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Governing the Nomadic Children of the ‘Dangerous Classes’:

A Genealogy of Youth Justice analysed through the
Developmental Prism of the Youth Rehabilitation
Order

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Submitted in partial fulfilment of the requirements
for the degree of Master of Jurisprudence

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Abbreviations

ACO	Attendance Centre Order
ACPS	Advisory Council on the Penal System
APO	Action Plan Order
CBT	Cognitive Behavioural Therapy
C&D Act	Crime and Disorder Act
CETS	Church of England Temperance Society
CJA	Criminal Justice Act
CJ&CS Act	Criminal Justice and Court Services Act
CJ&I Act	Criminal Justice and Immigration Act
CJS	Criminal Justice System
CO with EM	Curfew Order with Electronic Monitoring
CPO	Community Punishment Order
CRO	Community Rehabilitation Order
CSO	Community Service Order
DfES	Department for Education and Skills
CYPA	Children and Young Persons Act
DRR	Drug Rehabilitation Requirement
DTO	Detention and Training Order
DTTO	Drug Treatment and Testing Order
EO with EM	Exclusion Order with Electronic Monitoring
IFR	Intensive Fostering Requirement
ISSP	Intensive Supervision and Surveillance Programme
IT	Intermediate Treatment
NRR	Night Restriction Requirement
PCC(S) Act	Powers of Criminal Courts (Sentencing) Act
PO	Probation Order
PSR	Pre-Sentence Report

RFPP	Risk Factor Prevention Paradigm
SCG	Sentencing Guidelines Council
SIR	Social Inquiry Report
SO	Supervision Order
YJB	Youth Justice Board
YJS	Youth Justice System
YOT	Youth Offending Team
YRO	Youth Rehabilitation Order

Abstract

This thesis performs a Foucauldian genealogy of youth justice, situating the generic community based sentence of the Youth Rehabilitation Order (YRO) - introduced in 2008 - at the frontier of an emasculating developmental trajectory which has informed youth justice policy and practice since the foundation of the juvenile court. It is argued that the YRO's 'governmentalisation' (Foucault, 2007) of youth justice – its movement of sentencing determination and oversight from the judiciary to the executive - enabling the 'young offender' to be governed within a complex of managerial and administrative apparatuses with reference to bio-political 'norms' – has engendered the formation of a paradigm of governance which obfuscates the distinction between executive and judicial powers. It is expounded that this may serve to create administrative 'petty sovereigns' (Oksala, 2007) largely unhindered by judicial restraints, potentially exposing the 'young offender' to exceptional sovereign violence i.e., violence which is direct, arbitrary and subject to severely weakened judicial regulation (Oksala, 2010: 42). The genealogy, analysed through the developmental prism of the nine community based sentences which the YRO replaces, traces the 'governmentalisation' of youth justice, illustrating how this obfuscatory paradigm of governance is programmed within its hybrid 'penal-welfare' evolution. The thesis illustrates that at the apotheosis of the 'welfare-era' in the late 1960s and early 1970s a youth justice strategy of 'familial enclosure' – aiming to immobilise the working class child - delimited the exercise of exceptional sovereign violence to within the walls of the nuclear family. It is shown that the disintegration of the 'underclass' familial enclosure in an advanced-liberal Britain has rendered this governmental strategy of 'sedentarisation' untenable. The belief is promulgated that the YRO, which provides a nomadic form of electronic surveillance and control, is a technology of replacement for this disintegrating enclosure, introduced by a managerial Youth Justice Board in response to the return of the nomadic children of the 'dangerous classes' (Lea, 1997). The genealogy suggests that the YRO may facilitate the diffusion of exceptional sovereign violence throughout the 'social', exercised at-a-distance upon a nomadic population of 'underclass children'. It is also asserted that the YRO's amalgamation of the 'child in need' and the 'young offender' is indicative of a wider process of 'net-widening' and 'mesh thinning' (Cohen, 1985) in which the 'child in need' is being captured within the penal net. A 'de-governmentalisation' of youth justice through a return to the 'justice-model' of youth justice policy and practice is proposed as a remedy to these issues. This, it will be espoused, will de-obfuscate executive and judicial powers and reign in administrative 'petty sovereigns' by subjecting them to effective judicial controls, preventing the 'underclass child's' exposure to exceptional sovereign violence. The potential for the offence-centric 'justice-model' to restrict the orbit of the youth justice system will also be explored.

Introduction

“We quickly grow used to the way things are. Today more than ever, it is easy to live in the immediacy of the present and to lose all sense of the historical processes out of which our current arrangements emerged” (Garland, 2001: 1).

Over the past two decades youth justice policy and practice in England and Wales has been characterised by three salient themes: a ‘new punitiveness’ (Garland, 2001; Goldson, 2002; Pratt et al, 2005; Muncie, 2008); an emerging penology of ‘actuarialism’ (O’Malley, 1996; Kemshall, 2008; Muncie, 2009); and a related erosion of the child or young person’s human rights (Walsh, 2003; Goldson and Muncie, 2006; Muncie, 2008; 2009; Kemshall, 2008; Hollingsworth, 2008).

The emergence of the first theme, a new punitive ethos within the field of youth justice policy and practice, has manifested itself in: “a doubling of children held in the ‘juvenile secure estate’ since 1993, the introduction of curfews, naming and shaming, zero tolerance, dispersal zones, parental sin-bins, fast tracking, coupled with the abolition of the presumption of *doli-incapax*” (Muncie, 2008: 109).

This response to youth crime has been augmented by the second theme, an overriding emphasis upon risk management, with a pre-emptive focus upon ‘nipping crime in the bud’ (Home Office, 1997). In an advanced-liberal Britain the terms ‘risk’ and ‘youth’ have become inextricably linked (Green et al, 2000). Within governmental crime control rationality children and young people have been increasingly perceived as either ‘at risk of criminality’ (Chief Secretary to the Treasury, 2003; Department for Education and Skills (DfES), 2004), thus requiring pre-emptive intervention, or as ‘posing a risk’ to the wider community due to their criminal status which necessitates the exercise of increasing levels of surveillance and control over their lives (Home Office, 1997a; 2003a; Ministry of Justice, 2008; Youth Justice Board (YJB), 2001).

Conceptualising children and young people as ‘risks’ to be managed has resulted in a blurring of the boundaries between social and criminal justice policy. Social morbidities have been re-conceptualised as crime problems (Farrington, 1996) with: “crime control strategies...increasingly deployed to manage intractable social ills” (Kemshall, 2008: 22). These crime control strategies have been overwhelmingly targeted at marginalised and socio-economically excluded populations of both ‘pre-criminal’, ‘at risk’ children and young people, and ‘young offenders’.¹

¹ The term ‘young offender’ is apostrophised as it is a contested discursive construction, generally associated with the ‘law and order’ politics of the ‘justice-model’ in youth justice policy and practice. Some academics on the Left of the political spectrum contest the labelling of children and young people convicted of an offence as primarily ‘offenders’,

Actuarial governmental responses to these populations are inextricably related to a problematisation of their 'extra-institutional' or *nomadic* 'form of existence' beyond the institutional enclosures of the nuclear family and the school, both of which have entered into a period of rapid dissolution in an advanced-liberal Britain due to austere neo-liberal socio-economic policies (Currie, 1991; Lea, 1997; *see* Chapters 3 and 4). These enclosures have functioned throughout modernity to immobilise the children and young people of the 'dangerous classes' (Lea, 1997), excluding them from public space (Foucault, 1977b: 215-216; Donzelot, 1980: 47). Civil and criminal technologies introduced to manage the risk these *nomadic* 'underclass' children and young people pose have thus placed significant emphasis upon controlling their patterns of societal movement beyond these immobilising enclosures.²

This punitive and actuarial turn in youth justice policy and practice contributed to the emergence of the third theme, the erosion of the child or young person's 'human rights'. This has been condemned by the United Nations Committee charged with managing the UK's compliance with the United Nations Convention on the Rights of the Child (UNCRC), ratified by the UK in 1991. The Committee has condemned the UK's record of imprisoning children as young as 12, for increasing sentence duration, for targeting non-criminal behaviour through anti-social behaviour legislation and for failing to act in the 'best interests' of the child or young person as the Convention demands (Muncie, 2008: 113).

The Youth Rehabilitation Order

Embodying and consolidating these themes within the community sentencing framework, section 1 and schedules 1-4 of the 2008 Criminal Justice and Immigration Act (CJ&I Act) created a new generic community based sentence: the YRO. This abolishes nine previous community based sentences, incorporating their elements within a menu of 18 requirements, comprising a single community based disposition. The YRO's 'risk-led' model of service delivery - the 'Scaled Approach' (YJB, 2009c) - regulates the *nomadic* child or young person's *differential access* to the public spaces of an advanced liberal Britain. This access is actuarially determined by an

rather than children with considerable welfare 'needs' (Goldson, 2000). Some criminology theorists warn of the process of 'deviancy amplification' which such labelling can engender (Becker, 1963; Erikson and Kitsuse, 1962).

² Civil dispositions introduced to regulate access to public space include the 'local child curfew' (sections 14 and 15 of the Crime and Disorder Act 1998) and the 'dispersal order' (part 4 of the Anti-Social Behaviour Act 2003). The Youth Crime Action Plan (Ministry of Justice, 2008) provides dispersal powers to police and community support officers through 'operation staysafe' and 'afterschool patrol' initiatives, allowing removal of the child or young person from public spaces when putting themselves at 'risk'. Criminal dispositions introduced to regulate the physical movement of the 'young offender' include: the 'curfew order with electronic monitoring', introduced for those aged 16 and over by the 1991 Criminal Justice Act and extended to those aged 10-15 by section 43 of the Crime (Sentences) Act 1997; the 'action plan order' (section 69 and 70 and schedule 5 of the C&D Act 1998) and the 'exclusion order with electronic monitoring' (section 40A of the Powers of Criminal Courts (Sentencing) Act 2000, as inserted by section 46 of the Criminal Justice and Court Services Act 2000).

individualised ‘risk score’ generated through the *Asset* (YJB, 2006a) risk assessment tool which distributes them into one of three ‘scaled’ levels of intervention, each proposing a different intensity of intervention and control (YJB, 2009c).

The YRO has the potential to significantly undermine the child or young person’s criminal justice rights of ‘due process’ and ‘proportionality’, enshrined within human rights declarations and treaties.³ It shifts sentencing determination and post-sentence oversight to the executive, where ‘youth offending team’ (YOT) practitioners determine the content and management of the order, based almost exclusively upon the fluctuating ‘risk profile’ of the child or young person, rather than ‘offence seriousness’.

