



Preach, not Punish: Why we Need to Rethink our Approach to Youth Justice

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This article argues for the youth justice system of England and Wales to embrace a shift in method in dealing with offending youth. Particularly in relation to youths, overly punitive practices do not appear to be effective. Given the less developed state of a young mind, youths are unable to fully comprehend the rationale of punishment. This could have devastating consequences on youths, possibly causing many to spiral further into a life of crime. A welfarist agenda, on the other hand, will allow the youth to understand the error of his ways, as well as cater to his rehabilitation. Punishment in itself fails to tackle the root of the problem. Society should move toward embracing useful long-term solutions, rather than settling for the short-lived comfort of knowing that punishment has been meted out.

An overview of the youth justice system

‘Our aim should be to create a 21st century system that moves away from justice with some welfare, to a welfare system with justice’.¹ In concluding his Review of the Youth Justice System in England and Wales, Charlie Taylor (current Chair of the Youth Justice Board for England and Wales) succinctly describes the current state of the youth justice system, as well as his vision for the future. Throughout its history, the youth justice system of England and Wales has often been at the receiving end of criticism. This can be primarily credited to the system’s continuing dilemma of balancing its conflicting aims of catering for the welfare of young people and punishment for their offending behaviour.

At present, the system is predominantly hinged on ‘justice with some welfare’. During the late-2000s, the youth justice system underwent a renaissance of ‘devolution, discretion and diversion’,² spanning the last years of the New Labour government, through to the Coalition government and the current Conservative government. Increased use of referral orders for

relatively minor offences and greater diversion from the formal justice system have enhanced welfare for the child, representing a marked shift from the highly punitive discourse underscoring the mid-1990s. This change in tenor of government rhetoric was catalysed by the ‘neoliberal driver of reducing public sector spending’ in response to the economic crisis.³ Consequently, there is a leitmotif in the youth justice system of a consistent downward trajectory in the numbers of young people being admitted into the formal system since its peak in 2007. However, Taylor’s fear, that the current state of welfare provisions for young people remains inadequate, is not unfounded. While the statistics are representative of a more tolerant youth justice system, problems relating to the availability of welfare provisions for the child (or the lack thereof) continue to plague the system.

This article will first explore how the current youth justice system continues to run contrary to the welfare of the child. It will then suggest policy recommendations which could remedy these issues, and finally, it will assess whether it would be in the best interests of society to adopt the welfare model put forward by Taylor.

¹ Charlie Taylor, *Review of the Youth Justice System in England and Wales*, (Ministry of Justice, December 2016) [179].

² Rod Morgan and Tim Newburn, ‘Youth crime and justice: Rediscovering devolution, discretion and diversion’, in Maguire M, Morgan R and Reiner R (eds) *The Oxford Handbook of Criminology*. (Oxford: Oxford University Press, 2012) 490.

³ Joe Yates, ‘What prospects youth justice? Children in trouble in the age of austerity’ (2012) *Social Policy & Administration* 46, 436.

Current affairs: extant problems of the youth justice system

Cause for much of the prevailing concern lies within the area of youth custody, which Dr Tim Bateman (Deputy Chair of the National Association for Youth Justice) has described as being 'in a state of crisis' in his command paper, *NAYJ Briefing: The state of youth custody*.⁴ Article 37(b) of the United Nations Convention on the Rights of the Child (UNCRC) promulgates a key tenet that imprisonment should only be used 'as a measure of last resort',⁵ acknowledging that imprisonment can have damaging effects on children.⁶ Regrettably, the heavy use of custodial sentences against young offenders is still prevalent in England and Wales, yet again, attracting censure from the United Nations Committee on the Rights of the Child.⁷ Notwithstanding the drastic drops in the prison populace, England and Wales still had the fourth highest number of under-18s incarcerated amongst its European counterparts, as of 1 September 2015.⁸ Furthermore, conditions within the youth secure estate, in particular young offender institutions (YOIs), have been generally unsatisfactory. Common complaints include: 'physical and emotional neglect; bullying; poor treatment by staff; long periods of cell-based confinement; and insufficient opportunities to maintain contact with family'.⁹ Disconcertingly, 73% of inmates under-18 are housed in YOIs, which are modelled after adult prisons.¹⁰ Children who enter YOIs are forced into a phase which Dr Kate Gooch termed 'kidulthood' – a somewhat premature adulthood.¹¹ As a result, children not only experience the usual pains of imprisonment like deprivation of liberty, but additional pains unique to their age group.¹²

