 'How?' and they said 'Shh''.[108] It is a pitiful recollection that highlights the lack of any true ability on her part to participate, and also the 'show trial' element of such cases.[109] The book produced a political and media frenzy which focused on her wickedness. Bell, while still a child herself, had been prosecuted, convicted, punished, rehabilitated, and released, and yet, in the sight of the media and the public, there remained a sense that she had still not been completely redeemed, and never would be.

Nevertheless, despite the problems evidenced by the Bulger case and Mary Bell, the present JJS in England and Wales remains wedded to the simple age related ACR, a very low set bar which reflects an exacting mind-set, one which demands the imposition of responsibility irrespective of the individual's capacity or maturity. Accompanying this mindset is a fear of change and of floodgates being opened if radical, or even minor, changes were to be contemplated. This was demonstrated in *R v G* in 2003.[110] The case examined whether the issue of a child's developing maturity and capacity should be relevant to criminal responsibility and whether the law ought to be modified to take account of it. The facts related to two boys aged 11 and 12 years who on 22nd August 2000 set fire to some newspapers in the back yard at a Co-op store and left the scene. The fire spread and caused £1m worth of damage and they were charged with arson.[111] The court accepted that the children had not appreciated that there was any risk whatsoever of the fire spreading as it did. The case went to the House of Lords and the issue of the subjective and objective tests of recklessness to determine culpability were considered and whether the boys ought to have been compared with 'normal reasonable children of the same age' to determine culpability.[112] The leading judgement, given by Lord Bingham, rejected a subjective test, as a conviction would be dependent 'on proving the state of mind of the individual defendant', and that a similar modification would be needed for 'the mentally handicapped'.[113] This unsettling remark shows the disjuncture between legal formulations and individuals, which the law is always wary of accepting, as it would 'open the door to difficult and contentious arguments concerning the qualities and characteristics to be taken into account for purposes of the comparison'.[114] Effectively, this was an acceptance that

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[108] Nick Davies, 'The hidden history of the little girl who killed' *The Daily Express* (London, 9 May 1998).
[109] ibid.
[110] *R v G and another (Appellants) (On Appeal from the Court of Appeal (Criminal Division))* [2003] UKHL 50.
[111] Criminal Damage Act 1971, s1(1) and s1(3) states 'Arson in that 'without lawful excuse damaged by fire commercial premises belonging to …. others being reckless as to whether such property would be damaged'.
[112] *R v G* (n 110) [37].
[113] *R v G* (n 110) [37].
[114] *R v G* (n 110) [37].

the results might produce unwanted outcomes, that child defendants might not, after all, be criminally responsible on closer examination. Despite the obvious possibility of injustice, such a change in the law could not be countenanced, although the subjective as opposed to the objective test was re-established as the proper approach to determining recklessness.

The 'too-difficult' argument is a poor substitute for a proper inquiry and, as Lord Steyn observed, 'Ignoring the special position of children in the criminal justice system is not acceptable in a modern civil society'.[115] The leading judgement at present remains limited in its aspirations towards the best interests of the child defendant as, realistically, it is difficult to devise a practical procedure to do otherwise within the confines of the present JJS. Individualising recklessness as a subjective element in a criminal offence is problematic because of the rigidity of an ACR that gives no quarter to the individual child. More problematically, such an individualising subjective element would undermine procedures to prosecute and punish child offenders. The case of *R v G* supports the ACR and enables children to be treated as a single, homogenous class for the purposes of determining responsibility with no requirement to examine the individual's capacity or maturity. Indirectly, it makes plain that the legal process has no qualms about prosecuting children, once they attain their tenth birthday, and the *doli incapax* presumption, though not entirely forgotten, has been buried, at least for now.

2.4.3 The Bulger case and its aftermath for child defendants

The Bulger case was an enormous set-back for the ACR reform agenda as politicians followed the media and public clamour for a punitive response to the case. The outcome side-stepped the real issue of child homicide by children and focused, instead, on the *doli incapax* presumption, a legal device with limited relevance at the time for the case, or for the JJS in general. The argument for its abolition was advanced on the ground that 'when a child offends, it is in both his own interests and the interests of the public at large for him to be convicted'.[116] This is a novel proposition that does not sit well with criminal clients, their parents, or those interested in a fairer JJS.

[115] *R v G* (n 110) [53]. *R v G and another (Appellants) (On Appeal from the Court of Appeal (Criminal Division))* [2003] UKHL 50.
[116] Natalie Wortley, 'No Defence of Doli Incapax, *R v JTB* [2009] UKHL 20' (2009) 73 Journal of Criminal Law 305, 308.

The result of the abolition of the presumption of *doli incapax* was a return to a punitive and interventionist approach premised 'on taking individual responsibility for offending', an approach that did not heed the calls for caution.[117] As Crofts recognised, relying on 'sanctions to strengthen personal responsibility is particularly dependent on age limits to ensure that only those who are truly able to take responsibility are drawn into it'.[118] This is the crux of the reform agenda which lies at the heart of this thesis and it remains a truism that though 'some children may well develop at younger ages today; this does not mean that the children who commit offences are necessarily more mature'.[119] The question of maturity and behavioural responsibility is usefully applied in most aspects of life, but it is not applied in perhaps the most crucial area, the application of criminal law to child offenders. This thesis argues, that the present ACR causes long term harm to children. This is evident in cases such as Robert Thompson and Jon Venables. It is also argued that it is of the utmost importance that the JJS should treat children with care to avoid such harm. To achieve this end, the need for reform of the ACR must be recognised and acted upon.

2.5 The need to reform the ACR concept

This thesis is premised on the need for reform of the present ACR and its uniform application to children as a class for the purposes of imposing criminal responsibility. A fixed ACR is easy to apply when it is not burdened with any other criteria, such as verifiable educational difficulties which might indicate a potential lack of capacity. The present JJS attaches no significance to any individual's traits or deficits, or their influence on behaviour, but a reformed ACR could take a very different approach. For example, an assessment could be made to determine the stage of development reached by a child to decide whether he had sufficient maturity to be responsible for his criminal behaviour.

2.5.1 An ACR and children as a distinct class

A simple chronological age is a blunt instrument by which to impose criminal responsibility. Its imposition ought to be more nuanced, taking account of other factors; for example, age by reference to abilities such as reading age, a notion that is accepted for determining educational attainment, needs, and support. Maher argued that criminal liability could be premised on 'the

[117] Thomas Crofts, 'Catching up with Europe: taking the age of criminal responsibility seriously in England' (2007) 17 European Journal of Crime, Criminal Law and Criminal Justice 267, 273.
[118] ibid 270.
[119] Jamie Flattery, 'The significance of the age of criminal responsibility within the Irish Youth Justice System' (2010) 4 Galway Student Law Review 22, 25.

relationship between age and criminal responsibility' and be recognised by distinguishing two elements, firstly, 'the capacity of a person to engage in criminal conduct' and, secondly, the appropriate 'process whereby a person was held answerable for such conduct'.[120] This separation would acknowledge that the present low threshold ensnares every child aged at least 10 years, whereas a process that determined criminal liability for acts could examine more widely the individual's capacity. The second rung of a criminalisation ladder, as identified by Maher, focused on an individual's possession of the necessary mental intent of a criminal offence and, in some respects, it was akin to the concepts of general and specific intents. His argument stands in counterpoint to the ideas expressed in *R v G* noted above,[121] where criminal responsibility is imposed, not individually, but on children as a class, a view that is contrary to the tenor of this thesis.

The argument for an age rule is that it produces certainty but the over-simplicity of the application of the ACR, it can be argued, is also problematic since it generates a never-ending debate about reform. To pursue the reform agenda further would also pose some difficulties. It would require much more focus on the individual child's capacity and intellectual ability. However, such factors are already used to determine other interventions by the state, for example in education provision or legal capacity in non-criminal law matters, such as consent to medical procedures. At present in criminal law matters, non-personal factors determine the outcome with the JJS acting effectively as an arm of social control by the state. Sharma observed that criminal court proceedings have 'undesirable consequences in terms of social good', and 'have unduly harsh consequences for a child in later life' which need to be addressed.[122] It might be possible to achieve reform by simply raising the ACR. However, the drawback with such a broad reform is that it would, almost undoubtedly be perceived by some as allowing wrongdoers to go unpunished. Those children excluded from the JJS by such a change would become, in effect, a class outside the jurisdiction of the criminal justice system. Irrespective of the alternative programmes that might be set up to deal with these children and, the potentially more positive outcomes, such a reform would be presented by the more conservative media as allowing child offenders to escape Scot-free.

[120] Gerry Maher, 'Age and criminal responsibility' (2004-2005) 2 Ohio State Journal of Criminal Law 493.
[121] *R v G* (n 110) [50].
[122] V. D. Sharma, 'The Criminal Responsibility of Children in England' (1974) 3 Anglo-American Law Review 157, 170.

2.5.2 An ACR and non-legal insights

To justify change and the reform of the ACR requires a positive goal, beyond removing children from the JJS. Such a goal might be found, by drawing on the developments in behavioural psychology and neuroscience. These have provided a greater appreciation of the complexities of child development and offered insight into the longer range and duration of childhood in some individuals. Similarly, the increased understanding of the conscious, subconscious, and unconscious mind suggests that brain functioning is multi-layered. The individual child is unaware of the subconscious and unconscious processes that cause him to act as he does in the world around him. The levels of complexity in brain function and development can never be reflected in a simple ACR or indeed any legalistic JJS. The individual child develops because of his own 'adaptive unconscious processes' as part of the process of '*contextual priming'*.[123] This is a learning mechanism whereby each of us is reactive; the 'mere presence of certain events and people automatically activates our representations of them'.[124] It typically manifests itself in childhood copycat behaviour that, in turn, is often a precursor to anti-social behaviour, and involvement with the police. Criminal defence practice frequently corroborates this theory with examples of groups of child offenders, usually boys, seemingly acting in unison in committing criminalised behaviour, without any obvious or overt decision-making process by any individual child.

The child may therefore find himself in conflict with societal norms and expected behaviours, without understanding how and why events have happened. This does not excuse him wholly from responsibility for his actions, because the individual child still has conscious agency to function in his environment. It does, however, serve to indicate the sheer complexity of the maturing process underway in all children. Unsurprisingly, the present JJS must, of necessity, ignore this concept of cognitive development affecting behaviour, and function simply on the premise of free will. This allows 'the assignment of full responsibility to an individual for his or her behavior' [*sic*] and results in 'a readiness to react with punishment to every violation of norms'.[125] This superficial understanding of behaviour is necessary; without it the JJS would become bloated and reliant on non-legal professionals for assessments and reports, and it would be just too difficult to justify, politically and socially. It therefore follows that a more practical

[123] John A Bargh and Ezequiel Morsella, 'The Unconscious Mind' (2008) Perspectives on Psychological Science 3 (1) 73, 75.
[124] ibid 75.
[125] Miroslav Goreta, 'The psychoanalytical approach as a contribution to the assessment of criminal responsibility' (1990) 18 Journal of Psychiatry & Law 329, 329.

and understandable solution is needed. One such solution would be to address a child's criminal behaviour by using his age as an extenuating circumstance. For example, it has been argued that 'if an alleged perpetrator could not have chosen to do otherwise, then she or he should not be held to the same level of responsibility'.[126] This offers a simpler solution to the problem posed by the complicated mental processes noted above, and the effects of these processes on behaviour in children.

The superficiality argument applies, of course, not only to an individual's behaviour but also to the JJS itself, an organisation that is resistant to taking account of a child's capacity in determining whether he should be criminally responsible for his actions. Individual children, like adults, vary in intelligence and the ability 'to understand experience and make use of it'.[127] It seems therefore remiss that the present JJS is unable or unwilling to move with the times, and to make use of the ever-increasing knowledge base that already exists concerning the development of the brain and its relation to childhood behaviour. Taking account of such knowledge would facilitate a greater understanding of criminal misbehaviour in childhood.

2.5.3 ACR developments

The ACR remains an important signpost that determines the involvement of the JJS, including the police, and other agencies, in meeting childhood offending by those aged up to 18 years. However, it is an area that is constantly being examined, reviewed, and expanded into new avenues, and it is an area which is ripe for reform.

2.5.3.1 Statutory reform

The ACR in England and Wales has not been addressed for over half a century since the last radical reform in Section 4 of the Children and Young Person Act 1969 (the 1969 Act). This section of the 1969 Act provided for an increase in the ACR with an almost year-zero provision that no one would 'be charged with an offence, except homicide, by reason of anything done or omitted while he was a child'.[128] There had been a recent increase to 10 years of age in 1963 but this proposed increase, to include the whole of childhood in the 1969 Act, was remarkable. It reflected an era of major social and legal changes in England and Wales, and it arose

[126] Daniel P. Greenfield, 'Criminal responsibility from a clinical perspective' (2009) 37 Journal of Psychiatry & Law 9, 9.
[127] Sharma (n 122) 169. V. D. Sharma, 'The Criminal Responsibility of Children in England' (1974) 3 Anglo-American Law Review 157, 170.
[128] Children and Young Persons Act 1969, s4.

alongside similar developments in Scotland following the Kilbrandon Report.[129] However, Section 4 of the 1969 Act was not implemented and it was removed from the Act in 1991 to prevent any suggestion that it might ever be brought into force. The removal itself was a damning indictment of parliamentary timidity when dealing with child offending and public attitudes towards this difficult topic. It is indicative of the stagnation in the perception of children's legal rights and obligations and the way they are treated as children by the criminal law, almost irrespective of human rights and international standards.

Since 1969, politicians and the media have generally championed the status quo and any pressure for change has been focused on producing a more punitive regime, rather than one which aims to ameliorate the harm to children brought about by the JJS. Nevertheless, the calls for amendment persist with, most recently, a private member's bill introduced by Lord Dholakia. The Age of Criminal Responsibility Bill contained one operative clause to amend the ACR in England and Wales to 12 years.[130] It promoted the change on the ground that dealing with 10 and 11-year-old children through non-criminal procedures would be more effective than using the criminal justice process.[131] True to form, the Government argued that the public must have confidence in the JJS and know that offending will be dealt with effectively, that is by prosecution and punishment.[132] The Bill represented a noble attempt to keep the ACR reform agenda alive, and was a positive contribution in the public arena, promoting the rehabilitation of younger child offenders by moving them to a less criminal justice focused regime, but ultimately it failed.

2.5.3.2 Examples of the causes of intervention

More recent developments have arisen from responses to new forms of behaviour and the resurgence of older problems. These have added to the mix of childhood criminality, with concomitant demands for action that in turn has drawn more children into the JJS's ambit.

2.5.3.2.1 Social media

A prime example of this is the use of social media by children, with calls for criminal law measures in response to parental concerns and media campaigns in relation to cyberbullying

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[129] The Kilbrandon Report, Children and Young Persons Scotland, HMSO Edinburgh 1995.
[130] Increase in Age of Criminal Responsibility HL Bill (2017 -2019) 3 57/1. Clause 1 states 'In section 50 of the Children and Young Persons Act 1933 (age of criminal responsibility) for "ten" substitute "12".
[131] Library Briefing, 'Age of Criminal Responsibility Bill' (HL Bill 3 of 2017–19) House of Lords, (2017) House of Lords.
[132] ibid.

using digital devices on social apps and forums.[133] This tends to involve 'sending, posting, or sharing negative, harmful, false, or mean content about someone else' and in some instances 'crosses the line into unlawful or criminal behavior [*sic*]'.[134] In England and Wales, such behaviour by children towards other children, at its extreme, can amount to 'harassment or threatening behaviour' and has been linked to instances of child suicide.[135] The more serious examples raise complications with the ACR and the mind-set of the child bully involved, though the arguments relating to the criminal responsibility of children remain valid. It indicates that even with changing and challenging new behaviours, the responses generated by the state, its agencies, and the media, fixate on a criminal justice crackdown and punishment response. This effectively closes down any consideration of an individually focused response looking at the drivers of the cyberbullying child's behaviour.

2.5.3.2.2 Anti-social behaviour

Similarly, allegedly unacceptable, or anti-social behaviour by children frequently reasserts itself as a popular cause for greater police intervention. This has tended to produce responses that focused on the children involved, whether under or over 10 years, and irrespective of their behaviour being criminal. It has been concisely described as net widening. Under the umbrella of anti-social behaviour, policy initiatives were implemented by local authorities and the police focused on children's behaviour in public spaces, extending the reach of their powers in relation to specific social groups and locations. The result was an effective extension in criminal responsibility by corralling children into the policing system by reference to group behaviour. This approach altered the basis for intervention by the police and local authorities. It has been described as the evolution of a criminal justice system, especially in relation to children, where guilt

> 'is no longer the founding principle; intervention can be triggered without an offence being committed, premised instead upon a condition, a character or a way of life that is judged to be failing or posing 'risk'.[136]

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[133] Stop Bullying, What Is Cyberbullying <https://www.stopbullying.gov/cyberbullying/what-is-it/index.html > accessed 18 June 2021.

[134] ibid.

[135] NSPCC, Cyberbullying (Online Bullying) <https://www.childline.org.uk/info-advice/bullying-abuse-safety/types-bullying/online-bullying/> accessed 20 June 2021.

[136] Barry Goldson, 'Child criminalisation and the mistake of early intervention' (2007) 69 (1) Criminal Justice Matters 8, 8.

This broadening of the range of children processed, due to their involvement and presence with others aged over the ACR, contrasts with this thesis's argument for reform, and the reformist agenda in general, to lessen the involvement of the JJS in childhood.

2.5.3.2.3 Urban policing and Public Space Protection Orders

Public Space Protection Orders are part of a range of interventions that extend the exercise of controlling powers in the public space by the police and local authorities.[137] As a direct form of intervention affecting children, such orders may be made by a local authority in response to unwanted behaviour in a specified geographical area, initially for a period of up to 3 years. Breach of an order without a reasonable excuse is a criminal offence, with a power to issue a fixed penalty notice.[138] While there are no legal consequences for those under 10 years old, the use of controlling geographical powers nevertheless confirms the view that as ideas about unwanted childhood behaviours change over time, so too do the means to respond to behaviour that is often localised by reference to less well-off social areas. It is a class-focused approach demonstrating how society remains fixed on children, as a class, rather than as individual children. This focus also tends to be reflective of those children who are most likely to be new entrants to the JJS.

2.6 The continued importance of the ACR in the JJS

As a concept, the ACR remains embedded in the JJS even with well-meaning policy proposals and campaigns which, for example, argue for an increase in the age. Similarly, charities that promote the issues arising from difficult social conditions such as housing and education faced by many children in England and Wales generally resonate positively with the public. Unfortunately, that same public often presents as more concerned 'about juvenile delinquency than it is about other aspects of children and their welfare'.[139] It is an area where a strong degree of attachment to 'old fashioned' ideas persists, in relation to dealing with childhood misbehaviour. There have been major changes in attitudes in other areas of society, which have occurred without demur, such as the broad acceptance of same sex civil marriage, but the response to childhood misbehaviour remains much as it was in the 1950s and 1960s. This

[137] Anti-social Behaviour, Crime and Policing Act 2014, s59.
[138] Anti-social Behaviour, Crime and Policing Act 2014, s67. This is a summary only offence with a maximum level 3 fine.
[139] Michael Freeman, 'The Rights of the Child In England' (1981-1982) 13 Columbia Human Rights Law Review 601, 665.

reluctance to embrace more child focused policies continues to bedevil the juvenile justice reform agenda.

2.6.1 International intervention in the ACR debate

For example, in the international sphere, the United Nations Convention on the Rights of the Child has legal force in the UK with Article 3(1) requiring that a state act in 'the best interests of the child'.[140] It is a fine sentiment and initially there was an 'optimistic view that interventions with young offenders were going through a far-reaching and sustainable process of constructive realignment'.[141] The JJS, nevertheless, remains at best half-hearted when measured against this standard. It still retains its reliance on a mini-adult court procedural process in the Youth Court. Nor does it meet one of the main criteria, that custody should 'only be used as a measure of last resort'[142] since 'depriving children of their liberty tends to increase the rate of re-offending'.[143] In the JJS in England and Wales, the custodial punishment option is applied through Detention and Training Orders which must be made for a minimum period of 4 months. It is difficult to reconcile such lengthy orders as consistent with detention as a last resort. The European Union has also accepted that children below the age of 18 years often 'lack the necessary knowledge, experience, and maturity to make responsible decisions',[144] and yet it remains the case in the JJS in England and Wales that children below this age must still answer for their actions. The ACR in the present JJS cannot therefore claim to meet any of the international benchmarks. Nor has it made any progress with reform designed to avoid 'criminalization and to seek family-based or other social alternatives to imprisonment'.[145] The present JJS has developed a strange and seemingly contradictory approach to child offenders; in juvenile justice policy in England and Wales children are 'treated as if they have no

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[140] It has been reformulated in hope rather than expectation. 'All adults should do what is best for you. When adults make decisions, they should think about how their decisions will affect children'. UNICEF ,*UN Convention on the Rights of the Child In Child Friendly Language'*, UNICEF Outreach < https://www.unicef.org/rightsite/files/uncrcchilldfriendlylanguage.pdf > accessed 25 June 2021.
[141] Roger Smith, 'Children's Rights and Youth Justice: 20 Years of No Progress' (2010) 16 (1) Child Care in Practice 3, 4.
[142] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 art 37(b). United Nations (1989) *United Nations Convention on the Rights of the Child* < https://www.unicef.org.uk/wpcontent/uploads/2010/05/UNCRC_united_nations_convention_on_the_rights_of_he_child.pdf > accessed 25 June 2021.
[143] Thomas Hammarberg, 'A Juvenile Justice Approach Built on Human Rights Principles' (2008) 8 Youth Justice 193, 195.
[144] FRA: European Union Agency for Fundamental Rights, *Children's rights and justice Minimum age requirements in the EU* (Publications Office of the European Union, 2018) 5.
[145] Hammarberg (n 143) 193.

responsibility', while still being held 'responsible for their actions'.[146] An odd approach, but one that still holds sway in the JJS.

Criminal defence practice provides a reminder that, whatever the Youth Court Bench Book promotes, children are still being sentenced to custody, though the rate is reducing. For the year ending 2016 to 2017, 1660 children were sentenced to custody, a reduction of 74% compared with 2006 to 2007, but this still gave a daily average of around 870 children being held in such an environment.[147] An even more alarming feature is the racial makeup of those committed to custody with Black, Asian, and Minority Ethnic children accounting for 45% of the custodial population when they form only 18% of children aged 10 years and over in the general population.[148] Figures also confirm the ineffectiveness of the JJS in terms of recidivism, with a re-offending rate of 42.2 % compared to 28.2% for adult criminals.[149] Some limited progress has been made in reducing the use of juvenile custodial sentences but this may be related to initiatives to promote restorative justice or, from a practice point of view, greater sentencing consistency through the use of District Judges, in preference to lay magistrates.

Low-level anti-social behaviour, as noted above, offers an easy target for political and media attention as those involved tend to be drawn 'from working class communities'.[150] In part, this is based on the perceived need to label those involved as *other,*[151] and their acts as 'criminal' and 'antisocial behaviour' and, more seriously, as 'escalating manifestations of a collapse in societal values'.[152] Any debate about the ACR becomes focused on 'the age at which we choose to punish' rather than the 'mental capacities in relation to criminal intent' of the young offenders.[153] This highlights the continuing difficulties faced by those who wish to bring about reform of the ACR, especially when attempting to move the rigid focus of the Overton Window of acceptable policies at a particular time in relation to child offenders.[154] The tradition of the baying public attending court hearings for the most serious cases involving child offenders,

[146] Hammarberg (n 143) 194.
[147] Youth Justice Board / Ministry of Justice, *Youth Justice Statistics 2016/17 England and Wales Statistics Bulletin* (Youth Justice Board 2018).
[148] ibid.
[149] ibid.
[150] Phil Scraton, 'The criminalisation and punishment of children and young people: introduction' (2008) 20 (1) Journal of the Institute of Criminology 1, 1.
[151] Especially with serious cases, for example Thompson and Venables.
[152] Scraton (n 150) 4.
[153] Julia Fionda, 'Youth justice' in Julia Fionda (ed) *Legal concepts of childhood*, (Hart Publishing 2001) 85-86.
[154] The term is named after Joseph Overton and describes a range of policies or concepts that are acceptable to the mainstream population at a given time that changes over time. Mackinac Center for Public Policy < https://www.mackinac.org/OvertonWindow > accessed 25 June 2021.

shows that the demand for 'punishment' by the public seemingly never ends and any reform which seeks to take another route will face strong opposition.

2.6.2 Extreme vulnerability of child offenders

Criminal defence practice, for example, in the Youth Court provides ample evidence to suggest that children from difficult social and family circumstances provide a client base that self-renews because of their vulnerability and susceptibility to unwanted behaviour. This usually shows itself initially in a pattern which begins with repeated interventions by the police, often over a relatively short period. These interventions are often followed by a lull before a renewal of criminal activity often in company with other child offenders. The charity Barnardo's argued that children 'as young as ten or eleven, need to face prosecution for the most grave offences' but for less serious ones committed by them, it was 'unnecessary and more to the point, ineffective'.[155] The charity promoted the idea that there needed to be a broader discussion of the purpose of the present JJS and its intended outcomes, with a view to rebalancing the system, between society acting on behalf of the victims and the child offenders who all too quickly became adults. The limitations on child offenders as effective participants in criminal proceedings was emphasised by the charity's research that showed of those entering the JJS at the youngest ages, some '60% have significant communication difficulties, 24 to 30% a learning disability, 18% suffer with depression, 10% anxiety disorders and 5% psychotic-like symptoms'.[156] There is a great deal of state support for families with special needs, even with the present budgetary difficulties. However, there remains a reluctance to invest in similar services for children involved in criminal behaviour, and to address their low levels of educational attainment, their low aspirations, and their poor social functioning. A simple ACR, fixed at 10 years, misses these indicators. The basic issue of poor communication skills is unsurprising to anyone engaged in Youth Court practice, and generally reflects similar limitations in parents and siblings at the police station and court. It is argued in this thesis that there is a huge, as yet unmet, need to address these issues and to offer at least some legal protection to these most vulnerable children who are drawn into the JJS, if only in the re-invention of a form of *doli incapax*.

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[155] Barnardo's, *From playground to prison: the case for reviewing the age of criminal responsibility* (Barnardo's Policy, Research and Media Directorate 2010) 2.
[156] ibid 5.

2.7 The reinvention of the *doli incapax* presumption

The demise of the *doli incapax* presumption continues to generate arguments as to its effectiveness in practice, and the consequences of its loss to the JJS. Most interestingly, it is often suggested as a reform measure that should be reconsidered and reapplied in the light of its continued use in other common law-based jurisdictions such as Australia. As a rebuttable presumption it remains applicable in all states and territories to 'children between the ages of 10 and 13 [who] are presumed to be incapable of understanding the difference between naughty behaviour and criminal acts that are 'seriously wrong'' so that they cannot be held criminally responsible for their acts.[157]

2.7.1 The loss of the *doli incapax* presumption

The application of an ACR relies on the simple idea that children have capacity to know the difference between right and wrong. Of course, capacity is not simple. The concept 'carries with it some implication that a child has the requisite degree of 'knowledge' and it is strongly linked to the idea of 'crime and punishment', an idea which permeates the JJS.[158] This linkage feeds into the idea that 'criminal responsibility should be imposed on people who deserve to be punished', and that 'requires capacity and choice'.[159] Knowledge, in this equation, equals responsibility. In the past the dichotomy, between the legal system and the child before it, was partly addressed by the *doli incapax* presumption.[160] As discussed above, the issue is at what age a child is 'psychologically mature enough to be considered legally responsible for his or her actions'.[161] The abolition of the *doli incapax* presumption removed a working, but underused, legal device which with hindsight, should have been retained, as a reminder that child defendants are always de facto vulnerable within the JJS. It was a marker which indicated that such children were less likely, objectively, to be criminally responsible. The ACR is not, in any meaningful sense, capacity dependent but, it is argued in this thesis, it should be. Without the *doli incapax* presumption for younger children, this idea only exists, if at all, in a court sentencing exercise when is far too late to act as a means of excluding children from the

[157] Kate Fitz-Gibbon and Wendy O'Brien, 'A child's capacity to commit crime: Examining the operation of doli incapax in Victoria (Australia)' (2019) 8 (1) International Journal for Crime, Justice and Social Democracy 18, 19.
[158] Sharma (n 122) 177.
[159] Elliott (n 81) 293.
[160] Doli incapax, Legal Latin describing a person deemed incapable of forming the intent to commit a crime especially due to age.
[161] Claire Bryan-Hancock and Sharon Casey, 'Young People and the Justice System: Consideration of Maturity in Criminal Responsibility Psychiatry' (2011) 18 (1) Psychology and Law 69, 70.

criminal justice process. In practice, the recognition and weight given to a child's capacity to understand the consequences of his actions, as assessed by the magistrates, can become a negative feature of the sentencing process. The greater the capacity and understanding identified in the sentencing exercise, the more it becomes a quasi-aggravating factor, beloved by courts with the modern mind-set and adherence to sentencing guidance.

The removal of the *doli incapax* presumption represented a sea change that showed how far the JJS in England and Wales lagged 'behind the rest of Europe in the age at which it allows children to be drawn into the criminal justice system'.[162] It represented a step back just as the rest of Europe was moving forwards to a more nuanced understanding of child development and its relationship to criminal responsibility. In addition, its removal contributed to policy changes within the JJS and 'a marked preference for strategies based on the principle of 'early intervention'', including measures relating to anti-social behaviour with, as noted above, a 'tendency to extend the principle of criminal responsibility to younger age groups'.[163] The arguments for revisiting the ACR and the reintroduction of a form of the *doli incapax* presumption persist, though as ever, governments remain 'resilient to domestic criticism of the low age level of criminal responsibility' and staunchly 'committed to the deployment of criminal law as an answer to social problems'.[164] The Children's Commissioner reinforced the concerns felt by many about the ACR issue, acknowledging that the country failed 'in its treatment of children and young people in conflict with the law and in respect of the low age of criminal responsibility'.[165] The public and legal perception of crime remains very straightforward whether committed by an adult or a child over 10 years old, it should mostly be dealt with by a formal system of procedure and punishment. This thesis seeks to rebut that perception by promoting a more positive approach for the betterment of child offenders.

2.7.2 A new rebuttable presumption of *doli incapax*

Whether there is a change in the application of the ACR by a return to a form of the *doli incapax* presumption, or some other artifice, to exclude children from criminal responsibility for their behaviour, may, in part, depend on developments occurring elsewhere. New Zealand, like Scotland, distinguishes 'between the age of criminal responsibility (10 years) and the age of

[162] Crofts, 'Lagging behind Europe' (n 98) 1.
[163] Michael Cavadino and James Dignan, *Penal Systems: A Comparative Approach* (Sage Publications 2006) 210
[164] Crofts, 'Lagging behind Europe' (n 98) 1.
[165] Office of the Children's Commissioner, *Response to the Ministry of Justice's consultation: Breaking the cycle: effective punishment, rehabilitation and sentencing of offenders*, (Office of the Children's Commissioner 2011) 3.

prosecution (14 years)',[166] on the basis that there was an 'age at which societies were willing to punish child offenders and so 'higher' ages were seen as protective'.[167] Alternatively, the ACR concept could also be nudged by the use of alternative terms and a reinterpretation in the application of a higher conditional age as, for example, in Queensland, Australia. The Queensland Criminal Code addresses the concept of 'immature age' and precludes anyone under 10 years from having criminal responsibility, and similarly anyone under 14 years cannot be criminally responsible 'unless it is proved' that he 'had the capacity to know' that he 'ought not to' so act.[168] It is a simple but effective way of reordering how the question of attribution of criminal responsibility is considered. Of course, juvenile justice policy cannot 'prevent offending or reduce re-offending' in any jurisdiction, but it can reflect key values, such as 'the recognition of children's vulnerability and developmental stages', a feature that sometimes is in short supply in the JJS.[169]

It is argued that the ACR, when set at too low an age, as in the present JJS, means that 'young children can be punished and detained for their behaviour when they may not even have understood the wrongfulness of what they had done'.[170] Crofts, emphasising the unfairness inherent in the present system, has proposed that the age be increased to at least 12 years, matching European and international standards. He has argued for a higher conditional age level from twelve until an age that children are developed enough to be criminally responsible.[171] Further, he suggested any return to 'a presumption or a defence of *doli incapax'* should be with an upper age limit set ideally 'at 16 or even 18 thereby bringing the age of criminal responsibility into line with the age at which other rights and responsibilities are assigned to children'.[172] These are strong arguments which reflect the basic assumption in this chapter, that the younger the child offender, the less justifiable the argument to impose criminal responsibility. Unfortunately, Croft's suggestion is not likely to bear fruit soon, but it is nevertheless, important to continue to promote such a change as proportionate and fair to vulnerable children drawn into the JJS.

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[166] Alison Morris and Loraine Gelsthorpe, 'Towards Good Practice in Juvenile Justice Policy in the Commonwealth' (2006) 32 (1) Commonwealth Law Bulletin 27, 30. This separation is a feature of the JJS in Scotland and adaptable to England and Wales procedurally but not politically.
[167] ibid 30.
[168] Queensland Consolidated Acts, Criminal Code 1889, s29.
[169] Morris and Gelsthorpe (n 166) 53.
[170] Crofts, 'Lagging behind Europe' (n 98) 7.
[171] Crofts, 'Catching up with Europe' (n 117) 288.
[172] Crofts, 'Catching up with Europe' (n 117) 288.

2.8 Conclusion

This chapter has laid the foundation for the thesis's argument by exploring the ACR and associated concepts which, it is argued, limit the possibility to reform the JJS. The present procedural system remains fixated on a specific age as an entry gateway and another as marking an individual's admission to the adult system on attaining 18 years of age. It is suggested that the gateway age, and the rationale for a fixed ACR, does not lead to the fair and just treatment of children who, without question, are so variable in their abilities and vulnerabilities that there is a clear need for reform beyond the scope of the JJS as at present constituted. Whether reform is possible within the present system is not an easy question to answer. Reform might include a move towards a new form of the *doli incapax* presumption, or individualised assessments to exclude children from the JJS, or simply viewing children as *incapax simpliciter* and without legal capacity until aged 18. Whether such reforms would be effective when considered in the light of high-profile cases like Thompson and Venables is even more questionable. However, it is argued that there is a serious need for reform which should be based on an assessment of the individual child and whenever possible, diversion from the JJS should be the preferred option. Reform should be based on a recognition that childhood misbehaviour can become criminal behaviour in a moment, without any deep thought. For many children the necessity of criminalising them must be questionable.

At the very least, there should be an increase in the ACR as proposed by Lord Dholakia, amongst others, and it would at least bring the JJS back into line with other European countries. Alternatively, perhaps, a return to a two-tier structured age approach, one in which the duty rests on the JJS to show a child has sufficient capacity to have responsibility in law, as in the Queensland model, might be more acceptable. This would at least acknowledge a child's capacity as the determining issue of criminal responsibility leading to prosecution. Though this might be politically and publicly unpopular, it would help to meet the aspiration expressed by the United Nations Convention, to act in the best interests of the child. It must be recognised, however, that even recent proposed sex and gender legislation has incurred less public disquiet than the idea of decriminalising childhood criminal behaviours. This idea probably remains a step too far, both for the current political leaderships of the mainstream parties and for the public. For the present therefore, there must be an acceptance that the concept of an 'age' at which criminal responsibility is imposed on a child remains embedded in the JJS and in society.

The next chapter

The present system is entrenched by a combination of historical and cultural totems that make radical reform, as envisaged in this thesis, difficult to promote. Despite recent developments, such as the Child First approach as promoted by the Youth Justice Board, the JJS is a system that remains rooted in the nineteenth century. It is necessary therefore to understand how and why the present system has developed in order to rebut it and proffer a valid and cogent proposal for reform. The next chapter examines therefore the historical development of the criminal justice system, in particular the demands that led to the creation of a separate JJS. It focuses on the changes in the perception and treatment of child offenders that led to the creation of the JJS, especially those that arose from the social upheavals caused by industrialisation and urbanisation during the late Victorian period. The present JJS, it is argued, cannot be understood without an appreciation of this era of tremendous social change. The question will then be debated whether any radical reform proposals are likely to be successfully implemented within a system which still clings to a Victorian structure of crime and punishment.

Chapter 3

The nineteenth century and the juvenile justice system

3.1 Introduction

Chapter 2 examined the age of criminal responsibility (ACR) as the fundamental concept underpinning this thesis. This chapter builds on that foundation by examining the historical context within which the present juvenile justice system (JJS) developed by tracing its roots in the nineteenth century. The ideas and developments that occurred during that century laid down the foundations for the procedural architecture of the present JJS. In daily practice, the present system can appear as one which, in many respects, is still mired in Victorian legalese and formality, from courtroom etiquette to the buildings used in some instances.

The nineteenth century saw the development of the JJS as a separate and distinct body with principles and procedures which were formulated in response to demands to treat child offenders with the aim of rehabilitating them. These demands came from two sources. The first was a new understanding of child development which had begun to emerge in the seventeenth and eighteenth centuries. The ideas of Enlightenment thinkers, such as John Locke and Jean Jacques Rousseau, contributed to the recognition of childhood as a distinct phase of life, separate from adulthood. However, the second source and the key driver of juvenile justice reform in the nineteenth century was the social upheaval which accompanied industrialisation. Many of these reforms were developed to meet the challenges of child offending behaviour within the newly urbanised and industrialised society. Even so, it is notable that the first dedicated juvenile court in England and Wales did not open until 1900 in the Victoria Law Courts in Birmingham. Although renamed the Youth Court, the present court for juveniles still sits in the same ornate, high ceiling courtrooms today. This, perhaps, indicates the lack of progress since its conception. The present JJS, especially in its use of a formalised court setting, often appears as a system out of its time, and the formality of the courtroom and the court system remains one of the major obstacles which prevents juvenile offending being tackled in a more child-centred way.

The nineteenth century modernisation of juvenile justice was one in which the legal system attempted to be more child-centred and to move beyond black letter law procedures. It developed, however, without recognising the extent of the differences in the functional capacity between adult and child offenders, bar in an elementary way as noted in Chapter 2. This chapter

considers whether the introduction of the nineteenth century JJS was truly a new and revolutionary development, or whether it was simply an ad hoc accretion of ideas, cobbled together in response to juvenile offending. It will also assess whether the reformist ideas of the nineteenth century remain valid or were simply the products of that time and are now without relevance. It is argued that, although a kernel of useful insights remains, the ideas of the nineteenth century which still form a key part of the present system's mindset, are not sympathetic to the needs of child offenders and are not open to further reform.

The chapter considers how the nineteenth century development of the JJS was driven by paternalistic Victorian attitudes towards increasing criminality, and the growth in civic pride shown by localism and the drive for social improvement. It highlights the durability of the nineteenth century attitudes to crime and punishment, and the timidity these attitudes induce today, inhibiting our ability to generate and implement reforms based on our present understanding of child developmental behaviour.

3.2 The nineteenth century as a promoter of change

The ACR is a simple age threshold in an otherwise complicated JJS. To understand how, why and whether such a simplistic ACR remains the most appropriate approach requires consideration of developments in the criminal justice system that arose because of societal changes. The nineteenth century heralded the implementation of new ideas that led to socio-legal controls on children's behaviour as experienced by adults, rather than being rooted in a concern for the individual child's wellbeing.

3.2.1 The nineteenth century in today's JJS

The development of the present JJS has arisen from piecemeal responses to behaviours classified as unwanted and warranting a criminal law response. This was often related to the maintenance of good order and behaviour in the public space and was usually based on the perceptions and definitions of right-thinking behaviour by the wealthier higher social classes. This has somewhat altered in the modern era in that politicians now seem to obsessively follow public disquiet about abnormal crimes and individual criminals. Unfortunately, this has tended to produce 'clickbait' reforms designed to meet a public clamour that 'something must be done'. Such responses which are often not well thought through tend to worsen the legal position of defendants, especially child ones. The most well-known illustration of this phenomenon is the legal consequences following the convictions in the James Bulger murder case and the consequential removal of the rebuttable presumption of *doli incapax*. It has

certainly not led to a coherent reform of the system in the light of modern understanding of criminal behaviour in children.

3.2.2 The nineteenth century as a cauldron for societal change

The development of the JJS was driven by a hotchpotch of ideas derived from the prevailing belief structures of the time. The perception of, and the response to, juvenile crime reflected the steady developments in the understanding of the social, cultural, and environmental factors that contributed to criminal behaviour. This process was further complicated by a typically British layered approach to development rather than the creation of a clean slate one based on new ideas. This is reflected in the slow and gradual increase in the ACR, and the absence of any bold moves to exclude children from the criminal justice system.

Although the criminal justice system developed over many centuries, it was the industrial revolution, and the tectonic social changes it engendered during the eighteenth and nineteenth centuries which drove developments in dealing with criminal behaviour by children. These social changes occurred due to many factors, including population growth, urbanisation, child education, and industrialisation, together with the expansion of consumerism and the wage economy. They gave rise to greater social division and deprivation, poor housing, and disease and a concomitant increase in criminalised behaviour. The perceived rise in criminal behaviour, especially among the young, was a focus of much concern and led to the development of the concept of a simple ACR. This produced a JJS that ascribed criminal responsibility to children, irrespective of their mental capacity, and without any assessment of their competence to appreciate and control their own actions. The simple ACR formed the lynchpin of the Victorian JJS, and this thesis poses the question whether an ACR is still acceptable today, or whether it is an historical anachronism that should be abolished. The knowledge base and understanding of childhood development continues to expand and, it is suggested, reinforces the view that the JJS's reliance on legal theory and procedures to process offenders is woefully inadequate.[173]

From the beginning of industrialisation and urbanisation, the socio-legal response to the behavioural challenges posed by children has always recognised the need to formulate a legal limit to their criminal responsibility. This need can be contextualised by reference to the earliest

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[173] Rick Nevin, 'How Lead Exposure Relates to Temporal Changes in IQ, Violent Crime, and Unwed Pregnancy' (2000) 83 Environmental Research 1 and Herbert Needleman, Julie Riess, Michael Tobin, Gretchen Biesecker, 'Bone Lead Levels and Delinquent Behavior' (1996) 275 (5) Journal of the American Medical Association 363. For example, dysfunctional parenting and basic state education (poor numeracy and literacy), inappropriate diet or the use of chemicals such as lead in general environment associated with an increase in aggressive and delinquent behaviour.

cultural influences that continue to contribute discretely to societal behavioural norms. These earliest totems have subtly altered over time in relation to age and childhood capacity, to enable the law to be used as a tool of social control. Frequently, the criminal law changes have related to children from lower socio-economic classes, to prevent the undermining of the norms of the controlling elite. However, by the late Victorian period changes were proposed that included positive attempts at childhood reformation rather than simple punishment.

The nineteenth century witnessed changes in the perception of children. There was a recognition of their value and usefulness as workers, their individual capacities and abilities, and their potential, with basic education, to contribute economically to wider society. There was also, however, a more negative concern regarding their tendency to criminality. The recognition of the uniqueness of childhood criminality, and how it was tackled during the nineteenth century, is central to understanding the present JJS since, it is argued, those ideas still pervade the system. The responses developed in this period formed the core of the JJS and warrant examination to explain the present JJS's approaches in the context of this thesis. The low ACR meant that children caught by the simple age threshold were, for the most part, treated as being as responsible and as culpable as adults. The consequences of a guilty judgement tended to be ameliorated with lesser punishments being imposed on children. Added to this was the idea of reform and rehabilitation which was considered more likely to be successful with them. However, then as now, being treated and recorded as a juvenile criminal, even with the intention of reform and rehabilitation, remained a detriment which limited the prospects and life chances of such children.

3.3 Industrialisation and urbanisation in a society in flux

The nineteenth century saw a raft of changes in society because of industrialisation and the economic downturn following the end of the Franco-European War in 1815. This was followed by a period of steady economic revival, with expanding trade within and beyond the British Empire and the industrialisation of production and fundamental social changes that affected everyone.

3.3.1 Urbanisation and child offending

The social turmoil created by the industrial revolution and the mass production of goods on an unprecedented scale was accompanied by the urbanisation of much of the population. There was a growth in domestic radicalism, including demands for better standards of living. Coupled

with political and trade union reforms in the 1830s, with the Chartist Movement and the Great Reform Act 1832, there was an increased pressure to extend the franchise. The legal structure was also seen as ripe for reform. However, Liberal attempts to improve the lot of the lower classes also encompassed the need to maintain social control, especially over the behaviour of lower-class children. Declining childhood death rates meant they were becoming more numerous, and this was most apparent in urban areas where their perceived waywardness also became a major concern. The situation, it was felt, required intervention to exert control over the behaviours of children from the lower classes. This intervention took the form of educational provision for children, and a rejigging of the legal system to allow it to deal more effectively with criminality. It was during this period that concerns first arose about social changes that were occurring; the working classes were noted as being less deferential towards their betters. There was a perception that the stability of the social hierarchy was being undermined by a growth in crime, especially that committed by children. There were calls from politicians in response to reform the criminal law to stabilise the situation. Greater investigation of childhood criminality, through more data collection, served to heighten those fears as the statistical evidence gathered reinforced the idea that there was, indeed, a problem. Child offenders were seen as 'the shape of the future and as potential mirrors of the broader state of social order' and as indicators of 'nascent insubordination, idleness and family degeneration of many sections of the burgeoning urban working class'.[174]

The nineteenth century from the end of the Franco-European War onwards encompassed huge social changes leading to political responses and interventions from social reformers. These became more marked as the century progressed, with the height of legal reform occurring at the end of the century. The immediate economic collapse in 1815 in agriculture and war-related materiel led to increasing crime rates across the age range, but there was an increasing certainty that 'juveniles were responsible for a great deal of crime'.[175] These themes were rehearsed by reformers, and by Parliament, and they formed part of organised campaigns by liberal minded activists and philanthropists promoting their own agendas, in relation to issues such as the use of capital punishment and reform of the criminal law in its application to children.[176] One particular focus of social concern was the behaviour and lawlessness of underclass children. There was a fear that there were 'growing bands of children cast adrift on the streets and finding

[174] Peter King, 'The Rise of Juvenile Delinquency in England 1780-1840: Changing Patterns of Perception and Prosecution' (1998) 160 Past & Present 116, 157.
[175] ibid 156.
[176] ibid 156.

themselves unable to survive by legal means', and that 'juvenile crime was but another manifestation of the growing pains of a new urban society'.[177] Population growth and internal migration to expanding urban areas reinforced the factors that produced increased childhood criminality. The modern parallel is perhaps most obvious in the overall lower average age of criminals in those towns with above average influxes of immigrants from east European states.

The growth, actual and perceived, in childhood criminality, coupled with concerns about the death penalty, were met by the availability of lesser, though still harsh, punishments tailored to child offenders. Perversely, these changes increased the criminalisation of children as 'previous taboos about prosecuting' children were removed, and the number of pickpocketing prosecutions actually increased after it ceased to be a capital crime in 1808.[178] The tenor of the debate during this transitional period highlighted genuine concerns about the future shape of society. Penal policy was seen as a key response area by those who felt themselves, and their social position, to be under threat. More interestingly, these changes included the 'movement towards the provision of basic education facilities for the poor in the shape of Sunday schools, industrial schools', and other attempts to deal with childhood criminality.[179] There was a general view that the problem was a consequence of industrial development and the growth of towns and, whilst there was concern at the social cost, there was equal concern over the expense and loss to the country. The 'othering' of child offenders is reminiscent of modern media descriptions of child gang members, similar to the assessment in a Parliamentary intervention into a debate about delinquent children. It was observed that they were a race 'sui generis', 'different from the rest of Society, not only in Thought, Habits and Manners, but even in Appearance; possessing, moreover, a Language exclusively their own'[*sic*].[180] A view, that might be expressed today, voiced the concern that the 'life and business' of that race 'is to follow up a determined warfare against the constituted authorities by living on idleness and on plunder'.[181] An extreme assessment but illustrative of the genuine fears on the part of some in the higher controlling social classes.

[177] ibid 138.
[178] ibid 152.
[179] ibid 154.
[180] Susan Magarey, 'The Invention of Juvenile Delinquency in Early Nineteenth-Century England' (1978) 34 Labour History 11 quoting Parliamentary Papers 1835 (439) XI, 583.
[181] John Jacob Tobias, *Crime and Industrial Society in the 19th Century* (Batsford 1967) 53. He quotes Fraser's Magazine June 1832.

3.3.2 Societal responses to the changes

Pressure from wealthier social classes, who were benefiting from the increased economic development unleashed by continuing industrialisation, led to a number of novel legal approaches being implemented, in an effort to meet the challenges produced by the structural changes occurring in society. The period was characterised by the movement of people from a rural to a town centred way of life, the dislocation of family and community bonds, and a reduction in social wellbeing. It also produced severe poverty amongst many at the bottom of the social ladder and added to the fears of the higher social classes that there would be social revolution, as seen in Europe during the 1840s, if matters were not addressed to reassert control. There were attempts at all levels of society to improve the lot of the individual not only financially, but also socially and spiritually through the development of early trade unionism and Methodism, and the continuing growth of other Nonconformist denominations. The State also responded, through the Established Church, with the Church of England expanding its parish system into the growing urban areas with new churches being built and new church schools established. These were often funded by the non-resident aristocracy who retained economic and social control through commercial, industrial, and housing development schemes. The economic consequences of these changes soon became evident. The increase in available labour in the growing urban areas saw an increase in the populations in many towns and cities. This, together with growing consumerism, led to increased criminal activity. In particular, there was a growth in child offender prosecutions related to property crime. Other forms of child criminality causing concern included 'from gambling to Sabbath-breaking', but as with modern society, property 'formed the primary' concern. Interestingly, there was no equivalent increase in violent crime which 'was notably absent from contemporary discussions about juvenile lawbreaking'.[182] Present day criminal defence practice mirrors this curious phenomenon, with child offenders much more likely to be prosecuted for petty thieving and criminal damage rather than violence.

The perceived need to respond to the growth in criminal activity led to the creation of new social controls, such as urban policing, changes in criminal law, increasing prosecutions, and changing attitudes towards childhood and the poor.[183] The reality of the 'new society' was evident in a demonstrable shift in the willingness to prosecute children. However, the zeal for

[182] King (n 174) 122.
[183] King (n 174) 118.

prosecution was also accompanied by a zeal for reforming child offenders and there was a growing recognition of the social drivers of childhood criminality or delinquency by contemporary writers and social reformers. As with many legal developments in England, King observed that by the end of the period

> 'juvenile delinquency was established as a major focus of anxiety among the propertied, and separate penal policies and trial procedures for young offenders were being introduced for the first time'. [184]

The new modes introduced to tackle child offending reflected public concerns but also demonstrated the veracity of the assertion that there was nothing new under the sun, and as today, penal policy initiatives often arose from concerns of the moment.[185] There are always 'recurring cycles of fear about youthful hooligans' that can be traced to the early nineteenth century, and the present era is not immune from the same fears.[186]

Social reformers focused their attentions on problems involving specific groups in society, especially in relation to children and young people, leading to the 'reform of many aspects of the criminal justice system or the broader rise of a more disciplinary social agenda'.[187] In analysing the rise in child prosecutions, the issue was whether it reflected an increase in criminal behaviour because of urbanisation and industrialisation. Had more people and more portable goods in a smaller area led to the increase in criminal behaviour? In other words, had the combination of demographic, economic and social changes, effectively produced a society markedly different to the preceding non-industrial and more socially static one?[188] The answer seemed obvious, the previous rural based economy had had high poverty and limited educational opportunities, small villages and towns had had a fixed hierarchical social order and an almost mandatory religious adherence. This rigid social structure was ripe for the changes produced by urbanisation and industrialisation. Those who benefitted most from the new order and who had risen up the financial, if not social order, demanded the introduction of legal controls and redress against those lower down to ensure that their arriviste status was maintained. The challenge was whether this demand should be met by greater behavioural

[184] King (n 174) 116.
[185] 'What has been will be again, what has been done will be done again; there is nothing new under the sun' Book of Ecclesiastes Ch. 1: 9.
[186] King (n 174) 117.
[187] King (n 174) 117.
[188] King (n 174) 120.

repression, as in Tsarist Russia during the same period, or greater liberalisation as in the United States.

The reformist intervention included the terms used to describe a child offender with, for example, a preference for 'juvenile' rather than 'youth'. The latter indicated the 'journey to adulthood, usually lasting until the mid-twenties or beyond (i.e., until the achievement of domestic independence or marriage)'.[189] The term was used in relation to those prosecuted who were generally in their late teens and mid-to-late twenties and contrasted with contemporary usage, as illustrated when 'evidence to parliamentary committees mostly defined juveniles as not beyond the age of seventeen'.[190] The use of the term in this more restricted sense enabled the debate to be fixed on this young age group which was identified as the location of criminality by young people. The legal system responded in a novel way, but the gulf between the criminal law system and those drawn into it, was exemplified by the comments of Oscar Wilde in a letter to The Daily Chronicle newspaper dated 27th May 1897. He observed that

> 'The present treatment of children is terrible, primarily from people not understanding the peculiar psychology of a child's nature. A child can understand a punishment inflicted by an individual, such as a parent or guardian, and bear it with a certain amount of acquiescence. What it cannot understand is a punishment inflicted by Society. It cannot realise what Society is'.[191]

It is very difficult to argue that there has been much change in the intervening period. One of the interesting features that emerged from the reformist agenda, was a renewed focus on local justice in a way that was often not part of the criminal law system during the nineteenth century.

3.4 Victorian paternalism

Victorian society whilst remaining essentially socially stratified by class nevertheless, paradoxically, created a vibrant sense of civic society and duty in the middle and upper classes. There were great strides made by individuals and societies including mutual and friendly societies, the charitable provision of alms houses and medical services. At the other extreme, there was provision of the most basic kind for the destitute and those unable or unwilling to help themselves, with the increasing use of workhouses. Education provision expanded through British and National schools and, most notably, for all ages with the growth of libraries, with the first public one opening in 1857. This development was later supported by philanthropists,

[189] King (n 173) 121.
[190] King (n 174) 121.
[191] Oscar Wilde, 'Children in Prison and Other Cruelties of Prison Life' (Murdoch and Co.,1898)

as exemplified by Andrew Carnegie during the latter part of the century who funded them throughout the British Isles.[192] These changes led to an element of social mobility between the unskilled and skilled working classes, as new trades and skills were needed with technological advances in industry.

3.4.1 The Victorians and the treatment of child criminals

As today however, there remained a stubborn rump unable or unwilling to grasp the opportunities offered and those with political and social power responded harshly to this group. There was a reluctance by some conservatively minded individuals to see merit, for example, in education as a way out of dependency and poverty and by extension criminality, especially for street children. Charles Dickens recorded a case at Bow Street Court in May 1852 with two children sentenced to be whipped and commented ‘Woe, Woe! can the State devise no better sentence for its little children?’, demanding, ‘will it never sentence them to be taught?’[193] A sentiment that still seems relevant today.

Similarly, the Victorian religious conundrum between the harsh need to punish even children for breaking the Eighth Commandment, not to steal, and the injunction that the little children represented ‘the kingdom of God’, has never, even in the present age, been satisfactorily resolved.[194] The early twentieth century saw further consolidation of the Victorian approach to reforming children and was focused on attempts at diversion from criminal behaviour, rather than considering whether such children ought to be held criminally responsible at all. The crossover period into the twentieth century remained defiantly Victorian in outlook, though there was an acceptance that

> ‘the linkage between crime and poverty [could be] an attribute of social and psychological growth in adolescence and therefore only indirectly subject to economic and social conditions’.[195]

The early twentieth century witnessed one of the last religious revivals amongst the Nonconformist denominations. It led to the spread of the temperance movement and moves to extend secondary education to the lower classes, as part of the struggle to improve social

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[192] Historic England, The English Public Library 1850-1939 (2014 Historic England) 3.

[193] Diary of Charles Dickens, May 1852, ‘Two little children whose heads scarcely reached the top of the desk were charged at Bow Street on the seventh with stealing a loaf out of a baker’s shop. They said in defence that they were starving, and their appearance showed that they were speaking the truth. They were sentenced to be whipped in the House of Correction. To be whipped!’.

[194] ‘Thou shalt not steal’ The Book of Exodus Ch.20:15 and ‘Suffer little children to come unto me, and forbid them not: for of such is the kingdom of God’ The Gospel of Saint Luke Ch.18:6.

[195] John Gillis, ‘The Evolution of Juvenile Delinquency in England 1890-1914’ (1975) 67 Past & Present 96, 97.

conditions. Discipline and self-reliance were taught through social movements, such as, for example, the Boys Brigade and the Boy Scouts. They fed directly into British values and promoted the Empire, effectively British exceptionalism for 'the health and idealism of the young'.[196] Perversely, these new avenues of socialisation increased 'fears about the vulnerability of the adolescent' in that youths were malleable and 'so prepared for good and yet so accessible to evil.'[197] These contradictory attitudes towards children were similarly reflected in the criminal justice system as it edged towards a discrete JJS.

Even when children and young people were in employment, it was recognised that they were vulnerable to misbehaving in ways that would bring them into conflict with the criminal law. The pressure to conform socially meant that resistance to controlled environments for youthful excesses was 'interpreted as evidence of anti-social tendencies on the part of all adolescents thereby justifying further protective measures.'[198] Such resistance

> 'was particularly pronounced among a large part of working youth, for whom teen years traditionally had been free of all institutional involvement apart from employment, and to whom supervision appeared both unnecessary and illegitimate'.[199]

An illustration is provided by the city of Oxford where prosecution statistics during this period showed an increase in criminal behaviour between 1890 and 1910, as it underwent the same socio-cultural and economic-institutional changes as other small to medium sized towns and cities. Prosecution rates for males under 19 years for indictable and non-indictable offences rose sharply from a decennial average of 29.6 offences per year in the 1880s to 72.7 in the 1890s and to 99.2 in the 1900s.[200] Most alarmingly to the citizenry, childhood criminality increased at a faster rate and 'was well ahead of the city's rate of population growth.'[201] The outcome of these socially driven concerns about child offending has been described as 'the institutionalisation of adolescence', a classification that lowered expectations of childhood behaviour. It provided a categorisation for the fears of those involved in working with children that was transmitted

[196] ibid 97.
[197] ibid 97.
[198] ibid 97.
[199] ibid 97.
[200] ibid 99.
[201] ibid 99.

> ‘to legislators and law-enforcement authorities, with the result that types of juvenile behaviour previously dealt with in informal ways became the subject of prosecution’.[202]

While the extent of the unwanted childhood behaviour varied as to location and type of offending, the overall picture showed a greater increase in relation to non-indictable offences, such as drunkenness, gambling, loitering, damage, begging.[203] It is almost an earlier manifestation of the self-induced increase in criminal anti-social behaviour in the 1990s and 2000s. Both periods suggest legal interventionist responses arise from uncertainty as how best to control expressions of youthful behaviour during times of socio-economic change. Group activity by boys also played a part in the prosecution pattern, with, for example, in 1900, 70% of arrests involving ‘groups of two or more, sometimes as high as ten to fifteen’ and this led ‘the public and the police to attribute anti-social intents to boys collectively’.[204] The modern anti-social gang of children clearly has a long pedigree, but this waywardness must be balanced against positive outcomes, such as ‘the improving health and appearance of children in Oxford during the period, credited in part to universal elementary schooling’.[205] It is a reversal of this pattern which marks out the child offender with a breakdown in education often being linked with unwanted criminal behaviour and demonstrated to present day criminal defence lawyers by their child clients who rarely attend school.

Policing methods also altered with the police becoming more procedural in tackling childhood criminality and even petty misbehaviour, ‘abandoning their old practice of dealing with juvenile offences on the spot’, the clip on the ear approach to crime reduction.[206] Greater procedural formality meant that the most immediate route to challenging behaviour in public spaces disappeared and local police constables could no longer act as a supplement to parental discipline by imposing corporal punishment without objection.[207] This was a response to increasing social-awareness and campaigning groups, for example the National Society for the Prevention of Cruelty to Children and its agenda to protect children from the harsher aspects of the criminal justice system. Unfortunately, the progress of its agenda led to the police criminalising children by prosecuting offences that might have been resolved by local resolution in the past. Ironically this feature of local justice has lately been reintroduced, though

[202] ibid 98.
[203] ibid 99.
[204] William Edward Sherwood, *Oxford Yesterday: Memoirs of Oxford Seventy Years Ago* (Oxford, I927) 42.
[205] ibid 42.
[206] Gillis (n 195) 97.
[207] Gillis (n 195) 97.

in a much-modified form as local resolution initiatives by the police. The campaigning groups often combined a fear of social disruption with pity for the juveniles and this led to the growth of urban missionary work by the evangelical Christian Movement, including the Salvation Army and the Church Army. As with modern social justice campaigns, these socially minded interventions confirmed the dictum, 'seek and ye shall find'.[208]

The social and legal consequence of childhood misbehaviour, and even the very concept of childhood was being manipulated during this period so that the earlier view that children were simply small adults equally capable of work and criminal behaviour as an adult, became more nuanced. An allowance, if not an excuse, was made; that they did not have the same degree of responsibility and culpability for actions, which if committed by an adult would be criminal in nature. In effect, the language of society and the law had fused, and the concept of 'childhood' could serve to mitigate behaviour, suggesting that there were grounds to assess them differently to adults. This had consequences for their criminal responsibility and culpability in criminal law and demonstrates the steady progression to the present JJS.