The YRO is thus indicative of the flattening of the hierarchical tariff-based sentencing structure by an emerging actuarial regime of *control* (O’Malley, 1996., Feeley and Simon, 1992) which extols flexible and responsive administrative responses to youth offending (Macrory, 2006) tailored to ‘individualised risk’. The tailoring of sentences to the ‘young offender’s’ risk profile, rather than the seriousness of their index offence, could lead to an incarcerative process of up-tariffing. Such actuarial logic also has the potential to contribute to a criminalising process of ‘net-widening’ (Cohen, 1985) as the conceptual and administrative boundaries between the ‘child in need’ and the ‘delinquent’ begin to blur as ‘needs’ are re-configured as ‘individual risks of reoffending’ (Hannah-Moffat, 1999) to be perpetually managed. The hybrid composition of the YRO, incorporating both ‘welfare’/care and ‘justice’/punitive based requirements, suggests this has already occurred as actuarial crime control logic has penetrated both the community sentencing structure and the child welfare apparatus.

Foucauldian Genealogy: A History of the Present

The contemporary youth justice landscape outlined above is informed by a governmental crime control rationality, and its concomitant strategies of rule, whose suppositions and central axioms have assumed the status of commonsense within governmental policy circles and youth justice practice alike. Indeed, even to the wider population the punitive and risk-centric policy responses of government to a population of peripatetic ‘underclass’ children and young people has: “the same familiarity and easy intelligibility as other common elements of our everyday life such as cable television, mobile phones, or sub-urban shopping malls” (Garland, 2001: 1).

³ Rule 5.1 and Rule 17.1 (b) *UN Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules) include provisions ensuring the child or young person subject to juvenile justice interventions is dealt with proportionately and in the least restrictive manner. Article 40 (2b) of the UNCRC enshrines the child or young person’s due process rights in an almost universally ratified human rights instrument.

Against this ‘naturalisation’ and objectification of contemporary responses to ‘at risk’ or ‘risky’ populations of children and young people, it is worth noting that the current arrangements are historically contingent. They represent profound discontinuity with criminal justice responses to deviant youth which predominated as recently as the 1980s, when a strategy of ‘minimal intervention’ (Schur, 1973) held sway. Youth justice policy and practice within England and Wales has not been characterised by a straightforward linear development of which the present arrangements are the predictable and necessary outcome. Our present is shaped by contingent historical, socio-political and legal ‘surfaces of emergence’ (Foucault, 1972: 41). Therefore this genealogy is not motivated by a concern to understand the past in terms of the present, viewing present arrangements as the frontier of an undisturbed teleological development. It endeavours to uncover the contingency of the past, its discontinuity, accidents, minute deviations: “or conversely, the complete reversals- the errors, the false appraisals, and the faulty calculations that gave birth to those things which continue to exist and have value for us” (Foucault, 1977a: 146) today within the field of youth justice. The historical narrative which unfolds throughout this thesis is thus: “constructed from discreet and apparently insignificant truths” (ibid: 140) which have remained buried or peripheral in previous historical inquiries.

The concern which animates this work will be to radically historicise the present by uncovering the legal mechanisms, political and scientific discourses, socio-historical conditions and power arrangements upon which contemporary practices depend. The Foucauldian genealogical method which informs this historical analysis is concerned with the centrality of power and domination to the constitution of governmental crime control rationalities and strategies of rule, and the policy and institutional responses to both ‘children in need’ and ‘young offenders’ which they inform. It adopts a critical ethos towards these machinations of power (Owen, 1994).

Mobilising knowledge against the seeming ‘naturalness’ of contemporary arrangements, a Foucauldian approach to knowledge is adopted: viewing it as a weapon (Foucault, 2003).⁴ For the genealogist: “knowledge is made not for understanding, it is made for cutting” (ibid: 154) and undermining: “what was previously considered immobile...fragment[ing] what was thought unified... [and]... show[ing] the heterogeneity of what was imagined consistent with itself” (Foucault, 1977a: 147). This research brings the past to bear upon the present emasculating arrangements predominating within the field of youth justice. It aims to show that our present: “might have been- and might still be- differently arranged” (Garland, 2001: 3) by engaging in a form of ‘effective history’ (Foucault, 1977a) whose: “point is not to think historically about the past but rather to use that history to rethink the present” (Garland, 2001: 2) and imagine a future for youth justice which is not yet our own.

⁴ Claims to knowledge also necessarily entail an imposition of force: “... discourse is not simply that which translates struggles or systems of power, but is the thing by which there is struggle, discourse is the power which is to be seized” (Foucault, 1984: 110).

Chapter Outline and Development

Chapter One begins with the present arrangements within youth justice policy and practice, outlining the YRO's legislative provisions and integral features prior to problematising its potentially punitive and 'rights' eroding modality of operation. It shall be suggested that in order to effectively critique this governmental technology, political power and its relationship to violence must be reconceptualised. The shift from pre-modern 'societies of sovereignty' (Foucault, 1978) – which ruled juridical subjects through the instruments of law – to modern 'governmentalised' societies (Foucault, 2007) - which govern the life, health and security of the population through managerial and administrative apparatuses - shall be traced. The resultant shift towards largely 'extra-judicial' modes of sanctioning, legitimising, and regulating modern state violence shall be outlined. Issues surrounding the legal legitimacy of this violence will be explored, as will the incongruence of its 'bio-political' objectives with the imperatives of 'justice'. It will be suggested that the 'governmentalisation' of state power in modernity has led to the emergence of a paradigm of governance within youth justice which obfuscates the distinction between executive and judicial powers within governmental technologies such as the YRO. The role this has in empowering the executive and potentially creating administrative 'petty sovereigns' (Oksala, 2007) hidden within administrative-institutional sites shall be interrogated. The potential for this obfuscatory paradigm of governance to expose the child to *exceptional sovereign violence* - violence which is direct, arbitrary and subject to severely weakened judicial regulation (Oksala, 2010: 42) - will also be explored.

Chapters Two-Six perform a genealogy of the obfuscatory paradigm of governance, and the governmental crime control rationality, which animates and underpins the YRO by tracing the emergence, development and subsequent 'governmentalisation' of youth justice through the developmental prism of the nine community based sentences which the YRO abolishes, and whose elements it incorporates within a menu of requirements. This approach aims to uncover the socio-political, legal and criminological factors informing the development and introduction of the YRO, and the obfuscatory logic of governance imbuing it, in an effort to devise a future for youth justice which will mitigate its potential to erode the 'young offender's' judicial protections.

Chapter Two commences the genealogy by situating the emergence of the hybrid penal-welfare structure of the juvenile court at the beginning of the 20th century along a welfarist developmental trajectory animated by a shift from a *sovereign* to a *disciplinary* modality of power. The extent to which a problematisation of the vagrant/*nomadic* and un-segregated 'form of existence' of the children of the 'perishing' and 'dangerous' classes contributed to the emergence of a governmental concern with the welfare of the child shall be explored. The precursor to the

probation order – the judicial procedure of *recognisance* – will be analysed in relation to an array of ‘anti-*nomadic*’ measures introduced to segregate and immobilise this population.

The chapter concludes by tracing the juvenile court’s journey from a criminal jurisdiction to a welfarist jurisdiction at the apotheosis of the welfare-era in the late 1960s and early 1970s. The ramifications which this ‘governmentalisation’ of youth justice, and the emergence of an obfuscatory paradigm of governance, had for the lower class child shall be explored. To this end the governmental technology of the ‘supervision order’ shall be analysed and situated within a youth justice strategy of ‘familial enclosure’. Its role in creating a space of practice where administrative ‘petty sovereigns’ could thrive, and the ‘young offender’ was potentially exposed to *exceptional sovereign violence*, will be examined.

Chapter Three begins by illustrating how the ‘governmentalisation’ of youth justice during the welfare-era contributed not only to a ‘welfarisation of delinquency’ but a ‘net-widening’ ‘jurisdiction of need’ and process of up-tariffing. The chapter then explores the socio-political, legal and fiscal factors which coalesced to undermine the ‘governmentalisation’ of youth justice as a political strategy of rule throughout the 1970s. It focuses upon the empirical, criminological and theoretical critiques which fatally undermined the underpinning ‘welfare-model’ of youth justice policy and practice. These developments will be situated within a shift from a collectivist and inclusionary social welfare modality of political rule to an individualistic, exclusionary and fiscally conservative neo-liberal mode of governance. The adverse effect which this shift had on the disciplinary modality of power, and the disciplinary strategy of familial enclosure, exercised within youth justice shall be illustrated through an evaluation of the ‘attendance centre order’s’ reconfiguration to deal with the re-emergence of the *nomadic* children of the ‘dangerous classes’. The chapter will also examine how these disparate factors contributed to the emergence of the ‘justice-model’ as the dominant theoretical model underpinning youth justice policy and practice in the early 1980s. The role which the offence-centric, and criminal justice rights enshrining, ‘justice-model’ played in reigning in administrative ‘petty sovereigns’ and inhibiting the ‘young offender’s’ exposure to *exceptional sovereign violence* shall be outlined. The function of the ‘community service order’ within a ‘justice’ strategy of ‘diversion, decriminalisation and decarceration’ (Goldson, 1999) which served to arrest the ‘net-widening’ and up-tariffing consequences of the ‘welfare-model’ shall be investigated.

Chapters Four and Five outline the emergence of a new regime of power within youth justice: the regime of *control* (Deleuze, 1997), following the disintegration of the familial enclosure at the threshold of postmodernity. The actuarial logic, governmental technologies and systemic institutional forms which *control* introduces shall be delineated, as will public sector resistance to their implementation. This task shall be performed with reference to both the introduction of a range of risk-centric governmental technologies: the ‘curfew order with electronic monitoring’;

the ‘exclusion order with electronic monitoring’; the ‘drug treatment and testing order’; and older community based sentences, reconfigured to function within the regime of *control*. The chapter aims to show how *control* functions through generalised and unbounded forms of surveillance and control which break through the wall of the institutional enclosure. These govern *at-a-distance* the *nomadic* child’s access to the interconnected institutional sites and societal ‘circuits of movement and mixture’ (Hardt and Negri, 2000: 198) which comprise the post-disciplinary society of control.

Chapter Six outlines the development and implementation of the YRO, and its obfuscatory paradigm of governance, expounding the reasons why it was modelled upon the regulatory and risk-centric ‘action plan order’. The chapter argues that the YRO represents the legislative consolidation of the regime of *control* as the dominant modality of power exercised within youth justice. The effect it may have in diffusing the exercise of *exceptional sovereign violence* throughout the social field shall be addressed, as will its ‘net-widening’ and up-tariffing effects, exemplified by the YRO’s amalgamation of the ‘child in need’ and the ‘delinquent’.

The thesis concludes by proposing a return to the offence-centric, and criminal justice rights enshrining, ‘justice-model’ of youth justice policy and practice in an effort to prevent both the criminalisation and up-tariffing of those children and young people with ‘needs’ and the exposure of the child or young person to *exceptional sovereign violence* within the youth justice system (YJS).

Chapter One

Theorising the Present: The YRO and the Reign of Administrative ‘Petty Sovereigns’

*“[T]here is no liberty, if the judicial power be not separated from the legislative and executive. Were it to be joined to the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be the legislator. **Were it joined to the executive however, the judge might behave with violence and oppression.**”* (Montesquieu, quoted in Vile, 1967, emphasis added).

