Title       Changes in Diversionary Strategies within the Youth Justice System of England and Wales (1908-2010)

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CHANGES IN DIVERSIONARY STRATEGIES

WITHIN THE YOUTH JUSTICE SYSTEM OF

ENGLAND & WALES (1908 – 2010)

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Changes in Diversionary Youth Justice

Strategies (1908 – 2010) &

Their Consequences for

Children & Young People within the

Youth Justice System of England & Wales

by

Vicki Randall

A thesis submitted
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Abstract

Youth justice in England and Wales is a highly politicised area of government policy and youth justice provision has always been a highly contested issue.

The discourse of diversion stems from debates about the purpose and effectiveness of various types of penal regimes, and particularly their effect on children and young people in trouble with the law.

The process of diversion aims to remove children and young people from the formal sanctions of the criminal justice system or minimize their penetration into it, and failing that it aims to avoid incarceration.

Over the years diversion has taken many forms and the extent to which children have been diverted has varied. This thesis explores the various types of diversionary practice and how they have changed over time. It explores the political, administrative and professional conditions under which diversion has been a priority and those under which it has been effective.

Bernard (1992) has argued that there is a ‘cycle of youth justice’ in which responses to youth crime move from the harsh to the more lenient before swinging back again. The thesis suggests that there is a ‘spiral’ of youth justice in which different paradigms are sometimes entangled together leading to the often contradictory and complex realities of youth justice and diversion without necessarily returning to the place of origin.

It concludes that, given the current fiscal climate, there is a distinct likelihood that diversion policies will gain ascendancy. However, any developments will be fragile and susceptible to unintended consequences if the ‘real’ outcomes for children and young people are not part of the motivation for reform.
For Mum & Dad

For Ian

Thank you for always encouraging and supporting me.
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**Declaration**

I declare that this thesis is my own unaided work. It is being submitted for the degree of Master of Philosophy at the University of Bedfordshire.

It has not been submitted before for any degree or examination in any other University.

Name of candidate: Vicki Randall
Date: March 2011
Chapter 1:

Introduction and Methodology

1.1 Background and Scope

This thesis is primarily concerned with the discourse of diversion within youth justice, but inevitably any discussion of diversion must follow on from discussions of control, since it is as a strategy to manage control systems that ‘diversion talk’ came into being. Understanding ideologies of control, and in particular ideologies of punishment and incarceration, as well as the ‘recurrent failures’ of the prison, allows for a better understanding of the ideologies of youth justice, which in turn inform diversionary ‘ideologies’ and practices.

This thesis will consider the ‘control talk’ (Cohen, 1985) relating to the adult criminal justice system prior to considering the youth justice system, since the development of youth justice arose in response to concerns from penal reformers and experts, who were critical of the adult criminal justice system’s ability to deal effectively with children and young people in trouble. Many of the arguments for diversion from the criminal justice system and the prison in particular – for example, its inability to prevent re-offending, its comparative cost and its dehumanizing effects - have been used by reformers from as early as the mid 18th century (Garland, 1990).

Children and young people have long been acknowledged to have different ‘needs’ and respond differently to criminal justice interventions, and it is partially because of this that methods of diversion are frequently aimed at children and young people, in particular. ‘Childhood is the most intensively governed sector of personal existence’ (Rose, 1989, p.121) and children who offend are susceptible to even greater governance. ‘Modes of governance’, over the past hundred years since the inception of a separate youth justice system, have changed markedly
'in accordance with ideological perspectives, political calculations, judicial conceptualizations and operational strategies’ (Goldson, 2008, p.xviii)

From the 1930s to the 1960s, a child-centred, welfarist approach supplanted the ‘classical’ retributive and disciplinary responses of criminal justice. The focus changed from the child or young person’s ‘deeds’ to their ‘needs’. Welfarism found its fullest expression in the legislation of the late 1960s. (Pitts, 1988; Garland, 2001)

Then, in the 1970s a ‘hybrid’ system emerged comprising a combination of ‘welfare’ and ‘justice’ ideologies. The ‘welfare’ provisions of the 1960s were never fully implemented and critics and reformers argued that the level of intervention (governance) in children and young people’s lives - on the basis of welfare need - was excessive and unjust. This was evidenced by growing numbers of children and young people entering the criminal justice system and being removed from home.

The reaction to this ‘carceral bonanza’ (Pitts, 2005) was a decade of ‘minimal intervention’ or ‘progressive minimalism’ (Currie, 1985). Youth justice in England and Wales was heavily influenced by the ‘back to justice’ movement; theories of ‘radical non-intervention’ (Schur, 1973); and a ‘nothing-works’ (Martinson, 1974) orthodoxy. In the 1980s ‘bifurcated’ policies, based largely on fiscal imperatives, were adopted and they led to a dramatic decrease in the numbers of children and young people coming into contact with the youth justice system and in particular the numbers of children and young people in custody.

In the 1990s the focus changed once more when youth crime in England and Wales became subject to increased ‘politicisation’, as a consequence of heightened public and political concern about ‘a new breed’ of predatory and/or persistent young offender (despite the declining rate of youth crime). Developments in youth justice, following the election of New Labour in 1997, have led to the most radical reconfiguration of the youth justice system since its inception in 1908. The ‘new’ youth justice is based on a repudiation of welfarism alongside a belief that early intervention in the criminal justice system can deter crime. The late 1990s and early 2000s, witnessed an amalgamation of actuarialism and managerialism within youth justice, and arguably new forms of penal populism.
Subsequently, unprecedented numbers of children and young people have been drawn into the youth justice system and sentenced to custody in the secure estate, although we are beginning to see a reversing trend with regards to custody. Even so, given the extremely high reconviction rates generated by secure institutions, it would seem wise to consider how these children and young people might be effectively diverted into less criminogenic provision (Bateman & Pitts, 2005).

The youth justice system is, intermittently, a highly politicised area of government policy, and as such the past hundred years have spawned debates about the purpose and the effectiveness of various types of penal regimes. When at times the established orthodoxy is that the system is criminogenic, overtly interventionist or ‘failing’ to reduce crime (if this is deemed to be its intention) (Pitts, 2003a) the rhetoric advocating diversion from the youth justice system gains ascendancy, however, there is an almost permanent perception that justice interventions do not reduce crime. Similarly, when the levels of youth incarceration are perceived to be too high or concerns are raised over the negative impact of imprisonment on the lives of children and young people (Goldson, 2002) the rhetoric advocating diversion from custody gains ascendancy, but once again there is a consistent consensus that imprisonment is not appropriate for the majority of children and young people who offend.

The discourse of diversion, articulated by academics, politicians and reformers, is at times extremely influential and at others almost inaudible. What we lack is any coherent analysis of these oscillations which seem to have little if anything to do with its proven effectiveness, or otherwise. Furthermore, diversionary practices have an equally chequered history to that of youth justice more generally, and have sometimes worsened the problems they are ostensibly designed to solve, through a process of ‘net-widening’ (Cohen, 1985).

The fate of diversion, in today’s highly politicised arena, will be the ultimate focus of this study, looking to the future, as there now appears to be a reluctant and tacit, rather than explicit, rediscovery of diversion by a government eager to reduce public spending. The thesis will shed light on the ideologies, politics and rhetoric of diversion, over the period and, as such, will hopefully have practical
value for youth justice managers and professionals. The thesis hopes to demonstrate that particular imperatives (whether ideological, political or fiscal) are critical to understanding the potential effect, diversionary or otherwise, of alternatives to formal youth justice interventions and custody. It will be suggested that there continues to be a cycle of diversion, in much the same way that there is a cycle of juvenile justice (Bernard, 1992). However these cycles do not always end in exactly the same place that they began, given that they are influenced by the dynamic political, fiscal and ideological processes impacting youth justice more broadly.

1.2 Research Questions

This thesis starts from the assumption that unnecessary criminalisation of children and young people is counter-productive (Lemert, 1967a) and that contact with the criminal justice system may be, and often is, criminogenic (McAra & McVie, 2010). Therefore reducing the use of custody for children and young people will reduce its damaging effects on the often vulnerable children and young people who are involved in it (Goldson, 2002).

Only an historical interrogation delivers the scope to determine all of the oscillations in ideology, policy and practice and therefore an understanding of the present requires investigation of the past. This thesis will begin by considering the development of penal modernism and the ideologies of punishment as a necessary precursor to exploring the meaning and practice of diversion.

As revisionist histories contend, it is also important to look beyond the rationales provided at the time by politicians, reformers and policy makers, casting a critical eye upon the stated intentions of policies and their consequences in practice. ‘The picture is complex and it would be a mistake to conflate the intentions of government with their achievements or to ignore the unintended consequences of, and resistance to, governmental ambitions’ (Pitts, 2008) As Rothman (1981) observes; ‘put most succinctly, and without all the requisite qualifications, there remains a critical distinction between ideology and history, even if it takes a while to reach it.’ (p.20)
Youth justice is a contested arena and what may appear obvious at one place and time to the various actors may not appear so at another. Pitts (2003a) suggests that an understanding of developments in youth justice requires paying close attention to the role played by youth crime in the political sensitivities of the time. The political ‘climate’ can vary greatly over time and will fundamentally change the predominance of discourses of youth justice, incarceration and diversion. ‘In many ways, conflicts about the definition of crime and how to control it are central to criminology as a discipline, and there can be no simple escape into a world of antiseptic science. Science provides no refuge from politics’ (Stenson, 1991, p.11). As Young (2004) has observed, positivist approaches to crime and justice do not work in late modernity when definitions and causes of crime are problematised and pluralist.

The aim of this thesis is to specify the political, administrative and professional conditions under which, diversion strategies designed to keep young people away from the criminal justice system, in England and Wales, are most likely to be effective. It also aims to shed light on public, professional and political climates that favour or impede the emergence of diversionary policies and practices. In the process it will attempt to explore: the various meanings of diversion and how these have changed over time; the extent to which diversionary practice has been effective; and under what circumstances that success has been achieved.

It remains to be seen if diversionary discourse will become audible once more and if diversionary practices can offer an effective solution to the high levels of criminalisation, the large numbers of children and young people coming into contact with the criminal justice system and the high level of youth custody, in today’s contemporary climate. However, given the fiscal climate, in England and Wales at present, this thesis concludes that the likelihood is that new ‘life’ will be breathed into ‘diversion’ talk and we may again see a bifurcated policy response, similar to that of the 1980s. (Pitts, 2010)
1.3 Methodology and Ethics

The bulk of the thesis will comprise a literature review citing a variety of academic and non-academic sources, such as criminological texts and journals, research reports, Home Office data and data from Non-Governmental Organisations.

It will investigate and interrogate the changing strategies for diversion - from both the criminal justice system itself and from the custodial institutions - within England and Wales, beginning with the inception of youth justice in 1908, leading up to the present day.

It will do this by critically evaluating the internal coherence of the propositions that constitute the various diversionary discourses, paying particular attention to their compatible or contradictory elements.

The veracity of these diversionary discourses will be tested against the evidence derived from empirical studies of their systemic effects and secondary empirical data.

The study will investigate the practical application and/or effect of each of the diversionary discourses by critically evaluating the subsequent measures taken by governments, to implement policies which provide alternative pathways for children and young people in trouble.

Evidence which affirms or refutes the diversionary effect of such policies will be supported by reference to relevant statistical data held by governmental agencies, in relation to the numbers of children and young people brought into the criminal justice system or brought into the secure estate, during the corresponding timeframe.

Although the subject of youth crime can be a sensitive issue this thesis, being derived from secondary sources, is able to sidestep the difficult ethical considerations which would arise when conducting primary research.

In order to maintain as much objectivity as possible, when compiling this thesis, care has been taken to represent the work cited as accurately as possible and to acknowledge alternative viewpoints. Moreover it endeavours to ensure that any conclusions drawn are transparent and evidenced, where possible, by a range of credible sources.
1.4 The Structure of the Thesis

Chapters two and three are intended to provide the context for understanding the historical emergence of and the special status accorded to youth justice as well as the factors associated with pressures for the development of diversionary strategies.

Chapter two considers ideologies of incarceration, and in particular the revisionist account of the development of penal modernism (Garland, 2001) and evidence for the effectiveness of imprisonment.

Chapter three considers the development of the youth justice system in England and Wales, and the ‘special’ status afforded to children and young people before and after the emergence of the youth justice system of England and Wales in 1908.

Chapter four discusses the three major rationales (or principles) which can be seen to inform practices which aim to limit or eradicate the use of formal criminal justice interventions, and in particular incarceration – decriminalization and decarceration and diversion. It categorizes two distinct types of diversion, front-end and back-end, and discusses the degree to which alternatives (to prosecution and/or custody) are diversionary. In chapter four, Bernard’s (1992) Cycle of Juvenile Justice, which considers the contradictions inherent within youth justice is analysed to establish whether, and to what extent, the ‘micro-theory’ can offer an understanding of historical developments in the English and Welsh youth justice system. This will lead onto an examination of the theory of ‘net-widening’ (Cohen, 1985), sometimes considered an unintended consequence of policies designed to divert children and young people away from the formal interventions of the youth justice system.

Chapter five is an enquiry into the era of ‘penal welfarism’ and the political imperative behind the approach. It looks in detail at the 1969 Children and Young Persons Act, paying particular attention to the parts of the legislation which affected the numbers of children and young people coming into contact with the youth justice system and receiving custodial sentences. It contrasts patterns of offending with patterns of prosecution and custody between 1965 and 1978. Finally, the chapter considers the challenges that faced ‘penal welfarism’ and led to its decline.
Chapter six follows a similar trajectory focusing on the era of ‘progressive minimalism’ and ‘neo-liberal bifurcation’ paying particular attention to the ideological and fiscal imperatives behind the approach. It looks in detail at the 1991 Criminal Justice Act, paying particular attention to the parts of the legislation which affected the numbers of children and young people coming into contact with the youth justice system and receiving custodial sentences, and contrasts patterns of offending with patterns of prosecution and custody between 1980 and 1990. It also concludes with a discussion of the challenges faced by the aforementioned approach.

Chapter seven focuses on the changes in youth justice ideologies since the early 1990s, particularly regarding the repoliticization of youth (Pitts; 2000). It looks in detail at the 1998 Crime and Disorder Act, again paying particular attention to the parts of the legislation which affected the numbers of children and young people coming into contact with the youth justice system and receiving custodial sentences. It contrasts patterns of offending with patterns of prosecution and custody between 1990 and 2008. Finally, the chapter looks at the challenge facing the New Labour record – namely the record levels of youth incarceration and the ‘new’ cohort being subject to formal youth justice interventions – and considers the alternatives to custody which were developed during this time.

The final chapter critically evaluates what Garland (2002) calls the ‘crisis of penal modernism’ and looks at the arguments suggesting that there has been a renaissance of punitiveness. Chapter eight discusses the changing political situation in England and Wales since the demise of the New Labour government and considers the explicit and implicit criminal justice strategies being adopted by the coalition government and their likely consequences for youth justice policy and practice.
Chapter 2:

The Development of the Penal System and the Ideologies of Incarceration

2.1 Understanding Pre-Modernity and Penal Ideologies

Histories of imprisonment can be divided broadly into two strands; ‘Idealist’ and ‘Revisionist’. Idealist histories are primarily concerned with the rationales for the development of the penal system based on the accounts of the reformers and commentators of the time. In contrast, revisionist histories are concerned with how the social structures influenced or determined the development of the penal system.

Idealist histories, such as those proffered by Fabian and Orthodox or Whig commentators such as Webb & Webb (1963) dominated debate prior to the 1970’s and talked of a reformer-led struggle to remove the ‘inhumane’ and ‘barbaric’ practices of the past. In this discourse, over time, prisons became cleaner, healthier, more ordered institutions as a result of the reforming zeal of progressive thinkers and activists who were instrumental in banishing the filth, squalor and disorder that characterised the old gaols and bridewells. Thus penal reform marked a benevolent progression from cruelty to enlightenment: ‘the onward march of civilization’ (Elias, 1969) ushered in an era of what Garland (1990) calls ‘penal modernism’.

The revisionist histories view the emergence of penal systems and their subsequent reform as examples of shifts in power relations between ruling and subservient classes and as part of the growth of state intervention. The revisionist account will be considered in greater detail later on in this chapter, but first it is important to discuss the era prior to, and the era of, penal modernity.
Theories about penology start from the assumption that there is a sharp divide between pre-modern and modern societies. In Western societies, modernity is often distinguished on social, political, economic and cultural grounds. ‘Penal modernity’ (Garland, 1990) is best understood ‘as a dynamic and continuing historical process’ which has seen the arrival and development of new systems of individual discipline, control and surveillance, which aim to tackle the causes of crime through good governance (Foucault, 1977). Subsequently a ‘new reforming culture’ arose and ‘the modernist reformers succeeded in the establishment of a new apparatus of investigation, assessment, record-keeping, classification and prediction’ (Garland, 1999, p.518).

Over a period of 200 years, this modern penality gradually came to replace ‘the penal arrangements of traditional society’ (Garland, 1999, p.516).

Three main rationales for punishment informed pre-modern penal regimes of the 17th and 18th centuries; Deterrence; Retribution; and Ritual Cleansing.

The most obvious rationale was deterrence. Punishment could have a general deterrent effect, particularly in cases of capital punishment offences, hence hangings were traditionally public affairs with large crowds and great theatre, designed to act as a dire warning of the consequences of ‘sin’ or law breaking. It can be argued that the very existence of a penal system of punishment has a general deterrent effect on crime. It was also thought that punishment could also have an individual deterrent effect, providing the offender’s experience of punishment was unpleasant enough to ‘encourage’ them to alter their behaviour thus reducing the risk of being punished again. Punitive regimes could, through general deterrence, stop people engaging in criminal activity and, through individual deterrence, stop people becoming recidivists.

However, as early as the mid 18th century there was an emergent concern, articulated by philosophers such as Beccaria, with the lack of proportionality within the justice system which was one of the factors that eventually precipitated the shift towards penal modernism.

In 1767 the first English translation of Cesare Beccaria’s *Dei Delitti e delle Pene or An Essay on Crimes and Punishment* appeared. According to his theory, crime is a rational activity in which the criminals assess the likely consequences
and benefits of their actions. Punishment, therefore, should be just enough to outweigh the benefits. It ought to be firm and consistent, without being unnecessarily violent or prolonged. Central to Beccaria’s work was the maxim that certainty, rather than severity, would be vital to creating punishments which were effective at deterring people from crime. Punishment should also, importantly, be proportionate to the ‘harm done’. Beccaria’s Utilitarian writing’s also suggested that punishment, as well as being proportional to the crime, should seek to right the injustice done to society. The offender ‘owes a debt to society’ and must be punished, irrespective of circumstance.

Treating the convicted equally meant depriving them of the one thing all free citizens had in common: individual liberty. A prison could provide equal punishment, specifically deprivation of individual liberty, whilst creating an environment for reform, and simultaneously improving society by removing from it unworthy citizens. *Dei Delitti e delle Pene* ‘was warmly received [in England] for its criticisms of the barbaric punishments of the past and its exhortation to create a rational system within which punishment was certain and fitted the crime.’ (Emsley, 2002, p.222)

The second pre-modern rationale for punishment was retribution; an eye for an eye. Punishment is justifiable on the grounds that it is deserved by the offender. Serious crimes such as murder deserved equally serious consequences such as death by hanging. The ‘Bloody Code’ of the early nineteenth century stipulated more than 200 offences that were punishable by death. Oftentimes it was not feasible to send all those convicted of capital felonies to the gallows making the ‘Bloody Code’ appear an indefensible lottery.

Idealist histories suggest that by the mid-18th century the ‘Bloody Code’ came to be regarded as ‘arbitrary’ and ‘savage’ and contemporaneous opposition to the slave trade, the development of municipal hospitals, ‘the New Poor Law’ establishing workhouses, are cited as examples of the emergence of an ever more civilized and peaceful society (Briggs et al. 1996). As public forms of punishment in England, and hangings in particular, became more dramatic and precarious - rather than sober - they appeared to lose their legitimacy and were condemned by many influential public figures including the authors Daniel Defoe, Dr Johnson and Henry Fielding.
Leon Radzinowicz (1956) claimed that the abolition of public hangings in 1868 showed ‘the growth of humanity’, but Gatrell argues that although the end to public executions may have been evidence of a civilizing moment it was not a ‘humane’ one because ‘a civilizing process may redepoly, sanitize and camouflage disciplinary and other violence without necessarily diminishing it.’ (1994, p.590) He also argues that because of the increasing success of prosecutions, it was neither acceptable nor possible to execute all those convicted of capital felonies and the courts often showed a reluctance to convict when the penalty seemed disproportionate to the crime committed. ‘As many as ninety per cent of those convicted in the post-Napoleonic War period were pardoned...making the judicial system appear an unsustainable lottery.’ (Emsley, 1996, p.255)

After the 1718 Transportation Act was passed, capital felons who received pardons were significantly more likely to be ‘banished’ to the colonies. Transportation to America was originally considered the main alternative to capital punishment and by the 1760s, transportation constituted over seventy per cent of all sentences imposed by the Old Bailey. Between 1719 and 1772, 30,000 convicts were transported to America, from England, a journey which took about eight weeks in good weather but up to fourteen in bad. (McConville, 1995; Matthews, 1999) In 1775 the American War of Independence meant it was becoming impossible to send convicts to these colonies, but ten years after transportation to America ceased, the transportation of convicts to Australia began. ‘The great panacea was transportation, the vision of the Australian colonies as one vast open prison’. (Briggs et al. 1996, p.173) Eleven ships set sail for Botany Bay in 1787. ‘It is estimated that about 162,000 men and women were transported to Australia’ before the practice ended in 1869. (McConville, 1995, p.121) The voyage to Australia could take four or more months. ‘In some of the earlier voyages the death rates on convict ships were as high as twenty-five per cent (Hirst 1995; Hughes 1987).’ (Matthews, 1999, p.8) While labour was in demand in the British colonies, transportation was used in order to increase the free man-power needed to develop new settlements, however, when the work began to diminish it became harder to find labour for convict gangs and there was increasing pressure from the colonists for the practice to discontinue (Matthews, 1999a). There were also increasing doubts about the extent to which
transportation was punishment since it could be viewed as an opportunity for a ‘new life’ and consequently would lose any deterrent effect.

The third rationale of pre-modern punishment was ritual cleansing, whereby, to be readmitted into society, an offender had to do penance to the community often involving a shaming punishment, the most common of which was the pillory. (Briggs et al. 1996) Punishments tended to be physical because notionally, all offences were committed against the crown and the punishment was designed to demonstrate the monarch’s complete control over the body of his or her subjects. (Foucault, 1997)

However, with the rise of the middle class and the decline of the ancient regime these modes of punishment were supplanted by ‘rational’ forms of penalty predicated upon the infliction of what Ignatieff (1978) describes as a ‘just measure of pain’. With ideas of supreme sovereignty diminishing around Europe and the emergence of socio-political ideals of nation-states, painful punishments in order to claim vengeance for the sovereign were becoming an irrelevance.

In the late 19th century penal policy and the understanding of the origins and nature of criminality were influenced by an emergent positivistic social science. Ideas such as the causal power of social factors (Social Darwinism), ‘biological determinism’ and genetic predisposition meant it became almost impossible to look at an individual and their behaviour in the same manner. ‘As the century drew toward its close, suffering in itself was increasingly seen as more likely to crush than to stimulate the moral energies of ordinary individuals.’ (Wiener, 1994, p.321)

Particularly influential was the theory of Social Darwinism which had two central tenets. Firstly that there are underlying, and largely irresistible forces, which determine human behaviour thus allowing for the formulation of social laws, much like the natural laws pertaining to animals or plants. And secondly that these forces produce evolutionary progress where there is conflict between social groups, creating a social ‘survival of the fittest’.

In 1876 Cesare Lombroso published his influential L’Uomo Delinquente or Criminal Man in which he developed his ‘pioneering’ criminal ‘anthropology’. Lombroso’s theory stated that criminality was essentially inherited and that it was
possible to scientifically identify the ‘criminal type’ through examination of physical characteristics, which indicated a biological reversion to ‘atavistic’ or ‘primitive’ behaviours. Lombroso’s theories were popular (and enduring – despite their questionable scientific veracity) and this was arguably attributable to the ease with which his ideas fitted with existing stereotypes of the ‘criminal classes’.

It is true to suggest that despite the scientific determinism of Social Darwinism, and Lombroso’s anthropology in particular, there was a belief at the time that you could identify individuals with criminal propensity and that criminality could be ‘treated’ (even if some of the specific ideas did not lend themselves immediately to that perspective). More importantly perhaps, the notion that criminality was not a matter of free will and rational choice challenged the prevailing orthodoxy and meant punishment made little sense.

