

## **Punishment, Youth Justice and Cultural Contingency: Towards a Balanced Approach**

*Reflecting developments in the broader penological realm, accounts have been advanced over the last number of decades about a 'punitive turn' in the youth justice systems of western democracies. Against the background of this work, this project seeks to identify convergent and divergent trends in the youth justice systems of England, the Republic of Ireland and Northern Ireland as well as the rationalities and discourses animating these. The results lend support to research emphasizing the continued salience of national, regional and local factors on penal outcomes but also suggest the need to steer an analytical path somewhere between nomothetic (convergent) and idiographic (divergent) accounts (Muncie, 2011).*

Key words: 'punitive turn'; comparative youth justice; convergence; divergence.

### **Introduction**

It is now nearly trite to write of the influence of the newly dominant neo-liberal economic model on the penal realm and particularly its role in the decline of penal welfarism over the past number of decades. A wide range of contemporary writers such as Garland (2001), Wacquant (2009), and Cavadino and Dignan (2006), all advance arguments linking (in various direct and indirect ways) the 'free market turn' (Downes, 2011: 30) to its penological adjunct, 'the punitive turn'. For Wacquant and Garland in particular the result has been a homogenisation of criminal justice across western societies, driven by the spread of punitive policies from the USA. While the area of juvenile justice has not been neglected within this debate it arguably raises distinct issues which merit special consideration in any assessment of punitiveness (Tonry, 2007; Muncie, 2008). For instance, despite the argument for rehabilitation over retribution being strongest in relation to young offenders, children as the least powerful members of communities may be more susceptible to the risks and hazards of the neoliberal project (Muncie, 2005). There are, moreover, other global visions and processes at play including various forms of legal globalism deriving from the UN and other international bodies. International conventions such as the UN Convention on the Rights of the Child (UNCRC) have established a near-global consensus on core principles such as the 'best interests' of the child, the dignity of the child and the use of custody as a last resort. Within the field of youth justice, therefore, global processes of convergence may not be as one dimensional as they first appear, accommodating both punitive and more 'progressive' impulses (ibid).

Of course global factors are not the only influences on punishment and the various conceptualisations of the global discussed above have manifested themselves differently among western jurisdictions. Alongside the work of Garland (2001) and others on the rise of a 'risk society' and a neo-liberal inspired 'culture of control', more cautious accounts have appeared emphasising the crucial role of national culture and geo-political contexts in mediating global trends (Melossi, 2001; Field and Nelken, 2010). These accounts testify to divergence rather than convergence and, more recently, speak to the continued grip of national cultural traits on the political imagination, even in the face of momentum for reform (Goshe, 2015). Building on this work, this paper, by employing recent research findings, seeks to illuminate the extent to which national penal cultures

impact on the way in which youth justice is 'done' in a given jurisdiction. A 'focussed comparison' was undertaken between the Republic of Ireland, Northern Ireland and England in the context of the (ostensibly) highly divergent approaches towards youth justice taken by these jurisdictions over the period 1990-2010. While England has since the 1990s pursued policies which have sought to 'responsibilise' young offenders (and their parents) (Phoenix and Kelly 2013), resulting in higher custody rates and greater coercion in the community, Northern Ireland and the Republic of Ireland appear to have taken a very different path through their continued commitment to rehabilitative policies and restorative justice (McVie, 2011; Stern, 2006). The aim of the study is thus to identify convergent and divergent trends in the three jurisdictions as well as the rationalities and discourses which may be animating these. Our results lend support to studies emphasising the continued salience of national, regional and local factors on penal outcomes but also suggest the need to chart a path between the Charybdis of the nomothetic (convergent) tradition and the Scylla of idiographic (divergent) accounts (Muncie, 2011). While researchers should remain attentive to divergence at a regional and local level as well as disjunctures between policy and practice, sight should not be lost of the distinctiveness of national trajectories.

### **The 'punitive turn' in youth justice and its limits**

Readers of this journal will be well versed in the arguments concerning the shape and impact of a 'punitive turn' as it affected the youth justice field in the early 1990s and for this reason it is not proposed to rehearse these again in great detail. Suffice it to say that in his seminal article on the 'punitive turn' in juvenile justice, Muncie (2008: 110) argues that in Western Europe and the US 'punitive values associated with retribution, incapacitation, individual responsibility and offender accountability have achieved a political legitimacy to the detriment of traditional principles of juvenile protection and support.' In the US this was evidenced by a 43 per cent increase in juvenile incarceration during the 1990s, the continued application of the death penalty and life without parole sentences to juveniles, and the introduction in most states of a juvenile waiver system whereby children as young as seven could be tried as adults (ibid; Goldson and Muncie, 2009). While the punitive shift in England and Wales assumed its own distinct form, triggered by the moral panic over the murder of James Bulger by two young boys in 1993, distinct inflections of the American approach can be discerned in the raft of legislation adopted by successive governments since that date. Initiatives such as zero tolerance policing, dispersal zones, curfews, electronic monitoring, naming and shaming and antisocial behaviour orders together with a significant increase in custody rates for juveniles all appear to reflect a new authoritarianism and an intensification of the governance of young people through crime and disorder (Simon, 1997). In his analysis of the changing policy and practice context in England and Wales, Goldson (2005) points in particular to the increased use of 'risk factor' modelling and tools as a means of 'targeting' of children 'at risk' of offending on the basis that early identification will allow for preventive intervention. As with other critics of the new risk paradigm (Feeley and Simon, 1992, 1994), he questions the extent to which the logic of prediction and actuarialism widens the 'net' of the criminal justice system and effectively decouples punishment from guilt. Paralleling punitive trends in relation to adult offenders, these shifts have been variously attributed to social and economic changes associated with late modernity (Garland, 2001) or the influence of the newly dominant neo-liberal economic model on the penal realm (Wacquant, 2009; Cavadino and Dignan, 2006).