3.4.2 The Victorian concept of childhood and criminality

The progression towards a JJS was moulded in nineteenth century terms, with the attendant social mores and behavioural expectations of those involved in the political and civil servant classes tasked with responding to changing times. This is demonstrated by attitudes to education where the expectation that boys and, to a lesser degree, girls would be educated was very much confined to the middle and upper classes. Though, with the continued industrial development during the century, efforts were made to promote basic education by the state to the lower classes, this was only on the basis that it would produce more useful workers. The parallels, with present day educational failings, reflect the underlying rationale for state provision, to provide educated and therefore potentially more productive members of the workforce. Advocates for widening the availability of education were motivated by the recognition that it might be a road to individual social and financial improvement. This led to the concept of childhood as a time of development being expanded for all children, including the degree to which they should be considered legally responsible and culpable in law for their actions. The notion of childhood had broadened in its application beyond the higher social classes by the 1820s, though it was not 'generally extended to the children of the labouring sort

[208] The Gospel of Saint Luke Ch.11:7.

until after 1830'.[209] The latter children were viewed as 'underemployed and with little educational or welfare provision' and thought of as 'idle, and their idleness in turn was seen as promoting vice and crime'.[210]

There are similarities to the present-day approach to childhood offending, in that most child offenders are from lower social classes. However, there were genuine attempts to improve the lot of such children by endeavouring to avoid formal interventions, by either ignoring or dealing informally with minor wrongdoing as noted above. This simple and direct interventionist control was lost, however, and transformed into a vigorous policy of prosecution against child offenders, and it had the effect of 'increasing' the levels of criminality by the fact of due process being applied.[211] This negative effect on children was recognised and there were concerns that, for example, imprisonment

> 'would simply corrupt young offenders even further, but the vital movers – the victims – were beginning to move decisively towards direct judicial discipline and away from informal sanctions in cases involving juveniles'.[212]

As in present day Britain, the perception arose that the causes of childhood offending were related to difficult social circumstances, with many young working children employed in the 'least desirable, lowest paid and most precarious' jobs.[213] In a time of developing consumerism these younger workers were vulnerable, being surrounded by bulging open shop fronts servicing the ever-growing material needs of the prosperous middle classes, with petty property crime occurring as a consequence.[214]

In addition, widening the concept of childhood itself produced a shift in determining who might become a criminal. Rather than being dependent on social class, it had subtly morphed into a 'stage of life', so that adolescence replaced station in life as the perceived cause of misbehaviour.[215] A further unintended consequence, produced by extending the scope of criminal law and categorising behaviours as criminal, was the increase in crime because of its identification as such. The nineteenth century resonated with attempts to understand the growth in childhood offending and its causes, whether moral, social, or economic, and although often

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[209] King (n 174) 158.
[210] King (n 174) 158.
[211] King (n 174) 160.
[212] King (n 174) 161.
[213] King (n 174) 164.
[214] King (n 174) 164.
[215] Gillis (n 195) 97.

couched in expressive terms, the sentiment was genuine. These concerns were voiced in 1851 at the Birmingham Conference whose objectives included the

> 'Consideration of the Condition and Treatment of the 'Perishing and Dangerous Classes' of Children and Juvenile Offenders, with a view of procuring such Legislative Enactments as may produce a beneficial change in their actual condition and their prospects'.[216]

The nineteenth century witnessed the application of the criminal law to children, with terrible outcomes and punishments before the advent of more reforming tendencies, as expressed at the conference, bore fruit.[217] The reformist agenda then began to gain traction and implementation of their reforms took place in tandem with the growth of localism and civic society.

3.5 Localism and the drive for social improvement

Localism can be defined as the growth of civic pride and the development of town corporations. In a wider context, it included the devolution of legal powers to cities, towns, and boroughs to control industrial and residential development and, in turn, this led to the exercise of powers and controls in relation to housing, water supply, sanitation, education and policing. The Victorian civic ethos was also present in the continuing development of the local urban magistracy, support for which was seen as a public duty as well as providing enhanced social status. There was a recognition that the expanding entrepreneurial middle class could and should participate in local political and civil society. These changes occurred in response to social and industrial developments that had fractured the earlier social bonds and relationships between classes that reflected a less urbanised society. This radical civic intervention, by a localised entrepreneurial class, led to the growth of civil society and included, at the most ambitious level, efforts to create model living and working environments, culminating in the creation of the housing utopias of Bournville by the Cadburys, and Port Sunlight by the Lever brothers. As noted, the promotion of localism was born in part from concern to ensure social control in a time of great turmoil. This was especially the case from the middle of the century following the 1848 revolutions in Europe which produced widespread fear of similar violence in Britain because of the social and economic upheaval and the changing nature of society.

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[216] Report on the Proceedings of a Conference on the Subject of Preventative and Reformatory Schools Held at Birmingham on the 9th and 10th December 1851 (John Frederick Feeney Birmingham 1851) v.
[217] Magarey (n 180) 19.

3.5.1 The growth of the urban magistracy and summary justice

The law was not immune to these changes and the developing civic responsibility of the middle classes also included, as noted above, playing a role in the local urban lay magistracy. There was a willingness among the upper and middle classes to address local criminality and to preserve social control. The localised application of criminal law to child offenders was initially stymied by the distinction in offences between felonies and misdemeanours.[218] The jurisdiction of the local magistracy was limited to misdemeanours, lesser crimes such as petty thievery including theft of food and fuel which was, no doubt, sufficient for small town and rural life. The magistracy had been originally designed for 'primarily rural forms of appropriation and their urban equivalents remained largely outside legislatively sanctioned summary jurisdiction' of the magistrates, with the more serious felony offences dealt with at the quarter sessions or assizes.[219] In response to increasing crime levels associated with the growth of urban-industrial society, there was a greater use of summary justice by the magistrates, as provided by the Vagrancy Acts 1822 and 1824. This legislation devolved powers in respect of reputed thieves, removing cases from the higher courts and achieved a similar sleight of hand to that achieved by the 2014 amendment to the law of theft, whereby shoplifting offences up to £200.00 in value became summary only offences for sentencing purposes.[220] The increase in the use of summary jurisdiction by the magistracy meant quicker justice and a perceived 'rapid decline' as 'these new summary powers were mainly used to deal with juvenile offenders'.[221] In practice, this extension of local justice did not indicate a reduction in juvenile crime but in reality a 'transfer between jurisdictions'.[222] Cynically, this could be seen as a manipulation of the legal process to meet public concerns about child offending and fears that society was under attack by a wave of thievery committed by children. However, it also offered the possibility of a less onerous legal process to deal with child offenders, one of the planks of the reformist agenda.

Even though there was a strong rationale, in that it was a considered response to societal developments, the limited extension of summary jurisdiction to include a greater number of offences and offenders was not universally welcomed. It was not until the end of the 1840s that

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[218] Criminal Law Act 1967, s1. The section abolished the distinction between felonies and misdemeanours.
[219] King (n 174) 133.
[220] Anti-social Behaviour, Crime and Policing Act 2014, s176. This section reclassified admitted shoplifting theft offences to a value of £200.00 as representing 90% of such cases. Home Office, 'Implementing Section 176 of the Anti-social Behaviour, Crime and Policing Act 2014: Low-value shoplifting (June 2014 Home Office) 3.
[221] King (n 174) 134.
[222] King (n 174) 134.

Parliament granted the magistracy the power to try larceny cases involving child offenders, as there had been a 'heated debate about the sanctity of jury trial'.[223] In practice, and reflective of the jurisdiction being assumed, the 'magistrates in the largest urban areas simply developed their own system of summary trial for the majority of property offenders and then widened its usage to deal with juveniles'.[224] Initially, the use of summary jurisdiction remained limited to urban areas and only reached rural areas in the 1850s with further legislation devolving summary jurisdiction for specific offences. It is fascinating to note that 'it was the magistrates of the big cities who took the lead in transferring juvenile property offences into the murky world of informal summary jurisdiction'.[225] The motivation for this approach was the perceived need to control crime and punish child offenders within the context of a period of unrecognisable social change. This was a novel procedural legal response and moved the criminal justice system nearer to the present JJS, at least in the way it dealt with identifiable child offenders, rather than by reference to the offence.

In addition, the above led to a recognition of the divide between the sexes in juvenile criminality, as the increasing use of summary jurisdiction highlighted that, as today, boys were more likely to be drawn into the legal system.[226] The use of greater summary jurisdiction from the 1820s contributed to a reduction in child offenders before the higher courts in urban areas. The further extension of summary jurisdiction in 1847 enabled child offenders to be prosecuted for felony offences. These changes resulted in cases being heard by local magistrates where the child was under 14 years old with a maximum sentence of 'three months, with or without hard labour or a fine of three pound or, if male, whipping (but privately)', so not a regime that would be considered soft by today's standards.[227] The Summary Jurisdiction Act 1879 (the 1879 Act) permitted magistrates to discharge a child offender on his own recognizance rather than impose any other penalty. The 1879 Act also provided for a child under twelve years old to be tried summarily with the consent of his parents, unless charged with homicide, with imprisonment limited to one month. Fines were limited to two pounds and whipping to six strokes so that, while there had been substantial changes, for the individual child offender it remained a harsh regime.[228] The 1879 Act added further grist, providing for those aged 12 to 16 years to be

[223] King (n 174) 135.
[224] King (n 174) 135.
[225] King (n 174) 136.
[226] King (n 174) 137.
[227] Graham Parker, 'The Juvenile Court Movement' (1976) 26 The University of Toronto Law Journal 140, 159.
[228] ibid 159.

similarly 'tried for property offences but no other indictable offences'.[229] The 1879 Act restricted the maximum sentence to 3 months imprisonment, with or without hard labour and whipping was limited to twelve strokes in the case of boys under fourteen years old. These examples demonstrate the steps taken by magistrates both rural and urban to find 'ways of using their other summary powers' to punish potentially indictable offenders as discussed above. They represent a template for true local justice which, for a time, flowered in the Magistrates' Courts before sadly withering. It also provided the template for the development of a separate JJS, though this would ultimately prove to be flawed.[230]

3.5.2 Social control and developments in policing

The police service also developed during this period and was used as a means of responding to the challenges posed by social upheaval. The Metropolitan Police Act 1829 extended the direct and immediate application of police powers, providing constables with the authority to arrest people described as 'undesirable' without a warrant. It also gave legal powers in relation to 'all loose, idle and disorderly Persons' disturbing the peace or those suspected 'of any evil Designs' and those found lying or loitering in the road or public place between sunset and 8.00 am without a satisfactory explanation.[231] This broad category meant that the police could intervene and control those considered a nuisance, including children, but it produced an unintended consequence. Individual constables had to present their own cases before the court though they also incurred a potential liability for costs and counter-prosecution if defendants were acquitted. Magarey suggested that this may have encouraged a concentration by constables on child offenders who were 'less likely than adults to present an able defence or to instigate counter charges'.[232] The potential for targeting was increased as the categories of people who might be arrested widened. Subsequent Metropolitan Police Acts have been described as representing a 'wholesale onslaught on the leisure occupations of the poor and labouring classes' and 'made street-children susceptible to arrest'.[233] These Acts amounted to a concerted policy against children, with even more of them prosecuted under the Vagrancy Act than had been the case with the Larceny Act. Magarey observed that 'that most were occasional, rather 'than regular offenders'' and 'many had not stolen anything at all'.[234] Today's JJS mirrors this

[229] ibid 159.
[230] King (n 174) 133.
[231] Magarey (n 180) 21.
[232] Magarey (n 180) 21.
[233] Magarey (n 180) 21.
[234] Magarey (n 180) 24.

broad-brush idea with its modern iteration of a 'catch'em' young policy that aims to provide close monitoring of child offenders by either Youth Offending workers or police offender management officers. Another similarity with the past was the use of appearance as a marker for police attention, those, 'with their gaol-cropped heads' were turned into and remained 'easy targets for further police enthusiasm' just as the wearing of a particular style of apparel marks out suspects today.[235] Even with all these legislative reforms, there were still calls for greater and harsher reforms to meet the challenges of a society that had changed fundamentally within a relatively short period of time.

3.6 Approaches to reform

How to meet the effects of criminalising more childhood behaviours and the unease generated by the increase in childhood criminality, together with the focus on the defined lower social classes from which such behaviour was thought to arise, prompted new attempts to meet the challenges. These new ideas and approaches achieved varying levels of success, and most of them focused on a mixed carrot and stick approach. All, however, shied away from the notion that society itself might be the driver of criminal behaviour.

3.6.1 Ideas to reform the wayward child

There was a plethora of interventions proposed to improve and reform child offenders in the latter part of the eighteenth century and the early part of the nineteenth. Interest in childhood criminality and how to respond to it generated many new ideas, such as the Philanthropic Society's pioneering concept of reformatories in England. Four such institutions were opened for children in 1788, by Robert Young, to deal with young offenders and the children of convicts. In 1815 the Prison Discipline Society, founded by Elizabeth Fry and Sir Thomas Fowell Buxton, was established to improve conditions and to prevent 'corrupting association and consequent evil effects upon the youthful offender'.[236] Parliamentary committees reported that youngsters were often adversely influenced by hardened criminals and recommended a penitentiary for them. In 1838, in response to this call, Parkhurst was opened as a prison for child offenders.[237] However, the problems of dealing with child offenders, proved easier to identify than resolve and, as with today's JJS, though solutions were designed and implemented, the success they sought eluded the promoters. They contribute, nevertheless, to

[235] Magarey (n 180) 24.
[236] Parker (n 227) 148.
[237] RSE Hinde, *The British Penal System 1773-1950* (Gerald Duckworth & Co 1951) 96.

this thesis by highlighting the broad range of efforts made to treat unwanted childhood behaviours. The dichotomy in approaches to child offending that existed then continues today, namely, whether to address these concerns by pre-criminal behaviour interventions, such as expanding education provision or, after the fact, by punishment regimes which aim to prevent reoffending and rehabilitate. Many of the new ideas aimed to address childhood offending through the reform of those involved. It was even suggested that child offenders ought not to be released 'until they have given a guarantee to society that they have been reformed, and that they will, for the future, be honest and industrious citizens'.[238] A promise perhaps encompassing more hope than expectation, given the circumstances of most of the unfortunate children involved.

The harshness of the remedies to meet the identified problem of child offenders is troubling to modern sensibilities. Cornwallis made the obvious point, sometimes overlooked today in dealing with such offenders, that the adult criminal population was often derived from child offenders and a legal system that was 'ignorant and vengeful', served to augment 'to a fearful extent, the very evil it was framed to correct'.[239] She recognised that societal factors, including political, cultural, economic or religious factors, cannot be removed from any assessment of childhood offending and that child offending behaviour was no more than 'the blossom of a plant deeply rooted in our institutions'.[240] She added that the problem of so large a number of children without proper parenting meant that 'we shall have to look deep and inquire long, perhaps, ere we shall discover where the first fault lies'.[241] The superficiality of enquiry into the underlying factors that produce childhood criminal behaviour remains as true today as it was then. Put simply, to know too much about why a child has offended might lead either to the conclusion that nothing can be done to ameliorate the problem, or, that what needs to be done is beyond what society is willing to countenance or fund. This understanding of childhood criminality was echoed by others, with it being noted that there was 'no doubt that a large proportion of juvenile crime is the result of the offenders' circumstances rather than their dispositions'.[242]

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[238] Yale Levin, 'The Treatment of Juvenile Delinquency in England during the Early Nineteenth Century' (1940) 31 Journal of Criminal Law and Criminology 38, 41.
[239] Micaiah Hill and Caroline Frances Cornwallis, *Two Prize Essays on Juvenile Delinquency* (Smith, Elder & Co 1853) 305.
[240] ibid 305.
[241] ibid 305.
[242] Levin (n 238) 41 quoting First Report of the Inspectors Appointed to Visit the Reformatory Schools of Gt. Britain (1858) 13.

The middle of the nineteenth century gave rise to the notion of 'saving and reforming' the individual child, the rationale that underpinned the 1851 Birmingham Conference on Preventive and Reformatory Schools, and which also lay at the heart of the reformer Mary Carpenter's sustained attack on the hypocrisy of society and the criminal justice system.[243] It was the saving and reform of offenders which formed the basis of the Youthful Offenders Act 1854 which gave courts powers to send children to reform schools. Goldman described this legislation as the 'glory of the age', having the intention to cast away the 'barbarous policy of the past; and that they were desirous of being merciful to all, and giving a chance of reformation'.[244] The contrast with the present JJS is plain, with the purpose of such establishments being to solve 'the problem of juvenile delinquency'. This was almost incomprehensible in the context of the legal system of the time, 'whereby juvenile offenders over the age of ten were committed to jails and prisons.'[245] Unfortunately, and perhaps not unexpectedly, the Reformatory system failed to reduce childhood offending to the extent hoped for, but nevertheless such 'institutions represented a long step in the advance of the prevailing practice of committing juvenile offenders to prison.'[246] The state became involved in trying to meet the problem of child offenders with the establishment, noted above, in 1838 of a separate prison at Parkhurst on the Isle of Wight. It was designed for 650 child offenders under 18 years who otherwise would have been eligible for transportation, but who were characterised by Hill and Cornwallis as 'orphans or children abandoned by their parents' who had been driven to acts of petty dishonesty, or who had fallen in with bad companions.[247]

Not all legislators at that time were so liberally minded. Set against these liberal welfare concerns were the measures promoted by Sir Robert Peel. Though he 'may not have intended to expand the scope and severity of application of the criminal law', his legislative programme nevertheless extended 'all the means of state coercion provided by the criminal justice system' to child offenders.[248] His views were in direct contrast to those of the earlier reformers, such as Howard who thought the savagery of the law ought to be ameliorated to produce a proportionality between punishment and offence that would 'be more likely to prevent

[243] Mary Carpenter, *Juvenile delinquents, their condition and treatment* (W. & F. G. Cash, London 1853) A detailed dissection of objections to her reformist ideas and amounts to a statement of childcare principles that remain relevant.
[244] Lawrence Goldman, *Science, Reform, and Politics in Victorian Britain: The Social Science Association 1857–1886* (Cambridge University Press 2002). See Henry Mayhew, 'Law Amendment Society' (1855-56) 1 LAJ 51.
[245] Levin (n 238) 45.
[246] Levin (n 238) 46.
[247] Hill and Cornwallis (n 239) 308.
[248] Magarey (n 180) 24.

crime'.[249] Howard and other liberal reformers were behind attempts to understand the causes of childhood criminality, to take account of child labour laws, the degrading conditions of the poor, and particularly the terrible conditions faced by those in workhouses. Workhouse children were seen as lost souls and were described as 'remarkable for their extreme ignorance, viciousness, stupidity, stubbornness, and want of animation when they were not brutified morally and intellectually'.[250] There is a remarkable similarity here with today's child offenders who are often abandoned by the state education system, and subjected to 'off-rolling' to protect the school's standing, rather than being offered the help that these difficult-to-teach children need. These issues remain today and contribute to this thesis by highlighting the need to focus on and help the individual child offender.

3.6.2 The Victorian idealists and rehabilitation

The work of reformers, then as now, represented the search for alternative proposals to achieve better outcomes for children and wider society. Individual reformers, such as Mary Carpenter and Matthew Hill, raised the problem of childhood offending and the risk to society's well-being. They argued that the children involved in criminality deserved a different approach with 'less concern with court procedure' and 'closer connections with the communities in which they were located'.[251] Hill noted that of the children brought before the court 'scarcely one ... possessed either employer, parents or friends', and that they were vulnerable children adrift in a hard world.[252] A new initiative was implemented to deal with these children, and while it 'lacked legal authority to detain children', it did introduce an unofficial system of care or 'probation for young offenders 'not hardened in crime''.[253] The system continued to grow to meet the demand and, with more than 11,000 youths aged between 10 and 20 in prison in 1844, the need for such reform was evident.[254] These child-centred reformers had laudable aims that, to a degree, appear to be lacking in certain aspects of today's JJS. For example, child offenders often face less than understanding magistrates in the Youth Court who are, seemingly, unable to comprehend the reality of their life circumstances even when presented with the facts in written reports. The rationale of the Victorian attempts to reform the offender through

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249 John Howard, *The State of the Prisons in England and Wales with Preliminary Observations, and as Account of some Foreign Prisons* (William Eyres 1777) 15.
250 Samuel Phillip Day, *Juvenile Crime, its Causes, Character and Cure* (J F Hope 1858) 222.
251 Parker (n 227) 150.
252 Rosamond Davenport-Hill and Florence Davenport-Hill, 'The Recorder of Birmingham, A Memoir of Matthew Davenport Hill with Selections from his Correspondence' (Macmillan and Co 1878).
253 Parker (n 227) 150.
254 Parker (n 227) 150.

education was not intended to promote a 'liberal background but a technical preparation for life, the tools of which were discipline, steady habits, and a moral and religious outlook'.[255] This reflected the extent to which reformers saw their mission as aiding the development of a society fit for purpose from their standpoint.[256] The similarity to today's JJS's interventionist programmes, imposed when sentencing child offenders in the Youth Court, suggests that relatively little progress has been made in meeting the needs of this tranche of society who remain stubbornly resistant to the opportunities offered by education. It also highlights the limited social pool from which these children are drawn. Their continued involvement with the JJS stems from a multi-generational failure by society, and the state, to improve their lot.

Mary Carpenter's ideas for reform schools reflected her view that there were different grades of destitution, vagrancy, and criminality. She considered that the children involved needed education provision by way of free day schools, which would then feed pupils into the industrial and reformatory schools. With her grasp of the underlying difficulties faced by these children, her ideas are ones that the modern JJS could draw on in order to relearn the lessons of the past, Her suggested remedies could well form a starting point for modern reforms to improve the opportunities and outcomes for young offenders.[257] She held the view that all children could become useful members of society, whereas the JJS of her time simply labelled them as members of the criminal class, aiming neither to deter nor reform. With proper financial support and the legal authority to exercise control, she asserted that they could become a useful part of society. Somewhat contentiously from today's viewpoint, she argued that the parents of such children ought to be financially responsible for their maintenance, as the state was stepping in to ameliorate their failures to inculcate proper behaviour.[258]

It was recognised that the increase in childhood criminality related partly to the expansion of the criminal law during the nineteenth century. Its greater application to children brought a 'criminalisation of behaviour which an earlier age would at worst, have tipped a boy into a horse trough'.[259] Crawford and Russell observed that

> 'delinquencies of the most trifling description, committed by mere children, and formerly thought very lightly of, are now treated as grave offences; and the youth

[255] HW Schupf, 'Education for the Neglected: Ragged Schools in Nineteenth-Century England' (1972) 12 History of Education Quarterly 162, 165.
[256] ibid 165.
[257] Parker (n 227) 151.
[258] Parker (n 1227) 151.
[259] Magarey (n 180) 17.

> who would a few years back on detection have been summarily chastised, is sent to gaol and arraigned before a criminal tribunal'.[260]

Extending the reach of the criminal law, drawing in more children with the implementation of reactive legislation, criminalising a broad range of childhood behaviour from the 1820s onwards, was problematic. It drew in activities such as children picking fruit hanging in orchards, a fairly common practice in childhood that became criminalised.[261] Similar approaches continue today, with for example, Dispersal Orders under Section 30 Anti-Social Behaviour Act 2013 which enable police to respond to complaints about groups of children under 16 gathering together. These orders aim to control childhood behaviours by criminalising nuisance behaviour and involving the police in what is, at its worst, only low-level public disorder.

The nineteenth century JJS represents 'a history of improving the conditions' of children and a growth in the importance attached by the Victorians to 'saving' or reforming them.[262] The many and varied ways in which the Victorians sought to meet this task illustrate the tremendous difficulties faced by society then, and now, but their attitudes, especially the conflict between reform and punishment, have left a lasting legacy in the modern JJS and in the methods by which we seek to deal with child offending. The procedures they utilised reflect the strict attitudes and beliefs of that time and, whilst the steps taken, and the punishments imposed, may appear harsh, it is nevertheless a truism to state that most of those involved on both sides of the debate acted for the best of motives. When faced with the reality of today's efforts to deal with the same problems, it is difficult to assert that they are more successful, whatever criteria is used to measure the results. It is our modern failure to produce a more successful system of justice for child offenders that prompts the discussion in this thesis. The search for a better, more individualised response to child offending must continue, and it must progress beyond the parameters of the criminal law if it is to be successful.

3.7 The twentieth century onwards

The continuing search for new approaches to address child offending continued into the twentieth century but the gap between the nineteenth century developments and today's JJS bears witness to a complete remodelling of society's moral compass, one that has still not completely crystallised. The JJS has also remodelled itself in the light of legal reforms, as

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[260] Magarey (n 180) 18.
[261] Magarey (n 180) 20.
[262] Parker (n 227) 160.

demonstrated by increases in the ACR, and a reduction in the use of custodial institutions. During the late Victorian period campaigners pushed for measures to recognise the needs of child offenders, for example with the Child Study Movement, founded in 1893, which urged that they ought to be seen and treated as individuals. However, it was not until 1908, under the reforms introduced by the Liberal government in the Children Act 1908, that dedicated juvenile courts first appeared. The twentieth century was marked by two World Wars that produced social effects domestically and distorted behavioural norms and led to an increase in criminality. The Howard League, through the work of Cecil Leeson, examined the rise in child offending during the First World War. He suggested a link with the absence of suitable male role models in the local community and family life due to war service.[263] This seems a simplistic analysis and yet there are similar modern assertions which link male child offending with the absence of father figures in single parent families. As Lunden noted, adult criminality tended to decrease during wartime whereas it increased for children, though the 'social conditions influencing the amount of delinquency in England are not new or different but an accentuation and aggravation of factors already present'.[264] He observed that the conditions produced by wartime distorted the ethical values of youths as much as the adult population, with conduct and ethical norms becoming 'relative'.[265] The rise in criminality was directly attributable to a relaxing of behavioural norms that 'created anti-social behaviour among the youth of the nation and a corresponding increase in the number of delinquent acts in the teen-age groups'.[266]

After the First World War, the domestic economic decline also contributed to the increase in criminality with 'a delay in conversion to peace time production with a corresponding large amount of unemployment'.[267] This resurgence, coupled with labour unrest culminating in the 1926 General Strike, led to the Report of the Departmental Committee on the Treatment of Young Persons in 1927. It stated, in a phrase that still informs practice today, that 'the welfare of the child or young person should be the primary object of the juvenile court' and it suggested that the court ought to sit at different times and locations to the adult court.[268] This was an obvious proposal, to avoid behavioural contamination between the generations, but it is one

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[263] Cecil Leeson, *The Child and the War, Being Notes on Juvenile Delinquency* (London, 1917).
[264] Walter Lunden, 'War and Juvenile Delinquency in England and Wales, 1910 to 1943' (1945) 10 American Sociological Review 390, 391.
[265] ibid 393.
[266] ibid 393.
[267] ibid 392.
[268] Home Office Committee, *Report of the Departmental Committee on the Treatment of Young Offenders*, 1925-7 Cmd. 2831 (HSMO London, 1927) 121.

that has fallen by the wayside in the modern system, with a return to shared facilities in many venues. The report contributed to the Children and Young Persons Act 1933 which introduced changes in the treatment of child offenders, increased the ACR from 7 to 8 years and raised the juvenile age limit from 16 to 17 years. The Depression during the 1930s resulted in economic and industrial stress, increased unemployment, a high birth rate, increased socio-geographical mobility and family dysfunction all of which created social conditions 'inimical to normal integrated childhood'.[269] It led to an increase in childhood offending that could be linked to nineteenth century studies emphasising 'social and economic factors as the primary causes of delinquent behaviour'.[270] Levin recognised the contribution made by the psychological and psychiatric examination of the causes of delinquent behaviour but noted that this focus on individual psychology led to the neglect of earlier nineteenth and twentieth century sociological studies. These had focused on factors such as family, neighbourhood, and gang culture as underlying errant behaviour, even when a more scientific understanding is put forward as explaining the continued wayward behaviour of certain juveniles.[271] These factors remain valid today with the expanding domestic gang culture fuelled by the linkage between drugs, knife crime, genre specific music and immediate social media dissemination of gang propaganda. The consequences of such factors on children, and in particular child offenders, are debated in the media but have yet to be addressed in any meaningful way. They are a source of increasing urban ghettoization not observed since the nineteenth century and once more emphasize the need to consider reforms to the present JJS or risk the loss of further generations of children to criminality.

3.8 Conclusion

Although it appears that everything has changed, in fact nothing has altered in terms of presentation, with for example, the Youth Court continuing to present as a formalised court environment, albeit with some cosmetic developments. The many similarities between the nineteenth century reforms and today's JJS also support the view that little has changed. Even with the Youth Justice Board's promotion of the Child First approach the JJS remains fixated with legal process, rather than the causation and treatment of the individual child as envisaged in this thesis. For those child offenders who appear in court it remains a process that is designed to isolate and to create vulnerability; it certainly does not present as a suitable environment to

[269] Lunden (n 264) 392.
[270] Levin (n 238) 38.
[271] Levin (n 238) 38.

treat a vulnerable child with care and compassion. The social circumstances of child offenders and their families, including lack of education, poor health, alcohol or drug use, dependency on charity and welfare, remain the dominant features of criminality. The socio-family circumstances that underpin criminal behaviour, such as acquisitive crime to fund a 'lifestyle', apply equally to the nineteenth century and the twenty-first. The apparent immutability of these social factors reinforces concerns as to the effectiveness and validity of many of the ideas and procedures applied by the JJS to child offenders, both in the past and now. This is illustrated by the modern phenomenon of the shoplifting mother and child who offend together to realise an additional income. They are equally 'vulnerable souls' as those offenders in the nineteenth century. Even with today's welfare benefit payments, there are echoes of Magarey's observation that during the mid-nineteenth century 'far more worrying to property-owners and employers, were children who had found that stealing brought in a better income than working'.[272] It is an observation that remains equally true today.

At present, it is unlikely there will be any substantial developments in relation to the ACR in England and Wales, even to the extent of bringing the age in line with Scotland and Ireland. Though there are calls to remove younger children from the JJS, and there has been progress with the advent of the adoption of the Child First approach, movement in the opposite direction remains an ever-present risk. Such retrenchment might occur in the wake of a Bulger type event with attendant public outrage, fermented further by the media and politicians. It would result in knee jerk calls for harsh treatment of young offenders. This can be demonstrated by the policing measures which are currently brought to bear on those children, below the ACR, who become caught up in unwanted group behaviour which has been criminalised by the legal system. There is also the issue of 'net widening' which has been promoted as a means of protecting 'vulnerable children' and wider society. It often leaves such children subject to further involvement with the police and reflects the unintended effects of similar attempts to address unwanted criminalised behaviour in the nineteenth century.

The nineteenth century juvenile law developments and the reformist agendas were never intended to provide a cohesive system to tackle the causes and consequences of childhood criminality. Nevertheless, the attempts to address the issue of child offenders, their punishment and reform, highlight that the search for a more constructive approach to deal with them must continue as argued and promoted in this thesis. The aspects of reform considered in this chapter

[272] Magarey (n 180) 14.

demonstrate the importance of broadening the JJS, from the point of first contact with the police to the end-stage appearance in the Youth Court or Crown Court, to a context-based appreciation of the socio-family factors that directly and indirectly promote child criminality. The nineteenth century produced positive ideas for reform which still resonate in the domestic JJS debate. They support the thesis's call for a more holistic, more therapeutic response to criminalised childhood behaviour than the mere reformulation of the JJS. The pendulum in the nineteenth century swung away from treating children as responsible and culpable, and deserving of often harsh punishment, to recognising that there were unique features relating to child offenders which required a different regime. Unfortunately, this change in attitude has not been effectively translated into action to bring about this desired change in practice. In some respects, entry into the JJS remains as punitive and harsh in its effects on the life chances of child offenders in the twenty-first century as it was on those in the nineteenth.

The next chapter

This chapter has examined the historical development of the criminal justice system, and the creation of a separate JJS to deal with childhood criminality. The next chapter focuses on aspects of the JJS, as experienced by the writer as a criminal defence practitioner and relates those insights to the system and the child offenders involved. The chapter builds on Chapter 3 and completes the developmental journey of the JJS to the present day. Together these two chapters provide a domestic comparator for the Scottish and Irish JJSs which are examined in Chapters 5 and 6 as an integral part of developing the thesis's argument for reform.

Chapter 4

Assessing aspects of the present JJS

4.1 Introduction

This chapter assesses aspects of the juvenile justice system (JJS) through the focus of participatory action research and the lived experience of the writer derived from criminal defence practice. The aspects examined which are beyond direct experience are therefore analysed objectively, albeit this is through the lens of the writer's subjective experience of the JJS. For example, in the delivery of juvenile diversion programmes differences have evolved between the two elements of the JJS in England and Wales. It has been necessary therefore to acknowledge the differences experienced in professional practice between the English and Welsh elements of the JJS as they both evolve, although the adoption of the Child First approach by the Youth Justice Board (YJB) throughout the jurisdiction may serve to draw them together.

The first part of the chapter deals with the recent reforms that have occurred within the JJS in England and Wales and considers how effective they have been in putting the child offender first. Since 2000 there has been a steady process of reform in the JJS in England and Wales, principally evident by the huge reduction in the numbers of children progressing to the court system. In that year, for example, 225,000 children were dealt with by way of a caution for or convicted of a criminal offence, including 106,000 first time offenders, with 126,000 children prosecuted and 2,909 dealt with by a custodial sentence.[273] This represented a frightening number of vulnerable children who were brought into the JJS solely by their age, a process with potentially life limiting consequences. That these numbers are now unimaginable, speaks to the developments which have occurred with, for example, the headline number for children cautioned or convicted falling to 47,000 in 2015.[274] This trend continues with only 24,122 similarly dealt with in 2020, a decrease of 74% in the last decade though with only a reduction of 1% in the preceding 12 months.[275] The continuing demands for improvements placed on the JJS have morphed it into a more responsive and child focused system, though with differences

[273] Ministry of Justice, Criminal justice system statistics quarterly: December 2015 (Ministry of Justice 2016) < www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2015 > accessed 20 May 2021.
[274] ibid.
[275] Youth Justice Board/Ministry of Justice, Youth Justice Statistics 2019/20 England and Wales (Youth Justice Board 28 January 2021) 6.

in focus and purpose within the two English and Welsh elements as noted below. As Taylor observed, the

> 'police and youth offending services have, rightly, increasingly sought to deal informally with minor offending by children. The diversion from the youth justice system of children who were never likely to continue offending has meant that those who remain are the most difficult to rehabilitate'.[276]

When experienced through the lens of criminal defence practice, the English element of the JJS continues to present as a work-in-progress, especially, it is suggested, in relation to its treatment of the child offender, even in the era of the Child First approach as initially promoted in Wales. The extent to which the system acts in the best interest of the child offender remains questionable, even when account is taken of initiatives such as Child First and the diversionary processes in place. The formality of any process that acts in response to behaviour objectified as criminal necessarily defines the individual child as criminal too. The justice response and its underlying ethos, certainly as experienced at the police station and in the Youth Court with child offender clients, remains very much attached to the ideas of prosecution, guilt, and punishment, if only in the presentation and belittlement of child defendants. Undoubtedly, the JJS is moving towards a more holistic and therapeutic approach to child offending. However, in practice steps such as the Child First approach have a limited professional reach. There remains a reluctance to utilise, formally, the contribution that criminal defence lawyers could offer in the reformed pathway envisaged in Chapter 8. The first part of this chapter therefore also considers the aspects of the present JJS that demonstrate the continuing limitations in the perception of child offenders.

The development of the Child First approach which has been adapted and adopted throughout the JJS, identifies child offenders as vulnerable and deserving of a more rehabilitative response to criminalised behaviour. It is a justice response which promotes a more therapeutic and reformist strategy and has been integrated into the JJS in its organisational platform and within the police. It represents a more societally focused juvenile justice agenda and functions through the YJB and associated bodies such as Youth Offending Teams (YOTs) which operate, in combination with the police, as the primary contact for child offenders. However, although the YJB has developed reformist and rehabilitative policies, the results in practice suggest there is

[276] Charlie Taylor, Review of the Youth Justice System in England and Wales (Ministry of Justice 2016 Cmnd 9298) 1.

some way to go as, from the criminal defence practice viewpoint, child offenders remain the foundational client base of many community-focused criminal law firms.

The second part of the chapter examines the architecture of the JJS through which the juvenile justice strategies and policies are implemented. The JJS reflects the international prescriptions on the treatment of child offenders including, for example, Article 6 of the European Convention on Human Rights.[277] This guarantees by Article 40(1) that a child offender should be 'treated in a manner consistent with the promotion of the child's sense of dignity and worth' in light of his 'age and the desirability of promoting [his] reintegration and [his] assuming a constructive role in society'.[278] The extent to which the JJS meets this aspiration is considered in the context of the processes and procedures applied to child offenders.

The final part of the chapter draws the above elements together by examining aspects of the JJS's processes in practice, from the police station through to the courtroom, as filtered through the perspective of criminal defence practice. This examination recognises the importance of the police station environment in relation to the processing of the individual child suspect. It considers the inherent tension between the conflicting standpoints of the JJS and the public. This includes the conflict between the YJB mantra of Child First and the more frontline, and occasionally more confrontational, police approach to localised childhood criminality, along with the public's demand for a 'proper' response. The everyday police station reality is distilled and scrutinized in light of the procedural requirements which subtly control the police station and custody block environments, together with other influences, such as racial and social bias, which contribute to the processing of child offenders. In addition, the use of out-of-court disposals for criminalised behaviour by children is considered in the context of the reorientation in the perception of child offenders promoted by the Child First approach.

The aspects of the JJS examined in this chapter have been selected as the most relevant to the thesis's argument. They illustrate how child offenders are processed, with reference to new entrants. In some instances of child offending, there is a recognition of a need for a more traditional prosecution and punishment response, if only to satiate the public in its periodic clamour for 'justice'. The chapter also looks at everyday practice in the Youth Court and

[277] Council of Europe, European Convention on Human Rights (Rome 1950) < www.echr.coe.int/documents/convention_eng > accessed 20 May 2021.
[278] ibid. Art 40(1).

considers how government policies and legislation sometimes achieve positive outcomes in surprising areas, for example the Offensive Weapons Act 2019 (OWA 2019).

The chapter concludes by assessing whether there remains an unmet need for a more nuanced interventionist approach focused on the individual child, and an assessment of the extent to which the present JJS meets that aspiration. It also attempts to outline how a more therapeutically orientated JJS might endeavour to deliver justice, both to the victims and perpetrators of criminal behaviour, by recognising a child offender as a child. This recognition would be a positive response to the cri de cœur of this thesis for a better approach to child offending, one which seeks to bridge the present gap between aspiration and real-world implementation. The chapter ends with a call for the development of a therapeutic response, beyond that delivered through the present JJS, a response which is more reflective of its premised aim to act in the best interests of the child.

4.2 The perception of child offenders in the present JJS

4.2.1 The responsible child

As discussed in Chapter 3, the nineteenth century led to procedural developments including a dedicated juvenile court premised on the idea of making the child offender the focus of the state response. The intention was to responsibilise child offenders for their behaviour and, equally interestingly, 'their families and working class communities', and to impose 'an expanding control apparatus to 'manage' poverty and disadvantage'.[279] Muncie recognised that the resultant 'stream of 'crackdowns', initiatives, targets, policy proposals, pilot schemes and legislative reactions were prompted by a desire to refocus on the individual.[280] He described the change, referencing Rose,[281] as 'placing less emphasis on social contexts, state protection and rehabilitation and more on prescriptions of individual responsibility'.[282] Placing responsibility on an individual child offender is, however, problematic. The primary purpose remains unresolved; the demands of society for behaviour within the law and adherence to 'accepted' norms is set against the limits of a child to act and be legally responsible. Muncie observed

[279] John Muncie, 'Governing Young People: coherence and contradiction in contemporary youth justice' (2006) 26 (4) Critical Social Policy 770, 771.
[280] Muncie (n 279) 771.
[281] Nikolas Rose, 'Governing "advanced" liberal democracies' in Andrew Barry, Thomas Osborne, and Nikolas Rose (eds), *Foucault and Political Reason Liberalism: Neo-Liberalism, and Rationalities of Government* (UCL Press 1996).
[282] Muncie (n 279) 771.

> ‘that traditional justice vs welfare or welfare vs punishment debates are particularly inadequate in unravelling how youth justice acts on an amalgam of rationales, oscillating around, but also beyond, the caring ethos of social services, the neo-liberal legalistic ethos of responsibility and the neo-conservative ethos of coercion and punishment’.[283]

The JJS continues to face the same dilemma as the earlier approaches to child offending and which is encapsulated in the Bulger case, as examined in Chapter 2. There remains a basic and enduring need for a scapegoat for a crime and to be a focus of society’s wrath, even if that someone is a child himself. The response of people, media and politicians to extreme criminal acts is predictable and understandable; there is a need to hold an individual responsible, even a child, on whom the due opprobrium must fall. The extent of this need in England and Wales demonstrates the uphill struggle to be climbed to reach a truly therapeutic model as envisaged by this thesis. The Child First approach confirms the positive support from the state in focusing on rehabilitation and reintegration of child offenders where possible, although the extent of public support is questionable. However, there remains a societal urge to ‘other’ child offenders who kill and which is unlikely to disappear with the increasing use of social media and the all too frequent mob mentality that can be easily generated. For example, this is demonstrated by the media reports linked to the death of 26-year-old Kiaya Roberts on 11th June 2021 in Telford highlighting that 3 children aged 15 years and one aged 14 were charged with murder and their cases sent to the Stafford Crown Court.[284] As discussed below, the dedicated child court venue, the Youth Court, was excluded from the process after the initial formality of the first hearing and the child defendants were denied a trial in the dedicated court venue for them.

4.2.2 The changing landscape of juvenile justice strategies

The agendas and proposals promoted by politicians demonstrate the extent to which juvenile justice is subject to the vagaries and whims of those in political power. The pivotal change that led to a retrenchment of the traditional crime and punishment mantra occurred politically and strategically in 1997, when the argument was formulated on the lack of effort to promote behavioural change. This was expressed, somewhat simplistically, as a failure to teach ‘the difference between right and wrong’.[285] It became a tenet of the new mantra that there should be a focus on ‘early intervention to nip offending in the bud’. It was marked by the

[283] Muncie (n 279) 771.
[284] Sue Austin, ‘Four teenage boys charged with man’s murder in Telford’ *Shropshire Star* (Shrewsbury,15th June 2021)
[285] A common mantra of the time. See Jack Straw and Alun Michael, *Tackling Youth Crime, Reforming Youth Justice (Discussion Paper)* (The Labour Party 1996).

implementation of an 'interventionist system' of Reprimands and Final Warnings which Goldson described as a 'two-strikes-and-you're-in-court' rule, and it led to a significant increase in the number of children appearing in court.[286] Even with the adoption of the Child First approach, it is arguable that the interventionist model continues, albeit in a modified form, with the Referral Order procedure on first conviction before the Youth Court which triggers 'additional modes of criminalising intervention'.[287] The use of mandatory matrix tools to determine the JJS rehabilitation path for an individual child, contrasts markedly with the pithy assessments given by child offenders and their families and suggests that this approach remains a work-in-progress. The rationale for intervention is understandable; there is a greater demand for certainty, but uniformity comes at the expense of the individual child offender.[288] No doubt because of the Child First approach there are positive steps taken by the various agencies to promote desistence, but child offending persists. A minority of those involved progress through the JJS and become persistent juvenile offenders. Defence criminal practice emphasises that as one generational cohort moves to either an offending-free status by behavioural maturation or progresses to the adult criminal justice system, the JJS is replenished by new entrants. Those who progress through the JJS are processed by various procedural mechanisms designed to address their criminality and to offer exit routes from the system. These more liberal rehabilitative and diversionary processes highlight the growing use of more therapeutic – less criminalisation options focused on the individual child as promoted by this thesis.

4.2.3 The Youth Justice Board and its approach to child offending

The JJS is described as 'distinct' and designed to 'deliver justice for those who are victims of crime and rehabilitate offenders', a somewhat problematic statement as regards the perception of child offenders as vulnerable individuals deserving of support.[289] This general statement has been honed by the pronouncements of the YJB that recognise child offenders 'often have multiple and complex needs' and need to be diverted 'from the justice system entirely' and to be rehabilitated and given the support that they need to break free of offending and build productive and fulfilling lives.[290] The YJB's 2019 Standards detailed that its stated 'minimum

[286] Goldson (n 136) 8.
[287] Goldson (n 136) 8.
[288] Youth Justice Board, *Corporate Plan 2014 - 17 and Business Plan 2014/15* (Youth Justice Board for England and Wales 2014). The JJS processed 27,854 new entrants in 2012/13, a 25% reduction from the preceding year and a massive fall from 100,748 in 2006/07.
[289] Youth Justice Board, *Standards for children in the Youth Justice System* (Youth Justice Board 2019) 2.
[290] ibid 2.

expectation for all agencies' involved in the JJS was 'to ensure good outcomes for children'.[291] The standards detailed 5 points of interaction where the system ought to focus to be effective, namely, out of court, at court, in the wider community, in secure settings for those instances where the seriousness warranted detention and providing support on transition and resettlement in the community. For the purposes of this chapter, the first two are of note, as they demonstrate the degree to which child offenders are recognised as unique individuals within the JJS. The YJB stresses that it is guided by the principle of 'child first' and that the standards have been drafted to facilitate adherence to that ideal, by prioritising 'the best interests of children, recognising their needs, capacities, rights and potential'.[292] The aim is to build on an individual's 'strengths and capacities' to promote 'desistance from crime', and 'a childhood removed from the justice system' relying on prevention, diversion and minimal intervention' together with minimising 'criminogenic stigma from contact with the system'.[293]

Even with the adoption of the Child First approach, it is evident that the present JJS continues to reflect the previous coalition government's programme, in power until 2015, and its policy commitments contained in the YJB Corporate Plan 2014 – 17.[294] This plan highlighted outcomes indicating an 'ongoing reduction in the number of young people entering the system',[295] and reaffirmed that the YJB would continue to

> 'support the strategic aims of the UK Government, which include preventing offending, protecting the public and supporting victims, and promoting the safety and welfare of children and young people in the criminal justice system'.[296]

The laudable aim was to achieve a system where 'young people receive the support they need to lead crime-free lives and contribute positively to society', though still with the touchstone that offenders be held to account for their actions.[297] More broadly, the YJB confirmed its commitment to

> 'promoting equality, embracing diversity and working to ensure that the criminogenic risk factors of children and young people in the youth justice system are reduced'.[298]

[291] ibid 3.
[292] ibid 6.
[293] ibid 6.
[294] Youth Justice Board (n 288).
[295] Youth Justice Board (n 288) 2. There is recognition that 'the rate and the frequency of reoffending by those in the youth justice system remains relatively high'. As with financial investments, the value (or number of youths) may increase or fall, previous results are not indicative of future outcomes.
[296] Youth Justice Board (n 288) 2.
[297] Youth Justice Board (n 288) 4.
[298] Youth Justice Board (n 288) 7.

The YJB's support of government policy in relation to childhood offending was based on the 'guiding principle for safeguarding and promoting the welfare of children' as detailed in Article 3(1) of the United Nations Convention on the Rights of the Child (UNCRC).[299] The YJB determines the implementation of government strategies and guides a range of organisations, directly and indirectly, for example, through partnerships. These are broad based and encompass YOTs as well as

> 'the police, the Probation Service, local authority children's services and health services, police and crime commissioners, the Crown Prosecution Service and victim services, the courts and the secure accommodation providers'.[300]

The aims of the strategy are commendable and include the prevention of anti-social behaviour and youth crime, the provision of health services and education, training and 'job readiness needs', together with a recognition of the need 'to improve the outcomes for looked-after children, who are over-represented in the youth justice system'.[301] However, the day to day police station processing of child offenders, as observed in criminal defence practice, belies the implementation of these aspirations. New entrants keep appearing in a system that is wedded to the notion that childhood offending is a distinct societal feature, otherwise it is argued, childhood criminal behaviour would have to be seen and addressed as part of community life and its inherent problems. This would be a difficult assertion to make by any government, national or devolved, as it would amount to an acceptance of societal failure rather than aberrant criminal behaviour that can be managed and addressed on an individual level.

As noted, the role of the YJB is broad ranging and reactive and cannot, by its very purpose, do other than process children drawn into it as offenders. Its strategic objectives are naively straightforward, to prevent and reduce offending by early intervention. This approach is viewed as more effective than dealing with the consequences of offending, reduces the number of victims, provides a safer society, and produces savings for the taxpayer. These commendable aims are somewhat undermined by the acknowledgement that public 'protection is at the heart of the role of those working in the youth justice system', rather than the 'best interests of the child'.[302] The preventative strategies are based on children as proto-offenders and offenders so

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[299] Youth Justice Board (n 288) 9. Actions taken by the YJB in pursuit of its mission rest on 'the best interests of the child' being the primary consideration.

[300] Youth Justice Board (n 288) 9. This includes under-18 young offender institutions (YOIs), secure training centres and secure children's homes. A glaring omission, if only for 'input' as with most such criminal justice partnerships, is that defence lawyers with their knowledge of juvenile system and clients are rarely consulted.

[301] Youth Justice Board (n 288) 11.

[302] Youth Justice Board (n 288) 18.

that the stigmatisation remains in practice and in the localised home communities of the children involved. There remains some way to go to recognise the individual child first and criminality as the secondary consideration in its mission, though, as discussed below, the Child First approach terminology has been adopted and incorporated into the YJB wholesale as a positive benefit for child offenders and their futures.

4.2.4 The Child First approach

As noted above, the YJB has incorporated the Child First approach as pioneered in the Welsh element of the JJS jurisdiction and it has been adopted throughout the system. It has been described as 'a strategic priority for the Youth Justice System in England and Wales.[303] The Child First approach has been described as

> 'a new system in which young people are treated as children first and offenders second, and in which they are held to account for their offending, but with an understanding that the most effective way to achieve change will often be by improving their education, their health, their welfare, and by helping them to draw on their own strengths and resources'.[304]

The recognition that child offenders require and deserve a more child centred approach that treats them as vulnerable highlights the shift that has occurred in the JJS in England and Wales. It has embedded a focus on their being 'dealt with at the lowest possible level, avoiding the unnecessary escalation that will bring children further into the system and damage their life prospects'.[305] However, even this remarkable volte face has inherent limitations that hark back to the more fundamental approach and maintains a nomenclature with a formal labelling that identifies criminal behaviour as such. It specifies a co-ordinated response with youth offending services (YOSs) integrated with children's services, and requires the welfare needs of child offenders be addressed as part of a coordinated response led by the local authority.[306] Nevertheless, this more child friendly approach rests on the assumption that

> 'children will be diverted away from the formal youth justice system, and offered support in the community, but for more serious crimes, where children have admitted the offence or been found guilty by the courts, children will appear before Children's Panels'.[307]

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[303] Stephen Case and Ann Browning. 2021. Child First Justice: The Research Evidence-base. (Loughborough University 2021) 6 < https://hdl.handle.net/2134/14152040.v1 > accessed 28 June 2021.
[304] Taylor (n 276) 48.
[305] Taylor (n 276) 48.
[306] Taylor (n 276) 48.
[307] Taylor (n 276) 48.

The strategy and system described by Taylor is a positive step change and lays a foundation of how a modern interventionist and non-judgemental child focused JJS might be achieved.[308] The YJB grasped the Child First approach and incorporated its precepts in its Strategic Plan 2021 – 2024 which, nevertheless, recognised that building a child first system 'will take time and require a wide coalition of support'.[309] The plan outlines the YJB's vision to treat child offenders as children and to accept the 'moral responsibility to protect [them] in our society from all harms that might hinder their growth and their ability' to develop.[310] The aim is to ensure

> 'that wherever possible, children are prevented from having contact with the youth justice system. In cases where contact is unavoidable, any interventions that are deployed create constructive opportunities for children to realise their potential'.[311]

These aspirations rehearse the thesis's ambition to act for the 'benefit both [of] the child as an individual, and society'.[312] In the context of the JJS in practice, the Child First approach emphasises that children must be seen as works-in-progress because of 'their age, development, maturation and their potential as they grow into adulthood'.[313] This is effectively the opposite of the previous approach that demanded the JJS be 'focused on managing a child's offending behaviour and the risks they were considered to pose'.[314] It has been completely reversed in the JJS, in theory at least, by the Child First approach which has become 'the central and guiding principle of the YJB' and serves to direct 'the policy and practice of the youth justice sector as a whole'.[315] The Child First approach has the potential to cascade throughout the JJS and be further enhanced as a driver for reform. As a contribution to the thesis's argument, its key aspects and its foundational behavioural ideas warrant examination.

4.2.4.1 Child First background and purpose

The YJB's definition of the Child First approach reflects four aspects which mandates youth justice services:

1. to see a child as a child,

[308] It has similarities in some respects to the Scottish JJS and its Children's Hearing system as discussed in Chapter 5.
[309] Youth Justice Board, *Strategic Plan 2021 – 2024* (Youth Justice Board for England and Wales 2021) 3.
[310] ibid 10.
[311] ibid 10.
[312] ibid 10.
[313] ibid 11.
[314] ibid 11.
[315] Case and Browning (n 303) 6.

2. to aid his development of a pro-social identity to facilitate a positive outcome for him,
3. to collaborate with him, and,
4. to promote his diversion from the JJS.[316]

The Child First approach builds on the original iteration that proposed 'a strategic objective and complete model of practice and … interacting tenets (principles)' described in the work of Haines and Drakeford as 'Children First, Offenders Second'.[317] It represented a direct challenge to the strategies promoted in the Crime and Disorder Act 1998 and its focus on criminalisation of children and the criminal offence. The Act promoted responses predicated on addressing criminalised behaviour by children, ascribing responsibility to them for their behaviour and for self-rehabilitation, including desistence, delivered in a criminalised framework which included punishment as a necessary component.[318] The stressed key concept was criminalisation and revealed more about the proponents of the approach rather than its value as a positive child-focused strategy. Children First, Offenders Second was promoted through the youth inclusion strategy, Extending Entitlement, which in turn contributed to the All Wales Offending Strategy in 2000. These ideas led to 'an evidence-based model of practice entitled Positive Youth Justice' which included 'child-friendly and child-appropriate treatment of older children, the promotion of positive behaviours and outcomes for [them] and diversion' from the JJS.[319] It proposed child-friendly decision-making at all stages of the process with more meaningful engagement and participation by children and making the professionals involved in the process responsible for ensuring positive outcomes together with access to support and guidance.[320]

The perception of the Welsh iteration of Children First, Offenders Second as representing a sea change added to its allure as a new fundamental reordering of the purpose of the JJS. The All Wales Youth Offending Strategy (AWYOS) noted that it 'incorporated the different viewpoints, set out an approach on which there is consensus and laid the foundations for youth justice policy in Wales, incorporating how devolved services could support and contribute to the prevention of offending'.[321] The promotion of the strategy as incorporated into AWYOS

[316] Case and Browning (n 303) 6.
[317] Kevin R Haines and Mark Drakeford, *Young People and Youth Justice* (Palgrave 1998).
[318] Case and Browning (n 303) 7.
[319] Case and Browning (n 303) 7.
[320] Case and Browning (n 303) 7.
[321] Susan Thomas, Children first, offenders second; An aspiration or a reality for youth justice in Wales (University of Bedfordshire 2015) <www.uobrep.openrepository.com/bitstream/handle/10547/622111/Children%20First%20Offender%20Second%20Sue%20Thomas%20%202015.pdf?sequence=1&isAllowed=y > accessed 28 May 2021.

represented the biggest difference in policy within the JJS in England and Wales.[322] Case and Browning observed that the extent of the changes brought about by the strategy called 'into question whether England and Wales [could] still be regarded as a single jurisdiction notwithstanding the fact that youth justice [was] not formally a devolved matter'.[323] Such was the clear water between the two approaches, with the English variant addressing the risk of reoffending and the Welsh variant being more focused on supporting the individual child, that it is difficult to resist the assessment that there is now, at least, two systems within a single jurisdiction.

The Child First, Offender Second strategy and principles reflected the dragonisation of Welsh juvenile justice through three distinct avenues of development:

1. the ratification by the devolved Welsh Government of the UNCRC and its assurance to ensure compliance of devolved legislation,[324]
2. the promotion of Welsh only juvenile justice strategies, for example, Extending Entitlement,
3. the AWYOS juvenile justice strategy which, it was argued, raised 'no contradiction between protecting the welfare of young people in trouble and the prevention of offending and re-offending'.[325]

The Ministry of Justice succinctly encapsulated the Child First approach as preventing 'children from entering the criminal justice system, minimising their contact with it and maximising opportunities for diversion [to support] them to lead crime free lives', with the necessary requirements set out in the Social Services and Well-being (Wales) Act 2014 and the Well-being of Future Generations (Wales) Act 2015. These legislative foundations promoted the provision of local services to support children from offending and to promote their future welfare.[326] The youth justice design adopted incorporated the whole-system approach to provide a comprehensive response to child offending as utilised in Scotland.[327] The Welsh Blueprint defined success as improved 'criminal and social outcomes for children in contact

[322] Noel Cross, Jonathan Evans and John Minkes (2002) Still Children First? Developments in Youth Justice in Wales *Youth Justice* 2(3) 158.
[323] Simon Hoffman and Stuart Macdonald, Tackling youth anti-social behaviour in devolving Wales: a study of the tiered approach in Swansea, (2011) Youth Justice 11 (2), 150, 151.
[324] United Nations, *Convention on the Rights of the Child* (United Nations, Geneva 1989).
[325] Welsh Assembly Government and Youth Justice Board, *All Wales Youth Offending Strategy* (WAG, Cardiff 2004) 3.
[326] Ministry of Justice and Welsh Government, Youth Justice Blueprint for Wales (2019) < www.gov.wales/sites/default/files/publications/2019-05/youth-justice-blueprint > accessed 28 May 2021
[327] Discussed in Chapter 5.

with the youth justice system and to support them to develop resilience and to fulfil their potential'.[328] These developments mandated the recognition of the individual child being part of the process with the YJB, having placed the Child First principle at the centre of its approach. It was accepted that, in line with Article 12 of the UNCRC, child offenders had to have 'the opportunity to get involved in decisions about their care and supervision; access to the services they need; and a say in how those services work'.[329] The importance of compliance oversight was similarly recognised to ensure continuity of delivery of the aims through the Wales Youth Justice Advisory Panel, chaired by the YJB and the Welsh Government. The panel 'acts as a strategic reference group for change programmes in Wales providing check-and challenge to ensure the "child first" principle is central to development'.[330]

Initially, the Children First, Offenders Second approach to diversion of child offenders was complemented by the Swansea Bureau, a partnership between South Wales Police and Swansea YOS.[331] It developed a localised response to childhood criminal behaviour that built on similar initiatives in Northamptonshire and in the Scottish JJS's reporter system as discussed in Chapter 5**.** The Swansea Bureau rested on inter-agency partnerships with eligibility criteria intended to divert child offenders from the JJS without the need for a criminal charge, or indeed a criminal record.[332] An important and counter-intuitive point of difference with other diversion pathways, as discussed below, involved slowing a child offender's progression through the JJS process to ensure focus remained on him as an individual.[333] The process was designed to engage at 5 key points, arrest and bail of the child, an assessment of the child, an assessment of the victim, a Bureau Panel meeting and a Bureau Clinic. The latter stage of the process consisted 'of the members of the Panel plus the young person and their parent/carer and follows a broadly restorative model of operation'.[334] The intended aim was to facilitate a participatory discussion involving the professionals with the child offender and his parents 'given express

[328] Ministry of Justice and Welsh Government (n 326).
[329] National Assembly for Wales, *Children, Young People and Education Committee Inquiry into Children's rights in Wales CRW 03 Response from: Youth Justice Board* (2019) <www.senedd.assembly.wales/documents/s94640/CRW%2003%20Youth%20Justice%20Board> accessed 28 May 2021.
[330] National Assembly for Wales (n 329).
[331] Swansea YOS, *The Swansea Bureau. Swansea YOS and South Wales Police* (Swansea YOT 2010) 1 < www.yjresourcehub.uk/evaluation-library/item/320-swansea-bureau-children-first-offenders-second > accessed 24 May 2021.
[332] ibid.
[333] Kevin Haines, Stephen Case, Katie Davies and Anthony Charles, The Swansea Bureau: A model of diversion from the Youth Justice System (2013) 41 International Journal of Law, Crime and Justice 167, 171.
[334] Haines, Case, Davies, and Charles (n 333) 174.

opportunity to contribute to the discussion'.[335] The Bureau Clinic 'reached a mutually agreed and appropriate outcome/decision for each child', namely to prosecute; to administer a Police Reprimand or Final Warning; or to agree to a Non-Criminal Disposal which could include a support package.[336]

As an approach the Swansea Bureau represented an informal diversionary response to first-time low-level child offenders and rebuffed the more formalised pre-court diversion processes. In essence, the approach eschewed 'normalising offending by avoiding proactive intervention or stigmatising offending' and concentrated on 'a child-focused and prosocial approach that is committed to diversion' with 'supportive intervention to young people and parents'.[337] This inclusion is essential to facilitate positive outcomes and serves to make them 'subjects within changing youth justice processes, rather than as objects of study' and, it is argued, promotes a more positive value on the individual child offender's analysis of his own problematic behaviour. [338] It is an approach that recognises therefore the importance of combining juvenile justice professionals and the core participant, the child offender. The Bureau method promotes better outcomes through a holistic wrap around concept that is far removed from a simple admission of offending and a punishment-cum-rehabilitation model of diversion that requires the criminal label to be applied to the child involved. In the Welsh context, the use of the Bureau model has produced a fall in the number of child offenders dealt with by Youth Cautions or Youth Conditional Cautions, with child offenders being processed by non-criminal disposals as intended.