This chapter outlines the legislative provisions and integral features of the YRO prior to problematising its potentially punitive and ‘rights’ eroding modality of operation. It will be expounded that this modality of operation, and the governmental logic which underpins it, is derived from a working paradigm of governance characteristic of modern ‘governmentalised’ states (Foucault, 2007). This increasingly obfuscates the distinction between executive and judicial powers resulting in the empowerment of the executive and the administrative practitioners and ‘experts of life’ which do its governmental bidding.

This chapter suggests that to subject the YRO to effective critique we must reconceptualise political power and the forms which state sanctioned violence take in modernity. It will be argued that a Foucauldian understanding of political power as ‘governmentality’ (Foucault, 2007) elucidates the novel and insidious governmental practices of violence which proliferate throughout the administrative-institutional sites of modern ‘governmentalised’ states, allowing them to be subjected to critical evaluation. The chapter traces the emergence of this modern modality of power by outlining the shift from pre-modern ‘societies of sovereignty’ - which governed the juridical subject through the instruments of law (Foucault, 1978) - to modern ‘governmentalised’ societies (Foucault, 2007) which govern the life and health of the population through managerial and administrative apparatuses: “with policies, tactics and strategies based on various forms of scientific knowledge” (Oksala, 2007: 59). It will be argued that this process, termed by Foucault (2007) as the ‘governmentalisation of the state’, contributed to the emergence of an obfuscatory paradigm of governance which blurs the distinction between executive and judicial powers, potentially creating administrative ‘petty sovereigns’ subjected to diluted or compromised judicial restraints upon their arbitrary exercise of power. The chapter will explicate how this modality of governance may hinder judicial protections from reaching the ‘young

offender' subject to the YRO, potentially exposing them to *exceptional sovereign violence* i.e., violence which is direct, arbitrary and subject to severely weakened judicial regulation (Oksala, 2007).

YRO's Key Features and Modality of Operation

The CJ&I Act 2008 signalled the: "biggest legislative change for the youth justice system since the Crime and Disorder Act 1998" (YJB, 2009a: 6). It introduced the Youth Conditional Caution as a higher tariff pre-court disposal aiming to divert young people who commit low level offences from court. It extended the powers of the youth court to impose a Referral Order on more than one occasion and provided for the Youth Default Order, enabling courts to impose punitive requirements upon 'young offenders' in lieu of an unpaid fine (ibid). The most significant legislative change was the introduction of the YRO: a new generic community based sentence for children and young people aged 10-17.

The YRO came into effect across England and Wales on 30th November 2009. The governmental rationale underpinning its development and introduction was informed by the belief that the 'menu-based' community sentence, giving sentencers a choice of 18 requirements, would 'simplify' the sentencing structure and: "offer sentencers greater flexibility, giving them a range of requirements that address a child or young person's offending" (YJB, 2009b). To support the YRO and its 'flexible' application, the YJB for England and Wales and four pilot YOTs developed the 'Scaled Approach', a risk-led model of assessment and intervention which: "match[es] the intensity of a YOT's work to a young person's assessed likelihood of reoffending or risk of serious harm to others" (ibid).⁵ The 'Scaled Approach' is conceptualised within the managerial rationality of the YJB, as a model of service delivery which will 'strengthen case management across the youth justice system' by individually tailoring the requirements attached to the YRO to the assessed 'risks' and 'needs' of each child or young person (YJB, 2007a).

The YRO, as the: "standard generic community sentence for young people who offend" (YJB, 2009a: 10) supplanted nine community based sentences listed below:

Figure 1

- | | |
|---------------------|------------------------------------|
| > Action Plan Order | > Attendance Centre Order |
| > Curfew Order | > Drug Treatment and Testing Order |
| > Supervision Order | > Exclusion Order |

⁵ The YOT areas which piloted the 'scaled approach' were Wessex, Suffolk, Neath Port Talbot and Shropshire Telford and Wrekin.

> Community Punishment Order

> Community Rehabilitation Order

> Community Punishment and

Rehabilitation Order.

The YRO is available to sentencers in the Youth, Magistrates' and Crown Courts. It should only be imposed if the court is satisfied that the offence/s is/are 'serious enough', as per section 148 of the Criminal Justice Act (CJA) 2003. However, the CJ&I 2008 Act amends this by clarifying that even if an offence crosses this threshold: "nothing in section 148 requires the court to impose a community sentence even though the offence is serious enough to justify such a sentence" (s10 CJ&I Act 2008: explanatory notes). The YRO may not be imposed where the 'compulsory referral conditions' are shown to exist, thus the: "order will not be available in a youth court or magistrates court for a first time offender who has pleaded guilty to an imprisonable offence" (Sentencing Guidelines Council (SCG), 2009: 14).

If a young person reoffends whilst subject to a YRO, courts are expected to utilise the order on 'multiple occasions': "adapting the menu as appropriate to deal with repeat offending" (YJB, 2009a: 10). The YRO aims to facilitate sentencers in imposing more individualised and targeted community sentences (ibid), supported by the information provided by YOT practitioners utilising the 'Scaled Approach' (YJB, 2009c) to inform pre-sentence reports (PSRs) to the court. The PSR recommends to the court which 'packages of interventions' would be suitable for inclusion based upon the 'young offender's' risk profile (ibid).

When a PSR has been requested by the court the YOT practitioner must utilise the YJB *Asset-Core Profile* (YJB, 2006a) assessment tool to determine the 'young offender's' 'likelihood of reoffending' and 'risk of serious harm to others'. This generates a risk score between 0-64 which categorises the child or young person into one of three 'scaled' levels of intervention (*standard*, *enhanced* or *intensive*), each proposing a graduated intensity of control and combination of requirements specific to their risk score (YJB, 2009c).

The requirements which are listed below can be attached to a YRO, with no restriction placed upon the number or combination of requirements:

Figure 2

> Activity Requirement

> Supervision Requirement

> Unpaid Work Requirement

> Programme Requirement

> Attendance Centre Requirement

> Prohibited Activity Requirement

> Curfew Requirement

> Exclusion Requirement

- > Residence Requirement
- > Mental Health Requirement
- > Drug Testing Requirement
- > Education Requirement
- > YRO with Intensive Supervision and Surveillance
- > Local Authority Residence Requirement
- > Drug Treatment Requirement
- >Intoxicating Substance Treatment Requirement
- > Electronic Monitoring Requirement
- > YRO with Intensive Fostering

However, the ‘YRO with intensive supervision and surveillance’ and the ‘YRO with intensive fostering’ are ‘intensive activity’ requirements designed as ‘alternatives to custody’. Generally therefore they can only be imposed: “where the offences are imprisonable and so serious that if the ‘intensive activity’ requirements were not available, a sentence of custody would be appropriate” (Nacro, 2008: 1). The YJB thus believes that the plethora of disparate requirements provided within the YRO framework offers a: “viable and robust alternative to custody” (YJB, 2009a: 11), and with effective use the YRO should reduce reoffending, and effect a reduction in youth custody figures (ibid).

The menu of requirements is designed to attend to the purposes of sentencing. The CJ&I Act 2008 requires sentencers to have regard to the punishment, reform and rehabilitation of ‘young offenders’, public protection and the making of reparation by ‘young offenders’ to victims (SGC, 2009). In accordance with section 44 of the Children and Young Persons Act (CYPA) 1933 the court must have regard to the ‘welfare’ of the child or young person. It is required to find the correct balance between these principles (ibid: para. 10.11) whilst also ensuring that no requirements conflict with the child or young person’s religious beliefs, interfere with times they are in education or employment (if applicable), or impinge upon the requirements of any other YRO to which they may be subject (YJB, 2009a).

Despite the tensions existing between these purposes of sentencing, section 9(2a) of the CJ&I Act 2008 establishes the ‘principal aim’ with regard to ‘young offenders’ as the ‘prevention of offending’, a move aligning sentencing priorities with the principal statutory aim of the wider YJS, established by s 37 (1) of the C&D 1998.

The maximum duration for completion of all YRO requirements is three years from when the order came into effect (CJ&I Act 2008, sched. 1, para. 32, 1). However, individual requirements may have statutorily imposed timescales which can be less than the overall YRO duration, which ends when its longest requirement expires (YJB, 2009a). For instance a ‘curfew requirement’ is

available for a maximum of six months and an ‘exclusion requirement’ for a maximum of three months, whilst a ‘supervision requirement’ remains in force for the duration of the order (ibid).

Generally a child or young person can only be subject to one YRO at any given time. If they reoffend whilst subject to a YRO, the court can only impose a new YRO if the existing one is revoked (ibid). However, they can be subject to ‘multiple YROs’ if being sentenced for two or more associated offences. The court can impose a YRO for each offence, although the order must be ‘non-intensive’ to be eligible for combination with another YRO (ibid: 13). The court must stipulate whether they are to run concurrently or consecutively (ibid). If consecutively, this hypothetically extends the duration of the order well beyond the three year maximum.

The designated ‘responsible officer’, who manages the YRO post-sentence, is the YOT practitioner, except when the only requirement is a ‘curfew’ or ‘exclusion’ requirement with ‘electronic monitoring’, an ‘attendance centre’ requirement or an ‘unpaid work’ requirement. Then the ‘responsible officer’ will be the electronic service provider, the officer in charge of the attendance centre, or a probation officer respectively (YJB, 2010a). The ‘responsible officer’ has a range of ‘quasi-managerial’ duties. These include making necessary arrangements ensuring local protocols are in place between the YOT and various ‘partner agencies’ to facilitate the delivery of the YRO’s disparate requirements. The: “ case manager should co-ordinate services with other agencies (including local community safety partnerships) to prevent reoffending...and...be fully aware of the range of partner agency planning, intervention and review frameworks so that they can fully understand and co-ordinate relevant services and plans” (ibid: 7). In addition to this ‘quasi-managerial’ role, the YOT practitioner should promote and enable adherence to the YRO’s requirements, and when necessary take steps to enforce these (ibid).

The ‘Scaled Approach’ informs the YOT practitioner’s ongoing management of the ‘young offender’s’ YRO post-sentence. The YOT practitioner may exercise their ‘professional judgment’ to amend the level and intensity of supervision at the review stage of the YRO. In accordance with National Standards (YJB, 2009d) this is every three months, or sooner where evidence suggests that the level of risk posed by the child has changed (YJB, 2009c: 15). Although this ‘professional judgement’ is not subject to stringent judicial oversight it is not representative of an unfettered professional autonomy. Any proposed changes: “...should be defensible, discussed and agreed with a manager and the reasons clearly recorded... [and]... must be based upon an updated assessment of the likelihood of reoffending and risk of serious harm to others using *Asses*” (YJB, 2009c: 15). Their professional autonomy is also severely curtailed by adherence to National Standards (YJB, 2009d), Case Management Guidance (YJB, 2010a) and Key Elements of Effective Practice guidance (YJB, 2008).