Largely because of the emergence of the human sciences and the Christian notion of salvation, by the close of the 19th century, it is possible to discern a fourth strand in the philosophy of early modern punishment: rehabilitation. There began an endeavour to ‘reform the wrongdoer’ and time spent imprisoned, could be used as a way of making the convict see the error of their ways. ‘The spirit was to be transformed as well as the body chastised.’ (Briggs et al. 1996, p.85)

Debates intensified over the impact of punishment upon individuals who were deemed to be, by the new breed of experts, weaker and less responsible products of their environment or their genes. ‘Criminal justice was to cease being a punitive, reactive system and was to become instead a scientifically informed apparatus for the prevention, treatment, and elimination of criminality.’ (Garland, 2002, p.27) An objective which the supporters of incarceration believed could be best achieved within the confines of the penitentiary.

‘The penitentiary came to be the bearer of reformers’ hopes for a punishment capable of reconciling deterrence and reform, terror and humanity.’ (Ignatieff, 1983, p.80) It became necessary to think positively about the relationship between punishment and reformation, however, it is important to bear in mind that there was often a gulf between reformist rhetoric and the realities and practices of the penal system at the time.

That said, with the option of transportation and capital punishment waning, an alternative was required and, without the prospect of rehabilitation,
there was a risk that convicted felons would remain in prison indefinitely, the cost of which would have made the prospect undesirable and extremely unlikely.

With the realisation that offenders would need to be transformed, came a shift in ideas which Allen (1981) labelled the ‘rehabilitative ideal’: ‘The notion that a primary function of penal treatment is to effect changes in the characteristics, attitudes, and behaviour of convicted offenders, so as to strengthen the social defence against unwanted behaviour, but also to contribute to the welfare and satisfactions of offenders.’ (p.2)

2.2 Prison as the Predominant Form of Punishment

Most social-historical analysis of the development of Western penal systems, during the second half of the 19th century, pinpoints two distinct phenomena; Firstly the emergence of the prison as the predominant form of punishment for routine crimes; and secondly the amendment in the aims of imprisonment with the intention of changing offenders behaviour, through reform and rehabilitation. This period is referred to as the era of ‘penal modernism’ (Garland, 1990).

This section of the chapter will consider the political and legal developments which led the prison to become the predominant form of punishment in England and Wales.

During the 1700s and 1800s many convicted felons were punished by means of capital punishment (e.g. hanging), banishment (via transportation) or corporal shaming (e.g. public whipping). With declining support for capital and corporal punishment and the cessation of transportation, incarceration became the favoured alternative. ‘Almost overnight, imprisonment was transformed from an occasional punishment for felony into the sentence of first resort for all minor property crime.’ (Ignatieff, 1978, p. 81)

‘Prison Hulks’ were introduced to house convicts who could no longer be transported. They were old rotting ships moored on British rivers and inmates were set to work labouring in the dockyards and dredging rivers. This was originally regarded as a temporary solution between the end of transportation to
America and the start of transportation to Australia, however, hulks remained in service until 1857.

At the beginning of the 18th century there were two types of institution which were precursors to prisons, known as Houses of Correction (or Bridewells) and Common Gaols, but ‘traditionally, except in the rather specialized case of debtors, prison had rarely been used as a form of punishment.’ (Ignatieff, 1978, p.82)

The Houses of Correction were controlled by the Justices of the Peace, and when they were established during the reign of Elizabeth I, they were designed to discipline the ‘idle and disorderly and pilfering persons’ by detaining them for a period of hard labour, more like the Victorian ‘Workhouse’. Latterly they held petty criminals, beggars and drunkards. In the 1700’s Bridewells were owned and administered by county and borough magistrates.

Gaols were the responsibility of the county Sheriff and were not meant to house convicted criminals. They were primarily used to detain the accused pending trial and those convicted and awaiting sentence. ‘These sentences were likely to be corporal or capital [and it] was common for a person to be sentenced and hanged or flogged on the same day.’ (McConville, 1995, p.118) Both Bridewells and Gaols (generically referred to as prisons) were small, privately run, locally financed institutions (by ‘rates’ (local taxes) or in some instances by the plaintiff/victim) with limited purpose.

The condition of the prisons and hulks gave rise to more debate about the need for state regulated institutions to house prisoners and the logic and purpose of incarceration. Reformers were given more ammunition in their campaign to establish a principle of prisoner reform within existing penal institutions, some of which were to become ‘modern’ penitentiaries. ‘Furthermore the belief continued that prisons, and the hulks, by throwing first offenders together with recidivists, only served to make all offenders worse.’ (Emsley, 1996, p.265) It was thought one of the ways to overcome this problem of association would be through a system of solitary confinement.

During the 1770s Jonas Hanway advocated and campaigned for the use of solitary confinement. He believed prison should be a spiritual ordeal in order to enable reform, and notably called the London Bridlewell ‘a nursery for thieves and prostitutes’. The Quaker movement of the early 1800’s also campaigned for
reform, similar to that of the Evangelicals. Elizabeth Fry protested that prisons should be ‘healthy and efficient institutions’ with religious purpose.

John Howard is considered one of the most influential figures in the reform of the penal system at this time. Howard was appalled by the conditions and the practices he witnessed and in 1774 began visiting all the prisons in England and Wales. He would measure population sizes and nature, cell size, food rations, weight of chains and many other features of day to day life in these institutions. Howard’s publication in 1777 called *The State of the Prisons* was popular because of its scientific approach. It highlighted the inconsistencies of treatment and more significantly the levels of corruption from officials and gaolers which existed among the squalor of prison life. Howard estimated that the prison population, during the decade before 1776, had increased by almost three-quarters. This led to even more squalid conditions and sporadic rioting in a number of gaols.

Howard believed prison ‘life’ would be improved through solitude, Religion, decent food and clothes, and a strong work ethic. However, critics argued that his reforms might operate to undermine the deterrent effect of penitentiaries, by providing an easier existence for inmates than befell them on the outside.

In 1779 the Penitentiary Act was passed by Parliament. ‘It envisaged the well-conducted prison as a more effective method of reforming criminals and deterring crime than transportation.’ (Royle, 1987, p.220) It was drafted by Sir William Blackstone, William Eden, and John Howard, and provided for the construction of two penitentiaries in the metropolis. One would house six hundred men, the other three hundred women, and they could be held in these prisons for up to two years. Prisoners were to be uniformed, put to manual labour during the day, and locked in solitude at night. Inmates would be reformed by being taught the ‘habits of industry’ (Emsley, 2002) such as obedience and timekeeping. Prisons could be used to encourage industrial capitalism and exploit ‘free labour’ at a time when England was in the grip of industrialisation and factories employing waged labour were beginning to emerge (a point made quite explicit by the revisionists).

In 1791, Jeremy Bentham, a leading English Utilitarian philosopher and social commentator devised his own plan for penal reform: the *Panopticon*. It would be a circular building, which instead of having solid masonry, would deploy
iron framed divisions for solitary confinement. All of these ‘cells’ would be visible from a central observation tower allowing for constant supervision, both of convicts and gaolers. Communication between prisoners would also be prevented in this way. The Panopticon, as Bentham envisaged it, would run as a profitable commercial enterprise, by selling the products of the convict’s labour. Prison should be a mechanism, as Bentham put it, ‘for grinding rogues honest’. Bentham ‘thought he had found ‘a new mode of obtaining power of mind over mind, in a quantity hitherto without example’.’ (Linebaugh, 2003, p.371) However, in 1810 Bentham’s plans were rejected by the relevant authorities, mainly because of criticism they received over the emphasis on labour and the suggested need to supervise the prison guards.

In 1810, a government committee under George Holford was appointed to investigate the best type of penal discipline. All of the committee were advocates of a state penitentiary system but debate still raged over whether the fundamental purpose of incarceration ought to be solitary confinement, in order to achieve repentance through religion, or forced labour in order to instil habits of work, to replace the habits of idleness which led to crime. Their conclusion was that there ought to be an amalgamation of both forms of regime.

‘Prison sentences were meted out, proportionate to the gravity of the offence, and were served, at least in theory, in a perfectly regulated environment where all were stripped of their external identities and treated equally (Ignatieff 1976; McConville 1981).’ (Morgan, 2002, p.1120)

Work on Millbank, the first national penitentiary, situated by the Thames in London, was not begun until 1812 and it did not open until 1816. Once in use it fell short of these ideals. Solitary confinement was never complete, discipline was hard to maintain and the conditions remained poor. Millbank ‘was a constant source of administrative, financial and health problems until it was pulled down in 1893.’ (McConville, 1995, p.120)

The Gaol Act 1823 was intended to allow central government to set general standards in prisons across the whole country as a first step towards the centralization of the penal system. It was followed by the Prisons Act of 1835 which appointed prison inspectors, accountable to the Home Office, who would make annual reports and from this point on funding for prisons would be provided, in part, by the Treasury (instead of privately by victims or plaintiffs).
In 1842 Pentonville prison opened and unlike Millbank it was able to realise the goal of solitary confinement. Dubbed the ‘Model Prison’, it was built to house five hundred and twenty prisoners in five hundred and twenty identical prison cells. Uniformed staff would be regulated and employed by the state. A routine of silence, hard labour and religious doctrine would persist in the prison environment. According to Ignatieff ‘the opening of Pentonville in 1842 represents a point of culmination in the tightening up of social controls underway since 1820.’ (1978, p. 193).

The Annual Criminal Statistics reveal that, by the 1860s, over 90 per cent of those convicted of indictable offences were being sentenced to terms of imprisonment, and the gradual end of transportation confirmed the prison as the principal form of punishment. (Emsley, 2002, p.224)

Due to a change in administration and the beginnings of uniform treatment for all prisoners, increasing attention was drawn to those who did not fit the typical criminal construction. Exceptions came in the form of juvenile offenders, females, radical politicals, the ‘gentlemen’ classes (i.e. embezzlers and fraudsters), and the physically or mentally disabled inmates. By 1895 there was widespread support for penal reform in order to remove the prison’s institutional stigma as a ‘the punishing machine’, and to accommodate for these non-conventional prisoners, in particular women and children. It was argued that offenders ought to leave prison better people. These principles were endorsed by Parliament in the *Prisons Act* of 1898 which abolished inhumane punishments, such as the use of the treadmill and the crank, the use of solitary confinement for periods longer than a month, and reduced the use of physical punishments when prison regulations were transgressed.

### 2.3 Revisionist Histories

If conclusions are drawn from a direct timeline, then it would appear that when transportation, capital and corporal punishment had ceased to be acceptable or sustainable, the only sensible remaining option was a system of imprisonment, since an underdeveloped one already existed in most counties in England. This
would seem to be a fairly unsophisticated explanation for the use of incarceration as a predominant form of punishment, and many revisionist writers, such as Foucault (1977), Rothman (1971) and Ignatieff (1978), contend that the assertion of power over ‘problem populations’ was a far greater determining factor. Revisionists argue that the aforementioned changes to the penal system were not purely moves driven by philanthropic and humanitarian intentions.

Evidence for this assertion comes from the development of institutional arrangements to segregate - the ‘poor’ within the workhouse, the ‘mad’ within the asylums, the ‘bad’ within the prisons - during the 19th and early 20th centuries.

Michel Foucault (1977), the major exponent of a revisionist history, described the era of penal modernity as ‘The Great Confinement’ and explained the emergence of the penitentiary in terms of an exercise in power and as a product of new knowledge and classificatory capacity, coinciding with the social, political and economic changes, as discussed earlier in the chapter.

‘Foucault shows that the defects of the prison – its failure to reduce crime, its tendency to produce recidivists, to organize criminal milieu, to render prisoners’ families destitute, etc. – have all been recognized and criticized from as early as the 1820s.’ (Garland, 1990, p.149) So the question which follows is why did prisons persist? And for what purpose if not to reduce crime? Whose interests did the new institutions serve?

Foucault argues, as do Rusche & Kirchheimer (1939), that the rise of the prisons had far more to do with disciplining a potentially disobedient workforce for the needs of a capitalist society, than it had to do with the humanising effects of the ‘enlightenment’: ‘Thus discipline produces subjugated...‘docile’ bodies.’ (Foucault, 1977, p.138)

Rusche & Kirchheimer’s (1939) account correlates severity of punishment with changes in the labour market particularly the national demand for a labour force. They suggest that the impact of the prison is extended beyond the prison population because, firstly, imprisonment acts as a sponge to soak up the reserve army of labour, particularly in times of high unemployment, and secondly, it provides an example of ‘lesser eligibility’ whereby workers in the community are given a clear message that their conditions of service could be worse.
Other commentators agree, arguing that a key function of imprisonment was imposing labour discipline in an ever more industrialised society, where obedience and timekeeping were increasingly important to the process of production. (Matthews, 1999a; Giddens, 1981)

According to Linebaugh (2003) conspicuous punishment was required for urbanising the agrarian classes who had been thrown off the land as a consequence of enclosure and were ‘free’ to become wage labourers, but who remained reluctant to work in ‘manufactories’.

Critiques of this theory point out the fact that proving a correlation between penal change and demand for labour is not the same as proving that penal change can be ‘reduced to’ a change in labour demand – the social world is too complex (Box, 1987) for changes in one part of the social structure to be determined by ‘narrowly delineated changes’ (Young, 1999) elsewhere.

Rusche & Kirchheimer’s account cannot adequately explain why imprisonment, rather than another form of punishment which might meet the needs of a capitalist society, became the predominant choice. On the other hand, as previously mentioned, imprisonment did exist in embryonic form and its evolution would have perhaps seemed logical.

Unlike Marxist theories which would assert that the power of the state is bound up in a way that accords with capital interests, Foucault’s account contends that the power of the state is derived through knowledge. For Foucault, the modern prison, with its mechanism of total surveillance represented a new form of knowledge and power. ‘The carceral network...systems of insertion, distribution, surveillance, observation, has been the greatest support, in modern society, of the normalizing power.’ (Foucault, 1977, p.304) Hence imprisonment and the Panopticon (in theory at least) are examples of an ‘exercise of power’ which create ‘new objects of knowledge and accumulates new bodies of information.’ The evolution of the ‘carceral archipelago’ of disciplinary institutions, including schools, hospitals, asylums, barracks and prisons allowed the rise of the human sciences (criminology, penology, psychiatry, child development and so on) and meant there was a growing ‘knowledge’ with which to justify interventions designed to ‘transform’, ‘prevent’ and ‘treat’ individuals.

During this time philanthropy is transformed as science ousts religion (Donzelot, 1979). For Foucault ‘there is no power relation without the correlative
constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.’ (Foucault, 1977, p.27)

According to Foucault the function of the prison is to classify, organize and exert power over the potentially volatile lower class populations. Understood in this way, prison controls the working classes by creating the criminal. Writing in the 1990’s, Feeley and Simon (2003 [1992]) make similar observations about the ‘new penology’ suggesting that the function of imprisonment is to identify and ‘manage’ unruly groups, rather than punish or rehabilitate.

Michael Ignatieff’s ‘A Just Measure Of Pain: The Penitentiary in the Industrial Revolution’ (1978) like Foucault’s works, starts from the position that the prison ought to be ‘studied not for itself but for what its rituals of humiliation could reveal about society’s ruling conceptions of power, social obligation and human malleability.’ (Ignatieff, 1983, p.75) He is critical of the idealist histories’ perception of the reformers’ intentions. Ignatieff writes:

Philanthropy is not simply a vocation, a moral choice; it is also an act of authority...a political act, embarked upon not merely to fulfil personal needs, but also to address the needs of those who rule, and those who are ruled. (1978, p.153)

Ignatieff also endorses Rusche & Kirchheimer’s contention that part of the prison’s purpose is to discipline workers outside of the penal system by showing them that they could be required to labour under worse conditions.

Extending this argument Ignatieff asserts that incarceration was only conceivable because of a belief that society’s cohesion was threatened by the ‘dangerous classes’. In Ignatieff’s work, as with Foucault’s work, ‘imprisonment offered a new strategic possibility – isolating a criminal class from the working class, incarcerating the one so that it would not corrupt the industriousness of the other.’ (Ignatieff, 1983, p.90)

David Rothman’s ‘The Discovery of the Asylum’ (1971), although referring to Jacksonian America, argues that it was not merely the speed of social change itself (brought about prior to industrialisation), but the alarmist response to crime as an indictment of a disordered society and not the wickedness of an individual, which allowed ‘total institutions’ to emerge. Rothman also demonstrates that the
language used to describe crime, deviance and social disorder, within a given society, helps to define the solutions it develops to those issues. Reflecting on social control in 1981 he considers that the progressive reformers trusted the State to ‘treat’ the criminal. Because of this ideology, prison regimes became more liberal as ‘the prison was to approximate in so far as possible the outside community.’ (Rothman, 1981, p.116)

Some commentators suggest these explanations place too much emphasis on power relations and that it is inaccurate to assume the State had absolute monopoly or the authority and practical power to assert it. Revisionist histories are arguably guilty of over-simplification (Foucault, in particular, would have it that every social interaction can be understood in terms of a power struggle; domination and subordination) and of ‘reducing the intentions behind the new institution to conspiratorial class strategies of divide and rule.’ (Ignatieff, 1983, p.77) Revisionist histories also carry the functionalist assumption that society is made up of institutions which ‘work’ together to create or ensure social order. Yet prison is arguably the archetypal institution which persists despite working badly to generate or maintain social order.

In his criticisms of revisionist histories Ignatieff, who describes himself as a ‘former though unrepentant’ member of the revisionist school, concludes that the prison, rather than having a designated function and failing in its attempt to deter or reform, should be considered more broadly in the context of society at large. ‘Society [understood] in...dynamic and historical terms, [is] ordered by institutions like the prisons which fail their constituencies and...limp along because no alternative can be found or because conflict over alternatives is too great to be mediated into compromise.’ (Ignatieff, 1983, p.96)

As Ignatieff (1983) poignantly observes:

The real challenge is to find a model of historical explanation which accounts for institutional change without imputing conspiratorial rationality to a ruling class, without reducing institutional development to a formless ad hoc adjustment to contingent crisis, and without assuming a hyper-idealist, all-triumphant humanitarian crusade. (p.77)
This highlights the ever present problem of the relationship between agency and structure.

Importantly, however, it is what the revisionist histories have in common which is worth bearing in mind for the purposes of this thesis. Their shared concerns are put succinctly by Cohen & Scull (1983): A ‘scepticism about the professed aims, beliefs and intentions of the reformers; concern with the analysis of power and its effects’ and crucially in the context of this thesis a ‘determination to locate the reform enterprise in the social, economic and political contexts of the period’ and a ‘curiosity about the relationships between intentions and consequences’ (p.2).

2.4 The Crisis of the Criminal Justice System and Evidence for the Effectiveness of Imprisonment

For a century and a half the prison had always been offered as its own remedy: the reactivation of the penitentiary techniques as the only means of overcoming their perpetual failure – Foucault (1977, p.268)

One prevalent debate within penology is whether or not increasing the use of incarceration can reduce the incidence of crime. It is a debate that has lasted over a century with influential championing from advocates who agree and disagree over the effects of a carceral regime, favouring or otherwise, the needs of offenders, politicians or society.

Historical analysis by Foucault and Ignatieff, for example, highlight many of these complexities to show that even if there were a direct correlation between levels of punishment and crime rates, the determinants of crime rates go far beyond the severity of punishment, and often the certainty of punishment. Although there is evidence to the contrary, with regards to certainty, the problem lies in the fact that only a small proportion of crime is ever detected, undermining the certainty of punishment and any subsequent deterrent effect. Aside from
that, methods of punishment are conditioned by a number of socio-economic and cultural circumstances.

The concept that high crime rates and low imprisonment rates are correlated is not illogical or always unverifiable through statistical evidence, however, it is far too simple a formula to be applied consistently - over time and in different jurisdictions - given the dynamic nature of crime and the complex political, structural and cultural forces, which also affect the levels of imprisonment.

However, some commentators have suggested that prison rates are able to reflect, directly, the true extent of changes in offending patterns and the effectiveness or otherwise of measures of crime control.

Those in favour of policy based on the assertion that ‘prison works’ have an approach which has recently been dubbed the ‘punishment paradigm’ and has, arguably, become increasingly popular. (Cullen & Wright, cited in Matthews & Francis, 1996)

The ultimate attraction of the ‘punishment paradigm’ to its advocates has been its self-justifying character. On the one hand, if the crime rates fall it can be claimed that this is a consequence of ‘get tough’ methods. On the other, if the crime rates increase the intractability of the crime rate is taken not as evidence of the limits of harsh punishment but the need for more punitive measures (Clear, 1994). (Matthews & Francis, 1996, p.2)

Penal expansionism gains the credit for a falling crime rate and more importantly, advocates of penal expansionism are able to justify their claims when the crime rate rises (which it was until very recently) arguing that prison expansion has not been rapid enough.

One of the main proponents of the ‘prison works’ ideology is Charles Murray. In his 1997 text ‘Does Prison Work?’, Murray argues that in England and Wales, during the ‘Great Decline’ from 1954 to 1992, the number of crimes increased twelve fold, while the number of prisoners only doubled: ‘The risk of going to jail if you committed a crime was cut by 80 per cent.’ (Murray, 1997, p.1)
According to Murray politicians and policy makers who sought to introduce more ‘humane’, effective and ‘modern’ responses to crime got it wrong. Prison can deter crime; ‘Deterrence fails only because the odds of being caught and imprisoned aren’t high enough or because the sentence is not harsh enough’. (Murray, 1997, p.14) Prisons can also prevent people from committing crime through incapacitation. The criminal justice system is, Murray contends; ‘the public forum in which the peaceful members of the community assert their supremacy over the outlaws. It dispenses just deserts.’ (1997, p.24) If it fails to do this on any level; police ignoring crimes, prosecutors dropping cases, judges failing to pass sentences of punishment, then the public’s confidence in lawfulness diminishes.

The main crux of Murray’s argument is a straightforward one: ‘the rate of crime is an inverse function of the chances of going to prison.’ (Young, 1997, p.31)

Jock Young has mounted an effective critique of this argument, pointing out that it is contrary to other assertions Murray makes (in particular within his ‘underclass’ thesis) about the nature of autonomy, since in order for prison rates to have a deterrent effect (and subsequently fall) the offender has to rationally calculate the probability of being caught and convicted. In other works Murray argues that ‘the underclass’ - those identifiable through ‘illegitimacy, violent crime, and [who] drop out from the labour force’ – ‘actively endorse cultures which flirt with risk [or] are congenitally less aware of risk.’ (Young, 1997, p.32) All of which cannot be true.

However, the result of the ‘prison works’ ideology, in the USA at least, has been a dramatic increase in the use of, and the severity of imprisonment: a shift towards pure custody or ‘warehousing’. Something Simon (2000) argues is a ‘slide into a kind of post-enlightenment dead end where the prison and its inmates ‘survive rather than live’ in what Robertson (1997) describes as ‘our modern houses of the dead…They don’t instruct or correct. They merely contain’.’ (p.287)

‘Since [1986] the US has been adding about 100,000 prisoners every two years…America still has one of the world’s highest crime rates.’ (Murray, 1997, p.16) In 1970 there were 196,000 prisoners, held in state and federal prisons in the US. By the mid 1990s this figure had risen to over 1.1 million. Proponents of
the ‘prison works’ theory will maintain that the social and financial benefits outweigh the costs of an ever expanding prison population: the price is worth paying. Despite these figures, Murray argues that we ought to look beyond the obvious conclusion to the lessons we can learn from the US. According to him, they are: (1) When crime is low and stable, it is a catastrophe to stop locking people up; (2) Prison can stop a rising crime rate and then begin to push it down; (3) Prison is no panacea.

However, the ‘punishment paradigm’ comes under criticism from those who reject the ‘prison works’ assertion. ‘Incapacitation as a penal policy amounts to little more than a ‘warehousing’ of prisoners, since there is scarcely any recognition of the human character of the offender nor are the reasons for offending addressed.’ (McLaughlin & Muncie, 2001, p.147) This is considered dangerous because it is argued that doing nothing may mean more offenders who are incarcerated feel abandoned and marginalized, increasing their probability of committing further offences on their release:

Human warehousing (Cohen, 1985) rather than normalization (King & Morgan, 1980) or minimal ‘just deserts’ (von Hirsch, 1976) is all that is required...American society...rests on exclusion and banishment rather than inclusion and hopes of reform (Young, 1999). (Downes, 2001, p.55)

Despite the situation in America being apparently and considerably more punitive than that of the UK there are similarities, in particular in relation to the influence of penal ideologies. The ‘penal populism’ of the 1990s and 2000s is something which began in the US but had a profound effect in England and Wales and this thesis will consider the impact of the ‘prison works’ agenda in the penultimate chapter.

Discussion and analysis of the events and theories within this chapter will shed light on the parallels and paradoxes in ideologies, policies and practices - relating to the children and young people – when this thesis moves on to look at the latter decades of the twentieth century and their methods of custody, control and diversion.

Firstly, though, the next chapter will consider the development of the youth justice system in England and Wales, and the ‘special’ status afforded to
children and young people before and after the emergence of the youth justice system, in 1908.
Chapter 3:

The Development of Juvenile Justice

3.1 The Youth Justice System: A Philanthropic Imperative

The unhelpful, historical amnesia which tends to characterise the youth question means that ‘youth cultures and youth crime assume the appearance of ever-increasing outrage and perpetual novelty’ (Pearson, 1994, p.1168). - Newburn (2002, p.532)

Bearing in mind the competing traditions discussed in the previous chapter, and their strengths and weaknesses, an element of historical focus can guard against this ‘amnesia’ (referred to by Newburn in the quotation at the head of this chapter) providing a socio-historical context in which to view the youth crime phenomenon, including the changes and continuities in our understanding of it and the strategies brought about to control and alleviate it.