4.2.4.2 Child First and behavioural theory

Underlying the Child First approach are a number of theoretical foundations with 'operational examples of its successful application in practice'.[339] Case and Browning stressed the dual function of Child First as

> 'identifying/tackling the influences on offending *and* identifying/promoting the influences on children's desistance from offending and that help them to move into prosocial, positive behaviour'.[340]

[335] Haines, Case, Davies, and Charles (n 333) 174.
[336] Haines, Case, Davies, and Charles (n 333) 174.
[337] Haines, Case, Davies, and Charles (n 333) 185.
[338] Deborah H. Drake, Ross Fergusson and Damon B. Briggs, 'Hearing New Voices: reviewing youth justice policy through practitioners' relationships with young people' (2014) 14 (1) Youth Justice 22, 24.
[339] Case and Browning (n 303) 9.
[340] Case and Browning (n 303) 9.

In trying to understand the drivers of childhood criminality, they pointed to the work of Hirschi and his social control or bonds theory which holds that people have a natural tendency to delinquency so that the problem was, therefore, how to prevent such unwanted behaviour and promote conformity.[341] He argued that social bonds that affected social control manifested themselves through four forms, namely, 'attachment to family, commitment to socially accepted norms, involvement in activities and [a] belief that these' elements of social cohesion were important to the individual as a member of society.[342] Better behaviour and compliance with social norms could therefore be achieved with the development of such social bonds. Hirschi contradicted 'the assumption that delinquent adolescents exert a decisive influence on their peers of the same age' and instead argued that 'the more these values and norms have been internalized, the more difficult it becomes to violate them'.[343] In essence, individuals as members of a community, including maturing children 'internalise the norms of society' and where there is a failure to observe or a break down in observation an individual 'is free to deviate'.[344] The acquisition of societal norms 'lies in the attachment of the individual to others' to reinforce behaviours and as criminal defence practice tends to show, most of a firm's client base come from a defined social and location and exert a demand on resources far beyond that which their actual number would warrant.[345] Similarly, Case and Browning also point to the labelling theory, ascribed in part to Lemert, which objectifies child offenders as such because they had been

> 'subjected to processes of criminalisation - the allocation of 'criminal' labels by more powerful groups in response to rule-breaking rather than criminality (e.g. behaviours deemed anti-social) in order to justify targeting and differential treatment'.[346]

It was no more than this process of 'labelling the child as deviant which denotes [him] as an 'offender', rather than the behaviour itself' and this alters his self-perception, and he accepts his 'deviant identity' which leads to 'actual criminality as the social response'.[347] Lemert made the point that all interventions that endeavour to divert or reorientate an individual's behaviour

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[341] Christian Wickert, Social bonds theory (Hirschi) SozTheo 2019 < www.soztheo.de/theories-of-crime/control/social-bonds-theory-hirschi/?lang=en > 28 May 2021.
[342] ibid.
[343] ibid.
[344] Travis Hirschi, *Causes of delinquency*, (University of California 1969) 18.
[345] ibid 18.
[346] Case and Browning (n 303) 9.
[347] Case and Browning (n 303) 9.

necessarily risk exacerbating or perpetuating 'the very problems they seek to ameliorate'.[348] More recognisable criminogenic pathways are evident in the social development model where ''etiological factors' (causes) within the family, school, peer group and community interact to increase or decrease the probability of youth antisocial and criminal behaviour'.[349]

Effectively, the Child First approach is an attempt to meet the challenges of child offending by responding in a way that takes account of the underlying immaturity of the children involved, and why they are so receptive to such behaviours. Objectively, the above theories are reflective of Girard's mimetic theory which can be applied to childhood behaviours. He argued that everyone has a mimetic capacity built on the basic mechanism of learning and imitating behaviours, including undesirable ones.[350] These imitated behaviours become normalised, and the individual child is caught in a behavioural vortex which reinforces those behaviours which from a societal viewpoint are deemed unwanted. The behavioural mediation by another child or immediate family member or acquaintance, ensures that behaviours are learnt and acted out, producing unwanted behavioural norms, including criminal behaviours. Such behavioural mimicry is not uncommon, for example, in local authority provided accommodation with outbreaks of contagious criminality by older child residents which cascades to all residents and leads to a spike in localised anti-social behaviour and low-level nuisance offending.

4.3 Aspects of the JJS in practice today

In addition to the delivery of the JJS as noted above, there remain a number of areas of concern that call in to question the extent to which the JJS is fit for purpose. In the context of the thesis's questions, these areas include the use the localised bodies to address the needs of children vulnerable to criminal behaviour, discriminatory behaviours within the JJS, the implementation of the JJS's strategic aims and the effectiveness of the Youth Court as a dedicated venue for child offenders.

4.3.1 The Nottingham Safeguarding Children Board and the referral criteria

The Nottingham Safeguarding Children Board is one example of similar nationwide bodies which endeavour to deliver services to vulnerable children engaged in or at risk of criminalised behaviour. It promotes engagement with children at risk of criminal behaviour through defined

[348] Edwin M. Lemert, *Instead of Court, Diversion in Juvenile Justice* (National Institute of Mental Health Centre for Studies of Crime and Delinquency 1971) 13.
[349] Case and Browning (n 303) 10.
[350] Gabriel Andrade, René Girard (1923—2015) Internet Encyclopedia of Philosophy < https://iep.utm.edu/girard/ > accessed 4 July 2021.

criteria (the Criteria) which take account of key factors to prompt intervention.[351] These include repeated anti-social behaviour that could lead to an arrest or a Criminal Behaviour Order, or the use of violence, with weapons or targeting victims including repeated behaviour in school settings involving pupil assaults. More generally, a referral can take note of aggressive behaviour at home and the need to consider a referral to the family service for parenting intervention or non-physical bullying which could lead to arrest for criminal behaviour. The range of concerning behaviours includes racial and verbal abuse, online bullying, including posting images without the victim's consent, or other concerning traits that give cause for concern such as quasi domestic violence involving a boyfriend or girlfriend, psycho-sexual, cruelty to animals, fire-setting, extremist or discriminatory acts, or even just general behavioural concerns, for example stealing, dealing, using drugs, or sexual behaviour.[352] The breadth of factors demonstrates the range of activities which can underpin offending and which might be addressed and manipulated before further escalation leading to police intervention. The Criteria promote a basic matrix against which to assess a child and his family. Whilst there does not have to be police evidence or intelligence to support a referral, there needs to be evidence that the behaviour is current, and the child is at risk of entering the JJS. The referral must confirm that a discussion has been had with the young person and parent or carer to advise them that a referral will be made, and they have given their consent. It must also specify the behaviour to be addressed to prevent offending or anti-social behaviour.

The Criteria indicate how a more therapeutic and family-based intervention can tackle childhood criminality in a positive and creative way to promote acceptable behaviours. It represents a model of how the vulnerability of child offenders, in terms of immaturity and susceptibility to criminal behaviour, whether through family or peer pressure might be addressed by other practitioners, such as criminal defence lawyers. Even with the JJS promoting the diversion of children at the earliest point in their criminal career, enough still filter into the formalised system to cause concern, often for relatively minor offences that pose a minimal risk to the public. However, the consequences for those children, when balanced against the reduction in the individual's life chances, often seem to criminal defence practitioners to be out of proportion.[353]

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[351] Nottingham Safeguarding Children Board, *Pathway to Provision: Multi-Agency Thresholds Guidance for Nottinghamshire Children's Services* (Nottinghamshire County Council Children and Families 2018) 28.
[352] ibid 28.
[353] Tim Bateman, '*Justice for Children in Trouble'* (2011) National Association for Youth Justice Briefing Paper, 5.

4.3.2 Innate discriminatory behaviours

More fundamentally, the JJS presents, for example in the Youth Court, as unable to take any meaningful account of the individuality of each child offender whether by reference to basic and limited educational attainment, social class, or ethnic origin. These factors appear to carry little weight or are often ignored within a JJS process that reflects the dominant White British ethnic focus of society. There is evidence that

> 'young people from Black and Minority Ethnic … groups, especially of African-Caribbean origin and mixed heritage, have different and worse experiences of the youth justice system from their white counterparts'.[354]

Institutionalised socio-cultural discrimination can be observed in the JJS, in the interactions between clients and professionals, though it is more apparent in the court setting than at the police station. Discriminatory traits were noted as far back as 1999 as being discernible

> 'in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people'.[355]

In a twist of a plea for recognition of the individual child, the system may inadvertently be acting on characteristics that demonstrate the limits of the JJS to function objectively in dealing with him, for example, by being unable to disassociate its judgements from superficial racial identifiers. The ultimate illustration of this unresolved perception of differences is exemplified by those child offenders who complete their pathway through the JJS to a custodial environment. For example, HM Inspectorate of Prisons documented in 2017 – 2018 that 42% of children in secure training centres identified their racial background as Black, Asian and minority ethnic (BAME), 13% identified their religious affiliation as Muslim and 11% identified as Romany and Traveller backgrounds, percentages in excess of their overall representation in society.[356] Similarly, in Young Offender Institutions (YOI), 51% identified their racial background as BAME, 23% identified their religious affiliation as Muslim and 6% identified as Romany and Traveller backgrounds. The YOI survey also revealed 39% had been in local authority care and 19% were recorded as having a disability.[357]

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[354] Brian Littlechild, 'The youth justice system in England and Wales: History, current developments and key issues in policy and practice with young offenders' (2010) 1 European Research Institute for Social Work 13.
[355] Home Department, The Stephen Lawrence Inquiry (1999) Cmnd 4262 para 6.34 defines institutional racism and that it persists because of the failure to 'openly and adequately recognise and address its existence'.
[356] HM Inspectorate of Prisons, 'Children in custody 2017 – 2018, An analysis of 12–18-year-olds' perceptions of their experiences in secure training centres and young offender institutions' (2019) HM Stationery Office, 7.
[357] ibid 7.

As noted above, the number of children coming into contact with the JJS continues to decline though the statistical imbalance between ethnic groups continues to suggest discriminatory failings. For example, in 2020 68% of arrested children were white, 17% black and while the total number of children arrested has declined, the figure for black children had increased by 7% compared to the proportion in 2010.[358] These figures highlight that the JJS deals with a remarkably small section of society and, though not by overt design, nevertheless, reflects an 'othering' of certain groups. It leads to a disproportionate number of children from easily distinguishable racial backgrounds, or cultural lifestyles, still travelling further through the JJS compared to their peers in wider society even with the more child focused approaches discussed above. The JJS deals with a wider and more representative cohort of child offenders at its entry point, for example on first arrest, and processes most of them out of the system by way of disposals that do not involve court appearances or custodial environments. In the context of this thesis and its focus on individualised responses to child offending, those child offenders that remain in the JJS appear to be disproportionately 'selected' by reference to their ethnic and social background. The dominance of certain groups of child offenders at the end stage of the JJS is suggestive that its processes are not objective. Rather than providing an individualised response that is blind to such traits, the system itself, may, indirectly, be a promoter of criminal behaviour. If the JJS is unintentionally promoting a trait-based approach, it presents as potentially biased racially and socially and in need of reform. The issues surrounding the JJS's processing of child offenders, it is suggested, demonstrate serious failings, especially when contrasted with the more positive approaches implemented in its first-tier level intervention. These interventions are intended to act positively in a child offender's life by promoting out-of-court disposals and other options available with the potential for more therapeutic responses as envisaged in this thesis.

4.3.3 The implementation of JJS's strategic aims

The JJS functions through the professionals involved and their respective perceptions of their roles do not always gel and work for the common good, despite their endeavours to do so. As a part of the criminal justice system in England and Wales, the JJS works in tandem with the police service, the Magistrates' Court, including the Youth Court, and the Crown Court in the most serious cases. In addition, the system is augmented and supported by other agencies providing youth justice services under the strategic direction of the YJB. The operation of the

[358] Youth Justice Board/Ministry of Justice (n 275) 8.

JJS is also dependent on the Crown Prosecution Service (CPS) and the criminal defence lawyers to facilitate its day-to-day functioning, though the latter element is generally overlooked as regards its contribution to protecting child offenders and their rehabilitation. This element remains undervalued and underused in the pursuit of a better JJS and, even with the promotion of the Child First approach, the system often presents in practice as unwilling to view criminal defence lawyers as a valuable resource. In contrast, the reform proposal detailed in Chapter 8 specifically recognises the untapped potential of such lawyers to contribute more fully to a more therapeutically focused JJS.

The professional participants in the JJS provide a demand-led service detailed in published action plans for the state organisations such as the YJB. The performance of the independent defence lawyers providing representation to child offenders is also extensively monitored, though usually with greater concern on the financial aspects rather than the legal outcomes. The realities of life at the 'coalface' where child offenders are engaged with the JJS, whether at the police station or in the court system, highlight the limitations on the system's processes in treating the child offenders as vulnerable persons. There is a degree of overlap and interaction between the police and the CPS, the YOS, and the Magistrates' Court system including the Youth Court. This umbrella architecture includes court staff, volunteer magistrates, District Judges and Crown Prosecutors, but excludes those representing child offenders, the criminal defence lawyers. This exclusion is indicative of a system focused on a traditional adversarial criminal law model of crime and punishment, rather than a more proactive, or even therapeutic approach, as envisaged by this thesis and its plea for a reformed approach to child offending. This division is subject to the basic criticism that it is not inclusive of those independent professionals most involved in child offending processes. For example, the regular forums involving the above professional elements that meet to discuss, plan, and implement youth-orientated crime strategies rarely include criminal defence lawyers' representatives. From the outside, it can present as being one large overreaching system designed to control and enforce the law in relation to child offenders and their unwanted behaviours, rather than seeking to explore the wider context that gives rise to the problematic behaviours and to address them.

Recognising criminalised childhood behaviour as part of the developmental pathway which, in most instances, is resolved by the passage of time and the maturation of the individual child is a theme that contributes to this thesis's argument. How to address criminality is key to reforming the JJS and demands a greater knowledge of behavioural drivers. Hoffman and

Macdonald observed that 'offending and anti-social behaviour are so prevalent in the teenage years that they can be viewed as a relatively normal feature of adolescence'.[359] As a viewpoint, this accords with child offenders who appear and are active clients of criminal law firms for at most 18 months and then desist from offending, occasionally to return as adult offenders. This understanding contributed to the increasing use of diversion from the JJS rather than processing child offenders needlessly through the system. Diversion avoids the attendant problems associated with labelling child offenders as criminals and the effects of criminalisation produced by the system.[360] The introduction of the Youth Restorative Disposal and the Triage approach illustrate the attempts made to improve diversion.[361] The former was introduced in 2008 and represented a non-statutory approach that focused on low level offending where those involved had not previously received a Reprimand, Final Warning or Youth Conditional Caution. The primary aim was to provide early support, intervention, and guidance to child offenders. The Triage approach was introduced in 2009 as a joint approach by the police, CPS, and the YOS. It similarly focused on low level offending with the intention to promote diversion from the JJS towards restorative justice approaches and to address the individual child's needs. The intention was to process such child offenders out of the system where possible, while retaining the option of further intervention and support for them and fast track entry into the JJS for the most serious offending.

Child offenders who persist in criminal behaviour progress through the matrix of JJS responses that leads ultimately to a Youth Court appearance. In addition, the JJS retains in the Youth Court a procedure which enables the most serious criminal offences involving child offenders to be heard by the Crown Court. This anachronism enables the stated purpose of the Youth Court as the dedicated venue to deal with child offenders to be circumvented. Though the Youth Court can impose Detention and Training Orders on children aged at least 12 years, with a minimum sentence of 4 months and a maximum of 2 years, the court has the power to send a child offender to the Crown Court, where the court considers that a greater sentence is warranted or ought to be available.[362] There are very few offences which cannot by law be tried in the Youth Court with the exceptions including murder, attempted murder and manslaughter. Where a child or young person is jointly charged with an adult, the youth must be tried summarily unless the court considers it to be in the interests of justice for both the youth and

[359] Simon Hoffman and Stuart Macdonald (n 323) 154.
[360] Carceralism is discussed in Chapter 7.
[361] Youth Justice Board, *Youth Restorative Disposal Process Evaluation* (YJB 2011).
[362] Sentencing Council, *Youth Court Bench Book* (Sentencing Council 2017) 61.

the adult to be committed to the Crown Court for trial.[363] In practice, of course, the courts tend to favour a single trial and child offenders, in this predicament, find themselves before the higher court with the adult offender rather than in the dedicated venue, the Youth Court. In criminal defence practice, the issue is further complicated by the Youth Court for the most serious offences listed for trial being reserved for hearing by a District Judge. The positive advantage for a child offender of a Crown Court trial is the jury as this undoubtedly removes the concerns of trial by a single professional. In those instances where jurisdiction is retained by the Youth Court, the child offender cannot elect to have his case heard by the higher court.

The existence of the two court venues, one for adult offenders and the other for child offenders, subject to the exceptions noted above, is not without complications for criminal defence lawyers. The model of separate venues without any overlap, between the Youth Court, the Magistrates Court, and the Crown Court, seems attractive but as mentioned, in the JJS's present structure this is not a straightforward choice when assessing the best interests of a child client. For example, Kupchik observed that in an ideal criminal justice court system, the two venues, divided between children and adult offenders, would vary 'along three major dimensions: (1) evaluation criteria, (2) sentencing goals, and (3) formality of court proceedings'.[364] The contrast ought to be apparent between offence focused evaluation together with punitive sentencing in a court environment for adults, and offender focused evaluation and rehabilitation in a less formal environment for children.[365] The degree to which the present JJS corresponds to this approach is clearly questionable, because of the ingrained behaviours exhibited by professional and volunteer participants within the criminal court system, and its operation in practice. For example, the cosiness that exists between those involved in the system militates against the concept of treating child offenders in a different way to adult ones, and even the practicalities that require both child and adult offenders to share the same facilities in many courts.

4.3.4 Age and a court for child offenders

The Youth Court is the normal venue for child offenders unless one of the criteria discussed above applies. In the higher court, the Crown Court, whilst certain steps are taken to reduce its formality, for example the removal of wigs, it is nevertheless evident that the experience for

[363] Judicial College, *Youth Court Bench Book* (Judicial College, August 2017) 104 Appendix A Magistrates Association Protocol August 2017 Youth Court Bench Book.
[364] Aaron Kupchik, 'Prosecuting Adolescents in Criminal Courts: Criminal or Juvenile Justice?' (2003) 50 (3) Social Problems 439, 439.
[365] Youth Justice Board (n 288) 9.

the child offender, with or without a trial before a jury, cannot be appropriate. The failure to follow the logic of a dedicated court for child offenders is a glaring illustration of not 'acting in the best interests of the child'. The more serious the case is, the more important it becomes to provide protection from the public gaze, and a more age-appropriate environment in a dedicated court. The Centre for Social Justice lent support to the creation of an integrated Youth Court and Family Court on the basis that combining care and criminal matters would provide a proper joined up system.[366] As observed by Chris Stanley JP,

> 'If the main principle of a Youth Court is to reduce reoffending, how can a purely criminal Court tackle these problems that are the underlying cause of the offending? A mainly criminal range of sentences does not address the needs of these families. Only by addressing these can we hope to make a start in reducing offending'.[367]

The ACR, examined in Chapter 2, highlighted the contradiction inherent in such a structured legal system that had developed on the premise that child offenders had to be held to account for their criminal actions. The reforms which morphed the JJS into a more nuanced appreciation of childhood offending have further changed tack to place the child and his needs at the pinnacle with the adoption of the Child First approach. Criminal defence practice continues to confirm that for those child offenders prosecuted, there remains a lack of subtlety in the legal mechanism applied to them. The reform agenda propagated in this thesis, with its focus on a complete reorientation, is undoubtedly a step too far at the present time, though the Child First approach is a major step forward. Unfortunately, its limited application to date serves to highlight the need to go further with the client bases of criminal law firms still bolstered by the continuing flow of new entrants, albeit with a slightly older initial entry age.

The recognition of the individual child, as to his ability and capacity to know and be responsible for his actions, and therefore be subject to criminal procedures by the police and court, has no bearing on the ACR gateway. The public policy behind this approach has produced a political and legal cul-de-sac. The ACR gateway reinforces the reality that age-related rules, to impose criminal responsibility, have no evidential basis to support them. The assertion that children aged 10 'are sufficiently responsible and competent to participate in the youth justice system is seriously inconsistent with other aspects of the law in England and Wales'.[368] The criminal

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[366] Youth Justice Working Group, *Rules of engagement changing the heart of youth justice* The Centre for Social Justice 2012) 205.

[367] Chris Stanley, *I would give up...youth courts* (Centre for Crime and Justice Studies 19th March 2014) <https://www.crimeandjustice.org.uk/resources/i-would-give-upyouth-courts> accessed 25 June 2021.

[368] Youth Justice Working Group (n 366) 205.

justice system is the only legal area where 'ten year-olds are deemed competent to make informed decisions and take full responsibility for their actions'.[369] The Kilbrandon Report noted that in Scotland

> 'the legal presumption which the criminal law applies does not purport to reflect any objective facts about the actual age of attainment of responsibility, but was adopted as a practical rule with the object of exempting children of tender years from the pains of the law'.[370]

The ACR limits responsibility for a child's behaviour so 'that in no circumstances should a child under' that age be made the subject of criminal proceedings'.[371] The conundrum posed by this weak argument is that it has produced a JJS which is hamstrung from treating the individual child's criminogenic risk factors once they enter the court system. The process in most cases requires a legal outcome before help is offered. Raising the ACR would address some of the concerns about the prosecution of young children by removing them from the JJS and sidestep any further JJS and Youth Court reforms. It would also enable child offenders to avoid 'the stigmatising 'offender' label, which, the evidence shows can exacerbate delinquency, and [they] would more likely have their victim status and welfare needs addressed'.[372] Objectively, a simple age increase at least would shift the focus of the JJS to older children though it would not address the causes of childhood criminal behaviour as envisaged by the thesis.

4.4 Aspects of police processing and first tier intervention

4.4.1 The police and the child offender in practice

The issue of juvenile justice reform has been examined principally by reference to the ACR as the gateway to the system together with the positive steps introduced towards promoting diversion of child offenders have been noted. However, in practice various examples of procedural impediments remain which suggest that there is still some way to go before such offenders are processed in a more child orientated way. This is especially apparent in the context of police station procedures and, whatever the merits of the JJS in promoting reform, rehabilitation, and desistence, this first point of contact continues to reflect a very traditional obsession with police processes and procedures. The litmus test of a proper child focus can be applied to this day-to-day processing of child suspects by the police. Even with the acceptance

[369] Youth Justice Working Group (n 366) 205.
[370] The Kilbrandon Report, Children and Young Persons Scotland, HMSO Edinburgh 1995, Para 67.
[371] ibid Para 66.
[372] Youth Justice Working Group (n 366) 209.

of the ideas of the Child First approach, there is a dissonance with the realities of the professional interactions at the 'coalface' between police, criminal defence practitioners and their clients. For example, the initial behaviour displayed by child suspects when they are brought into police custody continues to determine their relationship with and treatment by the police officers involved. This can be observed in the behaviours between them as they banter and yet display their relative positions and weaknesses in the process. The weakness of the child suspects is obvious because of their immaturity in behaviour and language but there is a mirror reflection in the police officers who often display a need to be seen as friendly and stern at the same time. This initial jockeying often determines the outcome as the police officers and child clients achieve better outcomes when their relationship settles into one of quasi-surrogacy for the family, especially when the local authority provide an appropriate adult.

This first contact-connection with the police highlights a potential stumbling block to reform as envisaged by the thesis. It is beyond doubt that the Child First approach has the potential to move the JJS towards a more therapeutic approach as expounded in Chapter 8, but the role of the police remains the key determinate in a child's future criminal pathway. Police processing in practice often still presents, when viewed from a criminal defence lawyer involvement, as treating child suspects as small adults, albeit with additional notional protective requirements. However, these requirements often seem to produce the opposite result and draw some child offenders ever deeper into the tentacles of the system. Child suspects are subject to manipulation to achieve an end that is satisfactory to the police investigatory regime, an end which may not necessarily be in the best interests of the child. The dichotomy between the purpose of the JJS and day to day policing practice, for example, is evident to a criminal defence lawyer when attending a police station to provide advice and assistance to a child suspect. The procedures applied by the police during an investigation into childhood criminal behaviour reinforce the imbalance in the criminal justice system, between those controlling the process and those being controlled. The police retain total control of the environment, including the child, his appropriate adult, and his legal representative. As the point of first contact by a child with the JJS, the police act as first responders and set the tone for a child's journey in the system.

The police have flexibility in their response to reported criminality.[373] Unfortunately, operational demands for results and statistics, both by the police and by Police and Crime

[373] Association of Chief Police Offices, 'Guidelines on the use of Community Resolutions' (*ACPO* 2012) <www.acpo.police.uk/documents/criminaljustice/2012/201208CJBAComResandRJ >accessed 25 June 2021. It

Commissioners, act as drivers for 'detection' or 'finding' criminal behaviour.[374] For example, the dominant police view of the current ACR supports the contention that where there is 'capacity and freedom to choose' and the child concerned is aged at least 10, his choice to act means that 'the consequences of that decision should flow to him'.[375] The majority of police investigations involving children aged 10 years and over proceed on this basis, subject to the additional requirements detailed in the Police and Criminal Evidence Act 1984 (PACE) and the accompanying Codes of Practice.[376] Principally under Code C of PACE, for a suspected child offender, whether detained in a police station custody block, or attending voluntarily, the focus of the police, at that moment, is on the necessity for the attendance of an appropriate adult to comply with PACE. His presence is necessary when procedural steps are taken, including cautioning, reasons for detention, notifying another of the child's detention, the need for a lawyer or not, to offer information about his legal rights, and procedural consent for photographs and identification data.[377] In theory he is there as an extra protection for the child. However, in practice the appropriate adult does not generally hinder an investigation in any unique way compared to an adult in the same environment.[378] An appropriate adult should be an individual, such as a parent, guardian, or local authority provided officer, to whom the police can explain mandated information to comply with the requirements of PACE. These include the grounds for arrest and detention of the child, the legal formalities, such as the child being formally cautioned on arrest, and on being detained at the police station, the right to legal representation and to have someone notified of his detention and the proposed course of action in relation to the child and the matter under investigation.[379]

In practice, the appropriate adult role often appears to be taken as a formality by investigating police officers, with little information being provided to non-professionals attending in that role. Equally, there is a superficiality to the importance of the role even when it is fulfilled by

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details community resolution procedures for low level crimes including anti-social behaviour with the agreement of the parties including youth offending and offering an alternative to 'formal criminal justice processing'.

[374] Association of Chief Police Offices, 'Statement of Mission and Values' (*ACPO* 2011) <www.acpo.police.uk/About/missionandvalues.aspx> accessed 25 June 2021. Confirms that 'The mission of the police is to make communities safer by upholding the law fairly and firmly; preventing crime and antisocial behaviour; keeping the peace; protecting and reassuring communities; investigating crime and bringing offenders to justice'.

[375] Elliott (n 81) 289.

[376] Police and Criminal Evidence Act 1984, Code C, Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers.

[377] Home Office, *Code C, Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (Home Office July 2018).

[378] Police and Criminal Evidence Act 1984 (n 376) Paras 3.13, 10.11A and 11.13.

[379] Home Office (n 377).

a professional who often presents as being under pressure from his employers, the local authority's children's services, not to delay but to deal with such an attendance speedily. The appropriate adult should be the keystone in ensuring fair treatment of the detained child. A private room should be provided so that the adult may talk with the child. However, such discussions are not privileged, and a professional appropriate adult may give evidence as to matters discussed with the detained child, including admissions made to him. The risk to the child in such circumstances is not always known or appreciated by either of them at the time. The non-professional appropriate adult ought to be aware of the implications of a child being subjected to a criminal investigation. In particular, the potential for prosecution, or other disposal, and the consequent effects on the life chances of the child, including subsequent monitoring by the police and local authority agencies. His limited role, in not providing legal representation or advice to the child, is balanced by his ability to request that a legal representative be contacted. This acts as a brake on the police investigation and ensures to some degree that the legal interests of the child are protected. The importance of providing independent legal advice and representation to vulnerable people, including children, under police investigation is recognised by the provision of free legal advice and assistance.[380] However, the funding regime relies on fixed fees which limits the attendance of solicitors and has led to a reliance on legal advisers provided under the Police Station Representatives Accreditation Scheme.[381] In practice, the legal advice is often provided by non-lawyers, such as qualified police station representatives, who may not always be as diligent as a solicitor. This can on occasion produce inappropriate outcomes for the child, for example where a no comment interview leads to an outcome that could have been avoided by negotiating one more appropriate for the child that exited him from the JJS at the earliest moment.

The safeguard of an independent legal adviser provides a confidential support and advice to the child which counterbalances the dominant role of the police. Sometimes it can be avoided by a police officer suggesting to the child and on occasion the appropriate adult, especially when a parent, to co-operate so 'we can get this sorted and go home'. This is not to be cynical of police motives but is a valid observation in relation to policing strategies to control child criminality, and to demonstrate an effective response to crime. In the same way, investigating

[380] The Police and Criminal Evidence Act 1984 provided for legal advice and assistance schemes at police stations that were established in 1986.
[381] Solicitors Regulation Authority, *The Police Station Representatives Accreditation Scheme* < https://www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation>accessed 25 June 2021. A register of those authorised is maintained by the Legal Aid Agency.

police officers may suggest that the presence of a legal representative serves to slow an investigation and lengthen the time likely to be spent at the police station. This conflict in purpose, between police and lawyers or their accredited representatives, perhaps indicates that the system is, nevertheless, better than its absence, until more holistic procedures towards the child suspect exist as envisaged by the thesis.

4.4.2 Exerting control on the child suspect and the appropriate adult

The controls on dealing with a child suspect at the police station extend to a recorded interview with strict requirements as to the format and procedures to be followed. With the necessity for an appropriate adult, there may be up to five people present in an interview room at a police station.[382] This is not an ideal situation for a child but is required to comply with PACE and a more natural environment, such as a normal room, would be viewed as too informal and relaxed.[383] It would also remove the element of control and restriction on a child suspect who is cut off from the outside world, and generally placed in a room with no windows, artificial light, no privacy, no information as to the time of day, weather and other real world contacts that enable each of us to be aware and in control to the degree expected.[384] The confined situation can quickly morph into a dependency model when the police involved are perceived as friendly by the child. This occurs because of the immaturity of child suspects and their need to rationalise the environment by reference to those in control, the police, as the individuals with whom they should engage. Understandably, the police utilise this 'family' instinct to their advantage where possible, for example, to obtain admissions to offending behaviour or intelligence on other possible offenders.[385]

The child suspect is dependent on the adults who talk and interact with him. There is usually a change in how matters progress on the arrival of the appropriate adult, with the police officers assessing whether he will be compliant with the investigation. Often, this assessment is overt, for example, asking whether the appropriate adult believes that it is, 'quite rightly', important the child tell the truth so that the matter can be 'cleared up'. The elusive suggestion is implanted

[382] The detained child, two interviewing officers, appropriate adult, and legal representative.
[383] This contrasts with the more informal setting (living room type furniture) for interviewing vulnerable witnesses.
[384] Even mandated feeding of a detained juvenile can be manipulated with food being declined because of the way a meal is offered so that his ability to cope is further undermined in this controlled and manipulated environment.
[385] Clara Moskowitz, *Bonding with a Captor: Why Jaycee Dugard Didn't Flee Live Science* < https://www.livescience.com/7862-bonding-captor-jaycee-dugard-flee.html> accessed 25 June 2021. Stockholm Syndrome is named after a 1972 bank robbery in Stockholm, Sweden, where bank employees held hostage for six days ultimately bonded with their captors.

that everyone is working towards the same goal, that is resolving the matter being investigated. The police view an appropriate adult as an 'asset' and proceed to deal with him based on sharing their thoughts and ideas to conclude the matter, though for whose long-term benefit is not always clear cut within the confines of the police station. From an investigatory standpoint, the family member, attending the police station for the first time as an appropriate adult, is more malleable and manageable. It is usually very different where the child has a previous offending history and the appropriate adult, with previous experience of the role, will demand a legal representative be contacted. In contrast, the professional appropriate adult is often viewed as part of the team, and this may be confirmed by the tenor of the relationship with the officers. The YJB actively promotes the development of 'strong links with the police' to provide 'an opportunity for each service to work together more effectively'.[386] The purpose is to encourage local liaison and diversion services by providing information to the police about the child suspect, though the relationship is less than transparent to the individual benefitting from the appropriate adult assigned to him.[387] Alternatively, the professional may be deemed an 'awkward one' who actively questions the officers, talks to the child and requests legal representation. In the latter instance, the attendance of a legal representative may be welcomed by the police, as he too will be assessed as to whether he will be compliant. The usefulness of the appropriate adult with a defined role to be an observer, to assess the proper conduct and fairness of an interview and enable communication with the child to ensure the matter is properly dealt with, is questionable once a legal representative is instructed. It is more honest to say that the appropriate adult, in such situations, is there to hold the hand of the child, usually metaphorically, but on some occasions in practice, in what can be a very disturbing environment. In the evermore quasi-militaristic world of modern police stations with paramilitary dress and equipment, it can be overlooked by all those present that whatever the reason for the child being there they are still only a child and need to be treated as such.

The police station and custody block environments cede total physical and psychological control to the police, as regards the timings of interviews and the progression of the investigation. For example, a detained child suspect is brought from his detention room through the custody area to talk with his legal representative, with or without the appropriate adult being present, and later to the interview room. The interviewing officers will have prepared an

[386] Youth Justice Board, *Appropriate adults: guide for youth justice professionals* (Youth Justice Board 19th December 2014) < www.gov.uk > accessed 25 June 2021.
[387] ibid.

interviewing strategy based on the work and matrix provided by The National Strategic Steering Group on Investigative Interviewing (NSSGII). This demonstrates both the evidence gathering and psychological approaches mandated to support police officers, even in relation to detained child suspects.[388] It is beyond the grasp of even the most streetwise child to appreciate the psychological power imbalance from his position in the process, and probably many legal representatives struggle too. In most cases, there is a complete lack of control or influence over the procedures except for a timeout or disrupting the police game plan by requesting a break in an interview to provide advice to the client, or a comfort break, usually for the legal representative. The NSSGII's role ensures that police investigators adopt a consistent and professional approach, which can withstand judicial scrutiny and instil public confidence. It also promotes effective training, including how to interact and obtain information, evidence, and admissions from adult and child suspects.[389]

The recorded interview with a child suspect at the police station is controlled by PACE as to format, procedures and prescribed mandatory content as to the roles and purposes of those present. After the police caution is given, the interviewing police officers follow their interview templates and matters proceed until concluded or a break is requested by or on behalf of the child. At the conclusion of an interview, the detained child suspect is, after a debrief with his solicitor or legal representative where instructed, returned to the detention room with all its psychological and physical connotations of being trapped and alone, and yet compliant with PACE and the Codes of Practice. A decision is then made as to the next step, usually in consultation with the custody officer, senior officers, and a CPS lawyer to ensure compliance with policy requirements. There are a number of out-of-court pathways to exit those child offenders who accept criminal responsibility for their behaviour, though with the Youth Court as a backstop for serious or repeat offenders. The police station processes highlight the formal procedural architecture that controls the progression of child offenders drawn into the JJS at this first point of contact, and for some child offenders, their progression through the court-based elements as their criminal careers develop.

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[388] College of Policing, 'The National Strategic Steering Group on Investigative Interviewing' (*College of Policing* 2013) <www.app.college.police.uk/app-content/investigations/investigative-interviewing/#national strategic-steering-group > accessed 25 June 2021. The group oversees the development and delivery of the most effective interview strategy. Its role is to ensure that the police service adopts a consistent and professional approach, which is able to withstand judicial and academic scrutiny and instil public confidence.

[389] College of Policing, *Reference material – National police position papers* (*College of Policing, Investigations* 2014) <www.app.college.police.uk/app-content/investigations/investigative-interviewing/#national-strategic-steering-group> accessed 25 June 2021.

4.5 The JJS and out-of-court disposals for admitted offences

4.5.1 Out-of-court disposals

Out-of-court disposals offer an alternative and, for the purposes of this thesis, an intervention which provides a diversionary route away from the formalised court-based process. As a descriptor, it is a misnomer as it is a first level option applicable to entrants to the JJS to exclude them from the system. This diversionary approach nevertheless maintains a watching brief of the children involved by use of multi-agency partnerships. It provides for 'information sharing, planning, decision making and monitoring' to ensure there are 'targeted and tailored interventions for sustainable desistence'.[390] It offers an opportunity to lessen the potential long-term negative consequences for child offenders drawn into the JJS for even the most minor instances of criminalised behaviour.

The Out-of-Court Disposals Guide notes the principal aim of the JJS as the prevention of offending. It stresses that this framework has 'no restrictions on which disposal can be considered',[391] though it safeguards against inappropriate ones, including repeat cautioning. The framework functions with a range of three options to process a child offender, from no further action being taken to his being charged to the Youth Court. The only proviso is that the chosen option is proportionate, appropriate, and defensible, taking account of the complainant's views. This latter element, in the context of the thesis, is unnecessary and difficult to rationalise if the process is focused on the individual child offender. There are three options available, namely:

1. a community resolution which is a non-statutory option providing for local discretion. It requires the consent of the complainant, and the agreement of the child offender to the proposal.
2. a youth caution which is a statutory option that deals with admitted criminal behaviour by a child by way of a formal warning, though with escalating consequences if he reoffends. In this case the YOT determines the need for assessment and intervention in a joint decision-making process with the police as to the appropriate disposal.
3. a youth conditional caution. This too is a statutory disposal offered by the police with proportionate rehabilitative, punitive, and reparative conditions as an alternative to

[390] Youth Justice Board (n 289) 8.

[391] Youth Justice Board, *Youth Out-of-Court Disposals, Guide for Police and Youth Offending Services* (Youth Justice Board for England and Wales 2013) 4. Section 1.8.

prosecution with the YOT advising the police on appropriate conditions to prevent reoffending.[392]

The out-of-court framework provides alternative disposals designed to impact positively on the individual child's life chances. The two statutory disposals are recorded and form part of a criminal record, though a Community Resolution does not. However, the latter may have a future impact as it is recorded and can be disclosed as part of an enhanced Disclosure and Barring Service check at a later date.[393] It is anomalous as a Youth Caution is spent on issue and Youth Conditional Caution becomes spent on completion whereas a Community Resolution is never spent, in a legal sense, as it is outside the statutory system and so may be disclosed at the discretion of the police.[394] This unfortunately contributes to the perception that the JJS though designed for the best interests of the child offender, in some ways is drawn to achieve the opposite as he matures to adulthood. The out-of-court disposal regime has been widened with increasing use of the Child First approach which, as discussed above, should ensure that child offenders through the JJS in England and Wales are given access to a more child focused diversionary route that is less focused on processing child offenders as criminals.

4.5.2 Determining the out-of-court disposal

The out-of-court disposal process recognises that the success of the proposed disposal depends on the individual child. There is an initial screening of the child and the offence to be completed within 10 days of a referral by the police, to determine the likelihood of his complying and the best way to encourage desistence.[395] Medical parlance permeates this screening, with a triage process being applied to first offences by children, and also to low gravity offending for those children with a previous formal disposal.[396] The process takes account of individual circumstances, immediate admissions of guilt, remorse, and a willingness to engage in preventative support. The use of such terms as guilt and remorse is troubling in view of the age of the children and the import of such words to the adult assessors. Where found suitable, a child is diverted from a formal disposal and the matter recorded as 'no further action', with, for example, minor offending or anti-social behaviour type offences falling into this category.[397]

[392] ibid 6. Section 3.1. Overview of the disposal framework.
[393] ibid 21. Section 5.21 Explaining the effect or the disposal.
[394] ibid 25. Section 7.5 Rehabilitation of Offenders Act 1975.
[395] Youth Justice Board, *How to use out-of-court disposals: section1 case management guidance* (Youth Justice Board 1 May 2019) Section 2.1 Screening.
[396] ibid Section 2.2. Triage.
[397] ibid Section 2.4 Community Resolution.

This process avoids immediate progression through the JJS and remains a first-tier diversion process that can be considered as a foundation for more therapeutic measures. In practice, a Youth Caution may be given for any offence where the child offender makes an admission and 'there is sufficient evidence for a realistic prospect of conviction but it is not in the public interest to do so'.[398] It may be given without the police referring to the YOT for a first offence, although there must be a referral for a subsequent offence so that an assessment can be made and a joint decision agreed on as to the appropriateness of a further Youth Caution.[399] There is similar eligibility for a Youth Conditional Caution though with a requirement that there is an assessment and package of interventions necessary to support desistence.[400] The 'conditions imposed should be achievable within 16 weeks of the original offence date' and failure to comply can lead to prosecution where, for example, 'the YOT report wilful non-compliance' and it is 'seen as in the interests of justice' to do so.[401]

The out-of-court disposal options are required to 'always use restorative principles',[402] and as mentioned above, there should be an admission by the child offender, and it should not be in the public interest to prosecute. It is important to note that, in view of the vulnerability of the children involved, an admission to an offence need not be immediate and can be at any stage prior to a disposal and an 'early denial' or 'no comment' response should not lead to a more punitive outcome.[403] This is a realistic acceptance that it can be difficult for child offenders, as with adults, to accept their behaviour and its consequences. It is positive that even where children have been charged with less serious offences, or low gravity cases in the language used within the process, their cases can 'be sent back from the court for exploration of out-of-court options if the child may be prepared to make an admission at this stage'.[404] The decision to give an out-of-court disposal or to charge depends largely on the seriousness of the offence. To assist, the police have recourse to a Youth Gravity Factor Matrix that gives 'a gravity 'score' based on the offence and any mitigation or aggravating features' in making an assessment.[405] It is again of concern that there is a focus on a child being 'prepared to make an admission' as such a concept seems inappropriate when considering the immaturity of the offender involved.

[398] ibid Section 2.5 Youth Caution.
[399] ibid Section 2.5 Youth Caution.
[400] ibid Section 2.6 Youth Conditional Caution.
[401] ibid Section 2.6 Youth Conditional Caution.
[402] ibid Section 3. Guidance for managers in YOTs.
[403] ibid Section 3. Guidance for managers in YOTs.
[404] ibid Section 3. Guidance for managers in YOTs.
[405] ibid Section 3.1 Decision Making Process.

The management of out-of-court disposals by the police brings to bear a mindset that focuses on a traditional understanding of the purpose of the JJS. This extends to the upper echelons of the police with, for example, a National Police Chiefs Council review finding that such disposals are 'effective, compared to court prosecutions, at reducing harm and reoffending and sustaining victim confidence and satisfaction'.[406] However, the review also noted that evidence relating to formal processing of 'juveniles with alternatives including diversion or counselling' suggested that it did not 'have a crime control effect, and across all measures appears to increase delinquency'.[407] Against this view therefore it is important to recognise the limitations identified, as this model to address child offending can produce racially disproportionate usage, inconsistency in decision making by officers together with net-widening and labelling. The latter was noted as having led to an increase in the number of children processed and cautioned in London and had 'failed to result in better reoffending rates compared to court' based processing.[408] An examination of the concerns noted in relation to the use of Youth Cautions nevertheless reiterates their underlying quasi-therapeutic content and confirms their role in processing child offenders out of the system, especially with the Child First approach having been adopted by the YJB and incorporated into its strategies.

4.5.3 Youth Cautions and Youth Conditional Cautions

A Youth Caution represents the JJS's basic formalised alternative to Youth Court proceedings. It gives the individual child an exit route from the JJS and offers the opportunity to change or develop in the knowledge that he can be dealt with afresh should he reoffend. As an alternative to prosecution, Youth cautions are available where there is an admission of responsibility for the criminal behaviour by the child and sufficient evidence to support a conviction but no public interest in prosecuting him.[409] The only restriction on the police's use of such a caution is the requirement for the CPS to authorise it for an indictable offence. The Youth Caution 'supports the principle statutory duty of the youth justice system of preventing offending by children and young people', though this latter distinction relates more to public perception of child offenders.[410] The linguistic redefining of child offenders as 'youths' carries with it the baggage of media and social stigmas. It has direct consequences for policing in communities and makes

[406] Peter Neyroud, *'Out of Court Disposals managed by the Police: a review of the evidence'*(National Police Chiefs' Council of England and Wales 2017) 2.
[407] ibid 8.
[408] ibid 9.
[409] Ministry of Justice and Youth Justice Board, '*Youth Cautions, Guidance for Police and Youth Offending Teams'* (Ministry of Justice and Youth Justice Board 2013) 6.
[410] ibid 6.

it acceptable for the police to target, for example, instances of anti-social behaviour by youths rather than similar behaviour by children which might be seen in a different light.

A Youth Conditional Caution as its name implies is a form of caution with conditions or requirements attached to it which must be complied with by the child offender. It can be given on the same basis as a Youth Caution. The caution, and the consequences of non-compliance with its conditions must be explained to the child, including the possibility of court prosecution, and he must consent. Where the child offender is under seventeen years old, an appropriate adult must be present during the cautioning and explanation of the requirements and consequences of non-compliance. This type of caution is restricted to categories of hate crime and domestic violence and must be authorised by the CPS for an indictable offence but otherwise it may be given by the police. It is noteworthy that there is no restriction on this type of caution being given to a child with previous convictions, or on the number given, and indicates that it is an attempt to offer a constructive exit path from the JJS. An assessment as to the likelihood of it promoting behavioural change is undertaken and the procedure represents an attempt to mark admitted offending and deal with it in a constructive way.

4.5.4 The child offender and the Youth Court

The provisions relating to a child offender diverge at various key points, based on the procedural stage reached when responsibility for an offence is accepted by him. Where a matter is not admitted, and there is sufficient evidence together with a public interest assessment to proceed, a child will be charged to court. On an admission to an offence, there are several legal avenues available at this critical point for the child and clearly the police and CPS bear a great responsibility to determine how to proceed. However, whatever the written prescriptions on public policies to deal with a child adequately and proportionately in such circumstances, it is inevitable that external pressures on the police and CPS together with public and media debate contribute to the perceived appropriateness of a course of action. This is especially the case with more serious offences where the urge to prosecute in response to public and media pressure inevitably leads to Youth Court proceedings.

4.6 Knife crime and a modern quasi-therapeutic response

Everyday childhood criminality, often manifested as anti-social behaviour or petty thieving, is a topic on which most people are willing to voice opinions ranging from a liberal perspective of diversion and rehabilitation to a more robust traditional prosecute and punishment demand. Child offending remains an area of interest for politicians, the media, and the public and this

interest surges in relation to high profile crimes, especially when highlighted by police press releases and the media. A continuing example of this is knife crime by children. It created 'a something must be done' response in the juvenile justice field, though filtered through a traditional criminal law answer of more law and a harsher response. Past examples of politically driven responses demonstrate how they have often been short lived or ill-thought out. For example, Parenting Orders were introduced into the Youth Court to promote the recognition of the causal link between child offending and a lack of parental control and responsibility. After an initial period when orders were made in most Juvenile Court cases, enthusiasm declined, and they fell by the wayside despite their rationale being obvious. Similarly, Referral Orders were introduced for first convictions with subsequent offending leading to an escalation along the sentencing pathway. The regime had to be amended to permit a second order to be made, or the duration of the original order extended because of the number of orders effectively breached by further offending. The concept of the order remained valid but needed to be tweaked to match the reality of child offending.

More recently knife crime returned as a focal point due to the reported increase in knife related offences and the prevalence of young males carrying knives. In response, a first arrest for possession of a knife or bladed article leads to a charge for a child offender aged at least 16 years, while those children under that age must be dealt with by way of at least a Youth Caution.[411] In practice these offences are often possession offences, rather than possession and use, but the focus on knife crime has resulted in a hardening in judicial sentencing guidelines on a second offence with a 4-month minimum custodial sentence for child offenders aged 16 years or more.[412] These are often not followed in practice with District Judges, in particular, relying on the interests of justice exception to circumvent a potentially harsh sentence in the context of the individual child and the circumstances of the admitted offence. On the national stage, the United Kingdom's Government's Serious Violence Strategy (the Strategy) detailed its response to knife crime, gun crime and homicides.[413] It has been called a step change in the response to serious violence by promoting

[411] Crown Prosecution Service, '*Legal Guidance, 'Violent Crime, Offensive Weapons, Knives, Bladed and Pointed Articles'* (Crown Prosecution Service Legal Guidance, Violent Crime 22 January 2018) < https://www.cps.gov.uk/legal-guidance/offensive-weapons-knives-bladed-and-pointed-articles>accessed 25 June 2021.
[412] Criminal Justice and Courts Act 2015, s28.
[413] HM Government, *Serious Violence Strategy* (April 2019).

> 'the importance of early intervention to tackle the root causes of serious violence and provide young people with the skills and resilience to lead productive lives free from violence'.[414]

The Home Secretary stated that she knew 'intervening early can help us catch young people before they go down the wrong path, encouraging them to make positive choices'.[415] The aim was to be achieved by utilising 'a multi-agency approach across a number of sectors such as education, health, social services, housing, youth services, victim services and others' and not just the criminal justice system.[416] Early intervention and the prevention of criminality 'by building resilience, supporting positive alternatives, and providing timely interventions at the "teachable moment"', verges on a therapeutic intervention approach to meeting the challenge of serious societal criminality.[417] The Strategy notes that there 'is strong evidence that crime trends tend to be driven by a small proportion of highly prolific individuals whose criminal career tends to decrease via a lengthy 'ageing out' process'.[418] Those who exit the JJS are replaced to a greater or lesser extent by new entrants, more in line with the police resources devoted, for example, to tackling visible street criminality. This provides positive results for the police and is achievable because the child offenders involved commit urban based criminal acts. These are often captured by CCTV and by intelligence led analysis of known 'faces' and linked associates which leads to trawling, until a particular group of individuals is identified and processed. The Strategy accepts that one 'of the most important findings in criminology is that a small minority of people commit the majority of crimes', a given demonstrated by the client base of any criminal defence firm where the links through family, friendship or general community criminality never cease to surprise.[419] It is however often overlooked in the reporting of criminal behaviour and leads to unnecessary fear of crime by many vulnerable people who are not, in fact, at risk.

The concern with knife crime has also led to legislative intervention. The OWA 2019 introduced civil Knife Crime Prevention Orders (KCPO) designed to facilitate work by the

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[414] Home Office, *Knife Crime Prevention Orders Guidance* (Home Office 15th August 2019).
[415] HM Government (n 413) 7.
[416] HM Government (n 413) 9.
[417] HM Government (n 413) 14.
[418] HM Government (n 413) 25. Based on Dobash, R., Emerson Dobash, R., Cavanagh, K., Duncan S. & Medina-Ariza, J., Onset of offending and life course among men convicted of murder. (2007) 11 (4) Homicide Studies 243-271.
[419] HM Government (n 413) 25.

police ‘with young people and others to encourage them to help steer them away from knife crime and serious violence’.[420] The stated purpose is therapeutic and is intended

> ‘to divert those who may be carrying knives, or who are at greatest risk of being drawn into serious violence, away from being involved in knife crime’.[421]

It demonstrates that legal responses can move beyond crime identification and punishment and, importantly in the context of the thesis, towards the promotion of a therapeutic desistance route to address a major crime issue. A KCPO can be a stand-alone order, or made on conviction, and it is intended to help prevent those who have been involved in knife crime from further offending. When imposed on conviction, it is intended to be ‘preventative rather than punitive’ and to address factors that ‘may increase the chances of offending, alongside measures to prohibit certain activities, or introduce geographical restrictions and curfews to help prevent future offences.[422] The KCPO approach is multi-agency, involving the police and community and youth groups, and aims to steer those given orders away from criminal behaviour. Those involved professionally ‘have a role to play to ensure that KCPOs are the preventative tool that they are intended to be’.[423] The OWA 2019 promotes positive therapeutic purposes and, although couched in traditional phrasing, it nevertheless signals a novel way forward even in relation to those convicted. It is in effect a chance to change with support. For example, Section 19 OWA 2019 details that a KCPO may be made on conviction on application by the prosecution where the court is satisfied, on the balance of probabilities, the civil standard of proof, that the defendant committed an offence involving violence, the threat of violence, or where a bladed article was used or carried by him, or any other person involved in the offence. In addition, the court must consider an order necessary to protect the public generally, or individuals including the defendant from the risk of physical or psychological harm involving a bladed article, or to prevent the defendant from committing an offence involving a bladed article.[424] An order must specify the prohibitions or requirements placed on the offender to meet its protective purposes.[425]

Much like Anti-Social Behaviour Orders, as a pre-crime initiative, the court may also make an order, without a conviction, on a person aged 12 and over, emphasising the concerns about

[420] Home Office (n 414) 4.
[421] Home Office (n 414) 4.
[422] Home Office (n 414) 4.
[423] Home Office (n 414) 5.
[424] Home Office (n 414) 6.
[425] Home Office (n 414) 6.

knife crime and its perceived role in child criminality.[426] Section 14 OWA 2019 details the conditions for a KCPO to be made other than on conviction.[427] The court must be satisfied that an application by the complainant complies with Section 15 OWA 2019 and that, on the balance of probabilities, the person subject to the application has, on at least two occasions within a period of 2 years before the date of the order being made, had a bladed article with him in a public place, on school or further education premises without good reason or lawful authority. The final requirement is that such an order is necessary to protect the public generally, or individuals, including the defendant, from the risk of physical or psychological harm involving a bladed article, or to prevent the defendant from committing an offence involving a bladed article. The OWA 2019 details a range of requirements that may be attached to an order to address knife crime concerns. These can include an exclusion zone with defined times, a prohibition on associating with named individuals, engaging in specified activities, possession of specified items and on using the internet to facilitate or encourage knife crime. The court is not fettered, and any suitable provisions may be imposed providing they meet the directive to address behaviour in a preventative rather than a punitive manner as noted above.[428]

Both sections of the OWA 2019, as discussed, emphasise that an order may be made to protect the child offender and recognises that the law, albeit through a civil order, can proactively intervene to promote positive outcomes without necessarily requiring the criminalisation of the individual child. The OWA 2019 edges towards considering the individual's needs to encourage desistance and, most interestingly, the promotion of an individualised approach to the requirements attached to a KCPO. As a modern response to a resurgent problem, it chimes with the therapeutic treatment of problematic childhood criminal behaviours as envisaged by the thesis, rather than the punishment and subsequent rehabilitation model envisaged by the JJS.

4.7 Conclusion

This chapter represents an important steppingstone in the thesis. It recognises the attempts by the JJS to adopt a more Child First approach through the diversion routes examined and the progress made in recognising and supporting child offenders as vulnerable children. However, it is evident that shortcomings remain in the system which betrays its nineteenth century roots. There is still more to be done if such a progressive agenda is to be carried to its logical

[426] Home Office (n 414) 7.
[427] Home Office (n 414) 7.
[428] Home Office (n 414) 11.

conclusion. Such shortcomings, it is argued, require a fundamental remodelling of the JJS, one in which many of the punitive nineteenth century ideas are finally discarded. This exploration of the present JJS from the English element demonstrates that, ultimately, it still falls short in its perception and treatment of child offenders, especially in the courtroom. It is suggested therefore that the JJS fails to meet the needs of child suspects and offenders as envisaged by the ideal of the best interests of the child. It is argued therefore that, at present, there remains an unmet need for a more nuanced, interventionist design which is focused on the individual child offender, and which inculcates the Child First approach throughout the JJS process as a first step. Despite the identified progress, the JJS remains very much fixated on the admission of guilt before a child offender can be diverted from it, even though there are now more opportunities for diversion. Once a child offender becomes a 'customer' of the JJS by repeat behaviour he is effectively 'captured' by it with all the language of the criminal law. He ought to be more effectively triaged to promote better outcomes and to protect him as a vulnerable child from the negative labelling which accompanies his admission to the JJS.

The Child First approach, as noted above, offers a pathway towards a much more wide-ranging reform of the JJS. As an approach, it places the child offender centre stage in a visible and positive way, and it supports the diversionary strategy that is now at the heart of the YJB. Out-of-court disposals offer diversion for child offenders from the JJS at the earliest point of contact and, when considered with other tentative legislative steps such as the OWA 2019, suggest that a more therapeutic approach is possible and as such these policies offer a glimpse of a more effective system as envisaged by this thesis.

The next chapter

The aspects of the JJS examined in this chapter illustrate how child offenders are processed by the system and the options available to divert them and support them to avoid further offending. The next two chapters progress the thesis's argument by exploring the approaches adopted in Scotland and Ireland to meet similar challenges of addressing child offending. The approaches taken are markedly different and add to the palette of ideas that contribute to the development of the thesis towards its conclusion.

Commencing with the Scottish JJS, the next chapter considers aspects of that system and acknowledges the major contribution to its reform made by the Kilbrandon Report. It demonstrates how a JJS can be created anew into one which is able to resist demands for a punitive approach, and which is focused on the needs of the individual child offender. Its

uniqueness within the UK merits its examination before and after the report's reforms were introduced together with the subsequent tweaking as a consequence of devolution and the empowerment of a Scottish Parliament.

Chapter 5

The Scottish Juvenile Justice System's unique approach to children

5.1 Introduction

This thesis is primarily driven by concerns about the delivery of juvenile justice to vulnerable child offenders, concerns deepened by years spent as a criminal defence practitioner. However, it is recognised that such an approach has its limitations and in order to produce cogent and in-depth analysis and argument, the thesis requires a broadening out of the research to include the experience of other juvenile justice systems (JJSs), in other jurisdictions, and the ways in which they have sought to deal with the problem of child offending behaviour. The nearest illustration of a different approach is provided by the Scottish JJS. Its uniqueness within the United Kingdom (UK) will be examined, both before and after the introduction of reforms, along with a consideration of the continuing reforms which have flowed from devolution and the empowerment of the devolved Scottish Parliament.

The chapter begins with a consideration of the Kilbrandon Report (the Report). This was a hugely influential report and after its publication as the Report of the Committee on Children and Young Persons, Scotland, in 1964, the Scottish JJS began to move in a markedly different direction from the JJS in England and Wales. The wholesale reform envisaged by the Report was implemented in 1971 and has been augmented in the intervening decades, for example, with regionally targeted programmes under the direction of the Scottish Government.

The Report reforms also demonstrated the possibility of a JJS being repurposed so that it becomes a JJS focused on the needs of the individual child offender and able to resist demands for a punitive approach and to place the child at its centre. The modern Scottish JJS provides a child-centred template based on assessing the needs of the individual child irrespective of whether the behaviour is criminal or non-criminal. Even in relation to criminal behaviour, the process seeks to remove a child offender from the formalised criminal justice process in all but the most serious cases. It seeks instead the reform of the child. In the light of the call made in this thesis, to place the individual child first in a reformed JJS, it provides a model of a reformed system which appears ready made to offer insights for reform south of the border.

The purpose of this chapter is therefore to assess the relevance of the Scottish reforms to the JJS for this thesis and to assess how successful these reforms have been in producing a JJS which is based more on treatment than prosecution and sentencing.