Positioned alongside these accounts of global convergence (dubbed ‘nomothetic’ by Muncie, 2011) have been those emphasising divergence or differences between jurisdictions (‘idiographic’ accounts *per* Muncie). Such accounts are necessarily less pessimistic than the literature outlined above in that the ‘punitive turn’ can be understood less as a facet of changes in structural conditions common to western jurisdictions (such as neo-liberal economics) and more as an embedded aspect of American (and perhaps English) exceptionalism (Nelken, 2006; Hamilton, 2014). Muncie (2008) himself is quick to acknowledge the critical role played by local factors in mediating punitiveness, advocating ‘a continuing centrality to cultural contingency and local actors in the precise ways in which the global, the national, and the sub-national are activated on the ground’. On this view, the determinants of youth justice, whether institutional, political or historical, remain ‘parochially national and cultural’ (Tonry, 2001: 518; Tonry, 2007). The approach is supported by an emerging body of empirical work which points to the crucial way in which political actors define the ‘problems’ of youth and crime (Field and Nelken, 2010) as well as the varied and mediated influence of the new penological discourses such as risk (McNeill *et al* 2009). These processes of ‘relocalisation’ (Crawford, 2002) may also be observed within nation state territories. Various shifts in legislation and policy within the Scottish, Welsh and Northern Irish administrations following devolution in 1998<sup>1</sup> mean that it is now possible to identify four distinct youth justice ‘models’ within the UK. While these are far from pure models or typologies, they reflect the priorities accorded to different approaches within the youth justice system, namely, restorative justice in Northern Ireland; welfarism in Scotland; risk in England and a rights-based approach in Wales (Muncie, 2011). Even then, it has been argued that policy as promulgated and policy as activated and practised on the ground may not result in the same thing (*ibid*).

Of course, the ‘punitive turn’ thesis must now be considered in light of the recent dramatic decline in the use of youth custody in England and Wales and the consequent bifurcation in the adult and youth penal populations. Dating from approximately 2008, numbers of under 18s in the secure estate have plummeted from an average population of 2,750-3,000 between 2000 and 2008 to 1,216 in 2013/14 (Bateman, 2012a; Youth Justice Board/Ministry for Justice, 2015). Reflecting on the implications for the punitive thesis, Bateman (2012a: 46) has queried the extent to which this decline signifies ‘a more general climate of penal tolerance with the potential to endure’, pointing to the harsh rhetoric and punitive sentences handed down during the English riots of 2011. Notes of caution have also been sounded in relation to recent reform in the US such as nationwide falls in juvenile arrest rates and legal restrictions on punitive sanctions such as life imprisonment without parole. While Merlo and Benekos (2010) detect a return to ‘business-as-usual’ in US juvenile courts after a period of harsh punishments in the 1990s, Goshe (2015) argues that certain features of US society such as the logic of risk management and cultural ‘callous self-sufficiency’ will not allow the ‘punitive legacy’ to be so easily left behind.

### **A focussed comparison**

It is against the background of this work that this study aims to engage in a ‘focussed comparison’ (Pakes, 2014: 20) of the ‘punitive turn’ as it has impacted youth justice policy and practice in the

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<sup>1</sup> While Scotland initially underwent what has been interpreted as a period of convergence with English youth justice policy or ‘detartanisation’ (McAra, 2008: 494) it has subsequently been argued that the Scottish Nationalist Party (SNP) government has, since gaining power in 2007, reversed that trend in a process of ‘retartanisation’ (McNeill, 2011).

three jurisdictions. As noted, the effects of this punitive turn have not been uniformly felt in all jurisdictions and the instant research was motivated by a desire to explore what appeared to be a significant divergence of approach in three jurisdictions in close geographical proximity to one another. As already observed, dating from the early 1990s onward England has pursued policies which have sought to 'responsibilise' young offenders (and their parents) resulting in higher custody rates and greater coercion in the community (Muncie, 2008). Northern Ireland and the Republic of Ireland on the other hand, may be said to have pursued a very different path through their continued commitment to diversion, rehabilitative policies and restorative justice (Junger-Tas, 2006; Doak and O'Mahony, 2012; Carr and McAlister, 2014). Reforming legislation introduced in both these jurisdictions in 2002 and 2001 respectively has explicitly sought to align these systems with UNCRC principles and laid heavy emphasis on diversion from the criminal justice system. In the Republic, the Children Act 2001 has provided for an increase in the age of criminal responsibility, the abolition of imprisonment for children, restorative and family conferencing, a wide range of community sanctions and a statutory footing for the Garda Síochána (police) cautioning programme. Despite its slow implementation and subsequent government retrenchment on some of the provisions, it has been praised as a framework for reform (Seymour, 2006; Stern, 2006). In Northern Ireland praise has also been heaped upon the Justice Act 2002 which sets up restorative conferencing as the primary response to children in conflict with the law. While by no means without its problems (Maruna *et al.*, 2007; Carr *et al.*, 2015), evaluations of the system have shown promising results in terms of victim satisfaction rates, reduced levels of reoffending and increased rates of diversion (Jacobson and Gibbs, 2009). As will be discussed further below, the net result has been a steady decline in the use of detention in the Republic of Ireland and a more dramatic fall in youth custody rates in Northern Ireland, in stark contrast to the significant increases in detention in England in the 1990s.