In general, there are two strands of historic depiction – Idealist and Revisionist, which relate to the development of the juvenile justice system, in much the same way as there are for the adult penal system.

Idealist histories argue that prior to the early 20th century reforms which occurred within the penal system and the subsequent development of a juvenile justice system, children were treated in much the same way as adults and the creation of a juvenile court was an enlightened victory for what Platt (1977) ironically calls the ‘child-saving movement’.

Revisionist accounts contend that the juvenile court extended the reach, and the traditional legal values, of the adult system with the intention of being more efficient, and not necessarily more libertarian or enlightened. ‘The modern view of the juvenile court suffers from a sentimental interpretation of history to
suit progressive explanations of how social problems are ‘civilized’.’ (Platt, 1977, p. 193)

This chapter aims to address both arguments in relation to the discovery of adolescence and the development of juvenile justice policy and provisions, endeavouring to draw out ideological and theoretical similarities and differences which may reoccur in the subsequent chapters.

3.2 The Discovery of Adolescence and the Invention of Delinquency

The modern juvenile justice system emerged at roughly the same time as concepts of ‘adolescence’ and ‘delinquency’ were formed. While the notions of childhood and adulthood are largely understood to be neutral terms describing a specific period in the life-cycle, ‘youth’ and ‘adolescence’ are generally more emotive terms which conjure up images of ‘uncontrolled freedom, irresponsibility, vulgarity, rebellion, dangerousness…deficiency, vulnerability, neglect, deprivation or immaturity.’ (Muncie, 2004, p.3)

In pre-modernity there was no real perception of childhood. Children were not afforded any special status in society prior to the 17th century. ‘As soon as he had been weaned, or soon after, the child became the natural companion of the adult.’ (Aries, 1996, p.395) However, not all historians agree, and Pollock (1983) has argued against that ‘even if children were regarded differently in the past, this does not mean they were therefore not regarded as children.’ (p.236)

In historian Philippe Aries’ view the change came when reformers (or ‘moralists’) of the Middle-Ages recognized the importance of education and encouraged parents to be guardians of their children. ‘Henceforth it was recognized that the child was not ready for life, and that he had to be subjected to a special treatment, a sort of quarantine, before he was allowed to join the adults’ (Aries, 1996, p.396).

Prior to the late 1800’s children mixed with adults and worked from a young age. ‘Society was divided by status which, generally speaking, was not age-related (Stone, 1979)’ (Newburn, 2002, pg532). During the early 19th
century, however, critics, often ‘philanthropic reformers’, began to speak out and campaign against the use of child labour, particularly in the factories where ‘the scale and intensity of the exploitation of the young wage earners [found its] most vivid representation’. (Hendrick, 2002, p.26) It wasn’t until 1933 that the Children & Young Persons Act made it illegal for a child under the age of twelve to work, however, at this time, minimum school leaving age was fourteen (Kirby, 2003). There were progressive limitations on child labour (with varying degrees of effectiveness) in the series of Factory Acts during the 1800s.

In the mid-1800s, as children came to be viewed differently from adults and the ‘two phases in the life-cycle’ became more distinct, the transition period between each phase was extended and this intermediary phase became known as ‘adolescence’. (Newburn, 2002) Idealist histories would suggest that these categories arose ‘organically’ and although socially constructed were associated with the emergence - in the late 1800s - of formal education in schools, significant changes in family structures, and an emerging scientific understanding of child development.

One of the significant changes in family structure was as a result of the move, for many families, from an agricultural to urban way of life, due to the process of enclosure and industrialisation.

At this time too there was a ‘growth of individualism in philosophical, political, and religious thought (Stone, 1979)’ (Newburn, 2002, p.533) which was, arguably, the beginning of a change - albeit a protracted one (Young & Willmott, 1973) - in the roles of all family members, leading to the type of private, domestic unit we recognize today.

Contrarily, Aries (1996) argues that the liberal individualism of modernity did not weaken the family, but that it was, of ‘tremendous place in our industrial societies [having] much influence over the human condition’ given that it developed as a result of a ‘new concern’ for childhood. The child then needed something – like the family or school – to discipline, supervise and contain it. ‘These two agencies [the family and the school] took on increasing responsibility for both extending and deepening the processes of socialisation (Gillis, 1974; May, 1973).’ (Matthews, 1999a, p.154)

In a similar but more specific way, revisionist historians, like Foucault, argue that the concepts of adolescence and deviancy emerged as a result of the
new institutions and establishments, and the need to categorize their inhabitants, rather than vice-versa.

By the beginning of the nineteenth century young people, in the emerging cities and manufacturing towns, were gaining economic independence and increased ‘leisure’ time and this led to concerns about ‘delinquency’, ‘hooliganism’ and ‘lost’ children, as chronicled by philanthropists like Charles Booth, Beatrice Webb and novelist Clarence Rook. ‘The juvenile delinquent stood in contrast to the healthy adolescent and was seen as a product of faulty socialisation, inadequate parental supervision, or a lack of proper education.’ (Matthews, 1999a, p.154)

Anthony Platt’s book *The Child Savers: The Invention of Delinquency* chronicles the ‘child-saving’ movement and the juvenile court in America. He writes; ‘The essential preoccupation of the child-saving movement was the recognition and control of youthful deviance. It brought attention to and thus ‘invented’ new categories of youthful misbehaviour.’ (Platt, 1977, p.137) In a similar mode as the revisionists, Platt argues that it was no coincidence that the juvenile court brought within the ambit of governmental control, activities which had previously been managed informally or ignored, and which were largely attributable to lower and working-class children.

In the UK prior to the First World War juvenile crime was generally considered as a problem among the working classes, as a result of a lack of self-control or insufficient control by others, most often parents. ‘Poor social conditions and inadequate opportunities for constructive use of leisure were also seen as problematic.’ (Newburn, 2002, p.533) Solutions therefore, were largely based around providing and improving leisure facilities for children and young people from working class backgrounds. Most ‘services’ were made available by voluntary or church movements (not unlike today’s youth services with the exception of those interventions which are designed especially for young people who offend or are deemed ‘at risk’ of offending - This tendency will be discussed in more detail, presently.)

However, youth crime, according to official indicators, did rise in the years following the First World War. The 1930s witnessed the ‘great depression’ and national unemployment in 1933 was 22% (The National Archives). During the
Second World War levels of recorded youth crime, although fluctuating a bit, rose sharply. 'With the end of the War and the advent of the welfare state, there was some expectation that crime would return to its pre-War levels. This proved not to be the case'. (Newburn, 2002, p.534)

Newburn (2002, p.533) argues that since this time:

- Perhaps the key representation of youth in the past century has been to see them as a ‘problem’ – either as its source, or as being ‘at risk’ (Griffin, 1993). The close association between ‘youth’ and ‘crime’ has remained generally undisturbed ever since, and it has been paralleled by a continual nostalgic yearning for a lost ‘golden age’ of tranquility and calm (Pearson, 1983).

An ‘age’ which some criminologists have suggested never really existed because what was witnessed at the time was not an increase in ‘lawlessness’ but the criminalization of behaviours not previously deemed ‘problematic’ (Magarey, 2002) and a continuation of the past, given that delinquency is a perennial feature of working-class adolescent life (Pearson, 1983; Cohen, 1972; Hall, 1978), albeit that ‘working-class’ life-styles and sub-cultures, as we understand them, were (in the 1930s, 1940s and 1950s) a relatively new occurrence.

Before taking a closer look at the developments from the 1960s onwards (in the latter chapters) it is important to outline the developments within juvenile justice in England and Wales prior to the Second World War.

### 3.3 The Development of Juvenile Justice

At the beginning of the 19th century, the long established common law principle of doli incapax, meant that although the mode of trial for a child or adolescent was equivalent to that of an adult proceeding, the onus was on the prosecution to demonstrate that a child between the ages of seven and fourteen had the ability to ‘discern between good and evil’, otherwise they would be presumed innocent. A child under the age of 7 could not be held responsible for violations of the law, as it was presumed they were incapable of criminal intent.

Children between the ages of 7 and 14 were no longer considered ‘little adults’ within the courts but as persons entitled to special care and protection...
due to the fact that they, being still in a process of personal development, were not fully responsible for their actions. That said, if doli incapax was rebutted, for children under 14 the trial process was the same as for adults. An adolescent over the age of 14 would automatically be considered fully responsible for their actions, and they too would be prosecuted and sentenced under the same laws as an adult. (May, 2002)

However, once found guilty of an offence, children and adolescents were given the same retributive punishment, and age afforded them no special consideration when passing sentence. ‘Young offenders were liable for all the main forms of punishment, capital conviction, transportation and imprisonment.’ (May, 2002, p.99) In 1840 half of those sentenced to transportation were under 21 and in the 1850s 12,000 juveniles were being incarcerated annually. (Stern, 1998; Matthews, 1999)

According to the traditionalist histories, during the mid-1800s, social reformers campaigning for children’s rights in a variety of settings (home/school/workplace etc), demanded that they ought to be removed from the ‘adult’ prison system. Until this time, any consideration of the problem of children and adolescents (juveniles) within the adult prison system was incidental. However, with the changing attitudes to the purpose of imprisonment, most notably reform, imprisonment for children and adolescents (then all those under 14 years of age) was ‘increasingly seen as inappropriate and counterproductive. Imprisonment for juveniles…was likely to create ‘schools of crime’, while relatively short periods of confinement provided little possibility of reform.’ (Matthews, 1999a, p.155)

There had previously been some attempts to create state funded juvenile institutions, such as Parkhurst on the Isle of White, which opened in 1838; however, this was established, mainly to train male juvenile transportees before embarkation, and closed in 1864.

Prisons began to be criticised for the corruption of juveniles; ‘Newgate, where ‘children of the tenderest age were confined in the cells with prisoners of more mature age and more confirmed habits of crime,’ was but the most notorious of many.’ (May, 2002, p.99) The Brougham Committee of 1847 (a select committee of the House of Lords) reported that ‘the contamination of a
gaol or gaols as usually managed may often prove fatal, and must always be very hurtful to boys committed for a first offence’. (Stern, 1998, p.163)

The 1854 Youthful Offenders Act also provided state recognition of reformatories, designed to house the youth of the ‘dangerous’ or ‘criminal’ classes. The establishment of reformatories marked a radical change in penal policy, as they were set up with the intention of becoming alternatives to imprisonment and came under welfare provision. They were not state funded however, and rather than abolishing imprisonment for children and juveniles, arguably, this served to expand the penal ‘net’.

It has also been argued that, in much the same way as adult penal policies,

  youth policies were...designed to satisfy some powerful sectional (especially class, gender and racial) interests. As the rawest and least valuable recruits to a given social order, the young had to be socialized, schooled, trained and ultimately contained. (Davies, 1986, p.116)

Three years later in 1857 industrial schools, designed to house the ‘perishing classes’ (children aged between 7 and 14 who had been convicted of vagrancy) were established, initially within the educational system. (Newburn, 2002) Both institutions were run mainly by voluntary associations, and by 1895 were part of a well-established system, housing around 24,000 children and young people. ‘Consequently, the number of those aged sixteen sent to prison decreased from 10,000 in 1870 to 4,500 in 1890 and to less than 1,000 by 1907.’ (Matthews, 1999a, p.156)

It is important to note, however, that the number of juveniles held in reformatories and industrial schools suggests a possibility of a net-widening effect, as the total number of children in institutions - outside and inside the prison setting - expanded in what Pinchbeck and Hewitt (1973, p.491) call an ‘institution craze’. (This process will be discussed in more detail, in the next chapter).

In the mid-1890s the Gladstone Committee and the Lushington Committee made recommendations for a model of intervention which focused on the welfare of the juvenile offenders, as opposed to their punishment, and supported the
introduction of alternatives to custody. Consequently (and in contrast to the exclusionary, institutional arrangements) there was, at the turn of the century a growing belief that if interventions were going to work effectively they ought to take account of the background and disposition of the offender. Inclusionary forms of punishment sought to redress the ‘depravations’ or ‘disadvantages’ facing offenders through non-custodial interventions within the community, in particular addressing the situations of the family as a whole (Cohen, 1985).

‘The young offender, not being fully responsible for his or her actions, was deemed to be in need of support, supervision, guidance and control.’ (Matthews, 1999a)

With this in mind the 1908 Children Act established separate juvenile courts whose remit went beyond criminal offences to include cases where children and young people were deemed to be ‘in need of care and protection’. (Matthews, 1999a, p.23) Pitts observes that:

Then…it was a self proclaimed ‘modernising’ government that acted on these recommendations, and…this government argued that the new measures were ‘evidence-based’, informed by the new sciences of paediatrics, child psychology, criminology and penology and responsibility for this new form of youth justice was placed in the hands of a new legal and administrative entity, the juvenile court. (2003a, p.73)

It was thought that the necessary ‘support, supervision, guidance and control’ could be provided within the community through a range of inclusionary non-custodial interventions. In 1907 the probation service had been established in order to do exactly that with adult offenders, however, it was regarded as especially suitable for young offenders. ‘The focus of early probation practice was on young people, and by 1920 four out of every five of the 10,000 people under probation supervision were under twenty-one.’ (Rutherford, 2002, p.51)

The 1908 Children Act also prohibited children under fourteen from going to prison and fourteen to fifteen year olds could only receive a custodial sentence if the court issued an ‘unruly’ certificate. (Rutherford, 2002)

In the same year however Borstals, formally given recognition in the Prevention of Crime Act, were designed to act as an alternative to adult prison
and juvenile reformatories, and were created to house sixteen to twenty-one year olds who;

by reason of his criminal habits and tendencies or associations with persons of such character, it is expedient that he should be subject to detention for such a term and such instruction and discipline as appears most conductive to his reformation and the repression of crime. (Rutherford, 2002, p.51)

Borstals were part of the penal strand of detention facilities or custodial institutions (as opposed to the ‘care’ strand) and often appeared in wings of existing prisons. ‘The sentence was indeterminate, between one and three years [although there was the possibility of release after six months], and included a period of supervision in the community.’ (Hagell, 2005, p.154) Reformation would come via the training and education which would be provided by the institutions and sentences tended to be indeterminate; release was reliant on the individual’s ‘progress’.

In the fifteen years between 1905 and 1920 four borstals for men had been established, along with two (including a ‘modified’ borstal at Holloway Prison) for young women. ‘By 1921 there were over 900 young men undergoing borstal training, and nearly 250 young women (Forsythe, 1990)’ (Matthews, 1999a, p.159)

However, during roughly the same period, there was a dramatic decrease in the number of young offenders held in reformatories and industrial schools, down from the 24,000 at the turn of the century to 8,000 in 1922. (Rutherford, 2002)

Hagell & Hazel (2001) indicate that the numbers, in all kinds of residential provision, through the offending route, fell from 11,648 to 7,767 between 1913 and 1922.

The borstals, originally designed to provide education, occupational skills, and a strong work ethic to persistent young offenders, through a mixture of practical workshops, religious instruction and military-style drills, were ‘hailed throughout England & Wales as a promising and effective innovation’ during the inter-war years. (Rutherford, 2002) ‘Borstals, however, always remained in effect
junior prisons, in which the space-time relationship was stretched and readapted’. (Matthews, 1999a, p.161)

In the five or six years after the First World War forty institutions (industrial schools and reformatories) were closed, however Borstals were the exception since they were the only part of the prison system to be expanded, during this time. (Rutherford, 2002; Matthews, 1999a)

The borstals were remodelled on the English public school system in 1922/23. (Hagill & Hazel, 2001) Consequently, the borstal was considered so effective at reforming the young detainees that by the end of the 1930s its popularity with the magistrates was such that over half of all committals were to borstals. (Hood, 1965)

Part of the post World War II decline in institutional responses to youth offending could arguably be linked to the increased use of probation services; increase in school leaving age (from twelve to fourteen in 1918); the rising costs and a reluctance to pay for placements; and a broader scepticism about the effectiveness of institutional responses to crime. (Rutherford, 2002)

There is also an argument that, although the institutional provisions for young offenders (under the control of the prison service) were not expanding, greater flexibility within a range of open and closed institutions, capable of accommodating both offenders and non-offenders, meant that the juvenile justice and juvenile care systems were increasingly intertwined. The blurring of the system was in part due to an expansion of social work and social welfare provision at this time, but also partly due to the realization that much of the time the same problems applied to both the ‘deprived’ and the ‘depraved’ child. There is evidence of this in the White Paper which preceded the Children & Young Persons Act of 1933 which states:

There is little or no difference in character between the neglected and the delinquent child. It is often a mere accident whether he is brought before the court because he is wandering or beyond control or because he has committed some offence. Neglect leads to delinquency. (Home Office, 1933: 6)

The ‘welfare’ principle was epitomized in the subsequent Children & Young Persons Act (1933):
Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person, and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training.

- Children and Young Persons Act 1933 (Section 44(1))

The Act outlawed capital punishment for those under the age of eighteen; merged reformatories and industrial schools, creating a new system of ‘approved schools’ under Home Office regulation, to educate and train juvenile offenders, which were non-secure and run more like boarding schools; and established remand homes to kept juveniles on remand separate from the adult prison system.

It was believed that young people who offended usually needed ‘welfare’ interventions or psychological ‘treatment’, not punishment.

For the architects of the Children and Young Persons Act 1933, it was not just that a child’s immaturity mitigated the seriousness of their offending, but that the offences committed by a child were of far less significance than the underlying social and emotional disorders of which the offences were a symptom. (Pitts, 2005, p.2)

This ‘welfare clause’ enshrined in the 1933 Act was one of the high points of penal modernism, and needs of young offenders (rather than the deeds) remained the guiding principle throughout the 1930s, 40s and 50s.

Having said that, the rising levels of youth crime, after World War II meant there were some moves back toward ‘punishment’. In 1948 the Criminal Justice Act introduced ‘short, sharp, shock’ regimes in new custodial Detention Centres. (Millham et al., 1978) The late 1950s and early 1960s witnessed increasing moral panics over high profile student protests, football hooliganism and youth ‘gangs’ (Cohen, 1972; Pearson, 1983; Hall & Jefferson, 1976). ‘Borstal places rose to approximately 2,000 in 1952, and then doubled again by 1964, and those receiving the short, sharp shock regime rose in the 1960s from around 1,500 to nearly 6,000 (Stewart & Tutt, 1987; Millham et al., 1987).’ (Hagill & Hazel, 2001, P.6)
However, there was a strong 'welfarist' push against these changes, in the 1960s, and this will be the focus of discussion in chapter five.

This should help set the scene for chapter four which will consider the ways in which reformers, politicians, academics and professionals have tried to curtail the use of imprisonment for children and young people, as well as their involvement within the criminal justice system, and how this at times has had unintended consequences.
Chapter 4:

**Diversion and Unintended Consequences**

What does it say about this society that, in a matter of 30 years, the prison has gone from being a failed correctional facility, destined for abolition, to being a major and apparently indispensable element of modern social order? – Garland (2001, p.3)

Within the justice system the changing ideologies of imprisonment and the aforementioned debates about the effectiveness of imprisonment, have generated what Cohen (1985) terms 'social control talk', an aspirational discourse concerning the means by which the recurrent failures of the penitentiary and its methods will, at last, be remedied. This discourse underpins the ideologies of incarceration and decarceration which have informed political and professional debate from the inception of the youth justice system in England and Wales. Sometimes the rationale is that the system will work better if it is tougher, sometimes if it is less punitive and more therapeutic, and sometimes if we avoid the criminogenic effects of involvement in the system, such is the contradictory nature of social control talk which, in turn, spawns what we might call, 'diversion talk'. (Muncie, Hughes & McLaughlin, 2002)

This chapter will begin with an analysis of decriminalisation and decarceration, followed by a discussion of the rationale for diversion and the various types of diversion, to provide an overview of the different diversionary ideologies which have emerged, expired, and re-emerged in the years since the World War II.

Following on from this there will be some discussion about the ‘cycles of juvenile justice’ (Bernard, 1992) and how this ‘phenomenon’ fits with the changing discourse of diversion, articulated by academics, politicians and professionals, and how relevant the arguments are now in England and Wales.
The final part of this chapter will consider the crucial unintended consequence of diversionary practices and look in depth at the theory of 'net-widening' (Cohen, 1985; Austin & Krisberg, 1981).

4.1 Decriminalization, Decarceration and the Massachusetts Experiment

There are three major rationales (or principles) which can be seen to inform practices which aim to limit or eradicate the use of formal criminal justice interventions, and incarceration in particular. They are decriminalization, decarceration and diversion – and although distinct, the three are frequently linked in practice.

The principles of decriminalisation and decarceration emerged from an abolitionist theoretical perspective:

The theoretical, political and policy starting point for abolitionists is the recognition that penal institutions for juveniles are themselves social problems that not only have a minimal impact on crime but also inflict serious harm and damage on individual young prisoners, their families and communities. (Sim, 2008, p.1)

Decriminalization aims to avoid the criminogenic impact of system contact, either through the removal of the official ‘criminal’ status of certain acts or deviant behaviours, or through *de facto* decriminalization, where criminal acts are no longer prosecuted despite being ‘formally’ illegal. Some supporters of decriminalization have gone so far as to suggest that there is no such thing as crime (Christie, 2004) while others recommend replacing notions of crime with notions of ‘social harm’ and ‘problematic events’ (deHann, 1990). (Case, 2008)

Decriminalization emerged from an abolitionist theoretical perspective which challenges the ‘taken-for-granted’ nature of prisons’ existence, its failure to solve the problem of crime or reform offenders and its capacity to cause more social harm, by campaigning for a radical change of philosophy, policy and practice, in
relation to crime, crime control and imprisonment. (Jewkes & Bennet; 2008, Sim; 2008)

Decarceration aims to avoid the harmful effects of custody through reducing the use of imprisonment as the predominant penal sanction. Support for decarceration comes from abolitionists who argue for the removal of all custodial institutions and reductionists who argue for the limited use of penal incarceration.

All other things being equal, decarceration should have a ‘down-tariffing’ effect, whereby those children and young people no longer sentenced to custody receive alternative high-tariff interventions displacing those children and young people who were the previous recipients of high-tariff interventions.

Advocates of decarceration make many of the same criticisms as the penal reformers of the previous two centuries. Namely, that rates of recidivism are high; the cost of imprisonment is high (relative to community sanctions); incarceration is dehumanizing, stigmatizing and damages relationships between young people and their families, schools and communities; prisons are dangerous, unsuitable places for children and young people who often become victims; and they can encourage criminality as inmates are ‘schooled in crime’. (Hazel, 2008)

That said, decarceration as a distinct ideology has its roots in the 1960s ‘destructuring moves’ (Cohen, 1985) and was largely influenced by Erving Goffman’s (1961) critique of ‘total institutions’. His argument was that the experience of institutionalisation is more likely to impact negatively on those involved therefore rendering any possibility of rehabilitation, in a ‘secure’ setting, problematic. Short periods of incarceration would not allow time for rehabilitation while the ‘debilitation’ caused by a combination of alienation, marginalisation and institutionalisation, over a longer time period, would negate any rehabilitating endeavour.

The Massachusetts experiment proved to many policy makers and practitioners that decarceration was an achievable goal. In 1972 the state of Massachusetts began abruptly closing all of its training schools (the American equivalent of English borstals), removing nearly 1,000 children and young people and placing
them into community programs. Jerome Miller was appointed head of the Department of Youth Services in 1969 and by gaining government and media support – portrayed the juvenile institutions as places which were ‘destructive’, ‘corrupt’, ‘repressive’ and ‘barbaric’.

Miller (1991) and his associates had first attempted to humanize the Massachusetts correctional facilities, trying to transform them into ‘therapeutic communities’. But stiff staff resistance and sabotage of the new, more humane policies led Miller to conclude that only complete shutdown...would reform juvenile corrections practice. (Krisberg & Austin, 1993, p.143) Miller was convinced that the ‘more conventional, ‘shallow-end’ strategy, of first developing alternatives and later phasing out institutions would widen the net, with institutions remaining alongside new community-based programmes’. (Rutherford, 1992, p.66) He therefore adopted a ‘deep-end’ strategy seeking decarceration in juvenile justice prior to establishing community-based alternatives to custody.

Miller (1991) claimed ‘that [If] most prisons were closed tomorrow, the rise in crime would be negligible. Incapacitation as the major tenet of crime control is a questionable social policy’ (p.182).

Despite political pressure and Miller’s departure in 1973 the commitment to decarceration survived into the next decade. In 1982 Massachusetts had the lowest juvenile incarceration rate of any state in America. The national rate of juvenile incarceration was 134 per 100,000 but in Massachusetts it was 13 per 100,000 (Rutherford, 1992).