5.2 The Scottish JJS today

The fundamental ethos of the Scottish JJS, flowing from the Report's reforms, presents as centred on the individual child and the Children's Hearing system that began on 15th April 1971. The system represented an overhaul of the function and purpose of the criminal justice system's approach to childhood offending, both as to procedure and purpose.[429] The Scottish JJS's reliance on the Children's Hearings system has been modified in response to changing circumstances, most recently with the Children's Hearing (Scotland) Act 2011 (the 2011 Act), in force from 2013. This demonstrates that though the system is embedded, it is still subject to updating and further reform. The Scottish JJS follows a two-stage process that initially involves a child being referred to the Children's Reporter (the Reporter) whose role as an independent official in the Scottish JJS is pivotal to the progression of a referred child through the system as discussed below.[430] For example, a local authority must refer a child to the Reporter in circumstances that suggest 'the child is in need of protection, guidance, treatment or control and a compulsory supervision order may be necessary'.[431] This necessity may arise from a child's behaviour, neglect or harm and the same duty applies to the police and a constable must similarly refer if he 'considers that the child is in need of protection' and one of the criteria is met.[432] The 2011 Act's focus on the individual child is illustrated by the absence of criteria limiting the right to refer, so that anyone may act on a concern that a child may be 'in need of protection, guidance, treatment or control' so that a 'supervision order may be required'.[433]

Once the Reporter has investigated, the referral may conclude that a compulsory supervision order is necessary on the basis that one or more of the statutory grounds in Section 67 of the 2011 Act apply. On such a finding, a child may be referred to a Children's Hearing under one or more of the grounds in Section 67(2) of the 2011 Act. These grounds are wide ranging and demonstrate the breadth of welfare concerns, including criminal behaviour, considered by the Reporter, who may act where a child:

(a) is likely to suffer unnecessarily, or the health or the development of the child is likely to be seriously impaired, due to a lack of parental care.

[429] Scottish Government, *The Children's Hearing System in Scotland Training Resource Manual 1st Rev. Edition* < https://www2.gov.scot/Publications/2003/01/16151/16388 > accessed 12 July 2021.
[430] ibid.
[431] ibid.
[432] Children's Hearing (Scotland) Act 2011, s61.
[433] ibid.

(b) is a victim of a Schedule 1 offence as detailed in the Criminal Procedure (Scotland) Act 1995 that includes assault, ill treatment, neglect, exposure, abandonment or any offence involving bodily injury in a manner likely to cause unnecessary suffering and sexual offences.

(c) has, or is likely to have, a close connection with a person who has committed a Schedule 1 offence.

(d) is, or is likely to become a member of the same household as a child in respect of whom a Schedule 1 offence has been committed.

(e) is being, or is likely to be, exposed to persons whose conduct is, or has been, such that it is likely that the child will be abused or harmed, or the child's health, safety or development will be seriously adversely affected.

(f) has, or is likely to have, a close connection with a person who has carried out domestic abuse.

(g) has, or is likely to have a close connection with a person who has committed an offence under Part 1, 4 or 5 of the Sexual Offences (Scotland) Act 2009.

(h) is being provided with accommodation by a local authority under Section 25 of the Children (Scotland) Act 1995 and special measures are needed to support the child.

(i) is subject to a Permanence Order and special measures are needed to support the child.

(j) over the age of criminal responsibility (ACR) has committed an offence. This is subject to the Lord Advocate, as the senior law officer in Scotland, having the power to order that a child alleged to have committed a very serious offence should be prosecuted in the public interest.

(k) has misused alcohol, a ground that ensures compliance with Article 33 of the United Nations Convention on the Rights of the Child that requires action to protect children from illicit drug use.

(l) has misused a drug, whether or not a controlled drug.

(m) has behaved in such a way that his conduct has had, or is likely to have, a serious adverse effect on the health safety or development of the child or another person.

(n) is beyond the control of a relevant person, that is someone who bears responsibility for the child's behaviour.

(o) has failed without reasonable excuse to attend school regularly.

(p) is being, or is likely to be, subjected to physical, emotional or other pressure to enter into a civil partnership, or is, or is likely to become, a member of the same household as such a child.

(q) has been, is being or is likely to be, forced into a marriage or, is, or is likely, to become a member of the same household as such a child.

It is evident that the above grounds demonstrate that the Scottish JJS recognises criminal behaviour as one manifestation of childhood behaviour and risk of harm that justifies a referral. However, it is the only ground where the Reporter's duty requires the criminal standard of proof, beyond reasonable doubt, to be considered to determine that the individual child has committed the offence. The decision requires sufficient evidence under Section 67 of the 2011 Act and that a Compulsory Supervision Order is necessary for the child. If a ground is not made out then no further action is taken or the child is referred for 'advice, guidance and assistance on a voluntary basis from the local authority'.[434] If a ground is made out so that a Compulsory Supervision Order may be required, a Children's Hearing must take place.[435]

Within the context of the thesis question, the Reporter's initial assessment is vital for determining the next stage and confirms the importance attached by the process to an individualised assessment. Children's Hearings address the issue of child offending primarily by recognising that the needs of the child offender should be paramount. Such children are as much in need of care and protection as children referred under one of the other Section 67(2) grounds of the 2011 Act whose behaviour is non-criminal. The Children's Hearings provide an avenue for an independent panel of trained lay people to assess and implement measures for the betterment of the individual child's welfare. Panel members form 'a legal tribunal and act independently of the State to protect children' and the 'hearing process must be fair, transparent and balanced' in formulating decisions reached 'in the child's best interests'.[436] It is not a soft option to magic a social problem away, but rather, it operates through defined procedures that maintain a legal process that provides protection for the legal rights of the children. It facilitates

[434] Scottish Government (n 429).
[435] Scottish Government (n 429).
[436] Scottish Government (n 429).

diversion for those children whose criminalised behaviour can be dealt with by welfare measures as decided by the panel. The procedure retains the option of a court hearing for those cases where the alleged behaviour is disputed as in any criminal justice system and for appeals against decisions. The Children's Hearing rests on 'three child centred principles' detailed in the 2011 Act namely:[437]

1. having regard to the need to safeguard and promote the welfare of the child throughout his childhood as their paramount consideration.
2. giving the child an opportunity to indicate whether he wishes to express a view, and if he does, give him the opportunity to do so and have regard to any views expressed by him.
3. only making an order if the Children's Hearing decides that it is better for the child than not to do so.

These principles reflect the ethos of the Report and promote 'an integrated and holistic approach to care and justice, in which the child's best interests are the paramount consideration'.[438] Accordingly, the best interests mantra ensures that though Children's Hearings have 'extensive powers to make these decisions about children who may be in need of compulsory supervision orders', though one may only be made if the panel is satisfied that it is necessary to do so for the protection, guidance, treatment or control of the referred child; if not the panel 'must discharge the referral'.[439] The parameters that circumscribe the making of an order emphasise the focus on the best interests of the child, including a child offender, highlighting how the Scottish JJS's approach to treating childhood misbehaviour has relevance to the focus of this thesis. A Compulsory Supervision Order whilst designed to promote the individual child's best interests, also mandates legal duties and responsibilities on those implementing it as the designated authority. The order is a legal document which means that the designated authority 'must be involved in the child's life' and be 'responsible for ensuring that the child is supported'.[440] The Children's Hearing formulates a care plan to deal 'with the immediate needs of the child as well as that of the longer term needs', outlining 'the aims of

[437] Children's Hearing (Scotland) Act 2011, ss25 to 28.
[438] Scottish Government, *Child protection policy: Children's hearings* < https://www.gov.scot/policies/child-protection/childrens-hearings/ > accessed 12 July 2021.
[439] Scottish Government (n 429).
[440] Scottish Government (n 429).

supervision, why this is the best course of action, what the intervention will achieve and what will be expected of the child and family'.[441]

The importance of the content of an order demonstrates how the Scottish JJS, through its procedures, focuses on meeting the needs of an individual child by limiting its scope of intervention to elements necessary for his protection, guidance, treatment, or control. This requires specific measures to be detailed in an order, with as a minimum, a standard measure requiring a local authority to be responsible for its implementation and to supervise the child. Just as importantly for the purposes of a successful outcome, the individual child must accept the supervision process. An order has a maximum duration of 12 months, though the legislation provides scope for the Children's Hearing panel to call for an early review if they wish to have the child returned to the panel. As regards more particularised measures, panel members can add additional ones designed to meet the needs and issues raised in relation to the individual child, such as residence at a specified address, restrictions on liberty whilst living at such an address and, importantly to prevent the interference of third parties undermining an order, prohibiting its disclosure. Equally, an order can impose restrictions on geographical movements to control risk and, if necessary, authorising secure accommodation as a protective measure. The need to control a child's exposure to inappropriate third parties can be further restricted by regulating contact with a named person or class of persons. Where there are medical concerns, an order can require a medical or other examination or treatment though only with the child's consent. The issue of consent by the child runs throughout these requirements and emphasises the importance attached to promoting the welfare of the individual child as well as acknowledging the fact that a successful outcome is more likely with his positive compliance.

The above matters, it is argued, give a flavour of the uniqueness of the Scottish JJS's approach in valuing the individual. It provides for mandatory reporting, an investigation by the Reporter through to the powers of the Children's Hearing panel to construct an order where necessary for the individual child. It does not concern itself with the criminality of his behaviour but rather its response is governed by the mantra of acting to protect, guide, treat or control of the child in need.

[441] Scottish Government (n 429).

5.3 Recognising the need for the reforms

Before the introduction of the Children's Hearings and associated reforms, the Scottish JJS applied the criminal law to child offenders above the ACR which was fixed at 8 years, having been increased in 1932 from 7 years as recommended by the Morton Report published in 1928.[442] In his report, Sheriff Principal George Morton, examined the treatment of young offenders and young people drawn into criminality because of their bad associations or surroundings and the need for reform. He made 'no distinction between neglected and delinquent children, and recommended that industrial and reform schools should be amalgamated into schools 'approved' by the Home Secretary'.[443] This was a recognition of the idea that the reason a child has come to the attention of the state was secondary as to dealing with him as a child.[444] It acknowledged that socio-economic and, more simply, poor living conditions underpinned child offending, with some 114, 937 people in Glasgow noted as living more than four to a room and that 'no solution of the problem of delinquency is possible without the removal of these conditions'.[445] Similarly, a factor, often overlooked today, but acknowledged in the Morton Report, was 'the serious and demoralising effects of juvenile unemployment, bearing in mind the school leaving age then at 14'.[446] It proposed a 'separation of juvenile courts from other courts; the use of simple, intelligible language; and ordinary tables and chairs, with only people involved in the proceedings present'.[447] These progressive measures had an upper age limit of 17 years as, again highlighting the child focus of the report

> 'in all but the most serious cases, the problem of the offender and not the nature of the charge should be the first consideration. To this principle we attach paramount importance'.[448]

The Morton Report led to the Children and Young Persons (Scotland) Act 1932, consolidated in the Children and Young Persons (Scotland) Act 1937, that gave the Secretary of State for Scotland authority to order the establishment of juvenile courts though only 4 such orders were issued, relating to Ayr, Fife, Renfrew and Aberdeen.[449] This limited implementation was

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[442] Sir George A. Morton, *The treatment of young offenders and of young people whose character, environment or conduct is such that they require protection and training* (Report of the Departmental Committee on Protection and Training, Scotland HMSO, Edinburgh 1928).
[443] ibid.
[444] Penelope Lynne Ravenscroft, *Punish and be damned: judicial discretion in juvenile courts: the welfare and punishment dichotomy in England/Wales and Scotland.* (PhD thesis, London School of Economics 2011) 67 < http://etheses.lse.ac.uk/785/ > accessed 12 July 2021.
[445] ibid 67.
[446] ibid 67.
[447] ibid 67.
[448] ibid 68.
[449] Children and Young Persons (Scotland) Act 1932.

indicative of the existing system's entrenched position that relied on well-established procedures that made change difficult and slow.

Before the Report's reforms the Scottish JJS was somewhat complex and reflected an established and effectively Victorian structure, as in England and Wales. It functioned through four courts, the Sheriff Court, the Burgh or Police Courts, the Justice of the Peace Courts and the Juvenile Courts. It was a complex system though each was unique, with the Sheriff Court presided over by a Sheriff Substitute who was a permanent legal appointment, the Burgh or Police Courts which was presided over by a Bailie who was an elected town councillor appointed by the council for a term of three years and the Justice of the Peace Courts with appointed lay justices. The Juvenile Courts were intended to be focused of child offenders. They were the authorised by the Secretary of State and presided over by specially appointed justices drawn from the general panel to serve for a renewable three-year term, though as noted they were not widely adopted and failed as the intended venue for child offenders.

In addition, Glasgow's juveniles appeared before a Stipendiary Magistrate or a bailie, though in this instance the court also heard adult cases.[450] The most serious offences, such as murder, treason, rape, and incest, were tried before the High Court of Justiciary.[451] The child offenders were processed by a legal system that was ill equipped to deliver the individualised response to child offenders as envisaged by the focus of this thesis. The Scottish JJS, before the Report's reforms, had evolved over time and functioned under different social norms of behaviour and deference. It reflected an era when a child offender would be held to account on conviction in the then accepted sense that wrongdoing, at whatever age, once he reached the ACR, had to be punished, and often harshly to prevent reoffending and to deter other youngsters. As noted, the more serious offences were tried before the higher court and the Summary Jurisdiction (Scotland) Act 1954 directed that specified cases had to be heard before the Sheriff Courts, though there was a general assumption that cases involving child offenders ought to be heard before a summary jurisdiction juvenile court. This was 'subject to the over-riding discretion of the Lord Advocate under the common law to direct the taking of particular cases in the Sheriff Court or a higher court, either summarily or on indictment', with the same discretion effectively being retained in the present Scottish JJS.[452]

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[450] The Kilbrandon Report, *Children and Young Persons Scotland* (HMSO, Edinburgh 1995) 17.
[451] Barbara A. Cardone, 'Judicial Interpretation of the Scottish Juvenile Justice System: Fostering or Frustrating the Welfare Model?' (1985) 8 B. C. Int'l & Comp. L. Rev. 377, 380.
[452] The Kilbrandon Report (n 450) 17.

As will be examined in Chapter 6, the Irish JJS developed an effective diversion programme run by the police service and similar albeit more tentative steps occurred in Scotland, in the first half of the twentieth century. These have been described as 'police experiments with semi-official 'sub-court' interventions, endorsed by the Scottish Secretary of State in 1945'.[453] These policing initiatives by various agencies co-operating in youth justice and welfare were 'not a distinctly new phenomenon'.[454] Rather, they were intended to make 'use of informal or semi-formal mechanisms orchestrated at a local level rather than in response to statutory frameworks'.[455] Before the Report's reforms, Scottish police had recourse to the Juvenile Liaison Scheme, a form of pre-crime intervention. In addition, at that time, there was also the more traditional crime control technique, the use of physical force to enforce social control, though only in relation to lower socio-economic groups, as ''hard' and 'soft' styles of policing.[456] This more robust physical style of policing continued to operate in the post-war period in Scotland, as in England, but came under scrutiny as 'the policing of young people became increasingly politicised from the late 1950s onwards'.[457] The development, through amalgamation, of county and town police constabularies in the UK, in addition to providing general prevention and investigation of criminal behaviour, offered an avenue of direct intervention in the lives of potential and active child offenders. As examined in Chapter 3, policing methods had had to evolve beyond the watch committee and the parish constable to keep pace with the increasing population and industrialisation and expanding avenues of criminality. The ripple effects of consumerism during the nineteenth century produced increased criminal activity and policing evolved to meet such challenges in urban and rural settings throughout the UK. Scotland underwent similar changes during this period but its policing at that time has been described 'in terms of acceptance and consent, being based on a tradition of shared responsibility of 'watching and warding''.[458] However, as in England and Wales, this 'bobby on the beat' image of policing by consent is more an example of collective wistfulness, rather than indicative of the reality of social control by interventionist policing. The developing police strategies in Scotland during this period of societal change reflected the reality that middle-class interests shaped the late nineteenth and twentieth century policing agenda. Police officers 'were given a mandate to regulate and reshape working-class culture,

[453] Angela Bartie and Louise A. Jackson, 'Youth Crime and Preventive Policing in Post-War Scotland (c.1945-71)' (2011) 22 (1) Twentieth Century British History 79, 80.
[454] ibid 80.
[455] ibid 80.
[456] ibid 81.
[457] ibid 81.
[458] ibid 82.

in the process criminalising behaviour that had traditionally been tolerated'.[459] The criminalisation of class-based behaviours during the late nineteenth and twentieth centuries produced new thinking on how to address childhood criminality. The Children's Act 1908 required criminal cases involving child offenders to be heard at different times to adult cases and, in 1937, the Children and Young Persons (Scotland) Act provided for the establishment of juvenile courts.[460]

Public concerns grew with the increase in criminality during the Second World War, especially property offences and this phenomenon, that belied government propaganda of a united war effort, led to a focus on childhood offending. The explanations put forward for such offending tended to highlight immediate and visible social failings. Much was made of 'the absent father', 'the feckless mother', and the dislocation caused by the evacuation of children from city areas, were all cited as factors, as in England and Wales. In addition, in Scotland, attention was also given to the overcrowded living conditions associated with urban tenements, for example in Glasgow, and lack of amenities and leisure opportunities.[461] The economic stagnation during the 1930s together with the economic controls imposed during the Second World War and its aftermath, further altered the perception of the role of the state in meeting the challenges of criminal behaviour, in particular among children. The extent of the application of the criminal law to children had been a campaigning issue since the mid-nineteenth century and, as an unforeseen consequence, led to police pre-prosecution intervention practices being utilised without recorded official approval. The Scottish Office reported in 1944 that, while examining the growth of juvenile 'delinquency', police practices had been uncovered that were dubbed an 'extra-legal police warning system'.[462] This amounted to a semi-authorised widespread 'kangaroo court' procedure, noted as involving 'similar forms of ritual to that of a court had been used in Glasgow since 1905, in Kilmarnock since the 1920s, and in Dundee during the mid-1930s and again from 1942'.[463] This Scottish policing 'initiative' involved, for example, warnings given by a Chief Constable, with others such as headmasters, youth leaders, and court missionaries, later probation officers, present.[464] Similarly, a 'Senior Police Officer's Court' was held monthly in Dundee with representatives of the Union of Boys' Clubs and the Church

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[459] David Barrie, *Police in the Age of Improvement: Police Development and the Civic Tradition in Scotland, 1775-1865* (Cullompton 2008) 202.
[460] Bartie and Jackson (n 453) 84.
[461] Bartie and Jackson (n 453) 83.
[462] Bartie and Jackson (n 453) 85.
[463] Bartie and Jackson (n 453) 85.
[464] Bartie and Jackson (n 453) 85.

of Scotland present.[465] Cases before such tribunals would be reported to the child offender's parish to enable the local minister or priest, as it crossed the sectarian divide, and probation officer 'to arrange follow-up visits'.[466]

An open-minded interpretation of the above would recognise that these extra-legal police initiatives were endeavouring to meet the concerns raised by those with social and political influence who demanded a response to the perceived issue of child delinquency. As a process, it was designed to 'instil responsibility' in the minds of parents and guardians, and 'to convince them that the Police are not for convictions but rather to assist in seeing the children growing up into good and honest citizens'.[467] These localised initiatives highlight the interest taken in child offending as an arm of wider child welfare concerns, even before the Report's reforms. The aims mirror modern interest in restorative justice with parents and child offenders required to make reparations for damage or loss caused by the individual child.[468] This shadow court-style system functioned without official sanction, with the pretence of ignorance by those higher in the hierarchy. These 'courts' provided a layer of immediate and direct action by the state actors and were tolerated at the time as there were 'positive' results as measured by those with socio-economic influence in the community. In contrast, the formal and legally authorised JJS was headed by the Lord Advocate's office and functioned through the Procurator Fiscal and the Burgh Prosecutor. These law officers made all decisions about prosecution, after preliminary enquiry as a buffer between the public, the police, and the judiciary, though these 'distinctions were blurred'.[469] Bartie and Jackson observe that official warnings to child offenders had to be authorised and given in consultation with or on the advice of the Procurator Fiscal.[470] Interestingly, emphasising the less formal approaches that persisted in Scotland, in certain areas, warnings were given directly by fiscals, lower level prosecutors, even though they were not authorised. The chain of command and authority was subject to local practices that further muddied the waters as to the legality of actions taken with, for example, police superintendents in Glasgow up to the 1940s having dual office as assistant fiscals. This led to them directly administering 'warnings through a special 'Superintendents' Court' on a Saturday morning or after school.[471] The extent of the secondary level 'justice' system

[465] Bartie and Jackson (n 453) 85.
[466] Bartie and Jackson (n 453) 85.
[467] Bartie and Jackson (n 453) 85.
[468] Bartie and Jackson (n 453) 85.
[469] Bartie and Jackson (n 453) 85.
[470] Bartie and Jackson (n 453) 86.
[471] Bartie and Jackson (n 453) 86. They note that 3995 such warnings were given in 1936.

demonstrates that there were accepted shortcomings in the existing system, but reform was not at that time forthcoming, leading to a return to localised investigations and sanctions for criminal wrongdoing.

The Scottish JJS, before the Report's reforms, with its formal and informal shadow police systems contributed to the reformed JJS in relation to the police procedures. Irrespective of the degree of official sanction and knowledge, the recognition of the effectiveness of local knowledge 'paved the way for the gradual acceptance in the 1960s of [Juvenile Liaison Schemes] as more formalized multi-agency initiatives coordinated by the police'.[472] The criticisms of the shadow system of police intervention schemes included the suggestion that they 'were amateurs, ill-equipped to act in a welfare role'.[473] From the perspective of daily interaction in their communities, it is difficult to see the local police as being anything but best placed to know those children most at risk of criminal behaviour and consequently best placed to promote intervention.[474] Formal Juvenile Liaison Schemes in Scotland were built on the informal shadow system and utilised police warnings together with supervision of child offenders. It was recognised in the Report as giving to the police officers involved 'as Juvenile Liaison Officers a degree of personal responsibility in the future of the child'.[475] This newer, formalised role was not wholly welcomed, with police criticism noting that the concern given to the child offender's welfare was out of kilter with the role of the police. It should have been seen, it was suggested, at most, as 'an important auxiliary to their main purpose, that is, the prevention of crime'.[476]

The pace of reform quickened in May 1961 when John Maclay, then Secretary of State for Scotland and later Lord Muirshiel, appointed a committee chaired by James Shaw, Lord Kilbrandon, a distinguished lawyer, to be assisted by two sheriffs, a professor of law, a solicitor, a headmaster, a chief constable, justices of the peace and a child psychiatrist. It was directed 'to consider the provisions of the law of Scotland relating to the treatment of juvenile delinquents and juveniles in need of care or protection or beyond parental control'.[477] In itself, this direction was a recognition that the focus should be on children as a whole and not a false winnowing between child offenders and children in need. The Report's conclusions 'set out

[472] Bartie and Jackson (n 453) 88.
[473] Bartie and Jackson (n 453) 89.
[474] Bartie and Jackson (n 453) 89.
[475] Bartie and Jackson (n 453) 89.
[476] Bartie and Jackson (n 453) 89.
[477] The Kilbrandon Report (n 450) vii.

the principles which underlie the establishment' of the Children's Hearings'.[478] It promoted, in language that encapsulates the ethos of the reforms, the

> 'separation between the establishment of issues of disputed fact and decisions on the treatment of the child; the use of a lay panel to reach decisions on treatment; the recognition of the needs of the child as being the first and primary consideration; the vital role of the family in tackling children's problems; and the adoption of a preventive and educational approach to these problems'.[479]

5.4 The Scottish age of criminal responsibility

As noted above, the Morton Report recommended the Scottish criminal justice system's ACR be increased to 8 years,[480] and suggested that in assessing cases the child offender's problems and 'not the nature of the charge should be the first consideration'.[481] The Report followed the line and observed, in a similar vein, that under the common law it was accepted that a young age, 'may be a mitigating factor' in

> 'recognition of the varying moral and intellectual capacity of children; and in some significant sense marks them off, for the purposes of the criminal law, from adults. If the fact of youth is in itself a mitigating factor, this seems to represent an important qualification of the "crime-responsibility-punishment" concept'.[482]

The child offender was subject to the criminal law once the age threshold had been crossed and the 'general criminal law is not greatly concerned with motive and cause. In relation to a juvenile, the natural question must be - why did he do it?'[483] The Report considered the need to balance the 'crime-responsibility-punishment' concept against the 'welfare' of the child. It promoted the principle of not looking at the criminal act itself other than to indicate the extent and form of criminal behaviour, but rather

> 'the whole surrounding circumstances and above all to the future; and therefore implies a "preventive" or protective concept rather than judging the offence and the punishment which it deserves'.[484]

How to achieve a more nuanced approach to child offenders and the concept of the ACR was examined in the Report. It was not met directly, as is often advocated, by the simple expedient

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[478] The Kilbrandon Report (n 450) vii.
[479] The Kilbrandon Report (n 450) vii.
[480] Criminal Procedure (Scotland) Act 1995, s41 states that it is 'conclusively presumed that no child under the age of eight years can be guilty of any offence'.
[481] Morton (n 442) 49.
[482] The Kilbrandon Report (n 450) 21.
[483] The Kilbrandon Report (n 450) 21.
[484] The Kilbrandon Report (n 450) 21.

of increasing it, but by effectively circumventing the issue by imposing a separate age threshold and the introduction of 3 age bands. Firstly, a simple ACR fixed at 8 years. The higher age of criminal prosecution introduced into the Scottish criminal law by the Report's reforms changed and manipulated the age thresholds though the ACR remained at 8 years. Secondly, as a consequence of the prohibition detailed in the Criminal Procedure (Scotland) Act 1995 Section 41A, inserted by the Criminal Justice and Licensing (Scotland) Act 2010 Section 52. This stated that a 'child under the age of 12 years may not be prosecuted for an offence'[485] and effectively increased the first age threshold though it did not remove the lower age as regards the ACR that a child below 8 years cannot be guilty of an offence. More importantly, and from the thesis's argument, a bar on prosecution was introduced by the Criminal Procedure (Scotland) Act 1995, as amended by the Criminal Justice and Licensing (Scotland) Act 2010. Section 52 stated that 'A child aged 12 years or more but under 16 years may not be prosecuted for any offence except on the instructions of the Lord Advocate'.[486] These age thresholds may be seen 'as a source of confusion' with the lower being 'the age below which the child is deemed to lack the capacity to commit a crime.[487] The logic of this age threshold has been presented as 'based on the argument that for a variety of reasons there is no need to retain a rule on criminal capacity'.[488] This approach obviated for most purposes the ACR, with it being 'better conceptualised as relating to immunity from prosecution. Approaching the age of criminal responsibility in this way ... gives greater coherence to Scots law'.[489] The issue of simply raising the ACR to a higher threshold was effectively sidestepped although the matter has been more recently addressed by the Scottish Parliament.

The Scottish Parliament has sought to rectified the anomaly of the ACR by voting to increase it to 12 years with Section 1 of the Age of Criminal Responsibility (Scotland) Act 2019, substituting Section 41 of the Criminal Procedure (Scotland) Act 1995 to read simply that 'A child under the age of 12 years cannot commit an offence'.[490] On its implementation, criminal behaviour by children under 12 can be subject to statutory intervention, for example by Section 67(2)(m) of the 2011 Act, as discussed above. This addresses the interventionist creed by

[485] Criminal Justice and Licensing (Scotland) Act 2010. This inserted into the Criminal Procedure (Scotland) Act 1995, s41A.
[486] Criminal Procedure (Scotland) Act 1995 as amended by the Criminal Justice and Licensing (Scotland) Act 2010, s52.
[487] Claire Lightowler, David Orr and Nina Vaswani, *Youth Justice in Scotland: Fixed in the past or fit for the future?* (Centre for Youth and Criminal Justice, University of Strathclyde 2014) 15.
[488] Scottish Law Commission, *Report on the Age of Criminal Responsibility* (Scot Law Com No 185) (HMSO Edinburgh 2002) 1.
[489] ibid 2.
[490] Age of Criminal Responsibility (Scotland) Act 2019, s1.

offering ‘a solution to the question of how behaviour of concern, currently captured under “offence grounds”, could be captured if the age of criminal responsibility were to be raised’.[491] Subsection (2)(m) rests on the child’s conduct having had or be likely to have ‘a serious adverse effect on [his] health, safety or development’, and enables behaviour by an older child falling under Subsection (2)(j), ‘that the child has committed an offence’, to be addressed. Criminal behaviour is reinterpreted as conduct to ‘justify intervention,[492] and this provides a viable legalistic option to facilitate intervention for the good of the child. It is an approach that answers in part the conundrum in the concerns of this thesis, by focusing on the individual child and addressing criminal-cum-unwanted behaviour.

As a route for intervention, the above has implications for this thesis, as the Scottish approach removes children from criminal prosecution and provides a structured approach for those children aged 12 years and over. The need for proportionate sanctions and preventative interventions into a child offender’s life was recognised in the Report. It melded the ideas of punishment for criminal actions and the need for care or protection that resonate with a modern child focused JJS. It noted, for example, that

> ‘‘Care or protection’ proceedings in fact represent an extension of the ‘preventive’ principle, in that they may entail the application of compulsory measures in situations where no criminal offence may have been committed either by the child or the parent. Questions of criminal responsibility do not arise’.[493]

The Report tackled the ‘appropriateness of applying criminal procedure to juveniles’ as a basis for intervention in a child offender’s life.[494] It acknowledged that a child’s age was a mitigating factor and relevant to sentence or disposal, whilst recognising that ‘the concept of responsibility [was] still inherent and fundamental to the initial adjudication issue of guilt or innocence’.[495] This recognised that ‘the personal and moral responsibility of children may vary widely, age itself offering no reliable guide’.[496] It is difficult to argue with the view that

> ‘a child's capacity to distinguish right and wrong, i.e., his intellectual knowledge of moral standards, may, though well-developed even at an early age, not be accompanied by a corresponding degree of emotional maturity which would enable him to act on that knowledge’.[497]

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[491] Lightowler, Orr and Vaswani (n 487) 15.
[492] Lightowler, Orr and Vaswani, (n 487) 16.
[493] The Kilbrandon Report (n 450) 22.
[494] The Kilbrandon Report (n 450) 22.
[495] The Kilbrandon Report (n 450) 22.
[496] The Kilbrandon Report (n 450) 23.
[497] The Kilbrandon Report (n 450) 23.

Applying these ideas in practice, to achieve positive outcomes for a child offender, means that questions necessarily 'arise where the standards of the home and of his immediate associates are in conflict with those generally accepted by society'.[498] The Report observed that there can be a marked discrepancy between standards at a child's 'home and in school and the actual practice of other individuals with whom he comes into contact in society'.[499] In considering the ACR concept and the demands of the public, the Report recognised that it was 'one of the comparatively few conclusive presumptions of the law, and it shares with such presumptions this characteristic; it enshrines a proposition which is not necessarily true'.[500] It acknowledged that an ACR imputes possession of a cognitive faculty that

> 'may or may not be true, and because it is considered expedient that the law should provide that matters are to be regulated on the basis of the universal truth of the proposition, that the questioning of the truth of the proposition is for practical purposes prohibited'.[501]

The Report acknowledged that chronological age did not have 'any direct bearing on the capacity to form a criminal intent and to commit a crime'.[502] The ACR was described as having 'been laid down for purely legalistic reasons; it cannot possibly be said that the age so laid down either bears, or was ever intended to bear, any relation to the observable phenomena' relating to a child's life'.[503] In this context, the Report proposed a new regime for children in general with child offenders becoming effectively, a sub-group of children with problems to be helped.

5.5 The Essence of the Kilbrandon Report's reforms

The Report envisaged an approach to dealing with children in need, including child offenders that required a fundamental reordering of the purposes and processes of an entire system. It amounted to a 'brave experiment in decriminalisation' that sought to manage young offenders without succumbing to 'populist punitiveness'.[504] Its remit was succinct, to examine

> 'the treatment of juvenile delinquents and juveniles in need of care or protection or beyond parental control and, in particular, the constitution, powers and procedure of the courts dealing with such juveniles.'[505]

[498] The Kilbrandon Report (n 450) 23.
[499] The Kilbrandon Report (n 450) 23.
[500] The Kilbrandon Report (n 450) 24.
[501] The Kilbrandon Report (n 450) 24.
[502] The Kilbrandon Report (n 450) 24.
[503] The Kilbrandon Report (n 450) 24.
[504] Loraine Gelsthorpe 'Review of Juvenile Justice in Scotland: Twenty-five Years of the Welfare Approach' (1999) The Cambridge, Law Journal 258, 258.
[505] The Kilbrandon Report (n 450) 5.

The Report led to the introduction of a

> 'genuine "welfare approach" to young offenders – placing the best interests of the child above all other factors, and ensuring that issues which are the province of criminal justice agencies elsewhere, became the "property" of social work'.[506]

It was noted in the Report that the earlier attempts to promote dedicated juvenile courts had 'not taken extensive root in Scotland, and that in this respect the situation [was] very different from that prevailing in England and Wales'.[507] Witnesses to the Kilbrandon Committee had 'urged the adoption of a uniform system, or, short of that, a reduction in the number of existing types of juvenile court'.[508] This issue was grasped, and rather than streamline the system, the Report proposed the radical division of processes, with

> 'two separate aspects of court procedure, namely, the legal issue of determination of guilt or innocence; and, in cases in which there is a finding of guilt, the subsequent question of sentence, or measures to be applied appropriate to the circumstances of the case'.[509]

This separation recognised that most criminal cases 'resulted in guilty pleas not from any contested hearing but from there being no dispute as to the alleged facts'.[510] Consequently, the Report proposed that child offenders would be dealt with by 'a specialised agency whose sole concern would be the measures to be applied on what [amounted] to a referral'.[511] The procedure remains an exemplar of an approach to child offenders that reoriented the Scottish JJS. It enabled the process to focus on the measures to be applied to the individual child offender when the criminalised behaviour was accepted or proven. On a child denying the alleged offence, the court would determine the matter by evidence and on conviction, it would be concluded as though it had been 'agreed'. The case would be processed by a welfare agency that had no concern with the determination of legal issues, only consideration and application of appropriate measures for the individual child offender. The agency would not be a criminal court of law, or indeed a court in any accepted sense.[512] This separation meant de facto decriminalisation in processing child offenders, by providing for a non-court agency or panel of appropriate professionals who would be concerned solely with treatment measures to deal with a child offender's behaviour. It proposed that the agency proceeded on a basis of agreed

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[506] Gelsthorpe (n 504) 258.
[507] The Kilbrandon Report (n 450) 18.
[508] The Kilbrandon Report (n 450) 18.
[509] The Kilbrandon Report (n 450) 19.
[510] The Kilbrandon Report (n 450) 28.
[511] The Kilbrandon Report (n 450) 28.
[512] The Kilbrandon Report (n 450) 28.

facts to enable its decisions to be taken ‘on the criterion of the child's actual needs’.[513] The proposals also envisaged some cases being resolved on an informal basis to avoid the process being ‘seen by the parents as unwarranted interference’.[514] The Report attributed childhood offending ‘in large measure to social and environmental factors. It had for long been observed that many of those convicted of delinquency’ generally came from poorer parts ‘of urban communities-districts’.[515] It noted that the improvement ‘in economic and living standards and the development of the social services’ had not produced the expected behavioural benefits,[516] and there remained ‘substantial sectors within our society which that progress has only begun to touch’.[517]

The essence of the Report’s view, in addressing child offenders as individuals, was the logical consequence of believing that criminalised childhood misbehaviours were amenable to treatment. In addition, it recognised that societal structure contributed to childhood offending and that many child offenders exhibited ‘a degree of maladjustment, of malfunction personal to the individual’, and that though few ‘parents actively teach their children to steal …. rather more may imply an unconventional system of values at odds with that of society at large’.[518] It concluded that the Scottish JJS ought to emphasise ‘preventive and remedial measures at the earliest possible stage if more serious delinquencies are not to develop’.[519] This implied the application of ‘an educative principle’ that required in-depth analysis that ‘from the outset [sought] to establish the individual child's needs in the light of the fullest possible information as to his circumstances, personal and environmental’.[520] This appreciation of the wider influences on, and the needs of, the individual child, resonates with the concerns of this thesis and the Report route to its achievement represents a positive attempt that has not been adopted elsewhere in the UK. The rationale for this agenda was founded on the ‘principles of diversion’ including diverting such children away from formalised hearings, including Children’s Hearings.[521] The Report put forward the concept of ‘care or protection’ as the basis of proceedings that were premised on a ‘procedure aimed at early preventive action and not

[513] The Kilbrandon Report (n 450) 28.
[514] The Kilbrandon Report (n 450) 29.
[515] The Kilbrandon Report (n 450) 29.
[516] The Kilbrandon Report (n 450) 29.
[517] The Kilbrandon Report (n 450) 30.
[518] The Kilbrandon Report (n 450) 30.
[519] The Kilbrandon Report (n 450) 30.
[520] The Kilbrandon Report (n 450) 30.
[521] Christine Hallett, ‘Ahead of the game or behind the times? The Scottish Children’s Hearings System in International Context’ (2000) 14 International Journal of Law, Policy and the Family 31, 38.

involving criminal procedure'.[522] In turn, this promoted acceptance of the minimum intervention principle, the notion that 'things are best left as they are' unless the Children's Hearing by its decision could justify why intervention was appropriate.[523]

The Report proposed that children under the specified age-limit would be deemed incapable of criminal behaviour, but it would be processed on the basis their behaviour if committed by an adult would have been criminal.[524] However, it was considered that this would be 'little more than nomenclature' as the proceedings would be civil rather than criminal. It was recognised that the application of the civil standard of proof, the balance of probabilities, rather than the criminal one, beyond a reasonable doubt, might result in an injustice.[525] For example, it was observed that the acquittal of a child offender with a linked child under the specified age subject to

> 'care or protection (in which the whole background circumstances would be in issue from the outset and in which proof would rest only on a balance of probabilities), could be the subject of judicial action'.[526]

This highlighted a potential failing in any all-encompassing system designed to intervene and divert child offenders and non-legally culpable associates, as there would effectively be a jeopardy risk inherent in an inclusive child-centred interventionist system. Objectively, this risk might be acceptable as the price of meeting the challenge of criminalised childhood misbehaviour. The reluctance in the Report to countenance this problem rested on the care or protection juvenile model encompassing two distinct functions, with the court element dealing 'with the establishment of the truth or otherwise of the allegation issue' and the treatment measures being a separate function.[527] The Report's proposals combined 'the characteristics of a court of criminal law with those of a specialised agency for the treatment of juvenile offenders'.[528] This in turn was identified as a 'dichotomy of function' that potentially promoted an 'underlying conflict between the two separate principles' leading to 'confusions and misconceptions' consciously or otherwise, in the minds of the bench'.[529] To meet this concern, the Report proposed that cases be referred to a lay 'panel' consisting of three persons who 'by knowledge or experience were considered to be specially qualified to consider children's

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[522] The Kilbrandon Report (n 450) 26.
[523] Kenneth Norrie, *Children (Scotland) Act 1995* (Sweet and Maxwell 1995) 46.
[524] The Kilbrandon Report (n 450) 26.
[525] The Kilbrandon Report (n 450) 26.
[526] The Kilbrandon Report (n 450) 26.
[527] The Kilbrandon Report (n 450) 26.
[528] The Kilbrandon Report (n 450) 27.
[529] The Kilbrandon Report (n 333) 27.

problems', and it 'should be seen to be … entirely independent' with the machinery of appointment reflecting that fact.[530] As a safeguard, the robustness of the panel model would be confirmed with a right of appeal to the Sheriff Courts, to review the exercise of its powers.

The Report's reform proposals to the Scottish JJS emphasised that 'there is no "master-key to fit all cases", the criterion being that of the child's needs' so that there had to be 'an unfettered discretion not only initially to apply, but to modify or vary, the measures appropriate to the individual child'.[531] Such individualised measures were recognised as an infringement 'into personal and family life, amounting to loss of liberty or freedom from interference' that had to be accepted.[532] Otherwise, it was observed, society had to be prepared to accept the status quo and 'social consequences' of further problematic behaviour by the child.[533] The Report and subsequent legislation introduced fundamental changes in Scotland and led to a divergence between the JJSs in the UK. The changes introduced have influenced the juvenile justice debate ever since, and, without doubt, are highly relevant in formulating an answer to the thesis question. As a consequence of the Report's reforms, the resultant Scottish JJS has been described as existing '*preeminently* to serve the best interests of the *child*' and this fundamental feature was 'discernible from the outset'.[534] The rationale underpinning the Scottish approach was 'rooted in a kind of liberal common sense', premised on the notion that ascribes responsibility and consequent behavioural failure by a child to the parental dynamic.[535] There was an acceptance that

> 'for whatever reason parents have been unable or unwilling to ensure that their children develop a firm sense of social responsibility so that there is a requirement for 'training measures appropriate to the child's needs'.[536]

Criminal defence practice suggests most child offenders grow out of criminal behaviour so that 'a formal, accusatory, interventionist philosophy is harmful and counterproductive'.[537] Accordingly, a JJS should instead seek to protect and encourage the development of the individual child rather than accusing and labelling him.[538] Objectively, in the Scottish context,

[530] The Kilbrandon Report (n 450) 28.
[531] The Kilbrandon Report (n 450) 30.
[532] The Kilbrandon Report (n 450) 30.
[533] The Kilbrandon Report (n 450) 30.
[534] William S Geimer, 'Ready to take the high road? The case for importing Scotland's Juvenile Justice System' (1986-86) 35 Catholic University Law Review 385, 397.
[535] ibid 397.
[536] F. Martin, *Theories of Delinquency* in Martin, F. and Murray, K. (Eds.) The Scottish Juvenile Justice System (Scottish Academic Press, Edinburgh 1982) 150.
[537] ibid 150.
[538] Geimer (n 534) 398.

this necessitates confidence in the quality of the Children's Hearings in addressing offending behaviour and the seriousness of the offences with an 'emphasis placed upon the co-operation of the young person'.[539] In the absence of such co-operation, the requirements imposed may be terminated, an unexpected and opposite approach to the JJS in England and Wales with court imposed programmes to encourage compliance.

The Report's recommendations led to the Social Work (Scotland) Act 1968 and the implementation in 1971 of Children's Hearings, although the new welfare-based reforms were not without criticism with Hallett noting, for example, that some judges and police officers had suggested they were 'too soft'.[540] The process centred on the Reporter who, as discussed above, investigated referrals, made an assessment and determined whether to take no action or refer the child to the local authority or arrange a Children's Hearing. In the latter instance, the referred child's case would be discussed at the hearing, an assessment made, and a decision taken as to the appropriate disposal or treatment for him. On any factual dispute arising the case would be heard by a court and on a finding of fact that the criminal behaviour occurred, the procedure reverted to a decision being made as to disposal or treatment. The process focused firmly on the child offender though its implementation nevertheless raised 'legitimate civil liberties concerns'.[541] These were counterbalanced by the perceived advantages, in particular the separation of adjudication and disposition, that is whether the child offender's behaviour is admitted or is established after a court process, and effectively introducing 'citizens' panels exercising actual rather than advisory authority'.[542] The separation of the two functions whilst increasing the potential steps in the JJS produced a clearer demarcation between judicial findings imposing culpability and treatment by behavioural remedies. In the context of this thesis, the Scottish JJS post-Kilbrandon demonstrates a decriminalised child-centred system in operation, but it has not, however, been without reforms as the political system changed with devolution in the UK.

5.6 Internal challenges and developments to the Scottish JJS

The Scottish JJS's implementation of the Report's reforms flowed from the centre of political power, the Scottish Office in Edinburgh, though with devolution, more recent initiatives to augment the JJS have been sponsored by the Scottish Government. The latter have been

[539] Hallett (n 521) 42.
[540] Hallett (n 521) 32.
[541] Geimer (n 534) 386.
[542] Geimer (n 534) 386.

supplemented by regional and local authorities with their child-centred policies that show how the essence of the reforms, though embedded, can be modified. These highlight that a JJS can be developed nationally and locally enabling community priorities to be taken into account in delivering its overall aims. For example, a Dumfries and Galloway Council Discussion Paper noted that there had been 'achievements in the area of Youth Justice in Scotland over recent years, especially the implementation of the 'Whole System Approach''.[543] It also stressed that there was 'an opportunity to truly lead the way internationally in the development of a child-centred 'Rights Based' approach'.[544] However, the skewing of the discussion away from the recognised achievements under the reformed JJS, to the more 'rights based' platform, may undermine confidence in a fully functioning child-centred system. The necessity for further reform or otherwise should be measured against the proposed improvement in outcome for the individual child offender and, in this thesis, such a determination would depend on the degree or otherwise that focus on the child is diminished or enhanced.

The Scottish JJS's integrated approach identifies how best to deal

> 'with children in difficulty, whether they were referred for reasons of allegedly committing offences, for non-attendance at school, or as victims of neglect or ill-treatment. The 'troubled' and the 'troublesome', were to be treated in accordance with a perception of their need for healing and pursuit of their best interests'.[545]

The concept of child-centredness as a template for a JJS was not without criticism, especially in relation to its welfare approach and 'perceived tendency to threaten the civil rights of the young offender'.[546] The concern for the rights of the child offender were balanced by 'less due process but a greater concern for the interests of the juvenile'.[547] This combination exemplified the wish to examine the individual child's wrongdoing, though still with the pull of a judicial input to mark the criminal misbehaviour.[548] This opened the possibility of an imbalance in outcomes, as in effect an individualised approach to child offenders produced sentences concerned with 'treatment, reform and the 'best interests' of the child'.[549] This remained so even where 'the offences or behaviours if committed by adults, might, and in some cases would,

[543] Brian McClafferty, *Youth Justice in Scotland; Meeting the challenge* (Dumfries and Galloway Youth Justice Partnership 2014) 1.
[544] ibid 1.
[545] Hallett (n 521) 32.
[546] Hallett (n 521) 34. Ngaire Naffine, Joy Wundersitz and Fay Gale, 'Back to Justice for Juveniles; the Rhetoric and Reality of Law Reform' (1990) 23 Australian and New Zealand Journal of Criminology 192.
[547] Hallett (n 521) 35.
[548] Hallett (n 521) 35.
[549] Hallett (n 521) 36.

have been treated more leniently'.[550] However, such a potentially disproportionate outcome should be seen as almost a positive feature of the Scottish JJS, even though it raises issues of fairness; it is unavoidable in a JJS that deals with child offenders as children rather than little adults. As a defining feature of the Scottish JJS, the 'capacity to respond to similar 'deeds' differentially on the basis of dissimilar needs remains a characteristic' that is not reflected elsewhere in the UK.[551] And yet, it is argued, such an outcome actually confirms that the child offender is being treated as an individual, as envisaged by this thesis.

The Report's reforms, which infused the Scottish JJS, have been subjected to challenges post-devolution in the Scottish Parliament and in wider media and public debate. Criticism that the Scottish JJS is not sufficiently robust in tackling childhood offending, has been met by the Scottish political class rebutting suggestions of softness towards the children involved. McDiarmid observed, for example, the then Scottish Executive promoted relatively extreme measures to refute any implication that it was 'soft' on youth crime.[552] She noted a determined political 'campaign of spin' conducted against an expected report from Audit Scotland, with the then First Minister indicating his 'personal preference' was for 'a more punitive response'.[553] This politicisation produced a legislative response to the perceived public anti-youth crime concerns with the re-introduction of punitive sanctions and controls with the Anti-Social Behaviour (Scotland) Act 2004 (the 2004 Act). This Act permitted the imposition of an anti-social behaviour order on a child aged between 12 and 15. As in England and Wales, such orders were seen as an effective response to localised community level misbehaviour. An order could be obtained with evidence meeting the civil standard of proof, but with the prospect of criminal offences on its being breached by those named. Though the 2004 Act applied to adults and children, McDiarmid remarked that there was an underlying perception that its purpose was to address 'youth crime'.[554] Similarly, the use of restorative justice provided 'the conditions for reasonable reparation or compensation for the harm caused by the offence'.[555] The concept enabled the Scottish JJS to be tweaked, with, for example, police restorative warnings 'used to ensure that young people understand the impact of their crimes and make

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[550] Hallett (n 521) 36.
[551] Hallett (n 521) 36.
[552] Claire McDiarmid, 'Welfare, Offending and the Scottish Children's Hearings System' (2005) 27 (1) Journal of Social Welfare and Family Law 31, 34.
[553] ibid 34.
[554] ibid 34.
[555] Lode Walgrave, *Not punishing children but committing them to restore'*, in Weijers, I. and Duff, A. (Eds.), Punishing Juveniles: Principles and Critique (Hart Publishing 2002) 99, 100.

amends for their actions'.[556] Changes to the Scottish JJS landscape, at the first contact level with the police, suggested modifications to the Report's approach, not so much to improve the lot of the child offender, but as a reaction to changing socio-political demands. McDiarmid noted that these changes permitted Reporters to the children's panel to refer children to restorative justice services as an alternative to attendance at a Children's Hearing. This re-jigging was seen as not 'overtly punitive but the best interests of the child offender are subordinated to the requirement that the harm caused by the criminal act should be repaired'.[557] Such a rebalancing towards community demands, in response to group anti-social behaviour, was understandable, but potentially undermined the purpose of the Scottish JJS towards the individual child offender and his needs as originally envisaged.

The politicisation of the Scottish JJS by the Scottish Government and Parliament was inevitable, as a devolved power prompts a desire to use it. For example, this was demonstrated in 2004 with the Getting It Right Review which was criticised as simply mimicry of the rest of the UK's approach to child offenders. This stressed that the JJS would be reformed to include 'a more punitive approach to juvenile justice'.[558] The Review was tasked with examining

> 'the system's underlying principles and objectives and whether these continued to provide an appropriate and effective basis on which to deal with children in trouble in Scotland in the twenty-first century'.[559]

It confirmed that whenever an opportunity arises there would always be a push towards punishment as a counterbalance to welfare considerations. In the 'unsympathetic political climate pertaining in Scotland', the notion of 'welfare' remaining 'the basis for decision-making for all children referred to the children's hearings system' would be undermined, if only by repetition of criticism and political manoeuvring.[560] McDiarmid argued that the welfare principle as applied to children should not be 'subsumed in the politicised debate'.[561] The debate on 'the way values (whether stemming from Kilbrandon or other influences) can and might shape the youth justice system', came under scrutiny.[562] It was observed that 'without a broad, societal consensus about' how to deal with childhood offending behaviour, it would be

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[556] Scottish Executive, *Getting It Right for Every Child* (Scottish Executive 2004).
[557] McDiarmid (n 552) 35.
[558] McDiarmid (n 552) 31.
[559] McDiarmid (n 552) 35.
[560] McDiarmid (n 552) 41.
[561] McDiarmid (n 552) 42.
[562] Lightowler, Orr and Vaswani (n 487) 2.

challenging to maintain the Report's approach, in light of ideas 'promoted by the Scottish Government through initiatives' such as the Whole System Approach.[563]

In the context of this thesis, the post-Report Scottish JJS represented a real-world approach that placed the individual child centre stage, with an expectation that his behavioural 'problems' leading to criminal acts would be addressed. Unfortunately, stability is anathema to politics and politicians and the urge to act is never far away, and the Scottish Government succumbed to this urge. The crime 'narrative developed at Westminster filtered across the border to Scotland relatively swiftly along with several of the policies', not least, as noted above, the introduction of anti-social behaviour orders.[564] The Report's philosophy has been assailed by policy shifts, so that welfare 'and justice came to be presented almost as dichotomous variables and the belief that "needs" and "deeds" formed two sides of the same coin was challenged'.[565] The SNP Government has produced a number of publications and policy proposals over a number of years, for example, new plans were produced entrusting Community Planning Partnerships with responsibilities for their communities, 'initially outlined in the Scottish Budget Spending Review 2007'.[566] These initiatives were 'in line with the Scottish Strategy to support the needs of victims of crime irrespective of the age of the person involved in the offence'.[567] Balance was proffered by funding to improve the future prospects of child offenders, for example, the Reducing Reoffending Charge Fund. This provided 'mentoring initiatives, employability programmes and intensive support for young people involved in offending'.[568] Reform is a part of political life, but in this instance, it raised concerns when it was not necessarily formulated to dovetail with a JJS that was seen as meeting the needs of child offenders, and which was widely praised for its treatment of children. In addition to the Scottish Government, the mix was also stirred by regional reforms being added to it.

5.7 The Scottish JJS and national and regional reforms

The policy and programme developments that flowed from the Scottish Government's view that the JJS 'will have to change',[569] demonstrated how functioning systems can become subject to meddling, if only because of the passage of time and the need to be seen to act. The

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[563] Lightowler, Orr and Vaswani (n 487) 2.
[564] Lightowler, Orr and Vaswani (n 487) 9.
[565] Lightowler, Orr and Vaswani (n 487) 9.
[566] Lightowler, Orr and Vaswani (n 487) 10.
[567] Scottish Executive, *Scotland's Action Programme to Reduce Youth Crime 2002* (Scottish Executive 2002).
[568] Lightowler, Orr and Vaswani (n 487) 11.
[569] Graham Jones and Tim Ward, *Reducing Re-offending Strategic Plan for West Lothian 2013 – 2018,* (West Lothian Health & Social Care Partnership, Livingston 2012) 7.

incremental reforms and additions, with examples noted below, demonstrate how, even with a JJS that presents as meeting many aims of refocusing on the individual child offender, it is not static. For example, at a regional level, this is illustrated by the Reducing Re-offending Strategic Plan for West Lothian. This proposed a Reducing Re-offending Service to include a youth crime element, with early and effective intervention, prevention, and reintegration. The Strategic Plan for West Lothian rehearsed the well-known factors that contributed to a child offending behaviour including, in addition to generational educational failure and unmet housing needs, the harmful consequences of parenting failures, negative role models in a child's life, the effects of domestic violence within a family, the effects of alcohol and drug dependency and consequential mental health issues.

These factors are often recognised as indicators that can lead to childhood criminality. The Reducing Re-offending Strategic Plan for West Lothian recognised that the proposed outcomes of the strategy and plans had to be linked to the Whole System Approach. This had been devised and promoted by the Scottish Government as a national approach to childhood criminality. It required that offenders should 'be supported through offers of increased opportunities for diversion from prosecution and viable community alternatives to secure care and custody'.[570] Its commendable aim was to manage 'the risk posed by more concerning young offenders'.[571] Similarly, the Dumfries and Galloway Youth Justice Strategy highlighted the policy nexus with the Scottish Government's overarching strategy, 'Valuing Young People – Principles and connections to support young people to achieve their potential'.[572] This was premised on the need to support partner agencies, to 'deliver positive outcomes for all young people, while recognising that some need more help than others to realise their potential'.[573] It promoted partnerships with communities, local services and the voluntary sector, to encourage the participation of children in local activities,[574] and followed earlier programmes on the same theme, such as 'Getting it right for every child'.[575] Other programmes added more ideas and proposals, such as 'Preventing Offending by Young People – A Framework for Action' which asserted that 'the evidence shows the only way to prevent "deeds" is to address needs. A formula that few would argue with and, in reality, was encompassed by the ethos of the JJS,

[570] ibid 10.
[571] ibid 10.
[572] The Scottish Government, *Valuing Young People – Principles and connections to support young people achieve their potential* (The Scottish Government Edinburgh 2009).
[573] Brian McClafferty, *Dumfries & Galloway Youth Justice Strategy 2014-2017* (Dumfries & Galloway Youth Justice Partnership, Dumfries 2013) 10.
[574] ibid 10.
[575] Scottish Executive (n 556).

but which nevertheless asserted that individuals are 'often both victims and offenders: each aspect needs our attention'.[576] The extent of national, regional and local authority intervention in the field of child welfare, and particularly childhood criminality, reinforces the view that no JJS is ever perfected. The following examples demonstrate the depth of interest in reforming JJSs, even in the case of the Scottish model which for all its relevance to this thesis, cannot seemingly be left untouched.

5.7.1 National policies

The risk remains that flexing political power through policy initiatives undermines the uniqueness of the Scottish JJS. However, on balance, these programmes still promote the individual child as the focus of positive intervention rather than punishment as shown by the policies and programmes that have been devised and introduced, for example, the Whole System Approach, Getting It Right for Every Child and the Early Years Collaborative. Each of these was premised on recognising the imperatives of 'prevention, diversion and desistence', and each acknowledged the necessity to engage, challenge and support the drive for better individualised outcomes for child offenders.[577] They reaffirmed the political and policy 'recognition of the need for more effective joint working between all partner agencies to improve outcomes for children, young people and their families'.[578] For example, the Whole System Approach increased the identification of 16- and 17-year olds involved in offending behaviour and in need of support. It also facilitated, in suitable cases, 'the retaining of young people in the Children Hearing System'.[579] The extent of Scottish Government reforms was encompassed by the Whole System Approach. It mandated intervention 'at the earliest opportunity when young people are in trouble' to address identified needs, risks and concerns within the JJS, including the Children's Hearings System.[580] Equally importantly, it provided for follow-up into adulthood, including where there was regression and a return to criminality. It was built on core elements covering early and effective intervention, maximising diversion from prosecution, support for those not diverted and improving reintegration into the community.[581] The Whole System Approach contained idealistic proposals and fiscal demands

[576] The Scottish Government, *Preventing Offending by Young People – A Framework for Action* (The Scottish Government 2008) 7.
[577] Lightowler, Orr and Vaswani (n 487) 11.
[578] McClafferty (n 573) 7.
[579] McClafferty (n 573) 7.
[580] Scottish Government, *The Early Years Framework* (Scottish Government 2008) 1.
[581] Lightowler, Orr and Vaswani (n 487) 12.

that were difficult to fund, though it confirmed that Scotland remained as a proving ground for child-centred programmes to address criminal behaviour.

Similarly, 'Getting It Right for Every Child' promoted values and principles intended to 'bring meaning and relevance at a practice level to single-agency, multi-agency and inter-agency working across the whole of children's services'.[582] The core components sought to improve outcomes by way of 'effective information sharing and joint working' and targeting assessment and intervention on 'children, young people and their families' with 'an overarching focus on the wellbeing indicators'.[583] The Early Years Collaborative initiative also promoted this widening agenda that had been devised to 'accelerate the conversion of the high level principles set out' in 'Getting It Right for Every Child' and the 'Early Years Framework'.[584] The latter highlighted the need to support Scottish Government policies in this area through 'investment in early years focused on building success and reducing the costs of failure'.[585] It ambitiously aimed for a cultural change, by moving 'from intervening only when a crisis happens, to prevention and early intervention'.[586] This was effectively a restatement of a fundamental Kilbrandon principle though without acknowledgement. It has been argued that though Scottish devolution has led to increased politicisation of the JJS, there may be an element of

> ''over claim' as regards the significance of contemporary politics, policy and practice in re-shaping youth justice in Scotland over the last decade. Historically, many wider societal, cultural and environmental factors have been hypothesised to have some association with changing trends in both youth and adult crime'.[587]

It is arguable that socio-cultural behaviours have been affected by technological developments in daily life, with unforeseen consequences on crime rates.[588] For example, the smartphone carried by children has been linked by some to a decline in youth crime, as the inevitable boredom faced by the teenagers of yesteryear has been replaced with 'at your fingertips' entertainment in the form of social media, games and online entertainment, such as music and videos.[589] Whilst they may have contributed to a fall, smart-devices have unfortunately opened

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[582] Scottish Government, *Getting it right for children and families: A guide to getting it right for every child* (Scottish Government 2012).
[583] Lightowler, Orr and Vaswani (n 487) 11. Often referred to as the SHANARRI indicators, the eight well-being indicators emphasis that all children and young people should be: Safe; Healthy; Active; Nurtured; Achieving; Responsible, Respected; and Included.
[584] Scottish Government (n 582).
[585] Lightowler, Orr and Vaswani (n 487) 12.
[586] Lightowler, Orr and Vaswani (n 487) 12.
[587] Lightowler, Orr and Vaswani (n 487) 13.
[588] Lightowler, Orr and Vaswani (n 487) 13.
[589] Lightowler, Orr and Vaswani (n 487) 13. Mark D. Griffiths and Mike Sutton *'Proposing the Crime Substitution Hypothesis: Exploring the possible causal relationship between excessive adolescent video game playing, social networking and crime reduction'* (2013) 31 (1) Education and Health 17.

a gateway to other less welcome avenues of child exploitation and criminality with children often being victims and perpetrators. The lower juvenile 'crime trends that have been witnessed in Scotland is likely to be a complex mix of policy, practice, societal and individual factors'.[590] Accordingly, as Lightowler, Orr and Vaswani observed, there undoubtedly 'remains an element of tension between our Kilbrandonian ideals and the reality of how some young people experience the justice system'.[591]

The challenge for the Scottish JJS is to maintain and build on its success in a progressive and imaginative way, without sacrificing the core value of focus on the child offender rather than the criminal justice imperative. On balance, it has benefited from changes in 'systems and processes that can be achieved without the need for legislation or major additional investment'.[592] As noted above, the Whole System Approach has led to the 'recognition that the boundaries between child, youth and adult services can be artificial' as there is inevitably an overlap.[593] Nevertheless, the Scottish JJS has retained its broader societal appreciation 'that children differ from adults in their physical and psychological development, and have distinct emotional and educational needs'.[594] Lightowler, Orr and Vaswani observed that within the Scottish JJS

> 'children and young people under the age of 18 detained in custody may be deemed "children in need" and that local authorities had duties towards them as they would such children in the community',

rather than responding to them as alleged wrongdoers.[595] There is an underlying commitment to improving outcomes for children, demonstrated, as discussed above, by the Scottish Government's policies and initiatives in this area.[596] This commitment is further supported by the work of regional and local authorities that have endeavoured to build on them and promote 'responses to juvenile criminal behaviour' and produce strategic plans 'to make … communities safer'.[597] These responses are informative and show how the ripples from the Report continue to infuse the juvenile justice debate in Scotland, even as it edges towards a post-Report form, especially in the area of regional and local authority interventions. The policies and plans produced show the continuing relevance of the Report to the Scottish JJS,

[590] Lightowler, Orr and Vaswani (n 487) 14.
[591] Lightowler, Orr and Vaswani (n 487) 14.
[592] Lightowler, Orr and Vaswani (n 487) 17.
[593] Lightowler, Orr and Vaswani (n 487) 17.
[594] Lightowler, Orr and Vaswani (n 487) 19.
[595] Lightowler, Orr and Vaswani (n 487) 19.
[596] Lightowler, Orr and Vaswani (n 487) 19.
[597] Jones and Ward (n 569) 2.

albeit they are reflective of a widening focus away from the individual child. This is illustrated by the West Lothian, and Dumfries and Galloway examples discussed below, two responses that on balance maintain the focus on the individual child.