The central aim informing the YOT practitioner's supervision is ensuring engagement and compliance with the order (YJB, 2009d., YJB, 2010a). Those subject to the YRO must adhere to supervision requirements and: "keep in touch with the responsible officer as directed and must notify the responsible officer of any change of address" (YJB, 2009a: 14). The requirements are 'enforceable obligations'. Breach proceedings can be initiated if they: "have failed without reasonable excuse to comply with any requirement in their order on three separate occasions within a twelve month 'warned period', which begins on the date of the first warning" (YJB, 2009a: 14). Each warning must be formalised with a letter outlining the failure to comply, stating that the infraction of the order is unacceptable and informing the young person that they are: "liable to be returned to court for their failure to comply" (ibid: 15). The YOT practitioner can instigate breach proceedings outside the warning period where violation is: "of the nature which requires such action" (ibid: 15). During a warning period the 'responsible officer' has a 'discretionary power' to refer the order back to the court for a second failure to comply while there is a presumption in favour of referral back to court following a third failure. At this stage: "breach action can only be stayed in exceptional circumstances with the authorisation of the YOT manager" (YJB, 2009c: 15).

Contrary to the legal obligation concerning adult offenders subject to a 'community order', when breach of the YRO has been proved the court has no obligation to amend the order (SGC, 2009). The sentencing options available are firstly, the imposition of a fine of up to £250 if the child or young person is under 14 or up to £1000 if they are over 14 (with the order continuing in its current form). Secondly, the court may amend the YRO, adding any requirement available to the original court or substituting any requirements for those which are more suitable (ibid). Thirdly, for 'wilful and persistent offenders', the court may revoke the order and impose a YRO with an 'intensive activity' requirement even when the original offence did not meet the sentencing threshold i.e., did not warrant a sentence of custody. For further breach a custodial sentence not exceeding four months may be imposed. Finally, the court can revoke the order and resentence for the original offence (ibid).

Problematizing the YRO: The Empowerment of the Executive and Attenuation of 'Young Offenders' Criminal Justice Protections

The YRO marks a seismic shift in sentencing determination and post-sentence oversight and management of community based dispositions, from the judiciary to the executive. The YOT practitioner effectively determines, in line with the 'Scaled Approach' model of assessment and intervention, which requirements should be included within the disposition in the child or young

person's PSR and flexibly adjusts the intensity of intervention post-sentence in order to effectively manage fluctuations in risk.

Despite severely compromised judicial oversight of post-sentence management,⁶ the YOT practitioner does not have unfettered professional autonomy. They are rendered governmental policy 'technicians', with management of the new generic community disposition being delimited by centrally accredited risk assessment tools (YJB, 2006a; 2009c) and prescriptive governmental 'technologies of performance' (Dean, 1999) in the guise of 'National Standards', 'Effective Practice' and 'Case Management' guidelines.

The YRO creates a space of practice where judicial 'norms' and protections may not be able to reach. The administrative determination and regulation of the disposition has the potential to significantly undermine the universal criminal justice principle of *due process*, and the procedural protection, judicial oversight and restraint of arbitrary power which it entails (Gelsthorpe, 2006).

The deployment of a risk-centric disposition within the community sentencing structure and the 'individualised' and 'tailored' sentencing which it promotes also has the potential to compromise the universal criminal justice principle of *proportionality*. This entails a correspondence between 'offence seriousness' and the sentence imposed. The 'risk-led' disposition of the YRO conflicts with this sentencing principle, deploying an actuarial, rather than criminal justice, understanding of 'proportionality'. It detaches 'proportionality' from 'offence seriousness' and rearticulates it onto an individualised 'risk score' borne by the 'young offender' which serves to ensure a correspondence between this 'risk score' and the content, duration and intensity of their disposition. The maximum length of the sentence at three years, and hypothetically longer as discussed above, highlights the sentencing latitude provided to courts to ensure the control of the risk posed by 'young offenders'. The possibility of children and young people who have committed relatively minor offences but who are deemed 'high risk' becoming subject to a process of up-tariffing due to their social and/or personal characteristics (as identified by Asset) is a very real danger.

Despite the tailored nature of the YRO, the sentencing guidelines attempt to accommodate the principle of proportionality by linking it to the content and length of the order (SGC, 2009: para. 10.4). The Sentencing Guidelines Council (SGC) acknowledges the tension introduced into the heart of the sentencing structure between the principle of 'proportionality' and risk 'control', stating that: "particular care will need to be taken where a young person has committed a relatively less serious offence but there is a high risk of reoffending" (ibid: 8). However as discussed, the CJ&I Act 2008 has now brought the 'principal aim' of sentencing in line with the

⁶ 'Judicial review' does ultimately exist as an *ex post facto* legal mechanism through which a remedy for governmental abuses of power can be obtained. Otherwise it could be argued that the YRO deprives the 'young offender' of all judicial protections, effectively creating a 'state of exception' (Agamben, 1995: 166-180).

principal statutory aim of the YJS: the ‘prevention of offending and reoffending by children and young people’. This infuses the sentencing structure with the overwhelmingly pre-emptive and risk-centric rationality cultivated by New Labour within youth justice (Audit Commission, 1996., Home Office, 1997a., Haines et al, 2008) since coming to power in 1997. It is therefore likely that the tension between proportional desert based sentencing and ‘control’ will be resolved in favour of the latter.

This assertion is supported by a close analysis of the threshold for the two most restrictive requirements within the YRO: the ‘intensive supervision and surveillance requirement’ (ISSP), and the ‘intensive fostering requirement’ (IFR). Although these are designed to offer ‘alternatives to custody’ and can only be imposed where the offence/s is/are so serious that if they had not been available a sentence of custody would have been appropriate (Nacro, 2008), persistent breach of potentially onerous YRO requirements can result in its revocation and the imposition of a new YRO with an ‘intensive’ requirement attached (YJB, 2009a). For further breaches a ‘detention and training order’ (DTO) may be imposed (ibid). This highlights the potential for an incarcerative process of up-tariffing following the revocation of the disposition for breach, with punitive responses likely to be utilised to deal with those who find the requirements, and increased agency supervision, onerous.

The YRO and the ‘Governmentalisation’ of State Violence

“What we need, however, is a political philosophy that isn’t erected around the problem of sovereignty, nor therefore around the problems of law... We need to cut off the King’s head: in political theory that has still to be done.” (Foucault, 1980: 121).

The potentially punitive, and criminal justice rights eroding, YRO raises important questions regarding the legitimacy of state sanctioned violence exercised upon ‘young offenders’. In order to effectively critique this it is necessary to grasp the transformations undergone by political power since the onset of modernity, and the attendant, and novel, forms of state violence which these changes have brought with them.⁷ If the conceptualisation of political power is restricted to the traditional notion of juridical power, or what Foucault (1978) termed *sovereign power*, “state violence is always legitimate violence...it is a violence which is legitimized through state sovereignty... [with]... the rule of law as its instrument” (Oksala, 2007: 53). A pre-occupation with sovereign violence exercised through juridical means serves to mask the new and hidden forms of state violence: “the insidious leniencies, unavowable petty cruelties, small acts of cunning, calculated methods... [and]... techniques” (Foucault, 1977b: 308), which have, since

⁷ This thesis deploys a Foucauldian understanding of ‘violence’ (Foucault, 1982). It is an action which: “acts immediately and directly upon the body” (Oksala, 2007: 64). Violence is intimately related with political power and is deployed towards its ends, whether these ends are deductive or productive (see below: pages 23-27).

modernity, proliferated throughout corrective administrative-institutional sites where judicial protections often cannot reach.

Governmentality and Bio-Political Violence: From Public Sovereign

Violence to Hidden Bio-political Violence in Administrative-Institutional

Sites

“What is important for our modernity is not the state’s takeover of society, so much as the governmentalization of the state” (Foucault, 2007: 109).

Foucault’s concept of ‘governmentality’ refers to a modern form of governance emerging in the 18th century which governs the body of the individual, and the ‘species life’ of the population, through normative processes (biological, psychological, sociological etc) conceived as: “external to the institutions of formal political authority” (Dean, 1999: 98). This modality of governance aims to intensify, perfect and maximise these processes, consequently increasing the strength and vitality of the social body and by implication the state vis-à-vis other states (Foucault, 1981).

Conceptualising state power as ‘governmentality’ has a substantial advantage over other critical methods which focus exclusively upon the state apparatus in an attempt to render intelligible how children and young people are governed through the deployment of state sanctioned violence. Its analytical utility exists in its ability to widen the ambit of what is considered ‘political’ and thus rendering visible previously hidden forms of state sanctioned violence exercised within the administrative-institutional sites of a ‘governmentalised’ state. It performs this task by illustrating how modern: “power is assembled into complexes that connect up forces” (Rose, 1996: 37) between institutions considered to be part of the political apparatus of the state and local and regional institutions often deemed ‘non-political’ (ibid).

Governmentality has a broader conception of what constitutes ‘governmental authorities’: “embracing families, churches, experts, professions and all the various powers that engage in the ‘conduct of conduct’” (Garland, 1997: 175). It undermines the dichotomy which exists within liberal political philosophy between the ‘public’ - a circumscribed sphere of government, and the ‘private’ - a sphere of liberty and individual freedom which exists in a relationship of exteriority to the state known as ‘civil society’ (Dean, 2002). From the perspective of ‘governmentality’ this public-private divide is spurious, the ‘personal’ is most definitely ‘political’ with ‘private’ institutions such as the family being integral to governmental strategies of rule. As such they have formed integral sites within and through which governmental power has been exercised throughout modernity. It also undermines critical approaches, such as those promulgated by Marxists, which place excessive emphasis upon the state, portraying it as the essential: “target to be attacked and ... the privileged position to be occupied” (Foucault, 2007: 109).

Governmentality suggests that this is one-dimensional and thus misleading. It aims to show that although the state: “is undoubtedly a nodal point from which emerge all sorts of projects of governance, and a locale from which ‘private powers’ derive support for their authority, it is by no means the *fons et origo* of all governmental activity” (Garland, 1997: 175).

In contradistinction to these reductionist analyses of power which locate the source and origin of power within the state, the concept of ‘governmentality’ begins with the ‘micro-physics’ of power. It de-centres analyses of power from the state apparatus and refocuses its understanding: “looking at its extremities...its outer limits at the points where it becomes capillary...[in order]...to understand power in its most regional forms and institutions” (Foucault, 2003: 27). Power is not conceived as the property of the bourgeois class or sovereign state but as a ‘multiplicity of force relations’ immanent to the domain: “within which they operate and constitute their own organisation” (Foucault, 1978: 92). For Foucault these *force relations* within the ‘social’ find tactical support in one another and form ‘chains, networks and systems’ of power which due to ‘strategical’ efficacy come to be connected to the centralised institutions and apparatuses of the state (ibid). Governmentality explicates the ways in which these regional assemblages and arrangements of power come to be colonised by, and integrated within, the governmental strategies of the state (Garland, 1997). It illustrates how administrative practices of government which aim to manage the life processes of the population have come to displace and re-configure centralised forms of state power. It therefore exposes how judicially sanctioned and legitimised forms of state violence have been displaced by more subtle and pervasive forms of executively sanctioned coercion throughout modernity.