Critics of the Massachusetts experiment anticipated a juvenile crime wave, which never occurred. Historical trend data suggested that juvenile crime declined through the late 1970s and 1980s in Massachusetts. It is worth noting that this empirical evidence directly contradicts claims made by advocates of the ‘prison works’ theory – in particular the arguments made by Murray – even if only in relation to children and young people.

Fears were also raised that children and young people would be displaced into the adult justice system, but the evidence suggests that this did not happen and in fact the state bucked the national trend and saw a decline in the numbers of juveniles transferred to adult court. Another criticism levied at the
Massachusetts experiment is that it led to benign neglect (much the same as the argument against radical non-intervention). Although there is a possibility that some children and young people will ‘fall between the cracks’, Krisberg et al. (1991, cited in Krisberg & Austin, 1993) suggest that the children and young people were not released into minimum supervision and in fact 80% of them were given some community-based residential placement at the start of their sentence, allowing the most suitable community programme to be located for them.

4.2 Front-end Diversion and Back-end Diversion

Diversion often adopts measures which are closely associated with the principles of decriminalisation and decarceration, to varying degrees and in different combinations, in order to achieve the same effects without the ‘wholesale’ abolition of criminal acts, judicial sanctions or youth custody.

Diversion, in its broadest sense is ‘the process of keeping offenders and other problem populations away from the institutional arrangements of criminal justice’ (Lee, 2001, p.102). The process of ‘diversion’ is intended as a way of removing children and young people from the formal sanctions of the juvenile justice system or at least minimizing their penetration into it. Over the years diversion has taken many forms.

For the purposes of this thesis measures of diversion will be broadly separated into two categories; front-end diversion and back-end diversion.

It should be noted that situational and social ‘crime prevention’ (Pease, 1994) techniques, ranging from target hardening to training and education, are sometimes referred to as measures of diversion (from crime) but this is something quite different to the process which will be discussed here.

Front-end diversion refers to the process of removing children and young people from the criminal justice system and occurs before prosecution, however, the use of the term diversion often needs to be scrutinized:
Diversion may be an appropriate description of what happens to those offenders for whom there is a conscious decision not to use the formal process of prosecution and trial…but it is less properly applied to those offenders who are customarily and as a matter of principle dealt with outside the conventional parameters of formal criminal justice. (Dingwall & Harding, 1998, p.2)

Front-end diversion refers to the process of removing children and young people from the criminal justice system and occurs before prosecution, and can consist of two distinct routes. Firstly, diversion from prosecution by way of pre-court measures, such as the reprimand and final warning scheme. And secondly, diversion from any formal sanctions through informal responses such as informal (verbal) police warnings: ‘There were always, of course, some cases which were so trivial as to be properly ignored or dealt with by way of informal and unrecorded advice or admonition’ (Bingham cited in Koffman & Dingwall, 2007, p6). A more recent response in this vein is the youth restorative disposal (discussed later). Diversionary affects are undermined if cautions are used in cases which might otherwise have been subject to ‘no further action’ (NFA), instead of as an alternative to prosecution.

The risk of net-widening varies depending on the diversion route, and so the distinction is critical when trying to evaluate the ‘genuine’ diversionary effects of a particular process. For example, an increase in reprimands and final warnings might be evidence of more children and young people being successfully diverted from the criminal justice system or it might be evidence of a rise in the numbers of children and young people brought into the system. Conclusions from Farrington & Bennett’s study of police cautioning in London, from the late 1960s - when the Met introduced their juvenile bureau scheme - & early 1970s, suggest that the introduction of police cautioning led to a substantial increase in the numbers of ‘officially processed juveniles’ (1981, p.134). Furthermore their study suggested that although cautioning may have successfully diverted 10-13 year olds from court, they too were the most affected by net-widening.

One of the ways to explore a genuine diversionary effect is to look at whether or not there has been a rise in the rate of diversion – the proportion of
children and young people who get a pre-court disposal as opposed to prosecution.

However, those children and young people who are subject to a pre-court disposal do appear in the figures for the rate of diversion, while those subject to informal responses do not, and so in theory a rise in diversion may not be evident from the figures. This trend may be witnessed as a consequence of the target to reduce the numbers of first-time entrants into the youth justice system, since one of the ways this will be achieved is by giving informal responses to those children and young people arrested for the first time. Furthermore, in some circumstances, for example when the actual level of youth crime falls or remains stable, while the numbers of children and young people brought into the system rises, an increase in the rate of diversion might actually reflect the fact that children and young people are being brought into the system who would otherwise have received an informal response. This is arguably what happened with the introduction of the police ‘sanction detection / bringing offences to justice’ target. These are all issues and occurrences which the thesis will consider in greater detail during the latter chapters.

In the majority of instances the police are the gate-keepers of the criminal justice system and it would be naïve to assume that the police ‘merely’ enforced the laws made by politicians. The actuality of law enforcement does not always correspond to the legislation: ‘there is evidently a considerable element of discretion in decisions to invoke the criminal law’ (Ashworth & Redmayne, 2005, p.142). ‘Police officers are…frequently required to deal with situations which require the exercise of discretion – deciding, for example, between competing accounts of an incident…and determining what if any course of action to pursue (such as whether to warn, caution or arrest)’ (Loader, 1996, p.9). Furthermore, this kind of discretion is often needed when dealing with children and young people whose ‘potential’ offending behaviour boarders on anti-social or non-criminal.

The genesis of the informal cautioning policy was not systematically documented, by the police over time, and so it is difficult to ascertain the various levels of informal police cautioning without the use of statistical analysis of levels of
offending and formal cautioning. ‘It has been argued that cautioning lacked a
cohherent theoretical basis (Tutt & Giller, 1983) which led to considerable disparity
in it’s use between police areas (Ball, 2004; Ditchfield, 1976; Wilkinson & Evans,

Consequently, different police forces have considerably different
cautions rates.

‘Police force policy and practice appears to be the main influence
(Tarling & Laycock, 1985; Sanders, 1985b), compounded by
general inconsistency and the influence of ‘substantive’ suspect
characteristics (Steer, 1970; Nathan & Landau, 1983.’ (Sanders,
1988, p.517)

This is not always indicative of varying offender patterns and offence types, and
‘studies of police behaviour have long maintained that a police
officer is more likely to arrest and charge someone who threatens
the officer’s authority by means of insults or failure to comply with
the officer’s commands or requests [Bittner, 1967]’ (Ashworth &

Children & young people, as a consequence of their economically & socially
excluded status, fall into the category of ‘police property’ (Lee, 1981 cited in
Loader, 1996) - those people the police control as opposed to those they serve.
‘The young ‘street’ population has always been the prime focus of police order-
maintenance and law-enforcement work (Loader, 1996; M. Lee, 1998).’ (Reiner,
2000, p.136) Children and young people are more commonly involved in, and
apprehended for, police-enforced crime (Ashworth, 1984) and disparity between
enforcement of offence type can also lead to disparity in prosecution and
diversion of offender ‘types’. Not only that, but there is evidence that ‘patterns of
bias identified in street policing’ regarding the class and race of offenders, may
also be evident in decisions to prosecute or divert. (Sanders & Young, 2002)

Back-end diversion refers to the process of keeping children and young people
out of custody within the secure estate for children and young people - as it is
now generically known - and occurs after a conviction.
It has included sentences in/to the community such as Supervision Orders; Community Rehabilitation Orders (formally known as a Probation Order); Community Punishment Orders; Action Plan Orders and Attendance Centre Orders [all of which have, since 2009, been replaced by, and are now part of, the Youth Rehabilitation Order]. Also, in the 1980s, children and young people could be referred to an Intermediate Treatment programme.

It is important to note that not all community based sanctions are considered alternatives to custody – rather they represent a continuum of penalties, the ‘severest’ of which is custody. For example Referral Orders, Reparation Orders, fines and discharges make up a part of the ‘first tier’ of disposals available to the youth court and are usually reserved for first-time or minor offenders, and would not therefore be considered as alternatives to custody.

It has been argued that implementing alternatives to custody provision risks ‘up-tariffing’ rather than diverting. The process of up-tariffing occurs when;

Young people are accelerated up the ‘tariff’ by attracting the label ‘persistent young offender’ earlier in their careers and in relation to less serious offences, evidence of failure to comply with programme requirements is subject to more rigorous breach procedures, thresholds for punitive sanctions are widened (Goldson, 2006) and the consequence is...a persistently high level of custody. (Smith, 2007, p. 153)

As the number of ‘high-end’ provisions - designed as alternatives to custody - increases, the chances of children and young people (who would not have been considered eligible for a custodial sentence) receiving a relatively ‘high-tariff’ intervention also increases. Often this occurs because the court is concerned - perhaps for welfare-based reasons - about the need for considerable intervention, but despite ‘good intentions’ this can result in the child or young person receiving a ‘harsher’ punishment. (Haines & Drakeford, 1998) This combined process of net-widening and net-strengthening (Hudson, 1996) happens as interventions, designed to be alternatives to custody, ‘compete’ with custody.

That said this is not always the case as the use of Intermediate Treatment in the 1980s shows (Bateman, 2010a), however net-widening was arguably
avoided because of a specific set of political and fiscal circumstances (which this thesis will look at in detail later).

Traditionally there is a ‘common-sense’ association between rehabilitation and reform, and alternatives to custody or community penalties, an example of which is the use of probation. Non-custodial sentences are promoted as a way of reducing re-offending and avoiding the negative effects of imprisonment, but arguably the evidence for this is difficult to establish. ‘Direct appeals to ‘effectiveness’ as a justification for choosing a non-custodial over a custodial disposal immediately give rise to demands for evaluation and empirical proof that, in fact, non-custody ‘works’.’ (Brownlee, 1998, p. 51)

However, despite an increased emphasis on ‘what works’ John Pitts concludes that ‘in their [the politicians, criminologists and senior youth justice practitioners] efforts to elaborate a more pervasive and more politically plausible criminal justice apparatus, it simply has not mattered whether it ‘works’ or not.’ (2007, p.19)

That said perhaps an important justification for ‘alternatives’ to custody could be that they have their own penal value, and not only a rehabilitative value i.e. considered as ‘penalties in their own right’ (Morris & Tonry, 1990) in order that they might be seen to ‘work’ especially given that some non-custodial sanctions (curfew, electronic tags) involve a considerable deprivation of liberty.

In the 1980s there was some opposition to the use of the phrase ‘alternatives to custody’ as it implied that custody was the normal response to offending behaviour, and subsequently ‘an alternative that was in some way punitively equivalent to prison would then have to be proposed.’ (Hudson, 1996, p.179)

Ultimately, though, community sentences are justified in opposition to custody provided they work no less well than imprisonment, and so long as they do not subject the public to unacceptable levels of ‘risk’ (again, an issue this thesis will elaborate on later). Given the overwhelmingly negative effects of imprisonment and its ineffectiveness as a response to crime – as evidenced in high rates of recidivism – an important merit for community sentences is that they work just as well as the custodial option.
4.3 The Cycle of Juvenile Justice

As well as the theories - from the Idealist and the Revisionist accounts, and from the ‘authoritarian right’ and the ‘socio-liberal left’ - surrounding the role and effectiveness of a punitive or carceral system of punishment, whose ‘grand’ arguments focus on the external cultural, political and economic understandings of criminal justice, there are also theories about the internal contradictions within criminal justice systems.

Thomas J. Bernard wrote ‘The Cycle of Juvenile Justice’ in 1992 which analyses the cycles of reform in American juvenile justice, in terms of the influence of material conditions and subsequent philosophies, within the system, which arise perhaps as a justification for what Foucault calls the ‘perpetual failure’ of the ‘penitentiary techniques’.

Bernard argues that ideas of juvenile delinquency and juvenile justice emerge and change at different points in history. These ideas then become ‘philosophies’ which influence the way in which the realities of juvenile delinquency and justice are contextualised and understood. Subsequent philosophies can then be used to justify changes in the laws which govern juvenile delinquency, shaping juvenile justice policies. It is, therefore imperative to understand the changes within the context of history, philosophy and law. Bernard argues that the philosophies are especially important within juvenile justice because of the public’s demand for something which ‘makes sense’: ‘If they hold a conservative philosophy, then they demand that the juvenile justice system ‘get tough’...If they hold a liberal philosophy, then they demand that [it] rehabilitate juveniles and treat the causes of their problems.’ (Bernard, 1992, p.7) He argues that the effectiveness or otherwise, of any particular policy is irrelevant so long as the public believes it ‘makes sense’.

Arguably this has changed in the past twenty years with the development of the ‘what works’ agenda, which has seen impetus transformed from one of philosophy or ideology to one of pragmatism and ‘risk aversion’. That said, critics of the ‘risk factor’ paradigm suggest that the public’s demand for something which ‘makes sense’ or allays their fears is a bigger motivating factor than whether or not various interventions actually ‘work’ (McAra, 2010). (This thesis will consider these issues at greater length later).
However, Bernard’s argument raises interesting questions about the relationship between philosophy and policy, and intentions and outcomes. His starting point is to consider what has remained unchanged, with reference to juvenile delinquency and juvenile justice, over the previous two-hundred years and he concludes that five aspects have stayed the same. These arguments will be examined to establish the extent to which Bernard’s account of what has remained unchanged in youth justice in the USA is applicable to the UK:

‘1. Juveniles, especially young males, commit more crime than other groups.’ (Bernard, 1992, p.21)
In the UK there is evidence that a significant proportion of crime is committed by young people and in particular young males, ‘though the activities of young people are both more visible and more clearly policed than those of other age groups (Farrington & Burrows, 1993; Pearson, 1994; Loader, 1996).’ (Newburn, 2002, p.540) Self-report studies also indicate that the types of crimes which appear in police statistics (those which concern the public or are more likely to result in convictions) are, in fact, disproportionately committed by children and young people. (Graham & Bowling, 1995; Flood-Page et al. 2000) There is also evidence that for many young people offending is something of a ‘rite of passage’ and their offending behaviour is something which they subsequently ‘grow out of’ (Rutherford, 1992). However more recent evidence suggests that the peak age of offending has increased, possibly suggesting either a delayed ‘onset’ of offending or a delayed pattern of ‘desistance’. (Flood-Page et al. 2000)

‘2. There are special laws that only juveniles are required to obey.’ (Bernard, 1992, p.21)
Children and young people have much greater controls over their actions, both formally and informally, not least because they are more vulnerable and less able to protect themselves (a factor central to the justice vs. welfare debate which will be considered shortly). As in the USA, children and young people in England and Wales who are over the age of ten, can be prosecuted for criminal offences (i.e. any act that an adult could be prosecuted for) but they are also required to obey laws which other adults do not have to obey. These are sometimes referred to as
'status offences' because they apply only to juveniles, and include laws against truancy, alcohol consumption and engaging in sexual activity (Goldson, 2008).

‘3. Juveniles are punished less severely than adults who commit the same offences.’ (Bernard, 1992, p.21)

In general, sentences for children and young people, in England and Wales, are less severe than they would be had the individual been over eighteen, although interventions - not designed to be punishments – can often be more intensive or run for longer than the nearest comparable adult sentence. There is an important distinction here to be made about what punishment is and whose interests are served. Despite the benign intentions of those designing or administering an intervention (which isn't intended to punish) the result, especially from the perspective of the child or young person receiving said intervention, may be that they are being unduly punished.

Indeed, Bernard concedes that those children and young people involved in offending (or delinquency) are often subject to differentiated treatment on the grounds that they are ‘still reformable’ and therefore State intervention, to a degree not permitted with adult populations, is justifiable, and enhances the State’s power over its young people.

Recently, however, in the UK, an ever increasing concern with ‘risk’ has led to a series of juvenile justice interventions intended to ‘nip in the bud’ (Home Office, 1997) those potentially ‘criminal’ or ‘deviant’ behaviours through early intervention. An example of which is the final warning system, introduced in 1998, which replaced non-statutory cautioning for children and young people with a formalised (statutory) system of pre-court disposals. Controversially, a third offence - at latest - automatically gives rise to a prosecution, irrespective of circumstances or seriousness, which means children and young people can find themselves subject to greater levels of intervention (or punishment) than adults, to whom the final warning scheme does not apply. Not only that, the near mandatory imposition of a referral order for a first conviction – with a guilty plea – involves considerably more intervention than the financial penalty or discharge that an adult might receive for a first offence.
‘4. Many people believe that the current group of juveniles commit more frequent and serious crime than juveniles in the past.’ (Bernard, 1992, p.21)
While it is certainly true that adults are concerned with youth crime, for a long time in the UK there was little evidence to support the belief that juvenile crime was getting more frequent or more serious. Pearson (1983) argues that adults always tend to be wary of ‘social breakdown’ at the hands of a youthful population because the delinquent behaviour of ‘today’s’ youth indicates a ‘moral degeneration’, unparalleled in previous generations. Clarke (1976) suggests that this is because ‘youth’ is seen to represent, firstly, where the parental generation went wrong, and secondly, the direction in which our society is moving. Cohen (1972) argues that this invokes an increased fear of crime and consequently youth crime and deviance is more likely to receive greater attention from the general public and the authorities.

That said, there is some evidence that more recently, young people’s involvement in serious criminal activities has increased, albeit that it is only true of a minority of young people in specific places (Pitts, 2008). But despite this the public typically overestimate the level of crime, even when the juvenile crime rate is falling (Hough and Roberts, 2004).

‘5. Many people blame juvenile justice policies for the supposed ‘juvenile crime wave’.’ (Bernard, 1992, p.21)
Typically, and regardless of the realities of the incidence of crime, the public will take umbrage with policies they consider are causing this increasing crime wave. Whether the justice policies are considered too harsh or too lenient pressure for change will arise, from the public. When the responses to offending, which emerge as a result of this pressure, are of a repressive and draconian nature this is called ‘populist punitiveness’. (Bottoms, 1995) In 2010 the Ministry of Justice published research on public confidence in the criminal justice system which concluded that 77% of respondents of the 2007/08 British Crime Survey ‘felt that sentences given by the court were too lenient. However, many respondents underestimated sentencing practice.’ (Smith, 2010, p.1)

Recent trends in youth justice in the UK might be explained in terms of the rise of popular punitivism and can be seen as evidence of the perceptions of high youth crime, leading to a return to more punitive policy interventions.
(Allen, 2002; Bateman, 2010a) In keeping with Bernard’s previous observation ‘contemporary punitiveness has not developed in the context of rising crime rates.’ (Goldson, 2008, p. 279)

Given that these five factors remained the same in the US, Bernard subsequently seeks to explore what changes occurred, over a period of 200 years, prior to 1992 (but as we have established not all of the factors are necessarily true of the UK - at least not in the period from 1992 onwards).

Bernard, by investigating oscillations in policy through empirical analysis of the treatment of children in US, argues that a cycle of juvenile justice exists. The cycle begins when youth crime is perceived to be very high and there is a belief that state intervention can control or reduce the rate of offending. In response a harsh system of punishments is developed. Subsequently the ‘public’ become disillusioned with the ineffectiveness and punitiveness of the policies and more lenient or intermediate interventions are developed. Following this, if youth crime is then perceived to be high again the failures of the system are blamed on overly lenient interventions.

A similar argument (cited by Bernard) comes from Walker who states ‘An increase in the severity of the penalty will result in less frequent application of the penalty.’ (1992, p.36) He calls this the ‘law of criminal justice thermodynamics’. Therefore, when only harsh punishments are available to the courts some juvenile offenders receive no punishment at all, because the intervention seems inappropriate or counterproductive. As a result, the certainty of the punishment is diminished and this may seem ‘unjust’ so intermediate punishments must be developed, allowing an alternative recourse.

‘The extent of the reversal on each occasion [between leniency and harshness] is an indication of the wholesale nature of the rejection of philosophies that had underlain a broad consensus as to the appropriate response to youth offending just a few years previously.’ (Bateman, 2010a, p.108) However, as the period from the 1960s - in the UK at least - highlights, this does not necessarily mean a reversal of philosophies leading back to the ones which began the cycle.
Arguably, one of the ways the ‘system’ can persuade itself that it is effectual is by increasing its range of interventions – finding ‘new solutions’ (Foucault, 1977) – to the recurrent failures. Therefore, a proliferation of community sanctions may not be indicative of a more lenient climate emanating from ‘public’ concerns (as Bernard seems to suggest).

Nevertheless, this expansion of options available at the disposal of the authorities – generated by this ‘cycle of juvenile justice’ oscillating between leniency and harshness – is what Cohen calls ‘net-widening’ and occurs under the broader remit of ‘social control’, and not just criminal justice.

### 4.4 The Spreading of the Net of Control

Foucault suggested that from its inception the prison has been in crisis because of its failure to reform offenders, and that because of the tendency of modern states, through the collection of data (cf. ‘calculable man’), to exert ever greater administrative control over their subjects, penitentiary practices have been disseminated beyond the walls of the prison and have come to permeate civil society, in what he called the ‘carceral network’. New solutions, therefore, custodial or otherwise, are constantly being sought. Foucault argues that: ‘The prison transformed the punitive procedure into a penitentiary technique; the carceral archipelago transported this technique from the penal institution to the wider social body.’ (Foucault, 1977, p.85) (Progressive minimalism, witnessed in the UK in the 1980s, is arguably ‘the exception that proves the rule’ but this will be discussed in detail in chapter 6.)

This theory was developed and explored most comprehensively by Stanley Cohen (1985) who coined the term ‘net-widening’ to describe the process whereby more and more people are subject to more and more forms of social control. Diversion measures can potentially divert ‘into’ the system, rather than away from the system (as intended), meaning that more, not less, children and young people, end up becoming subject to alternative criminal justice interventions.

Cohen argues that within the justice system there are two opposing impulses, one which is inclusionary and one which is exclusionary (although
inclusionary measures often have exclusionary consequences, a point which will be discussed to a greater extent, later in this thesis). Diversion measures were designed to be inclusionary - non-stigmatizing, informal, decentralized and non-institutional - however the problem of individual offenders remained. In policy terms the two modes - 'inclusionary' and 'exclusionary' - merge often with exclusion - traditional punitive measures - dominating. 'When matters such as boundary blurring, integration and community control take place, the result is that more people get involved in the 'control problem'. In order to weaken, bypass or replace the formal apparatus, more rather than less attention has to be given to the deviance question.' (Cohen, 1985, p.231) The argument maintains that what you then get is 'deepening bifurcation'. The softer or more lenient social controls become more inclusionary – drawing in more people - while the tougher or more traditional forms of control become more exclusionary (i.e. indefinite prison sentences) because the inclusionary model does not offer a solution to 'serious crime'. Cohen argues that in order to reduce the formal and punitive controls of the criminal justice system, society has to be subject to greater surveillance, community policing, and neighbourhood justice, for example. Because these measures cannot prevent all deviancy they require 'back-up' sanctions, which Cohen argues will inevitably mean those offenders at the 'hard-end' - career criminals, dangerous offenders, recidivists etc. – 'will be subject to more and more punitive forms of exclusion.' (Cohen, 1985, p.234)

Simultaneously, offenders at the 'soft-end' of the justice system are drawn into punishments (or provisions) originally intended as an alternative for those who would otherwise be imprisoned.

According to Cohen when it becomes doubtful any destructuring impulse will survive 'the response to real or perceived breakdown is to call for more regulation, order and control.' (Cohen, 1985, p.218) (This account - as a general prognosis - again runs up against the problem of progressive minimalism of the 1980s.)

Paradoxically, instead of reducing the 'reach' of the state and creating alternatives to custody, what has occurred as a result of the 'destructuring moves', is the supplementation of the juvenile justice system through new services and agencies ('different nets') affecting more and more juveniles ('wider
nets’) and requiring even greater intervention (‘denser nets’). (Austin & Krisberg, 1981)

Intervention comes earlier, it sweeps in more deviants, is extended to those not yet formally adjudicated and it becomes more intensive. And all this takes place in agencies co-opted into the criminal justice system (but less subject to judicial scrutiny), dependent on system personnel for referrals. (Cohen, 1985, p.53)

‘A broader range of ‘tough’ community sentences is likely to feed that process rather than reduce the number of children going into custody.’ (Goldson, 2008, p.245) An increasing number of provisions lead to a corresponding growth in the number of children and young people subject to them, and when failure to comply is punishable through incarceration this is likely to have unintended consequences (Muncie, 1999a).

There is a danger, inherent in any new provision designed to limit custody that it will serve to displace other less intensive community disposals. One critical appraisal of the role of alternatives to imprisonment within the penal system has argued that, historically, such developments have often had little impact on levels of custody for precisely this reason (Vass, 1990). (Bateman, 2010a, p.9)
Chapter 5:

The Evidence for Penal Welfarism

The high point of the welfare approach, stressing the causal effects of external circumstances rather than individual responsibility, was probably during the period leading up to the Children and Young Persons Act 1969 – Curtis (2005, p.54)

‘The history of youth justice is a history of conflict, contradictions, ambiguity and compromise...[it] tends to act on an amalgam of rationales, oscillating around and beyond the caring ethos of social services and the neo-liberal legalistic ethos of responsibility and punishment.’ (Muncie & Hughes, 2002, p.2) Much of the twentieth-century juvenile justice fell into a double taxonomy encapsulated by ‘welfare’ and ‘justice’ rhetorics which gave rise to a ‘political polarisation’ of ‘welfare’ and ‘justice’ where the two ideologies appear as oppositional. (Pitts, 1988)

The decade which began in 1960 saw a convergence of these two ‘incompatible’ ideological models of intervention at the disposal of the juvenile court; the justice model and the welfare model. Bottoms, writing in 1974, suggests that ‘this, one suspects, lies at the heart of the ‘problem of the juvenile court’, and is the reason why the role of the juvenile court or its equivalent raises so much controversy’ (p.324).