5.7.2 The Reducing Re-offending West Lothian Strategic Plan

As noted, the plans produced have a narrative that addresses child offending as part of wider criminal behaviour, as shown by the Reducing Re-offending West Lothian Strategic Plan. This focused policy initiatives and resources on child offending in a more generalised context, addressing child offending by reference to the 'new initiatives and priorities being regularly identified both at national level and by Community Safety and Community Planning Partnerships'.[598] It recognised that 'it would be an oversimplification to suggest that there is inevitably a connection between upbringing, social situation and offending'.[599] The plan accepted that there was a range of factors that led to offending behaviour. It stressed that these had to be tackled by ''Working up-stream' – recognising and dealing as soon as possible with the range of problems and poor influences that contribute to later offending'.[600] It aimed to address the social factors and failings that contributed to criminal behaviour from the perspective of partner agencies, observing that no

> 'organisation can possess the entire range of skills and resources that is needed to reduce the incidence of behaviour that causes harm, whether physically, emotionally or financially, to individuals or to the wider community'.[601]

The Reducing Re-offending West Lothian Strategic Plan addressed the victims of crime who had 'the right to live their lives free from crime, disorder and danger'.[602] It accepted that for offenders who because they often faced 'multiple and interrelated problems, breaking the cycle of re-offending [was] a considerable challenge'.[603] It also stressed that such disadvantages and inequalities did not 'legitimise or excuse their behaviour'.[604] In addressing how to reduce reoffending, the Plan envisaged producing safer communities and fewer victims and that would, in consequence, 'reduce pressure on the resources of the organisations that make up the criminal justice system'.[605] It recognised that the passing of the Social Work (Scotland) Act

[598] Jones and Ward (n 569) 2.
[599] Jones and Ward (n 569) 2.
[600] Jones and Ward (n 569) 2.
[601] Jones and Ward (n 569) 4.
[602] Jones and Ward (n 569) 4.
[603] Jones and Ward (n 569) 4.
[604] Jones and Ward (n 569) 4.
[605] Jones and Ward (n 569) 5.

1968 meant ‘the way that local authorities work with people who offend has changed out of all recognition’, so that working with offenders had ‘a prominence that would have been unimaginable even twenty-five years ago’.[606] This was based on ‘a shared understanding, reflected throughout the Plan, that effective intervention in longstanding patterns of offending cannot be the responsibility of any single organisation’.[607] It recognised that difficulties in challenging child offenders ‘in terms of their everyday life, [were] wide-ranging and difficult to control’, and accordingly, the ‘contributions of all partners [were] valuable in making our communities safer’.[608]

5.7.3 The Dumfries and Galloway Youth Justice Strategy 2014 – 2017

In this example, the Dumfries and Galloway Youth Justice Partnership drew together the local authority, Police Scotland, NHS Dumfries & Galloway, and Scottish Children’s Reporters Administration. It rehearsed similar insights to those in the Reducing Re-offending West Lothian Strategic Plan and aimed to address the challenges of childhood offending behaviour by reference to the Whole System Approach noted above. The Dumfries and Galloway Youth Justice Strategy 2014 – 2017 preamble detailed the factors necessary for children to become ‘successful learners, confident individuals, effective contributors and responsible citizens’, noting the importance of adequate parenting, support in education, training and employment opportunities and accessible and supportive universal services.[609]

Again, these identified factors were compatible with the underlying approach of the Report’s reforms, while asserting that no one agency could have ‘sole responsibility for supporting young people to make positive lifestyle choices’.[610] Though the number involved in offending behaviour was recognised as small, the purpose was to prevent them becoming entrenched ‘in antisocial and offending behaviour’.[611] It maintained the Report’s ethos, for example, highlighting the need to identify the problem behaviours to ‘enable a resolution for the individual child offender through a co-ordinated and planned approach’.[612] As an illustration of local authority plans in response to Scottish Government policies, the Dumfries and Galloway Youth Justice Strategy provided a comprehensive account of the national framework

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[606] Jones and Ward (n 569) 5.
[607] Jones and Ward (n 569) 5.
[608] Jones and Ward (n 569) 5.
[609] McClafferty (n 573) 7.
[610] McClafferty (n 573) 7.
[611] McClafferty (n 573) 7.
[612] McClafferty (n 573) 7.

underpinning it.[613] The primary purpose was the provision of a better and more individualised service to child offenders, aiming 'to reduce offending by young people' by reference to the Community Pledge.[614] The Pledge rehearsed the need to reduce youth crime, prevent re-offending, promote social inclusion, and divert children from offending; it was intended to deliver 'services to children and young people involved in or at risk of being involved in offending or antisocial behaviour'.[615] Sometimes, a statement of the obvious can draw those involved in any organisation in the delivery of a plan back to first principles, to ensure they are not lost in the mêlée of policies, strategies that may unintentionally work to the detriment of the individual child offender.

5.8 Conclusion

An aim of this thesis is to assess how effectively juvenile justice is delivered, through the prism of the writer's experience in criminal defence practice. This positionality, though subjective in its stance, nevertheless permits a valid contribution to be made because it provides a point of view by which to describe and assess the approach examined.

The Scottish JJS offers a unique opportunity because of the circumstances of its origins and its tabula rasa implementation of reforms. The Report led to the reformation, indeed almost the recreation, of the JJS. The implementation of the reforms suggested by the Report produced a remarkable reordering of priorities, as regards the focus placed on the individual child, and remodelled the entire system in an image of its own devising. When assessed against its primary purpose, the Report's legacy continues to be successful in terms of its focus on individualising a response to childhood offending. The refocusing on the individual child offender has also expanded beyond the JJS itself and has cascaded from the Scottish Government's strategies and into local government plans as noted above. It suggests that once a radical and progressive step has been taken in one area of public policy, in this instance the JJS, it can lead to wider societal reforms outside its original ambit.

The Scottish JJS, after the Report, addresses childhood criminality mostly without recourse to a formal court environment. However, it is not without its flaws and, as observed, there have been attempts to reintroduce some elements of the more traditional approach to juvenile justice, as epitomised in England and Wales. Even with such retrenchment, the Scottish JJS offers a

[613] It references Valuing Young People (Convention of Scottish Local Authorities and Scottish Government), Getting it right for every child, and The Children and Young People (Scotland) Act 2014.
[614] McClafferty (n 573) 14.
[615] McClafferty (n 573) 14.

pathway for fundamental reform in England and Wales as a system with the laudable ambition not to focus on society as the victim of criminal behaviour but on the individual child as a child-in-need. The examination of the Scottish JJS before and after the Report in this chapter, including the shadow system operated by the police service, with the connivance of law officers, demonstrates that, before its implementation, approaches to prevention and diversion foundered as out-of-time and not fit for purpose in terms of policing and justice. After the implementation of the Report, there was a different paradigm of causal factors for childhood behavioural issues, with criminal behaviour being only one factor used to justify intervention and action. However, at its fundamental level, the primary legacy of the Report was to produce a JJS that gave the individual child another chance, by placing him within a system designed to help rather than criminalise.

This examination of the Scottish JJS offers a palette of ideas for remodelling the JJS in England and Wales with different solutions to meet the challenges faced by it. The Scottish JJS forms a key part of the development of this thesis and its reform proposal in Chapter 8. It also highlights the shortcomings, for example, of the Youth Court in England and Wales with its use of criminalised terminology and its formality towards a child defendant who is often left sitting alone in front of lay magistrates or a District Judge because of the indifference of his parents to attending court.

In conclusion, the Scottish JJS offers a starting point for greater reform in England and Wales with valuable insights into how a system can be reformed. It provides a major contribution towards this thesis and demonstrates that there remains a need for a more holistic, more therapeutic response to criminalised childhood behaviour, one that goes beyond a mere reformulation of the JJS.

The next chapter

The next chapter continues the examination of alternative approaches to juvenile justice in nearby jurisdictions with an exploration of the Irish JJS. In the context of broadening the research base to develop the thesis's argument, the Irish system was chosen because of the shared heritage with the JJS in England and Wales and the contrast in its modern iteration which focuses on dealing with child offenders by diversion, wherever possible at the first point of contact with it.

The Irish JJS promotes the diversion of child offenders through intervention programmes run by the Garda Siochána or Irish Police Service. The genesis of this approach is discussed by

reference to the historical and political context in which the Irish JJS developed and implemented the Garda Diversion Programme. The role and functioning of the programme in the overall system is examined as illustrative of how first-time child offenders can be diverted at the earliest point in the process. As such, it bears comparison with the Children First, Offenders Second concept pioneered in Wales, and its later more general iteration in the Child First approach, since it deals with child offenders through a complete diversion from the formal JJS.[616] These examples of promoting diversion are referenced in the next chapter as valuable sources of diversionary strategies and as useful additions to the palette of ideas from which proposals for child centred reform of the JJS in England and Wales can be drawn. While the Scottish JJS is an example of a completely remodelled system, the next chapter contributes to the thesis by demonstrating that an existing system can be modified to produce an equally effective one to address child offending.

[616] Haines and Drakeford (n 317).

Chapter 6

The Irish Juvenile Justice System and diversion

6.1 Introduction

The Irish criminal justice system, including the juvenile justice element, has a shared history with the United Kingdom (UK) of which it was once a constituent part, although it has diverged in many ways since Ireland gained independence. These similarities and differences present many useful avenues for exploration and this chapter examines the very different reform route followed by the Irish juvenile justice system (Irish JJS).

The Irish JJS, and the Garda Diversion Programme (GDP) will be considered through an examination of key aspects of Ireland's history and development which have produced a very different response to childhood criminality. The value of this chapter to the overall thesis stems from those differences and their potential relevance for reform of the JJS in England and Wales. Both countries have similar socio-cultural problems of poor educational outcomes and failing families and urban community cohesion leading, in some instances to criminal behaviour. The present Irish JJS addresses the issue of childhood criminality wherever possible through the GDP which ensures less contact with the court-based element of the system, and it is this feature that justifies its relevance to this thesis. The chapter highlights that there is more than one route to radical reform. The Scottish JJS demonstrates the implementation of a completely new approach to child offending whereas in Ireland equally radical reforms have been achieved by the reorientation of its existing system. Although not as fundamental in aspiration as the reforms introduced in Scotland, the Irish reforms recognise similar problems within the JJS, and seeks to address them.

This chapter examines the Irish JJS through its mainstay, the GDP, which is the foundational level programme intended to address child offending.[617] The GDP is a first tier diversion process underpinned by statute and government initiatives and, in the context of this thesis, it presents as an example of a child offender focused programme of intervention. It aims to proactively deal with child offenders, not by punishment, but by diversion from criminalised behaviour. As a template, the GDP demonstrates a unique process operated by the Garda Siochána (the Garda) or Irish Police Service and, it is suggested, is as much a part of the Irish

[617] Garda Diversion Programme Irish Youth Justice Service, Garda Youth Diversion Projects' Irish Youth Justice Service < http://www.iyjs.ie/en/IYJS/Pages/GardaDiversionProgramme> accessed 24th June 2021.

JJS as, for example, YOTs in England and Wales. It plays a key role in the Irish JJS and delivers the first-tier response to children drawn into criminalised behaviour. As such, it demonstrates that a JJS can be effective without necessarily adhering to traditional prosecution and punishment ideas to facilitate an outcome.

The GDP is central to the Irish JJS in its modern guise and together with the general role of the Garda under the Children Act 2001 (the 2001 Act) and, in relation to Children Court proceedings, illustrates the reliance placed on the police service in the delivery of juvenile justice. The Garda as the primary avenue of initial intervention will therefore be examined with reference to the GDP in practice, its admissions procedure, the Garda's response to childhood criminal behaviour in general, and the procedural safeguards in place for child offenders. As mentioned, the Irish JJS has relevance to this thesis in part because of the similarity of childhood offending in Ireland to that in England and Wales. This chapter also considers the extent of child offending in the context of socio-economic failure and educational failure, together with the legislative response to treat child offenders as children. Having explored these aspects, the chapter will conclude with an assessment of the Irish JJS's use of the GDP, considering whether it successfully promotes rehabilitation and desistance, and whether it therefore provides a model of a successful approach to child offending which could make a useful contribution to reform proposals.

6.2 Aspects of the development of the Irish JJS

The Irish JJS, in its modern incarnation began to develop in the late nineteenth century, when the country was part of the UK. Legislation led to the introduction of reform schools and industrial schools that were intended to address the problem of child offenders who had committed petty offences, and children who had been abandoned or orphaned. The modernising process culminated in the Children Act 1908, under the devolved Dublin government administration, which promoted the idea 'that children and young people should not be exposed to the full rigor of the criminal law in the same way as adults'.[618] With the end of the civil war and the establishment of the Free State, a distinctly Irish approach to juvenile justice began to evolve from 1922 onwards to meet the needs of the newly created dominion state and later republic, with its own socio-economic problems. The Irish responses, including those relating to childhood criminality, developed within the context of a written constitution

[618] Mairead Seymour, *Ireland* in Christopher J Schreck (ed.), The Encyclopedia of Juvenile Delinquency and Justice (Wiley Blackwell 2017).

which placed the Roman Catholic Church at its heart. However, the Church's influence on social and cultural life contributed to delaying progressive reforms. The reform and industrial schools remained under the control of religious orders into the twentieth century and were beset by inherent abuse and cruelty which blighted the lives of many of their child inmates. The modern Irish JJS retains an effective traditional prosecute and punishment process which is effective for those instances where the seriousness of the offending warrants it or where the GDP fails to address the offending behaviour and rehabilitate the child offender.

6.2.1 The 2001 Act and the present Irish JJS

Recent social and economic changes, and clerical scandals, have lessened the Church's influence on societal mores though a bedrock of principles from the previous political union with the UK, and the common Christian teachings, remain. The Irish JJS underwent a major reorientation with the passing of the 2001 Act which transformed it from a traditional prosecute and punishment approach, to one that promoted a regime of culpability and punishment mixed with rehabilitation of individuals. The changes also gave the GDP a statutory basis, and it is this programme with its focus on the individual child offender and his criminalised behaviour, together with its relevance for this thesis, which forms the core of this chapter.

The present Irish JJS's age of criminal responsibility (ACR) is 12 years unless the offence is a serious offence when it is 10 years. Children are defined as under 18 years,[619] and their criminal behaviour accounts for about 15% of the total of recorded crimes.[620] As in the UK, childhood criminality concerns the Irish public, its politicians, and the media, with demands for effective 'policies and delivery' to address it.[621] The Minister for Justice and Equality described the Irish JJS's ambition as continuing

> 'the downward trends in high volume crime and detention; becoming more adept in understanding and intervening in more serious crime offending patterns; and improving the effectiveness and efficiency of these interventions in addressing the behaviour and needs of these young people'.[622]

This mission statement emphasised the Irish JJS's strategy to individualise its response by dealing with childhood criminality fairly and proportionately.

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[619] Children Act 2001, s52(2) as amended by Criminal Justice Act 2006, s129.
[620] Minister for Justice and Equality, *Tackling Youth Crime, Youth Justice Action Plan 2014 – 2018,* (Department of Justice and Equality 2013) 2.
[621] ibid 2.
[622] ibid 2.

The present Irish JJS is the product of a society which has undergone remarkable social and economic changes when contrasted with the early years of the Irish state. It rests on the 2001 Act as amended by the Criminal Justice Act 2006 and the Children (Amendment) Act 2015. The philosophy of the 2001 Act is that child offenders 'should only be detained (in custody) by the state as a last resort', with a variety of diversionary community-based steps to be utilised 'and exhausted before detention can be considered'.[623] The Irish JJS operates through the Department of Children and Youth Affairs which was established in 2011. It has responsibility for all aspects of the JJS and is tasked to provide 'strategic direction to the development of services and promote reform'.[624] The reform process included changes to the terminology used to describe the children drawn into the system and removed labels such as 'minor, juvenile, youth offender and young person'.[625] Instead, it adopted the word 'child', as defined in Section 3 of the 2001 Act, to mean a person under the age of 18 years old.[626] The Republic of Ireland raised the ACR from 7 years to 12 years in 2006,[627] and proceedings against children aged under 14 years require the consent of the Director of Public Prosecutions. This maintains and supports the concept of *doli incapax*. Section 52(1) of the amended 2001 Act states that 'It shall be conclusively presumed that no child under the age of 12 years is capable of committing an offence', with Section 52(2) detailing the

> 'rebuttable presumption that a child who is not less than 12 but under 14 years of age is incapable of committing an offence because the child did not have the capacity to know that the act or omission concerned was wrong'.[628]

It is only in relation to serious offences, such as murder, manslaughter, rape, and aggravated assault that the permitted age of prosecution, for reasons of political policy, falls to 10 years.

6.2.2 The role of the Garda under the 2001 Act

The role of the Garda under the 2001 Act is much more protective towards child offenders. For example, children aged under 12 years who are believed to be responsible 'for an act or omission which but for section 52, would constitute an offence' fall within a protective umbrella, and can be taken by a 'member of the Garda Síochána, to the child's parent or guardian'.[629] The 2001 Act's focus on the individual child is further demonstrated by Section

[623] ibid 2.
[624] ibid 2.
[625] Children Act 2001, s3.
[626] ibid. s3.
[627] ibid. s52 as amended by Criminal Justice Act 2006, s129.
[628] ibid. s52(1) and s52(2) as amended by Criminal Justice Act 2006, s129.
[629] ibid. s53 as amended by Criminal Justice Act 2006, s130.

53(2) that provides where a member of the Garda has 'reasonable grounds for believing that the child is not receiving adequate care or protection', he is required to inform the health board about the child 'and the circumstances in which he or she came to the notice of the Garda'.[630] This protective care arises even in the absence of such grounds. Section 53(3) states that where it is not 'practicable for the child to be taken to his or her parent or guardian, the member of the Garda Síochána' can arrange for the child 'to be given, into the custody of the health board for the area in which the child normally resides'.[631] Equally, for the purposes of an individual's life chances, the 2001 Act provides that child offenders shall, by Section 258(4)(*a*), 'be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or found guilty'. The child offender is given a clean sheet, by Section 258(1) providing he committed before the age of 18 years, it was not an offence required to be tried by the Central Criminal Court, for example murder and not less than 3 years has elapsed since the finding of guilt, and he has not been dealt with for an offence during that time.

However, in processing child offenders towards prosecution, the Irish JJS retains similarities to the JJS in England and Wales which continue to reflect their shared heritage. For example, criminal behaviour substantiated by evidence may result in a decision to charge a child offender with an offence to be heard before the Children Court, which is the court designated to hear cases involving child offenders. The charge sheet details the individual child, the offence charged, the name of the prosecuting Garda and when and where to attend court. This process is normally carried out with a parent present and copy documents provided together with a reminder of the legal obligation to attend court. The parents are also given the details of any solicitor or other adult attending the Garda Station in relation to the child's case. Should the parents not attend, then the same information is provided to them as soon as practicable. Similarly, for less serious offences, the child may be dealt with by way of a summons to court, with his parents named and required to attend with him. For serious offences, the child may be detained in custody until the next Children Court or, as with less serious offences, bailed from the Garda Station to appear before the court within 30 days.

6.2.3 Children Court proceedings

The Irish JJS functions primarily through the Children Court, as it is termed in the 2001 Act, and is equivalent to the Youth Court in England and Wales. It deals with criminal cases

[630] ibid. s53.
[631] ibid. s53(2) and s53(3) as amended by Criminal Justice Act 2006, s130.

involving child defendants under 18 years old though criminal charges against children aged under 14 years old require the consent of the Director of Public Prosecutions.[632] In everyday practice, it is known as the Children's Court and, under Section 75(1) of the 2001 Act, it may

> 'deal summarily with a child charged with any indictable offence, other than an offence which is required to be tried by the Central Criminal Court or manslaughter, unless the Court is of opinion that the offence does not constitute a minor offence fit to be tried summarily or, where the child wishes to plead guilty, to be dealt with summarily.

In retaining indictable offences before the Children Court, Section 75(2) of the 2001 Act directs that account be taken of 'the age and level of maturity of the child' and 'any other facts it considers relevant'.[633] Interestingly, though premised on being the venue for child offenders, the Act provides under Section 75(3) that the court

> 'shall not deal summarily with an indictable offence where the child, on being informed by the Court of his or her right to be tried by a jury, does not consent to the case being so dealt with'.[634]

This enables a child offender to elect jury trial and on occasion, there are instances were such an option would benefit child offenders in the JJS in England and Wales. The 2001 Act also contains a reserve power for offences 'that by reason of their gravity or other special circumstances' the court determines them not suitable and they ought more properly to be heard before the Circuit Court that sits with a jury of 12 and is equivalent to the Crown Court in England and Wales.[635] Carroll and Meehan examined 400 cases and noted 3% were sent for trial before the Circuit Court and tended 'to involve some degree of harm or threat to harm another person and/or involved a weapon'.[636] The decision of the Children Court in the retained cases resulted in a 59% conviction rate. Of the 3% sent to the Circuit Court, most interestingly, 38% resulted in no conviction, a term including acquittals and cases struck out for lack of evidence.[637]

The Children Court provides a focus on the individual child without public attendance and limits who may be present during a hearing to the child and his legal representatives, officers

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[632] Citizen Information Board, *Courts System* < https://www.citizensinformation.ie/en/justice/courts_system/ > accessed 24 June 2021.
[633] Children Act 2001, s75(2).
[634] ibid. s75(3).
[635] Jennifer Carroll and Emer Meehan, *The Children Court: A National Study,* (Association for Criminal Justice Research and Development Ltd March 2007) 34.
[636] ibid 34.
[637] ibid 39.

of the court, his parents or guardian or an adult relative or another adult, if the child's parents or guardian are not present. In addition, people directly involved in the proceedings such as witnesses, bona fide representatives of the press may attend, together with others as allowed by the court.[638] The Children Court may order a separate welfare conference to consider whether a care or supervision order should be made or where the child accepts responsibility for the offence order a family conference to formulate an action plan.[639] These conferences involve the child's family, complainants and other relevant people, for example his social worker. They are intended to promote discussion and examination of the offence and child offender with a view to making orders which prevent reoffending and promote rehabilitation through restorative justice. The 2001 Act and subsequent Children Acts provide for the Probation Service to facilitate these conferences and the court proceedings are adjourned until it reports. This process is grounded in an examination of the child's behaviour, and his ability to consider his actions, and how to make amends. The inclusivity of the process is demonstrated, for example, by the action plan process where the child and his parents can draft the plan which is discussed by the full group prior to its being presented to the Children Court. On approval, it is supervised by a probation officer and on completion of the requirements, the child offender's response is considered by the court and, where satisfactory, the case closed. Where a child offender does not comply with the action plan, the Children Court reassesses the case and he can be dealt with by way of community penalties or, in appropriate cases, by detention.

In the cases of child offenders who are prosecuted and convicted, the Children Court, as with the Youth Court in England and Wales, calls for reports. These provide information and proposals to assist on sentence with reference to 'suitability for community sanctions' and programmes to rehabilitate.[640] The expansion of restorative justice programmes recognised the importance of the victim in the process and 'cemented the 'responsibilisation' of the offender as best practice – rehabilitation being linked to reparation'.[641] The report details information 'to facilitate the court in combining the legal and social elements of justice and therefore allow the court to understand issues outside of the offence'.[642] As with the JJS in England and Wales, the Irish JJS court process often has a negative reinforcement effect on the individual child and,

[638] Citizen Information Board (n 632).
[639] Children Act 2001, s77(1) and s78(1).
[640] Etain Quigley, 'Pre-sentence Reports in the Irish Youth Justice System: A Shift to Risk-Oriented Practice?' (2014) 11 Irish Probation Journal 67.
[641] ibid 68.
[642] ibid 68.

while nudging or demanding behavioural changes by court order, the system itself often has a detrimental influence on his behaviour.[643] It contributes 'to a high degree of criminalisation of young people' and, for a minority of child defendants, therefore promotes further offending by association.[644] This unintended consequence has been identified as socialisation due to 'interaction with criminal justice agencies', attendance at court and 'living in the company of other young offenders'.[645] The Irish JJS, having less reliance on the court based approach may not suffer this disadvantage to the same extent, but it is still a factor in the failure to rehabilitate some child offenders.

The effective prevention of criminal behaviour is limited by the very behaviour and capacities of the children involved. It has been noted that many lack engagement, motivation, empathy and pro-social behaviour so that 'considerable effort sometimes has to be deployed in merely engaging a young person in a particular programme of interventions'.[646] Accordingly, intervention programmes utilised in the Irish JJS aim 'to reduce offenders' risk of reoffending, for example, by incorporating 'measures to increase victim awareness and empathy, as well as offender accountability'.[647] They include 'specific elements of reparation and restoration' such as 'Community Service, victim impact assessment reports completed for Courts', together with 'victim-offender mediation and community-based restorative panels'.[648] This strategy, initially formulated in 2009, was intended to marry 'a victim sensitive response to criminal offending' combined with a recognition of the need to facilitate 'offender rehabilitation and integration into society'.[649]

6.2.4 The custodial environment for child offenders

In the most serious instances of criminal behaviour, custody remains as a sentencing option on conviction throughout the age range. The custodial facility is based at the Oberstown Children Detention Campus in County Dublin and serves all the country. Under the 2001 Act the principal objective of the campus 'is to provide appropriate care, education, training and other programmes to young people between 12 and 18 years with a view to reintegrating them

[643] The potential for negative behavioural effects on child offenders caused by a JJS is considered in Chapter 7.
[644] Carroll and Meehan (n 635) 52.
[645] Carroll and Meehan (n 635) 52.
[646] Sean Redmond and Brian Dack, *Working in partnership with communities to reduce youth offending,* (Young Persons Probation and the Irish Youth Justice Service 2010) 26.
[647] The Probation Service, *Restorative Justice Strategy, Repairing the Harm: A Victim Sensitive Response to Offending,* (The Probation Service November 2013) 1.
[648] ibid 1.
[649] ibid 2.

successfully back into their communities and society'.[650] This highlights that, even in the most restrictive environment, for the most serious of child offenders, the Irish JJS retains its focus on the rehabilitation of the individual child, a focal point which lies at the heart of this thesis, and its reform proposal.

The campus provides accommodation for both sexes and in May 2020 there were 35 children resident who had been sentenced to detention, including eight children aged between 13 and 15 years and the remainder aged between 16 and 18 years. As part of its contribution to focusing on the individual child offender, Oberstown promotes behavioural control by 'single separation'.[651] This is a management technique that involves removing a child offender from his peer group because of behavioural concerns and to control risk to himself and other children or staff. It is a measure that utilises a behavioural nudge strategy 'to manage challenging behaviour, and to assist young people to move on from their offending behaviour' and emphasises the focus on addressing the behaviour of the individual.[652]

6.3 The Garda and the GDP

6.3.1 The purpose of the GDP

The Irish JJS presents as a traditional model as regards those cases that progress to the court system and the custodial sentencing regime. However, the court-based element, as discussed above, is only the second tier of the system, and it is the first tier of the process, devolved to and operated by the Garda, which is most relevant to this thesis. It is at this level that the whole focus is on the individual child offender, and it is here, at the earliest point of contact with the JJS, that a template for a reformed approach to address child criminality has been developed.

The Garda's role in the Irish JJS as the first tier response to child offending represents a model of intervention that eschews the more traditional court focused approach and the twin pillars of prosecution and punishment. The Garda's mandate and responsibility for managing the GDP developed over time from its original inception in the early 1960s as an 'informal diversion scheme'.[653] The purpose of the GDP was to prevent those involved in childhood criminality

[650] Oberstown Children Detention Campus, *About Us* <https://www.oberstown.com/about-us-2/> accessed 24 June 2021.
[651] ibid.
[652] ibid.
[653] Citizens Information Board, *Garda Juvenile Diversion Programme* <http://www.citizensinformation.ie/en/justice/children_and_young_offenders/garda_juvenile_diversion_programme.html> accessed 24 June 2021.

‘from entering into the courts system and incurring a criminal record’.[654] The recognition of the importance of the GDP, shown by the primacy given to it in juvenile justice policy, served to adjust the public’s perception of how childhood criminal behaviour could be addressed. A formalised court-based system was not necessarily appropriate in many instances. It led to an acceptance that a child offender could properly be processed as a child by the GDP, and that it was not a soft option. The 2001 Act gave the GDP the statutory purpose of preventing

> ‘young offenders in Ireland from entering into the full criminal justice system by offering them a second chance. The intended outcome of the Programme is to divert young people from committing further offences. Where a young person comes to the notice of the Garda Síochána because of their criminal activity, they may be dealt with through the Diversion Programme’.[655]

Compared to police forces in England and Wales, the Garda has a much more comprehensive role, involving both the detection of crime, and a responsibility to re-orientate a wayward child’s life. The GDP is implemented by Juvenile Liaison Officers who are

> ‘trained to deal with young people and their families in relation to crime-prevention, the operation of the diversion programme and all other areas involving young people and the criminal justice system’.[656]

The GDP is very much a locally based organisation with Juvenile Liaison Officers in each local Garda District. The Officers are expected to maintain contacts with ‘young people at risk and to liaise with teachers, Child and Family Agency staff, school attendance officers and other gardaí in their local area’.[657] The GDP provides a procedural route for an individual child offender to be cautioned rather than being prosecuted and, unlike the JJS in England and Wales, the details cannot be adduced should he be prosecuted for further matters. While the underlying idea has merits for the individual child offender, there have been difficulties arising from the effective and timely application of a GDP response while the appropriateness of diversion was determined.[658] This is perhaps understandable in a JJS in which the Garda has to perform multiple roles including criminal investigation, diversion through the GDP, together with charging decisions and prosecuting in the Children Court. The wide range of options available to the Garda emphasises its influential role, procedurally and consequentially, for the life

[654] ibid.
[655] ibid.
[656] ibid.
[657] ibid.
[658] Ursula Kilkelly, *The Children’s Court: A Children’s Rights Audit,* (Irish Research Council for the Humanities and Social Sciences May 2005) 83.

chances of the individual child offender. The Garda's remit is circumscribed by the 2001 Act which imposes a duty on it to

> 'act with due respect for the personal rights of the children and their dignity as human persons, for their vulnerability owing to their age and level of maturity and for the special needs of any child who may have a physical or mental disability'.[659]

This attempt to individualise the application of the GDP emphasises the focus of the Irish JJS on the child rather than the criminal justice process. The approach is not a panacea, and there are, almost inevitably, criticisms about delay and variation in practice, such as noted in relation to the prosecution of cases before the Children Court. For example, it was observed that the Limerick Children Court was staffed by a single prosecutor aided by an inspector, in contrast to the Children Court in Dublin which had multiple prosecutors and individual case Gardaí attending. This led both to too many officers being present in court in the latter, and a failure of individual Gardaí to acquire competence by regular appearances in the former.[660] Localised differences are inevitable but, as in England and Wales, there is always a drive for consistency to ensure fairness of outcomes irrespective of location.

In the broadest assessment, the Irish JJS has benefitted from its response to childhood criminality with over 100 programmes being created and operated under the umbrella of the GDP. The potential to impact early on childhood criminality is distinguished from other youth service initiatives, by the active participation of the Garda as the primary implementer.[661] The GDP continues to be developed, as shown by the compact between the Irish Youth Justice Service and the Garda Office for Children and Youth Affairs, which includes the Garda Youth Diversion Projects and Community Based Organisations programmes. The compact was designed to

> 'improve the effectiveness of the projects which, in turn will have a positive impact on reducing crime … and support improvements in the lives of the participants attending the projects and their families'.[662]

The compact was also intended to have an effect at a local level on 'the attitudes, behaviours and circumstances that give rise to youth offending'.[663] It placed a focus on children who

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[659] ibid 79.
[660] A system similar to police prosecutors in England and Wales before the advent of the Crown Prosecution Service.
[661] Community Programmes Unit, *Progress Report on Garda Youth Diversion Project Development 2009-2011,* (Irish Youth Justice Service and Department of Justice and Equality 2013) 6.
[662] ibid 6.
[663] ibid 6.

'appear to be establishing a pattern of repeat offending' and who had been 'identified by the local Gardai'.[664] It represented a determined effort to divert child offenders significantly at risk of being 'involved in anti-social and/or criminal behaviour' through 'targeted interventions to facilitate personal development, promote civic responsibility, and improve long-term employability prospects'.[665] These intended outcomes confirm that the Irish JJS offers a working example of a system that addresses offending at the earliest point in a child's criminal career. Its purpose remains to intervene and divert in the least corrosive manner and to remove the individual child offender from the Irish JJS as quickly as is practicable and justifiable under the GDP.

6.3.2 The GDP in practice

The underlying ethos of the GDP rests on modifying the attitudes and behaviours of child offenders. The programme recognises the importance of education by reducing the number of early leavers, and by setting employment goals with career specific courses being available.[666] In addition, through home visits by local Gardai, the GDP uses outreach techniques to encourage positive communication within the family. This promotes individual motivation to cope with personal circumstances and to deal more effectively with unwanted behavioural traits. This is achieved through anger management, peer group interaction and addressing anti-social behaviour, from bullying to racism, endeavouring to break the herd mentality dynamic that often drives community-based child offending.[667] From a policing perspective, the GDP offers the seeds of better relationships with Gardai for the benefit of the wider community. For example, utilising football, Gaelic games, pool tournaments and vehicle projects, led to reported improvements in positive attitudes towards authority and greater understanding of the criminal justice system and individual consequences.[668] The perceived success of the GDP led to the 2001 Act being amended by the Criminal Justice Act 2006, to allow 'the programme to cater for children aged 10 or 11 years' in relation to accepted anti-social behaviour, whilst raising the age of criminal responsibility to 12 years.[669] This age related net-widening was a recognition that with such children 'because of their age, their vulnerability and the special role they have within society, there is an even greater onus upon Garda to protect them'.[670] The

[664] ibid 6.
[665] ibid 6.
[666] ibid 24.
[667] ibid 25.
[668] ibid 25.
[669] Citizens Information Board (n 653).
[670] An Garda Siochána, *Children and Youth Strategy 2012-2014* (An Garda Siochána 2012) 1.

commitment of the Garda includes ‘ensuring that the provisions of the United Nations Convention on the Rights of the Child are upheld at all times’ and

> ‘the highest level of international best practices are adhered to when dealing with children in conflict with the law and that the provisions of the Beijing Rules are adhered to in the administration of juvenile justice’.[671]

While it shares, with the JJS system in England and Wales, an intention to confront childhood criminalised behaviour, the Irish JJS succeeds in a remarkable way, when compared to the JJS in England and Wales, in the positive effects it has on individual child offenders. The operation of the GDP through the police service still emphasises the criminal justice system as a starting point to treating unwanted criminalised behaviour in society. Nevertheless, in practice, it also provides a useful pattern for a more individualised approach to child offending behaviour as envisaged, and as positively advocated by this thesis.

The GDP in the Irish JJS is underpinned by restorative justice, enabling the individual child to ‘accept responsibility for his/her offending behaviour and become accountable to those he or she has harmed’ and ‘to deal with the harm through a discussion’.[672] It is stressed that the ‘Restorative Justice process does not concern itself with judging or blaming’.[673] The idea is attractive, though the absence of judgment or blame is perhaps less easily accepted in traditional prosecution and punishment models. There is, however, a counterbalance to the lack of judgement; the child must show voluntary acceptance of responsibility ‘for his actions and to account for [his] behaviour’.[674] Modern policing is intelligence driven with targeted resources and in Ireland, as in the UK, there is a focus ‘on a priority group of young people who appear to be establishing a pattern of repeat offending’.[675] Though maligned as an aid to tackling criminality, effective offender profiling has the advantage of taking account of local Garda knowledge of those children exhibiting concerning behaviours. It leads to focused intervention on those children to hopefully maximise the positive outcomes by ‘challenging their offending behaviour and addressing their needs’.[676] The argument for the GDP is simple: use intelligence-based programmes to divert or nudge child offenders towards required behaviours and improve their life chances, and the lot of society in general. Against this view,

[671] ibid 3.
[672] Garda Youth Diversion Office, *Annual Report of the Committee Appointed to Monitor the Effectiveness of the Diversion Programme,* (An Garda Siochána 2012) 16.
[673] ibid 16.
[674] ibid 17.
[675] Community Programmes Unit (n 661) 6.
[676] Community Programmes Unit (n 661) 6.

there are concerns that such targeting reduces youth work provision for those children not considered at risk of criminal behaviour. It effectively ensures that youth work and Garda projects are promoted as a frontline response 'to the maintenance of law and order' to the exclusion of non-troublesome children.[677] Those troubled, for example, by anti-social behaviour might query this with a 'so what' response, so long as it works within those communities who have to endure such unwanted behaviour.

The Irish JJS functions through four limbs, the GDP, the Garda Youth Diversion Projects, the Probation Service, and the Children's Detention Schools. These elements are similar to those in the JJS in England and Wales, though the pathway of intervention differs on the child's first contact with the system. The first level response by the Garda, through the GDP, is designed to ensure, if successful, the removal of any stigma of criminality attaching to a child. The reliance on the GDP as an integral part of the Irish JJS is emphasised, for example, in 2012, 12,246 child offenders were referred with 9,776 or 80% of them being admitted to the programme. During the same period 1,036 cautions were administered and this is indicative 'of the increased use of Restorative Justice and Restorative Practices when interacting with children who come into conflict with the law'.[678] More recently, in 2019 a total of 9,842 children were referred in 2019, an increase of 15% compared to 2018 with half of those referred aged between 12 and 15 years with 4,046 child offenders recommended for formal cautions.[679]

The GDP reflects the overall gender divide within the juvenile justice system with 75% being male.[680] A child accepting responsibility for an offence, as required under the 2001 Act, may be dealt with either by caution or charge and formal prosecution. The child offender must first be considered for a caution, that is a warning from a Garda Juvenile Liaison Officer, and it includes a discussion about his criminal behaviour. The decision to caution or prosecute is made by a 'Garda Superintendent at the Garda Youth Diversion Office' and, on caution, the matter proceeds under the GDP.[681] This approach to child offenders is well developed and effective and the Child First approach discussed in Chapter 4 shares similarities with this process of intervening and diverting at the earliest point of contact. A child offender, cautioned by an officer under the GDP, 'may be placed under the supervision' of a Juvenile Liaison

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[677] Micheál O'hAodain, ''Coffee Houses' and 'Crime Prevention', Some thoughts on Youth Cafés and Garda Youth Diversion Projects in the Context of Youth Work in Ireland' (2010) 5 (2) Youth Studies Ireland 44.
[678] Garda Youth Diversion Office (n 672) 3.
[679] Noel Baker, 'Almost a third of child offenders not suitable for youth diversion programmes' *Irish Examiner* (Cork, 1 April 2021).
[680] Garda Youth Diversion Office (n 672) 3.
[681] Garda Youth Diversion Office (n 672) 6.

Officer for 12 months.[682] The form of supervision is decided by the officer taking account of the identified rehabilitative needs. It may include for example, agreement by the child to engage in specified activities, such as attendance at a youth project.[683] The devolution of this assessment indicates the reliance and trust placed in individual members of the Garda.

6.3.3 The GDP's admission procedures

Child offenders can be dealt with by the Garda because the GDP permits a decision to be taken to deal with them 'by means of a caution instead of the formal process of charge and prosecution'.[684] A cautioned and referred child may be placed under supervision and be subjected to a conference to facilitate mediation 'between the child and the victim, if appropriate' together with an action plan for him as noted above.[685] There is oversight in cautioning in that

> 'the final decision as to whether or not a young person is cautioned lies not with the Garda Síochána, but instead with the Director of the National Juvenile Office. In cases, however, which involve serious crime, consent to issue a caution must first be obtained from the Director of Public Prosecutions'.[686]

The criteria for admission to the GDP require that the child must be at least 12 years old, subject to the 2006 amendment to the 2001 Act enabling 10- and 11-year-olds to be eligible by reason of their behaviour. He must accept responsibility for his criminal behaviour and consent to be cautioned, and where appropriate, to be supervised by a Juvenile Liaison Officer.

The decision to caution a child is taken 'by the Director of the Programme and will depend on the seriousness of the child's criminal behaviour'.[687] Generally, a 'formal caution is given by a Garda inspector or more senior' officer, with parents or guardian accompanying the child. The victim may also be invited to attend the cautioning. Section 28(2) of the 2001 Act requires the level of supervision imposed on a child admitted to the GDP to take account of three facets relevant to success: the seriousness of the criminal behaviour, the support and control provided by his parents, together with the 'likelihood of committing further offences'.[688] The Juvenile Liaison Officer must be 'pro-active in relation to the child's behaviour', and may require the child to report to him within his normal routine, 'without being forced to attend meetings on a

[682] Garda Youth Diversion Office (n 672) 7.
[683] Garda Youth Diversion Office (n 672) 7.
[684] Citizens Information Board (n 653).
[685] Citizens Information Board (n 653).
[686] Citizens Information Board (n 653).
[687] Citizens Information Board (n 653).
[688] Citizens Information Board (n 653).

regular basis'.[689] The key element is that the child realises that his 'behaviour is being monitored for the period of supervision'.[690] It may include statutory conferences to consider the child's welfare and he may be subject to

> 'an individual plan of intervention for him/her which seeks to assist the child to examine their decision making process focusing on the decisions that led them to offend and on the need for change'.[691]

The importance and independence of this assessment arises from

> 'a statutory duty, outside of the remit of the Director of Public Prosecutions, to make decisions about the case disposal of a crime involving a young offender, regardless of the seriousness of the crime'.[692]

The latter point reinforces the concept of focusing on the individual child and his future rather than a response based on the actual criminal behaviour. The generous resources and attention devoted to the GDP demonstrate its importance to the state, and its purpose 'to directly impact on youth crime which distinguishes them from other youth interventions'.[693] The Progress Report on Garda Youth Diversion Project Development 2009-2011 led to further reform that sought

> 'to improve the effectiveness of the projects which will in turn have a positive impact on reducing crime in the communities they serve and support improvements in the lives of the participants'.[694]

This suggests an element of implicit bias with the determination to establish projects focused on particular communities, with participants drawn from within them. However, the report also raised concerns that such an approach might focus on or promote the notion of distance between groups of people, whether by class or location, rather than just dealing with the identified need. It leads inevitably to an almost anthropological study to determine the effectiveness of such projects. The language of selection used, like many youth justice assessments, remains fixated on identification, not just of the child offenders but on socio-cultural groups, as being the prime driver of the need for the projects through which the GDP is delivered. The argument is that certain population groups exhibit criminal behaviours and, to justify the expenditure involved, it is vital from social cohesion, legal policy, and fiscal perspectives, to identify the responsible

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[689] Citizens Information Board (n 653).
[690] Citizens Information Board (n 653).
[691] Garda Youth Diversion Office (n 672) 26.
[692] Citizens Information Board (n 653).
[693] Community Programmes Unit (n 661) 6.
[694] Community Programmes Unit (n 661) 6.

cohorts on which to concentrate resources to achieve the desired outcomes. This is perhaps one of the more negative aspects of the GDP and reflects its roots in the criminal justice system.

6.3.4 The Garda's response to childhood criminal behaviour.

Evidence provided by the Garda indicates that the majority of young people grow out of crime, irrespective of any intervention. In 2011 there were approximately 395,000 children aged 12 to 17 years in Ireland with 25,043 criminal offences recorded within the age group. The breakdown of the offences showed similar categories as in England and Wales,[695] with public disorder offending accounting for 18% of the total, 14% shop theft and 10% criminal damage, excluding by fire.[696] In 2019 the figures detailed 31% of referrals to the GDP related to theft and dishonesty offending with 20% relating to public disorder and anti-social behaviour and 10% drug offences whilst 9% related to homicide, assault, and harassment. These categories illustrate the reality that even with the resources applied to diversion, there continues to be a stream of new entrants into the diversion system, though the numbers are 'still far below levels in other years over the past decade'.[697] The Irish figures demonstrate the commonality of childhood offending and that, rather than indicating societal failure, such 'criminality' may be 'natural' in the maturing age group. There is an inevitability that certain children will rebel and transgress the criminal law. The Irish GDP offers an alternative and structured option to rehabilitate and nudge behaviour without the same focus, as in England and Wales, on prosecution and punishment.

Any JJS programme designed to curb and prevent childhood criminality depends on the people implementing it. The GDP staff are trained in motivational interviewing techniques 'to facilitate this change and pro-social modelling is used to challenge individual participant's attitudes and behaviours'.[698] The individualised response also seeks 'assistance and support' from 'the participant's family recognising that any changed attitudes and behaviours' must 'be positively re-enforced at home, in school, within peer groups and in the community'.[699] The GDP, as the first tier entry to the Irish JJS, determines how a child offender progresses through the system. High expectations are placed on the Garda and the GDP, but success for an individual child repays the investment of the Garda manpower and monetary resources by his

[695] Community Programmes Unit (n 661) 8.
[696] Community Programmes Unit (n 661) 8.
[697] Baker (n 679).
[698] Garda Youth Diversion Office (n 672) 26.
[699] Garda Youth Diversion Office (n 672) 26.

diversion from criminality. However, it is equally important that the Garda, in overseeing the pre-court entry system, is subject to proper and proportionate legal controls and the child's 'right to childhood' as a vulnerable minor is appropriately protected.[700]

While the overall reputation of the GDP is positive, it has not been without criticism, as noted by the Policing Authority, because of failures in its child offender assessment procedures.[701] In a report presented to the authority in 2019, the GDP was assessed in relation to the 158,000 cases referred between 2010 and 2017. Concern was expressed that 55,000 were rejected and, of these, 33,000 were dealt with by way of summons or charge. More concerningly, the report highlighted 8,000 rejected cases where there had been a failure to 'appropriately process',[702] including examples where there was insufficient evidence and where the child had declined to make a statement. The authority stressed that the failures identified in the report related to child offenders 'who were deemed unsuitable for the programme and for whom there was no follow up and no consequences'.[703] The processing of cases improved with a new computer system in 2016 that led to the number of no-action cases falling from 7% to 0.5% in 2017. As discussed, the effective functioning of the GDP depends on individual officers and the report described the failure as being due to 'laziness' and 'a lack of managerial oversight'.[704] The Policing Authority, in responding to the report, acknowledged that the GDP had made a positive contribution to dealing with child offending and had helped 'many children avoid jail and a possible life of crime'.[705] However, at the other extreme, some child offenders had 'received as many as 10 referrals to the programme',[706] a surprisingly high number in the context of its intended diversionary purpose. On balance, the GDP has, nevertheless, as stressed by the Policing Authority, assisted many thousands of child offenders to avoid further criminality by its individualised focus. It remains a template of a successful scheme to address child offending.

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[700] Garda Youth Diversion Office (n 672) 26.

[701] The Policing Authority was established by the Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015 as an independent statutory body on 1 January 2016 to oversee the performance of the Garda.

[702] The Irish Times, 'The Irish Times view on the Garda youth diversion programme' *The Irish Times* (Dublin 18 January 2019).

[703] ibid.

[704] ibid.

[705] Josephine Feehily, Opening Statement of Policing Authority in a public meeting with Garda Commissioner. Police Authority 17.1.19 < https://www.policingauthority.ie/en/all-media/news-detail/policing-authority-launches-annual-report-for-2018 > accessed 24 June 2021.

[706] The Irish Times (n 702).

6.3.5 The procedural safeguards for child offenders

The operational role of the Garda, as part of the Irish JJS, is subject to a requirement to act legally, proportionately, and fairly when dealing with children suspected of involvement in criminal activity and detained during an investigation.[707] The constraints placed on the Garda are similar to those in England and Wales. For example, a detained child must 'not associate with an adult who is so detained and shall not be kept in a cell unless there is no other secure accommodation available'.[708] As with Welsh police stations, the issue of bilingualism is also addressed with the 2001 Act imposing a duty on the Garda to inform the child in age appropriate language in English, or Irish where the child is from the Gaeltacht or is a first language Irish speaker, about the offence being investigated. The child must be informed he may 'consult a solicitor and how this entitlement can be availed of', though presumably using a more colloquial form of words so that he understands.[709] There are further safeguards for the child, especially where there is reasonable cause to believe that the detained child 'may be in need of care or protection'.[710] In these circumstances, the officer having conduct of the matter

> 'shall, as soon as practicable, inform or cause to be informed the health board for the area in which the station is located accordingly, and the health board shall send a representative to the station as soon as practicable'.[711]

The representative, acting effectively as an appropriate adult, 'shall be entitled to be present at the questioning of the child'.[712] This reinforces the duty of care role of the Garda in crime investigation to take account of the broader welfare issues relating to a child who, being suspected of involvement in criminal behaviour, is at risk and vulnerable.

In addition to the attendance of a representative, there is also a right to independent legal representation by a solicitor nominated by the child or the representative attending him. The solicitor may be present with the child 'during the questioning'[713] and The Law Society of Ireland maintains an online list of solicitors who will represent detained children.[714] Support in the use of this right is provided by the Garda with a randomised list of available solicitors, where the child is unable to name an individual one which is common with first time offenders.

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[707] Children Act 2001, s55 and s56.
[708] ibid. s55 and s56.
[709] ibid. s58.
[710] ibid. s59(1) and s59(4).
[711] ibid. s59(1) and s59(4).
[712] ibid. s60.
[713] ibid. s60.
[714] Law Society of Ireland, *Find a Garda Station Solicitor* < https://www.lawsociety.ie/Find-a-Solicitor/Find-a-Garda-Station-Solicitor/ > accessed 24 June 2021.

Legal representation at a Garda Station is covered by legal aid and ensures the Irish JJS meets standards on a par with other nearby jurisdictions. The legal framework relating to this important first procedural step is robust and imposes restrictions on the investigating officers. For example, a detained child cannot 'be questioned, or asked to make a written statement, in relation to an offence in respect of which he or she has been arrested' unless in the presence of a parent or guardian or failing that 'another adult (not being a member of the Garda Síochána) nominated by the member in charge of the station'.[715] These controls serve to slow the pace down and prevent improper behaviour. When, for example, a child is waiting for his solicitor, he 'shall not be asked to make a statement, either orally or in writing, in relation to an offence until a reasonable time for the attendance of the solicitor has elapsed'.[716]

These policies and safeguards reflect similar concerns in the JJS in England and Wales where there is a recognised imperative to protect child detainees who are vulnerable because of their age. The Garda's perception of its own role indicates a sense of primacy in safeguarding the interests of detainees. In practice, there is a need to control events in the Garda Station environment, not just in relation to its own function within the investigatory process but also the involvement of other professionals. For example, The Code of Practice on Access to a Solicitor by Persons in Garda Custody (the Code) acknowledges that an 'appreciation of each other's role is important' but that the

> 'solicitor's only role in the Garda station should be to protect and advance the legal rights of their client. The responsibility of AGS [An Garda Siochána or Irish Police Service] is much wider than that of the solicitor'.[717]

The Code reflects the 'advice of the Director of Public Prosecutions that a suspect may have a solicitor present during interview'.[718] The Criminal Justice Act 1984 and regulations made in 1987 and 2006 confirm that an arrested and detained person is 'entitled to consult a solicitor'.[719] The provision of legal advice was recognised as a constitutional right, and widened to provide

> 'at least in general terms and potentially subject to exceptions, an entitlement not to be interrogated after a request for a lawyer has been made and before that lawyer has become available to tender the requested advice'.[720]

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[715] Children Act 2001, s61(1).
[716] ibid. s61(1).
[717] An Garda Síochána, *Code of Practice on Access to a Solicitor by Persons in Garda Custody,* (An Garda Siochána April 2015) 2.
[718] ibid 2.
[719] ibid 2.
[720] ibid 2.

The Code confirms that an arrested or detained suspect

> 'unless he/she expressly waives his/her right to be given legal advice, should not be interviewed prior to him/her obtaining legal advice except in wholly exceptional circumstances'.[721]

The Code demonstrates the similarity of approaches between police forces in Ireland and the UK in their shared desire to maintain control. The procedures detailed in the Code represent an attempt to comply with national and international standards, though in practice no concession is made in relation to the individual child. The safeguards relating, for example, to the requirement for an adult to be present and for legal representation are not couched in any way that acknowledges the age of the child involved as being significant. Rather, as in England and Wales, the presence of a representative and solicitor where requested, is sufficient to allow the matter to proceed as though involving an adult, and no further consideration of the cognitive abilities of the child is necessary. This reflects the conundrum that any attempt to individualise the investigation, by reference to the individual child at that stage, could lead to potential legal difficulties. Most obviously, for example, in relation to cautioning the child, or waiving the right to consult and be represented by a solicitor. It may be the case that the GDP becomes almost the quid pro quo for the limitations of the Garda investigation provisions. Arguably, the GDP can be seen almost as a counterbalance in that it offers the detained child the prospect of being 'processed' within the Irish JJS at that point in the process.

As noted, the Code controlling the Garda officers during an investigation is similar to the Police Station Codes of Practice in England and Wales. Both set limits on police powers and provide an attempt at fairness to the detainee, especially when a child, with the provision of a representative and a solicitor. The proper application of the Code facilitates obtaining evidence and permits a reasoned decision to be reached regarding the involvement of the detained child in offending, and the appropriateness of his referral to the GDP. The procedures provided in the Code give confidence that the detained child has been treated fairly and most importantly given access to diversion where the criminality is admitted.

6.4 Child offending in Ireland

Childhood criminality does not occur in a vacuum and reflects a child's

> 'attitudes and behaviours, intellectual capacity, school performance, family circumstances, choice of friends and the influence of other adults within a

[721] ibid 2.

> particular neighbourhood that can serve to entrench and prolong offending behaviour'.[722]

These 'risk factors' encompass aspects of a child's upbringing that contribute to his development and provide keys to understanding why some children become involved in criminalised behaviour, and others do not.[723] The Irish JJS developed a diversion and rehabilitative approach having taken note of the reformist policies adopted in other common law jurisdictions. The raft of 'new legislation and/or a renewed approach to tackling youth offending' was examined, especially in Northern Ireland, England and Wales, Scotland, Australia, New Zealand and North America.[724] This had been prompted by 'political concern about the effectiveness of methods of dealing with' criminal behaviour, new legislation and the need for 'new leadership and co-ordination mechanisms at national and local level'.[725] These needs were 'universal', but there was no 'international consensus on how best to respond' to 'that delicate balance between the 'justice' and 'welfare' demands' implicit in tackling childhood criminality.[726] The outcome for the Irish JJS was the implementation of a legislative step-change that procedurally brought forward the point of intervention, to promote diversion and rehabilitation. The key moment to intervene became the initial contact with the Garda, rather than after conviction in a court focused system which was recognised as too late if the risk of reoffending and entrenchment of behaviour was to be challenged.

6.4.1 Criminal behaviour

The Irish JJS's reliance on diversion delivered by the Garda as the first-tier response to child offending raises the issue of its effectiveness and whether it is more than just a different approach. The level and type of criminal behaviour has remained stubbornly static, for example, in 2009 the statistics detailed that 42% of youth crime related to anti-social behaviour, 16.6% to theft and 13% to road traffic offences.[727] These categories represented 71% of juvenile crime and continue to be reflective of child offending, and may, perhaps, be considered as an inevitable feature in the childhood development for a certain tranche of children. Equally importantly, the overall picture 'clearly indicates that the majority of young people involved in

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[722] Redmond and Dack (n 646) 20.
[723] Redmond and Dack (n 646) 22.
[724] Department of Justice, Equality and Law Reform, *Report on the Youth Justice Review,* (Government of Ireland, The Stationery Office Dublin 2006) 23.
[725] ibid 23.
[726] ibid 24.
[727] Redmond and Dack (n 646) 17.

offending behaviour will desist their offending behaviour in their early twenties'.[728] This begs the question whether the rationale for traditional prosecution and punishment JJSs was ever valid, except as a sop to societal demands for revenge-justice with most child offenders just ceasing their offending behaviour. The decline in offending, as the children involved age, relates more to 'increased maturation and the acquisition of responsibilities tied to adulthood',[729] rather than as a result of being processed by a JJS. The Irish age and crime curve is 'similar to neighbouring jurisdictions and provides sound underpinning for responses such as the Diversion Programme',[730] if only on the basis that it is as effective as other more traditional models.

In reforming the Irish JJS, a consultation process was carried out by the Irish Government about the new approach to child offending introduced by the 2001 Act. It indicated that there was support for the provision of 'a modern and comprehensive youth justice system'.[731] It was recognised that increasing the age of criminal responsibility to 12 years would

> 'place a considerable burden on social services as children who offend between the ages of 7 and 12 years would become the responsibility of the care system rather than the justice system'.[732]

While this reflects the transfer of children for accounting and spending purposes between different parts of the state apparatus, it perhaps indicates, as in the JJS in England and Wales, a reluctance to challenge the belief in the need to punish childhood offending behaviour. This can be contrasted with the failure to provide any meaningful route map for such children out of their socially and economically deprived communities. Most child offenders live in such communities, and they tend to remain in them and produce the next generation, in both jurisdictions. The similarities between the socially deprived areas of Dublin, Birmingham or Cardiff indicate that whatever the degree of policy innovation, government spending or social engineering and nudging, there remains and will remain a group of highly disruptive families. In attempting to meet this social failure, the Irish JJS emphasises addressing childhood criminality through a funnelled approach focused on the Garda, and with a court system almost as a backstop. The Children Court deals with all except the most serious offences and has therefore a function akin to the Youth Court in England and Wales. It has

[728] Redmond and Dack (n 646) 17.
[729] Redmond and Dack (n 646) 19.
[730] Redmond and Dack (n 646) 19.
[731] Department of Justice, Equality and Law Reform (n 724) 33.
[732] Department of Justice, Equality and Law Reform (n 724) 35.

> 'a central role in the administration of youth justice and as such, it has considerable potential to influence the behaviour of young people in conflict with the law and to address their offending behaviour'.[733]

In the context of this thesis, the key issue is the extent to which a court-based component can promote positive outcomes. It is argued that court proceedings are only as effective as the subsequent implementation of the decisions taken and the penalties imposed. Pre-court diversion is more immediate and, when effective, lessens the need for more formal court proceedings and processes.