The de-centralised and insidious nature of power within modern societies ensures state sanctioned violence is both more generalised and insidious, rendering its judicial regulation ever more necessary. To problematise this modern form of violence it is first necessary to re-conceptualise political power and its relationship to violence by tracing the historical shift from pre-modern ‘societies of sovereignty’ to what Foucault (1978; 2008) termed modern ‘bio-political societies’. This is to outline the actual historical process by which western societies became ‘governmentalised’. In place of what Foucault (1978) termed ‘sovereign power’ - a model of power in which a sovereign ruled the juridical subject through the instruments of law - today we live in societies: “in which a complex managerial and administrative apparatus governs the population with policies, tactics and strategies based on various forms of scientific knowledge” (Oksala, 2007: 59).

For Foucault the relationship between power and violence, and the forms which violence has taken, contrasted greatly between the pre-modern regime of *sovereign power* and the modern regime of *bio-power* (Foucault, 1978) emerging along a line of modification in the ‘art of government’ which Foucault termed the ‘governmentalisation of the state’ (Foucault, 2007: 109).

Within ‘societies of sovereignty’ power was delimited to juridical sovereignty and the centralised

institution of the state (Foucault, 2003: 34). Sovereign power was founded upon the use, or threat, of violence which utilised the rule of law as its instrument (Oksala, 2007). It was thus a means of deduction, a: “right of seizure: of things, time, bodies and ultimately life itself; it culminated in the power to seize hold of life in order to suppress it” (Foucault, 1978: 136). The negative and deductive manner in which the violence of sovereign power was deployed was illustrated by the fact that the sovereign exercised his power over the life of his subjects only through ‘the death he was capable of requiring’. It was a power to *take life or let live* (ibid: 136).

The sovereign, who acquired his principality through inheritance or by conquering it, existed in an external and transcendent relationship to his territory, having a ‘synthetic’ rather than a: “fundamental, essential [or] natural” (Foucault, 2007: 91) relationship to it. As such his rule was fragile, continuously threatened by internal and external enemies. Sovereign violence was thus exercised in an instrumental fashion, deployed to maintain, strengthen, and protect his rule over his territory and thus ultimately to secure his power. Sovereign power was therefore first of all exercised over a geo-political territory: “and consequently on the subjects who inhabit[ed] it” (ibid: 96). Sovereign violence was exercised in a public and exemplary fashion and only over the few, in a manner which aimed to deter by exposing those who witnessed it: “to a ferocity from which one wished to divert them” (Foucault, 1977b: 9; *also see* ibid: 48).

Sovereignty, in its singular transcendent position above the social field, became less effective in regulating the population throughout the 18th century due to the huge demographic upheaval caused by industrialisation (O’Farrell, 2005: 102). The negative and deductive nature of sovereign violence, which in a circular and self-referential fashion was exercised in order to ensure the continued existence of the sovereign, was no longer congruent with the *raison d’etat* of the modern state. The *raison d’etat*, which arose alongside the administrative state in the 16th century, was a secular and autonomous rationale for government which objected to the ends of the state being subordinated to the whims of a prince or a particular faith (Dean, 1999: 84). This modern rationale for government espoused the notion that: “the first duty of government was to know itself, and to enhance its strength, its wealth, its population, and its competitive position vis-à-vis other states” (Garland, 1997: 176). As such, a new modality or ‘technology of government’ emerged which was not concerned with territory but ‘a complex of men and things’: that of ‘governmentality’ (Foucault, 2007: 87-100).

With the emergence of ‘governmentality’ the exercise of state power became immanent to the social field (ibid). It was no longer directed towards the maintenance of the sovereign’s territorial rule, but towards the perfection, maximisation and intensification of the processes within the social body which contributed to the overall strength of the state (ibid). Along this trajectory of *governmentality*, by which power became ever more intimate to the social domain in an effort to ‘know’, enhance and foster: “the vital aspects of a states indigenous strength” (Garland, 1997: 176), in the 17th century at the threshold of the modern era the life processes of human beings - be

they: “economic, social, psychological or biological” (Dean, 1999: 98) - entered into the order of power and the political calculations of the state (Foucault, 1978:142-143). The modern state thus became: “a formidable machine of individualisation and totalisation” (Simons, 1995: 40). The: “modern art of government or state rationality... [began to conceptualise its task as]... develop[ing] those elements constitutive of individuals’ lives in such a way that their development also foster[ed] the strength of the state” (Foucault, 1981: 322). This contributed to the birth of the modern *bio-political* state and the emergence of the regime of *bio-power* (Foucault, 1978; 2008).

Foucault identifies a range of differences in the respective aims and modalities of operation characteristic of sovereign power and bio-power. Contrasting aims and modalities of operation which re-configured both the form and ends of state sanctioned violence, as the regime of bio-power began to displace, and re-configure, sovereignty at the threshold of modernity. Whereas sovereign violence is deductive: it depletes life, bio-political violence is productive: it aims to correct/normalise the living through the enforcement of ‘norms’ derived from the military, human and social sciences (Foucault, 1977b., 1978).

To grasp the nature and productive ends of bio-political violence it is necessary to outline the regime of bio-power’s trajectory of development. The modern bio-political *power over life* is a bi-polar configuration of power which developed in two inter-related forms: a ‘micro-physical’ *anatamo-politics* of the human body and an ‘actuarial’ *bio-politics of the population* (Foucault, 1978: 139). Both poles, which became conjoined in the 19th century (ibid: 140), are productive. Anatamo-politics or *discipline* produces ‘docile bodies’ and bio-political regulation produces: “a healthy and vigorous social body through its administration and optimisation of life” (Simons, 1995: 33).

The *disciplinary pole* of power over life takes ‘man-as-body’ as its object, focusing on its: “disciplining, the optimisation of its capabilities, the extortion of its forces, the parallel increase of its usefulness and docility, its integration into systems of efficient and economic controls” (Foucault, 1978: 139). Unlike sovereignty, exercised in a spectacular fashion and over the *bodies* of the few, discipline is a more subtle form of power exercised over the *interiority* or *soul* of a multiplicity of men. It is an individualising power which functions only: “to the extent that... [this]...multiplicity can and must be dissolved into individual bodies that can be kept under surveillance, trained, used and, if need be, punished” (Foucault, 2003: 242). Thus: “[d]iscipline makes individuals; it is the specific technique of a power that regards individuals both as objects and as instruments of its exercise” (Foucault, 1977b: 170).

Throughout modernity the bio-political state governed the population through a: “general economy of discipline that... [ran]... throughout society” (Hardt and Negri, 2000: 88; Foucault,

1977b).⁸ In the 19th century disciplinary power found its institutional location within a *carceral archipelago* or institutional continuum which included the school, universities, barracks, workshops and even the family (ibid: 299; 215-216). This diffused the disciplinary technique of the penitentiary throughout the institutional apparatus which runs throughout the social body, with each institution adapting the disciplinary modality of power for its own internal purposes (ibid: 215-216).

For Foucault the disciplinary *dispositif* (apparatus) managed to implicate or embed itself so deeply within the social body that it succeeded in transforming itself into apparatuses which took into account the collective biological processes of the population (Hardt and Negri, 2000: 89). The *bio-political* or actuarial pole of bio-power, formed at the end of the 18th century (Foucault, 2003: 243), rather than being an individualising power focused upon the body, was a 'massifying' power focused upon: "a new body, a multiple body, a body with many...heads" (ibid: 245) - the *species body* of the population. A: "body imbued with mechanisms of life and serving as the basis of biological processes: propagations, births and mortality, the level of health, life expectancy and longevity" (Foucault, 1978: 139). Although the bio-political pole of 'power over life' may give rise to individualised scientific assessments and examinations, knowledge is accumulated in actuarial form and individualised bio-political interventions are part of overall mechanisms intended to have regularising effects at the level of: "the entire social body or...groups taken as a whole" (ibid: 146).

A productive form of violence is thus deployed within the administrative-institutional sites of a 'governmentalised' state in contradistinction to the deductive and negative form of violence exercised by the pre-modern sovereign regime. The bio-political regime deploys violence in a manner which is not only deductive and punitive but also corrective and normalising. "[I]t deactivates the transcendent violence of the law in favour of the immanent power of the norm... [and thus]... no longer merely threatens life, deducts from its forces and constrains its energies but rather incites and supports life, maximises its potential and nurtures its capacities" (Prozorov, 2007: 60). At its disciplinary pole it introduces a series of 'micro penalties' or material coercions which subject the: "slightest departures from correct behaviour...to punishment" (Foucault, 1977b: 178). Disciplinary violence thus has the: "function of reducing gaps" (ibid: 179) between irregularities and the norm. It is a productive rather than deductive form of violence, constituting the very individuality of the subject. In its bio-political or actuarial form it targets entire groups for regulatory interventions due to the danger their abnormal 'form of existence' poses to the life, health and security of the population (Foucault, 2003: 239-263).

In this way bio-political power is violent. It allows the: "individual to be 'cared to death' by the experts of life who are capable of what no sovereign ever cared for: manipulating the life choices

⁸ Foucault was not to recognise 'discipline' as one of the poles of 'bio-power' until the latter concept was fully outlined in *The History of Sexuality, Vol. 1: The Will to Knowledge* (Foucault, 1978).

of the individual, intervening into the most mundane of individual practices, restructuring...human existence in terms of a variable distribution of restrictions, sanctions and regimens” (Dillon cited in Prosorov, 2007: 60). Sovereign violence consists: “in inflicting...pain on the living...bio-political violence consists in making life itself unbearable” (ibid: 60) through defining and enforcing the limits of what forms human life may legitimately take. Thus sovereign violence may be punitive but bio-political violence is suffocating (ibid).

Unlike the regime of sovereign power the bio-political regime deploys violence not in a public and exemplary fashion but insidiously, with these practices secreted away in corrective administrative-institutional sites. This is because the bio-political rationality of a modern ‘governmentalised’ state served to transfigure the focus of the penal system from the ‘crime to be punished’ towards the ‘abnormal individual to be corrected’ (Foucault, 1999). Sovereign power is restricted to operating within the binary framework of legal/illegal; bio-political power is more discriminating, making nuanced distinctions between variations distributed around the norm: “it operates on the sliding scale of healthy/sick and normal/abnormal” (Oksala, 2007: 55). The bio-political aims of the modern penal system were to be facilitated by the development of ‘a technical knowledge system’ (Foucault, 1999). Criminal psychiatry and other ‘expert knowledges’ - most notably criminology - allowed the modern penal system to function by identifying the irregularities or abnormalities within the offender’s bio-psychological disposition which were defined as the cause, origin and motivation of the offence. These would constitute the corporeal basis for a corrective intervention (ibid).