## **Methodology**

In light of these ostensible differences the aim of the study was to identify convergent and divergent trends in the three jurisdictions as well as the rationalities and discourses which may be driving these. Fieldwork took place in 2014 and the research was conducted based on a mixed methods or triangulated design which provided for a natural iteration between the qualitative and quantitative elements of the research. Thus, for example, interviewees were asked to reflect upon quantitative data collected on detention and these views informed our understanding of the patterns in the data. Reflecting the need to explore both the 'objective' and 'subjective' dimensions of punitiveness (Nelken, 2005), data were collected on objective differences in penal outcomes as well as the factors motivating these decisions. Objective indicators, following Muncie (2008), comprised quantitative data on the use of custody for young offenders for the period 1990 to 2010 as well as a brief human rights 'audit' or analysis of compliance with international human rights standards such as the 1989 UN Convention on the Rights of the Child (UNCRC) conducted in respect of each jurisdiction. The final indicator was derived from practitioner responses to three vignettes or hypothetical cases. This enabled us to directly compare the practice outcomes in each jurisdiction for three situations involving young people in conflict with the law and at different stages of the criminal justice process. Data were elicited in interviews carried out with approximately 13-15 stakeholders (per jurisdiction) representing key institutions involved in the criminal process. Given the different scale of jurisdictions as well as for practical reasons, in England fieldwork was largely conducted in the

London metropolitan region. In light of the divergences identified amongst youth offending services in different regions of England (see Kelly and Armitage, 2015), this is an obvious limitation of the research. The overall sample comprised: police officers involved in youth diversion, probation officers working in youth justice, prosecutors specialising in youth justice, members of Youth Offending Teams (where appropriate) and Children's Court judges/magistrates, as well as Crown Court judges. In order to gain some insight into what local practitioners say they are trying to do (subjective punitiveness) these respondents were questioned about their philosophies, attitudes and priorities when undertaking their role in the youth justice system. A purposive sample with maximum variation within the youth justice system was used to gain interviews with a range of actors involved in the young person's journey through the criminal justice system. The boundaries of the sample were dictated by accessibility and a snowballing technique was used to gain access to particularly difficult groups of professionals such as judges and magistrates. While clearly an important indicator of the punitiveness of the youth justice system should be provided by young offenders themselves this was considered beyond the scope of the instant study (for an illuminating account, see McAlister and Carr, 2014).

## **Findings: Objective Indicators**

### ***Youth Detention Rates***

Punitiveness as measured by incarceration rates<sup>2</sup> can of course be examined comparatively or historically. While comparative assessment provides an important way of making sense of imprisonment or detention rates and a useful indication of standing in relation to other countries, arguably longitudinal analysis is more helpful for assessments of a 'new' punitiveness (Hamilton, 2014). In the instant study we chose to examine both aspects with a view to obtaining as complete a picture as possible. In line with Muncie's (2008) arguments concerning the most accurate indicator of *juvenile* incarceration rates, estimates of juvenile custody rates per 1,000 under-18 population were based on data collected by the International Centre for Prison Studies (ICPS) (the most recent figures available, dating from 2014-2015) and under 18s population data gathered by UNICEF. This was supplemented where necessary with data from the Council of Europe Annual Penal Statistics (2015) and mid-2014 population estimates for the UK.<sup>3</sup> The results shown in Table 1 below provide an interesting point of comparison with the earlier figures provided by Muncie (2008). Considering it was the highest European incarcerator of juveniles in Muncie's sample in 2008, the English jurisdiction now looks much less punitive, moving much closer to mid-range European countries such as Austria (0.1) and Portugal (0.06) (Muncie, 2008). On the other hand, it would still appear to be the more punitive jurisdiction when compared with the other two sample countries, perhaps substantiating claims that progress in this regard should be considered in light of the very high starting point (Howard League for Penal Reform, 2015).

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<sup>2</sup> Clearly, the concept of punitiveness is multidimensional in nature and can be measured using many indices beyond incarceration rates. Owing to the small scale and time limited nature of the study, however, we chose to focus on a select few indices as indicated in the methodology section. For further discussion on how best to operationalise punitiveness, see Hamilton (2014a, 2014b).

<sup>3</sup> Unfortunately, UNICEF does not disaggregate figures for the UK into the four administrations.

**Table 1: Estimated number of juveniles in penal custody in England and Wales, the Republic of Ireland and Northern Ireland.**

	Number of under 18s in custody (Muncie, 2008)	Rate per 1,000 under 18 population (Muncie, 2008)	Number of under 18s in custody (2013-2015)	Rate per 1,000 under 18 population (2013-2015)
England & Wales	2927	0.25	1003	0.09
Northern Ireland	76	0.16	28	0.06
Republic of Ireland	52	0.05	47	0.04

**Source: Muncie (2008); ICPS; Council of Europe Annual Penal Statistics; UNICEF; Office for National Statistics Population Estimates.**

As is often the case with comparative criminal justice research, difficulties abound in obtaining accurate and comprehensive longitudinal data, especially data that are consistent over the time period in question (Goldson and Hughes, 2010). Particular difficulties were encountered in Northern Ireland and the Republic of Ireland owing to the paucity of good quality data and inconsistent recording practices (Seymour, 2006; Youth Justice Review, 2011). In the Republic, the detained juvenile population was also split between two institutions: St. Patrick’s Institution (run by the Prison Service) which traditionally held young male offenders aged 16 to 21 and Children Detention Schools which traditionally housed children under 16. Given serious deficiencies in Prison Service data,<sup>4</sup> the use of detention in ‘special schools’ or children detention schools from 1990-2007 was selected as the most complete and reliable source of information. Northern Irish data is similarly limited with the only available historical data deriving from a Northern Ireland Office Commentary on Crime Statistics published in 2001. When combined with other data sources (notably, Jacobson and Gibbs, 2009), however, this allows us to piece together an (incomplete) picture of the use of custody over the period.

The results for the three jurisdictions can be shown below. As expected, they have all experienced downward trends in their youth detention rates in recent years, yet they have arrived at this point via very different paths. Figure 1 illustrates the rise and fall in the use of custody in respect of young offenders in England over the period 1992-2010.<sup>5</sup> As can be seen, custodial sentences began to fall

<sup>4</sup> In the Prison Service Annual Reports up until 2005 attention is focused on those under 21 rather than those under 18 so that the juvenile rate of detention cannot be determined. Requests made by the authors to the Department of Children and Youth Affairs for historical data relating to the under 18 population in St. Patrick’s Institution confirmed that this data is only available from 2003 onwards.