Youth justice has to continually seek a compromise between the children and young people as a special case and the children and young people as responsible members of their communities; ‘whilst problems of control and order have always been central to youth justice discourses, they have also been underpinned by concern for vulnerability and protection.’ (Muncie & Hughes, 2002, p.2) It is this concern for children and young people as a ‘special case’ that has determined a need to look beyond the justice model of crime control.
The 1960s saw the beginning of an ‘era’ of decarceration, in which ‘destructuring moves’ would be pursued, with the intention of reducing the numbers of juveniles in custody. (Cohen, 1985; Matthews, 1989; Scull, 1977)

The 1960s gave rise to debates about diversion from custody, emerging from within the larger ‘destructuring moves’ (Cohen, 1985) or radical movements, wishing to reduce the state’s power and intervention, some of which created damning critiques of ‘penal welfarism’ (Garland, 2001). Demands for decarceration and deinstitutionalisation were central to this critique, suggesting as they did, that rather than being part of the solution, the prison was not only expensive and ineffective, but also criminogenic, amplifying social deviance through a process of stigma and labelling. And it was not a critique aimed solely at the prison system; the juvenile justice system as a whole – whether dealing with offender ‘deeds’ or ‘needs’ – could be deemed criminogenic. The newly emerging welfare approach was, ‘premised on the assumption that welfare-orientated, inclusive and community-based sanctions are in general preferable and that penal custody [of any kind] was either inappropriate or counterproductive’ (Matthew, 1999a).

5.1 The Political Imperative

In 1956 the Ingleby Committee was set up to enquire into the working of the law in juvenile courts and whether or not new powers were necessary to prevent children, within the local authority, suffering neglect in their own homes. In 1960 the Report of the Committee on Children and Young Persons declared that the juvenile court should be retained and that the then range of orders and treatment facilities were, on the whole adequate. However the report brought to light a major ‘weakness’, regarding the logical difficulty of a criminal trial for a juvenile court which was duty bound to consider, on sentencing, the welfare of the child or young person. There was a discrepancy between the expectation of a criminal trial based on ‘just deserts’ and the ‘treatment and welfare’ considerations at disposal. The Ingleby report raised the question that welfare delivered via the criminal justice system might amount to a ‘denial of the legal
rights of the young offender’ (Pitts, 1988, p.1) by imposing intervention on welfare grounds that was not warranted by the offending behaviour. One way around this ideological dilemma, it was suggested, was to increase the age of criminal responsibility (first to twelve but perhaps to fourteen) in order that younger children might be spared the inappropriate ‘justice’ consequences of a criminal trial. Civil ‘welfare’ proceedings could be brought for those under the age of criminal responsibility, because they and their guardians would be considered jointly responsible for any actions which would render a person over that age guilty of a criminal offence:

In other words, the model was, in crude terms, one of social pathology for the younger child, but more classical assumptions about choice of evil for the older child; and these models were to be reflected in the differing procedures – civil proceedings for the younger child and criminal for the older. (Bottoms, 1974, p.324)

Young people above the age of criminal responsibility were morally responsible for their crimes and should be dealt with appropriately, thereby reducing the element of ideological contradiction in the court.

The Ingleby Committee also argued in their report that social deprivation might be a causal factor in delinquent behaviour, and therefore one way of preventing such high rates would be to distribute welfare resources within the communities which produced high rates of juvenile crime.

Nevertheless ‘in the hands of the Fabian reformers the ideas of class and poverty are transformed.’ (Pitts, 1988, p.3) The ‘new’ political outlook of the 1960s saw crime as a result of a ‘lack of skills’ or ‘opportunity’ and these issues could be eradicated through the interventions of a welfare state, through the eradication of unemployment and through increased educational opportunities for everyone. The criminal justice system should and would only be needed to engage those young people who had slipped through the ‘net’. The subsequent stigmatisation afforded to children and young people who ended up in court would, it was argued, only serve to compound their problems.

Critically, the party political reaction to the Ingleby report drew a line between the Conservatives and Labour, which would pervade party attitudes for at least the subsequent decade. Labour were broadly sympathetic to the recommendations, preferring to focus on providing welfare, while the
Conservatives were relatively dismissive (especially regarding an increased age of criminal responsibility), preferring to focus on the need for justice.

The *Children & Young Persons Act* 1963, which constituted the Conservative government’s response to the *Ingleby* report, did raise the age of criminal responsibility from eight to ten, but this was a result of an amendment in the House of Lords rather than a government initiative.

In 1964 the Fabian Society published a report of a committee chaired by Lord Longford, on behalf of the Labour Party Study Group, entitled *Crime: A Challenge to Us All*. The report made a clear connection between crime, or more precisely, criminality and social deprivation and advocated the increased availability and use of therapeutic facilities for those families who had slipped through the net of welfare-state provision.

The Longford Report proposed that the welfare principle should become more central to the juvenile jurisdiction and that the juvenile court be replaced by a welfare-oriented family council’. (Stanley, 2005, p.83) The report’s philosophy for the abolition of the juvenile court was that ‘no child in early adolescence should have to face criminal proceedings: these children should receive the kind of treatment they need, without any stigma’ (Report of the Labour Party’s Study Group cited in Bottoms, 1974, p.327).

Prior to the 1969 *Children & Young Persons Act* there were two White Papers, the first of which was *The Child, the Family & the Young Offender* in 1965. It proposed the abolition of a juvenile court to be replaced by ‘family panels’; an idea first proposed in the Longford Report.

Critics of the 1965 White Paper argued that this kind of restructuring would involve a ‘lumping together of the deprived and the depraved’ and cause greater harm to the working class poor, through a process of stigmatization and corruption, by ‘thrusting them into close association with the feckless and the delinquent’ (Pitts, 1988, p.13). Although, some critics would argue that this was exactly what the existing system did anyhow.

The Paper came up against fierce opposition from a variety of sources. ‘These [court reform] proposals were resisted by politicians, magistrates, lawyers and the probation service.’ (Stanley, 2005, p.83) If passed the Paper would hand
power from the police, the magistrates, the lawyers, the judges and the probation officers to social workers, psychiatrists and psychologists. Political and judicial reaction and resistance to the *Child, Family & the Young Offender* Paper came from both sides of the political spectrum.

The *Child, the Family & the Young Offender* Paper had suggested ways to reform the structure of youth justice but because of the political resistance, or perhaps because of ‘bad timetabling’ on the part of the government (Pitts; 1988) it was not met with enough support. Subsequently, the *Children in Trouble* White Paper which followed it was more focused on trying to transform the function of youth justice instead the structure.

*Children in Trouble*, with minor modifications, became law in 1969. It has been argued that this Paper passed successfully through Parliament because ‘the argument has much more the influence of professional social work thinking than of the Fabian politico-social thinking, which tended to characterise the earlier Labour papers, especially Longford.’ (Bottoms, 1974, p.331)

With the end of the decade and the ‘radical’ and ‘revolutionary’ *Children and Young Persons Act*, there came the climax of welfarist ideologies.

The Ingleby Committee exposed an [ideological] anomaly; the Labour party and the social workers in different ways turned it into an issue; and successful legislation eventually resulted, following a long period of evolution since the establishment of the juvenile courts in 1908. (Bottoms, 1974 p.338)

However, it is worth noting that the *Children in Trouble* White Paper was in effect a concession to the interests of those (particularly within the criminal justice system) who had opposed the *Child, Family & the Young Offender* Paper. Therefore, even though the *Children & Young Persons Act* may be described as ‘radical’ and ‘revolutionary’, it was already a compromise to a pure welfare agenda.
5.2 Pathways for Children and Young People: The Children and Young Persons Act, 1969

The *Children & Young Persons Act* 1969 proposed that the structure of the juvenile justice system remain much the same, but that the emphasis on ‘treatment’ (as opposed to justice) would be much greater.

One of the intentions of the Act was to increase the age of criminal responsibility to fourteen years (with the exception of the offence of homicide). The proposal to raise the age of criminal responsibility remained on the statute book until the *Criminal Justice Act* (1991), but it was never implemented.

Children were, wherever possible, to be dealt with outside of the juvenile court, with ‘treatment’ voluntarily agreed between parents and social workers. Young people (minors over the age of fourteen) may be prosecuted in certain cases, but the non-criminal care proceedings were to be preferred in most cases, if not voluntary agreements. The presumption that children should be dealt with outside of the court arena was also not implemented.

One of the powers given by the 1969 *Children & Young Persons* Act, to the juvenile court in criminal cases, was a care order (designed to replace the use of approved schools). Under a care order a child could be placed into Local Authority care until the age of eighteen. Although the court passed the sentence of ‘care order’, it would be left up to the social worker to decide whether that meant removing the child from his or her home.

Two main disposals will be available for persons successfully prosecuted or found in need of compulsory care, i.e. the ‘care order’ and the ‘supervision order’. In both, supervising social workers will have a significant element of discretionary power which is not subject to court review or scrutiny. (Bottoms, 1974, p.319)

Over 8,000 criminal proceedings resulted in care orders in 1974. (Curtis; 2005)

Controversially, the courts were also allowed to impose a care order in civil proceedings for ‘children at risk’ if ‘he is guilty of an offence... and that he is in need of care or control which he is unlikely to receive [at home]’ (Curtis, 2005, p.53) This suggests that to some degree offending in itself is considered a welfare need, because if it were not, then this clause would not be necessary –
the care order would be applicable on the basis of the other welfare grounds (as distinct from offending). The logic of the clause implies that welfare need leads to offending and offending is evidence of welfare need, but in addition to this offending is effectively enough evidence (of welfare need) on its own, and as such it can be considered in a civil court and given as justification for substantial intervention.

For the first time in the history of the juvenile justice system the welfare 'needs' rather than the 'deeds' of any child considered 'at risk' became paramount. (Pitts, 1988)

However, another one of the main intentions of the 1969 Children & Young Persons Act was to phase out the use of custody for children and young people. Arguably, 'the 1969 Act was an attempt to keep the abolition of imprisonment for children and young people in England and Wales on the political agenda’ (Pitts, 1998, p.16) for everything but ‘grave’ crimes.

The main form of formal community provision, introduced in the 1969 Children and Young Persons Act, was a ‘supervision order’ and was intended as an alternative to custody (although subsequent history showed that this was not always the case). Supervision Orders, placed a duty on the supervising officer - either a social worker or probation officer - to ‘assist, advise and befriend’ the child or young person, and ‘subject to amendments during its history, a range of requirements or conditions could be attached to the order, including intermediate treatment’ (Monaghan, 2008, p.343) - although the term intermediate treatment is not used in the legislation.

Since the architects of the Act believed that there was little difference between socially disadvantaged and delinquent young people, Intermediate Treatment (IT) was conducted with children and young people considered in 'need', in 'trouble' or 'at risk' of being so. IT allowed local authority social services to provide informal interventions and could include a wide range of educational, work and training, and recreational opportunities from evening clubs and outdoor pursuits to literacy classes and voluntary work. ‘Just as diverse as the young people engaged in IT – and their routes on to IT projects – were the range of services provided under the IT rubric.’ (Case, 2008, p199)
Many children and young people attended IT programmes on a voluntary basis or as a result of a recommendation from a social worker or because they had been subject to a ‘supervision order in care proceedings’ (Monaghan; 2008), as well as, as a consequence of a Supervision Order from the juvenile court for offending behaviour.

The fact that many children and young people attended IT projects for reasons other than delinquency, during the 1970s, meant that intermediate treatment appeared to make ‘no discernable impact on the imprisonment of juveniles’ (Pitts, 1988, p.35) at this time.

5.3 The Challenge: Too Much Treatment

If the 1969 Children and Young Persons Act was the high point of ‘welfarism’, the general election of 1970 was the watershed for the previously existing political consensus, and perhaps for criminal justice generally (Bottoms & Stevenson, 1992). - Newburn (2002, p.551)

Those defending the welfare approach pointed out that because of the change to a Conservative government in 1970, and resistance from within the police service and judiciary, the 1969 Children and Young Persons Act was never fully implemented and therefore unsatisfactory results were a consequence of a lack of implementation.

John Muncie maintains that; ‘The underlying social welfare philosophy of the Act was quashed. While the legislation stressed the importance of fitting appropriate care and treatment to each individual child, the values of the police and magistracy tended to stress punishment to fit the crime.’ (2004, p.260)

Critiques of the 1969 Act argued that it failed to protect children and young people from disproportionate (and ultimately counterproductive) interventions, or punishments disguised as ‘treatment’. ‘Perceived ‘treatment needs’ meant that significant numbers of children were deprived of their liberty for long, indeterminate periods far beyond the seriousness of their offences and typically
Children and young people were subjected to disproportionate levels of intervention because a ‘tariff based on needs’ was grafted onto a ‘tariff based on deeds’. (Morris & McIsaac; 1978)

There is mounting controversy as to whether involuntary treatment, prescribed by the court and social services can be anything but punishment...judicial impartiality and fairness, especially in sentencing, have been severely hindered by the welfare approach [resulting] in grave injustice to children. (May, D. cited in Adams et al. 1981, p.20)

Thorpe et al (1980) argue (in a somewhat Foucault-esque way) that juvenile criminal justice became more ‘punitive’ after the 1969 Act, not only because of the traditional justice agencies but also as a result of the increase in the power and reach of child care and social services; ‘not necessarily because they were punitive on principle, but primarily because they had a licence to collect information about families even before their children were in trouble...and were in control of a large number of institutions to which delinquents could be sent.’ (p.5)

Muncie refers to the process as a ‘double jeopard[y]’ where children and young people are ‘sentenced for their background as well as their offence – and unintentionally accelerated...up the sentencing tariff.’ (2004, p.259)

Care orders, in particular, were criticised for being unfair and draconian. Theoretically, two children committing identical offences could be subject to two very different outcomes, should one child come from a troubled home. It was also argued that a child’s ‘punishment’ could last longer, than that of an adult committing the same offence, because of the ‘offence clause’. Under this system, it would be well within the law to place a child into local authority care for four years for stealing a bottle of milk. In the case of care orders, it was felt that too often the onus on welfare, ‘meant that magistrates could have been placed in a position where they served as mere rubber stamps for social workers and their therapeutic intentions.’ (Pitts, 1988, p.14)

Not only this, but if a child or young person had already been subject to an intervention – either because they had welfare needs, or because their offending was relatively minor – and they appeared in court again, the likelihood of them receiving a ‘higher’ tariff disposal was greater than it would have been, had they not entered the system previously. For example, a young person who
had ‘failed’ to desist from offending following an Intensive Treatment programme, would find themselves ‘up-tariffed’ because punitive responses remained available and they would appear to be appropriate since ‘welfarist’ responses obviously had not worked.

Furthermore ‘intermediate treatment...has signally failed to provide an alternative to institutional care...[I.T] should not attempt to be all things to all children.’ (Adams et al. 1981, p.300)

Borstals, detention centres and remand centres were still in use, and, as shown in figures 5.1 and 5.2, the numbers of juveniles incarcerated continually increased. (Pitts, 1988; Matthews, 1999a) Attendance centres and detention centres were meant to be replaced by Intermediate Treatment but they remained throughout the 1970s and early 1980s.

Indeed the 1970s saw a major increase in custody for young offenders in England and Wales and a shift in the balance of power within the system away from social work (which had previously been dominant) in favour of the judiciary (Cavadino & Dignan, 2007). (McAra, 2010, p.306)

**Figure 5.1:**

![Young Offenders Sentenced to Immediate Custody - 1965-1978](image)

Source: Figures derived from Newburn (2002)
Many radical and/or right-wing critics of the 1969 Act maintained that under a welfarist approach, children and young people were being denied their legal rights to ‘due-process’ and advocated a ‘back-to-justice’ model suggesting; the response to criminal behaviour should be subject to due process of the law, with appropriate limited penalties, as in an adult court of law, and that the vulnerability of children should be examined separately, in a non-criminal context in which parents were represented. (Curtis, 2005, p.54)

Although not synonymous with penal welfarism, the early 1970s also saw a rise in the number of criticisms of the ‘rehabilitative ideal’. Within a relatively short period of time the ‘rehabilitative ideal’ – which had been a guiding value within penology for almost two centuries, and was ‘a keystone in an arch of mutually supportive practices and ideologies’ (Garland, 2001, p.8) – collapsed.
During the 1970s the decline in the rehabilitative ideal becomes a ‘force’ which shapes academic, political and public perceptions and understanding of crime as well as their responses to crime.

Rehabilitation was not only an unobtainable idea, but it was also an unworthy and potentially dangerous one which was ‘counter-productive in its effects and misguided in its objectives’ (Garland, 2001, p.8).

Although not the first, in 1974 Martinson published a damming critique of rehabilitation based on his analysis of 231 treatment programmes, within adult penitentiaries in the USA, suggesting that ‘with few and isolated exceptions the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.’ (1974, p.25) An idea notoriously encapsulated by the phrase ‘nothing works’.

But, as Tim Bateman asserts ‘a single article could not have had the impact that it undoubtedly did if the ground had not been fertile: the first buds of the scepticism were already beginning to appear.’ (2010a, p.128)

Since the 1960s penal welfarism has in many ways, ideologically and within youth justice practice, collapsed. ‘This is partly due to the problematics of free-ranging discretionary welfare and unbridled net-widening (Thorpe et al. 1980).’ (Curtis, 2005, p.54) The optimistic era of ‘penal modernism’ gave way to the ‘soul-searching’ era of ‘nothing works’, ‘which might more accurately have been described as the ‘nothing-can-be-shown-to-work-better-than-anything-else’ era’ (Brownlee, 1998, p.51)

The parallel developments encapsulate by the ‘back to justice’ movement and the decline of the rehabilitative ideal led to an ideological and actual backlash to the liberalism of the 1969 Act, and permitted Thorpe et al. (1980) to conclude:

The tragedy that has occurred since can best be described as a situation in which the worst of all possible worlds came into existence – people have been persistently led to believe that the juvenile criminal justice system has become softer and softer, while the reality has been that it has become harder and harder. (p.8)
Chapter 6:

The Evidence for Progressive Minimalism and Neo-Liberal Bifurcation.

If the emphasis of the 1970s had been on doing good, without much success in demonstrating that good was being done, the 1980s were to be about avoiding harm, in particular by reducing unnecessary incarceration. - Raynor (2002, p. 1,176)

At the centre of the Thatcher government (1979-1992) were some, often contradictory, changes in dominant concepts which stood in stark contrast to the politics of the welfare state and ‘the culture of late modernity’.

This period saw the emergence of ‘neo-liberalism’ – the reassertion of market disciplines – and a Conservative government who were interested in ‘rolling-back’ the state and ceding welfare interventions in health, education, policing etc to market forces – in a process Rose (1996) labels the ‘death of the social’.

It also saw the emergence of ‘neo-conservatism’ – the reassertion of moral disciplines - which condemned the economic and moral assumptions of the past, blaming them for societies failures, including crime. (Garland, 2001) Personal responsibility and the behaviour of certain ‘demonized others’ (Pitts, 2010) became more important than society’s needs.

The previous guiding principles (or imperatives) for juvenile diversion - front-end and back-end - and the subsequent youth justice policies arose on account of an ideology or a political consensus.

Arguably the primary imperative for diversion in the 1980s was fiscal – the Conservative government were reluctant to spend increasing amounts of money on interventions, criminal or otherwise, but simultaneously they needed to be seen to be ‘tough on crime’. However, it was not merely the right of the party
who were happy to accept increasing diversion on the grounds of reducing costs. Academics (some of whom were radical) and youth justice practitioners were also keen to see an increase in diversion, because they were critical of law and order policies.

The Conservative government found support from a wide range of people (in terms of politics and class) as the country grappled with rising unemployment, record levels of inflation, dilapidated inner-cities and rising crime rates. Writing about the USA in 1981 Austin & Krisberg note ‘the state is experiencing a fiscal crisis making very real the need to develop less costly, community-based control devices’ (p.269) and a similar economic crisis was taking place in the UK in the late 1970s and early 1980s, epitomised by high unemployment and industrial unrest.

Mick Ryan (2005) argues that Thatcher’s politics contained ‘some of the essential ingredients of populism…It was ‘the people of Britain’…that she was listening to on crime and punishment.’ (p.141) Arguably this was the beginning, in England and Wales at least, of ‘populist punitiveness’ (Bottoms, 1995) – an explanation of the process of reactionary policy making based on the popular demands of the electorate. ‘Punitive populist’ trend did not sit comfortably with the theoretical approach of ‘minimum intervention’, and during this time it led to divide in response to crime – the bifurcation of policy and practice.

The Conservative government of the 1980s - who purported to be the natural party of ‘law and order’ - needed a way of appearing tough on crime while tackling the burgeoning costs of crime control and imprisonment. Not only that, but they also perceived the secure estate as a dangerous and counter-productive place for many children and young people, perhaps in part because of several ‘institutional abuse’ scandals, ‘the attenuation of family relationships [family being an important part of the Tory’s moral crusade] and abysmal re-conviction rates’ (Pitts, 2010, p.11).

The paradox is that ‘the decade of ‘law and order’ was also the decade of what has been called ‘the successful revolution’ in juvenile justice’ (Rutherford, 1986)’ (Newburn, 2002, p.552) because it ‘comprised ‘one of the most remarkably progressive periods in juvenile justice policy’ (Rutherford, 1995).’ (Goldson, 2006, p.140)
6.1 The Underlying Ideologies and the Fiscal Imperative

Bifurcation policies are rarely, if ever, rooted in criminological thinking but owe much more, as noted, to political concerns of a pragmatic or financial nature. - Haines (2008, p.37)

In the UK the ‘resurgence of legalism’ and ‘back to justice’ arguments which arose as a result of the welfare vs. justice debate led to two different lines of argument, but both believed concentrating on offending behaviour, as opposed to individual welfare needs - because this had led to disproportionate outcomes for children and young people – was preferable.

Calls increased for a ‘just deserts’ (von Hirsch, 1976) model of juvenile justice, with proportionality at its centre. In this model punishment should be an end in itself rather than a means to an end. But those in favour of retribution (instead of rehabilitation) as a sentencing goal were also advocating fairness and ‘due process’ and believed that imprisonment should be reserved for the most ‘serious’ of offenders.

However, also predicated on the ‘back to justice’ arguments, were calls for the restricted reach of the juvenile justice system, through methods of ‘radical non-intervention’ and ‘maximum diversion’.

The concept of radical non-intervention was constructed by Edwin Schur, in his 1973 publication Radical Non-Intervention: Rethinking the Delinquency Problem. Schur believed that delinquency was ‘extremely common’ and that labelling those children and young people who were ‘caught and processed’ as delinquent was ‘socially unnecessary and counter-productive’. (Schur, 1973) He argues that polices should not aim to reduce delinquency, but if they were to, they would have to do this by altering societies’ values and not the behaviour of individual children and young people. Arguing from the same perspective as labelling theorists (Becker, 1963; Goffman, 1963), who contend that deviancy is not an inherent or intrinsic quality of an act, Schur argued that involvement in the criminal justice system served to perpetuate criminal or delinquent behaviour (not unlike the process of ‘deviancy amplification’). He writes that there is a ‘strong possibility that various kinds of intervention in the lives of children...may
do more harm than good.’ (Schur, 1973, p.126) Similarly, Matza concurs stating that ‘the very effort to prevent, intervene, arrest and ‘cure’ persons [is likely to] precipitate or seriously aggravate the tendency society wishes to guard against.’ (1969, p.80) Rather than providing the solution, the system is regarded as part of the problem and Schur’s (1973) conclusion was:

thus the basic injunction for public policy becomes; leave the kids alone wherever possible. This effort partly involves mechanisms to divert children away from the courts but it goes further to include opposing various kinds of intervention by diverse social control and socialising agencies. (p.155)

Schur and other advocates of radical non-intervention did not deny that interventions could be appropriate, but rather insisted that they ought to be outside the remit of the formal criminal justice system, because more universal social and youth policies would avoid ‘criminalizing’ children and young people, thereby reducing the ‘harm done’. Minimum intervention strategies aim to avoid the negative (and sometimes unintended) consequences of involvement in the youth justice system, though limiting the level of unnecessarily intrusive professional intervention in the lives of children and young people who offend.