6.4.2 Child offending and socio-economic failure

The Irish JJS deals with child offenders from socio-economically deprived, often urban, backgrounds which reflect the concentration of crime and criminals in these areas. Such a concentration is unsurprising and the Irish JJS exhibits similar class and group bias that defence criminal law practice suggests exists in the JJS in England and Wales. It has been noted

> 'that two thirds of the children appearing before the Children Court in Dublin came from a relatively small area of Dublin, characterised by high levels of disadvantage'.[734]

It is argued therefore that the Irish JJS, like other JJSs, functions partly as a social service-cum-control agency which is focused on lower social groups with recognised markers. These include family group composition and the lack of a stable family unit coupled with the effects of unemployment, especially the difficulty in securing well paid work when one or both parents have limited education and skills. The absence of work leads to parents of child offenders at risk of becoming welfare benefit dependent, or, as experienced especially in Dublin, as illustrated by the growth of B&B families, the risk of homelessness. The growth of socio-economic and mental health problems has been recognised as leading to generational criminality with the parents of child offenders who may have travelled the same route into criminal behaviour and coupled with domestic, physical, and sexual abuse, drug and alcohol use and dependency. The Irish public and media perception of childhood criminality pigeonholes those involved as belonging to lower socio-economic groups. The red-top newspapers, for example the Irish Mail and Irish Sun, are quick to emphasise the distinctions between 'them and us', enabling the readership to feel safe in their approbation of such children. Carroll and Meehan describe this as a sad indictment of societal failure and describe

[733] Kilkelly (n 658) viii.
[734] Carroll and Meehan (n 635) 19.

a representative child offender as 16 to 17 years old and not living at the parental home where there had been substance abuse and he had

> 'left school before doing his Junior Certificate, has no qualifications and no engagement with mainstream education. His parent's home is in a locality widely regarded as very disadvantaged'.[735]

This is an all-too-common description of older child offenders and equally applicable to many child offenders in England and Wales and that such persistent child offenders 'suffer from personal disadvantages, structural disadvantages and a process of socialisation in the criminal justice process'.[736] It suggests that those children who are 'at risk of offending are easily identifiable' by profiling those who fit the socio-educational and economic exclusion template.[737] This similarity of characteristics should make it

> 'possible for the relevant agencies to direct their intervention and support to those with unmet needs, well before such young people become involved in the criminal justice system'.[738]

The contentious use of profiling, by reference to such determinant factors, should not undermine its contribution to identify children at risk of criminal behaviour. Its potential to assess and focus resources on the individual child as envisaged by the thesis question, cannot be ignored. There is little appetite for the idea that such child criminality is generally immature age-related behaviour rather than a threat to society in general. The approach is illustrated by mission statements that are promoted by state agencies, such as seeking to 'create a safer society by working in partnership to reduce youth offending through appropriate interventions'.[739] The Irish JJS, like that in the UK, must respond to political, media and public concerns, even where the perception of child criminality does not reflect the underlying reality of criminal behaviour. For example, it has been noted that child criminality has been rated 'as a major national problem [76%], secondary only to drug-related crime and violent crime' with ''lack of parental control' as a significant cause of crime in Ireland'.[740] The recognition of these concerns contributed to the debate that produced the 2001 Act and the subsequent developments to address child offending.

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[735] Carroll and Meehan (n 635) 51.
[736] Carroll and Meehan (n 635) 19.
[737] Carroll and Meehan (n 635) 52.
[738] Carroll and Meehan (n 635) 52.
[739] Redmond and Dack (n 646) 4.
[740] Community Programmes Unit (n 661) 3.

6.4.3 Child offending and educational failure

The educational contribution to child offending cannot be ignored and is, it is suggested, a major contributor whose influence goes back to the nineteenth century when Irish society was under the control of the UK state in most areas of governance, including its criminal justice system. The process of change, that began with the development of the Irish state following independence in the 1920s, led slowly to the present Irish JJS. It was a country bedevilled by economic difficulties, coupled with the innate cultural conservatism of the majority Catholic population and the dominant political parties, Fine Gael and Fianna Fáil. Modernisation began only with the advent of the expansionism engendered by the period of the 'Celtic Tiger' economy from 1993 to 2001. FitzGerald described it as a time 'during which Ireland caught up on its previously much more prosperous EU neighbours' and in eight years the economy grew at a rate without precedent in Europe.[741] It was a financial bubble that ultimately burst, but it had served as a spur to social and political modernisation. It produced unexpected changes throughout the state architecture including criminal justice as illustrated by the 2001 Act. However, the achievements of the reforms to the Irish JJS have been limited by a legacy of restricted education provision and uptake. A good education offers improved outcomes, especially when proper support and encouragement is provided to an individual child and his family. All JJSs rest on the wider educational and social support networks and the results and effectiveness of them influences the achievable outcomes, including those of the GDP in Ireland. As in the UK, children's education presents as failing those children who fall into criminalised behaviour. This has far-reaching and lifelong consequences for all children, as observed by Carroll and Meehan. They commented that

> 'only 29.5% of child offenders had fulfilled the statutory requirement to have completed three years of post-primary education and be at least 16 years of age (but less than 18 years) before leaving school'.[742]

In addition, they noted that

> 'of arguably greater importance is the fact that 86% of young people before the Children Court, for whom education information was available, were absent from mainstream education'.[743]

[741] Garret FitzGerald, 'What caused the Celtic Tiger phenomenon?' *The Irish Times* (Dublin 21 July 2007).
[742] Carroll and Meehan (n 635) 23.
[743] Carroll and Meehan (n 635) 24.

This echoes Youth Court practice in England and Wales, where the lack of mainstream education is evident in many child offenders, who are all too keen to express their unwillingness to attend school when questioned by their lawyers or by magistrates in the Youth Court. Carroll and Meehan recognised that even where educational provision is available, there was no certainty that it would be inclusive and draw in the very children who would benefit from it. The commonality of educational failure, in Ireland and the UK, is emphasised by the poor literacy skills of child offenders. When they were 'tested to establish their literacy level', it became clear that their reading, writing, and spelling ages were significantly below their chronological age. For example, one young person was tested for literacy at 14 years of age and was found to have a reading age of 7.1, a spelling age of 7.5 and a vocabulary age of 8. While another 'young person was literacy tested at age 16 and identified [to have] a reading age of 9 and spelling age of 8'.[744] Criminal defence practice regularly supports this sad indictment of failure, with too many child offenders demonstrating a fear of reading, and a reluctance to write even their name. A JJS that effectively 'treats' child offenders by reference to their culpability should also be premised on an assessment of their competence to participate. However, the noted educational limitations suggest that the present approach, despite its positive aspects, fails to take this fundamental limitation sufficiently into account. The creation of the GDP has been recognised, for example, as 'one of the most effective ways of preventing young people from reoffending', by giving opportunities for training connected to future stable employment or supporting education.[745] The Irish educational system failure rate is illustrated by the 14% of 18- to 24-year-olds who are classified as early school leavers who have not obtained their leaving certificates. This rate is 'substantially higher' amongst males and represents a key indicator of the social problems within Irish, and by extension, British, society.[746] Educational failure in both jurisdictions is a major factor in childhood criminality that remains unaddressed both by the schools and the legal systems.[747]

An ACR ought to be set at an age that is based on a level of competence to participate, but as Carroll and Meehan's work, and experience in criminal defence practice suggests, this remains a fiction in both jurisdictions. It may be argued that this flaw is tolerated in the Irish JJS, almost as a balance, because of its readiness to divert such children out of the system. Objectively, as

[744] Carroll and Meehan (n 635) 24.
[745] Ben Ewan and Niamh O'Carolan (Eds.), *Access All Areas: A Diversity Toolkit for the Youth Work Sector,* (National Youth Council of Ireland and Youth Net 2012) 53.
[746] ibid 61.
[747] ibdi 61.

in England and Wales, the Irish JJS functions on the basis that child offenders are being effectively processed, whereas in reality, the underlying educational attainment gap is ignored and ties those children to life at the bottom of society.

6.4.4 The legislative response

The 2001 Act established a 'framework for dealing with troubled young people and young people in trouble with the law' on the basis that they should be held 'to account while accepting the 'premise that most young people mature into adulthood and cease offending'.[748] It marked a legislative milestone and broadened the understanding of why children offend, although it did not go as far as introducing the individualised focus on the child offender as discussed and promoted by this thesis.

Rather than promoting a pre-criminalisation response to achieve desistance, the reforms did focus on the needs of the individual child at the point of initial criminality. The 2001 Act provided community-based disposals and confirmed the GDP as the main statutory response to childhood criminality 'in an effort to 'divert' young people from further offending'.[749] The Act established an intervention framework with four distinct limbs:

1. the GDP as a first level response to child offenders who admit involvement in criminal behaviour.
2. the Garda Diversion Projects for child offenders 'deemed to present with added risk of further offending'.[750]
3. the Probation Service for those appearing before the Children Court.
4. the Children Detention Schools designed to meet the challenge of repeat or serious child offenders by removal of liberty.[751]

Further consolidation of the statutory approaches followed with the establishment of the Irish Youth Justice Service in 2005. It was given responsibility for 'coordination and reform in the area of Youth Justice',[752] and for funnelling the funding to organisations delivering projects and services. It produced a cross-departmental approach, with the Service's 'operating mandate' arising from the Department of Justice, Equality and Law Reform, while its 'strategic

[748] Community Programmes Unit (n 661) 4.
[749] Community Programmes Unit (n 661) 7.
[750] Community Programmes Unit (n 661) 7.
[751] Community Programmes Unit (n 661) 7.
[752] Community Programmes Unit (n 661) 9.

mandate' fell within the scope of the Department of Children and Youth Affairs.[753] The Government recognised the necessity to 'respond to the issue of troubled and troublesome children'.[754] The joint efforts of the Minister for Justice, Equality and Law Reform and the Minister for Children produced new strategies to augment the 2001 Act, and to address childhood criminality more effectively. The level of criminal behaviour had remained stable as regards its frequency and mainly involved 'theft, criminal damage and drink related' offences, approximately 20,000 offences per year with the addition of 'vehicle and public order offences' featuring in the Dublin area.[755] The Act provided for a mixed 'child welfare and justice approach' resting on the triangle of the GDP, the Probation Service supported projects to deliver diversion, together with youth justice, child welfare, community, and the voluntary sector.[756] The Act boldly states that its objective 'is to divert from committing further offences any child who accepts responsibility for his or her criminal behaviour' to 'be achieved primarily by administering a caution to such a child.'[757]

The process of millennial reform of the Irish JJS arose at a time when there was a general trend to place the 'emphasis on diversion except of serious and persistent offenders'.[758] It was accepted that there had to be integration of social services to address 'truancy/disengagement from education' which was a major risk factor leading to offending behaviour.[759] Interestingly, there was also support for the use of community-based sanctions to target 'persistent young offenders'[760] and, at the same time, public support for increasing the ACR.[761] Objectively, the 2001 Act was a beacon of enlightened reform based on diversion and rehabilitation, rather than punishment. It was the fruition of the ideas of diversion and rehabilitation which had first begun 'to take hold in the Irish system during the late 1960s, at the time that it was starting to wane elsewhere'.[762] The reforms within the Act demonstrated a sea change in attitudes, a move from dealing with child offenders as a group deserving of punishment, to a more purposeful regime seeking to positively intervene in their lives.[763] The developments arising from the Act,

[753] Community Programmes Unit (n 661) 9.
[754] Department of Justice, Equality and Law Reform (n 724) 3.
[755] Department of Justice, Equality and Law Reform (n 724) 5.
[756] Department of Justice, Equality and Law Reform (n 724) 6.
[757] Children Act 2001, s19(1) and s19(2).
[758] Department of Justice, Equality and Law Reform (n 724) 7.
[759] Department of Justice, Equality and Law Reform (n 724) 7.
[760] Department of Justice, Equality and Law Reform (n 724) 7.
[761] It paved the way for a de facto increase in Scotland with a minimum age of prosecution set at 12 years, though the age of criminal responsibility remains 8 years.
[762] Quigley (n 640) 65.
[763] Quigley (n 640) 67 references the 'expansion of community service, an incorporation of risk assessment tools across a number of criminal justice agencies'.

together with the establishment of the Young Persons' Probation Service in 2006, were 'an example of a modernisation and a broadening of expertise and professionalism'.[764] The Act introduced 'a range of youth-specific supports, sanctions and activities for young people', and it 'led to significant changes and placed youth justice at the centre of many policy- and practice-based initiatives'.[765] The central role given to the Probation Service in prosecuted cases ensures that it exercised a key function 'in applying the core principle of the 2001 Act – detention as a last resort'.[766]

The importance of the 2001 Act cannot be underestimated. It was an attempt to reflect 'Ireland's international obligations under the United Nations Convention on the Rights of the Child'.[767] These made clear that children in conflict with the law have 'the right to be treated in a manner consistent with the promotion of the child's dignity and worth'.[768] The Convention demands account be taken of 'the child's age and the desirability of promoting the child's reintegration'.[769] It emphasises that detention in a custodial environment should 'be used only as a measure of last resort and that the diversion from the criminal justice system be preferred as long as the child's rights are protected'.[770] The Act undoubtedly represented a major rethink in the understanding of providing justice for child offenders. It attempted to proportionately enforce legal procedures and sanctions for criminal behaviour, taking account of the need to better comply with international requirements in the Convention. As a party to the European Convention on Human Rights and the United Nations Convention on the Rights of the Child, Ireland accepted its obligations relating to the treatment of child offenders and in relation to the court process itself. As a consequence, the Irish legal system acknowledges essential human rights, especially the requirement that the voice of the child be considered, without discrimination, in all decisions taken concerning him, and that his best interests are the primary concern in all matters. The Act has been described as bringing Ireland into 'line with other countries and global principles' and reset its compass in the treatment of child offenders.[771]

[764] Gerry McNally, 'Probation in Ireland, Part 2: The Modern Age' (2009) 6 Irish Probation Journal 187.
[765] Quigley (n 640) 68.
[766] Quigley (n 640) 68.
[767] Carroll and Meehan (n 635) 7.
[768] Carroll and Meehan (n 635) 7.
[769] Carroll and Meehan (n 635) 7.
[770] Carroll and Meehan (n 635) 7.
[771] Carroll and Meehan (n 635) 44.

6.4.5 Child offenders are children

A child offender's background provides insights into his behavioural problems that may cross the criminal behavioural boundary. As Carroll and Meehan recognise, young people 'have little capacity' to deal with everyday problem solving without some form of 'anti-social presentation'.[772] In effect, a reaction typified by a 'short-fuse response' so that they tend to exhibit

> 'poor emotional literacy, limited ability to manage anger or aggression, a tendency towards impulsiveness, lacking the capacity for reflection, good judgement and empathy towards others'.[773]

These limitations are natural in children, but they can become mixed with criminal behaviour that can, in turn, be triggered by a lack of self-identity and self-worth. It can become a carousel of revolving response driven behaviours with such children seeing 'little wrong with their offending behaviour and consequently [showing] little motivation toward change'.[774] The abilities of such children are also often further curtailed by mental health issues, learning disabilities, disaffection with school and delinquent peer groups. On a positive note, Redmond and Dack suggest that 'given a more supportive environment young people have the capacity to behave more pro-socially'.[775] Such assessments of the difficulties encountered by children drawn into criminality demand consideration of novel approaches that may lead to genuine diversion. The Irish government took steps through legislation based on the identified 'common factors' that exposed 'vulnerable young people to risk'.[776] Their need for 'care or protection' to address 'patterns of anti-social/offending behaviour', arising from 'issues of social or economic exclusion, poverty or disadvantage' was recognised in the legislation.[777] Objectively, it might be thought that 'risk', in this context, is perhaps no more than 'growing up' in disadvantaged circumstances, and solutions may therefore relate to underlying political and economic policies rather than criminal justice. As in the JJS in England and Wales, a more politicised punitive approach to childhood offending can be contrasted with a more socio-liberal 'needs' analysis which focuses on young people and attempts 'to address needs and issues within their own personal circumstances'.[778] Such an approach aims to help children to

[772] Carroll and Meehan (n 635) 44.
[773] Redmond and Dack (n 646) 23.
[774] Redmond and Dack (n 646) 23.
[775] Redmond and Dack (n 646) 23.
[776] Department of Justice, Equality and Law Reform (n 724) 24.
[777] Department of Justice, Equality and Law Reform (n 724) 24.
[778] Ewan and O'Carolan (n 745) 52.

grow up, and criminal or anti-social behaviour can be 'interpreted' as symptomatic of their conditions rather than the problem itself.[779] In the Irish context, the risk factors noted above are recognised as precursors to criminalised behaviours which are often compounded by the 'direct impact of alcohol' and the use of drugs.[780]

The effects of socio-cultural problem behaviours have been noted, in particular those relating to education failure, lack of parental support, and breakdown in family group stability. The change is illustrated by, for example, 'almost 80% of births to under 25's' in Ireland being illegitimate, with teenage pregnancy over 4 times that of the Netherlands, 23 births per 1000 teenagers in Ireland as against 5 births per 1000 teenagers in the Netherlands.[781] The breakdown of family groups and support networks in the late twentieth century has similarly contributed to a society that, after the era of unprecedented growth during the Celtic Tiger period, regressed to one mired in debt. The subsequent fiscal austerity with budgetary constraints restricted the ability of the state to promote societal improvements, including building on the Irish JJS model of pre-court diversion of child offenders. The recent fiscal controls have meant that though the same public concerns about childhood offending remain, generally accompanied by the idea of a lack of parental control, reliance on the Garda, as the first-tier initial contact for most youngsters involved in criminal behaviour, continues to be supported. Maintaining a long term programme of intervention demonstrates the value of diversion pre-court in reducing criminal behaviour and improving educational attainment. Equally, the continuance of the GDP contributes to improving community quality of life and has positive consequences for public spending in meeting the challenge of childhood offending earlier in the JJS process.

The Irish JJS's focus on initial and immediate intervention, through the GDP, encompasses 'care, education and social service provision' for the individual child 'and their families'.[782] It is arguable, therefore, that the Irish JJS fulfils a greater function than merely the application and enforcement of the criminal law and can be considered to be part of a much broader child-centred social policy. For the purposes of this thesis, it adds to the conundrum of how best to deal with childhood criminality, with the answer depending on whose interests are best served; the child or the community, and whether there is any difference when long term outcomes are

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[779] The UK Justice Minister in a written statement to Parliament announced a youth justice review on 11.9.15, referring to the 'opportunity to rehabilitate young people' and 'steer them away from a life of crime'. <www.gov.uk/governement/speeches/youth-jutsice > accessed 24 June 2021.
[780] Ewan and O'Carolan (n 745) 53.
[781] Ewan and O'Carolan (n 745) 56.
[782] Department of Justice, Equality and Law Reform (n 724) 24.

considered. Objectively, the function of any JJS to address childhood criminality becomes a fiction when assessed against the concepts of an ACR and the lack of childhood capacity which were discussed in Chapter 2. The value of a JJS is, perhaps, more accurately measured by assessing its role in contributing to social control policy. This is demonstrated by the application of police, social services, and youth justice resources towards the lower achieving social groups, or those excluded from social progress and mobility by the failure of education. The Irish JJS developed, originally, as a system based on an older model of punishment, as in other parts of the UK. Its modern iteration, however, has moved towards addressing the unwanted behaviour, rather than through a procedural criminalisation followed by rehabilitation. Fundamentally, it is argued that the Irish approach to child offenders can be judged on the degree to which there is an acceptance that youthfulness should be treated as 'a mitigating factor which requires that children who commit crimes must be treated differently from adults'.[783] This is a key argument of this thesis, as it recognises the essential need to focus on the individual child rather than child offenders as a distinct class. Whilst the Irish JJS still processes children based on their criminal behaviour, it demonstrates a greater willingness to divert a child offender at the earliest point in his journey through it compared to the JJS in England and Wales. It is this feature which marks out the prime difference between the two systems and which is to be commended and when taken together with the Scottish JJS, offers a valuable contribution to reforming the present JJS in England and Wales.[784]

6.5 <u>Conclusion</u>

The remodelled Scottish JJS demonstrated a wholesale reform which involved a complete overhaul with entirely new purposes and procedures introduced. Within the parameters examined in this chapter, it is argued, the Irish JJS has been reorientated more simply and just as successfully by making the GDP its primary focus. It demonstrates how a JJS's processes and procedures can be refocused and reformed in purpose, not necessarily to the degree envisaged by the writer but sufficiently to be recognised as being for the benefit of child offenders.

The changes introduced by the 2001 Act created an Irish JJS that reined in the use of court prosecution of child offenders, and emphasised non-custodial, pre-prosecution interventions,

[783] Kilkelly (n 658) 1.
[784] Chapter 8 moves the discussion beyond this approach and focuses on addressing the behaviour per se through Behavioural Problem Solving rather than through a legal system.

to address offending behaviour.[785] The Irish Probation Service has developed an infrastructure for court ordered community sanctions and projects providing 'services to a wider group of marginalised young people at risk'.[786] The provision of community based responses highlights a more open door policy to helping child offenders before unwanted criminal behaviour becomes entrenched. The use of the GDP confirms that the Irish JJS provides an alternative process to deal with child offenders and it is an example of attempting to marry a JJS to the individual child.[787] As a state body, the Irish JJS must demonstrate statistical and financial success and value for money for the taxpayer. As noted in the Youth Justice Action Plan 2014 'the number of children sentenced to detention by the Courts on criminal conviction has consistently dropped; the operational costs of detention have reduced by over 30%' and most importantly, youth crime has decreased.[788] This serves again to highlight the importance of the GDP and of the role assigned to the Garda.

The GDP confirms the importance of addressing childhood criminality at the first point of contact, along with the provision of a direct route to positive guidance for child offenders which the remodelling of the Irish JJS produced via the 2001 Act. There will always be instances of childhood criminal behaviour which may not fit easily into this simplified route to diversion, such as criminal behaviour involving extreme violence. However, for most childhood offending, this thesis envisages a JJS that aims to deal with a child offender as an individual. The Irish JJS acting through the GDP goes a long way, it is suggested, towards meeting that ideal. It is designed as a proactive, restorative, and even-handed approach, offering the child offender a chance to respond through programmes designed to stop offending. It encourages and directs him towards more acceptable behaviour, without court proceedings. The GDP has been described as ready to guide 'young people to deal with the issues surrounding their offending and the need for behavioural change', in effect, to help them to mature.[789]

[785] Redmond and Dack (n 646) 7.
[786] Redmond and Dack (n 646) 7.
[787] Redmond and Dack (n 646) 7.
[788] Minister for Justice and Equality (n 620) 2.
[789] Department of Justice, Equality and Law Reform, *Garda Youth Diversion Project Guidelines,* (Department of Justice, Equality and Law Reform) 4 < http://www.dit.ie/cser/media/ditcser/images/GARDA-YOUTH-DIVERSION-PROJECT.pdf >accessed 24 June 2021.

The ultimate purpose of the Irish JJS is to prevent crime by childhood offenders by

> 'a process of learning and development that will enable them to examine their own offending and to make positive lifestyle choices that will protect them from involvement in criminal, harmful or socially unacceptable behaviours'.[790]

This should be the goal for all JJSs. The Irish JJS provides an example of a repurposed system that seeks to encourage all child offenders to develop into responsible and valued citizens, to avoid further offending and progression 'into the criminal justice system'.[791] The Irish JJS, for the most part, delivers a system that enables most child offenders to be processed without the need to progress beyond an initial stage. It helps them to avoid the attendant stigma of criminalisation and the risk of further criminality. There is also much to commend in a JJS that recognises that criminalised behaviour is often part of a developmental journey and, because of this recognition, progresses to the complete removal of such children from the criminal legal system.

In conclusion, the Irish JJS makes a positive contribution to the thesis's exploration of how to deal with child offenders. It validates the view that there can be an effective focus on the individual child offender while still retaining full public support for the JJS. It provides a useful template for a reformed, child focused JJS, one which can perhaps be seen as a halfway house between no reform and the completely new approach to juvenile justice adopted by the Scottish JJS. Both this chapter and the previous one demonstrate the effective reform of JJSs which have their origins in the UK. They support the thesis's argument that the JJS system in England and Wales can be reorientated for example, as in Scotland and Ireland, though neither of them has involved reform as radical as envisaged in this thesis. The JJS in England and Wales has edged towards the Irish model rather than the wholescale reform undertaken in Scotland. However, although both the Scottish and Irish JJSs have much to commend them it is argued in this thesis that a much more radical approach is called for if the individual child offender is really to be dealt with as an individual, and as a child.

<u>The next chapter</u>

The preceding chapters have illustrated the growth of divergent approaches to meeting the challenge of child offenders within the JJSs examined. Chapters 2 to 6 laid the foundations and examined differing structures formulated in response to changing ideas. They represent the

[790] ibid 8.
[791] ibid 8.

visible manifestation of the policies and strategies implemented to deliver justice as understood from the nineteenth century to the present day. As such, these chapters, essential to progress the thesis's argument to its conclusion, nevertheless do not reveal the hidden and unintended effects which potentially have a role in determining outcomes. These effects serve to restrain and control an individual's behaviour beyond the intended parameters, for example, of a court order. They are carceral in nature and, it is argued, are not given weight or credence when child offenders are being processed whether by diversion or in court environments.

Accordingly, to complete the exploration of the thesis's research material, the next chapter considers how JJSs intended to modify the behaviour of child offenders may be undermined because of invisible features but real effects which work against the intended purposes. These hidden carceral behavioural inhibitors are common to all justice systems and have important implications for child offenders both at the time of their processing and in later life. Carceralism is pervasive and implants constraints on the behaviour of child offenders in their home and community environments and is an important element in any consideration of how to reform juvenile justice. It must be addressed if the thesis's conclusion is to be comprehensive and the next chapter therefore pursues how carceralism leaches into any designed of JJS and assesses its subtle presence and effects on an individual's behaviour.

Chapter 7

Carceralism in the Juvenile Justice System

7.1 Introduction

This chapter explores the concept of carceralism by considering its role in the JJS and its effects on the individual child offender. It also considers how the presence of carceral features in the juvenile justice system (JJS) contribute positively or negatively, and whether they are inevitable in all JJSs. The chapter begins by examining the foundations of carceralism as a concept and thereafter its effects on recent attempts to reform processes in the JJS. It concludes with an assessment of how effective reforms can be, given the inherent nature of carceralism in systems such as the JJS. The chapter questions whether identified features, if they cannot be remedied, might be mitigated to lessen their negative effects, especially the potential to promote further criminality and whether carceralism may act as a block to radical reform as promoted by this thesis.

Carceralism lies at the heart of all JJSs because it is inherent in any structured system which seeks to exert behavioural controls. In relation to childhood criminal behaviour, such controls are designed to inculcate more acceptable behaviour which necessarily restricts the individual child offender's freedom to act in his immediate home and community surroundings. Such restrictions can have positive and negative effects on behaviour. This chapter explores some of the hidden aspects of the JJS's procedural architecture which exist as shadow or unintended influences. Their effects can be observed in the behaviour of individuals and arise from the very processes and procedures devised and utilised to deliver positive outcomes, for example, by diversion or in complying with a court order, but which may also contribute to further offending.

It is argued that JJSs, by their design and purpose, inevitably exhibit controlling and manipulating features to achieve their purposes and some of them can be described as carceral in nature. The negative carceral features are those which display inherent manipulatory aspects with the potential to affect the behaviour of child offenders in unwanted ways. In the context of this thesis's argument, negative carceralism is too easily ignored and its role in generating negative behavioural responses too often underestimated, for example in a Youth Court sentencing exercise. It demands consideration and recognition because of its potential to undermine positive outcomes for child offenders.

7.2 Examining the carceral concept

In this chapter, the term *carceralism* is used to define the features of the JJS which by their design restrict the freedom of the individual child offender to act in his immediate home and community surroundings. As a concept, it includes physical and psychological controls which, though not necessarily recognised by the individual, act on him to regulate or, at the very least, to monitor his behaviour. It includes a range of overt and covert effects of the JJS that exert influence on his sense of self-control, for example his ability to instigate behaviour, including criminalised behaviour.

7.2.1 The origins and development of carceralism

The origin of the word, from the Latin *carcer*, the name of the ancient prison of Rome, highlights the idea of confinement.[792] It need not be a cell, the closest form of confinement but rather it encompasses the idea of *control.* Its origins, in other Indo-European words for circle or round object, including *curvus* in Latin, highlight both its usage in this chapter, and its more usual form in modern English, *incarceration*. It is argued that the present JJS has inherent carceral features which affect child offenders who have been processed through it, for example, by being made subject to a Referral Order. Such an order imposes requirements to promote rehabilitation through mandated controls, for example attending appointments with youth offender workers, and complying with set behavioural targets. In addition to his direct compliance, the order also serves to restrict the child offender's behavioural options in terms of location and socially interacting with others. This shows how behavioural control can extend beyond that imposed by the order and illustrates the idea that the processing system, the JJS, has a form of hidden behavioural control that promotes carceralism as child offenders are processed through it and afterwards. The JJS and other avenues of social interaction have carceral effects that spill out into any environment where children are exposed to good and bad influences, for example from family, peers, the local community, state agencies, including the JJS itself. In the context of the JJS, child offenders are subjected to manipulation directly and indirectly, firstly, by direct intervention to address, by diversion or rehabilitation, the criminalised behaviour which led to the individual child being processed by it. Secondly, by the intended and unintended carceral features of the JJS that may lead to further criminality. This has been described as the carceral reach, that is the extent to which these features have an

[792] The dictionary definition of carceral highlights its relationship *'to, or of prison'* with its origins in English usage from Latin in the late-sixteenth century from carcer.

influence on the behaviour of individuals. The JJS through its interventions, whether by pre-prosecution diversion, or court orders on conviction, seeks to alter the behaviour of child offenders who, by reason of age and level of maturity, are susceptible to behavioural manipulation. This idea underpins the whole of the JJS. The unintended carceralism can, also however, have unintended long-term effects on the individual's personal development throughout his life.

Carceral reach is an ever-expanding phenomenon, not just in the JJS but throughout society, as demonstrated by the level of adult compliance with the recent Covid-19 restrictions. In relation to offenders, carceral reach has been described as so effective that offenders may never be 'released' from it. Brown observes that for some 'incarceration does not end at the prison, but rather follows them 'into the community'' and through life.[793] In relation to child offenders, this phenomenon demands careful examination as they often have difficult socio-economic backgrounds and have acquired behavioural norms that can lead them into criminalised behaviour. Criminal defence practice tends to confirm that child offenders rarely come from middle class backgrounds, and this contributes to the JJS's policies, practices, enforcement, and control architecture, to meet the perceived childhood behavioural challenge. This contributes to its carceral reach, for example, with a child offender subject to a Youth Rehabilitation Order (YRO) who must comply and attend locations and appointments as directed by the Youth Offending Team (YOT). It is a process which demonstrates carceral controls by its restrictions on the individual child's freedom to act and, in operation, necessarily creates a criminalised micro-community of child offenders. It therefore produces social control beyond the initial directed intervention

> 'not because of the recalcitrance of court-involved youths, but because the community-oriented reforms instantiate a much broader, more intrusive, and ultimately, for some youths, more incarcerating set of practices than traditional mechanisms of confinement'.[794]

The carceral effects of the JJS are exemplified by the concept of *system survival* by a child offender. This describes the behavioural risk which arises after he has been processed by a court for criminal behaviour and his attempts to navigate the next level of behavioural turmoil caused by the implementation of the court sentence. For example, the readmission of child offenders into their local community, or into education, can be undermined by compliance

[793] Elizabeth Brown, 'Expanding carceral geographies: challenging mass incarceration and creating a "community orientation" towards juvenile delinquency' (2014) 69 Geogr. Helv. 377, 378.
[794] ibid 380.

requirements that may act as 'a deterrent to their attempts to 'just survive''.[795] In serious cases, four contributing factors have been noted as relevant to further criminality; 'criminogenic neighborhoods [*sic*], mandated community program [*sic*] attendance, extensive probation conditions on home detention and residential placements'.[796] They have been identified as acting 'to extend, rather than contract, carceral power' by inducing criminality or contributing to non-compliance with court orders.[797] This results in further court proceedings so bringing about the very outcome that the orders were intended to avoid; renewed contact with the JJS. In effect, the identified carceralism, produced by an order, can be considered as enveloping and restricting the freedom of an individual child offender to act. This extends the implicit purpose of an order to address offending behaviour and rehabilitate and promotes 'geographical targeting and shuffling of court-involved youths'.[798] The child offenders involved are corralled by the constraints of the order that confines them within a defined area, albeit with the perception of freedom to move around and function within it. They are therefore subjected to positive control and the rehabilitative effects of an order, but also have the negative outcomes of 'confinement' even though the individuals are not physically incarcerated.[799] In the Youth Court, there is no recognition of carceral risk in the sentencing process. District Judges and magistrates follow the procedures and sentencing guidance and apply the guidelines, with the rationale that it provides consistency in sentencing.[800] This approach to sentencing ignores the idea of carceral consequences which have been described as reflecting an 'unprecedented fluidity between forms of confinement' to such an extent that 'the scale of deployment of carceral techniques and infrastructures demands critical attention'.[801] Unsurprisingly, this argument finds little support, for example in a courtroom, since it poses circular questions as to cause and effect which in the present JJS in England and Wales are impossible to address. In the context of this thesis, however, it is a highly relevant argument because of the potential consequences for the individual child offender and is bolstered in criminal defence practice by repeat child offenders. This everyday illustration of the carceral effects on child offenders highlights how the JJS becomes a revolving carousel for some offenders, where their repeat

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[795] Dominique Moran, Jennifer Turner and Anna Schliehe, 'Conceptualising the Carceral in Carceral Geography' (2018) X Progress in Human Geography 1, 3.
[796] ibid 3.
[797] ibid 3.
[798] ibid 3.
[799] ibid 3.
[800] Judicial College (n 363) Overarching Principles – Sentencing Youths. The Sentencing Council, *Definitive Guidelines* (The Sentencing Guidelines Council 2009) and The Sentencing Council, *Sentencing Children and Young People Definitive Guideline* (Sentencing Council 2017).
[801] Moran, Turner and Schliehe (n 795) 6.

offending, or non-compliance, leads to further interventions. The continuation and the long-lasting nature of these carceral effects demonstrates the importance of recognising the underlying factors involved, even if they may prove problematic to address.

7.2.2 The spectrum of carceral features

The spectrum of carceral features produced by the diversion and rehabilitation of child offenders highlights the ways in which such features can reach out into the wider community. They can be linked to ideas of geographical and location confinement combined with individual behavioural docility and the visible perception of offenders in the community with examples as noted below.

7.2.2.1 Location confinement

The carceral environment operates on community behaviour in defined localities as well as on the individual child's behaviour in the JJS. This contributes to his acquisition of 'acceptable' community behaviours which may be criminal in nature, as localised social mores are composites of the resident population. Moran notes that micro-community toleration of behaviour which might be unacceptable elsewhere demonstrates that geographical location is 'more than the surface upon which social practices take place'.[802] Rather, it is a geo-social environment which is 'simultaneously the medium and the outcome not only of political or macro-economic practices, but also of everyday social relations and exclusion'.[803] The acceptability of criminalised behaviour by such micro-communities underpins the rationale for governments or local authorities intervening to impose greater carceral-like controls on urbanised locations in particular. The police or local authorities seek to curb and corral those involved in criminalised behaviour and other unwanted behaviours 'committed' by residents of whatever age by mimicking carceral spaces. These spaces are 'spatially fixed and bounded containers for people' and are designed and exist to 'improve' local environments.[804] It is a trompe l'oeil intended to produce location confinement and to encourage acceptable behaviour by, for example, renewal programmes or community projects funded to 'occupy' the unoccupied, such as unemployed youths. The locations involved are, in reality, extensive carceral spaces anchored in the community which are 'connected to each other and articulated

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[802] Dominique Moran, 'Spatialization and Carceral Geographies' (2017) Oxford Research Encyclopedia, Criminology and Criminal Justice 8 <www.criminology.oxfordre.com/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-143 > accessed 2 July 2021.
[803] ibid 8.
[804] ibid 8.

with wider social processes'.[805] This is similar to the indirect effects of carceralism that occur in the community due to interventions to control or meet the challenge of unwanted behaviour. In turn, this expansionist and interventionist approach has spawned location confinement which serves to 'effectively regulate poor communities'.[806] Jefferson argues that with 'carceral management of public spaces, urban minority youth come into contact at exponentially higher rates than the rest of the population' with state agencies such as police and local authority personnel.[807] Such targeted intervention similarly creates an echo effect with increasing policing so that 'differential crime rates in communities of poor, minority, urbanites are thus in part a consequence of the extraordinary scope with which they are monitored and managed'.[808] It is a curious phenomenon that those subjected to carceral community monitoring, often because of their criminal behaviour, respond to anti-social or criminal behaviour as though 'trustee prisoners' and report even petty matters to the police. This results in the police effectively acting as agents of one side in a complaint against another and is all too common in localised disputes, whether between competing youth groups or adults.

7.2.2.2 Behavioural docility

As a social control mechanism, behavioural docility is often seen as a positive aspect of carceral growth in the JJS and it can be compared to road signage that promotes conformity by most legal drivers. This reflects the idea that it is possible to manipulate behaviour by carceral features which leads to the 'subtle but effective imposition of uniform behaviour on individuals' who become, as noted by Foucault, 'docile bodies'.[809] The idea is simple in concept, namely, that most individuals respond positively to a continuing process of 'hierarchical observation' and 'normalising judgment'.[810] An individual's judgement of the appropriateness of his actions is lessened and replaced with a tendency to assess himself by reference to the members of 'his' group or gang. This leads to group behaviour judged 'on a differentiating scale or continuum which ranks them in relation to everyone else' in the group.[811] It undermines the judgement of the individual who 'decides' his behavioural response by reference to his group, even though, objectively, it may be inappropriate. In the context of

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[805] ibid 8.
[806] Erica R. Meiners, 'Trouble with the Child in the Carceral State' (2015) 41 (3) Social Justice 121, 122
[807] Brian Jordan Jefferson, 'Cities, Crime, and Carcerality: Beyond the Ecological Perspective' (2017) 32 (2) Journal of Planning Literature 103, 109.
[808] ibid 109.
[809] Bert Olivier, *Our Carceral Society* (Thought Leader 9 April 2009) < http://thoughtleader.co.za/bertolivier/2009/09/24/our-carceral-society/ >accessed 2 July 2021.
[810] ibid.
[811] ibid.

childhood criminality and from the perspective of social control through the JJS, it may lead to the acceptance of the parameters and duration of carceral control through court orders, but behavioural docility may also have negative consequences too. It certainly does not encourage an individual's development as a responsible member of society who is able to make his own judgement. Instead, behavioural docility encourages behavioural herding, the urge to fit in with the group behavioural standard. In turn, this herding facilitates anti-social behaviour in the community and, for example, gang membership. It may also support the rationale for increasing police intelligence led measures to 'combat' youth offending by continuous monitoring of target groups perceived as responsible for criminal behaviour.[812]

7.2.2.3 Visible perception

As an effect of carceralism, visible perception relates to a physical locality and can be described as a mix of 'images of crime and crime control' which equate to 'crime and criminal justice itself'.[813] As a concept, visible perception is an outward manifestation of the carceral structure not as perceived by the individual child offender, but by others viewing his behaviour, within and outside of the community environment. Visible perception therefore has the potential to alter the discourse about criminal behaviour because it involves focusing, for example, on child offenders and, also, the members of their community who may have borne the consequences of such behaviour. It ties the unwanted criminal behaviour to an individual in a defined location which can lead to positive behavioural interventions. For example, police or youth workers can target resources towards an identified problem, such as addressing youth drug-taking in communal areas. But it also has some negative outcomes as it may fuel 'public ignorance and fear of crime' through information which 'is largely derived from the media'.[814] This often leads to inevitable agenda-based misrepresentations and the modern social media phenomenon of the echo chamber effect where mainstream media and social media form a 'social construction of reality'.[815] Unfortunately, the public response can be the production of a false 'image of reality on which they base their actions' and in some instances may lead to the demonization of child offenders, or whole areas of towns.[816] The risks are clear, the work of

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[812] The use of militaristic terms facilitates public support for measures that might otherwise be seen as curtailing children's natural exploration of societal boundaries, e.g., playing football in the 'wrong' place.
[813] Michelle Brown, 'Visual Criminology' (2017) Oxford Research Encyclopedia, Criminology and Criminal Justice 7 <http://criminology.oxfordre.com/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-206 > accessed 2 July 2021.
[814] ibid 7.
[815] Ray Surette, *Media, crime, and criminal justice: Images and realities* (Brooks/Cole, USA 1992) 1.
[816] Brown (n 813) 7.

diversion and rehabilitation can be undermined by a counter-environment or counter-narrative created by the system itself. Two of the clearest examples of this phenomenon are Robert Thompson and Jon Venables who were demonized from the moment of their arrests.[817]

7.2.3 The necessary conditions for carceralism

Carceral effects can be recognised by examining the JJS's design architecture, in particular its hierarchical management and reporting structure with, for example, the compliance regime imposing strict demands on child offenders under the terms of an order. It has been suggested that carcerality can be identified by reference to three characteristics described as a detriment, an intention and a spatial locality which reflect the carceral spectrum noted above. They describe the 'nature and quality' and inevitability of carceralism whether individually or in combination.[818] Detriment describes the experience of the individual subjected to processing which in its most extreme form relates to the punishment imposed by the system, such as imprisonment, restrictions on movement or permitted behaviours. More broadly, it includes the denial 'of various types of opportunity or potentiality that would otherwise have been available, and whose loss is experienced as a detriment'.[819] In child offenders, a prime example of such detriment of potentiality is the loss of educational opportunities. Intention describes carcerality in operation in a custodial environment, or in the wider community. It reflects both intended and unintended purposes including 'temporal distance' restrictions which are detrimental to the individual, such as limits on his life chances but also 'mental health problems'.[820] Even when the intended outcome may have 'ceased directly to act on the individual in question, its effects persist'.[821] This is illustrated by the number of former child offenders who experience lost life chances, in terms of education, job opportunities and general socio-economic failure. Many of these form part of the 'lost souls' cohort, familiar in the Magistrates' Court, who persist in low level adult offending, often due to drug dependency acquired in childhood. Spatiality is the primary facilitator of carcerality, and it is 'a geographical truism to say that the carceral will always relate to some kind of space',[822] or a location that subjects the individual to control. It is also a truism that with detriment and intention, 'there will be a space or spaces to which these

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[817] The bear pit of media and public attention coupled with his failure to assimilate into community life has probably doomed him to a permanent carceral existence.
[818] Moran, Turner and Schliehe (n 795) 30.
[819] Moran, Turner and Schliehe (n 795) 31.
[820] Moran, Turner and Schliehe (n 795) 33.
[821] Moran, Turner and Schliehe (n 795) 33.
[822] Moran, Turner and Schliehe (n 795) 34.

relate'.[823] Most clearly, this is highlighted by the provision of social housing in the poorer areas of urban environments, leading to ghettoization and drug and mental health issues that can become generational.

In view of the above factors, it is contended that carceralism is an inevitable companion to being processed by the JJS, from the initial involvement of the police through to post sentencing. It is evident that the JJS's procedures and programmes, designed to process criminalised behaviours by children by diversion or rehabilitation, represent the visible or overt interaction in the lives of child offenders. The covert, the less visible, less obvious, and wholly unintended effects of the carceral features may be compared to a computer programme running in the background, though in this instance, with real world effects. Science accepts that the fact of observation alters the observed subject and this notion, it is argued, is equally applicable to the JJS interventions.[824] Known as the Hawthorn effect, it resonates with carceral behavioural controls and suggests that the reactivity phenomenon has a role to play in this area of intervention. However, it is accepted that the effects may lessen over time as individuals 'become used to being observed' and 'habituate' to the environmental observation and carceral features.[825] For example, children who are susceptible to peer group behaviours can become involved in criminalised behaviour leading to processing through the JJS. They are then at risk of further criminalised behaviour by the fact of their being processed. This can be described as carceral because it relates to behavioural curtailment or confinement, coupled with coercive control elements which cannot easily be avoided by children. For example, those who fail to comply with a court order are dealt with by breach proceedings before the Youth Court and the JJS process begins anew, with the child being subjected to further overt compliance requirements. Behavioural curtailment describes the way in which child offenders become constricted in their behavioural responses, including temporal and physical restrictions. For example, a court order may include an element of physical confinement being imposed by the YOT involved, restricting an individual child offender's permitted social or geographical environment to promote desired behaviours. While accepting the merits of the measures put in place by court orders to promote rehabilitation, it is evident that further behavioural controls arise from the mere fact of the JJS process. These positive and negative features are comparable

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[823] Moran, Turner and Schliehe (n 795) 34.

[824]Ayesh Prera, What is the Hawthorn effect (Simple Psychology 28 May 2021) < www.simplypsychology.org/hawthorne-effect.html > accessed 21 July 2021.

[825] Rajiv S. Jhangiani, I-Chant A. Chiang, Carrie Cuttler, and Dana C. Leighton, *Research Methods in Psychology* (Kwantlen Polytechnic University 2019) < https://kpu.pressbooks.pub/psychmethods4e/chapter/observational-research/chapter32 > accessed 21 July 2021.

with those that exist in a closed confinement regime, as in a Young Offender institution (YOI), though in most instances this is ignored. It has been observed that 'the practice of incarceration does not end at the boundaries of the prison',[826] and, it is in this sense, that carceralism throughout the JJS exerts a behavioural control on child offenders. In the context of this thesis, it is an extremely troubling feature of the JJS, since carceralism focuses on child offenders as a class, and fails to focus on the individual child who is at risk in such a system. These practices have been described as 'transcarceral', that is, ones that function within 'the shadow carceral state to demonstrate how the line between incarceration and "freedom" is often much more complex in practice'.[827] Carceralism can therefore be seen as promoting control mechanisms, without any legal mandate or policy imperative, which operate through

> 'Neighborhood [*sic*] social control, probation practices, mandated community program [*sic*] participation, and residential placement work to encapsulate youths into a broader practice of social control'.[828]

This assessment highlights that the vulnerable in society, especially child offenders, are the ones most at risk from such behavioural controls spreading into communities and society in general.

7.2.4 The carceral society

Carceralism can be described as an overarching influence on criminal justice systems, not just in relation to offenders in prison environments but, as noted above, in the wider community. Michel Foucault explored the idea of carceralism in *Discipline and Punish.*[829] To be effective, he suggested that the necessary surveillance had to be

> 'capable of making all visible, as long as it could itself remain invisible. It had to be like a faceless gaze that transformed the whole social body into a field of perception: thousands of eyes posted everywhere, mobile attentions ever on the alert, a long, hierarchized network'.[830]

In essence, he argued that carceralism depended on monitoring, whether of a group, community, or population, which was permanent in its surveillance, exhaustive in its ability to monitor and omnipresent in that it was pervasive throughout a community or society. These three requirements are clearly met in the United Kingdom (UK), by the sheer number of police, local authority, and privately operated CCTV units. In addition, much of the population

[826] Brown (n 793) 378.
[827] Brown (n 793) 379.
[828] Brown (n 793) 380.
[829] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Allen Lane 1977).
[830] ibid 214.

willingly submit to location monitoring thanks to their mobile phone dependency. The British Security Industry Association estimated that there are 6 million CCTV cameras in operation.[831] The use of CCTV evidence in criminal cases is commonplace, although its much vaunted use, as a crime prevention measure is questionable. The carceral related use of technology is interesting in the context of its effective monitoring in criminal justice terms. Technology has developed beyond video streaming and recording, to include electronic tagging, facial recognition, and video analytics enabling individuals to be located and monitored in defined areas. In the UK, the growth of mass observation presents more as a managing tool for societal control. It has been aided by the developments in mobile signal technology and coverage in most areas which has fuelled the growth in monitoring of individuals, including child offenders. This intrusive and pervasive drive to watch and record is the latest and most successful example of Foucault's panoptical theory put into practice on a docile populace.[832]

The idea of a 'surveillance society', is derived from Jeremy Bentham, an eighteenth century jurist and philosopher who devised his penal theories, including his 'project of a prison, with an all-seeing inspector', after visiting Russia in the 1780s.[833] His concept of a panopticon prison was dependent on the Inspection House, a circular building with cells around it to permit observation. He suggested that this 'new mode of obtaining power of mind over mind, in a quantity hitherto without example' would cause those observed to modify their behaviour.[834] In contrast to modern panoptical telemetric surveillance, the panoptical prison regime was premised not on the actual intensity of the surveillance but rather from the perception by those subjected to it that they were being monitored. The modern acceptance or even indifference to monitoring is startling but underpins the rationale for the reliance placed on CCTV systems in the UK. Porter has observed that the increasing use of surveillance technology risked changing the 'psyche of the community' by reducing individuals to trackable numbers in a database,[835] and such mass data gathering combined with passive monitoring encourages greater carcerality. This increase in technological reach has 'fundamentally altered the capacity and capability of these systems',[836] with the public generally positive, if not indifferent, about

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[831] Tony Porter, Speech delivered to IRISS, REPSECT and SURVEILLE event, 18 November 2014 < www.gov.uk/SurveillanceCameraCommissioner/Speeches > accessed 2 July 2021.
[832] Michel Foucault (n 829).
[833] Anne Brunon-Ernst (Ed), *Beyond Foucault: New Perspectives on Bentham's Panopticon* 2 <https://www.researchgate.net/publication/263007588_Beyond_Foucault_New_Perspectives_on_Bentham's_Panopticon > accessed 2 July 2021.
[834] University College London, Bentham Project, The Panopticon < http://www.ucl.ac.uk/bentham-project/who/panopticon > accessed 2 July 2021.
[835] Tony Porter, 'UK Surveillance Camera Commissioner' *The Guardian* (London, 6 January 2015).
[836] Porter (n 831).

CCTV and 'surveillance by consent' and this is the key to its expansion.[837] The control through technology which also draws in child offenders in the JJS, potentially introduces elements of covert carcerality. These elements may operate against the rehabilitative effects of a court order, by creating and monitoring micro-communities of child offenders. It is an outcome that has been described as an

> 'ideological decoupling of 'crime' from what had been previously understood as crime's 'root causes', disavowing the understanding of crime as an expression of larger social conditions'.[838]

Examples of the carceralism inherent in the JJS are easily identifiable in close confinement venues, such as a YOI. However, it is equally inherent, although often ignored, in the mass surveillance by police and local authorities through CCTV and drones and the tentative use of facial recognition systems. In addition, individualised carceral controls operate with real time monitoring of individual offenders by electronic tagging pre- and post-conviction. This illustrates how carceralism has expanded 'beyond conventional carceral spaces' and seemingly works because of the willingness of most offenders to participate and comply to improve their own conditions.[839] It is a form of behavioural docility in action and its modern-day form can be seen in the purpose-built police custody suites that model the panopticon idea, with the added layer of constant CCTV. In the wider community, a similar model has been installed and accepted and produced the carceral corralling of people by physical and geographical controls. These controls include multiple CCTV cameras and the presence in many town centres of security guards in quasi-police uniforms patrolling and ensuring behavioural compliance, especially in shopping centres, often a magnet for child offending. There has been a similar growth in remote monitoring in housing areas, with known anti-social behaviour and socio-economic problems, which serves to exclude a section of society by carceral inclusion. It is a form of victimisation by reference to the problems of the individuals and to 'their community, culture, or family structure'.[840] Hunt observes that this amounts to 'a criminal justice system response to criminalised behaviour that justifies repression and provides a means to cleanse the larger culture of its responsibility'.[841] It enables a less objectionable form of open-incarceration

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[837] Porter (n 831).
[838] Ashley Hunt, 'Politics of Vision in the Carceral State: Legibility and Looking in Hostile Territory' (2017) Oxford Research Encyclopedia, Criminology and Criminal Justice 18 <www.criminology.oxfordre.com/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-137 > accessed 2 July 2021.
[839] Moran, Turner and Schliehe (n 795) 2.
[840] Hunt (n 838) 5.
[841] Hunt (n 838) 5.

to be implemented to meet public concerns and fears in relation to anti-social behaviour, often caused by child offenders. Such anti-social behaviour has been tackled by various policies, including prohibitions on specified areas and temporal restrictions which tend to corral and restrict groups of children who are often definable by their families' socio-economic circumstances.

From a child offending perspective, it has been suggested that 'the structure of criminal justice institutions affects geographic patterns in urban crime'.[842] Unsurprisingly, increases in criminality in disadvantaged areas are linked 'to intensifications in criminal justice policies and practices.[843] In essence, the police find the crimes that they are looking for. The level of surveillance described by Foucault undoubtedly exists in modern Britain, as discussed above, and has mostly been achieved without any demur, and probably willingly, by many people. In the context of this thesis, it is equally true of child offenders who are as keen as most people to be on social media and to divulge their interests, contacts, and locations to various digital applications. The potential to monitor appears unbounded, irrespective of the notion of consent by a child and offers effective monitoring opportunities to various agencies.

The growth of the carceral digital environment has added another layer to a well-established pattern that Oliver observed reinforced the view that true carceral environments, prisons, now existed 'to hide the fact that we live in a carceral society'.[844] This may appear to be overly dramatic but such an expansion of monitoring technologies raises concerns about the voluntariness of the compliance by child offenders when it is not mandated by any legal requirement, such as a court order. It can appear that the carceral reach has become omnipresent and can determine who benefits from positive societal inputs, such as a good education, or who is corralled or 'carceralled', and marked out for failure. This is provocative as it suggests child offenders are unlikely to be 'allowed' to reach their potential and this is a fear that resonates with the individual focus envisaged by this thesis. It may prove impossible to refocus on the individual if, as is implied by Foucault, there is a structurally imposed limitation on social progress because of the societal carcerality in general and, more particularly, in the functioning of the JJS. He notes that the

[842] Jefferson (n 807) 106.
[843] Jefferson (n 807) 108.
[844] Olivier (n 809).

> ‘carceral network does not cast the unassimilable into a confused hell; there is no outside. It takes back with one hand what it seems to exclude with the other. It saves everything, including what it punishes’.[845]

This description rests on the idea that

> ‘In this panoptic society of which incarceration is the omnipresent armature, the delinquent is not outside the law; he is, from the very outset, in the law, at the very heart of the law’.[846]

It leads Foucault to assert that the ‘carceral texture of society assures both the real capture of the body and its perpetual observation’.[847] Such an unavoidable presence of carceralism is an impediment to the individualisation of a JJS response in the present system. In everyday life the diffusion of carceral control techniques has increased with greater technological developments as discussed above. This expanding use of technology which is carceral in nature and purpose has been described, echoing Foucault, as a ‘leakage’ into wider society with an

> ‘increasingly complex bundle of cultural, economic and political relations that undermines any simple distinction between the “carceral inside” and the “public outside”’.[848]

This leakage has occurred with little public understanding of, or interest in, the enveloping control and information gathering, and perhaps even with a similar lack of understanding by those working within the system itself. The reliance on carceral practices in the criminal justice system, and in the wider community, raises important issues for everyone in relation to ‘the governance and economy of carceral spaces, environmental politics, global mobility, bodily treatment of individuals and youth justice’.[849]

7.2.5 The conflict between carceralism and criminal justice

The clash between the diversion and rehabilitative purpose of the JJS and the reality of its inherent carceralism ought not to be ignored, especially in relation to child offenders. It is difficult to envisage a JJS without such effects as they are inter-dependent and function in a ‘range of geographical locations and at different scales’, with ‘synergies between carceral and everyday space’.[850] It is an entrenched relationship, and attempts to address the unwanted carceral features of the JJS might also contribute in an unintended way to undermining its

[845] Foucault (n 829) 301.
[846] Foucault (n 829) 301.
[847] Foucault (n 829) 304.
[848] Jennifer Turner, ‘Criminality and carcerality across boundaries’ (2014) 69 Geogr. Helv. 321. 321.
[849] ibid 322.
[850] ibid 322.

ability to rehabilitate.[851] In reality, the issue is whether, and to what degree, the carceral features of the JJS limit the rehabilitative progress by individual child offenders. There may have to be an acceptance that the carceral features of the JJS, though they may be counter-productive and promote criminality, are also inevitable. In which case, the issue becomes more about managing the problem so that it is identified and taken into account in relevant situations, for example a court sentencing exercise. The JJS rehabilitates and its processes must be monitored, to assess effectiveness in outcomes, including rehabilitation, recidivism, and value for money.

Foucault recognised that 'a 'carceral system' extends far beyond the prison structure.[852] He identified 'five models of organisational control', namely family, army, workshop, school and judicial system, that intertwined 'wider society with the carceral in a diffuse way'.[853] These systems were like 'carceral circles', extending 'far from the prison', without the need for 'fences or walls'.[854] This understanding of carceral growth or diffusion can be demonstrated, in England and Wales, with the development of anti-social behaviour policies over recent decades. These have involved the control of young people in defined areas by limiting permitted behaviour or simple exclusion.[855] More recently, Criminal Behaviour Orders (CBOs) were introduced in the Anti-social Behaviour, Crime and Policing Act 2014 (the 2014 Act). This provided that a CBO can be imposed on conviction of any criminal offence and designed to address 'the most serious and persistent offenders where their behaviour has brought them before a criminal court'.[856] An order can be made where a court considers that it would prevent 'the offender from engaging in such behaviour', though in the case of a child offender, the views of the [YOT] must first be sought by the police or local authority'.[857]

The language used in the 2014 Act is couched to suggest the helpfulness to the individual child offender of a CBO although Section 49 Children and Young Persons Act 1933 does not apply to such an order and the media can report the proceedings. This is an instance where the known risks to naming a child offender are displaced to ensure publicity and further notoriety, something that is likely to lead to further contact with the JJS. In practice, a CBO made in

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[851] ibid 322.
[852] Foucault (n 829) 293.
[853] Moran, Turner and Schliehe (n 795) 6.
[854] Moran, Turner and Schliehe (n 795) 6.
[855] Carceralism by exclusion from a defined area tends to herd those controlled into locations that are more acceptable and is therefore carceral in purpose. Confinement equals control. Criminal Behaviour Orders have taken up the slack following the loss of ASBOs.
[856] Crown Prosecution Service, Criminal Behaviour Orders < https://www.cps.gov.uk/legal-guidance/criminal-behaviour-orders > accessed 2 July 2021.
[857] ibid.

relation to a child offender must be for a fixed period of at least 1 year and not more than 3 years and may contain prohibitions to prevent anti-social or public disorder behaviour or anything described in it, under Section 22(5)(a). It may contain positive requirements to meet concerns relating to anti-social or public disorder behaviour, such as attending an educational behavioural programme about the use of drugs or alcohol and may be used in relation to hate crimes, domestic violence, gang violence and social media abuse, effectively high-profile criminal behaviour demanding a suitable response by the JJS.

The potential scope of a CBO demonstrates how the perceived need to tackle a community problem has been met by a legal procedure which, by its form and purpose, includes carceral features in relation to the prohibitions and the positive requirements. A child offender who fails to comply is subject to breach proceedings and on conviction is sentenced again.[858] This ensures further embedding of the child offender in the JJS and its carceral tentacles.[859] CBOs are a popular approach on conviction to address concerns about criminalised behaviour by children in defined areas, but they highlight the risk of the ripple effect of criminal processes extending further into the general community. In criminal defence practice, it is a recognised consequence that the notoriety attached to named child defendants ensures that they are monitored by the police but also by community members. An attempt to impose behavioural controls by a CBO has the potential to create further anti-social problems because of the carceral features of the attached prohibitions and positive requirements. Such problems often arise at the expense of social cohesion between intergenerational groups, though in the context of this thesis, it is more important to note the impact on the individual child offender and his childhood offending and future life chances.

7.3 Considering the effects of carceralism on the JJS in relation to the individual child offender

Having defined carceralism and its effects on the JJS, it is necessary to consider the arguments that the carceral features undermine its primary purposes, to reduce child offending and encourage the rehabilitation of offenders, and that they increase the risk of childhood reoffending.

[858] Anti-social Behaviour, Crime and Policing Act 2014, s30.
[859] Anti-social Behaviour, Crime and Policing Act 2014, ss22 to 30.

7.3.1 The carceral purpose and process

It is common, in criminal defence practice, to observe a child offender becoming locked into a pattern of offending and, on being processed by the JJS, into a system of behavioural monitoring and compliance. Typically, this monitoring extends far beyond that initially imposed by a court order. For example, he may become cajoled into unwanted behaviour by the carceral features in his own community environment, so that his rehabilitation is almost secondary. Though he may be managed by a YOT, he may be persuaded to 'behave', in the sense of conform, not because of rehabilitative work but because of his surveillance and monitoring. This idea is a recognised feature of carceralism and is partially conveyed by the original title of Foucault's work, '*Surveiller et punir'*. He used the word *surveiller* to translate Jeremy Bentham's preferred word *inspect* which is better translated today as supervise.[860] The form of the carceral features is not always easily discernible, with Meiners observing that 'the benefits or liabilities' of such features are 'rarely transparent or coherent', rather they are blurred with a vagueness of utility, especially in the case of child offenders.[861] The growth in carceralism undermines rehabilitative outcomes because it anchors individual child offenders to a system of perpetual monitoring. This serves to increase the difficulties placed on a child offender to break free of unwanted criminal behaviour. For example, the earlier a child has contact with the JJS, the longer the effects endure, even into adulthood where 'a criminal record results in considerable financial penalties and limited job prospects'.[862] In criminal defence practice, this phenomenon is all too common with child offenders graduating to adult crime and in some instances, even their offspring following the family tradition.