<sup>5</sup> Trends are shown from 1992 onwards to allow for comparison. The Criminal Justice Act 1991 extended the age range of the youth court to include 17 year olds and this legislation was implemented in 1992.

from 2001 onwards, although the 4,219 children given a custodial sentence in 2010 remains higher than the 4,000 receiving such a sentence in 1992.<sup>6</sup> The cyclical nature of the trend fits within a more general pattern of rising and falling rates of custody over the last fifty years or so with peaks in the early 1980s and late 1990s (Morgan and Newburn 2007). While the data in Figure 2 are not complete, they do illustrate the dramatic impact of the 2002 Act on the youth justice system in Northern Ireland as the restorative conferencing legislation began to take effect (conferencing commenced at the end of 2003). It is important to note, however, that numbers were already falling from 1995 onwards: the proportion of young people sentenced to immediate custody fell from 25% in 1994 to 11% in 1999, probably reflecting a number of significant legislative changes during the mid to late 1990s<sup>7</sup> (NIO, 2001; O'Mahony and Campbell, 2006). Similarly, in the Republic of Ireland, the downward turn in detention from 1993 onwards appears to precede by some distance the full implementation (in 2006) of the watershed Children Act 2001 referred to above. This may in all likelihood be due to the expansion and nationwide extension of the Garda Diversion Scheme in the years 1990-1991. Walsh (2005) notes that between 1991 and 1993 the numbers referred to the programme almost doubled from 6,208 to 11,440.

**[Insert Figures 1-3 here]**

### ***Human Rights Audits***

Superior protection by states of the human rights of offenders has been related by Snacken and Dumortier (2013), among others, to lower levels of punitiveness. At first blush, significant differences may be detected in the extent to which the three jurisdictions have complied with human rights standards such as the UNCRC. While none of the three have gone so far as to incorporate the Convention into domestic law, Northern Ireland and the Republic of Ireland have both explicitly adopted the Convention's standards as a framework for reform of their youth justice systems. In the Republic, this is reflected in key provisions of the Children Act 2001 legislating for: an increase in the minimum age of criminal responsibility to 12; protection of privacy during legal proceedings; a heavy emphasis on diversion; a statutory right for children to be heard in any proceedings affecting them; detention as a last resort and for the shortest time possible; and a statutory obligation to order a probation report prior to imposing sentence. Similarly, in Northern Ireland, the centrality of human rights and conflict resolution discourses to the Criminal Justice Review (2000) and subsequent reports on the youth justice system (eg Youth Justice Review, 2011), has had tangible impacts in terms of: the radical reorientation of the system towards restoration and diversion; articulation of the 'welfare principle' within legislation; the extension of the youth justice system to include 17 year olds; and, of course, the significant decline in the use of custody since 2003 discussed above. This can be contrasted with the English jurisdiction which has been sharply criticised by the UN Committee on the Rights of the Child in 2002 and 2008 for its record of imprisoning 12 year olds; its heavy use of custody in respect of the young offenders in general,

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<sup>6</sup> It should be noted that on account of the heavy use of remand and increase in sentence length the population of the secure estate in England continued to grow until 2008 (see further Bateman, 2012b).

<sup>7</sup> Criminal Justice (NI) Order 1996; Criminal Justice (NI) (Children) Order 1998.

including increases in sentence length; the use of antisocial behaviour legislation to target noncriminal behaviour; and for generally failing to act in the child's 'best interests'.

On closer inspection, however, similar failings can be detected across the three countries in terms of the human rights protections afforded to young people within the youth justice system (for a discussion of the limitations of 'rights based approaches' more generally, see Kilkelly and Goldson, 2013). One critical indicator (seemingly correlated with lower use of custody (Muncie, 2008)) is the low minimum age of criminal responsibility (MACR) in England and Northern Ireland; at 10 one of the lowest in Europe. While the Department of Justice in Northern Ireland has accepted 'in principle' the recent recommendations of the Youth Justice Review (2011) to increase the age to 12, this has met with strong resistance from local politicians refusing to pursue the United Nation's 'agenda' on youth justice (see further Hamilton, 2015). Resistance to a raised age of responsibility was also in evidence in the Republic when the 2006 Criminal Justice Act which amended the 2001 Act confirmed the MACR as 12 rather than 10 for certain serious offences on the grounds that public opinion would not tolerate it if there were no 'punitive consequences for children who murdered or raped' (Minister for Justice Michael McDowell cited in Cahill, 2006).<sup>8</sup> A more ambiguous response to youth offending in the Irish and Northern Irish jurisdictions can also be discerned in the legislative provisions detailing the aims and guiding principles of the respective systems. Section 53 of the Justice (Northern Ireland) Act 2002 mirrors the English provisions in asserting that 'the principal aim of the youth justice system is to protect the public by preventing offending by children'. As with the MACR, proposals to amend this to explicitly incorporate the 'best interests' principle espoused in Article 3 of the Convention have met with a lukewarm response. The Implementation Report (Criminal Justice Inspectorate, 2013) notes that the overall elements as set out in section 53 will not change, but that amending legislation will merely extend the existing reference to the welfare of the child in section 53 to include the 'best interests' principle. Kilkelly (2008: 53-54) has similarly identified the duty to act in the best interests of the child as an omission in the (Republic of Ireland's) Children Act 2001, noting 'while this requirement was added to section 96(5) by the Criminal Justice Act 2006 it is not set out as a general guiding principle, but rather one factor which, along with the interests of the victim and that of the public, must be taken into account in relation to measures for dealing with young offending.'

### ***Vignettes***

Interviewees were asked to give their views on three case scenarios reflecting both different levels of risk and also defendants at different stages along the youth justice system (ranging from point of entry to sentencing to breach of a post-custody supervision order). The cases are listed below in Table 2. For all three scenarios, respondents were asked to indicate what they felt would be the most likely outcome in the case and why.

**Table 2:**

<b>Case 1:</b> A 10 year old boy whose brother is involved in drug offences and who has served a prison sentence is showing disruptive behaviour at school, including truancy.
<b>Case 2:</b> A 15-year-old from a disrupted family background steals CDs to the value of £150/€200 from

<sup>8</sup> It should also be noted that the 2006 Act introduced a requirement that the Director of Public Prosecution (DPP)'s consent be required for prosecutions up to 14 as an additional safeguard.



a record shop (one of a well-known chain). The defendant has been dealt with through [diversion] and community disposals in the past.