This new penal logic reconfigured sovereign power, re-deploying it towards bio-political ends i.e., the protection of the social body through the normalisation of abnormal individuals and groups (Foucault, 2003: 239-263). Thus since modernity the law has been placed in service of the ‘norm’: “and...the judicial institution... [has been]...increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory” (Foucault, 1978: 144). This re-configuration resulted in the ‘governmentalisation’ of state violence, a violence which is no longer exercised in a spectacular and exemplary fashion in public spaces but in the corrective administrative-institutional sites of a ‘governmentalised’ state in the name of the life, health and security of the population. Therefore ‘governmentalised’ state violence is irreducible to the law, it is exercised within administrative apparatuses and utilises managerial/bio-political techniques such as the YRO.

Governmental technologies such as the YRO obfuscate the distinction between executive and judicial powers in a manner which compromises criminal justice protections and judicial oversight of governmental practices, whilst empowering the executive and the administrative practitioners and ‘experts of life’ who perform its governmental bidding in administrative-institutional sites. They utilise administrative tactics rather than the law, or the law as an administrative tactic (Foucault, 1978: 144; Foucault, 2007: 99), deploying violence towards bio-

politically or managerially defined ends, rather than the ends of ‘justice’. This deployment is determined by medical experts and administrative practitioners rather than by courts of law. It is informed by ‘bio-political norms’ and governmental policy objectives which often conflict with and undermine criminal justice ‘norms’ and protections such as ‘due process’ and ‘proportionality’.

With the ‘governmentalisation’ of state violence since modernity, the bio-political state constructs an apparatus of expertise around its exercise in an effort to imbue such practices with a pseudo-legal aura of legitimacy (Oksala, 2007: 62). ‘Expert knowledge’ and executively determined managerial guidelines form an administrative structure of accountability for governmental technologies. This administrative regulation potentially short-circuits the structure of legal accountability which must annex governmental practices of violence if they are to be subject to judicial controls and deemed legally legitimate. As Oksala (2007) states: “When practices of violence are monitored by professional administrators... [and]... medical experts, they are controlled processes rather than arbitrary punishments, yet they are not necessarily legally controlled at all” (ibid: 60). They can thus be relatively uninhibited by the judicial restraints which modern democratic sovereignty places upon the arbitrary exercise of state sanctioned violence.

The attenuation of a judicial structure of accountability to regulate administrative practices of violence, exercised through governmental technologies such as the YRO, has arguably resulted in: “the reign of petty sovereigns” (ibid: 60). These are administrative ‘experts’ or managerial practitioners who issue executive decrees with the force of law, and assume the role of the judiciary by deciding upon matters of justice despite being subject to diluted or compromised legal restraints upon their arbitrary use of violence. Thus the bio-political violence exercised within the administrative-institutional sites of a ‘governmentalised’ state could potentially transform into *exceptional sovereign violence*, i.e., violence which is direct, arbitrary and subject to severely weakened judicial regulation (Oksala, 2010: 42).

Chapter Summary

It has been shown that the YRO’s modality of operation, and the governmental logic which underpins it, is derived from an obfuscatory paradigm of governance characteristic of the modern ‘governmentalised’ state which blurs the distinction between executive and judicial powers. It is grounded upon: “effective policy, professional management, and expert knowledge” (Oksala, 2007: 61) and its content is thus determined by medical experts and administrative practitioners rather than by courts of law. Such governmental technologies rely upon the construction of an apparatus of expertise to imbue the exercise of modern state sanctioned (bio-political) violence with a pseudo-legal aura of legitimacy. This notion of legal legitimacy is highly dubious, as such

violence is exercised with reference to bio-political 'norms' in the pursuance of governmental policy objectives, which often conflict with and undermine criminal justice 'norms' and protections and the imperatives of 'justice'. The formation of an administrative structure of accountability for the YRO also ensures that although the YRO is administratively regulated, it is not necessarily subject to adequate judicial regulation. The bio-political violence exercised within the administrative-institutional sites of a 'governmentalised' state could thus transform into *exceptional sovereign violence* exercised by administrative 'petty sovereigns' unfettered by effective judicial controls.

Chapter Two

The ‘Governmentalisation’ of Youth Justice: Governing the *Nomadic* Children of the ‘Dangerous Classes’

“(T)he disciplinary societies...initiate the organisation of vast spaces of enclosure. The individual never ceases passing from one enclosed environment to another, each having its own laws: first the family; then the school (“you are no longer in your family”); then the barracks (“you are no longer at school”); then the factory; from time to time the hospital; possibly the prison, the preeminent instance of the enclosed environment. It’s the prison that serves as the analogical model” (Deleuze, 1997: 309).

This is the first of a number of chapters which will trace the historical evolution of youth justice through the developmental prism of the nine community based sentences which the YRO replaces, incorporating their elements within a generic menu of 18 requirements. It aims to show that the tendency to obfuscate the distinction between executive and judicial powers, resulting in the empowerment of the executive and the ‘experts of life’ pursuing its bio-political policy objectives, is a paradigm of governance which not only animates youth justice policy and practice today but has animated the uneven and fragmented developmental trajectory of youth justice since the foundation of the juvenile court.

The chapter will posit that the emergence of this paradigm of governance is related to the hybrid penal-welfare structure of the juvenile court, the establishment of which is situated along a trajectory of child welfare, child protection and criminal justice legislation which placed a concern for the ‘welfare’ of the children of the ‘dangerous’ and ‘perishing’ classes at its centre. It aims to show that much of this legislation was illustrative of a governmental rationality which problematised the vagrant/*nomadic* and un-segregated ‘form of existence’ of these lower class populations of children and young people. The reason for this problematisation shall be explicated with reference to the prominence of the modern notion of ‘childhood’ as a protective experience, and the modern conceptual ‘norm’ of the immobilised, visible and docile *Apollonian child* (Jenks, 1996), amongst the 19th century ‘Child Saving’ movement. The chapter will show that the actuarial discovery of ‘juvenile delinquency’ in the first half of the 19th century was causally attributed by these middle class reformers to the spectre of ‘moral contamination’ caused by the un-segregated and vagrant ‘form of existence’ characteristic of the children of the lower classes. It will be argued that the precursor to the ‘probation order’ – the judicial procedure of *recognisance* – constituted one of an array of ‘anti-*nomadic*’ disciplinary strategies of enclosure deployed to enforce the conceptual norm of the *Apollonian child* upon working class children and

young people. It will be argued that these disciplinary enclosures aimed to transform the: “confused, useless or dangerous multitudes” of children created by industrialisation: “into ordered multiplicities” (Foucault, 1977b: 148) by preventing: “their diffuse circulation, their...dangerous coagulation” (ibid: 143) with contaminating influences within the industrial city and unreformed prisons.

The second half of the chapter will trace the ‘governmentalisation’ of the juvenile court as it moved towards a welfare jurisdiction at the apotheosis of the welfare-era in the late 1960s and early 1970s, outlining the factors which influenced this movement. It aims to demonstrate that as the juvenile court was gradually ‘governmentalised’ it began to seamlessly combine executive and judicial powers resulting in the empowerment of the executive and the ‘experts of life’ pursuing its bio-political policy objectives in administrative-institutional sites. An analysis of the executively determined and regulated ‘supervision order’, central to a welfare strategy of ‘government through the family’ (Donzelot, 1980; Rose, 1989), will outline how this governmental technology may have inhibited the judicial oversight and protections of the law from reaching the ‘young offender’ immobilised in, and governed through, the nuclear family enclosure. The chapter will conclude by explicating how this may have served to create administrative ‘petty sovereigns’ who potentially exposed the ‘young offender’ to *exceptional sovereign violence*.

Problematizing ‘Nomadic Life’: the moral contamination of the children of the ‘perishing’ and ‘dangerous’ classes

Children have not always been perceived as a distinct social category with their own individualised ‘rights’ to provision and protection. The modern conceptualisation of ‘childhood’ as a protective experience, with the ‘child’ ensconced within the privatised domain of the family, emerged in the 18th century (Aries, 1962). Throughout the Middle Ages ‘children’ did not exist as a distinct social category (ibid). The art of the medieval period exemplifies this ‘invisibility’ of the ‘child’ and their assimilation to adults, with depictions of children in unique and individualised form noticeably absent (Jenks, 1996: 64). The socio-cultural absence of ‘children’ and ‘childhood’ persisted until the 17th century, with various languages being ill-equipped to define the ‘child’. As Aries (1962) states:

“In its attempts to talk about little children, the French of the 17th century was hampered by a lack of words to distinguish them from bigger ones. The same was true of English, where the word ‘baby’ was also applied to big children” (1962: 28-29).

The assimilation of children to adults was illustrated by fact that from an early age children of all classes took up employment and contributed to communal life. As Gillis expounds:

“Ready for semi-independence, they were dressed as miniature adults and permitted to use the manners and language of adult society” (Gillis cited in Morris et al, 1987: 4).

With children viewed as economic assets who contributed to the: “economy of the family” (Jenks, 1996: 65) and as a cheap source of labour for industry, child labour was: “traditional, universal and inescapable” (Morris et al, 1987: 4). As a result the economic and physical exploitation of children was widespread. This intensified during the period of industrial growth occurring towards the end of the 18th and beginning of the 19th century, as children came to form a significant proportion of the workforce in the factories, mines and cotton mills of industrial Britain (Gillis, 1974). The lack of governmental concern with the welfare of the child throughout this period is conveyed by the high birth and death rates which persisted into the 18th century, with the odds of a child living to the age of five in this period being estimated as three to one against (Morris et al, 1987: 4).

The socio-cultural indistinction between children and adults was paralleled within the CJS, with there being no separate system of juvenile justice. Until the first half of the 19th century children were subject to the same court procedures and range of sentencing dispositions as adults. As Parsloe (1978) states:

“They were brought before the same magistrate or judge....sometimes set upon a box or table so that they could be seen over the rail, and were remanded to the same prisons....to await their trial. Once convicted, they were subject to the same sentences, including death, transportation and imprisonment.” (1978: 5).