Another area that has proven intractable is curbing reoffending rates. Children are particularly susceptible to recidivism. A staggering 67.1% of youths released in 2014 reoffended within 12 months.¹³ What is more unsettling is that reoffending rates show little sign of improvement. In fact, they are almost at a point of stagnation, with a decrease of only 0.7% in 2013-14 from the previous year.¹⁴ Of course, much of this has been attributed to the fact that the increased use of diversion and community-based orders (community sentences which may involve unpaid work as restitution to the local community, in lieu of a prison sentence) has left behind a

distilled group whom 'manifest in the most challenging behaviours',¹⁵ and are therefore more likely to offend. However, the root of this problem stems from the fact that most youths lack proper continued support post-release. At an age where most have not figured out their direction in life, the first days of freedom with nowhere to turn 'could destroy [any intention] of desistance, leading to quick resumption of offending behaviour'.¹⁶ Referring back to the issue of custody, these figures are clearly reflective that imprisonment is not efficacious in the prevention of youth crime; on the contrary, Bateman asserts that it has a 'criminogenic effect'.¹⁷

A final crucial issue with the youth justice system today, which has fuelled much charged debate, is the low minimum age of criminal responsibility (MACR) of 10 years.¹⁸ England and Wales have the lowest MACR amongst European Union nations.¹⁹ Lord Faulks justified the Government's stance, stating that, 'children aged 10 and above are, for the most part, able to differentiate between bad behaviour and serious wrongdoing'.²⁰ This arbitrary measure disregards findings by the Royal College of Psychiatrists that demonstrates that the maturity of the brain's frontal lobe is not found to occur until about the age of 14.²¹ Consequently, this gives rise to the possibility of criminal responsibility being unfairly imputed unto young persons who have yet to reach that stage of neural development. To be fairly found to be criminally accountable, Claire McDiarmid recommends that the child should, 'as a minimum, know that the act is wrong, know the difference between right and wrong, understand that the act itself is contrary to the criminal law (together with some recognition of the wider meaning and consequences of criminality) and be able to place this within a moral context'.²² For a child aged 10, it is highly unlikely for such capabilities to manifest in him/her. While the child may certainly understand the difference between right and wrong, '[d]eveloping morality is – like literacy – not a once and for all achievement; it improves with conceptual maturity'.²³

The way forward: moving towards a welfare-oriented system

One of the most significant policy recommendations posited by Taylor is the introduction of secure schools.²⁴ This entails a reconceptualisation of the youth prison network as schools. Placing a greater emphasis on

⁴ Tim Bateman, *NAYJ Briefing: The state of youth custody*, (NAYJ: October 2016) 12.

⁵ United Nations Convention on the Rights of the Child, Art.37(b).

⁶ Carolyne Willow, 'Children behind bars: why the abuse of child imprisonment must end', (2015) 56,5 *The British Journal of Criminology* 1039-1042.

⁷ United Nations Committee on the Rights of the Child, *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland* (UNCRC: 3 June 2016), [77(d)].

⁸ Marcelo F. Aebi, Melanie M. Tiago and Christine Burkhardt, *Annual Penal Statistics: SPACE I – Prison Populations* (Council of Europe and University of Lausanne: 2016) Table 2.2.

⁹ Paul Gray, 'I Hate Talking About It: Identifying and Supporting Traumatized Young People in Custody', (December 2015) 54(5) *The Howard Journal of Criminal Justice* 443.

¹⁰ Youth Justice Board, *Monthly youth custody report May 2016: England and Wales* (Youth Justice Board: May 2016).

¹¹ Kate Gooch, 'A Childhood Cut Short: Child Deaths in Penal Custody and the Pains of Child Imprisonment' (September 2016) 55(3) *The Howard Journal of Crime and Justice*, 279.

¹² *ibid* 280-287.

¹³ Ministry of Justice and Youth Justice Board, *Youth justice statistics 2014/15*, (Ministry of Justice: 2016).

¹⁴ Andrew Ashworth, 'Is the youth justice system a success?' (2014) 10 *Criminal Law Review* 692.

¹⁵ Diana F. Johns, Kate Williams and Kevin Haines, 'Ecological Youth Justice: Understanding the Social Ecology of Young People's Prolific Offending' (2017) 17(1) *Youth Justice* 3.

¹⁶ Kathy S. Hampson, 'From the Mouths of Dragons: How Does the Resettlement of Young People from North Wales Measure Up ... In Their Own Words?' (2016) 16(3) *Youth Justice* 255.

¹⁷ Bateman (n 4) 2.