**Case 3:** A 16 year old boy who has served a number of short custodial sentences for offences of burglary, assault and public order has missed a number of post-custodial or supervision appointments.

The results are interesting for what they suggest about the shifting priorities of practitioners as well as differences in risk foci at various stages of ‘the new correctional continuum’ (Goldson, 2002). Perhaps reflecting the contemporary emphasis on custody as a last resort in all jurisdictions, the second ‘cusp of custody’ scenario provoked a surprisingly similar response across the board. Notably, *none* of the practitioners in the three countries felt custody was an appropriate response to the situation. The majority of respondents in Northern Ireland suggested another conference would be the best option in the circumstances, while formal court sanctions were preferred by practitioners in England and the Republic of Ireland. These ranged from a suspended sentence, period of adjourned supervision or probation bond in the Republic to community rehabilitation, payback orders or conditional caution in England.

Differences were more apparent, however, in relation to the ‘entry to criminal justice system’ case study (No. 1) and perhaps revealed themselves most vividly in relation to the final scenario involving breach of an order. For Case 1, a majority of practitioners in all three jurisdictions felt the case warranted work with the school as the main focus. In the Republic of Ireland and Northern Ireland the shared view was that the child should be kept out of the justice system unless there was more evidence of offending. A considerable number of the English respondents (6 out of 13), however, *also* suggested early involvement of the youth justice system in one form or another (ie YOT referral or police warning) implying a lower threshold for entry to the system in England than the Republic of Ireland and Northern Ireland. With regard to Case 3, outcomes suggested by English respondents were the most punitive with only 3 out of 13 respondents stating that the young person would be afforded a second chance prior to recall and return to custody. This compared with 9 out of 15 respondents in the Republic Ireland and about half of the respondents in Northern Ireland. The Irish and Northern Irish jurisdictions appear to be able to see ways to renegotiate the system to enable the young person to have another opportunity to prove themselves whereas this was viewed as more difficult in the, perhaps more bureaucratised, English jurisdiction.

### **Findings: Subjective Indicators**

As noted above, the research aims to capture the subjective element to punishment as well as more objective indices. Low levels of imprisonment or detention can be the result of inefficiency, delay or neglect as well as a deliberate choice to reduce levels of pain infliction. Conversely, in an increasingly complex penal environment, ‘bad’ outcomes, such as an increased use of custody, can occur for ‘good’ reasons (Nelken, 2005). It was for this reason that it was considered important to question practitioners about what they felt they were trying to achieve within the system, asking questions about their aims, those of others within the system and their perceptions of change. The results do little to contradict existing arguments about the complexity and messiness of contemporary youth justice systems (Goldson and Muncie, 2009; Goldson and Hughes, 2010; Carr and McAllister, 2014). While elements of convergence were apparent, there was also a sense in which the interview data reflected the distinct paths forged by the three jurisdictions in the youth justice field.

### ***Mind the Gap: Practice Philosophies***

Unsurprisingly, our discussions with practitioners in all three jurisdictions revealed multiple and competing aims and objectives, drawing on retributive, rehabilitative, restorative, diversionary, public protection and rights-based rationales (Goldson and Muncie, 2009). There was therefore some tension (described by McNeill *et al* (2009) as the ‘governmentality gap’) between the rationalities deployed by practitioners in their interactions with young people and the statutory aims of the systems in which they worked. Even in England, where the overwhelming majority of practitioners gave their goal as ‘preventing offending’ in line with the statutory mandate, this was fused with welfare, rehabilitative and justice elements:

‘[it’s] about rehabilitation and being more productive ...supporting families, so that the ripple effect on children is a more positive outcome.’ (England, Probation Officer).

‘I think it’s to prevent reoffending and to have regards to welfare of the youth. I would hope that we are giving them a fair outcome, of a mixture of punishment and support.’ (England, Magistrate).

Interestingly, this was the case even with respondents who demonstrated a more punitive attitude to young offenders. One police officer, for example, who held a self-declared preference for the ‘punitive approach’ was also very critical of ASBOs as they didn’t provide for any form of intervention: ‘the focus isn’t about engaging the individual, trying to look at what’s happening, work out a strategy to deal with it’. In both Northern Ireland and the Republic of Ireland there was considerable consistency in terms of the young person’s welfare being cited as the predominant concern. In Northern Ireland, respondents generally perceived their own actions as being in the ‘best interests of the young person’ and there was some sense of youth justice work being undertaken in a ‘soft’ manner: ‘I’ve been described as a Peeler in fluffy slippers, a hug-a-hoodie’ (Northern Ireland, Police youth diversion officer)<sup>9</sup>. In the Republic, welfarism was the most commonly cited aim and it was notable that both legal professionals and probation officers seemed to stress young people’s engagement with probation rather than the seriousness of the offence as being the key influence on sentence.<sup>10</sup> This is interesting because it is at odds with the purported aims of the Children Act, which was presented in the Dáil (Irish Parliament) as a ‘modified form of the justice model’:<sup>11</sup>

‘...because generally it’s because there is no engagement with the probation services, that’s the reason they are going [to detention].’ (Ireland, barrister)

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<sup>9</sup> ‘Peeler’ is a colloquial term used in Northern Ireland to refer to a police officer. It derives from Robert Peel - the founder of the Metropolitan Police Force.

<sup>10</sup> In this regard, it is also noteworthy that legal professionals interviewed cited regular departures from the rules of evidence in the Children Court and that, in their view, both hearings and sentences tended to be conducted in a much more ‘lenient’ fashion. There was also considerable evidence of ‘entrepreneurism’ within the system with a view to achieving the best outcome for the child, even to the extent of judges pushing the limits of their jurisdiction (‘There would be a tendency to say look if somebody wants to get out of a system you might help them’).