Lemert (1967a) argued for progressive minimalism and radically concluded that ‘social control leads to deviance’. He coined the phrase ‘judicious non-intervention’ when writing, what was at the time, a radical critique of what he considered a failing juvenile justice system in America. Lemert ‘argued that formal intervention...could ‘create’ (or at least consolidate or confirm) criminogenic ‘identities’.’ (Goldson, 2008, p.195) He objected to the courts interference with minor, ‘status’ and victimless offences and believed that the courts should limit their jurisdiction, dealing only with more harmful criminal offenders. The youth justice system ‘contributes to juvenile crime or inaugurates delinquent careers by the imposition of the stigma of wardship, unwise detention or incarceration of children in institutions which don’t reform and often corrupt’ (Lemert, 1970, p.120)

Bifurcation, a term coined by Anthony Bottoms in 1977, refers to the polarization of criminal justice policy and system responses to two categories of deviant/criminal. The idea being that if the serious, dangerous and ‘abnormal’
offenders are dealt with severely by the criminal justice system (usually by way of a custodial sentence), the public will tolerate less-severe sanctions (often in the community) being placed upon those offenders deemed ‘normal’, ‘routine’ and ‘relatively harmless’. Bottoms was arguing that this was occurring naturally in sentencing practice and that ‘bifurcation in penal policy could extend to the prison-community dichotomy’ (Haines, 2008, p.37) and that those offenders who ‘warranted’ custodial sentences would be treated more severely while those offenders who ‘warranted’ non-custodial sentences would be treated more leniently.

While Bottoms was writing about the adult justice system, John Pitts (1988) argued that the same process was occurring in youth justice policy and practice in the 1970s and 1980s, allowing ‘governments to get tough and soft simultaneously.’ (p.29) The newly categorised offender who is ‘less dangerous’ is no longer eligible for a custodial sentence, thus reducing the prison population and public expenditure, without the politicians being open to criticism, for becoming ‘soft’ on crime. ‘Governments can have their law and order cake while they eat their public expenditure one too.’ (Pitts, 1988, p.29)

As well as a dichotomous approach to sentencing and sanctions, in England and Wales, there was a bifurcation between what the government rhetoric focused on and what they did in practice.

[There is] a need, particularly in the sphere of penal reform, to distinguish as clearly as possible between rhetoric and reality; and to be sensitive to the fact that, while politicians and prison administrators may be saying one thing, they are in fact doing another. (Matthews, 1999a, p.118)

In talking tough and soft simultaneously the Conservatives were appealing to both the ‘law and order’ advocates as well as those who favoured minimum intervention.

It is also important to note that, as well as between categories of ‘dangerous’ and ‘relatively harmless’, there can be bifurcated responses between the categories of adult offender and children or young people who offend. Therefore while the use of custody for the children and young people declined rapidly under Thatcher the use of custody for adults remained relatively stable.
The government embarked on a huge prison building programme in 1984 and 'having risen modestly during the 1980s the [overall] prison population peaked at around 50,000 in 1988-1989.' (Morgan, 2005, p.1115)

However, throughout the 1980s, the use of custody for children and young people fell dramatically from a peak of 7,600 in 1981 to an annual low of 1,400 in 1990 as shown in figure 6.1. This trend coincided with a decline in the number of 14–16 year olds in the general population, but while demographic change explains part of the fall in custody, it does not provide a full account since the drop in the latter was sharper. There was also a corresponding decline in the level of detected youth offending as shown in figure 6.2, but this too is insufficient to explain the pattern of custodial sentencing since there was also a fall in the rate of custody as a proportion of all court disposals for boys in the relevant age range (Morgan & Newburn, 2007).

What occurred in youth justice was a process of bifurcation which allowed for the diversion of children and young people ‘by the back door’.

**Figure 6.1:**

![Custodial Sentences Imposed on 10-16 Year Olds - 1980-1990](image)

*Source: derived from Bateman (2010a)*
There are several factors which are considered to have influenced the use of custody, for children and young people, during the 1980s.

A significant factor, which led to a reduction in the use of custody for children and young people, was the increased use of front-end diversion. Declining numbers of children and young people were appearing in juvenile court (Farrington, 1992 cited in Newburn, 2002). ‘In 1980, 71,000 boys and girls aged 14-16 were sentenced by the juvenile courts...by 1987 this figure had dropped to 37,000’ (Pitts; 2005, p.5). And between 1985 and 1990 the number of juveniles who were known offenders (persons cautioned or found guilty of indictable offences) fell by 37% (Rutherford, 1992).

The development of local multi-agency diversion panels - comprised of police officers, social workers, education professionals, youth workers and voluntary agency staff – were established to develop ‘a range of educational, recreational and therapeutic ‘alternatives to prosecution” (Pitts, 2005, p.5). Police could be convinced to caution, rather than prosecute, children and young people if they attended these panels, where they were in operation. Arguably, this led to an increase in practice of multiple cautioning, since children and young people were
still subject to some form of intervention despite being diverted from court. That said the use of multiple cautioning was later exaggerated by politicians and the police when the practice fell out of favour.

Partly because of the success of multi-agency diversion panels, the Home Office (during the mid-1980s) officially sanctioned a practice known as ‘cautioning plus’. The child or young person would be encouraged to participate in one, or a range of, informal interventions, and by doing so would avoid prosecution. There is evidence that this acted as a real ‘alternative to prosecution’ (Kemp et al. cited in Pitts, 2005). Informal warnings – also endorsed by government – were increasingly being used as well, which effectively led to the decriminalisation of certain children and young people altogether. Consequently, many children and young people were kept out of court, without the need for multiple cautioning, however the evidence for this hard to establish as, by definition, there is no record of the numbers of children and young people receiving informal cautions.

In a 1988 Green Paper entitled *Punishment, Custody and the Community* the Home Office acknowledged that most offenders grow out of crime and stated that; ‘They need encouragement and help to become law abiding [and] even a short period of custody is quite likely to confirm them as criminals’ (cited in Newburn, 2002, p.554). The subsequent White Paper also clearly favoured reducing the use of custody (for only serious and dangerous offenders) and increasing the use of community disposals; “nobody now regards imprisonment, in itself, as an effective means of reform for most prisoners...it can be an expensive way of making bad people worse’...and ‘more offenders should be punished in the community’.’ (MacMillan & Brown, 1998, p.69)

Another factor in the explanation for the declining use of custody was support for the use of back-end diversion. Fiscal concerns emanating from the Conservative government of the time urged a reduction of ‘the custodial population on the grounds of cost effectiveness [and this in turn] led to general support for alternatives to custody initiatives’ (Pratt, 1987, p.429)

An example of which was the Intermediate Treatment Initiative. In 1978, the previous Labour government established the National Fund for Intermediate Treatment which provided financial support for the development of IT projects and defined it as an intervention positioned between ‘traditional social work
methods’ and ‘removal to institutional care’ (Case, 2008, p.200). As mentioned in
the previous chapter IT was used with a variety of children and young people for
a variety of reasons, but in 1983 the Thatcher government launched the
Intermediate Treatment Initiative, establishing a £15 million fund. With this,
Intermediate Treatment was transformed from a ‘catch-all’ intervention - which
in practice meant ‘almost anything that social workers did directly with [children
and] young people’ – to an intervention ‘expressly targeted as [a] direct
community-based alternative to custody’ (Case, 2008, p.199-200). The aim was
to create programmes that would divert children and young people away from
custodial institutions. ‘One hundred and ten projects offering 3,389 places were
set up by voluntary bodies in sixty-two local authority areas between 1983 and

Barry Goldson (2006) notes the significance of ‘innovatory ‘alternatives to
custody’ combined with ‘permissive statute’ (p.141), in the reduction of the
numbers of custodial sentences imposed during the 1980s.

Several Acts were passed during the 1980s affecting the numbers of children and
young people sentenced to custody. The 1982 Criminal Justice Act effected a
reduction in the use of custody for children and young people by restricting the
criteria for custodial sentencing, making Community Service available for sixteen
year olds. It also introduced ‘specified activity’ as a requirement of a Supervision
Order, which was regarded as higher tariff, because the court had more direct
control over the child or young person’s activities, making the Supervision Order
a more appealing option for the court, when it was considering custody.

Sentences to Detention Centres (for 14-21 year olds) under the ‘ethos’ of
‘short-sharp-shock’ were popular in the 1980s - in rhetoric at least - for
appeasing those who thought the system of the 1970s was ‘too soft’, but as a
consequences of the 1982 Act there was a reduction in numbers of children and
young people sentenced to custody within a Detention Centre. (Muncie; 2008)
Inside the Detention Centres the emphasis was on severe discipline and military-
style drills (harking back to the 1940s) and intended to be purely punitive, perhaps
reflecting, once more, the bifurcation - government showing a tough
exterior to the electorate while telling those implementing legislation within the
youth justice system to get ‘softer’ - resulting in the declining use of ‘short, sharp, shock’ regimes.

Perhaps this trend was also partly a reflection of the ‘law of thermodynamics’ – sentencers perceived this intervention as too ‘harsh’ and consequently, the ethos of ‘short-sharp-shock’ began to unravel, which meant less and less children and young people receiving custodial sentences. The use of institutional responses to children and young people was declining across the board during the 1980s and the legislation reinforced the trend, despite the fact that the 1982 Criminal Justice Act also allowed courts to impose longer sentences in Youth Custody Centres (formerly Borstals).

Two years later the Criminal Justice Act 1988 restricted the criteria further, limiting the use of custody only as a last resort for the most dangerous and most serious offenders. ‘Short-sharp-shock’ experiments were formally abolished in 1988, when Detention Centres were merged with Youth Custody Centres and became Young Offender Institutions. (Munice, 2008; Hagell, 2005) The Act established a maximum penalty for the detention of 15–16 year olds, in Young Offender Institutions, of one year (and of four months for 14 year old boys). The Act also allowed the courts to impose a Supervision Order with a ‘specified activities’ requirement as a direct statutory alternative to custody, in cases where the offending would otherwise have crossed the custody threshold.

Continuing in this vein, the government published a Green Paper (preceding the 1991 Criminal Justice Act) which stated that ‘imprisonment is not the most effective punishment for most crimes. Custody should be reserved as punishment for very serious offences’ (Cadman, 2005, p.60).

Finally, the 1989 Children Act abolished the Criminal Care Order, which had been the cause of so much controversy. Although by this time the use of such orders had been reduced substantially. ‘The ‘separation’ of children as victims and children as offenders was institutionalized by the separation of civil (childcare) and criminal (youth justice) functions of the juvenile court’ (Piper, 2008, p.53). It established Family Proceedings Courts to handle civil cases and this placed the juvenile court in a better position to employ principles of ‘justice’ and ‘proportionality’ which were now central to youth justice.
However, if the 1969 Children & Young Persons Act was the ‘high-point’ of the ‘welfare’ model of juvenile justice, then the Criminal Justice Act of 1991 was the ‘high-point’ of ‘bifurcation’ in youth justice policy.

6.2 Pathways for Children and Young People: the Criminal Justice Act, 1991

The 1991 Criminal Justice Acts official policy thrust was one of bifurcation – promoting community sentences for ‘lesser’ offenders, reserving imprisonment for ‘serious’ offenders – reducing expenditure whilst still appearing tough on crime.

The Act arguably signalled the end for the welfare approach and further reinforced the ‘justice’ approach as the predominant model in juvenile justice. (Newburn, 2002) It did this by placing a statutory duty on sentencers to impose disposals ‘directly related to the seriousness of the offence’ (Pickford, 2008, p.105) - regarding all offences and not just ones where custody was an option - meaning decision making was to be directly influenced by the principle of proportionality and ‘just deserts’. The new sentencing framework meant ‘any restriction of liberty should be commensurate with the gravity of the offences committed’ (Cadman, 2005, p.59) The Act established thresholds for community sentences and ‘low-level’ disposals such as discharges and fines, in addition to the existing thresholds for custodial sentences.

One of the objectives of the 1991 Act was to create a ‘common-sense’ consensus between the judiciary, the police and the youth justice practitioners, with regard to expectations (Pitts, 2002).

The 1991 Criminal Justice Act established ‘Youth Courts’ in which the majority of criminal cases involving children are heard, unless they deem a case serious enough to be committed to the Crown Court. The Act brought 17 year olds into the jurisdiction of the renamed youth court and raised the minimum age for a custodial sentence, within that court to 15 for boys (in line with the minimum age for girls). Since 17 year olds were now under the jurisdiction of the Youth Court they too could only be given a maximum one year sentence in a Young Offender
Institution. The 1991 Act also restricted the courts from taking into account all of a defendant’s offending history. (Pickford; 2008)

In relation to community sentences the 1991 *Criminal Justice* Act extended probation to young people aged 16 by introducing the Probation Order for 16 and 17 year olds sentenced in the youth court. A *Probation Order* could be given to a young offender for any offence, imprisonable or otherwise. Similarly *Community Service* and *Combination Orders* were also made available as a punishment for 16 year olds. The probation service would supervise any *Probation Orders*, Community Service Orders and Combination Orders.

The only sanction available as a direct alternative to custody was a Supervision Order, with a specified activity requirement where the court indicated in that the sentence was being imposed as an alternative (as introduced by the 1988 Act). Guidance at the time required the probation service and the social services to agree arrangements regarding the administration of *Supervision Orders*, for 16 and 17 year olds. Prior to 1991, social services and probation had shared responsibility for youth justice – with an age cut off in most areas (in some as low as 14). As a consequence probation had supervised *Supervision Orders* for older children. In most areas there had been a move, however, towards pushing probation out, but this required renegotiation when the age range was increased to include 17 year olds. Social services, would supervise the rehabilitation element of the order, and the probation service, would supervise the ‘community service’ or ‘unpaid work in the community’ element. (Patel & Canton, 2008)

‘The 1991 Act signalled the importance of inter-agency and joint working [by probation and social services giving them] joint responsibility for making local arrangements (‘action plans’) for dealing with young offenders’ (Newburn, 2002, p.555); this is effectively the same requirement as the one for dealing with *Supervision Orders*. This led to a variety of different arrangements in different parts of the country, but there was a general tendency for social services to take a wider role than they had done up till then.
The 1991 *Criminal Justice* Act introduced pre-sentence reports (to replace social inquiry reports) ‘as part of a package of measures designed to enhance the courts’ confidence in imposing non-custodial measures’ (Bateman, 2008a, p.269). A pre-sentence report was a statutory requirement for all cases where a child or young person could receive a ‘high-tariff’ sentence. The pre-sentence report would be drawn up by either a probation worker or a social worker, depending upon the age of young person and in accordance with their agreement over agency responsibility. It was intended to inform the youth court of the personal and social circumstances of the defendant and suggest the most appropriate from of intervention. ‘The clear purpose [of pre-sentence reports] was to oblige sentencers to consider what community-based options were available before imposing a custodial disposal, so that alternatives might be fully explored.’ (Bateman, 2008a, p.269)

In theory this, and many of the aforementioned provisions, should have led to a reduction in the use of custody for children and young people, but once again a big change of political climate was about to occur, resulting in a ‘back-lash’ towards the perceived leniency. Any bifurcatory effect of the 1991 *Criminal Justice* Act was short-lived. Just eleven months after its implementation the *Criminal Justice* Act of 1993 revised elements of the provisions from the 1991 Act and so any decarceral effect of pre-sentence reports was undermined.

**6.3 The Challenge: The Repoliticization of Youth**

One problem for bifurcation is that the policy messages are twofold – ‘get tough’ on the one hand while ‘reducing custody’ on the other – and often the judiciary favour the former response. (Pitts, 1988) This can also mean architects and/or practitioners responsible for community sentences will feel compelled to ‘toughen’ them up in order to appeal to the judiciary – ‘often at the cost of their rehabilitative value’ (Haines, 2008, p.37).

Although this may be true, for much of the 1980s bifurcatory policies worked. This suggests that the pressure - to make community sanctions tougher
arises, not as an unavoidable product of bifurcation, but as a consequence of a wider change in the political and populist climates.

The key criticism of bifurcation is its susceptibility to changes in the political, populist or fiscal ‘climate’: ‘Bifurcation illustrates the extent to which criminal justice policy is vulnerable to political vicissitudes.’ (Haines, 2008, p.37) This was arguably central to the demise of the influence of bifurcation, as a policy response to children and young people within criminal justice.

During the 1980s, in England and Wales a ‘quiet consensus’ among professionals, academics and politicians meant that ‘diversion was central to the agenda of juvenile justice, and over-intervention, particularly custody, was frowned upon’ (Kelly, 2008, p.282) but this was about to change dramatically. A number of very specific factors and incidents changed the tenor of public, political and judicial approaches to children and young people.

In the early 1990s, a series of urban riots and high profile incidences of youth offending (‘rat-boy’ and ‘bail bandits’) occurred. The government were forced to defend its bifurcated policies in the wake of public concern about ‘persistent young offenders’, but the mood in Westminster was already changing, perhaps in anticipation of Labour politicians trying to grasp the ‘law and order’ mantle.

Then, in February of 1993, two year old James Bulger was tragically murdered in Liverpool, after being abducted from a shopping centre, tortured and beaten. Two ten year old boys – Robert Thompson and Jon Venables - were responsible. They were tried - amidst massive media attention which was largely punitive in tone (despite their age) - convicted of murder and sentenced to indeterminate custody, initially for a minimum tariff of eight years, by a judge concluding adult court proceedings. The Lord Chief Justice then intervened, increasing this to ten years, but such was the public unrest and media pressure that six months later the then Home Secretary, Michael Howard, announced they would serve a minimum of fifteen years. The European Court of Human Rights ruled that Howard’s actions were illegal, and subsequently the ‘new’ Lord Chief Justice reviewed the case condemning ‘the higher tariff as “institutionalised vengeance...by a politician playing to the gallery”.’ (Guardian, 22nd Jan 2010)
[Thompson and Venables served eight years (in accordance with the original sentence) and were released on ‘life license’ aged 18.]

The case ‘acted as a ‘focusing event’ (Birkland, 1997)...[inspiring] ‘a kind of national collective agony’ (Young, 1996)’ (Newburn, 2002, p.556) & a media driven ‘moral panic’ (Cohen, 1972) which generated political pressure to re-think the assumption that children and young people are less responsible for their actions.

The Bulger murder was hugely significant because ‘the case was hailed as the ultimate expression of a pervasive and deepening wave of moral degeneracy and child lawlessness...the shadow of suspicion was cast over childhood itself (Scraton, 1997)’’. (Goldson, 2008)

What occurred in the aftermath of the Bulger case was the ‘repoliticization of youth’ (Pitts, 2000), a process (not seen in the 1980s) wherein ‘electoral anxieties’ determine political priorities thus influencing youth justice policy. ‘Bottoms & Stevenson (1992, p.23-4) observe that ‘...reforms of the system often take place not so much because of careful routine analysis...but because one or more individual incident(s) occurs, drawing public attention to...policy in a dramatic way which seems to demand change’. (Goldson, 2008, p.263)

Populism is seen to have gradually taken responsibility for the expansion of penal policy away from the professionals and experts, to the public and the media (Ryan, 1999; Garland, 2001). Previously ‘avowed expression of vengeful sentiment was virtually taboo’ (Garland, 2001, p.9) but during the 1990s, in part because of attempts to express ‘public sentiment’, justice and the rhetoric which accompanies it became increasingly punitive, with punishment and retribution being forefront in the concerns of politicians and policy makers.

This proved to be the case in the early 1990s, and sparked government and opposition claims that they would increase ‘law and order’ and subsequently meant that they could justify a more punitive response to children and young people who offend (many of whom would once have been considered ‘in need’ or ‘in trouble’). ‘The Labour party...began playing the Conservatives at their own [law and order] game’ (Downes and Morgan, 2002, p.290)

Similarly, Scraton and Hayden (2002) note that the ‘crisis in childhood’ - the process of ‘child demonization’ and adulterization - which began in the 1990s, allowed the criminal justice system to ‘impose...surveillance disguised as
prevention, subservience disguised as discipline and punishment disguised as correction.’ (p.315) Prime Minister John Major famously remarked; ‘society needs to condemn a little more and understand a little less’. (1993, Guardian 22\textsuperscript{nd} Jan 2010)

Analysis, made from all sides of the political spectrum, suggested that diversionary and decriminalizing interventions within youth justice were indicative of a state which had become ‘soft on crime’.

Only one month after the Bulger murder, Kenneth Clarke, then Conservative Home Secretary ‘promised to create 200 places for twelve to fourteen year old ‘persistent offenders’ in new ‘secure training centres’ (Pitts, 2005, p.7).

Two months later Michael Howard took over as Home Secretary and declared, in a speech to the Conservative party conference, that; ‘We shall no longer judge the success of our system of justice by a fall in our prison population. Let us be clear. Prison works.’ (quoted in Newburn, 2002, p.556)

Michael Howard’s period in office marked a key moment of transition in youth justice from ‘penal modernism’ to ‘penal populism’ (Pitts, 2003a). Howard also set about reducing the numbers of cautions young offenders received insisting; ‘your first chance should be your last (Gibson, 1995).’ (MacMillan & Brown, 1998, p.72) Interestingly, however, Downes & Morgan (2002) note that it is ‘more accurate to see Kenneth Clarke and Michael Howard as the prisoners of Blair and Straw’s agenda, rather than – as is conventionally assumed – the reverse (Downes, 1998; Cohen, 2001)’ (p.297). The Conservative party could not afford to be ‘outdone’ with regards to law and order.

Meanwhile, the Criminal Justice Act of 1993 amended the 1991 Criminal Justice Act, ‘abandoning some of the principles of proportionality’ (Pickford, 2008, p.106) by ‘loosening the criteria governing custodial sentencing’ (MacMillan & Brown, 1998, p.72) Once again sentencers were allowed to view the whole of a defendant’s offending history and consider non compliance of previous community disposals as aggravating factors (however, the threshold for custody remained unchanged). ‘It also made offending on bail a statutory aggravating factor’ (Cadman, 2005, p.62), effectively increasing the seriousness of the offence, thereby allowing courts to impose heavier sanctions.
In 1994, the *Criminal Justice and Public Order Act* was passed, containing a series of provisions which would make it easier to lock up more children and young people for longer periods of time, encouraging a more punitive response to youth offending.

The Act doubled the maximum period of detention for 15-17 year olds in the Crown Court. It also allowed the Crown Court to sentence children aged 10 to 13 to long-term custody, for any offence which, had it been committed by an adult, would have been punishable by a maximum of fourteen years imprisonment. Previously this had only been applicable to those young people aged 14-17 – with the exception of 10 to 13 year olds convicted of murder or manslaughter. Subsequent legislation has also increased the number of offences deemed to be ‘grave’ crimes.

Most controversially, the 1994 Act introduced a new custodial sentence, namely secure training orders for 12-14 year olds. It proposed that new (privately run) Secure Training Centres be established (although the first of four did not open until 1998) for the custody of these ‘persistent young offenders’, who could be sentenced for up to two years, and for offences including ‘non-grave crimes’. ‘Pressure groups and commentators saw these ‘child jails’ (Howard League, 1994) as a retrograde step that would undermine the attempts of earlier legislation to focus on community penalties’ (Fionda, 2008, p.111) rather than custodial ones.

In 1996, the Audit Commission was tasked with conducting its first major investigation into the youth justice system - *Misspent Youth* - paying particular attention to how costs might be reduced, and improving the efficiency and effectiveness more generally. In line with the increasingly important precepts of ‘managerialism’, ‘the emphasis in the Commission’s report was on clarity of objectives, consistency of approach, and targeting of resources.’ (Newburn, 2002, p.559) *Misspent Youth* identified several shortcomings in the system and made recommendations for change.

The report was critical of the long delays between the arrest and sentence of young offenders arguing it could be remedied through government targets. The report was also critical of the use of multiple ‘cautioning’. Both of which brought the youth justice system into disrepute at a time when there was
diminishing public confidence in the effectiveness of policies to 'tackle' youth crime (Audit Commission, 1996).

*Misspent Youth* suggested money, which was currently spent on administration and the processing of young offenders, should be spent on community programmes to address offending behaviour. It was critical of the lack of programmes directed at offending behaviour and suggested that this was due, in part, to poor co-ordination, between agencies; ‘the agencies dealing with young offenders have different views about what they are trying to achieve...these different approaches need to be reconciled if agencies are to work together and fulfil their different responsibilities’ (Audit Commission, 1996, p.17). The report suggested that this problem could be overcome through the establishment of multi-agency partnerships with shared responsibilities and an overarching aim for youth justice.

*Misspent Youth* linked the incidence of youth crime with forms of social disadvantage ranging from ‘inadequate parenting’ and ‘unstable living conditions’ to a ‘lack of training and employment’ and ‘drug and alcohol abuse’ (Audit Commission, 1996).

The report also suggested that more preventative work with young people was necessary particularly in high-risk areas. (Newburn, 2002) However, preventative work could only take place if it became possible to ‘identify key risk factors that increase the probability of offending’ (Haines & Case, 2008, p.5) Strategies, focused on early intervention and risk minimisation, could be developed - based on the risk factor paradigm (Farrington, 1998) – which would ‘counteract’ those factors identified as precursors to criminality. ‘The prescriptive identification and targeting of risk factors offers a simplistic crime management system that is politically inviting’ (Haines & Case, 2008, p.12), but is fraught with unintended consequences such as net-widening and up-tariffing (which the next chapter will discuss later in relation to the 'invention' of anti-social behaviour).