This punitive response to the adult and child alike was informed by the rationality of sovereign power still underpinning state responses to crime in the early 19th century. It sought to punish rather than reform the offender, expiating the crime and deterring potential offenders through draconian punishment (Morris et al, 1987). However, a concern for the welfare of the child was developing amongst 19th century reformers informed by the modern conceptualisation of ‘childhood’ and the innocent, docile and dependent *Apollonian child* (Jenks, 1996) which had emerged in the 18th century philosophy of the Enlightenment. Jean-Jacques Rousseau is attributed with formalising this modern conceptualisation of ‘childhood’ in his 1762 publication *Emile: or, On Education* (ibid). In *Emile* Rousseau espoused the notion that children are frail, innocent and docile and enter the world in unsullied form. He considered children ontologically distinct from adults. Born inherently ‘good’ they only gained a capacity for ‘evil’ through contamination from the adult world: “Everything is good as it leaves the hands of the Author of things; everything degenerates in the hands of man” (Rousseau, 1979 [1762]: 37). The ‘child’ had unique potentials and an inherent capacity for reason which had to be facilitated and nurtured. This constituted the child as an individualised: “target for correction and training by the growing standards of rationality that came to pervade the time” (Jenks, 1996: 65). ‘Childhood’ was thus to be an

individualised, protective and nurturing experience in which these ‘human becomings’ (Qvortrup, 1994) were sheltered from the adult world within the familial enclosure, and facilitated in achieving their own unique potentials and capacity for reason (ibid).

This conceptualisation of the child differed sharply from the 17th century puritanical conception of the wilful and innately wicked *Dionysian child* (Jenks, 1996: 70-72) whose stubborn will had to be ‘broken’ by corporeal punishment and strict moral direction, as the commonly used childrearing epithet of that time - ‘spare the rod and spoil the child’ - attests (ibid). The modern conceptualisation of ‘childhood’ began to displace this at the beginning of the 19th century amongst those members of the privileged middle and upper classes who: “could afford the luxury of childhood with its demands on material provision, time and emotion and its attendant paraphernalia of toys and special clothing” (ibid: 64). It was this modern conceptualisation of the innocent and dependent *Apollonian child*, protected from the pernicious influences of the adult world and nurtured within the familial enclosure, which informed the middle class ‘Child Savers’ of the 19th century concerned with both the ‘physical abuse’ and ‘moral contamination’ of the ‘child’ (Priestley et al, 1977).

Progressively throughout the 19th century the ‘physical abuse’ of children by their parents and employers was dealt with through legal prescription and the regulation of both parents and employers (the Factory Acts) (ibid).⁹ However, the concern with the ‘moral contamination’ of the ‘child’ was to have wide-ranging repercussions for the CJS. This concern was informed by the actuarial discovery of the ‘juvenile delinquent’ in the first half of the 19th century as the first continuous national criminal statistics began to be collected from 1835 (Morris et al, 1987). Those aged 15-25 were overrepresented, comprising 10% of the general population yet accounting for 25% of the criminal population (Worsley, 1849). This actuarial discovery led to the problematisation of the practice of incarcerating children and adults in the same prisons (Morris et al, 1987). The possibility for moral contagion through the uncontrolled coagulation of young petty criminals with older, more experienced career criminals within unreformed prisons was thought rife. As one reformer commented at the beginning of the 19th century after visiting one such prison:

“...young beginners in error or vice, and old offenders, are here promiscuously mingled together in perilous association. Unruly apprentices, with felons of experience must surely feel far worse than the mere pressure of the personal seclusion from the world at large... Imprisonment is bad enough: But what is this compared with a daily exposure, amidst evil communications, to principles of depravity, and the horrid, the almost certain chance of infamy acquired in a receptacle intended for moral reformation” (Neild cited in Priestley, 1977: 4).

⁹ The Factory Acts (ten in all introduced throughout the 19th century) regulated factory working conditions, set a minimum age limit for legal employment, and limited the number of hours which could be worked by children in industrial factories (Hutchins et al, 2007).

The reformatory movement also problematised the *nomadic*/extra-familial mode of existence characteristic of the children of the lower classes. Their vagrant lifestyle was thought to engender juvenile criminality through facilitating their exposure to the degenerative conditions of the industrial urban setting (Harris et al, 1987). To middle class reformers the children of the industrial working class seemed remarkably un-childlike (Jones, 1996). Whereas working class families viewed children as economic assets and contributors to the economy of the family, the Enlightenment conceptualisation of ‘childhood’ as a period of dependency and protection, and the concomitant concept of the ‘innocent’, ‘docile’ and ‘dependent’ *Apollonian child*, had become firmly embedded amongst the more privileged classes. The reformatory movement would entail extending this privatised, sedentary and dependant conceptualisation of ‘childhood’ to the working classes (Steedman, 1995: 62).

This extract from Morris et al (1987) illustrates how the increasing prominence of this conceptualisation was indelibly related to the emergence of the disciplinary modality of power. The familial enclosure was reconfigured as a surveillance apparatus within which the ‘child’ was immobilised, shielded from outside contamination, rendered visible and subjected to disciplinary ‘norms’ which actively constituted/produced the *Apollonian child*. With the passage from the regime of sovereignty to the bio-political regime of discipline, and the concomitant displacement of the wilful and wicked *Dionysian child* by the innocent and frail *Apollonian child*, corporeal violence directed against the body was gradually displaced by a: “more subtle and intrusive correction and training of the very soul” (Jenks, 1996: 75):

“In the middle-class family, children remained children into their mid and late teens. They were protected and dependent. Purity was maintained by ignorance of realities outside the home. The ideal child was submissive, hardworking, obedient, modest and chaste. Similarly, the ideal adolescent was organised, disciplined and supervised. Not that children or adolescents were naturally so. Dominant beliefs were of the need for parents to mould children” (Morris et al, 1987: 21).

In contrast to this immobile, dependent and disciplined existence, the economically independent children of certain sections of the lower classes lived a *nomadic* ‘form of life’ beyond the order imposed within the familial enclosure. As such they were exposed to the degenerative and contaminating influences of adult working class culture in the industrial city (Parsloe, 1978). The process of urbanisation accompanying the Industrial Revolution had, by the mid-19th century, created a problem of social order in the major cities. Vagrancy was believed to be the ‘nursery of crime’, with two-thirds of London’s criminal class having ‘migratory habits’ (Harris et al, 1987). By 1876 around 30,000 indigent children slept in London’s streets (Tobias, 1972).

For the ‘Child Savers’ ‘juvenile delinquency’ was therefore: “mainly attributable to parental neglect or parental example” (Worsley, 1849: 218). It was indicative of faltering mechanisms of

socialisation, discipline and control within the families of the *perishing* and *dangerous classes* (Carpenter, 1851). The ‘perishing classes’ comprised:

“...those who have not fallen into actual crime but who are almost certain, from their destitution and the circumstances in which they are growing up to do so, if a helping hand be not extended to raise them” (ibid: 2).

Whilst the ‘dangerous classes’ were comprised of:

“...those who have already received the prison brand, or if the mark has not yet visibly set upon them, are notoriously living by plunder who unblushingly acknowledge that they can gain more for the support of themselves and their parents by stealing than by working...” (ibid: 2).

As these definitions demonstrate, little distinction was made between the ‘needy’ and the ‘delinquent’, other than those children found within the former category were predisposed to an eventual inclusion within the latter.

The demise of the family, and with it the destruction of the informal means of socialising, disciplining and controlling the child was by the mid-19th century being attributed to poverty and the: “degenerative conditions of city life” (Morris et al, 1987: 19). In turn the *nomadic* lifestyle of the children of the ‘dangerous’ and ‘perishing classes’ resulting from the erosion of the familial enclosure exposed the child to these ‘degenerative conditions’. Criminal areas of the industrial city such as Shoreditch or Bethnal Green in London were considered: “hot bed[s] of crime and demoralisation” and: “great dunghills on which society rear[ed] criminals for the gallows” (Morris et al, 1987: 18). Here juveniles:

“... [became]... *familiarised with scenes of infamy offensive to every principle of morality...* [and were]... *initiated into every species of criminality by the precept and example of adult and hardened offenders*” (Neale cited in Tobias, 1972: 34).

With a growing recognition amongst reformers of the causal link between poverty and juvenile delinquency, the harsh punishment previously meted out to the ‘young offender’ within the CJS was increasingly viewed as unjustified. Their criminality was beginning to be perceived as a consequence of circumstances beyond their control (Parsloe, 1987). This statement by a witness to a House of Commons Select Committee on Police in 1817 alludes to this emerging conceptualisation of juvenile crime as a social malady determined by aetiological antecedents such as poverty and destitution, which decimated the family and bonds of kinship:

“It is very easy to blame these poor children, and to ascribe their misconduct to an innate propensity to vice; but I much question whether any human being, circumstanced as many of them are, can be reasonably expected to act otherwise (cited in Tobias, 1972: 94).

The reformatory movement was thus influenced by an evangelical zeal; it sought to reform rather than punish juvenile offenders. However, a concern for the welfare of the child first emerged not simply due to altruistic motives. As delineated above, it did so primarily because of the threat posed to the social order by the *nomadic* ‘form of life’ of the children of the ‘perishing’ and ‘dangerous classes’ and their admixture with hardened adult offenders in the unreformed prisons and court houses. As such, the separation of the children of the ‘perishing’ and ‘dangerous’ classes from their crimenogenic social milieu (Donzelot, 1980: 47), and the segregation of juvenile offenders from older career criminals in the unreformed prisons, in an effort to prevent ‘moral contamination’ was an integral theme of the reformatory movement of the 19th century (Morris et al, 1987: 19). This logic informed a strategy of disciplinary enclosure, segregation and supervision amounting to an enforcement of the conceptual ‘norm’ of the immobilised, visible and docile *Apollonian child*. The juvenile had to be learn to become a ‘child’ once more, to be: “brought to a sense of dependence...[to]... yield his own will in ready submission... [to be]... gradually subdued and trained” (Carpenter, 1853: 298).

Various reformers focused upon different aspects of the CJS in an effort to remedy the social menace of ‘moral contamination’ (Parsloe, 1978). Legislative measures were introduced in the 1870s and 1880s to enforce: “middle class standards of family obligation” (Morris et al, 1987: 22), with those parents who refused to control their children being subjected to punitive interventions. The primary contribution of the reformatory movement during this period to tackling ‘moral contamination’ was the classification, segregation and immobilisation of the children of the ‘dangerous’ and ‘perishing’ classes in the *reformatory* and *industrial schools* respectively, which received statutory recognition in the mid-19th century.¹⁰ By the mid-1890s these enclosures housed almost 22,000 juveniles (Morris et al, 1987: 27). The contribution of the forerunner to the probation order (PO) – *recognisance* – within the disciplinary strategies deployed by the reformers will inform the focus of the next section.

¹⁰ The 1854 Youthful Offenders Act introduced the reformatory schools for children below the age of 16 found guilty of an offence punishable by imprisonment or penal servitude. In recognition of the link between poverty and juvenile crime, the 1857 Industrial Schools Act introduced industrial schools for: “juveniles begging or receiving alms, found wandering and not having any home or visible means of subsistence, found destitute, either being an orphan, or having a parent undergoing penal servitude, and frequenting the company of reputed thieves” (Morris et al, 1987: 9). Within these the: “industrial discipline demanded by the factory...was inculcated in the delinquent or rootless young” (Harris et al, 1987: 13). However, the schools were also influenced by Christian faith and sought to offer love to the child in an effort to ‘reclaim their soul’ and humanise/reform them. The reformatories were in effect artificial familial enclosures, “modelled on inculcating the norms of the middle class in a quasi-family structure” (Morris et al, 1987: 23).