<sup>11</sup> See Minister for Justice, Austin Currie, Dail Debates, 12<sup>th</sup> February 1997, Children Bill, Second Stage: ‘In accordance with our constitutional requirements and social conditions, we have rejected legislating for a pure form of either model. Instead, the most appropriate system for this country is a modified form of the justice model which incorporates suitable elements of the welfare model, as provided in the Bill’. (The Children Bill 1996 was the forerunner to the Children Bill 1999 which became the Children Act 2001).

'I am not sure there is enough focus put on the actual offence. You know it is very much client focussed... [the aim is] to try and keep them out of St. Patrick's and to give them as good a result as possible and also to ensure that if they don't have a social worker, that they should have a social worker....the welfare aspect is huge.' (Ireland, solicitor).

In line with the results from the sentencing vignettes, practitioner data in Northern Ireland and the Republic of Ireland reflected a stronger (perhaps more embedded) shift towards the use of custody as a last resort. Practitioners were asked to consider instances where in their view the punishment had been unduly lenient or punitive and in both jurisdictions examples were given of an unlimited number of referrals being made to conferences and/or diversion.<sup>12</sup> In addition, in the Republic cases were described in which very serious drugs offences attracting presumptive sentences in excess of 10 years imprisonment were dealt with restoratively.<sup>13</sup> It should be strongly emphasised, however, that this perceived 'leniency'<sup>14</sup> was highly contingent in both jurisdictions. Practitioners in the Republic referenced many factors which may impact on the sentence a young person will receive, namely, geography (young people appearing before regional courts were perceived as particularly disadvantaged), resources (the availability of a bed in a detention centre), delays and a child's ability to engage with the relevant services. In Northern Ireland similar factors such as location and delay also appeared relevant but, perhaps most significantly, experiences of justice were also strongly mediated by interactions with the police. These ranged from the positive ('you are able to come out of a conference and talk with that young person about how understanding that police officer was' (Northern Ireland, Police youth diversion officer)) to the very negative ('And the police had pulled up him and his mates standing there... there was nothing happening they weren't doing anything but when the police officers he said was cheeky to him, he turned round as the police officer was walking round and gave him the finger and ... now he's in court' (Northern Ireland, Youth justice worker)).

### ***Perceptions of Risk and Managerialism***

One discernible difference between the sample countries concerned conceptions of risk and the exercise of discretion by practitioners. While risk assessment tools and guidance documents are employed in all three jurisdictions, the manner in which they are applied in England points up the profound changes that have occurred in terms of deskilling and bureaucratic managerial strategies (Fitzgibbon, 2011). In line with earlier studies conducted by two of the authors (xxx, 2010), it appeared that risk tools were relied on more heavily in England than in the Republic of Ireland and Northern Ireland where practitioners appear to use risk tools jointly with clinical assessments:

'certainly in the Youth Offending Service...I think they are very scared to use their own clinical assessments, when looking at risk ... it's more about looking at the factors on the actuarial tool and using that, which is very much like working in a box.' (England, Probation officer).

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<sup>12</sup> Significantly there is no legislative limit in either jurisdiction in regard to these disposals.

<sup>13</sup> Section 75, Children Act 2001.

<sup>14</sup> See further McAlister and Carr (2014) on the manner in which conferences may be experienced punitively by young people.

'I make my own risk assessment and then I use that [the tool] as a backup and they usually marry to some degree' (Ireland, Probation officer).

'I would say that would be true of nine out of ten practitioners that they go to do them "oh flip that's out of date, have to get it updated" as opposed to going to it as a reference point' (Northern Ireland, Youth justice worker).

Strikingly, in England the change in working culture which had occurred over the past number of years meant that some practitioners were not comfortable with exercising their discretion even with the recent relaxation in national standards: 'a lot of my colleagues and myself felt very anxious about that' (England, probation officer). Indeed, there was a sense in which probation officers in England were more conflicted in their role as illustrated by the following comments in the interviews:

'I think I'm a bit of both. I'm rehabilitation on one hand, but when someone has kind of like, had all their chances, I'm also enforcement... I find it interesting working here [in a YOT], because sometimes you hear your officers say, "well Probation just want to breach" or "Probation just wanna do that" and I find it funny' (England, Probation officer).

This contrasts with comments made by Irish probation officers who held a clear view that their role in working with other agencies was to avoid custody as much as possible: '[custody is] not always the answer and we with our, custody is a last resort and child centred and all the rest of it approach would be resisting that...'. (Ireland, Probation officer).

Northern Ireland appeared to occupy the middle ground in terms of discretion. While key decision makers in Northern Ireland such as prosecutors<sup>15</sup> considered themselves to enjoy considerable degrees of discretion, it was also clear that Northern Ireland was much more proceduralised and systematised than the Republic, something which was not without practical importance:

'...during the flag protest<sup>16</sup> I youth conferenced a young man ...this young person had no previous, although I knew him and knew there was issues with Social Services ... [but] when I spoke to the investigating officer... they had went for prosecution and I had asked them "well why is that?" And they said well the direction from the top is that everyone is to go to court. Well I said that that is unfair, so you're treating some people different because of the political situation and that was a directive.' (Northern Ireland, Police diversion officer)

It is also important to note that the increased levels of discretion enjoyed by practitioners in the Republic of Ireland and Northern Ireland did not necessarily result in a more 'lenient' outcome or experience for the young person. In this regard, practitioner data reflected some of the dangers associated with welfarism and a restorative approach such as: a lack of consistency and due process; disproportionate punishments and low entry thresholds; and an excessive focus on engagement and

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<sup>15</sup> Under the 2002 Act, a Youth Justice Conference can be ordered by the court or can be a result of diversion. The decision on whether to undertake a diversionary youth conference or to proceed to court is made by the Public Prosecution Service (Art. 58, Justice (NI) Act, 2002) under criteria set out in this legislation and further articulated in PPS guidelines.