The carceral attributes of the JJS restrict the reformative outcome of the policies and programmes with an almost shadow-like subtlety and, to the extent that they intervene in the daily life of another person, have the potential to have negative effects. The JJS's policies and programmes for implementing and administering justice are not a passive gloss acting in response to criminalised behaviour. Rather, they are active ingredients that contribute to determining outcomes, for example, superficially, a child offender may be required to comply with a YRO, but its implementation requires exposure to other child offenders. The risk is that their behavioural norms might undermine the intended diversion or rehabilitation work and

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860 Foucault (n 829) 301. Translator's note by Alan Sheridan.
861 Meiners (n 806) 124.
862 Vesla M. Weaver and Amy Lerman, 'Political Consequences of the Carceral State' 6 <http://faculty.georgetown.edu/hcn4/SpeakerPapers/Weaver%20&%20Lerman%20%20Political%20Consequences%20of%20the%20Carceral%20State%20-%20APSR.pdf > accessed 2 July 2021.

produce negative effects, such as loss or disruption of family and community ties together with opportunities in education and employment. Child offenders subjected to custodial environments cause most concern in criminal defence practice, as they often return to offending emboldened by the experience of a custodial environment. The initial shock effect on the individual at the court sentencing hearing can dissipate with remarkable speed and new friendships are forged inside the custodial environment. There is a need to improve outcomes associated with such child offenders. The most radical approach has been the reduction in the use of incarceration, especially in the use of short sentences. The counter-productive nature of short sentences has been a spur to change. For example, Brown notes that an attempt 'to decrease incarceration by turning to a community-based model of punishment in its juvenile court system' reduced the use of incarceration but did not lead to 'a lessening of carceral power'.[863] Effectively, the carceral features continued and exerted their effects in the extended use of court orders for child offenders who remained in the community. This 'community orientation' has been described as promoting 'juvenile justice entanglement' because 'the reality of the institutional labyrinth of juvenile justice often means community sanctions can resemble' even harsh environments like 'prison'.[864] This can be seen with child offenders in relation to compliance with YROs. When an order is made for serious offending or previous non-compliance as an alternative to custody, the attached requirements can be perceived as more onerous by the individual child offender than 'going away'. This can promote further non-compliance or offending as he rebels and ultimately, therefore, a custodial sentence is imposed, and the underlying issue is not addressed.

7.3.2 The child offender's perception

For the individual child offender, the contradiction between intended and actual outcomes in a court order that operates in the community is not surprising, as it rests on the fallacy that he is able to rationalise his sentence as appropriate to his offending and rehabilitation. Criminal defence practice highlights that child clients rarely present as having such insights or understanding. Instead, a non-custodial sentence is seen as a positive result enabling them to remain 'in-play' with their peer group. Non-custodial sentences, such as YROs, have been noted as doing 'little to address the material circumstances of youths' lives and, instead, [are] often cited by youths as a considerable deterrent to their exiting the juvenile justice system'.[865]

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[863] Brown (n 793) 378.
[864] Brown (n 793) 378.
[865] Brown (n 793) 380.

The reasons for this are, firstly, community-based interventions, whether pre-prosecution, such as diversion by the police or on sentence by the Youth Court, often seem to demand more of child offenders by way of positive responses than is realistic. Secondly, they do not recognise the child offender's inability to comprehend the JJS's intentions and processes. Child offenders, perhaps not surprisingly, continue to act as children when discussing their cases and have great difficulty participating in the process in any meaningful way, something which is often overlooked, for example by magistrates in the Youth Court. Thirdly and importantly from the perspective of this thesis's argument, the JJS is not formulated to process child offenders in a way that accepts their individual limitations so that their ignorance is ignored in its application.

As Hughes and Mcphetres observed, child offenders generally 'lack psychosocial maturity and therefore should be held less criminally responsible for their actions'.[866] Their shortcomings are enhanced by the carceral features which ensnare them, and which build on their lack of understanding, for example, the necessity to comply with a court order. They have been accurately described as children who are

> 'emotionally reactive, have difficulty suppressing action and attention toward emotional stimuli, and have underdeveloped cognitive control systems associated with executive functions such as emotion regulation, [and] response inhibition'.[867]

This description underlines the positive rehabilitation which is offered to child offenders by a community-based court order, with 'the opportunity to be socialized outside of institutionalized settings'.[868] There remains a risk that the effects of carceralism in the JJS may derail any positive features as, even in the community setting, the rehabilitative purpose is circumscribed in part by the inherent carceralism. Much of the ability of a child offender to be rehabilitated depends on his relationship with the JJS, his understanding of the process and his decision-making potential. These are important indicators of maturity in a child offender and are indicative of his potential for diversion and rehabilitation. The degree of maturity in such a child has been described as a trinity 'of three broad psychosocial factors', defined by Cauffman and Steinberg as responsibilisation, potential outcome perception, and behavioural restraint.[869]

[866] Jamie S. Hughes and Jonathan Mcphetres, 'The Influence Of Psychosocial Immaturity, Age, And Mental State Beliefs On Culpability Judgments About Juvenile Offenders' (2016) 43 (11) Criminal Justice and Behavior 1541, 1542.
[867] ibid 1542.
[868] ibid 1542.
[869] Elizabeth Cauffman and Laurence Steinberg, 'The cognitive and affective influences on adolescent decision-making' (1995) 68 Temple Law Review 1763, 1789.

These factors vary and fluctuate over time 'as an individual matures and might explain how youths differ from adults in their decision making and subsequent culpability in the justice system'.[870] They indicate an individual's ability to act logically, to take action, and to foresee possible results of his behaviour and, in the context of this chapter, his susceptibility to the effects of carceralism. To be diverted or rehabilitated, the self-awareness of a child offender must be enhanced by reference to the concepts, firstly, of responsibility so that he is able to function independently, including autonomous decision making, and be self-reliant. Secondly, he must have perspective to recognize both long- and short-term consequences of potential actions and be able to accept that the viewpoint of another person is equally valid. Thirdly, he must have behavioural restraint to be able to delay action and limit impulsivity and exhibit self-control.[871]

It has been recognised that there are 'age differences in all identified' aspects of maturity in children, though responsibility and perspective are generally relatively stable in adolescents.[872] However, it has been noted that behavioural restraint continues 'to develop in the mid-20s. Unsurprisingly most adults exhibited higher levels of temperance than adolescents'.[873] The degree of behavioural restraint appears to be affected by the effects of carcerality, and the abilities of the individual child to respond appropriately, so that the issue of whether 'maturity can be treated or bolstered through targeted intervention' becomes problematic.[874] In the absence of such maturity, it becomes questionable whether child offenders should be processed by the JJS at all, since they are more vulnerable to the carceral effects than any others in the criminal justice system and, therefore, deserving of greater protection from it. In the context of this thesis, the individual child offender is caught in an unequal relationship in the JJS's ever-expanding avenues of intervention. The carceral effects of contact by a child offender with the police arise from the necessary documenting and processing of the individual and his behaviour. The process also then extends to his relationship with others involved in unwanted criminal or anti-social behaviour. The intelligence gathering role of the police adds further to the level of contact and adds an additional carceral social control element. This is especially

[870] Christina L. Riggs Romaine, Kathleen Kemp, Christy L. Giallella, Naomi E. S. Goldstein, Jennifer Serico, and Sharon Kelley, 'Can We Hasten Development? Effects of Treatment on Psychosocial Maturity' (2017) International Journal of Offender Therapy and Comparative Criminology 1, 2.
[871] ibid 2.
[872] ibid 3.
[873] ibid 3.
[874] ibid 5.

visible in the social housing areas from which, criminal defence practice suggests, most youth offenders originate.

Contact with the JJS exposes child offenders to control and manipulation, whether through police diversion programmes or in Youth Court proceedings. In the latter, the extent of control has been enhanced with mobile technology, as noted above, that is equally available before conviction with measures such as conditional bail with intensive supervision and surveillance which can be imposed on a child offender. This can involve, for example, a minimum of 25 hours contact time per week for education, training, and offending behaviour intervention. It can include an electronically monitored tagged curfew restricting movement, and it may also use voice identification and verification. Alternatively, a Youth Court may consider conditional bail with an electronically monitored tagged curfew requirement which can be imposed on a child if he is at least 12 years old and charged with or convicted of a violent or sexual offence or an offence punishable with at least 14 years for an adult or has a recent history of committing imprisonable offences when remanded on bail or remanded to the local authority.[875]

The electronically monitored tagged curfew is at the forefront of the growth of the carceral reach. It functions like a long leash, allowing a sense of individualism while maintaining a hold on a child offender and drawing him back into line by sanctions if he fails to comply. It exerts control over a child offender through the bail process and the proceedings and extends much wider as it operates in both the child's home and his community environment and influences his perception by others. While carceral behavioural restrictions can lead to better behaviour in individuals, there is a concern that induced conformity can, counter-intuitively, reinforce offending behaviour in other child offenders. As noted above, to refrain from unwanted behaviour needs a positive decision by the individual to stop or to try and recognise the triggers that lead to it. A decision to temper behaviour is not easy for a child to make and the concept of behavioural temperance is significant in demonstrating a maturing individual. Those children who exhibited it 'remained stable' and those who acquired it 'were significantly more likely to desist from delinquent behavior [*sic*]'.[876] Childhood development is influenced in part by 'environmental factors', with secure settings promoting 'a temporary reduction in temperance and responsibility'.[877] Longer-term exposure to these factors 'negatively impacted the development of psychosocial maturity in adolescent males, despite programming and

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[875] It is noteworthy that the offence requirements are by reference to adult sentences and not focused by reference to youth court practice.
[876] Riggs Romaine, Kemp, Giallella, Goldstein, Serico and Kelley (n 870) 5.
[877] Riggs Romaine, Kemp, Giallella, Goldstein, Serico and Kelley (n 870) 5.

therapeutic supports.[878] The risk in the JJS is that its carceral features serve to supress the development of behavioural temperance and maturity.

7.3.3 Aspects of carceralism in the JJS

The carceral features operating in the non-custodial environment appear less onerous than in a YOI but may, however, be more long-lasting and detrimental to the individual child offender. This ought to be a matter of concern, though in reality, there is little that can be done in the present JJS in England and Wales. It is difficult to envisage how such effects on child offenders can be avoided without fundamental reform. At the very least, there should be an increase in awareness by those working within the JJS of the risks to the vulnerable individual child offender. Some commentators contend that not all examples of carcerality pose the same risk and that there are 'gradations of carcerality'.[879] This idea has been questioned given that it has been observed that the rationale for this suggestion appears unsupported by 'any objective rise' in criminality.[880] Indeed, it is perhaps easier to argue that in a community context any differences relate to societal responses to criminal behaviour 'as well as the criminalisation of poor neighbourhoods'.[881] In the case of child offenders, the concern is that the imposition of behavioural controls, whether geographical, temporal or peer group focused, supports primarily the social bias of carceral features. The relationship between the socio-economic background of child offenders and the carceral features in the JJS emphasises more the issue of proportionality of application. In effect, communities perceived as poor in economic, social, cultural, educational, and aspirational terms, with attendant problems associated with alcohol, drug use and anti-social behaviour, are subjected to closer 'scrutiny and heavier sanctions' than dissimilar areas.[882] For example, during the 1990s the United States witnessed city administrations utilise

> ''order maintenance' policies to establish greater control over public nuisances and vaguely defined disorderly conducts more common to low-income, minority neighborhoods [*sic*]'.[883]

Such policies produced divisive interventions by 'labeling [*sic*] and spatially targeting disorder' and led to a dramatically increased 'apprehension of petty criminals in inner-city

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[878] Riggs Romaine, Kemp, Giallella, Goldstein, Serico and Kelley (n 870) 5.
[879] Moran, Turner and Schliehe (n 795) 15.
[880] Moran, Turner and Schliehe (n 795) 14.
[881] Moran, Turner and Schliehe (n 795) 14.
[882] Jefferson (n 807) 108.
[883] Jefferson (n 807) 108.

communities, thereby increasing the number of arrestees from these neighborhoods [*sic*]'.[884] The use of carceral techniques to exercise social control, for example by police and local authorities through local by-laws or CBOs, produces an attendant risk to the rehabilitation of the individual child offender and further offending. As Jefferson observed, the 'system itself produces the crime-inducing conditions that planners seek to redress'.[885] It can lead to worsening socio-economic outcomes, including 'exacerbating unemployment rates among low-skilled workers, engendering social disorganization'.[886] Such effects on the adult population inevitably create further and attributable childhood behavioural problems which feed into any assessment of the effectiveness of the JJS. The result can be a social ecosystem which produces generational low-level criminal offending, the very behaviour by children that undermines many deprived urban environments and impacts on their education and life chances.

As discussed above, the carceral nature of the JJS continues to expand and becomes more pervasive because of the continued developments in mobile telemetry. Such monitoring, accompanied by economies of scale, will enable the possibility of locational and temporal monitoring throughout the duration of court orders. It is argued that the ever-increasing reach of these technological developments has the potential to produce a high level of real time surveillance. This is demonstrated by electronic ankle tag monitoring and the provision of compliance evidence together with the induced behavioural docility. Such tags are time-cost effective and show a carceral confluence relating to 'space, place, and geography, particularly the development of the prison and the regulation of space and discipline'.[887] Criminal defence practice gives an appreciation of the home areas of criminal families and community groupings, together with an understanding of the links between them. The police have similar knowledge, albeit for reasons of crime control and detection, and the use of tag technology can only deepen their level of intelligence to enable better targeting of those engaged in unwanted criminal behaviour. The potential positive use of technology to address childhood offending ensures that the carceral benefits of, for example tagging, will lead to its greater use. On a societal level, the dehumanising effect of these approaches, especially, tagging and monitoring is worrying. For those children involved, it means a loss of focus on them as vulnerable individuals and a perception that they are once again 'mini-adult' criminals. As most criminalised behaviour by

[884] Jefferson (n 807) 108.
[885] Jefferson (n 807) 110.
[886] Jefferson (n 807) 110.
[887] Moran (n 802) 7.

children occurs in areas local to their homes, it is difficult to foresee a reduction in the expansion of the use of technology as the information obtained will undoubtedly be seen and presented as a valuable community safety response.

The lessening of carceral features would be seen by many involved in the JJS as a retrograde step as, it is argued, the more extensive the carceral controls the better prepared the system is to meet the challenge of childhood criminal behaviour. However, in the context of this thesis, whilst carceral features provide a focus on a child offender, it is argued that their primary purpose is less about addressing the need of the individual child and more about containing and supressing criminal behaviour. The issue is additionally complicated by the unintended effects of the carceral features that potentially promote further criminal acts. There is clearly a balance to be struck between the role carceralism plays as a factor promoting childhood criminality and the positive values of carceralism as perceived by the public. It is suggested that covert carceralism is a negative factor in the JJS, since it does not assist in the refocusing of attention on the individual child offender. However, it is accepted that used appropriately, with an acknowledgement of these negative effects, the carceral features could provide robust support, through monitoring, to child offenders subjected to diversion and rehabilitation. How to deal with the effects of carceralism on an individual child offender can appear tangential to the main purpose of the JJS, especially when considered with previous chapters. Nevertheless, its impact on the success of diversion and rehabilitation should not be underestimated.[888] Community engagement through focused policies, such as investing and providing support in deprived neighbourhoods, for example by improving the provision of resources in an area, should not be undervalued. In the JJS, similar engagement policies, especially by the police, may be perceived by the residents as being 'ultimately kinder, more caring, and, for the purposes of institutional legitimacy, more rehabilitative' than straightforward control and disruption policing.[889] To encourage better outcomes for all, including child offenders, utilising positive carceral features through localised investment in the social environment has been described by Brown as enabling 'people to escape criminality, [and] lessen some of the binds of incarceration'.[890] The risk of failure in relation to child offenders cannot be ignored when continued involvement in the JJS has such long-term effects and it must be related to the JJS's mantra of the prevention of offending and the welfare of the child offender, albeit with the

[888] Brown (n 793) 382.
[889] Brown (n 793) 382.
[890] Brown (n 793) 382.

increasing recognition of the Child First approach potentially producing less onerous interventions and more positive outcomes.[891]

As Hunt notes, the JJS 'functions not merely by criminalizing people but as a euphemism, wherein 'criminal' stands in for a fundamentally different kind of person, if as a person at all'.[892] This approach bedevils the criminal justice system, and the JJS, in particular, would benefit from being reordered and refocused on the individual child by assessing their behaviour as children first, and as criminals only as far as is necessary to assuage the public desire for 'justice'. This suggestion relates to the JJS's mission to divert or rehabilitate and to the question of whether less carcerality would impact on these aims because, as Brown observes, less formalised programmes do not 'necessarily mean relenting control over the lives of youths'.[893] The consequence of reducing the carceral features in the JJS would be a reduction in control and monitoring and that, in turn, might lead to unwanted side effects such as undermining family bonds through more interventions by social services. Counter-intuitively, more control and restrictions often seem to create greater family cohesion as a form of pushback against the JJS. For example, out of area child placements with 'a relative who [has] been approved by the court' and who appears to be 'outside the network of carceral power' in fact serves 'to extend this type of power over the home spaces of youths'.[894] Nor is the bringing together of the family always a positive factor for the child, as child offending often relates to home circumstances and associated criminalised behaviour. Child offending can also open a door to the disclosure of 'neglect, abuse, or dysfunctional relationships' so the child might be considered to 'be better (according to the court) in another environment'.[895] This then has to be balanced with an appreciation of the levels of abuse associated with placements and it is a difficult judgement to decide whether the perceived benefits are worth the risk to the individual child, or the public purse, in the long term. Arguably, the past problems in state funded care facilities suggest that the state is rarely able to provide a better parenting experience for the child.

Of course, as noted above, the ultimate sanction for a child offender is custody. However, taking account of the carceral features that can limit and control behaviour in the community, the question arises as to whether, save for the most serious offences, there is a need for it. It

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[891] The Sentencing Guidelines Council, *Overarching Principles – Sentencing Youths, Definitive Guidelines* (2009) 3.
[892] Hunt (n 838) 28.
[893] Brown (n 793) 384.
[894] Brown (n 793) 384.
[895] Brown (n 793) 384.

appears fanciful to suggest, but it is possible to envisage a JJS without a custodial sanction in most instances. In practice, the most telling moment in the Youth Court is when a child offender receives his first Detention and Training Order. There are always tears from him, his parents, and on occasion the magistrates, though never the District Judges. Other professionals usually comment on the futility of such sentences for most cases before the Youth Court. How to devise a different and effective response to these behavioural failures is implicit in this thesis but it 'requires a radical imagination to recover public safety from the punitive "law and order" paradigm that punishes the poor'.[896] The carceral effects of the JJS on a child offender indicate the difficulties in moving to a different approach, as its innate carcerality 'penetrates everyday life and plays a part in organizing geographies of crime'.[897] The impact cannot be underplayed and it has been identified with the criminalisation and control of disadvantaged socio-economic groups and has been labelled as 'carceral governance'.[898] Such governance is a consequence of policies intended to address unwanted behaviour and reflects, rather, 'the behavior [*sic*] patterns of those who invent, modify and enforce norms' rather than those involved.[899] When considering the limitations of most child offenders, as they present to their lawyers, this seems an obvious truism. The degree of carceral manipulation in the JJS of child offenders has been described dramatically as society's 'dehumanization of that other and their capitulation as a material, a slave, an enemy, a criminal, controlled through regimes of social and corporeal death'.[900] This level of malevolence appears excessive, though it does reveal something about how child offenders are viewed in some instances in JJS policies.

Having considered examples of carceralism in the JJS and in wider society, it is appropriate to consider whether, fundamentally, the effects of carceralism are inevitable in any and every JJS system and, if this is so, whether the effects of carceralism should be taken into account or ignored.

7.4 Determining whether carceralism is inevitable in all JJSs

This chapter argues that the carceral features in the JJS create a risk that childhood criminal behavioural traits may be reinforced by it. As discussed above, child offenders are encouraged to comply with an 'ethos of personal responsibility' and that they need 'to stay the probation

[896] Meiners (n 806) 123.
[897] Jefferson (n 807) 106.
[898] Jefferson (n 807) 107.
[899] Austin T. Turk, *Criminality and Legal Order* (Rand McNally, Chicago 1969) 9.
[900] Hunt (n 838) 2.

course, without messing up'.[901] This idea of behavioural compliance can become ingrained and has been linked with 'feelings of regret and entrapment [which] reflected the strength of carceral power over the lives of the youths'.[902] At its most extreme, the saddest epithet of success attached to child offenders may be that they had broken free of criminalised behaviour, and the carcerality of the system 'by assuming the mantra of personal responsibility', or, as one young woman put it, change happens 'when you finally believe you're a failure''.[903] Such an assessment has to be examined and challenged.

7.4.1 The inherent carceral envelope

The carceral architecture of the JJS, which moulds and controls child offenders, has been illustrated by reference to its procedures and processes, including bail provisions and court orders. They demonstrate how child offenders can be held in check and their behaviour addressed by rehabilitation programmes, without experiencing a custody regime. Programmes can enforce behavioural requirements, as discussed, including location and peer group controls, which create a 'multiplicity of carceral spaces' that serve 'to create the carceral society that is so common' within the wider community.[904] As Jefferson observes, 'children with an incarcerated parent are more likely to drop out of school, which increases substantially the likelihood they'll engage in criminal activity'.[905] This generational carceral reach is, it is argued, a major issue that is not adequately addressed in the JJS, for example in Youth Court sentencing exercises. Child offenders brought up in families with a criminal offending history are at a behavioural disadvantage which undermines their acquisition of societal behavioural norms. Perhaps, as Meiners notes, there is an argument for 'less legal (and moral) culpability for harms (and crimes) committed and more access to state protection through the presumption of the potential for development'.[906] This potential to affect the development of an individual child highlights the need to recognise that there may be effects on his childhood capacity through 'experience (or lack of reason)' or the 'temporal stalling of development'.[907] In turn, this lends weight to 'the idea that juveniles need protection',[908] and that this might be achieved

[901] Brown (n 793) 384.
[902] Brown (n 793) 384.
[903] Brown (n 793) 384.
[904] Brown (n 793) 384.
[905] Jefferson (n 807) 111.
[906] Meiners (n 806) 153.
[907] Meiners (n 806) 126.
[908] Meiners (n 806) 126.

through recognising them as works in progress rather than the finished adult, with appropriate weight given to their family background to lessen their culpability.

The question whether carceralism is inevitably a 'bad thing' depends, in the context of this thesis, on the desired outcomes from the JJS. The range of sentencing options has inherent carceral features, and the extent of the controls imposed, such as by a court order, varies with the severity of each sentencing exercise. As noted, programme requirements, attached to a court order, can include prescribed attendances at specified locations at set times or limiting movements in defined areas. These geographical and temporal controls demonstrate that the concept of 'incarceration operates at a number of scales, but, increasingly, the neighborhood [*sic*] is noted as a significant site in shaping the carceral experience (or lack thereof)'.[909] It is the ever-widening range of carceral features which leads to concerns about the long-term effects on a child offender's behaviour. Objectively, the perception is reinforced that the JJS has the potential to manipulate individual child offenders, otherwise its purpose appears pointless. Police strategies highlight the point by their use of limited resources on groups and locations to ensure that there is

> 'surveillance, targeting of neighbourhood [*sic*] crime spots, and frequent familial interactions with police [that] all represent ways that carceral power operates in a more fluid, dynamic, and, ultimately, more expansive geographical form'.[910]

The focused application of JJS resources, especially police resources, has produced an uneven distribution of carceral power 'across urban space, recreating geographies of inequality and exclusion through the micropolitics of neighborhood [*sic*] crime control'.[911] These policy initiatives, often in response to anti-social behaviour, have been described by Jefferson, as 'qualitative changes in the core functions' of the criminal justice system.[912] Superficially, they may be described as crime prevention measures but, in effect, they are also 'the replacement of social welfare policies with hyperaggressive penal and policing policies designed to regulate' the geographies of urban crime.[913] Such initiatives serve to calm the concerns of one section of society over another, in this instance, the challenging behaviour of children by geographical exclusion measures, effectively enveloping and monitoring those involved .[914]

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[909] Brown (n 793) 380.
[910] Brown (n 793) 382.
[911] Brown (n 793) 382.
[912] Jefferson (n 807) 108.
[913] Jefferson (n 807) 109.
[914] In its simplest form, 'No Ball Games Allowed'.

7.4.2 Carceral growth theory

The carceral effect of the JJS on child offenders in a custodial environment, for example, a YOI or secure accommodation, is immediate. Such an environment is meant to be a last resort because of the recognised risks to the individual child's future development. The carceral effect associated with community-based orders may, however, be equally debilitating. In the context of this thesis, with its focus on the individual child, there is a need to consider whether immediate custody has any additional rehabilitative effects compared to a non-custodial environment. If it does not, then the need for close incarceration as 'a period of prison *time*, rather than as a space' arguably becomes unnecessary.[915] In a reformed JJS, one that focuses on the individual child offender, it is questionable whether a custodial institution would have any positive features that would promote the rehabilitation of the child offender and the acquisition by him of behavioural norms. The carceral features of the JJS, through its procedures and processes, have been described as 'hyperincarceration, because it effectively has porous carceral boundaries and seepage of carceral techniques and technologies into spaces far beyond the prison'.[916] This rippling outward growth of 'carceral spaces and carceral effects' has occurred 'within ostensibly public space' and highlights once again the extent of the carceral reach.[917] Accepting this growth, from the perspective of this thesis and the identified carceralism, it is suggested that its presence in the community is better for a child offender than a custodial environment. This is so, even though community based carceralism has a herding effect on child offenders and, as criminal defence practice confirms, draws a minority of child offenders together, creating further offending risks. On a positive note, it may lead to behavioural docility in such child offenders and catch them in its compliance net before they progress to further offending and a 'real' custodial environment.

The JJS's present approach to child offending presents as superficially robust. A discussion with the professionals involved and their 'customers', the children, quickly undermines that view. The outcome for the individual child offender ought to be the benchmark for an assessment of its effectiveness. There will, of course, always be a minority demand for more severity in the JJS to stop 'the rot' in child behaviour, as reinforced from time to time by the media. However, from a practice point of view, the need to examine 'the uses of the symbolic

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[915] Moran (n 802) 3.
[916] Moran (n 802) 5.
[917] Moran (n 802) 5.

child in contemporary incarceration'[918] is evident from the rehabilitation failures that reappear back in court, and those unfortunates who progress to adult offending. This also relates to the JJS's diversion and rehabilitation processes and whether it is acceptable that some child offenders may be held back from rehabilitation because of carceral effects or even led further into criminality. The interplay between the stated principles of the JJS and carceral related criminality is highly relevant to this thesis, especially whether the carceral risks are balanced by the positive outcomes in the individual child. In its extreme form, carceralism has the potential to restrict the social mobility of those involved in criminalised behaviour because of the architecture of implementation, and its wide reach within the community. It shapes the physical environment too, in ways that if prioritised by racial groupings, rather than socio-economic background, would be deemed racist. It encompasses 'a whole host of social-control practices in addition to the practices of social welfare'.[919] For example, programme requirements can be too demanding for child offenders to comply with, and may lead to 'insecurity, greater demands on their time, and a litany of conditions to satisfy',[920] factors that limit the individual's development in the community outside of a JJS programme. Rehabilitative programme requirements are necessary for individual offending work to be done, but there must be a recognition of the shadow cast over this aim by those very requirements, and the potential to reinforce the wrong behaviours by association and peer modelling.

Carceral growth affects the efficacy of the system and its relationship with an individual child offender, and mirrors Foucault's 'rippling carceral circles' which cannot be divorced from political, media and public pressures.[921] These pressures have fed into the procedures associated with policing and prosecution and the court system pre- and post-conviction as noted above. Carceral measures are reactive and respond to 'the myths of law and order' and calcify 'as a common sense'.[922] At their most depressing level of stupefaction, they help to confuse 'our need for safety with the security regime of the state', and become settled 'into the normality of our spatial and social expectations'.[923] In wider society, there are overarching carceral mechanisms at work, promoting techniques of social control by corralling unwanted behaviours into defined geographical spaces. The police and local authorities demonstrate a

[918] Meiners (n 806) 125.
[919] Brown (n 793) 383.
[920] Brown (n 793) 383.
[921] Moran, Turner and Schliehe (n 795) 11.
[922] Moran, Turner and Schliehe (n 795) 11.
[923] Moran, Turner and Schliehe (n 795) 11.

visible example, by directly intervening through 'community support' and through visible markers such as curfews.[924] This produces a so-called carceral visual order that by design promotes 'appearances and disappearances, sound and noise, movement and space, and a sense of things in and out of 'their place''.[925] The promoted visual order seeks to manage social interactions in a community environment by extending carceral-like ordering of behaviour. The possibility for dominating the community, through carceral control, has been described as the effective manipulation of the

> 'values of human life—preconceptions of intellectual and moral capacity, rights to space and freedom of movement, rights to health, happiness and authority, freedom of word, language, and sound'.[926]

The issue is whether the positive outcomes outweigh the negative ones or, at least, are perceived as neutral. This, however, depends on accepting the risks associated with carceral environments which have been described as 'much more numerous, insidious, and may be, in some cases, more totalizing than traditional practices of incarceration'.[927] Interventions by a JJS are presented as enlightened 'alternatives to incarceration and carceral power', but the concern remains that the carceral reach continues to spread.[928] Unfortunately, as the 'technologies of confinement leach into every day domestic life, into the street, and into institutional spaces',[929] it becomes ever more difficult to differentiate between a voluntary response to diversion and rehabilitation and one produced by carceral induced docility. The positive effect of carceralism is relevant if the intention is to further the aims of 'Big Brother' passivity, to control unwanted criminal behaviours rather than to understand and improve outcomes for the individual child offender. Carceral features can at most be neutral and only positive where total control is the primary purpose, rather than diversion and rehabilitation. Child offenders are the lifeblood of the JJS, and criminal law firms have established criminal families, which perhaps suggests that the JJS is not successfully diverting and rehabilitating child offenders. More interestingly, new child offenders arise from families with no previously known criminality. This may indicate that criminalised behaviour occurs because of socio-educational circumstances that cannot be countered before the behaviour manifests itself. For example, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of*

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[924] Visible markers include group activities in the community or curfew controls for older child offenders.
[925] Hunt (n 838) 10.
[926] Hunt (n 838) 10.
[927] Brown (n 793) 379.
[928] Brown (n 793) 379.
[929] Moran, Turner and Schliehe (n 795) 11.

Offenders[930] considered reoffending and acknowledged that 'most criminals continue to commit more crimes against more victims once they are released back onto the streets'.[931] Child offenders were considered as a threat, with the risk that they would 'become the prolific career criminals of tomorrow'.[932] More positively, it was acknowledged that early intervention 'in the lives of children at risk and their families, before behaviour becomes entrenched, can present our best chance to break the cycle of crime'.[933] As Tomczak notes, for the Ministry of Justice, the issue was related to economic problems rather than anything more fundamentally at fault with the criminal justice model including the JJS.[934] This is an unacceptable assessment if one is truly interested in addressing the needs of vulnerable child offenders.

7.4.3 Carceralism as social policy and in society

The JJS is a part of the criminal justice system and it should represent the ideals of society and reflect the ''citizens' political attitudes and behaviors [*sic*]'.[935] It has the potential to make or break a child offender as a future adult, to the extent, even, of negatively affecting 'the likelihood of participating in politics and carrying out the responsibilities of citizenship'.[936] The generational social markers that flow from contact with the JJS procedures and processes, combined with the carceral behavioural effects, are unsettling for anyone interested in better outcomes for child offenders. As Weaver and Lerman observed, 'punitive encounters with the state foster mistrust of political institutions and a weakened attachment to the political process', which reinforces a lack of engagement in civil society at any level.[937] This antipathy towards state provided services includes, most worryingly, education, and can be readily observed when in company with child offenders and their immediate families. These negative attitudes are transmitted generationally and communally. They build on the educational system's failure to advance aspirational development in child offenders, many of whom fail to attend school. In England and Wales, with its developed state structures of intervention and support, the criminalised element of the population is effectively side-lined by the carceral controls of state dependency, ghettoization, and surveillance. The reach of carceralism into pockets of society

[930] Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (HMSO December 2010).
[931] ibid 1.
[932] ibid 1.
[933] ibid 68.
[934] Philippa Tomczak, (forthcoming) 'The Voluntary Sector and the Mandatory Statutory Supervision Requirement: Expanding the Carceral Net' (2017) 57(1) Brit. J Criminol. 152. Author's version 6.
[935] Weaver and Lerman (n 862) 3.
[936] Weaver and Lerman (n 862) 3.
[937] Weaver and Lerman (n 862) 3.

means that there is 'a uniquely negative experience of democracy', and 'one's role in the civic community' leading many to feel unable to engage in any civic or political process in adulthood.[938] For child offenders, the effects are often more immediate, with their removal from mainstream education and, for some, the offer of home schooling or classes at non-school locations. This reinforces the sense of being 'othered' and it can be seen as one of the 'collateral consequences' of incarceration in the community which can arise from contact with the JJS.[939] It is difficult to refocus on the individual child offender and improve his lot without addressing the carceral features inherent in the JJS. It is equally difficult to envisage a workable JJS that diverts and rehabilitates without those features which, to some degree, skew behaviours. However, it may be that a less intensive JJS would lessen the problems associated with carceralism.

Carceralism produces a system akin to incarceration in a panoptical environment, its effects are real on those within its circle of influence especially child offenders. The key question is simple; 'How far from the prison must the carceral circle extend before the influence of the prison is lost?'[940] Beckett and Murakawa suggest that the JJS contributes in 'more legally hybrid and institutionally variegated' ways than may be apparent, as a 'shadow carceral state'.[941] This describes an environment where criminal justice is delivered through a hybridised legal system that combines civil, administrative, and criminal law models which leads to social control through 'heightened surveillance'.[942] The social control agenda has become so pervasive that it may be unstoppable as a prime driver of the criminal justice system, with the cry of community safety used to justify carceral monitoring of potential and actual wrongdoers. This Orwellian vision has been labelled by Allspach as 'transcarceral spaces',[943] a phrase that gives a flavour of the virus-like ability of carceralism to encroach into society, and as illustrated by the very recent willingness of many to forego their freedom in response to Covid-19.

As noted above, social policy has been tainted by carceralism, so that there are locations 'in poor urban areas that are slowly but steadily being managed like quasi-prisons'.[944] A visit to a

[938] Weaver and Lerman (n 862) 25.
[939] Weaver and Lerman (n 862) 2.
[940] Moran, Turner and Schliehe (n 795) 15.
[941] Katherine Beckett and Naomi Murakawa, 'Mapping the shadow carceral state: Toward an institutionally capacious approach to punishment' (2012) 16 Theor. Criminol. 221, 222.
[942] ibid 222.
[943] Anke Allspach, 'Landscapes of (neo-)liberal control: the transcarceral spaces of federally sentenced women in Canada' (2010) 17 Gender Place Cult. 705, 707.
[944] Jefferson (n 807) 109.

social housing area quickly confirms that there is a difference in the environment beyond the immediate visual cues as to location, for example shown by 'the increased use of surveillance cameras'.[945] The potential for panoptical and pan-technical corralling of individuals, whether criminal or not, is increasing but, unfortunately, it is suggested, it has little to do with a constructive focus on a community. Instead, it is reflective of carceral policies designed to monitor, control, and corral individuals, including children. In this sense, it is argued that carceralism is inevitable in the JJS in its present form for the reasons examined above.

7.5 Conclusion

This chapter broadened the thesis's scope by moving beyond the overt presentation of the JJS in England and Wales and explored the hidden carceral features inherent in any system requiring control and compliance. The preceding chapters have focused on how child offenders are perceived within the JJS, and how they are dealt with. Beyond the problem of how they are perceived, these children are also subjected to a more hidden form of control which acts to manipulate their behavioural responses in complying with court orders, and to control their general behaviour within their community. Such controls appear to be inherent and unavoidable in any formalised system whether imposed on an individual, a group or a community. However, it is this very ubiquity which emphasises the importance of recognising the existence of such controls within the JJS, and their potential behavioural consequences, both positive and negative.

The examples of carceralism used as illustrations in this chapter have indicated the breadth and depth of carcerality within the JJS and its potential to affect both the system in which it exists, and those child offenders drawn into it. Child offender clients often present as being at a loss in knowing how to navigate the JJS. A common cry from young clients is that they do not understand the purpose of the imposed controls, especially in their peer groups and communities. Sometimes the demands are just too onerous for a child offender to meet satisfactorily, and repeat offending leads back, inexorably, to court. This is even more galling and confusing for the child offender when the court appearance is not for further criminality but a failure to comply with the requirements of an existing court order.

This thesis is concerned with the need to focus on the individual child offender and the carceral features of the JJS, it is argued contribute, directly and indirectly, to the behavioural pressures

[945] Jefferson (n 807) 109.

on a child offender, and curtail his ability to fully benefit from diversion and rehabilitation. Without doubt, these features have the potential to negatively impact on an individual's behaviour and open the way to further wrongdoing. More broadly, they have wide effects on a child offender and his family through generational criminality, and on his peers, through the creation of micro-communities of child offenders. Their effects even reach out into the wider community, through the ripple of carceral control and monitoring. In the wider world, this ripple of carceral control extends beyond the JJS, into the community, with the urban environment especially having been transformed by technology so that, if only by the plethora of CCTV cameras, the carceral landscape appears almost inescapable. Carceralism treats all within its reach as being susceptible to control, but this control can lead to negative as well as positive behavioural outcomes. The increasing prevalence of societal carceralism offers a truly panoptical view of child offenders and this can only increase with advances in technology, artificial intelligence, and real-time monitoring. The child offender is never free from control and observation. This is perhaps nightmarish enough but, in addition the carceralism of the JJS also exposes the child to other offenders, and their poor behaviours, which potentially creates another barrier to their rehabilitation.

Carceralism has been given prominence in this thesis because it adds fundamental support to the thesis's argument that a simple reformation of the present system will not achieve the desired end of refocusing the JJS on the child offender as an individual, and as a child. This chapter illustrates the social control and ghettoization produced by carceralism, both in the JJS and the community, which make it a major stumbling block to achieving better outcomes for most child offenders.

It is argued that a better understanding of the way these carceral controls operate within the JJS, and an understanding of their negative effects on children would facilitate a better appreciation of the potential benefits stemming from their diversion and rehabilitation. Along with a better understanding of the carceral nature of the JJS, there would be better understanding of why compliance failures occur, and how further offending may simply be a consequence of a child's involvement with it. It is argued that carceralism means that failure is effectively 'baked in' as a direct consequence of its carcerality. On a positive note, the chapter concludes that while carceralism is an inevitable feature of any JJS, it can be addressed, and its effects mitigated through a wider understanding of its potential behavioural effects on child offenders. A reformed JJS would take account of the risks carceralism poses and aim to deal

with child offenders through a less criminalised and onerous process and which would be free from the present focus on criminal behaviour, diversion, and reform.

The next chapter

The next chapter will consider how the JJS could be effectively reshaped to better focus on the individual child. It will present practical ideas and proposals for the treatment of criminalised behaviour by the individual child offender. It will begin with a consideration of child development and how it contributes to child criminality. It will then examine the level of maturation of child offenders and the factors that can undermine their development into mature adults. It will also include an examination of the long-term detrimental effects of carceralism. This thesis has been used to explore the experiences of the individual child offender in several jurisdictions within and beyond the U.K. It has also included the writer's personal experience, as experienced through the lens of criminal defence practice, and his interactions, sometimes over multiple generations, with child offender clients and their families. The next chapter represents the culmination of this thesis because it represents the writer's views as to where juvenile justice should aspire to go next. It offers a proposal for reform of the JJS, through the introduction of behavioural problem solving to address the previously outlined problems of the present JJS. It offers insights into why some children become engaged in unwanted criminalised behaviours and proposes avenues which might more successfully address problematic behaviours.

It is still remarkably easy in the Youth Court for the professionals present with the child defendant sitting, watching and occasionally participating, to forget his vulnerability whether because of his demeanour, bravado, or indifference to misinterpret his behaviour and overlook the salient fact that he is still a child. he must always be treated as such, even when, as with Thompson and Venables, the crimes are so terrible.

Undoubtedly the ideas and views expressed her are tinged with subjectivity, and this is freely acknowledged, but this does not lessen the validity of the views as a contribution to the juvenile justice debate.

Chapter 8

Behavioural problem solving

8.1 Introduction

The rationale for this thesis is a deep concern about the effects of the juvenile justice process on child offender clients. Professional practice as a criminal defence solicitor has entrenched the belief that more suitable and effective ways to deal with childhood criminal behaviour should be implemented. The research discussed in the preceding chapters and analysed from the perspective of a professional participant has reinforced the opinion that much more can be done to address the issue. There have been many piecemeal reforms imposed, often in response to political reactions to notorious cases involving child offenders. This chapter argues that in these circumstances, a repurposed system is required which would employ a more holistic and therapeutic approach in response to criminalised childhood behaviour.

Scotland and Ireland have both sought solutions to the problem of child offenders. Each has sought to tackle childhood criminality in a different way to meet the challenge but, in both jurisdictions, the problematic behaviours of child offenders persist. The reasons behind this persistence, and why it happens, is a societal question and this chapter proffers an answer. It also outlines a different, and more radical, response to child offending behaviour which addresses the issue from a fundamentally different starting point, and which attempts to draw on the knowledge base already developed in this thesis. A new approach to juvenile justice is put forward using the concept of behavioural problem solving (BPS) as a means by which child offenders can learn to address their behaviours, and their progress along the developmental pathway to individual maturity can be promoted. This proposal is not put forward as a panacea, or as a single solution, rather it is offered as a contribution to the debate. BPS envisages the treatment of the unwanted criminalised behaviours in children through an exploration of the factors that have led to those behaviours. The use of the word treatment is intended to reinforce the notion that in many respects and in many instances, childhood criminal behaviour is part of a spectrum that reflects the maturing child's individual development. Such behaviour, it is argued, should, in many instances, be seen as normal, and within the natural childhood developmental spectrum. It should also be seen sometimes as an inevitable response to an individual child's difficult life circumstances.

BPS requires child offenders to be viewed through a different lens as vulnerable children who can best be helped and supported by targeted interventions which promote behavioural change.

This would require an initial assessment of their problematic behaviour, and an analysis of the factors underpinning it to determine whether it could be addressed by triaged pathways to promote the individual child's welfare. The individual child would then be processed through the juvenile justice system (the JJS) which would, wherever possible, aim to cause the least harm by minimising the use of, or involvement with, the police or the court processes. BPS would aim to provide a pathway for a child to exit the JJS at the earliest point in their offending career by using effective and dedicated BPS programmes. These would be focused on aiding the rehabilitation of such children, and the promotion of better outcomes for them. The intended purpose of the JJS would be simple, to provide a therapeutic response to criminalised childhood behaviour to produce a more positive experience for those children. This would promote more positive outcomes for them, thereby improving their life chances for education, employment, and as citizens.

The exploration of BPS continues with an outline of how this approach, based on the concept of therapeutic jurisprudence, could be developed, as an adjunct to the present JJS. It examines and evaluates the basic ideas behind the BPS, including the concept of behavioural problem solving, and the origins of therapeutic jurisprudence.

The chapter concludes with an analysis of the consequences of such a fundamental reformation of the JJS and its value to this thesis in meeting its goals. It is argued that BPS, as a concept, offers a positive contribution by refocusing the JJS away from the processes and procedures associated with the traditional criminal justice mindset. Further, it is suggested that BPS moves the reformation argument beyond the aspirations of the Child First approach, to a wholly new position, which is based around the needs of the individual child offender. It will conclude that this proposal makes a positive contribution to the debate surrounding the criminalisation of children who, it is argued, deserve a more child-orientated resolution for their benefit and for society's.

8.2 Behavioural problem solving and the origins of therapeutic jurisprudence

BPS seeks to apply the ideas of therapeutic jurisprudence to the JJS to promote individual desistance from crime and to aid rehabilitation. Therapeutic jurisprudence rests on an underlying philosophy of examining, assessing, and treating offenders with programmes focused on the individual and his criminal behaviour. Historically, its development can be traced to late nineteenth century America, with the creation of a JJS with a distinct court structure in Chicago, and in a quasi-therapeutic jurisprudence court model in Florida in 1899.

The latter was a judge led initiative dedicated to 'addressing the root cause of drug-related crime (substance abuse) rather than prosecutorial outcomes'.[946] It represented a 'response to the 'revolving-door' syndrome' and became the first drug court in the United States (US).[947] Its pioneering approach can be contrasted, even today, with the limited efforts made in England and Wales.[948] The modern iteration of the therapeutic jurisprudence concept was encapsulated by Mack in 1909. He suggested that it was necessary for a judge to

> 'understand the boys' point of view and ideas of justice; he must be willing and patient enough to search out the underlying causes of the trouble and to formulate the plan by which, through the cooperation, ofttimes, of many agencies, the cure may be effected'.[949]

Mack's idea remains relevant in the basic identification of the real behavioural problems to be tackled when dealing with a child offender. He observed that the issue to be determined was not the commission of an offence, but rather who the child was as a person

> 'and how he has become what he is, and what can best be done, in both the interests of the child and of the state, to save him 'from a downward career''.[950]

The idea of therapeutic jurisprudence was renewed and promoted by Wexler and developed by Winick in the 1980s and 1990s in the US, stressing the idea that 'substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or antitherapeutic consequences'.[951] The essence of their core arguments was

> 'the law's impact on emotional life and on psychological well-being. Wexler and Winick wanted to concentrate on the capacity of the law to both help, as well as hinder, positive outcomes for defendants, and on the need to carefully look at the possible results of a legal decision'.[952]

Wexler placed therapeutic jurisprudence within the legal procedural framework, observing that

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[946] Helen Murrell, 'Therapeutic Jurisprudence' (2012 Conference Paper Howe Island) 4 < http://learnedfriends.com.au/Conferences/Conference-Papers > accessed 18 July 2021.
[947] ibid 4.
[948] Home Office, *Drug Interventions Programme* (DIP) (Home Office 2011). For example, a positive Class A drug test following arrest for specified offences (usually shoplifting) imposes requirements to attend a treatment provider. Failure to attend is a criminal offence but attendance does not guarantee immediate treatment.
[949] Nigel Stobbs, 'Mainstreaming Therapeutic Jurisprudence and the Adversarial paradigm Incommensurability and the Possibility of a Shared Disciplinary Matrix' (2013)) SSRN Research Journal Research Gate 202 <https://www.researchgate.net/publication/272259954_Mainstreaming_Therapeutic_Jurisprudence_and_the_Adversarial_Paradigm_Incommensurability_and_the_Possibility_of_a_Shared_Disciplinary_Matrix> accessed 8 July 2021.
[950] ibid 202. Quotes Julian W Mack, 'The Juvenile Court' (1909) 23 Harvard Law Review 104, 119.
[951] Kathryn Kelly, 'Essays in Therapeutic Jurisprudence. By David B. Wexler and Bruce J. Winick (Review)' (1993) 9 (1) J. Contemp. Health L. & Pol'y 623, 624.
[952] College of Health, *Therapeutic Jurisprudence* (College of Health, University of Alaska Anchorage 2009) 1 < https://www.uaa.alaska.edu/academics/college-of-health/dep…ter/alaska-justice-forum/26/1spring2009/d_therapeutic.cshtml > accessed 18 July 2021.

> 'other things being equal, the law should be restructured to better accomplish therapeutic goals. Whether those other things are equal, however, is often debatable, and therapeutic jurisprudence does not resolve that debate'.[953]

He argued for a refocused procedural system that addressed problematic childhood behaviour, recognising that the capacity of children to behave in a societally unacceptable way was a feature of their immaturity. The unwanted childhood behaviour would not be regarded as a failure by them but, rather, as symptomatic of their development. In this light, it would be seen as susceptible to treatment to improve behaviour. Such children are on a developmental pathway and can be encouraged or nudged by guidance when their unwanted behaviour becomes criminal. The aim was, and in this chapter is, to refocus them, with their co-operation, towards more acceptable behaviours.

As an approach to addressing unwanted childhood behaviours, the uniqueness of therapeutic jurisprudence is its philosophical focus 'on the emotional life and psychological wellbeing of those affected by decisions' of the justice system.[954] It draws 'on the work of the social sciences in charting the therapeutic or anti-therapeutic effect of decisions by courts and justice agencies'.[955] BPS would similarly re-orientate the JJS, from a system that, ultimately, relies on the prosecution and punishment-rehabilitation matrix, to one that would be focused on the individual. It would place the child offender and his unwanted behaviour at the centre of the process, rather than as secondary to the offending behaviour. Placing the child offender at the centre would transform the criminal justice process, albeit with the purpose of reform, into one with an appreciation of the wider issues that underpin criminalised behaviour. It can be argued that therapeutic jurisprudence is meddling in the legal process. However, in the context of this thesis, and its refocusing on the individual child, it is an idea that holds enormous potential. Therapeutic jurisprudence offers an alternative route, by altering purpose and terminology, to deal with childhood offending, one that bends towards non-medicalised 'treatment' of problematic behaviours. The effective utilisation of BPS depends on the perspective from which the justice system is viewed, that is whether 'the law and legal institutions [should] have healing effects or detrimental effects' or, whether it is possible 'to focus more on problem-

[953] David B. Wexler, 'Therapeutic Jurisprudence and the Criminal Courts' (1993) 35 (1) Wm. & Mary L. Rev. 279, 280.
[954] Kathy Douglas, 'Steering through troubled waters' (2007) 81 (5) Law Institute Journal 1, 1.
[955] ibid 1.

solving without sacrificing the rule of law' and the principles that our legal system serves, such as predictability and stability.[956]

For some child offenders, a therapeutic jurisprudence process would be of limited relevance in the context of family and social group behaviours which would be considered reprehensible, for example by District Judges, magistrates, and most of the public. In such instances, there would be a continuing need for a limited number of individuals to be dealt with through a traditional prosecution pathway. However, BPS delivered within the JJS process, would offer the potential benefits of a therapeutic jurisprudence model which could take more account of societal changes, for example with courts providing 'frontline of responses to substance abuse, family breakdown, and mental illness'.[957] Applying therapeutic jurisprudence programmes has been described as staunching 'the flow of such problem behaviours into the courtroom',[958] and addressing them in specie rather than being focused on their foremost classification as criminal. The boldness of such claims is made in part because of the difficulty of maintaining the fiction in the JJS that child offenders are as responsible for their decisions and actions as adults. This fiction limits the extent to which an individual's problems are taken, or not taken, into account. It has been identified as a bar to 'effective adjudication of cases', one that would undermine the use of therapeutic jurisprudence as a treatment tool.[959] This highlights the prescriptive nature of criminal justice systems which operate within defined procedural parameters. Individualised enquiries, as encouraged by therapeutic jurisprudence, are avoided, and no assessment is made to address the individual's problems or the traumas that have manifested themselves in unwanted criminal behaviour. The need for such enquiries is even greater in relation to child offenders.

8.3 Evaluating the application of BPS to child offenders

The BPS concept, expressed as non-medicalised treatment through programmes, introduces the idea of consent to any proposed programme for the child offender. This is an important shift in the dynamic of responsibility for the unwanted behaviour. In the JJS in England and Wales, the child offender presents as a powerless participant who is dealt with and processed for his wrongdoing. In BPS, the child offender is the fulcrum around which the other elements

[956] Shirley S. Abrahamson, 'The Appeal of Therapeutic Jurisprudence' (2000) 24 Seattle University Law Review 223, 223.
[957] David Rottman and Pamela Casey, 'Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts' (1999) National Institute of Justice Journal 13, 13.
[958] ibid 13.
[959] ibid 13.

coalesce to address the criminal behaviour. Consent to treatment, as part of a BPS programme, is an issue that is both a weakness, and a strength; without it the purpose founders as the child has not agreed to participate, with it, the child offender assumes responsibility for the treatment and the outcome. The child offender must have the capacity to consent to BPS though it is necessary to distinguish this from the concept of capacity in criminal law. Considered from the perspective of an individual's autonomy, consent expressed 'as a right, a virtue and a capacity'[960] has been recognised as 'a necessary condition, because an individual who does not have capacity cannot exercise rights or develop virtues'.[961] The consent of child offenders is dependent on their autonomy to act, to have a degree of self-reflection and control of their actions. Consent expressed in these terms may be indicative of a child's potential to develop 'an integrated life by reviewing and shaping [his] projects, motives, and conduct'.[962] However, a child offender by his presence in the JJS must be treated as vulnerable and recognised as having limited abilities and responses. This reflects the cross-over boundary between the therapeutic jurisprudence process, expressed through BPS, and the criminal justice process. Child offenders are the product of non-legally relevant and unresolved areas of personal trauma that have ultimately broken through into unwanted criminalised behaviour. That is the rationale for treatment by therapeutic jurisprudence principles and BPS as envisaged in this chapter.

In a JJS without the application of BPS, there is no option or purpose in child offenders 'discussing their actions with others outside of their legal team'.[963] This ensures, for example, that case preparation and presentation in court are not 'damaged' by procedurally irrelevant personal history being disclosed. Unfortunately, this runs counter to the psychological theory that suggests 'when a child is upset but does not talk about it, the child is more likely to "act-out" behaviorally [*sic*]',[964] and the drivers producing unwanted behaviours remain unaddressed. However, the potential of BPS as an adjunct to a JJS can only be utilised by the professional participants involved, and it would procedurally alter their role and purpose. From the prosecution perspective, save in the most serious or high-profile matters, BPS would redefine the evidence in a case as part of an information package which would determine the appropriate intervention programme to assist the child. From the offending perspective, it

[960] Astrid Birgden, 'Therapeutic Jurisprudence and Offender Rights: A Normative Stance is Required' (2009) 78 Rev.Jur.UPR 43, 45.
[961] ibid 45.
[962] ibid 45.
[963] Michael Jenuwine and Gene Griffin,'Using Therapeutic Jurisprudence to Bridge the Juvenile Justice and Mental Health Systems' (Scholarly Works. Paper 452 Notre Dame Law School 2002) 65 < http://scholarship.law.nd.edu/law_faculty_scholarship/452 > accessed 18 July 2021.
[964] ibid 70.

would entail a more detailed presentation of child offender information, from a variety of sources, to facilitate an understanding of the behavioural causes and drivers. The Youth Court's role, in such a process, would be redefined to focus on the implementation of BPS measures, and the role of the child offender's lawyer would widen into a quasi-social worker-cum-legal adviser. The latter would have implications for client confidentiality in relation to the instructions provided and the advice given. These changes would represent a major widening of the parameters of the JJS and would promote a legal process requiring 'the use of an interdisciplinary approach that focuses on existing behavioral [*sic*] science research and methods'.[965]

BPS would therefore promote a process that encourages child offenders 'to develop their own rehabilitation plan in which they problem-solve about future risk of crime'.[966] This demands the child offender's active involvement and participation in the process to ensure that he is part of a problem-solving programme tailored to his individualised behavioural needs. In essence, the child offenders would become 'the "architects" of their own relapse prevention plans' on the basis that their involvement in devising their own behavioural treatment programme would mean that they 'will be more committed to changing their own behavior [*sic*] '.[967] Therapeutic jurisprudence delivered through BPS would shift the focus on child offenders from the present legal process as the driving rationale. It would essentially weigh the relative usefulness of the legal process against the value and balance of the BPS elements for the betterment of the individual child offender. This would involve assessing firstly whether the substantive law actively promotes therapeutic objectives by balancing community rights against individual rights. Secondly, it would determine whether the applied procedures serve to maximise the therapeutic effects and minimise the anti-therapeutic consequences, and the degree to which the behaviours of legal professionals are therapeutic or antitherapeutic.[968] This last aspect would require those professionals involved to determine their own value and contribution within a BPS approach and whether they improve outcomes or not for the child.

As envisaged, BPS would certainly promote positive outcomes and would complement the JJS, and the argument of this thesis by addressing the need to refocus on the individual child offender. However, successful lawyering may not necessarily be conducive to positive

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[965] Carolyn Copps Hartley and Carrie J. Petrucci, 'Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law' (2004) 14 Wash. U. J. L. & Pol'y 133, 154.
[966] ibid 154.
[967] ibid 154.
[968] Murrell (n 946) 5.

outcomes for the child offender. For example, a successful Youth Court practice depends on the lawyer-client relationship being maintained, and it would, clearly, be naive to ignore the long-term consequences for the individual child offender when such an offender has a monetary value to a law firm. The extent of individual professional willingness to engage in BPS may reflect an openness to alternative approaches, though only, it is suggested, within the legal comfort zone of 'proper law', including the present legal system and the funding of Legal Aid in relation to child offenders. In effect, the adoption of a therapeutic approach depends on the degree to which it 'is consistent with, and subordinate to, adjudication (adversarialism) [which] is deeply ingrained in our current jurisprudential worldview'.[969] Hopefully, BPS would contribute to how legal professionals view their role in relation to child offenders and lead practitioners to individual reflection 'about the role of the wider legal system in a civil society'.[970] The present legal system, however, encourages self-interest within the legal profession. BPS would involve therefore fundamental change on a number of levels, from process to funding.

BPS would build on interventions that, to a degree, already exist within the JJS but which are also tinged with the negative association of being a punishment, such as, for example, a Referral Order imposed on conviction. As envisaged, BPS would provide a more comprehensive process which would acknowledge criminal behaviour and aim to address it in a positive way, rather than by punishment. It would

> 'be conceived of as, primarily, a set of procedural guidelines, protocols and techniques for making the justice system more user-friendly in quite specific ways'.[971]

A BPS process, as developed from Wexler's therapeutic jurisprudence model, has merit when considered in relation to courtroom practice but, as with all ideas for improving JJSs, it is 'not a panacea for the justice system's problems' and 'other values of the justice system may outweigh therapeutic values in particular cases'.[972] This may appear especially the case in England and Wales, where public disquiet, and media demonization of a child offender can lead to far reaching outcomes for all child offenders.[973] Nevertheless, the vulnerability, whether

[969] Stobbs (n 949) 25.
[970] Stobbs (n 949) 176.
[971] Stobbs (n 949) 176.
[972] Michael S. King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 (3) Melbourne University Law Review 1096, 1126.
[973] The James Bulger Case. As discussed in Chapter 2 and the removal of the doli incapax rebuttable presumption.

as a result of traumas or adverse events suffered by such children should, it is argued, be evaluated in any JJS, and especially in examining the use and application of BPS as a response.

8.4 Examining childhood traumas and adverse events

In addition to addressing unwanted criminalised behaviour, BPS would consider background factors that have produced or contributed to that behaviour. Childhood maturity occurs over time and any group of child offenders will contain a range of maturity and behaviour. The age of criminal responsibility (ACR) has been examined in Chapter 2 and the usefulness of a chronological age was questioned in relation to the developmental level of the individual child. There are obvious exceptions where adult individuals are not considered criminally responsible, for example where individual development is restricted, or impaired such as with impaired mental development because of chromosomal abnormality, or definable mental health related conditions. The concept of diminished responsibility also recognises a limitation to an individual's responsibility for his actions. However, the same logic that applies limitations to criminal responsibility in an otherwise fully responsible adult, is not applied to children whose level of maturity is less. A child may thus be held fully responsible for his behaviour under the ACR, and no weight may be given to the individual child's capacity and ability to understand. BPS, by contrast, would recognise the variation in child maturity, and the degree to which an individual child was responsible. Though all individuals are responsible for their behaviours in that they physically act, they are not all equally responsible in understanding the nature and consequences of them. The idea of 'consciousness of guilt',[974] as observed by Nietzsche, reflects that for most of history, 'punishment was *never* based upon the responsibility of the miscreant for his action, and it was *never* presumed that only the guilty should be punished'.[975] This mirrors the JJS as a blanket idea which covers the ACR as applied to child offenders, and yet, it has less relevance the younger the child offender. In practice, the limitations of a child offender to know and appreciate the nature of his act, is readily observable but, for example, in the Youth Court there must be first an acceptance of guilt, or a finding of guilt, before considering how to rehabilitate him. Such a harsh approach can be contrasted with the more sympathetic BPS assessment envisaged in this chapter.

The examination of the drivers of unwanted childhood behaviours and consequential criminalised behaviour that occurs in some instances, takes the thesis material beyond that

[974] Friedrich Nietzsche, *On the Genealogy of Morals* (Penguin Books Ltd, London 2013) 48.
[975] ibid 49.

discussed in the preceding chapters. Non-legal ideas have a contribution to make to this thesis's quest to focus on the individual child offender and BPS offers a route to achieving that goal. BPS demands consideration of factors which may affect a child's behavioural responses before the issue of criminal responsibility becomes an issue. For example, dishonesty and violent offences tend to manifest themselves in family circumstances where other unwanted social behaviours occur, including alcohol, drug dependency, and domestic violence. These early childhood events are often rehearsed when talking with child clients and their parents. Such incidents may be categorised as traumatic or adverse childhood events (ACEs) and can be directly linked to later poor physical and mental health, educational and socio-economic outcomes. This has promoted new avenues of understanding of childhood criminality and a recognition of the limitations they may place on a child's ability to understand and appreciate the quality and potential outcomes of his behaviours. In turn, this has led to developments in educational and medical services to address the resultant trauma. These developments have not, however, been delivered effectively, and they are not reflected in the JJS in England and Wales. Social and economic programmes, in terms of child offenders being punished and the cost of programmes to offer second chance education opportunities to such children, continue to be restricted by the non-acceptance of childhood trauma and adversity as relevant to child offending.