¹⁸ Children and Young Persons Act 1933, s.50, as amended by Children and Young Persons Act 1963, s.16(1).

¹⁹ House of Lords House of Commons Joint Committee on Human Rights, *The UN Convention on the Rights of the Child, Tenth Report of Session 2002-03* (HMSO: 2003) 18.

²⁰ Terry McGuinness, *House of Commons Library Briefing Paper Number 7687: The age of criminal responsibility* (House of Commons: 15 August 2016) 14.

²¹ Royal College of Psychiatrists, *Child defendants - Occasional Paper 56*. (Royal College of Psychiatrists: 2006) 38.

²² Claire McDiarmid, 'An Age of Complexity: Children and Criminal Responsibility in Law' (2013) 13(2) *Youth Justice* 152.

²³ Tim Bateman, *NAYJ Campaign Paper: Criminalising children for no good purpose: the age of criminal responsibility in England and Wales* (NAYJ: October 2012) 6.

²⁴ Taylor (n 1) 141.

education, subjecting young offenders to a rigorous curriculum would ensure that their time spent in custody is productive. While secure schools will still serve a custodial function, many elements commonly associated with prisons will be eliminated. Staff employed in these secure schools will include teachers, health workers, and pastoral care staff who will be specialised in their relevant fields and equipped to deal with challenging children. Secure schools should operate without wardens whom Taylor sees as raising the risk of violence, despite their function being to prevent such disorder.

The delineation of youth secure estates as schools will serve to reduce the ill effects that traditional incarceration can have on children, while simultaneously removing the stigmatisation of imprisonment. Secure schools will also be located within the local authority areas which they serve, reducing the distance between young inmates and their families, as well as the youth offending team (YOT) social workers. This proposed remodelling of the youth secure estate looks to ameliorate much of the additional pains of child imprisonment and seeks to rehabilitate, rather than punish, the child.

Apart from improving conditions of youth custody, secure schools could potentially reduce recidivism rates by ensuring better resettlement. In Hampson's study, the empirical data which she had collected through interviewing 11 young people whom had all experienced incarceration, showed that they 'knew what they needed to do in order to stay away from future offending...their knowledge was not in question, just their ability to actually achieve it'.²⁵ Secure schools allow children to enrol in work, education or training while in custody, facilitating for a 'robust after-justice exit plan...necessary for effective resettlement'.²⁶

In response to the issue of the low MACR, apart from the obvious solution of raising the age to match the recommended MACR of 14 or the average MACR of 12, another option could be the introduction of a defence of developmental immaturity. This proposed new defence was introduced by the Law Commission to address a gap in the law, left by the defence of diminished responsibility which made 'no allowance for 'normal' developmental immaturity of a child or young person'.²⁷ The effect of this proposed defence would be similar to that under diminished responsibility; it would act as a partial defence for the defendant's conduct. Through Fitz-Gibbon's study, over two-thirds of legal practitioners and policy stakeholders surveyed were supportive of a new defence of developmental immaturity.²⁸

Welfarism: spare the rod and spoil the child?

First, it is important to dispel the myth that in employing a welfare-dominated system, its inverse will be implied – that justice will not be served. While retributive justice will certainly not be present within the welfarist agenda, restorative justice will still be meted out to the young offender.²⁹ Instead of an emphasis on outright punishment, restorative justice offers a more effective solution towards offending behaviour, by tackling the root causes of the child's offending. This alternative form of justice encompasses the young offender making restoration to the victim, taking responsibility for the consequences of the behaviour, while simultaneously achieving reintegration into the community.³⁰ In relation to youth justice in particular, welfare should be at the heart of the system. As youths are at a phase in life where their cognitive abilities are developing, their reasoning would not yet have reached the level of sophistication as that of an average adult. A child's 'reasoning and risk assessment will be more impulsive' than an adult's.³¹ As a result, they 'often do not appreciate the consequences of their actions'.³² Furthermore, a majority of the children in the system come from dysfunctional households where substance abuse, crime, and domestic violence are prevalent in their everyday lives.³³ These children are victims of circumstance, and often, they grow up perceiving offending as normative behaviour.