<sup>16</sup> In 2012 and 2013 a number of so-called loyalist 'flag protests' took place in Northern Ireland following the decision of the Belfast City Council to fly the Union flag on city hall only on designated days.

the 'character' of the offender (Goldson and Muncie, 2009; McAllister and Carr, 2014; McNeill *et al*, 2009).<sup>17</sup>

'It is [discretionary] yeah. Some would say that's too subjective because you could have one JLO who wants to bring them in [prosecute them], but I think maybe that's the strength of it is that some of the best JLOs work against the odds.....there isn't a numerical guideline, it's more behaviour.' (Ireland, Juvenile Liaison Officer)

'...this is the difficulty I would have with the Children Act to a certain extent, is that if there is engagement, great, everything is 100% and they might be left without a custodial sentence, without a conviction. If there is no engagement, there is no middle ground, so that technically the young person could be getting a custodial sentence for something that you know, would an adult have gotten a custodial sentence for?' (Ireland, barrister)

'the plan is built around things that the people who are there as part of a conference agree to, that there are things that need to be put in place in order to address them issues. So sometimes that can be more extensive with some people than others.' (Northern Ireland, Police officer)

'you know we had another one [conference] recently for a young person stealing a packet of cheese straws out of a Spar [shop]...' (Northern Ireland, Youth justice worker).

### **Analysis and Conclusions: Unifying and Fragmentary Impulses**

To return to the research questions posed at the beginning of this article, there is a sense in which the arguments of Muncie, Garland and Goldson *do* find a resonance in that elements of penal populism, risk and managerialism are present in all of the case studies. The role of respondents in all three jurisdictions has changed with the introduction of risk assessments and practice guidance documents in the 1990s and 2000s and these shifting priorities are reflected in a new language of risk and dangerousness. The susceptibility of youth justice to populist demands and politicised constructions of 'youth' is also revealed in historical and contemporary departures from near-universal human rights standards such as the UNCRC and, in the Republic of Ireland and Northern Ireland, hostility to changes in the age of criminal responsibility. Thus, more punitive discourses meet and mingle with other potentially unifying discourses such as human rights, even in transitional societies such as Northern Ireland where global human rights norms retain a particular purchase for historical and political reasons (Hamilton, 2015).

On the other hand, many elements of the research speak more strongly to the continued salience of national, regional and local factors. While the trend in rates of incarceration is downward in all of the countries, explanations do not appear reducible simply to structural factors or changes in macroeconomic conditions. Granted, the economic crisis and concomitant fiscal constraints have been forefronted in England as a key driver of the decarcerative trend (see Goldson, 2015; Bateman,

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<sup>17</sup> Further still, it is important to note that so-called 'diversionary' measures may ultimately result in the same negative outcome for young people, i.e. the acquisition of a criminal record (see Carr *et al*, 2015).

2012a) (and indeed may have an application in consolidating reform in the two other jurisdictions), yet local historical factors appear most relevant in providing legitimating discourses for the 'diversionary turn', at least in the two Irish jurisdictions. Given the different starting points for the decline (1993 in Ireland, 1994/5 in Northern Ireland and 2001/2008 in England), it may be best to relate explanations to contemporaneous 'critical junctures' or 'windows of opportunity' such as the peace process in Northern Ireland, the crisis over residential care in the Republic (Kennedy, 1970) or the economic crisis in England. It may also be, as Karstedt (2015: 377) surmises, that smaller jurisdictions may be more likely to adopt criminal justice changes from abroad (such as restorative conferencing) than countries with a longer history or who can wield hegemonic power such as England. In any event, the extent to which these influences and different contexts served as catalysts for a 'new' juvenile justice in each of the jurisdictions remains speculative in the absence of further, more nuanced research (for some good starting points, see Bateman, 2012a; Carr and Hamilton, 2013; McAllister and Dwyer, 2013).

In keeping with the theme of diversity, a 'governmentality gap' (McNeill *et al*, 2009) or dissonance between policy and front line discourses can also be discerned in the mixed discourses and rationalities employed by practitioners in all three jurisdictions. Despite the statutory emphasis on public protection in England and Northern Ireland, welfarist rationalities continue to dominate or are reconfigured to fit within newer discourses (Field and Nelken, 2010); equally in the Republic of Ireland the balance between justice and welfare heralded by the Children Act appears on the basis of our data more oriented towards welfare. These rationalities play out in different ways in different contexts (geographical location, resources, professional interactions, etc) and, importantly, are influenced by differing levels of professional discretion. Higher levels of autonomy in Ireland and (to a lesser degree) in Northern Ireland would appear to leave increased space for contestation and creativity in working with young offenders, but also introduce problems of inconsistency and disproportionality (for a fuller discussion of the divergence between the law in the books and the law in practice in a Republic of Ireland context, see Kilkelly, 2014; on the Garda Diversion Programme, see further Smyth, 2011).

We should be careful, however, lest to suggest a divergence in local practices so great that *national* policy discourses no longer retain explanatory purchase (Muncie, 2011). Reflecting historical policy choices, namely, the much higher starting point from which England and Wales began (Howard League for Penal Reform, 2015), comparative and historical analysis continued to point up differences in the levels of detention in the three jurisdictions. This should be considered alongside the interview data which reflected a stronger (perhaps more embedded) shift towards the use of custody as a last resort in the Republic of Ireland and Northern Ireland. Perhaps, as averred to by Bateman (2012), the situation in the two Irish jurisdictions can be described as more stable than that in England where dramatic events such as the Bulger tragedy or the riots retain the potential to unleash a reactionary punitive response. Differences in the responses to the sentencing vignettes and in the interviews also highlighted an aversion to risk-taking and preference for early intervention among English practitioners which was much more marked than in Northern Ireland<sup>18</sup> and the Republic of Ireland. Indeed, despite a significant relaxation in national standards, English

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<sup>18</sup> For a fuller discussion of early intervention in a Northern Ireland context, see Haydon (2014).