The notion of cause and effect is well known in the physical world and, as an idea, it is equally applicable to childhood offending in terms of criminalised behaviour and rehabilitating child offenders. Children are a product of their background and experiences, both positive and negative, and there are identified correlations between ACEs and problems in childhood that can continue into adulthood. They are 'forms of emotional trauma that [go] beyond the typical, everyday challenges of growing up'.[976] ACEs have been recognised as having 'a tremendous impact on future violence victimization and perpetration, and lifelong health and opportunities. As such, these early experiences are an important public health issue.'[977] Importantly, from the point of view of treatment, and BPS, they need not be 'clinically deemed traumatic' but the evidence indicates an association of behaviour with 'a significant effect on the child'.[978] These

[976] Donna Jackson Nakazawa, *7 Ways Childhood Adversity Can Change Your Brain* (Psychology Today 7.8.15) <https://www.psychologytoday.com/blog/the-last-best-cure/201508/7-ways-childhood-adversity-can-change-your-brain > accessed 18 July 2021.

[977] Centers for Disease Control and Prevention: Violence Prevention, *Adverse Childhood Experiences* (Centers for Disease Control and Prevention, Atlanta 2017) < https://www.cdc.gov/violenceprevention/acestudy/about_ace.html > accessed 18 July 2021.

[978] Samantha Pratt, 'The Impact of Childhood Adversity on Later Anxiety' (OPUS, Department of Applied Psychology, New York University 2014) 4

effects can include, for example, reduced physical brain development in the hippocampus, an area responsible for processing emotion, memory and controlling stress levels. Felitti and Anda observed a size reduction in ‘an area related to decision-making and self-regulatory skills, and the amygdala, or fear-processing centre’.[979] The development of a child’s brain can also be effected by trauma, producing neural pruning affecting the ‘default mode network, brain-body pathway and brain connectivity’.[980] Neural pruning occurs when a child faces unpredictable, chronic stress of repeated ACEs, producing neuro-inflammation and ‘a reduction in neurons and synaptic connections’.[981] The extent of such neural pruning makes it clear that the consequences of ACEs go beyond the physical and neuro-physical, and undoubtedly have an impact on externalised childhood behaviour, including criminalised behaviour.

In the JJS in England and Wales, the extent that the child offender’s brain function is affected by ACEs, and how they may underpin subsequent criminalised behaviour, is ignored for the most part when determining how to process a child. Nevertheless, when the brain is affected, or compromised, by ACEs, it may cease to be an effective limiter on behavioural responses in childhood, and beyond, so that those individuals ‘may have trouble reacting appropriately to the world around them’.[982] The outcomes from ACEs are not predictable and can be countered by resilient parenting. As Pratt observes, brain function can be recovered ‘in under-connected areas of the brain. The brain and body are never static; they are always in the process of becoming and changing’.[983] However, the fact that these fundamental behavioural outcomes, relating to ACEs, are not taken into account for child offenders, are not even seen as relevant to understanding childhood criminalised behaviours in the JJS, is a system failure that needs to be addressed. ACEs ought to be viewed at least as explanatory, and perhaps even exculpatory, of childhood criminality. The consideration of ACEs endured by a child could also contribute to BPS, by allowing an analysis of the underlying behavioural causation behind his criminal behaviour and an examination of the interplay of nature and nurture within his emotional and social development. The ideas expressed in this thesis represent an attempt to describe the drivers of child development in a more appropriate way, as biosocial factors. This is a more comprehensive term that recognises that nature and nurture interact, and it highlights ‘the various ways biological and environmental variables work together to cause problem behavior

< http://steinhardt.nyu.edu/appsych/opus/issues/2014/spring/pratt > accessed 18 July 2021.

[979] ibid 4.

[980] ibid 5.

[981] ibid 5.

[982] ibid 6.

[983] ibid 7.

[*sic*]'.[984] It would perhaps finally demonstrate the truism that a child is the product of his upbringing, both directly by his parents, and through events that mark him during his childhood.

ACEs whether in the home or community environment can lead to 'criminal and noncriminal behaviors [*sic*] [which] are thought to result from a combination of the socialization process, situational circumstances, and group values'.[985] A child's general upbringing by his parents and family, and the ACEs he experiences combine to create his perception and understanding of the world, and his place in it and to define the parameters of his behaviour. Whether an early intervention to address an ACE would be more effective than a later one, through the JJS, is a difficult question to answer. This thesis, in effect, asks whether pre-criminal trauma induced behaviours, such as ACEs, need to be considered because, it is suggested, that they offer insights into a child's future development and how he might be negatively affected by them. Addressing such events would offer a dividend, not just economically but also socially, by reducing the behavioural traits which contribute to criminalised behaviours later in life. However, it must be recognised that a BPS programme would undeniably face difficulties in identifying and understanding the life defining ACEs experienced by an individual child. Nevertheless, such interventions have been delivered through programmes in the UK that have identified ACEs and the behavioural challenges and needs involved. These programmes have been developed with the intention of reducing the risk of later criminality. One example is the Routine Enquiry about Adversity in Childhood (REACh) programme developed by Lancashire Care where healthcare professionals 'routinely ask individuals about their traumatic/adverse experiences during the assessment process. Practitioners can then respond and plan interventions appropriately'.[986] The programme assesses the effects of ACEs that have been described by the World Health Organisation as

> '…some of the most intensive and frequently occurring sources of stress that children may suffer early in life. Such experiences include multiple types of abuse; neglect; violence between parents or caregivers; other kinds of serious household dysfunction such as alcohol and substance abuse; and peer, community and collective violence'.[987]

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[984] Michelle Coyne and John Paul Wright, Nature Versus Nurture (Oxford Bibliographies, OUP 2014) <https://www.oxfordbibliographies.com/ > accessed 18 July 2021.
[985] Kevin M. Beaver and Holly Ventura Miller, *Sociological Criminology and Drug Use* in Kevin M. Beaver, J.C. Barnes, Brian B. Boutwell (eds), The Nurture Versus Biosocial Debate in Criminology On the Origins of Criminal Behavior and Criminality (Sage Publications 2014) 318.
[986] Lancaster Care NHS Foundation Trust, *What is REACh* (Lancaster Care NHS Foundation Trust 2017) < https://www.lancashirecare.nhs.uk/what-is-reach > accessed 18 July 2021.
[987] ibid.

The REACh programme is designed to 'assist them in understanding their current circumstances and enable us to plan more focused interventions'.[988] The aim is for the programme to 'be a part of any integrated prevention and early intervention service'.[989] The examination of the effects of ACEs includes consequential criminality as

> 'Young offenders are at higher risk of having mental health problems. This may be due to having risk factors that lead to offending behaviour, such as poor parenting or risk-taking behaviours'.[990]

Criminal defence practice, for example in the Youth Court, reinforces the view that child offenders are already vulnerable, not just in terms of repeat offending behaviour, but also in relation to later life chances. It has been recognised that the fact of processing criminalised behaviour through the JJS itself becomes a quasi-ACE and 'subsequent consequences may lead to further detachment and increasing risk of homelessness'.[991] ACE outcomes demonstrate that there are implications for the JJS, and childhood traumas, whether or not described as ACEs, underscore the necessity to analyse or consider the extent to which these factors should mitigate the application of JJS procedures. ACEs should prompt consideration of more therapeutic interventions. These behaviours can best be understood as flowing from a preceding event, which affects the developmental process. The difficulty in applying this in the JJS relates more to societal and economic problems rather than an acceptance of the concept. As an approach to understanding childhood criminality, and contributing to this thesis, ACEs, and childhood trauma in general, undermine the prosecution-punishment paradigm which continues to be the foundation of the JJS in England and Wales. The effects of ACEs on an individual child can clearly lead to difficult behavioural problems which can, in turn, develop into unwanted criminalised behaviours.

8.5 The effects of childhood traumas

The behavioural consequences of ACEs raise questions as to how a chronologically based JJS can be considered fit for purpose. The steady process of mental and physical development in childhood is vulnerable to family and community factors which limit or reduce appropriate, age-related, functioning and the learnt behaviours and strategies acquired by a child to cope

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[988] ibid.
[989] ibid.
[990] Specialist Public Health Directorate, *Integrated Strategic Needs Assessment Children and Young People - Emotional Health and Wellbeing* (Blackburn with Darwen Council) 37 < http://www.blackburn.gov.uk/Lists/DownloadableDocuments/CYP-ISNA_final-full-version.pdf > accessed 18 July 2021.
[991] ibid 37.

with the vagaries of life. A child's personal development is objectively relevant to his assumption of criminal responsibility for his actions. However, the question is to what degree, and whether it can or should form part of a JJS intervention. How to determine the point in a child's developmental journey at which an event becomes behaviourally relevant ought, it is argued, to be key in deciding whether he should bear criminal responsibility for his actions. In this context, there is no fixed starting point, rather it depends on the nature of the trauma endured because it is 'through the first years of life, the brain undergoes its most rapid development, and early experiences determine whether its architecture is sturdy or fragile'.[992]

ACEs can arise from well-intentioned interventions which still have negative consequences, as shown for example by children who when 'placed shortly after birth into orphanages with conditions of severe neglect show dramatically decreased brain activity compared to children who were never institutionalized'.[993] The role of a child's home environment is a major factor in their development so that children placed in foster care before they were 2 years old showed increased IQs and 'their brain activity and attachment relationships were more likely to become normal than if they were placed after the age of two'.[994] Similarly, children in care tend to be overrepresented in the client base of most criminal law firms, again highlighting the negative effects of a well-intentioned social service. Addressing these ACEs through structured intervention earlier rather than later during the child's life seems to be more effective, though distinguishing which is the better intervention route is not straightforward. Not unsurprisingly, the most successful interventions occur when the affected children are placed in a secure family home environment. For example, a child with a settled network of family relationships and 'early care and education providers' experiences less 'stress hormone activation when frightened by a strange event'.[995] The worrying implication is that by the time a child offender appears in the JJS a great deal of time sensitive development has been lost, yet a positive intervention is still possible.

Criminal defence practice, for example in the Youth Court, emphasises the delicacy of balancing concerns about an individual child's development and the degree of his responsibility for his actions. A child offender's parents often demand the child's lawyer request the Youth

[992] Center on the Developing Child, *InBrief: The Impact of Early Adversity on Children's Development* (Centre on the Developing Child, Harvard University) < http://developingchild.harvard.edu/resources/inbrief-the-impact-of-early-adversity-on-childrens-development/ > accessed 18 July 2021.
[993] ibid.
[994] ibid.
[995] ibid.

Court to treat their child leniently because he has attention deficit hyperactivity disorder (ADHD). It is common for parents to produce the prescribed medication to verify that he has 'an excuse' for his criminal behaviour. It tends not to carry weight with District Judges, but some magistrates seem more able to recognise the wider picture and are therefore more willing to go beyond the sentencing guidelines to which they are referred.[996] However, even where magistrates show some insight, there is often a lack of appreciation of the nature and duration of the trauma underpinning the criminal behaviour being addressed by the court. Research on ACEs suggest that all children are susceptible to traumatic behaviours and events and that these produce both immediate and slow burn effects. In the long term, these affect an individual's wellbeing, physically and mentally, and his ability to interact in society. Society's failure to act effectively through its state providers, such as schools or GP referrals, has long term cost implications, especially for education and medical provision. These costs may potentially outweigh those of assisting such children earlier and certainly before any criminal behaviours arise and the child enters the JJS.

A common diagnosis that attaches to child offenders is, as mentioned above, ADHD, a condition that encompasses a group of behavioural symptoms that tend to be noticed at an early age, with most cases diagnosed when children are 6 to 12 years old.[997] At the higher age, ADHD coincides with increasing physical development and challenging behavioural boundaries which in some cases opens the gateway to criminality. However, there is no definitive diagnosis that a child has ADHD and, as a term, it describes 'a serious mental health concern that is characterized by inattention, hyperactivity, and impulsivity'.[998] It is 'better characterized as a continuum'[999] of behaviour as child offenders with high levels of symptoms, even if they do not meet the criteria for ADHD, may nevertheless struggle with attention.[1000] It is arguable from practical experience with parents of child offenders that rather than challenge their assertion of ADHD, it is helpful to recognise that criminalised behaviour is often a manifestation of childhood waywardness. Unstructured and unfocused thinking which can be described as mind-wandering can lead to criminalised behaviour and demonstrates 'how

[996] This illustrates the difference in purpose between sentencing the crime and sentencing the child offender.
[997] NHS Choices, Attention deficit hyperactivity disorder (ADHD) (NHS Choices) < http://www.nhs.uk/conditions/Attention-deficit-hyperactivity-disorder/Pages/Introduction.aspx > accessed 18 July 2021.
[998] Michael S. Franklin, Michael D. Mrazek, Craig L. Anderson, Charlotte Johnston, Jonathan Smallwood, Alan Kingstone, and Jonathan W. Schooler, 'Tracking Distraction: The Relationship Between Mind-Wandering, Meta-Awareness, and ADHD Symptomatology' (2014) 21 (6) Journal of Attention Disorders 475, 475.
[999] ibid 475.
[1000] ibid 475.

subclinical expressions of ADHD are related to distraction, performance, and the content of thought'.[1001] This notion of distraction is interesting and readily observable in Youth Court practice as child offenders often have difficulty, like their parents in many instances, in calming themselves sufficiently to discuss their cases. It can be a challenge to get clients to focus on the matter in hand, let alone to provide cogent instructions indicating that they understand their predicament. The child may exhibit a dissociated appearance from his immediate surroundings, effectively a mind wandering response, and this reflects

> 'a situation in which individuals cease to focus on their primary task or current environment (a process known as perceptual decoupling) and their attention instead becomes directed toward task-unrelated concerns'.[1002]

Childhood mind wandering is problematic as regards ascribing criminal responsibility as the consequences can appear as random, ill-planned behaviour, without any defined purpose and suggestive of 'deficits in task performance'.[1003] These episodes, or longer duration periods of mind wandering, have been described as representing a 'failure of inhibition' and children 'with ADHD symptomatology experience excessive task-unrelated thoughts' which can lead to behavioural problems.[1004] It has been noted that mind wandering 'often continues for some time before being recognized by the individual'.[1005] This suggests that positive cognitive behavioural training may promote behavioural changes more beneficial to the individual child offender than, for example, a procedurally based Youth Rehabilitation Order (YRO) designed to punish and rehabilitate. BPS would contribute to meeting the needs of children who present as unable to comprehend their unwanted criminalised behaviour. This often seems to arise from the absence of any appreciation of the right-wrong dichotomy, and an ignorance of the deeper concepts of dishonesty. This shows during police interviews as the absence of any concept of acceptable behaviour and suggests a wider social behaviour dissociation that produces response driven behaviours. Such children are unable to locate themselves in any wider societal role and act without any self-imposed behavioural limiters. They are driven by responses to events but appear to have no internal control framework to rein in their impulsivity. It has been suggested that in these circumstances, a child offender's response may produce an overt behaviour not reflective of his conscious experience, because of his dissociated subjective awareness.[1006]

[1001] ibid 476.
[1002] ibid 476.
[1003] ibid 476.
[1004] ibid 476.
[1005] ibid 476.
[1006] Umberto Castiello, Yves Paulignan and Marc Jeannerod, 'Temporal dissociation of motor responses and subjective awareness. A study in normal subjects' (1992) 114 (6) Brain 2639.

A child offender cannot comprehend that his perception of his own response driven behaviours may be out of kilter with a more objectified observation of the same incident or event. This contrast between a child's subjective and another person's objective awareness of an event highlights 'the occurrence and consequences of mind-wandering' and the limitations on an 'individuals' ability to notice their off-task thoughts'.[1007] This analysis is supported by the observed behaviour of child offenders appearing before the Youth Court. For example, such child offenders, in one-to-one conferences with their lawyers about their cases, often display even younger childlike attributes, including simplicity of verbal and body language. There is often confusion or indifference about events under discussion, and their perception of their role in criminal behaviour is often at variance with witness descriptions of determined criminal actions. There is a strong and innate tendency in child offenders to disassociate or distance themselves, as though the actions belong to another person. This dissociation, as an effect of indifference, or mind wandering, is augmented by behavioural dissonance. A child offender may have spatiotemporal dissociation whereby he reduces his own perception of the effects of his actions on himself and others.[1008] In practice, the JJS cannot take account of these dissociative states. In most cases, there can only be a limited enquiry into an individual child offender's capacity and cognitive competence. The dissociative states tend to correlate with episodes of childhood criminality where the child offender is unable to identify any reason or purpose for his actions, let alone place them in the context of his other behaviour or social interaction at the time. This is similarly an all-too-common occurrence with child detainees at a police station who often appear as being completely nonplussed by the description of their criminal behaviour, or the allegation that they are responsible and therefore culpable. This can, unfortunately, be perceived as superficial indifference, rather than being recognised as a lack of self-awareness and presence.

The complexities of behavioural patterns in children that lead to criminal behaviour develop over time. Some behavioural patterns are objectified by society as acceptable, such as the acquisition of musical skills, while others are seen as not acceptable, such as resolving social interaction difficulties using violence. In relation to this thesis and focusing on the individual child, the identification of ACEs and their effects, suggest the present JJS is too simplistic, addressing only endpoint behaviours, rather than considering why behavioural development

[1007] Franklin, Mrazek, Anderson, Johnston, Smallwood, Kingstone and Schooler (n 998) 476.
[1008] Qi Li, Zachary Hill, and Biyu J. He, 'Spatiotemporal Dissociation of Brain Activity Underlying Subjective Awareness, Objective Performance and Confidence' (2014) 34 (12) Journal of Neuroscience 4382, 4382.

has gone awry. A broadened assessment to include, for example, information beyond the immediate problematic behaviour would be much more revealing. The present system barely scratches the surface in understanding the complexities of childhood criminal behaviour. A modern and responsive JJS ought to take note of non-legal developments in understanding a child's developmental pathway and incorporate them through BPS programmes to aid the child and his future. The effects of ACEs on subsequent child development can, it is argued, be addressed through BPS though there are associated consequences that need to be considered.

8.6 The consequences of refocusing the JJS

8.6.1 Refocusing problems

Refocusing the JJS on the individual child offender involves taking account of the underlying drivers of unwanted behaviours in a way that the present system does not. This is the crux of the argument in this thesis and the proposed refocusing would reposition the JJS as a socio-welfare model concerned with the reorientation and rehabilitation of the individual's behaviour, rather than his prosecution and rehabilitation. As noted, this requires a willingness and an ability on the part of the child offender to think about, if not understand, why he acts as he does in certain circumstances.

Refocusing the JJS flows naturally where the basic purpose of the system is the diagnosis and treatment of child offenders, such as envisaged in court systems operating 'under the umbrella of therapeutic jurisprudence'.[1009] The quasi-medicalisation implicit in the term therapeutic jurisprudence and expressed through the idea of BPS in this chapter, highlights the need to address the relationship between criminalised behaviour and the court process. Community Courts are an example that 'evolved as another form of problem-solving court'.[1010] The name may appear to be only a matter of semantics, but it also alters the public perception of the court and is a more positive label.[1011] Therapeutic jurisprudence delivered through BPS, aims to tackle unwanted behaviours, including criminalised behaviours, by looking beyond the superficiality of procedurally driven JJSs, such as in England and Wales. For example, delivering a BPS response to criminalised behaviour through local justice centres ought to be achievable when they 'are located in neighborhoods [*sic*] or communities and are designed to meet the specific needs of residents'.[1012] The downside is that this approach needs 'extensive

[1009] College of Health (n 952) 1.
[1010] College of Health (n 952) 6.
[1011] College of Health (n 952) 6.
[1012] College of Health (n 952) 6.

input by residents' and requires them to work with the formalised state agencies such as the courts and social services.[1013] At present, it is uncommon to have localised Youth Courts in England and Wales in any meaningful sense as they are often located at some distance from many child offenders' home locations. In addition, child offenders tend to live in communities that themselves often fail to participate in the wider social community, save through the prism of their own needs. The extent of integration often relates to accessing state provided services which often present as devoted to maintaining the residents through the benefit and welfare model of social control. This is illustrated by the shift over recent years in the attitude of the JJS and its concern with

> 'the balance between punishment and welfare, or between community rights and offender rights. Rather than being considered an individual in need of support, the offender is perceived as a risk to be managed, in order to safeguard community protection'.[1014]

The social control aspect in this limited refocusing has its detractors, being seen as a widening in the ambit of the state to interfere albeit couched in the name of public protection. Broadening the scope of unacceptable behaviour, in a way not compatible with BPS, leads to net widening agendas in relation to anti-social behaviour, irrespective of the age of the individual child, and often where the behaviour itself is either not criminal, or the child is under 10 years of age. Superficially, the rationale offered is attractive in that early intervention may prevent subsequent criminality but, in this guise, such intervention may also promote databases that lead to the individual child being logged. Once a child is 'tagged' on a police database by reference to his known associates, he tends to remain for future reference, especially in localities known for criminality, including childhood criminality.

8.6.2 Refocusing the client-lawyer relationship

BPS necessarily involves broadening the scope of the child client-lawyer relationship, with complications for confidentiality. The promotion of BPS through reorientation and rehabilitation to encourage good behaviours at the expense of bad, or unwanted criminalised ones, rests on the idea of 'nudging' an individual's behaviour in the desired direction. In the JJS in England and Wales, this would originate, not as now, through the Youth Court and the input into the sentencing process by the Youth Offending Team (YOT), but rather, from the

[1013] College of Health (n 952) 7.
[1014] Birgden (n 960) 44.

child offender's lawyer. As a concept, this relationship can perhaps be described as preventative lawyering and

> 'has its source in a perspective that legal problems typically raise both legal and non-legal concerns for clients, that collaboration between attorneys and clients is likely to enhance the effectiveness of problem solving, and that clients ordinarily are in the best position to make important decisions'.[1015]

BPS would enhance the role of the lawyer so that he would move from being a client-legal adviser to 'a client-centered [*sic*] counselling approach' and change him from being 'the agent of the client', to one that required him to give 'information about all possible choices and alternatives available to the client'.[1016] This would enable the client to make decisions about his case, without perhaps the 'paternalism and coercion' that can occur in real world criminal practice.[1017] It would offer the child offender information to aid his decision making and contribute to his 'ability to reach self-actualization when the lawyer acts as a helping professional and is genuine, empathic, and non-judgmental'.[1018] This deeper 'lawyer-client interaction, is believed to lead to positive, therapeutic consequences for clients' though the extent to which this more nuanced relationship could be applied in practice is questionable.[1019] As a necessary development, broadening the role of the lawyer fits with this thesis's focus on the individual child offender, but it poses difficult questions of its own. Initially, it appears a difficult proposition to promote to criminal lawyers as a business model, though viewed as a contribution to societal well-being it has a logic to it.

There is a symmetry in the idea of preventative lawyering. It reflects the child client's existing perception that his lawyer is there to help him against those state actors ranged against him, whether the police, the Crown Prosecution Service, or the Magistracy. It also reflects the relationship between lawyer and client, especially in the area of criminal law. The lawyer is potentially an effective initiator for behavioural change, as by its very nature, there is an inbuilt tendency to view 'solutions generated within the lawyer-client relationship … as successful by clients'.[1020] This dependency model is more noticeable with child clients and demonstrated by the questions asked by them which often do not relate to the criminal behaviour or proceedings.

[1015] Shelley M. Kierstead, 'Therapeutic Jurisprudence and Child Protection' (Comparative Research in Law & Political Economy Research Paper No. 34/2012 Osgoode Hall Law School of Your University 2012) 36 < http://works.bepress.com/shelley_kierstead/8/ > accessed 18 July 2021.
[1016] Copps Hartley and Petrucci (n 965) 153.
[1017] Copps Hartley and Petrucci (n 965) 153.
[1018] Copps Hartley and Petrucci (n 965) 153.
[1019] Copps Hartley and Petrucci (n 965) 153.
[1020] Kierstead (n 1015) 36.

Their important questions usually relate to how quickly the matter will be concluded, or what they will have to do to go home sooner rather than later. There is a fear factor regarding being taken into custody, though that occurs less frequently today than child offenders realise. In daily practice, they generally present as remarkably indifferent to, for example, court proceedings and, as with magistrates, they tend to dislike delay to consider legal points or evidence. Similarly, when in police detention, there is an air of indifference from the 'regulars', often borne from a keen understanding of the limits of what the police can, or more usually cannot, do to them. The risk with a new, broadened, client-centred form of lawyering is that it crosses a boundary that many lawyers may be ill prepared for, especially within their traditional role, representing their clients in the legal sphere. In some ways, however, it is no more than using the lawyer's skills to achieve the best outcome for the individual child offender, by widening the skillset, or formalising the quasi-social worker approach utilised by most criminal lawyers to achieve the best outcome for their child clients. In the Youth Court, lawyers are most effective, as regards the best outcomes for their child clients, when there is a familiarity with family networks and background to help them determine which proposals have a realistic chance of working. Parental willingness to support compliance with a court order, such as a Referral Order, is often a key indicator of successful compliance by the child.

From a legal practice viewpoint, broadening the lawyer's role into a more interventionist, or activist one, may be curtailed by demands for 'increased attention to race, ethnicity, and culturally competent practice in the lawyer-client relationship'.[1021] The dissonance between representative and represented also raises issues regarding the emergence of mono-ethnic Legal Aid funded criminal law firms which narrow the ethnic diversity of lawyers available to clients of a different background. The imposition of further hurdles, and therefore controls, to oversee and manipulate the process, by other agencies determined to 'explicitly address cross-cultural competency',[1022] may conflict with the fundamental lawyer-client relationship. It has been suggested that this can be addressed by an additional layer of competences described as a

> 'set of congruent behaviours, attitudes, and policies that come together in a system, agency, or among professionals and enable that system, agency, or those professionals to work effectively in cross-cultural situations."[1023]

[1021] Copps Hartley and Petrucci (n 965) 135.
[1022] Copps Hartley and Petrucci (n 965) 153.
[1023] Copps Hartley and Petrucci (n 965) 171.

This seems to challenge the idea of the lawyer being foremost competent in that role and suggests, in addition, a need for an almost ethnographic perspective, rather than just representing child clients from different backgrounds as individuals.

8.6.3 Refocusing and BPS

Therapeutic jurisprudence, as expressed through BPS, provides a method of responsive intervention in the lives of child offenders which could be delivered through, or as a separate process within a remodelled JJS. It would broaden the options available to deal with childhood offending and represent a move towards the concept of mandatory behavioural therapy programmes before the conclusion of a court process. The court process should no longer be the pinnacle of the JJS procedure and should be the last resort. BPS programmes, much like those already provided through current YROs in the Youth Court, would be designed to facilitate change in the child offender, but without the court-imposed punishment-rehabilitation process. BPS programmes would be delivered by other procedural routes because, as noted, the identified need for behavioural change can be addressed by 'problem-solving courts' or 'solution focused courts'.[1024] Such courts 'utilise therapeutic processes and a multidisciplinary approach to achieve behavioural change',[1025] promote improvements in 'the offender's lifestyle and [reduce] the risk of future criminal behaviour'.[1026] The process to achieve the required behavioural change contrasts with the present JJS and relies instead on 'the psychology of conflict management to understand and manage the way in which people respond to decisions'.[1027] It has been observed that an individual offender's acceptance and compliance with programmes was 'strongly influenced by perceptions about the fairness or "justice" of the decision-making process'.[1028] To achieve this, refocused intervention would need to move away from the certainty imposed through sentencing guidelines and mandatory matrices. Fundamentally, 'the goal of equal justice under law' would be abandoned as the logic of an individualised response would be just that, different in every case.[1029] A similarity of sentence would be anathema to BPS as no two child offenders would have the same behaviours and treatment needs.

[1024] Murrell (n 946) 6.
[1025] Murrell (n 946) 6.
[1026] Murrell (n 946) 6.
[1027] Murrell (n 946) 7.
[1028] Murrell (n 946) 8.
[1029] Arthur Christean, 'Therapeutic Jurisprudence: Embracing a Tainted Ideal' (2002) Focus on Utah 4 < http://psychrights.org/Articles/TherapeuticJurisprudenceTaintedIdeal.htm > accessed 18 July 2021.

When criminal behaviour is identified as relating to a child's development, it becomes susceptible to resolution by an individualised solution. The identified issues or problems form the basis for an intervention designed to promote 'the objectives of behavioural change and reduced recidivism'.[1030] For example, in the Youth Court, a BPS treatment programme would be designed to encourage the child offender to take 'responsibility: within the courtroom, the participant is active rather than passive'.[1031] It would demand a collaborative decision-making process, augmented by an adjudicator, whether described as a judge or magistrate or not. He would have 'an understanding of the psychological science behind behavioural change, and ways of communicating so as to promote behavioural change'.[1032] This form of processing would represent a refocusing away from judiciality to a model with a 'solution focus' necessitating an understanding of 'the psychology of behavioural change' to enable it to be effectively implemented and managed.[1033] BPS would build on therapeutic jurisprudence practices and assess an individual child's likelihood of behavioural change by taking account of several recognised psychological steps. These would aid the determination of the usefulness of the process to him by reference to a well-established assessment matrix involving:

1. pre-contemplation by him to determine his problematic behaviour.
2. contemplation of his behaviour and strengthening his confidence in his ability to change.
3. self-preparation to strengthen his resolve and intention to change and identify barriers to his success.

These preliminary elements would be followed by implementation or action with assistance provided to him with practical steps and guidance to promote optimism about change and importantly, for sustaining the behavioural change, support to maintain his optimism about the changes.[1034] Though these elements are based on adult drug courts in America, they illustrate a whole person focus that is adaptable to BPS as envisaged in this chapter and that offers a contribution to the refocusing of the JJS.

[1030] Murrell (n 946) 9.
[1031] Murrell (n 946) 9.
[1032] Murrell (n 946) 9.
[1033] Murrell (n 946) 11.
[1034] Murrell (n 946) 6.

8.6.4 Recognising generational failure

BPS necessarily includes the observation of child offenders and their parents together with siblings. The areas of familial failure reflect skewed behavioural norms, family, educational and aspirational failings, and economic dependency on state support. There would also need to be a consideration of the factors that restrict the abilities of child offenders to escape or improve their circumstances. These factors if left untreated may result in repeated or escalating unwanted behaviours, including criminal acts, homelessness, mental health deterioration, and substance addiction. Help provided through BPS could address these issues by, borrowing medical terminology, 'Trauma-sensitive treatments [that] can also reduce recidivism of crimes that are causally linked to disease, anxiety, rebellion, and panic'.[1035] The potential to treat such traumas and limit their consequences by BPS, whether by a court directed programme or not, offers an individually focused response to childhood offending.

8.7 Consequences of implementation of BPS

8.7.1 Implementing BPS

The implementation of BPS would require the present JJS to be substantially re-orientated, both in purpose and process, moving away from a system triggered by an ACR and compliance with carefully crafted legal rules and procedures. The JJS represents an amalgam of rules and procedures which have developed over time and that reflect the system's legal and cultural background. An attempt to broaden the JJS's ambit as envisaged in this chapter would undoubtedly meet resistance from professional participants and wider society, collectively fearing a diminution of the values of traditional tried and tested responses to childhood offending. For example, the extent that a JJS could intervene in a child offender's development through BPS would contrast with the perceived role and purpose of a legal system in prosecuting, punishing, or rehabilitating. The potential for conflict between the status quo and BPS would arise from the need for a deeper investigation coupled with individualised responses and treatment programmes. The JJS would be reconfigured towards greater toleration of criminalised behaviour to secure a better outcome for the child offender, something that would not always meet with the approval of a complainant, a victim, or wider society.

[1035] Carmen M. Cusack, 'Kent Make-Up Their Minds: Juveniles, Mental Illness, and the Need for Continued Implementation of Therapeutic Justice Within the Juvenile Justice and Criminal Justice Systems' (2013) 22 (1) American University Journal of Gender Social Policy and Law 149, 157.

Though different in process and operating with a different mindset, BPS programmes would be delivered through local venues that would nevertheless retain similarities to the JJS. They would

> 'like all courts, look at the seriousness of the crime and appropriate sanctions, but in addition therapeutic courts [could] look closely at treatment options, likelihood of rehabilitation, willingness of the offender to participate in treatment, and ways to create positive outcomes for the offender and society'.[1036]

Existing court-based attempts to utilise therapeutic jurisprudence problem solving have demonstrated an 'ability to reduce recidivism and incarceration'.[1037] A commonality of positive features have been identified by the Bureau of Justice Assistance Center for Program Evaluation and Performance Measurement which would be equally applicable in BPS. These features highlight the necessity for support of a therapeutic approach throughout the system to contribute to positive outcomes for an offender, victim, and society. Additionally, to maximise the possibility of success, there is a recognition for greater collaboration with treatment providers and a reduction in adversarial approaches between lawyers. BPS treatment would need to be delivered through a triage process combined with a fuller assessment of an individual offender's suitability and early identification of those susceptible to a problem-solving system response.[1038] These features reinforce the view that BPS offers an in-depth assessment relating to the child offender's unwanted behaviour, including 'social problems that arise in a community' that underpin and drive his offending.[1039] Additionally, such assessments can be coupled with 'the selection of a therapeutic option - an option that promotes health and does not conflict with other normative values of the legal system'.[1040] In essence, BPS would seek to explore treatment options through programmes that would remain 'consistent with principles of justice, the knowledge, theories, and insights of the mental health and related disciplines' to ensure the refocused JJS was defendable in its implementation.[1041] The value of understanding behavioural conflicts in child offenders rests in part in their self-analysis of their actions especially when their distorted rationales enable a denial of responsibility for them.[1042] These self-generated distortions become embedded in a child's behavioural responses and, unless addressed and challenged as envisaged by BPS, can lead to re-offending.

[1036] College of Health (n 952) 1.
[1037] College of Health (n 957) 1.
[1038] College of Health (n 952) 2.
[1039] Rottman and Casey (n 957) 13.
[1040] Rottman and Casey (n 957) 14.
[1041] Rottman and Casey (n 957) 14.
[1042] Rottman and Casey (n 957) 15.

Everyone, including child offenders, can be educated or re-educated. Most children have a facility to be tutored, and the ability to acquire new skills and behaviours. This is the foundation of individual rehabilitation through BPS. It includes both physical and behavioural rehabilitation. A child's criminalised behaviours can be addressed, if necessary, through a court process where on guilt being determined, the child offender can provide information as to his understanding of why he acted as he did, and what he did. Indeed, his own 'acknowledgment and description of the offense [*sic*] may be helpful in convincing the defendant to participate willingly in treatment' and, just as importantly, 'may be helpful during treatment if the offender relapses into denying participation in the offense [*sic*]'.[1043] Describing one's own actions, and being challenged, is a form of guided self-analysis that contributes to BPS. It is a key component of therapeutic jurisprudence and contributes to 'offender autonomy in decision-making' as a core value in rehabilitation.[1044] In itself therefore, therapeutic jurisprudence, as promoted through BPS, does not exclude traditional legal processes because it 'does not advocate an exclusive focus on therapeutic considerations, but seeks to include them with legal considerations'.[1045]

The purpose of BPS is to extend the range of therapeutic options available, both before and after a court-based process, but that range implicitly accepts the backstop of maintaining a focus 'on the process of law as well as its outcomes'.[1046] To do otherwise would risk public support of the ideas to widen the approaches taken in a reorientated JJS to address childhood offending. For example, in the court arena, BPS could be grafted onto the JJS to reorientate it by creating 'a form of 'court intervention' which focuses on the 'chronic behavior [*sic*] of criminal defendants'' leading to a treatment programme being implemented.[1047] In essence, it would enhance the 'fair process' of a JJS by making it and its rules secondary, with primacy given to 'the whole defendant, provision of some form of treatment, and the outcome of that treatment'.[1048] Success would be measured by whether 'a defendant has altered his thoughts and behaviors [*sic*], not whether he had a fair hearing'.[1049] Such a liberal interpretation of the purposes of a JJS would have an almost irresistible appeal to those who understandably yearn to find solutions to people's needs and want to 'get things done''.[1050] As a description of

[1043] Rottman and Casey (n 957) 15.
[1044] Birgden (n 960) 45.
[1045] Copps Hartley and Petrucci (n 965) 138.
[1046] Copps Hartley and Petrucci (n 965) 138.
[1047] Christean (n 1029) 2.
[1048] Christean (n 1029) 2.
[1049] Christean (n 1029) 2.
[1050] Christean (n 1029) 5.

purpose, it is undoubtedly an attractive approach to dealing with child offenders because of the refocusing on the individual and how best to treat him.

8.7.2 The value of these ideas for the child offender

BPS may be challenged as naive in its belief in the possibility of change through education. It may be seen as time consuming, with its additional child assessments and would be more expensive when compared to the traditional JJS. However, it has merit because it incorporates, 'developing processes and functions that are different, better and more effective than those that seem perennially unable to solve some fundamental weaknesses in the legal system', such as the problems of new entrants into the system and reoffending.[1051] The remodelling of the JJS discussed in this chapter would aim

> 'to achieve a fundamental change in the lifestyle of the youths and families that will, at a minimum, substantially reduce the likelihood of their further involvement with the justice system, increase public safety, and significantly enhance the likelihood that the youths and their families will function as productive community members'.[1052]

To that end, BPS would seek to reorientate the JJS to one utilising treatment programmes to improve the family relationships which contribute to childhood behavioural problems, and relationships between the family and other state or community bodies which 'influence youth', including schools and colleges.[1053] Effective participation by the child offender and his family in community life, in its broadest iteration, would reduce the child offender's further involvement with the JJS, by 'active participation' to address behavioural problems that lead to criminalised acts.[1054]

8.7.3 Financial implications: the cost problem

The implementation of BPS assessments and programmes would involve an increase in funding to establish and maintain the process, expanding the workforce, and meeting the costs involved. Similarly, BPS, as expounded, would involve greater use of lawyers in the pre-prosecution and court stage of a reoriented JJS involving work which would fall outside the scope of the present Legal Aid Agency funding model. A quasi-therapeutic model of intervention already operates in relation to drug dependent adult shoplifters that might provide a template for the introduction

[1051] Stobbs (n 949) 248.

[1052] Janet Gilbert, Richard Grimma and John Parnharn, 'Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)' (2002) 54 (4) Alabama Law Review 1153, 1173.

[1053] ibid 1173.

[1054] King (n 973) 1115.

of an element of BPS into the JJS. Detainees are drug tested and those who test positive are given immediate advice and a follow up appointment involving local drug agencies. The carrot of help is balanced by prosecution if the individual fails to attend the appointment, an aspect which would be contrary to BPS as envisaged in this chapter.[1055] It is galling that such an approach is deemed appropriate for adult drug users, while there is no similar push to intervene with child offenders who are similarly in thrall to drugs from cannabis to heroin. Long-term savings in medical, welfare benefits and social costs would suggest that earlier intervention would pay dividends, at least on a par with those for adults. In addition to cost considerations, the promotion of BPS involves a differentiation in procedures and resource allocation in terms of delivery by professional staff, including Social Services Departments and YOTs.

In other jurisdictions, implementation of similar models of drug-related problem solving have been developed, demonstrating how an established 'mainstream legal system has anti-therapeutic aspects at the levels of substantive law, procedures and lawyer behaviour', without undermining it.[1056] For example, in the Australian State of Victoria there has been 'significant change with the introduction of new problem-solving courts such as the Koori, drug and family violence courts'.[1057] Such therapeutic problem solving courts

> 'are generally distinguishable from the mainstream courts in terms of their focus on individual litigant improvement, their concern with outcomes, and the relationship between litigants and judges'.[1058]

This can be contrasted with the general adversarial court, which is 'characterised by an almost exclusive focus on the integrity of process as the benchmark for success'.[1059] The JJS in England and Wales tends to the latter obsession, with the prime driver in Youth Court being that the daily court list is completed, with the least delay because of the continued statistical analysis of the use of court time and outcomes. Accordingly, there are no adjournments, except in the most exceptional of circumstances, and certainly not for additional background information.[1060] It is difficult to fathom how the court-time focused regime is beneficial to the individual child offender. Rather, it is just reflective of a JJS that promotes short term time efficiency over longer term problem resolution. This is not to suggest that BPS is without fault.

[1055] Home Office (n 948). Effective intervention for detained adults modified in 2007 and mandatory for trigger dishonesty offences.
[1056] Murrell (n 946) 11.
[1057] Douglas (n 954) 1.
[1058] Stobbs (n 949) 35.
[1059] Stobbs (n 949) 35.
[1060] This can be contrasted with the Covid-19 mass adjournments in the Magistrates and Youth Courts purely to avoid defendants attending the court building.

It must be accepted that there is an argument 'for restraint in over-emphasising the ambit of therapeutic jurisprudence and of treating it as a panacea',[1061] as without doubt it is not the perfect answer. On balance, it can be described as a useful contributor to the ever-challenging question of child offending and how to respond to it.

As an additional resource and process to the JJS, BPS would offer a pathway to help those child offenders not diverted pre-prosecution and would give proper weight to the more deep-seated reasons for the criminalised behaviour. It has been observed that those who are not diverted or aided by a rehabilitative programme 'usually progress to serious habitual offenders'.[1062] Those child offenders drawn into the JJS ought to be processed by the most effective response, one focusing on their potential for future development, rather than on the criminal justice aspect of their unwanted behaviour. The link between 'adverse experiences (those experiences not clinically deemed traumatic) and adolescent and adult psychopathology' has been noted above.[1063] A therapeutic problem-solving approach recognises that 'traumatic experiences (i.e. physical abuse, verbal abuse, mental abuse, witnessing violence within the home, and severe illness)' and 'chronic stressors (i.e. family conflict, parental separation, parental education, parental mental health, neglect, poverty, loss, drug use in the family)'[1064] have significant effects on childhood development. On balance, BPS has much to commend it as a more appropriate process for child offenders, even with its limitations as noted above.

8.8 The contribution of BPS to this thesis

8.8.1 The need for BPS

The unaddressed factors, as discussed above, that influence childhood behaviours should, without doubt, be addressed to offer a second chance to a child, preferably by a form of BPS developed from the concept of therapeutic jurisprudence put forward by Wexler. BPS, as proposed in this chapter, can be considered as a continuation and development of earlier nineteenth century ideas for dealing with childhood criminality which also contained elements that might be termed as therapeutic in purpose. Often described as 'reforming', the nineteenth century ideas recognised that the socio-economic conditions of the time contributed to childhood criminality, and that to treat children as mini adults for sentencing and punishment purposes was not acceptable. Developments in child psychology added to this debate.

[1061] Stobbs (n 949) 35.
[1062] Gilbert, Grimma and Parnharn (n 1052) 1203.
[1063] Pratt (n 978) 1.
[1064] Pratt (n 978) 1.

Knowledge and understanding of the steady growth and development of children as they interact socially, and acquire behavioural norms, led to a recognition of a child's receptibility to new ideas, including behavioural malleability, and the adoption of corrective behavioural nudging in court-imposed programmes. It was accepted that these concepts 'associated with behavioural contracting can be adapted by courts to increase compliance with orders in a treatment setting'.[1065] These insights could be used positively, for example, 'to increase adherence to a treatment plan. In a court setting, it would be used to seek an offender's agreement to comply with the conditions of an order'.[1066] BPS, mediated through the JJS, would promote the well-being of the child offender through a framework of intervention which assumes

> 'the best interests of the community are met when the likelihood of re-offending is reduced through offender rehabilitation rather than punishment, deterrence, and/or incapacitation'.[1067]

This approach advances the liberal idea that 'community rights and offender rights ought to be balanced by enhancing community protection through offender rehabilitation'.[1068] BPS would give an avenue of intervention to achieve these aims by delving deeper into the trauma, or the behavioural drivers, that produced the unwanted criminal behaviour. Arising from this almost analytical approach, would be a revelation of the child's psychological layering, from innocent to child offender, enabling the behavioural fault line to be discerned and addressed. The loss of procedural and objective legalised judgement and punishment in the traditional JJS would be the price and, as a positive, the loss of the longstanding focus on the criminalised act itself. It would instead look to the criminalised actor, the child, with an acceptance that his behaviours should be treated as childhood misbehaviours susceptible to treatment by BPS. The logic of this approach is acceptance that 'help and guidance' trumps 'crime and punishment' as the purpose of the JJS and gives proper focus on the individual child offender. BPS would have the certainty of process, combined with an analytical assessment of an individual, which would shift the JJS in the court context from adversarial to inquisitorial. The process would rely on examining, assessing and recommending how best to proceed for the individual child offender.

[1065] Rottman and Casey (n 957) 15.
[1066] Rottman and Casey (n 836) 15. David Rottman and Pamela Casey, 'Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts' (1999) National Institute of Justice Journal 13, 15.
[1067] Birgden (n 960) 44.
[1068] Birgden (n 960) 45.

The role of the judge would be redesignated to 'the role of confessor, cheerleader and mentor' in contrast to the traditional 'dispassionate, disinterested magistrate'.[1069]

8.8.2 The pluses and minuses of BPS

The promotion of BPS involves a balance between competing views of how a JJS should tackle the never-ending cycle of child offending. At a basic level, therapeutic treatment, through problem solving, requires an understanding of 'the impact of the legal process' on those drawn into it by their unwanted behaviour. It demands that the court system acts to

> '…modify procedures and behaviour so as to maximise positive impacts (therapeutic consequences) and minimise negative impacts (anti-therapeutic consequences)'.[1070]

To be effective, the necessary court modifications would require a reorientation of the JJS away from the present-day emphasis on the speedy completion of cases. The implementation and monitoring of court orders after conclusion of the proceedings with stand-alone breach proceedings for non-compliance would be stopped. These make a break in continuity between the original criminal behaviour and its treatment and have detrimental consequences for the child offender. Continuity of treatment would involve, as Wexler suggested, in-built delays before concluding court proceedings 'in order for an offender to demonstrate to a court that they have reorganised their life in such a way that rehabilitation is likely'.[1071] It is noteworthy that the Magistrates Courts used to regularly defer sentence to monitor compliance by offenders to achieve a level of oversight which was lost once sentence was imposed.[1072] This achieved the in-built delay suggested and, it is argued, would similarly bear fruit in relation to child offenders, as lawyers know from their experience that deferment generally had a positive effect. Deferment promoted oversight by the sentencing court, through the monitoring of compliance, and was a continuing reminder to the individual that his response would be reviewed. In relation to child offenders, some of them would be unable to respond to BPS programmes, or would lack the commitment demanded, but for many the continuity of contact would, it is suggested, enhance compliance. The minority who were unable or unwilling to change would remain within the traditional system acknowledging the 'reality … that not all offenders want to end

[1069] Stobbs (n 949) 238.
[1070] Murrell (n 946) 11.
[1071] Douglas (n 954) 8.
[1072] Sentence deferment was used effectively to promote a positive response from defendants who on successful completion knew that they would not receive a custodial sentence.

their criminal lifestyle'.[1073] The need to retain the present procedural court element in the JJS flows from those who are unwilling to participate or who are not suitable for the proposed regime and the need, even with BPS, for presentational safeguards to provide reassurance to the public otherwise there may be a risk that 'traditional justice system values are jeopardized'.[1074] There remains a recognised need for public protection, especially where there is serious violent criminal behaviour by child offenders.

BPS delivered through court proceedings would promote 'frequent in-home contact with the family and the juvenile, communication with school personnel, regular and frequent court appearances coupled with probation supervision'.[1075] In contrast, the present JJS effectively outsources this aspect post sentence to specialist youth services but as noted above, without the oversight implicit in a problem-solving system and so the link between process and outcome is severed. A repurposed JJS incorporating BPS would alter the balance between therapeutic treatment and punishment and, from first contact to the courtroom, there would be a wholly different ethos. Judges, magistrates, lawyers, and other professionals would find their perception of a case altered by an appreciation of the child offender's worldview which led to criminal behaviour. BPS based on therapeutic jurisprudence ideas, would assess the individual child offender

> '…holistically, instead of merely in terms of the facts of the case, the applicable law and the possible legal outcomes. The client's best interest is therefore widely construed, encompassing health, economic, vocational, familial, social and, for some, spiritual domains'.[1076]

It would look beyond the immediate problem behaviour that often stands at the top of a pyramid of behaviours, that in turn draws in wider family and peer group unwanted behaviours. BPS would give an opportunity to delve more deeply into the child offender's conception of his actions, and to design an individualised response to help him to reintegrate into more acceptable behaviours, and that can only be for his future good, and therefore for the good of society.

8.9 Conclusion

This chapter represents the culmination of this thesis's exploration of the JJS. Each of the previous chapters has been laid out, systematically and methodically, with two aims. Firstly, to

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[1073] Samantha Jeffries, 'Transforming the Criminal Courts: Politics, Managerialism, Consumerism, Therapeutic Jurisprudence and Change' (2003) Criminology Research Council Canberra 36 < http://www.criminologyresearchcouncil.gov.au/reports/2002-jeffries.pdf > accessed 18 July 2021.
[1074] Gilbert, Grimma and Parnharn (n 1052) 1204.
[1075] Gilbert, Grimma and Parnharn (n 1052) 1204.
[1076] King (n 973) 1122.

demonstrate the failure of the present JJS to meet the needs of child offenders who come into contact with it, and, secondly, to critically analyse some of the alternative approaches that might be used to address this failure. The present JJS remains fixated on the legal process, and, it is argued, this fixation makes it almost impossible to deal effectively with the child offender. It often, in fact, leads to further offending. This thesis contends, therefore, that there are strong reasons supporting a complete and radical reformation of the JJS.

This chapter has drawn on some of the alternative approaches to juvenile justice which have been outlined in previous chapters to devise a proposal for a new and uniquely reformed JJS. Its parameters would be much wider than the present JJS, and its primary aim would be to address and treat childhood criminalised behaviour as a behavioural problem, susceptible to treatment, rather than as criminal behaviour requiring a punitive response. This proposal for a new JJS envisages the adoption of a less legally focused process and one more attuned to understanding the drivers of unwanted or criminalised behaviours. Such problem behaviours would be recognised as a corollary of a poorly maturing child's uncertain understanding of his place in the world as he 'grows up'. The child would be treated or aided in his development to prevent further problems through the ideas of therapeutic jurisprudence, as expressed through BPS.

This would not be an easy option. For all professional participants, there would be a repositioning of their roles and skills. It would also require a change in the perception of justice in the JJS, from a prosecuting process by the state, to a holistic examination of factors underlying offending. Additional interpersonal skills would be required of lawyers whose role would also be reconfigured beyond the present detached comfort zone of traditional legal representation.

BPS is not without its own problems and the therapeutic treatment concepts discussed in this chapter have been recognised as 'well removed from the traditional model of the 'dispassionate, disinterested magistrate''.[1077] Although therapeutic treatments offer 'promising benefits', they have also been criticised as representing 'serious threats to the judicial process because such court 'intervention' distorts the judicial process and the role of judges in it'.[1078] There are concerns that focusing on the behavioural problems of the child offender would be to the detriment of victims and the public and that there would be less condemnation of

[1077] Rottman and Casey (n 957) 13.
[1078] Christean (n 1029) 3.

childhood criminality. Wexler, however, argued that therapeutic jurisprudence did meet the challenges of delivering justice fairly. The concept 'does not assert that wellbeing promotion should be the law's paramount role', though Wexler did stress that, like medicine, the law should as far as possible 'do no harm'.[1079] This laudable aim is fully endorsed but, unfortunately, the JJS in its present guise does not always meet it.

It is recognised that this proposal for reform of the JJS would involve a substantial re-orientation of its purpose and its delivery. If introduced, BPS would create a 'major social service delivery system', necessitating substantial 'compromises with due process and judicial impartiality'.[1080] It would, however, breathe new life into a formulaic and legalistic JJS that still presents in practice as a fixed, traditional prosecution and punishment-rehabilitation model to lawyers working within the system. BPS would necessarily involve widening of the ambit of the JJS to take account of the factors that contribute to child offending, to focus more on the individual child, and to positively address the child's behavioural needs. There would be a need to recontextualise and reorientate the JJS to refocus it on the individual child at a deeper level than a mere legalistic determination of criminality. Therapeutic jurisprudence delivered through BPS would enable the development of a JJS which would better meet the needs of the individual child offender by assessing, defining, and treating him rather than the offending behaviour taking centre stage. BPS offers a positive contribution to the juvenile justice debate by proposing a reform that would deliver justice by refocusing the JJS onto the individual child offender.

[1079] King (n 973) 1113.
[1080] Christean (n 1029) 8.

Conclusion

This thesis posed two questions which arose from professional participation as a defence criminal lawyer involved in the juvenile justice system (JJS) in England and Wales:

1. whether it is time to refocus the system on the individual child offender, and if it is,
2. how to refocus it more effectively on him as a child.

The methodology adopted for this thesis flowed from the perceived failures in the JJS to focus on child offenders as witnessed over many years by the writer as a professional participant. This lived experience-cum-action research has been the unique experiential resource through which this work has been developed and produced. The rationale for this thesis was a deep concern about how we define and treat child offenders, combined with a recognition that the JJS needs to acknowledge them as children in need. This need persists even with recent positive contributions to the debate, as for example, with the Child First approach. There still remains a criminal law focus which determines who progresses through the system and who has the benediction of diversion. The ongoing vocabulary of admission, prosecution, plea, guilt, and sentence should be recognised as anachronistic in the light of evolving knowledge of child development. Child offenders deserve to be treated as children in need of support, guidance, and help, not punishment.

Accordingly, this thesis argues that a more radical approach to reform is needed if child offenders are truly to be considered as children in need first, and that such a reform cannot be achieved through the mere reformulation of the JJS. Rather, it is argued that a wholly repurposed system is required. To validate this argument, the thesis examines the foundational concept of the age of criminal responsibility (ACR) in Chapter 2 and relevant developments which occurred during the nineteenth and early twentieth centuries in Chapter 3. The effects of the huge social changes brought about by the Industrial Revolution are analysed, together with the accompanying legal reforms. The nineteenth century saw the creation of a distinct juvenile justice process with child offenders as a separate class of criminals with a low ACR which responsibilised them legally for the unwanted behaviour. The demographic change from rural to urban dwelling led to fundamental behavioural changes, including the growth in acquisitive crime. Although the intended purpose of the JJS in the nineteenth century was, in part at least, beneficent, it nevertheless left a persistent legacy of negative attitudes towards childhood criminality which endures. It also failed to deal with the conflict at its heart, that is, between the urge to prosecute and punish, coupled with the desire to rehabilitate, and reform. The legacy

of the campaigning reformers of that time persists and the conflict itself continues to permeate both adult and juvenile justice even today, and as not yet, it is argued, been satisfactorily resolved.

In developing the thesis, the present-day JJS is explored through its more recent developments, and the efforts made to remove some of the vestigial legacies of nineteenth century attitudes towards child offenders. Reforms discussed include, most recently, the advent of the Child First approach as a positive step towards the kind of JJS envisaged in this thesis, one that is genuinely concerned with the individual child. However professional practice continues to suggest that, with the continuing elements of control, especially in police station practices, there remains a strong argument that further reform is required throughout all levels and aspects of the JJS.

The thesis's argument is advanced in Chapters 4 to 6 by an examination of the foundational aspects of the procedures and processes in JJSs in England and Wales, Scotland, and Ireland. The historical context in which the JJS developed in England and Wales is examined in Chapter 4 and the thesis progresses in a similar vein in relation to Scotland in Chapter 5 and Ireland in Chapter 6. These chapters provide a broad palette of research material which demonstrates that though these systems originated within the United Kingdom, each has developed separate and distinct approaches to tackle the same child offending problems. The degree to which these neighbouring jurisdictions are more successful in recognising the inherent limitations of children to be responsible in law is also assessed. Their success by diverting child offenders from the criminal justice system is considered together with the extent to which, by design, they reduce the attendant detriments associated with being cast as a child offender including the consequent negative effects on the individual child's life chances. Scotland and Ireland provide a basis from which to compare, contrast and draw conclusions in relation to the JJS in England and Wales. In the case of the Scottish JJS, its historical and present-day context includes an examination of the effects of the Kilbrandon Report and devolution on the development of the Scottish JJS, while the examination of the Irish JJS focuses particularly on the pivotal role the Garda Diversion Programme (GDP) plays in diverting offenders from criminality and the JJS. The Irish GDP was also recognised as a prime example of first tier diversion of child offenders at the earliest point in their criminal careers.

The writer's views on the shortcomings of the present JJS in England and Wales are expressed in Chapter 7 and 8, commencing with an assessment of the basic foundational architecture and the attendant carceral features of the system in Chapter 7. The chapter shines a spotlight on

carceralism as an almost unavoidable feature of a criminalised JJS. It is described and analysed in relation to its potential to generate deep-rooted behavioural control in all criminal justice systems. The carceral nature of the JJS in England and Wales and its **consequences, are** examined and placed in context in relation to the whole of society which often seems little interested in its challenges to individual freedom, as illustrated by the high level of Covid-19 rule compliance. Carceralism has the potential to undermine the reform of a child offender and the degree to which the JJS contributes to, and even promotes, childhood criminality is recognised. The inevitability and unavoidability of carceral features in all JJSs is acknowledged, and it is submitted that, since carceralism lies so deeply ingrained within the system's architecture, its inherent problems are not easily overcome in a system focused on criminality, reform, and prevention.

The inevitability of carceralism demands consideration of whether child offenders might be more fairly processed and more effectively treated through a less or even non-legalistic approach if the aim is genuinely to rehabilitate and reform them. It is argued that, in order to achieve the rehabilitation and reform of child offenders, there must first be a recognition of the need to reform the JJS, and an awareness of the carcerality that infuses it. Although it may not be possible to totally exclude carceral features from the JJS, their potential to derail the rehabilitation and reform of child offenders must be mitigated. In the present JJS in England and Wales, the concept of carceralism does not merit any overt discussion in its daily dealings with child offenders. It is evident that its potential for harm is real, and this should therefore be recognised in everyday criminal defence practice in order to bring about more positive outcomes for vulnerable children. The discussion of carceralism widened the thesis's focus beyond the procedures and processes examined in the preceding chapters into a consideration of the effectiveness of a JJS in the shadow of carceralism. This shadow, it is argued, inhibits the reform and rehabilitation of offenders, and has implications for the reform and rehabilitation of the system itself.

The final chapter introduced and explored the implications of a reform proposal based on the concept of therapeutic jurisprudence to address the issues raised. The concept is examined in the light of its practicality for everyday juvenile justice practice and a reinterpretative assessment of the JJS from the standpoint of therapeutic jurisprudence. For example, a knowledge of adverse childhood events or trauma suffered by a child leads naturally to the consideration of how to improve the present JJS, not by the use of prosecution and punishment, but rather by therapeutic treatment programmes to improve the lot of the individual child. There

is ample evidence to suggest that childhood criminal behaviour is an inevitable component of childhood development. The identification of the underlying causes of criminalised, or even just unwanted behaviour leads to a greater understanding of the individual child and his behaviour. It is an approach which, it is argued, and supports the view that in most instances, a JJS which rests on a formalised prosecution and punishment paradigm is no longer fit for purpose.

The contribution made by this thesis is based on the research undertaken combined with, and filtered through, the realities of everyday criminal defence practice with child offenders as clients. The reform proposal is offered as a contribution to the juvenile justice debate and seeks to address the fundamental conflict between punishment and reform which has bedevilled the whole legal system since the nineteenth century. Behavioural problem solving (BPS) is advocated as a therapeutic treatment process delivered not as a punishment but to aid the rehabilitation or, more accurately, to aid the reform of the child offender by reorientating the individual child's behaviour. A child offender is first and foremost a child and, surely, it is the prime function of any JJS to do all it can 'in the best interest of the child'.

This thesis is intended to give a flavour of the writer's commitment to this area of research which has been motivated by personal experience in criminal defence practice over three decades. There have been good and bad outcomes for child offender clients but there remains the concern that more could have been done to better represent their interests when they were processed by the JJS, and to rehabilitate them subsequently. Accordingly, it is argued that there is, without doubt, a great need for the promotion of a more holistic, more therapeutic response to criminalised childhood behaviour than the mere reformulation of the JJS within a criminal law setting. In acknowledging that need, this thesis suggests that it is time to refocus the JJS on the individual child offender, and that this is more likely to be achieved by adopting a more therapeutic response such as described in Chapter 8. The reform proposal offered in that chapter represents an attempt to describe an approach utilising the idea of BPS to make a positive contribution to answering the thesis questions posed in the Introduction. In this call for reform lies the prospect of better outcomes for the individual child, and the hope that each child gets the treatment that he deserves to reach his potential and not be marked as a criminal by the JJS. From the writer's perspective, and based on practical experience of the present JJS, therapeutic jurisprudence is posited as offering a possible route for a progressive and radical reform of the system, one in which the focus of the JJS is not on the individual child offender but on the individual child.

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