Paradoxically, even the *Misspent Youth* report concluded that there is ‘no way of predicting accurately which individuals are going to offend’ (Audit Commission, 1996, p.58) But despite this ‘early intervention predicated on the identification of ‘at risk’ young people and the amelioration of risk factors, serves as the cornerstone of Labour’s response to youth offending (Goldson, 2000)’ (Haines & Case, 2008, p.11).
The next chapter will consider the new rhetoric of youth justice and the vast changes New Labour made to the youth justice system which brought an end (at least for the subsequent decade) to back and front-end diversion, and progressive minimalism.
Chapter 7:

Prison Works: the Demise of Diversion?

Today, with the brutality rather than the innocence of youth trumpeted in the media and the rehabilitative ideal all but abandoned, as a goal of corrections policy, the very notion of the juvenile reform school seems like an oxymoron. - Schlossman (1995, p.325)

7.1 The Third Way: New Labour Imperatives

In 1997, the Conservative government were defeated in a landslide Labour victory, in part due to ‘New Labour’s’ pledge to be ‘tough on crime, tough on the causes of crime’ (first uttered by Tony Blair in 1993, when he was shadow Home Secretary) and their promise to overhaul the youth justice system.

The new youth justice would be based, not on ideological politics, but on a ‘scientific’ pragmatism encapsulated in the ethos of ‘what works’. ‘Welfarism and progressive minimalism were rejected on the grounds that they were ideologically inspired and pre-scientific.’ (Bateman & Pitts, 2010, p.53)

Within New Labour’s first six months in office, they published no less than five consultation papers detailing reform proposals to overhaul the youth justice system which the then Home Secretary Jack Straw suggested ‘mimicked the behaviour of a bad parent – indulgent one minute, overly harsh the next’ (Macmillan & Brown, 1998, p.76). The culmination of which was the White Paper titled No More Excuses: A New Approach to Tackling Youth Crime, which was strikingly similar to the Audit Commission’s Misspent Youth report.

No More Excuses set out the government’s position on youth crime and proposed measures aimed at tackling offending and re-offending by children and young people. It was critical of the ‘old’ system for failing to offer young people
constructive activities and for failing to offer victims solutions to youth offending. It wanted to see a system that offered ‘value for money’ for victims and offenders and suggested that one of the crucial ways to do this was through earlier, robust intervention (Pitts, 2005) and a ‘rigorous preventative strategy’ (Fionda, 2008). Many of the subsequent structural changes to the youth justice system were recommended in No More Excuses.

In the preface to the White Paper, Straw writes;

For too long we have assumed that young offenders will grow out of their offending… Instead we will refocus resources and the talents of professionals on nipping offending in the bud, to prevent crime from becoming a way of life for so many young people.

No More Excuses lists four key criminogenic risk factors that are far easier to measure, and arguably affect, than any of the aforementioned structural causes. They are; being male; being subject to poor parental discipline; having criminal parents; and showing poor school performance. Bateman and Pitts contend that this overly simplistic account amounts to an ‘aetiological reductionism’, a result of ‘the process of transforming statistical correlates of populations into underlying causes of individual delinquency’ (2010, p.52-53).

Muncie (1999b) coined the phrase ‘institutionalized intolerance’ to describe the mood of the government’s youth justice reform of the late 1990s, wherein anti-social behaviour and incivility could and should no longer be ‘tolerated’. There needed to be a ‘crackdown’ on disorder. The government would not stand for ‘excuses’ any longer.

Muncie also asserts that ‘the rationale for this major reforming project was based on the notion that previous youth policy had ‘failed’ (2008, p.197). However Blair’s ‘crusade’ on ‘law and order’ was heavily inspired by the success of Bill Clinton’s Democratic Party in the USA in 1993. Clinton’s electoral success was partly attributable to a tough take on ‘law and order’ – a stance usually associated with the Republicans – with Democrats promising to drive down urban crime. For Blair looking to move New Labour rightwards into the centre, the ‘third way’ represented by Clinton’s Democrats looked politically attractive.

‘Prison works’ rhetoric from the USA – as discussed in chapter two of this thesis – was also a big influence on the changing climate of youth justice.
7.2 Pathways for Children and Young People: the Crime and Disorder Act, 1998

The 1998 Crime and Disorder Act was a vast piece of legislation which implemented many of the proposals found in the No More Excuses White Paper. The 1998 Crime and Disorder Act established the Youth Justice Board (YJB) whose job it is to monitor youth justice provision in England and Wales and provide advice to the government and raise standards and effectiveness of youth justice practice. The YJB sets targets for the secure estate and Youth Offending Teams (YOTs) also established as a result of the 1998 Act. The creation of the YJB embodied the managerialism of the ‘third way’, New Labour policy.

Local Authorities are responsible for ensuring the provision of multi-agency Youth Offending Teams (YOTs) in their areas. The teams consist of social workers, probation officers, police officers and education and health authority staff, and may also involve staff from other agencies and the voluntary sector.

As Pitts (2001a) observes the new YOT’s formation echoed the multi-diversionary panels of the mid-1980s, however their focus was not on diversion, but rather intervention.

One of the primary functions of YOTs was to prevent offending through multi-and inter-agency working: ‘The Act established, for the first time [in statute], that the principal aim of the youth justice service would be ‘to prevent offending by children and young people’ (Tomlinson, 2005, p.32).

From now on practitioners would be expected to confront children and young people about their offending behaviour, encouraging responsibility and eradicating excuses. The intention of creating a statutory aim was to make clear, to practitioners, the government’s policy ideals and remove ‘the historical ‘see-sawing’ between hard-line punishment approaches and...rehabilitative responses based on welfare concerns’ (Fionda, 2008, p.247).

The government maintained that the new statutory aim would render superfluous the long standing tension between welfare and justice, replacing it with a pragmatic concern with what works. However, since ‘prevention’ is an ambiguous term, professional interpretations of what forms of intervention will prevent offending will not necessarily be the same, and there are different possibilities depending on whether you consider prevention from a long term or
short term perspective. For instance, high levels of surveillance and/or incapacitation may be justified to prevent reoffending for the life of the order and the period immediately after – but these types of interventions would be unlikely to prevent reoffending in the longer term. Alternatively, if the intention is to prevent further reoffending in the long term, then an intervention focusing on educating or developing employment skills for the young person may be justified. Consequently interventions may still fall into categories of ‘welfare’ and ‘justice’ because it is possible to identify either approach as being more effective at preventing reoffending than the other. Therefore, the statutory provision does not solve the dilemma in the way that it was intended.

It was the broader climate – an increasing focus on ‘what works’ and the domination of the ‘risk factor’ paradigm - that made it seem as if the previous debates were irrelevant. Rather than being concerned with proportionality and due process (as in the justice model) or the promotion of the child’s wellbeing (as in the welfare model), to a large extent the primary concern becomes that of public protection (reducing the ‘risk’). ‘The victim, not the perpetrator...emerge[s] as the central object of penal policy, and increasingly, being ‘for’ the victim implied being against the offender.’ (Bateman & Pitts, 2010, p54)

According to the risk factor model interventions are based on future risk of offending rather than past behaviour with the aim of addressing those factors associated with offending: the child or young person’s ‘criminogenic needs’. The ‘needs’ here are far more selective than the welfare needs of the past, hence Jo Phoenix talks about the return of ‘repressive welfarism’ (2009). Phoenix (2009) argues that ‘highlighting the welfare needs of young lawbreakers can, and does, render them more not less punishable’ (p.114) because criminal justice responses are often the only responses available to these children and young people.

Accordingly in practice, the statutory aim is equivalent to a commitment to intervening early on the basis of assessed risk, with the potential to ignore welfare and eschew considerations of proportionality. In explicit contradiction to diversionary approaches of the previous decades, the youth justice system is now the apparatus for increased interventions, directed at more and more children, of younger ages, and for longer and longer periods.
Furthermore, those ‘remaining voices’ who are of the opinion that offending is caused by structural factors – such as poverty, restricted opportunity, neighbourhood socio-economic status etc – may opt for a political approach or advocacy. However, making ‘prevention’ a statutory aim for criminal justice intervention lends itself to more individualised risk factors, as arguably more explanatory ‘risk factors’, such as structure and ‘political economy’ (Cavadino & Dignan, 2006), are beyond the remit of criminal justice.

The 1998 Crime and Disorder Act introduced several civil measures to ‘prevent’ offending, including Child Safety Orders (which allow YOTs to work with children under the age of ten whose behaviour – were it not for their age – would be classified as criminal) and Parenting Orders (requiring adults to attend parenting classes if their child is convicted of an offence). One of the Act’s most controversial and crucial measures was the introduction of Anti-Social Behaviour Orders (ASBOs) which were partially justified on the grounds that anti-social behaviour is a precursor to criminal behaviour.

Anti-Social Behaviour Orders are civil orders, requiring only a civil (rather than criminal) burden of proof, and although they were not initially intended to be used with children and young people, (the original draft guidance indicated that it would be unusual to use an ASBO for a child under 18 - but this was changed in the final version which removed any such caveats) the focus on low level disorder, ‘incivility’ and ‘nuisance’ behaviours meant that ‘by the end of 2005, over 40 per cent of ASBOs had been issued in respect of persons under 18’ (Squires, 2008, p.18).

Although the Orders are civil (and last a minimum of two years) the breach of an ASBO was a criminal offence. ‘Non-compliance [is] punishable in the case of a young person by a detention and training order.’ (Marlow, 2005, p.69)

Critics of the anti-social behaviour agenda argue that its emergence was a result of political power-play in response to a fall in youth crime: ‘Faced with a declining crime rate, the Labour government discovered...a new territory of concern, and a beguiled public found a new crime wave replacing the old.’ (Mooney & Young, 2006, p.399)
Detected youth crime fell for the later half of the 1980s and continued falling throughout the 1990s (as shown in figure 7.1), however, the records show what appears to be an increase in offending in 1992. It is in fact due to 17 year olds – as a consequence of the 1991 Criminal Justice Act – being included in the figures for children and young people for the first time, from that year onwards.

**Figure 7.1:**

![Detected Youth Offending - Children Aged 10-17 (indictable offences) 1990-1997](image)

Source: Figures derived from Bateman (2010a)

Since the government attributed its electoral success, in large part, to its calls to increase law and order and be tough on crime, so arguably they could not let something like a falling crime rate stop their plans for justice reforms, and so ‘the decline in crime, far from being celebrated, was sidelined and concealed’ (Mooney & Young, 2006, p.404). Anti-social behaviour is an ideal focus since (unlike for instance burglary) it is a very subjective phenomenon – the more you look for it the more you will find – allowing the government to keep up the ‘law and order’ campaign. ‘Although recorded crime overall was falling in the 1990s, the party’s strategists had breathed new political life into the issues with the discovery of the anti-social behaviour agenda.’ (Hale & Fitzgerald, 2006, p.16)
With the anti-social behaviour agenda a ‘different net’ had been cast and ‘the picture that emerges, therefore, is that more and more offenders are getting mired deeper and deeper within the criminal justice system for doing less and less’ (Morgan, 2003, p.14)

Being such a vast and complex piece of legislation, however, the 1998 *Crime and Disorder Act*, also had elements of restorative justice – based on the notions of ‘community’ and ‘responsibility’ which its architects claimed were central – most notably the *Reparation Order*.

The *Reparation Order* was intended to supplant the conditional discharge and is aimed at offenders aged 10-17. Once convicted of an offence the child or young person – under supervision of the YOT – must undertake some form of reparation, either to the victim (with their consent) or to the community at large (by removing graffiti for example). Often the same reparative activity would, by the YOT, be built into final warning programmes, action plan orders and supervision orders as well. (Newburn; 2002)

However, many commentators are critical, arguing that ‘the reforms hardly amount to a ‘restorative justice revolution’ let alone the ‘paradigm shift’ that some...advocates have called for’ (Dignan, 1999, p.58) since the kind of restorative ‘work’ is frequently experienced as retributive – rarely involving victims – and is ‘tainted’ by the encompassing punitivism within the youth justice process.

Arguably the need for restorative justice (in this form) only emerges as a result of increasing intervention into the lives of children and young people who previously would have benefited form ‘informal’ provisions.

One disposal created by the *Crime and Disorder Act* which was aimed at nipping offending in the bud via early intervention was the *Action Plan Order* – a three month community sentence for 10-17 year olds – also often with elements of reparation as a condition of the order. As does the *Referral Order* – introduced by the *Youth Justice and Criminal Evidence Act* 1999, which is arguably more restorative in intent. But again, while it does involve the community, victim engagement remains low and so most reparation is indirect.

The 1998 *Crime and Disorder Act* abolished the use of informal and formal cautioning and replaced it with a system of reprimands and final warnings. A
'three-strikes' approach applies whereby a child or young person committing a first offence will receive a reprimand – providing that there is an admission of guilt, the offence is relatively minor and they have not committed any previous offences – but a reprimand can only ever be given once.

A final warning will be given if a child or young person is found to have committed a second offence – and the offence is again relatively minor. In exceptional circumstances when a third offence is committed more than two years after the second offence the individual may be given a second warning (two warnings being the absolute maximum) but normally a third offence will result in the child or young person being prosecuted. (Pragnell, 2005)

At final warning stage all offenders must be referred to a YOT (by law) for some form of pre-court intervention - often with an element of reparation – similar in some ways to 'cautioning plus'. (Newburn, 2002) In the case of a reprimand a child or young person may be referred to a YOT, but they do not have to be. Failure to comply with the disposal is not an offence, however, it may be cited in court - if the child or young person re-offends - in much the same way as a previous conviction. 'Furthermore, if a young person has received a warning within the past two years the court can only give a conditional discharge in exceptional circumstances’ (Pragnell, 2005, p.79).

One of the criticisms of the reprimand and final warning scheme is its’ inflexibility: ‘The room for judgement, creativity or professional discretion appears to be quite restricted, for both practitioners and judicial decision-makers’ (Smith, 2007, p.57) over and above that of the police (Pragnell, 2005), as a result of the scheme.

This inflexibility inevitably leads to more children and young people being prosecuted and processed through the courts, continuing a negative trend in front-end diversion. Despite the intention being to ‘nip offending in the bud’, young people are entering the court at a much younger age and as a result their progress though the system is arguably, accelerated. In this way, the reprimand and final warning scheme is an example of a ‘net widening’, drawing more young people (who would previously have received cautions) into the formal youth justice system.

In such circumstances, it comes as no surprise that, as in previous periods, the rate of diversion in the wake of the
[Crime and Disorder Act, 1998] displayed an inverse relationship with the use of custody; the continued decline of the former was associated with an unremitting expansion of the child population subject to penal detention. (Bateman, 2010a, p.275)

What is more, it was not just civil court and pre- (criminal) court measures established by the 1998 Crime and Disorder Act, which had an effect on the numbers of children and young people receiving criminal justice sanction and custodial sentences.

In order to send a message that ‘so-called’ excuses for youth crime would no longer be tolerated, the government abolished the English common law presumption of doli incapax, whereby children 10-14 were presumed incapable of criminal intent. This meant the prosecution no longer had to prove a child understood the difference between acts which were either ‘seriously wrong’ or ‘merely mischievous’ (Muncie; 2004). In other words, children as young as 10 are now always deemed “unequivocally responsible and accountable for choices made and harm caused” [Bandalli] and subject to punishment accordingly’ (Bateman, 2010a, p.261).

The 1998 Crime and Disorder Act replaced all previous custodial sentences for children and young people (namely, detention in a Young Offender Institution for 15-17 year olds and Secure Training Orders for 12-14 year olds) with the Detention and Training Orders, which can be served in any part of the secure estate.

The Detention and Training Order (DTO) was implemented in 2000 for 12-17 year olds, although it has the potential to be extended to offenders as young as 10. It quadrupled the maximum length of detention for offenders aged 15-17 guilty of a single offence (from six months to two years) and can be imposed (for this age-group) when the offence is ‘so serious that neither a fine alone nor a community sentence can be justified’ (Bateman, 2008a, p.135).

At the same time the criteria for the imprisonment under a DTO for offenders below the age of 14 was loosened, and again a maximum sentence length of two years applies (although the old secure training orders had provided
for a two year maximum detention also). For children aged 12-14 the court must deem the offence serious (as above) but must also consider the child to be a ‘persistent’ offender.

Detention and Training Orders are intended to be served half in custody and half in the community – under statutory supervision (and often electronic monitoring) - although this may vary depending on the child or young person’s ‘progress’ during the custodial element of the sentence.

Long-term detention for ‘grave’ crimes, under Sec 90/91 of the Powers of the Criminal Courts Sentencing Act 2000 (formerly Sec 52/53 of the Children and Young Persons Act 1933) are still available sentences for the Crown Court, as well as the DTO.

All of these factors make sending children and young people to custody easier and ‘undoubtedly contributed to a rise in the use of child custody...between April 2000 (when the measure was introduced) and August [2000] the population of the juvenile secure estate increased by 14 per cent.’ (Bateman, 2008a, p.135)

The 1998 Crime and Disorder Act also repealed the use of a Supervision Order as a ‘direct alternative to custody’ which may also have contributed to an increase in the use of custody. (Monaghan, 2008) In addition, until 1998, a child or young person could only get custody for a breach of supervision order if it had a specified activity requirement as a direct alternative to custody, attached to it. Following the abolition of such requirements, the Act also allowed custody for breach of any type of supervision order.

7.3 The Challenge: Rising Custody Levels

With diversion (rhetoric and practice) effectively obsolete and a new raft of interventions available for ‘tackling’ not only criminal, but also anti-social behaviours, unsurprisingly the numbers of children in contact with the youth justice system increased markedly.

In 2006/07 the number of first time entrants into the youth justice system peaked at 104,361 children and young people. One of the reasons for this was the final warning scheme which had mandated a formal response to any young
person who came to attention for offending, with net-widening effect. However, by this date the scheme had been fully operational for six years. The peak was largely the result of another net-widening mechanism in the form of the sanction detection target introduced in 2002 (which this chapter will consider shortly).

In addition to the number of first-time entrants, the number of anti-social behaviour orders also increased peaking in 2005 at 4,122 (Pitts, 2010).

This increase in the numbers of children and young people entering the 'front-end’ of the system resulted in a vast increase in the numbers entering the ‘back-end’ of the system – sentenced to custody within the secure estate, as shown in figure 7.2. ‘Between 1992 and 2002, the numbers of 10-17 year olds sentenced to custody rose by almost 90%, while detected youth crime fell by more than a quarter (Nacro, 2004)’ (Bateman & Pitts, 2010, p.54)

The ‘punitive’ climate inevitably had an impact on professionals too and pre-sentence reports recommending custody, which were once a rarity, became ‘commonplace’. (Bateman, 2005)

**Figure 7.2:**

![Custodial Sentences Imposed on 10-17 Year Olds - 1992-2000](image)

Source: Figures derived from Bateman (2010a)

On the one hand politicians have to be the guardians of law and order and public safety, and on the other, if custody levels rise exponentially attempts have to be made to contain the growing numbers of children and young people receiving
custodial sentences. And despite the rise in custody during the late 1990s and early 2000s there were alternative sanctions (which functioned as forms of back-end diversion) established in the New Labour era.

In 2000 the *Powers of the Criminal Courts (Sentencing)* Act renamed Community Punishments Orders (CPOs) (formally Community Service Orders) which remained the responsibility of the probation services, unless the young person was subject to an additional court order.

Community Rehabilitation Order (CROs) (formally Probation Orders) could be given to a young offender aged 16 or 17, for any offence, imprisonable or otherwise (with the exception of fixed sentence offences). CROs were supervised by the YOTs and often had additional requirements attached such as an *Intensive Supervision and Surveillance Programme* (ISSP) which will be discussed shortly.

The Community Punishment and Rehabilitation Order (CPROs) (formally Combination Orders) was effectively a combination of the CPO and CRO. They were only available as a ‘high-tariff’ sentence, reserved for ‘serious’ and ‘persistent’ offenders aged 16 and 17.

Supervision Orders also remained, and in 2003 intensive fostering was introduced in as a requirement for children and young people whose offending was linked to home circumstances, if the order was given as a direct alternative to custody.

Community Rehabilitation Orders; Community Punishment Orders; Community Punishment and Rehabilitation Orders; and Supervision Orders; may all include (as a condition) a Curfew Order or a drug treatment and testing requirement (for children over the age of 14).

These community-based orders were already available to the court but from 2001, the Youth Justice Board developed a new measure in the form of the ISSP as a mechanism for providing higher levels of intervention for children and young people whose offending was persistent or serious. It was anticipated that it would, in the process, effect a reduction in the custodial population. Centrally funded, ISSP was not a new statutory provision but could be attached to a Community Rehabilitation Order or a Supervision Order by way of existing requirements. The programme was piloted from July 2001 and rolled out nationally in October 2003. ISSP could be used in this way as an alternative to a
custodial sentence but was also made available as a condition of bail where the child or young person is at risk of remand to custody, and as a condition of a Notice of Supervision after custody.

'Since 2001, the primary high-tariff alternative to a prison sentence developed in England and Wales has been the Intensive Supervision and Surveillance Programme' (Goldson, 2008, p12). In order to tackle prison overcrowding, community interventions needed to be strengthened to provide for ‘persistent’ and ‘one-off serious’ offenders. To insure that community-based alternatives to custody were politically credible, arguably, they had to appear to be sufficiently ‘tough’ (Beaumont; 2005).

The supervisory element of ISSP requires a minimum attendance of 25 hours over seven days a week and the young person may be subject to an electronically tagged curfew. ‘At their inception, about 70% of the subjects of ISSP were [electronically] tagged but by early 2004 this figure had risen to almost 90% (Waters et al., 2003).’ (Whitfield, 2005, p.126) ‘This allows an element of punishment through the inconvenience caused and through the ‘shame’ of having to wear a tag, and it offers social control without the most damaging effects of imprisonment.’ (Hazel, 2008, p13) More recently, the YJB has introduced the option of a reduced level of intervention (fewer hours) for children and young people in education or employment and for those below the age of 14.

Arguably, ISSP was not an effective measure of back-end diversion because of its potential to up-tariff compounded by the problems innate in identifying ‘high-risk’ offenders. Furthermore, because the programmes are so intensive and rely heavily on electronic monitoring, breach rates are likely to be high. ‘Many of those cases that completed ‘successfully’ had breached at some stage’ (Moore, 2008, p.198) undermining programme integrity. Arguably, ISSP ensured that, for many children and young people, the period of incarceration is deferred, rather than avoided altogether. There is also a possibility that a child or young person may be given ISSP for an offence which would not previously have resulted in a custodial outcome and subsequently receive custody for breach because the courts will nonetheless sentence on the basis that the child has refused to comply with an alternative to custody disposal. This is a particular concern given the evidence that breach has been a significant driver of custody in
the recent period. ‘In 2006/07, 16 per cent of those sentenced for breach of a statutory order received a custodial penalty, accounting for 27 per cent of Detention and Training Orders – more than any other offense type’ (Bateman, 2010b, p.84)

In 2002 the government introduced a ‘sanction detection’ target which encouraged the police to make more formal interventions. The government wanted to see an increase in the number of ‘offences brought to justice’ from 1.025m in 2002 to 1.25m in 2007/08. The sanction detection rate is not a reflection of improved performance however, since the ‘clear up’ rate did not rise accordingly. Bateman (2008b) suggests that this is due to the fact that behaviours previously dealt with informally were now dealt with formally so they could be counted as an ‘offence brought to justice’. Inevitably this impacted more on children below the age of 15 and girls - who previously would have been more likely to benefit from police discretion. ‘Under New Labour, target-driven policing has become practically synonymous with net-widening.’ (Bateman, 2008b, p.4)

The 2003 Criminal Justice Act again loosened the custodial threshold for children and young people by introducing a requirement that the courts treat each previous conviction as aggravating (unless they consider it is unreasonable to do so). It also made provision for two new long term custodial sentences in the crown court for offences of a violent or sexual nature where the court deemed that the young person was ‘dangerous’. This latter provision was further evidence of the shift towards sentencing on the basis of future risk rather than a justice based response to prior offending.

The 2003 Anti-Social Behaviour Act made Intensive fostering a condition of a Supervision Order, in cases were the sentence was an alternative to custody.

Since the 2008 Criminal Justice and Immigration Act, however, the Youth Rehabilitation Order (YRO) has replaced all the aforementioned orders as the only form of community order for offending that is serious enough to cross the community threshold, but many elements (and/or requirements) of the old orders remain as part of the ‘new’ disposal. Youth Rehabilitation Orders are an
attempt to standardize community disposals, while also providing a ‘menu’ of requirements, enabling a greater individualized response to children and young people who offend. ‘The courts are expected to use the YRO on multiple occasions, adapting the ‘menu’ of requirements as appropriate.’ (Goldson, 2008, p.109)

Other non custodial options which still remain are; Absolute and Conditional Discharges; Fines; Compensation; Reparation Orders; and Referral Orders, but they are not high-tariff ‘alternatives’ to custody.