The problems that underlie offending behaviour amongst youths are complex. To help these profoundly troubled children, the youth justice system should not merely seek to pathologise behaviour and impose punishment. Rather, it should aim to address the underlying issues by 'improving their welfare, health and education',³⁴ through a coordinated multi-agency response. Studies have substantiated the claim that contact with the formal justice system does not always serve to reform children, instead it may exacerbate 'us versus them' attitudes and only reinforce their identity as outcasts.³⁵ While the youth justice system is a mechanism available to tackle relentless offending behaviour, it should not be the means by which all misdemeanours are redressed.³⁶ Children represent the future of society and they have 'great strengths on which to build and are capable of rapid and extraordinary change'.³⁷ More often than not, offending only represents a 'short-lived phase'³⁸ for children, a thoroughfare of growing up. It would not be in the best interests of society to punish and potentially send a child into a downward spiral over a minor crime. Clearly, the age-old proverb, 'spare the rod and spoil the child', does not hold true in this context. As such, Taylor urges society to shift their mind-set in relation to youth

²⁵ Hampson (n 16) 257.

²⁶ *ibid* 258.

²⁷ Law Commission, *A new homicide act for England and Wales? An Overview* (Law Com No. 177, 2005) [4.21].

²⁸ Kate Fitz-Gibbon, 'Protections for children before the law: An empirical analysis of the age of criminal responsibility, the abolition of *doli incapax* and the merits of a developmental immaturity defence in England and Wales' (2016) 16(4) *Criminology & Criminal Justice* 405.

²⁹ Claire Hamilton, Wendy Fitzgibbon and Nicola Carr, 'Punishment, Youth Justice and Cultural Contingency: Towards a Balanced Approach' (2016) 16(3) *Youth Justice* 226.

³⁰ Loraine Gelsthorpe and Allison Morris, 'Restorative youth justice: The last vestiges of welfare?', in John Muncie, Gordon Hughes and Eugene McLaughlin (eds), *Youth Justice: Critical Readings* (SAGE Publications, 2002) 243.

³¹ *ibid* (n 21) 155.

³² *ibid* (n 1) [6].

³³ *ibid* (n 1) [4].

³⁴ *ibid* (n 1) [6].

³⁵ Lesley McAra and Susan McVie, 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending' (2007) 4(3) *European Journal of Criminology* 315.

³⁶ *ibid* (n 1) [9].

³⁷ *ibid* (n 1) [6].

³⁸ *ibid* (n 1) [9].

justice so that we see ‘the child first and the offender second’.³⁹

Of course, enhancing welfare will come at a price, both literally and metaphorically. Implementing Taylor’s plan for secure schools would entail a large-scale revamp of the youth secure estates across England and Wales. Under his blueprint, all three forms of penal institutions (YOIs, secure training centres and secure children’s homes) currently in use would be abolished. The government would have to allocate a significant proportion of the budget towards setting up new facilities in each local authority area for these secure schools to operate from, as well as providing specialist training for staff in handling children. Then again, there is little authoritative evidence to show that a soft-handed welfarist approach will actually succeed in reducing youth offending and reforming the child. Furthermore, transitioning towards such a system would invariably be met with much opposition from the public. The unfortunate high-profile tragedy of the murder of James Bulger and the riots of 2011, compounded by the vilification of youths in the media, have made a lasting negative impact on the minds of the public. As a result, the public continues to harbour a myopic view of the youth justice system, regarding it as a tool for punishment. Anything less than a punitive response to youthful transgressions is likely to result in the government being placed in an invidious position.

Should Taylor’s vision be adopted?

The recurrent problems with the youth justice system evince that insufficient consideration is being given to the welfare of the child. The jurisdiction of England and Wales continues to breach human rights guidelines in relation to the child and preserving the status quo – a ‘justice system with some welfare’ – will only allow these problems to persist or worsen. Clearly, the current system has reached a ceiling in improving welfare provisions for children. An overhaul of the system is necessary. Despite it coming at a fiscal cost, and a potential political cost, the potential benefits of Taylor’s proposed ‘welfare system with justice’ far outweigh the negatives. Children are the next generation of citizens and leaders, and it will prove prudent to invest in safeguarding their welfare. Society must stop viewing the youth justice system in a myopic light, and recognise that children’s cognitive ability to comprehend morality is not as advanced as that in adults. This is why there was a bifurcation of the justice system to begin with. The benefits in enhancing welfare for children will be apparent in the long term. On the other hand, a punitive stance, although it allows for the victim to experience a sense of satisfaction in witnessing the young offender’s punishment, fails to be purposeful in other respects. Society should embrace welfarism and recognise that restorative justice presents an alternative and effective method in both preventing offending and reforming the child. This call for a change in approach is especially appropriate in relation to the contemporary

situation, where the cohort that remains within the youth justice system is a persistent bunch. While it will certainly be an uphill battle for Taylor’s vision to come to fruition, this article submits that adopting his methodology will be the appropriate path for the future.

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