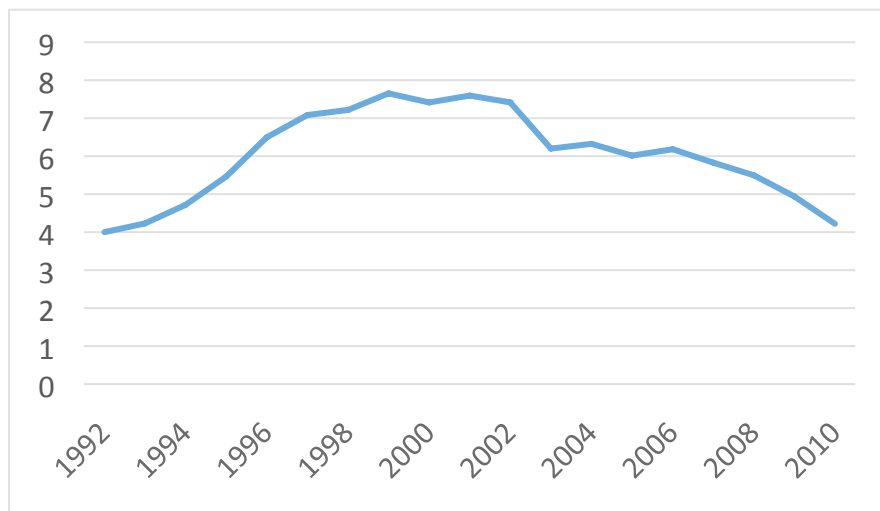
interviewees suggested a reticence, particularly among new recruits, to form their own judgments in case it proved wrong in the future. This data, drawn from some interviews outside of London metropolitan area as well as within it, is reinforced by research suggesting national rates of breach remain high (Bateman, 2011). It highlights what may well be an important 'legacy' issue deriving from the loss of professional autonomy and stringent monitoring of national standards during the 1990s. The 'staying power' of these features and their ability to 'perpetuate a punitive legacy' has been discussed in an American context by Goshe (2015). As she argues, we should be sceptical of accounts which suggest 'a simple "cyclical" characterisation, which implies we leave one era completely behind before we move on to another' (ibid: 43) and rather proceed with a sense of 'cautious scrutiny'.

We might conclude therefore with a recommendation to steer an analytical path somewhere between the nomothetic (convergent) and idiographic (divergent) impulses shaping youth justice (Goldson and Hughes, 2010; Muncie, 2011). The 'translational disjunctures' evident between: on the one hand, international drivers such as risk and human rights frameworks and national policies; and, on the other, national policies and local implementation, do not require us to lose sight of distinctive national trajectories which may retain important explanatory purchase. Beyond the particular, the local and the idiosyncratic lie national pathways of penal development informed by shared cultural values, institutions and practices. The challenge, as ever, is for comparative researchers is to hold these various interpretative frameworks simultaneously in focus.

### **Funding**

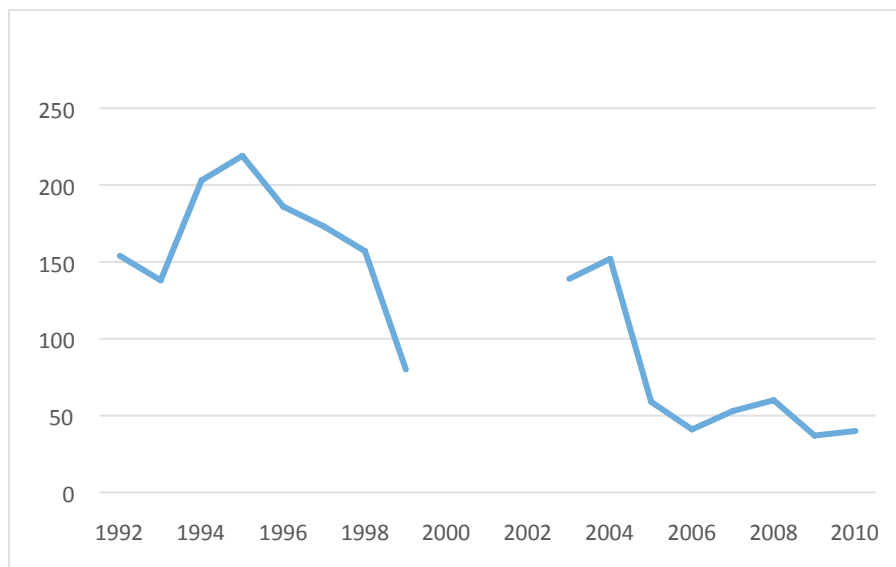
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**Figure 1: Number of 10-17 Year Olds Sentenced to Custody in England and Wales, 1992-2010 (000s)**



**Source: Bateman (2012b).**

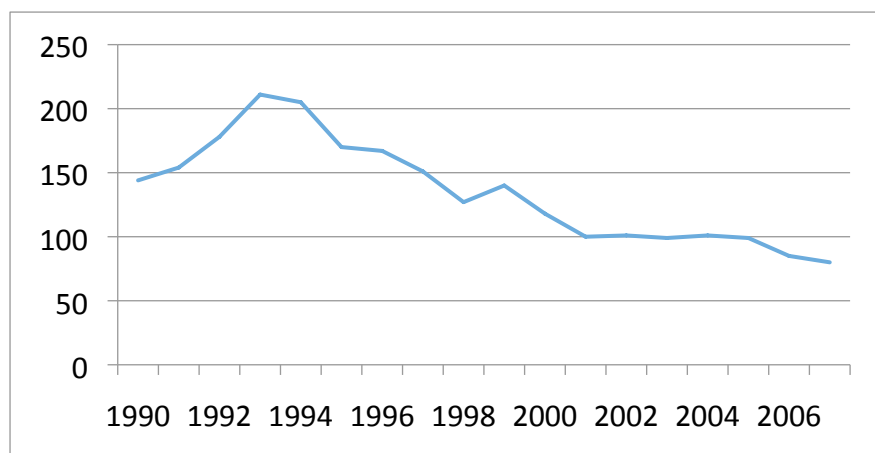
**Figure 2: Number of Juveniles Sentenced to Custody in Northern Ireland 1992-2010.**



**Source: NIO Commentary on Crime Statistics (2001); Jacobson and Gibbs (2009).**



**Figure 3: Numbers in Special Schools in the Republic of Ireland, 1990-2007**



**Source: Department of Education Annual Reports.**

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