The 2008 Act has made Intensive fostering a statutory requirement of the Youth Rehabilitation Order when it is used as an alternative to custody i.e. the court can only impose it where it would otherwise have imposed custody. Intensive Supervision and Surveillance (ISS) – which must now include a curfew as a matter of law - can also (as of 2009) be a statutory requirement of a Youth Rehabilitation Order, in cases where the court indicates that the offending crosses the custodial threshold.

Conversely, if the court imposes a Detention and Training Order it must say why it did not think a Youth Rehabilitation Order with ISS or Intensive fostering (the only other alternative to custody) were not appropriate.

The Criminal Justice and Immigration Act also provides for a Youth Conditional Caution, introducing an additional ‘layer’ of pre-court interventions between a final warning and prosecution. Where such a caution is administered, providing that the child or young person complies with the conditions – which can include a range of types of intervention – within a specified time scale, he or she will avoid prosecution.

The legislative changes in the 2008 Criminal Justice and Immigration Act appear to be the start of move to alleviate the concerns that professionals (and maybe now politicians) have about the large numbers of children and young people entering the youth justice system at the front-end, as well as a concern with the persistently high numbers in the secure estate at the back-end.

In 2007, as a result of the ‘global financial crisis’ the political and financial stability of the UK was shaken. The Labour government could not keep spending as it had during the ‘boom’ years of the late 1990s and early 2000s. There would need to be ‘cuts’.
Since the ‘credit crunch’ the number of children and young people entering the youth justice system has been falling steadily from a peak of 212,242 in 2006/07, to 184,850 in 2008/09. The obvious question is why? One of the reasons appears to be a resurgence in the use of front-end diversion. This was manifested in a number of ways.

First, in 2008, the government abandoned the old ‘sanction detection’ target (which, as has already been established, undoubtedly adversely affected children and young people) and introduced a new target to reduce the number of first-time entrants into the youth justice system by 20 per cent by 2020. (Bateman & Pitts, 2010) The target was rapidly met. The number of first-time entrants, which peaked in 2006/07 at 104,361 began declining and had fallen to 74,003 by 2008/09. (Pitts, 2010)

One of the ways that the first time entrant target is being delivered, is via a scheme underway in 69 of the 158 Youth Offending Team areas. In these Youth Crime Action Plan areas YOTs and police are using what has become known as ‘triage’. Children and young people who are arrested for the first time are assessed - by the YOT (and not the police) - into those who should get a formal response and those who can be given an informal intervention – so that they do not become first-time entrants. In the Youth Crime Action Plan areas, the police are also encouraged to use ‘youth restorative disposals’ where young people come to attention for minor offending. In such cases, provided that the young person and the victim consent, the matter is dealt with informally through a restorative process without recourse to a formal criminal justice disposal.

It would appear that in many respects, the original purposes of the final warning scheme - to reduce informal responses to a minimum and limit the number of pre-court measures to a maximum of two - have in practice been abandoned. In the latter years of New Labour’s administration the youth justice system was witness to something of a rediscovery of diversion by stealth.

During the same period, the number of Anti-Social Behaviour Orders has also fallen by over 50 per cent from 4,122 in 2005 to 2,027 in 2008. (Pitts, 2010) In 2010, Teresa May, Home Secretary for the newly elected government announced that the government is considering getting rid of ASBOs altogether.
The fall in first-time entrants as a consequence of these changes corresponds very closely to the decline in the population of the secure estate, as figure 7.3 shows.

**Figure 7.3:**

Custodial Sentences Imposed on Children and Young People - 2001-2008

Source: Figures derived from Bateman (2010a & 2010b)

The final chapter will discuss what these changes and the latest change of government may mean for the future of front and back-end diversion, within the youth justice system of England and Wales.
Chapter 8:

The Fate of Diversion in a New Era?

8.1 Youth Justice and Diversion: Complexities and Contradictions

From the early 19th century youth justice – rhetoric and reality – has not followed an even linear trajectory, as the developments discussed throughout this thesis highlight. As Harris and Webb (1987, p.79) have reflected, youth justice ‘is riddled with paradox, irony, even contradiction’. It is not always about ‘progress’ as the idealist accounts would contend, nor is it, as revisionists would argue, always about State control since at times the State is willing to relinquish control and promote informalism.

The discourse of diversion is equally complex and variable, and diversionary discourses are sometimes central to both government and professional rhetoric, while at other times they are deemed unnecessary and/or counter-productive. In England and Wales in the 1960s, when ‘welfarism’ was at its height, the presumption was that children and young people in trouble with the law would be diverted away from youth justice system because the system was deemed criminogenic. However, many young people did come into contact with the youth justice system, the unintended consequence of which was that their level of ‘need’ resulted in increased intervention. In the 1980s the political and fiscal climate changed and this was paralleled by a reaction to the excessive intervention in the lives of children and young people. Subsequently, the government pursued policies of ‘minimum intervention’ and ‘maximum diversion’ despite propounding a law and order agenda. In the 1990s diversion declined rapidly, and the prevailing orthodoxy was that the State had become ‘soft’ on crime. With a growth of the ‘politicisation’ of youth, actuarialism and managerialism, increasingly the imperative was to reassert control over ‘threatening’ youth through early youth justice intervention and tougher sanctions. Since the late 2000s the imperative appears to be changing once
again, as diversion, particularly front–end diversion is being ‘rediscovered’. As this thesis has illustrated the imperative is critical to the effectiveness, diversionary or otherwise, of alternatives to formal youth justice intervention and custody.

The discussion has shown that, at various times in the 20th century, wider patterns of juvenile offending do not always correspond with equivalent trends in adult offending. Similarly, patterns of youth justice have conflicted wider patterns in adult criminal justice, in England and Wales, particularly in instances where diversion has been favoured, as witnessed in the bifurcated policies of the 1980s.

In light of the discussion about the special status afforded to children and young people it is easy to see why several dichotomies arise; firstly between adult justice and youth justice; and secondly within youth justice between two, seemingly incompatible, ‘philosophies’ of ‘rehabilitation’ and ‘punishment’. There has to be a balance made between the needs of the child or young person and the needs of society.

In view of that, at times youth incarceration has also followed a different trajectory to adult incarceration. Perhaps this is because, as well as the external influences, there are also internal pressures which influence the youth justice system’s response to children and young people. McAra rightly notes that ‘while a particular system may adhere to a strong set of guiding principles, these principles may be skewed or subverted by the working practices and cultures of the various agencies which act as gatekeepers to and/or colonize the systems themselves’ (2010, p.288).

Sometimes the processes of youth justice do not conform to the expectations that accounts - like penal modernism; the end of the rehabilitative ideal; the punitive turn - might lead us to anticipate. However despite the fact that within youth justice the effects of the wider socio-economic and political climate may be tempered or altered somewhat by internal influences, the influence of these broader processes can be seen, at different times and to different degrees, and so it is important to acknowledge them.
Given what has been described here in terms of patterns of front and back-end diversion, and the complex nature of youth justice, the question that remains is, is it possible to conclude anything about the future direction of diversionary strategies in youth justice?

8.2 The Rise of the Punitive?

David Garland (2001) suggests that from the mid 1960s and the early 1970s Western industrial societies witnessed a radical destabilisation, the process of which created a ‘crisis in penal modernism’. This radical destabilisation has been linked to: neo-conservatism; neo-liberalism; post-Fordism (Matthews, 1999a); politicization; fear and insecurity; managerialism; populism; actuarialism; the advent of ‘risk’ (Beck, 1992); and growing individualism (Young, 1999) - all of which paralleled the decline of the rehabilitative ideal and the demise of welfarism.

Garland (2001) has argued that the process undermined the central notion of penal modernity - namely that intervention through the criminal justice system ought to be rehabilitative rather than retributive, inclusive rather than exclusive - and consequently, over the past several decades Western democracies have witnessed a new ‘culture of control’ as a result of this crisis in modernity. This has led to an increase in punitive forms of crime control and the expansion of the Penal State.

If this ‘culture of control’ determines the level of imprisonment then it might be anticipated that custody rates will be high and diversion levels would be low. In the 1980s, in England and Wales, the reverse happened – methods of diversion grew and levels of incarceration decreased – as the Thatcher government pursued a policy of progressive minimalism (as discussed in chapter 6). In England and Wales when levels of diversion decreased and levels of custody rose in the 1990s, arguably this was the result of a different process (as discussed in chapter 7) which this thesis will return to shortly.

There have also been marked differences in the administration of justice and subsequently the prisons’ populations in the two jurisdictions of USA and England and Wales - which are often perceived to be closely aligned in arguments
put forward by ‘Penal State’ theorists about neo-liberal economies. In the 1980s, in the USA, Ronald Reagan’s government were pursuing a criminal justice policy which was increasingly interventionist. This leads Pitts to conclude that there ‘is no necessary link between the advent of neo-liberalism and the emergence of a Penal State.’ (2010, p.11)

Some criminologists contend that there was a ‘punitive turn’ – which took place in the 1990s in England and Wales – and consequently there is now a ‘new punitiveness’ (Pratt et al.; 2005). This new punitiveness is a distinct transformation of criminal justice which is a radical departure from the past and based on abandoning notions ‘not only [of] welfare and rehabilitation but also [of] retributive just deserts in favour of incapacitation’ (Muncie, 2008, p.279). Some commentators argue that systems of crime control and punishment are now reliant on methods or punishments which are emotive and vindictive, designed with the intention of humiliating, dehumanizing and/or inflicting harm on offenders, as a result of a repressive and draconian climate of control.

They support their claims that we are witnessing increased punitiveness by citing developments such as: mass imprisonment; chain gangs; super-max prisons; boot camps; naming and shaming policies; austere prisons; ‘three strikes’ laws; mandatory minimum sentencing; paedophile registers; anti-social behaviour policies; and zero-tolerance policing. (Pratt et al.; 2005, Garland; 2001, Muncie; 2008)

This type of explanation of recent events would lead one to anticipate low levels of front and back-end diversion alongside a rise in custody, which did happen during the 1990s and early 2000s. However as the final part of chapter 7 illustrates, this is not the current trend.

Roger Matthews (2005) is critical of the view that there is a growing punitiveness, suggesting that sanctions provided as proof of increased punitiveness are often ‘largely symbolic’ and that the numbers of people sentenced to community-based sanctions increased alongside the rise in the use of custody. That is not to say, however, that community-based sanctions are exempt from being seen as punitive. Given that the evidence suggests, not only has the level of intervention increased, but also interventions are being targeted at children and young people who would not previously have come to the
attention of the youth justice system, it is important to acknowledge that ‘community penalties’ (as they are now called) still fit on a punitive scale. It is true that since the early 1990s and until very recently the use of diversion from the criminal justice system had decreased, and net-widening occurred, which may in itself be considered punitive, especially if all interventions are delivered on the basis of ‘criminogenic need’.

It is because of these issues, that the concept of punitiveness may be unhelpful in discourses of crime and punishment. As a concept it is often ill-defined and sometimes fails to capture the diversity, the tensions and contradictions of criminal and youth justice reform. As Matthews (2005) stated there is a ‘danger in becoming lost in a series of false dichotomies’ (p.197) – of justice and welfare; of needs and deeds; of punitivism and informalism; of rights and responsibilities and so on. Matthews is also critical of the criminological ‘histories of the present’ arguing that because they fail to identify ‘specific mechanisms’ which led to the ‘punitive turn’ their analysis has a ‘depressing sense of inevitability’: ‘Thus what appears at first sight to be a liberal critique of existing policies and practices can turn rapidly into a conservative defence of the status quo.’ (Matthews, 2005, p.187)

Many commentators link the growth in populism to the perceived growth in punitivism, blaming the public’s assumed punitive sentiments for the changes in penal policy. In 1995 Anthony Bottoms coined the phrase ‘populist punitiveness’ to describe this process. Some see the process as one that is driven by an increasingly anxious and intolerant public (Pratt, 2002), while others suggest that the drive comes from the ‘top-down’ with ambitious and manipulative politicians using the public’s fear of crime as justification for increased punitiveness (Wacquant, 2000).

The aforementioned evaluations of the ‘populist culture’ fail to recognize, however, the positive effects of populism such as the public and the media’s ability to draw attention to injustices, for example, in the case of Stephen Lawrence (Matthews, 2005). These evaluations can also be criticised for ignoring political will. The supposed dominance of punitive populist sentiments does not require politicians to respond punitively. (The 1980s provides evidence of the capacity for governments to say one thing while doing another.) As Mick Ryan
(2005) notes, the populism under the Thatcher government was significantly different to the populism witnessed under Blair’s government. These evaluations also fail to recognize the importance of the direction of the dialectal relationships between public opinion and government responses, for example, defining deviancy down - by downplaying the falling crime rates of the 1990s while ratcheting up fear of anti-social behaviour (Young & Matthews; 2003), in order to justify increased ‘law and order’ policies.

There is also evidence to suggest that popular opinion is not increasingly punitive and that the general public want something that works to reduce offending:

The most common responses by members of the public to the open-ended question: ‘What should sentencing achieve?’ do not include the words ‘punish’, ‘deterrence’ or ‘rehabilitation’...People are generally not wedded to a particular philosophy of punishment; they just want something done which changes offenders’ behaviour. (Morgan, 2002, p.221)

In some ways this seems like a logical development of Bernard’s (1992) assertion that political ‘philosophies’ need to ‘make sense’ to the public; only now, arguably, the public are not being asked to choose between political ‘philosophies’, since they have been discarded or at least severely damaged by governments whose focus is appealing to the electorate, as evidenced in the reactionary politics of New Labour (Downes & Morgan, 2002).

McAra (2010) writes about ‘sensibilities’ which impact on youth justice paradigms, similar to the ‘imperatives’ which this thesis has discussed. She contends that retribution is the sensibility of ‘just deserts’, philanthropy is the sensibility of ‘welfarism’, and fear is the sensibility of ‘actuarialism’, the paradigm which we are now witnessing in England and Wales. Although fear may be a critical element of actuarialism, children and young people have been a constant cause for concern and their behaviour has been a source of fear for many decades (Cohen, 1972; Clarke, 1976; Pearson, 1983). The change has been that, in the wake of the perceived ‘popular punitivism’, alleviating public concerns becomes the primary aim of youth justice. ‘The principal audience for actuarial interventions is the public’ (McAra, 2010, p.291).
As John Pitts (2003a) suggests ‘the erratic twists and turns in the politics, policy and practice of youth justice in the UK in the post war period are best understood as a product of governmental attempts to manage the tensions between political ideology, economic reality and electoral viability.’ (p.2)

Feeley & Simon (1992) argue that in the UK what has developed has been a ‘new penology’ with increasing mechanisms for justice based on actuarialism. ‘The new penology is neither about punishing nor about rehabilitating individuals. It is about identifying and managing unruly groups.’ (2003, p.435)

This in itself is arguably not ‘new’. Matthews suggests that ‘since punitive and emotive strategies have historically been an endemic feature of crime control policies there is a need to explain what is new.’ (2005, p.197) Revisionist accounts have convincingly illustrated that penal developments have always been about controlling dissident populations.

The difference within the ‘new penology’ analysis made by Feeley and Simon is the emphasis the government place on risk management (actuarialism) and their reliance on the ‘science’ of risk factors. Government action ‘is preventative rather than responsive. It seeks not to punish but to exclude those with criminal tendencies.’ (2003 [1992], p.185)

Cavadino & Dignan (2006) suggest that this ‘exclusionary’ propensity is the critical factor in the likelihood of states to exert greater control and punishment over its citizens and is a feature of neo-liberal societies: ‘Societies that are prepared to reward success with higher incomes and greater social status are also more willing to punish failure with both poverty and formal sanctions’ (p.45). Hence, we see increased punitiveness in states, such as the USA and England and Wales, where there is: an individualised relationship between state and citizen; a free-market economy; a large divide between rich and poor; a minimalist or residual welfare state; and ‘right-wing’ political ideologies. This links to Jock Young’s (1999) assertion that a growing heterogeneity of communities has led to a greater sense of insecurity, and therefore individuals are more preoccupied with risk. Not only that, but the criminal justice response is exclusionary as a result of the ‘decline in the rehabilitative ideal’.
These are important arguments because they go some way to explaining why it is that some states have witnessed neo-liberalism but have not seen an increase in their prison populations as Matthews (2005) and Pitts (2010) both note. Similarly, Pitts (2010) argues that a positive conception of freedom is a crucial factor in explaining how certain states, for example Finland, are able to avoid the worst consequences of neo-liberalism, maintaining robust social intervention and penal minimalism. Because the relationship between the state and the citizen is not adversarial, as it is in the UK or the USA, Finland is able to intervene in the lives of children and young people who offend (and it is not considered problematic to do so) while simultaneously maintaining a low level of imprisonment.

Matthews (2005) cautions against uncritical acceptance of the new penology, arguing that it ought to imply reduced levels of punitiveness: ‘why would neo-liberal governments want to spend millions of dollars locking up minor offenders’ (p.187) if they can manage the risk more efficiently in the community? However, as evidence from the previous chapter shows the ‘punishment’, for those children and young people who are diverted into community interventions and consequently reoffend, is greater than it would otherwise have been. Similarly Jock Young (2003) reasons that you could, in theory at least, have actuarialism alongside a policy of bifurcation – using risk measures to determine which crimes would fall each side of the dividing line – leading to ‘harsh’ and ‘lenient’ interventions.

On the other hand Feeley and Simon argue that more efficient risk management ‘dictates an expansion of the continuum of crime control’ (1992, p.547). Similarly, one might argue that actuarialism has a slight inbuilt tendency to increase interventions because potential future behaviour will be taken into consideration (as well offending which has already been committed) and the importance of due process, under actuarialism is negated, since ‘risk’ needs to be alleviated if the intervention is to be deemed a success.

That said, at the ‘high-tariff’ end of the scale, with ‘risk management’ being a primary imperative in the new youth justice climate, the function of imprisonment changes from one of rehabilitation to one of incapacitation. (Matthews, 1999a) The rise in prison populations may be indicative of a rise in
actuarialism and managerialism. The response to breeches of various types of community-sanction can more often result in imprisonment, because the failure of community interventions is evidence that the ‘risks’ could not be contained outside the prison (as discussed in chapter 7). One of the unintended consequences of a rise in more rigorous managerial enforcement of conditions for alternatives to custody will be a rise in the number of breeches, and, in all likelihood, a rise in the numbers of people incarcerated. (Hart, 2010)

Actuarialism combined with a ‘punitive climate’ is inconsistent with diversion and the ‘science of risk’ increases the chances that children and young people will become subject to greater levels of intervention earlier.

8.3 The Beginning of a New Cycle?

Bateman (2010a) rightly indicates that ‘Bernard’s (1992) ‘cycle of juvenile justice’ reminds us that the negative consequences of an overly harsh system might yet lead to adoption of a programme of reform’ (p.384). However, as he also notes the changes are not determined, as Bernard suggests, simply by ‘professional perceptions that what went before was ineffective’ (p.108).

On Bernard’s account, there have been three cycles of juvenile justice in the 200 years prior to the 1990s. The changing pace of youth justice in England and Wales over the past 50 years has been far more rapid than the 50 or even the 150 years preceding the 1960s. Arguably, each change in imperative and model of youth justice was a reaction to what went before, somewhat reminiscent of Bernard’s cycles. However, the changes did not amount to a complete reversal of ‘philosophies’ and indeed there is still rhetoric about punishment and rehabilitation, justice and welfare, notwithstanding the rise of neo-liberalism and actuarialism.

Each change of imperative and model of youth justice is influenced by dynamic political, fiscal and ideological processes which mean that the cycle of juvenile justice is not one in which the ‘philosophies’ (that Bernard talks about) are entirely rejected leading to a return to the beginning of the cycle.

This suggests that there is a ‘spiral’ of youth justice (rather than a cycle) triggered by ‘top-down’ political and fiscal climates, as opposed to the ‘expert
intervention’, or the backlash to ‘recurrent failures’, or the bottom-up political reaction to ‘public perceptions’. Although there are periodic reactions in youth justice imperatives and paradigms, the ‘cycle’ does not take youth justice from one particular philosophy to another and back again, as with Bernard’s theory. While there are sometimes profound differences in dominant paradigms from era to era, there are also some similarities. The shift from the ‘welfarism’ of the 1960s, with its focus on ‘needs’, was followed by a shift to ‘justice’ in the 1980s. This was followed by a shift to a more punitive climate where there was increased actuarialism and ‘criminogenic needs’ became the focus, but these ‘needs’ are markedly different from the ‘welfare needs’ of old. Moreover, these shifts are partial since there are always residual policies and practices from the previous period. As a consequence of this, different paradigms are sometimes entangled together leading to the often contradictory and complex realities of youth justice.

In much the same way as youth justice more generally, diversion rhetoric and practice has also witnessed periods of ascendancy, followed by periods of decline, and so on. It appears now, however that there is a tacit rediscovery of diversion albeit in different forms (as alluded to at the end of chapter 7).

As Roger Smith rightly notes, ‘with each new development, the task of moving from ‘where we are’ to ‘where we want to be’ also becomes transformed, and practical and political questions of achieving progressive reforms must be addressed rather differently.’ (2007, p.211)

As of May 2010, there is a new Coalition government in power – made up of Conservative and Liberal Democrat MPs – and an ‘urgent’ focus on reducing spending in all state sectors, as a consequence of the recession. With the justice budget being one of the largest there appears to be a new political imperative emerging, spurred on once again by the fiscal climate. ‘As New Labour, belatedly discovered, Law and Order crusades cost a great deal of money, and the Coalition hasn’t got any.’ (Pitts, 2010, p.18)

Kenneth Clarke, Justice Secretary (formally Home secretary in 1992/93), indicated that this tacit rediscovery of diversions and its consequences will be reinforced by the new administration’s penal policy, when he suggested that prison was ineffective at reducing crime:
There is and never has been, in my opinion, any direct correlation between spiralling growth in the prison population and a fall in crime. Crime fell throughout most of the western world in the 1990s. Crime fell in countries that had, and still have, far lower rates of imprisonment than ours. (July, 2010, guardian.co.uk)

Similarly, at the Liberal Democrat party conference MP (and member of the Justice Policy Committee) Mike Crockart said:

The justice system as it stands doesn’t work...We have a strange opportunity now in that everything is seen through the prism of cost effectiveness and value for money. And [on those terms], prison doesn’t work. (Sept, 2010, cypnow.co.uk)

This suggests that the Coalition are preparing to try and reduce custody and there is a greater likelihood that they will look to build on the ‘rediscovery’ of diversion which has transpired in the past several years.

Hence the present youth justice situation is somewhat anomalous because, although there is pressure to increase diversion and reduce custody (on the basis of cost and effectiveness), the climate is still ‘risk averse’ (even if it is less so than previously) and punctuated by regular bouts of punitive rhetoric. Youth justice may experience bifurcation again - with an increasing use of front and back-end diversion - as it does not necessarily contradict the prevailing actuarial climate, and it could indeed lead to a reduction in the numbers of children and young entering the youth justice system and the secure estate. However, the imperative behind such a move would more likely be a pragmatic and fiscal one, rather than a political will motivated by the best interests of the children and young people affected and grounded in principles of decriminalisation, diversion and decarceration. This will arguably make any developments more fragile and susceptible to unintended consequences if the ‘real’ outcomes for children and young people are not part of the motivation for reform.

In light of the new actuarialism it is hard to imagine bifurcated policies having exactly the same effect as those of the 1980s, but as Pitts (2010) rightly maintains ‘Conservative governments are able to achieve far more radical penal reforms than their Labour counterparts because, in the popular imagination and
the tabloid press, they remain the *Natural Party of Law and Order* (p.18). In an era of spending cuts if the public’s desire is for something that ‘works’ (Morgan, 2002) we may witness a ‘popular pragmatism’, reflecting the government’s aspiration to see increased ‘value for money’ within an increasingly expensive youth justice system and secure estate.

As the revisionist histories contend, it is important to scrutinize the alleged rationales of politicians, reformers and policy makers. However, in the current financially turbulent climate where actuarialism is well established those rationales are arguably less significant than the political climate.

*It is not necessarily the explanatory power of the theory that ensures its popularity but its adaptability to a changed political environment which encourages the emergence of some theories and the suppression of other[s].* (Pitts, 1988, p.111)

The fiscal imperative may provide a countervailing influence to the ‘punitive turn’ and ‘actuarialism’, reinforcing the diversionary direction youth justice appears to be taking now, as a response to the record levels of youth incarceration in the mid 2000s.

*It may be that the rise in back-end diversion (if it continues) will be justified on the grounds that community measures, unlike in the past where they were considered more humane or rehabilitative, have the ability to ‘punish’ more efficiently. This could also be described as a process of bifurcation, allowing governments to maintain a seemingly tough and ‘risk-averse’ rhetoric whilst reducing the number of children and young people who are imprisoned. Although, as previously discussed, what punishment is according to the child or young person, may vary from the views of the policy-makers and/or those administering youth justice interventions.*
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