The Probation Order

The PO was statutorily enacted by the 1907 Probation of Offenders Act as a community based disposal imposed as an *alternative to a sentence* (Worrall, 1997).¹¹ It placed the offender under the supervision of a probation officer whose role it was to: “advise, assist and befriend...[them]... and, when necessary, to endeavour to find...[them]... suitable employment” (Probation of Offenders Act 1907, s. 4 (d)). It was traditionally imbued with reformatory objectives, being targeted at those who because of their age, character and minor criminality: “seemed both deserving of mercy and ‘promising subjects’ for reformatory intervention” (Brownlee, 1998: 67).

The origins of probation practice can be found in the medieval common law doctrine of ‘recognisance’ (ibid). In the first half of the 19th century the court began to target this disposal at young and petty offenders to divert them from, what was by today’s standards, a draconian penal regime (Rumgay, 1989), thought to contaminate those who were not yet ‘hardened’ criminals. The parents or carers of a juvenile subject to this judicial procedure were required to enter into a ‘recognisance’ with the court to provide due care and control over the child (Davenport cited in Parsloe, 1987: 130). The practice occasionally involved them depositing money with the court as a guarantee against their child’s future conduct. Those subject to recognisance were: “released without punishment or, indeed, sometimes without trial, subject only to their continuing to be of good behaviour” (Brownlee, 1998: 63). Although this procedure shared common features with contemporaneous probation practices, including the possibility of revocation for breach, it was distinct from the modern PO by lacking a formal supervision requirement (Dressler cited in Brownlee, 1998). However, the police could be obliged to check upon the progress of the ‘young offender’ (Parsloe, 1978).

Exemplifying the disciplinary logic of enclosure and supervision underpinning recognisance, juveniles were only considered eligible for it when they had a stable familial enclosure with parents capable and willing to exercise control over them. Matthew Davenport Hill, a magistrate in the mid-19th century, attested to this necessity when depicting its use:

“During my attendance as counsel at the Warwick sessions I found that the magistrates there were in the habit of sending both boys and girls, immediately after conviction when they had reason to suppose the prisoners were not hardened, back to their parents or masters when they were respectable and when they were willing to take care of them... In 1831 I adopted a similar practice” (Hill cited in Parsloe, 1987: 130).

¹¹ The 1908 CYPA made the PO available to sentencers within the newly formed Juvenile Court. It was subsequently renamed the ‘community rehabilitation order’ by section 43 of the CJ&CS Act 2000.

The Juvenile Offenders Act 1847 introduced this practice on a statutory basis for juvenile offenders only. However by the end of the 19th century, due to the pioneering activities of religious organisations, the practice of subjecting those released on recognisance to the supervision of individuals approved by the court - namely *probation* - was common (Brownlee, 1998). This was extended to petty, low-tariff offenders other than juveniles by the 1879 Summary Jurisdiction Act. In the late 1870s, in an effort to ‘reclaim’ the souls of offenders charged with alcohol related offences, the Church of England Temperance Society (CETS) began sending missionaries into the lower Police Courts and petty sessional districts, endeavouring to save the souls of those drunkards appearing before them by: “preaching, distributing tracts and encouraging abstinence” (ibid: 64). By the late 1890s missionaries were already performing social enquiries for the court to identify those offenders thought suitable for, and worthy of, their reformatory interventions. To perform their work these missionaries appealed to magistrates for clemency on behalf of the offender, and sought that those offenders suitable for ‘restoration and reclamation’ were bound over into their supervision (ibid).

The Juvenile Court – A Hybrid Penal-Welfare Jurisdiction

“...[T]here are but a few cases in which the offender is without some extenuating circumstances... In fact, there is no crime in which it is not easy to discover them. It requires but a slight investigation and they swarm on all sides. In short, the only criminals who appear to us to be without excuse are those for whom we have not taken the trouble to find it” (Garafalo, 1914: xxv).

Along the welfarist trajectory of development outlined above emerged the juvenile court, established by the 1908 Children Act as: “an administrative solution to successive Victorian attempts to reduce contamination and ensure the improved socialisation of the young” (Harris et al, 1987: 9). Its establishment represented an extension of the concern with moral contamination to: “the operation of justice itself” (Priestley et al, 1977). The law’s operation was increasingly recognised by reformers throughout the 19th century as a potential source of contamination to children and young people. They came into contact with hardened criminals whilst appearing at court where: “promiscuous mingling...took place in the corridors and waiting rooms” (ibid: 3). The child’s public appearance in the dock could also have a stigmatising affect, branding them a criminal: “almost as effectively as a stay in the old house of correction” (ibid: 3). In an effort to prevent this moral contamination the 1908 Children Act stipulated that the public would be excluded from all hearings taking place in the juvenile court and that all sittings of the court would occur at a different time or in a different building to the sittings of the ordinary criminal court (Parsloe, 1978: 134).

Although the juvenile court constituted a jurisdiction within which: “the full impact of judicial proceedings on the individual offender was subject to considerable mitigation” (Priestley et al, 1977: 3), when it first emerged it was also a jurisdiction within which the criminal law ran an untrammelled course. The ‘young offender’ aged 7-17 appearing before the court could still be made subject to all the dispositions available to the ordinary criminal court except imprisonment,¹² and they were subject to the due process of law and its accompanying procedural safeguards and protections (Morris et al, 1987).

Due to the perceived link between poverty and juvenile delinquency however, the juvenile court was also given jurisdiction over children and young people aged under 14 who were in need of care or protection (Parsloe, 1987: 134). Although the juvenile court made a distinction between the ‘child in need’ and the ‘delinquent’, reserving punitive dispositions such as whipping, fining and committal to reformatory schools solely for offenders (Morris et al, 1987), the conceptual distinction between these two subjects was gradually eroded within governmental crime control rationality. This was partly due to a shift in the probation service’s (formerly CETS missionaries) modality of practice and the knowledge base underpinning it.¹³

This shift involved a movement away from the service’s evangelical modality of practice, informed by a ‘missionary zeal’ and focused upon ‘saving souls’, towards a ‘scientific’ modality of practice which, influenced by ‘positivist criminology’, diagnosed individual pathology, remedying it through the deployment of psycho-therapeutic skills (Brownlee, 1998). This modality of practice marked the discursive and conceptual reconstruction of the ‘delinquent’ (already initiated by the 19th century ‘Child Savers’) from the wilful, wicked and morally culpable subject, to the subject whose criminality was causally related to aetiological antecedents. With the emergence of positivist criminology at the end of the 19th century, the offender’s criminality was increasingly no longer conceptualised as a consequence of free will: “individuals were seen as able to exercise little control over the factors leading to their criminal behaviour” (Morris et al, 1987: 20). Contrary to the belief of the ‘Child Savers’, within the theoretical schema of criminological positivism, juvenile delinquency was not considered to be determined by poverty and destitution. Its aetiological antecedents were found in an embodied psychological pathology caused by maladjustment due to poor socialisation within the offender’s familial or environmental milieu, which required diagnosis and individualised treatment (Burke, 2005: 74-90). Thus the public health philosophy of the ‘Child Savers’ was augmented by the atomistic, and

¹² However, imprisonment remained an option for sentencers where the juvenile offender was aged over 14 and with a “certificate” (Parsloe, 1977: 135).

¹³ The probation service was established by the 1907 Probation of Offenders Act, which transformed CETS missionaries into ‘probation officers’ employed by the state (Worrall, 1997).

aetiologically narrow theories of crime causation which accompanied psychological positivism (Priestley et al, 1977).¹⁴

With the emergence of this scientific theorising, a conceptualisation of the offender materialised: “rapidly blessed with the irrefutable status of professional common knowledge” (ibid: 50): that ‘delinquents’ had similar life histories to children who were neglected by their parents or carers (ibid). This ‘professional common knowledge’ developed as a result of the ‘penal-welfare’ structure of the juvenile court. It blurred the administrative boundary between the civil and judicial spheres, by ensuring that tribunals which dealt with delinquents also dealt with those in need of care or protection (Harris et al, 1987), undermining the conceptual distinction between the ‘child in need’ and the ‘delinquent’ further. The blurring of this conceptual boundary, indicative of a conceptual ‘welfarisation of delinquency’, ultimately led to a ‘welfarisation of delinquency’ proper, illustrated by the juvenile court’s subsequent movement towards a welfarist jurisdiction. As this welfarist programme became more fully realised in the post-war period, the: “central planks of its reform agenda - individualised sentencing, indeterminate sentences, classification... [and]... treatment” (Garland, 2001: 28) undermined the central tenets of criminal justice: ‘due process’, and ‘just deserts’. Under the modernist ‘penal-welfare’ regime a new conceptualisation of law emerged, viewing its role no longer as inflicting retributive justice but protecting society through functioning as part of an administrative apparatus, seeking to ‘normalise’ the abnormal/pathological offender (Foucault, 1978: 144).

The remainder of this chapter shall trace this ‘governmentalisation’ of juvenile justice by charting the movement of the ‘child in need’ and the ‘delinquent’ into a conceptual zone of indistinction within governmental discourse. It will be shown that this conceptual ‘welfarisation’ of the ‘delinquent’ resulted in the movement of the juvenile court towards a welfarist jurisdiction which sought to deploy the law as one element amongst a range of administrative tactics utilised to correct the *abnormal* ‘delinquent’. It will be promulgated that the justice of the juvenile court during the welfare-era was a ‘fictitious justice’ (Donzelot, 1980: 110). It gave judgements no longer upon offences but upon individuals: the offence was *dematerialised* into a range of embodied pathologies which were thought to engender it. As a concern for the welfare of the child or young person became firmly lodged at the centre of the juvenile court, a: “whole set of assessing, diagnostic, prognostic, normative judgements concerning the criminal...[also became]...lodged in the framework of penal judgment” (Foucault, 1977b: 19). It will be argued that this fragmented and diffused the legal power to judge and to punish, turning the: “assertion of guilt into a strange scientifico-juridical complex” (ibid: 19) in which administrative ‘experts’ were invested with the decisional power of the judiciary and the coercive capacity of the law,

¹⁴ The probation service’s adoption of a psycho-therapeutic modality of practice was exemplified by the introduction of a legislative provision to attach a psychiatric treatment requirement to the PO in 1948 (Worrall, 1997).

whilst being subject to severely weakened judicial restraints upon their arbitrary exercise of violence.

The ‘Governmentalisation’ of Juvenile Justice: Governing through the Nuclear Family Enclosure

The first review of juvenile courts in England, undertaken by the ‘Departmental Committee on the Treatment of Young Offenders’ (the Molony Committee) in 1927, was established to examine the validity of applying the procedures of criminal law to juveniles. The Molony Committee recommended the juvenile court’s retention, stating: “it is very important that a young person should have the fullest opportunity of meeting a charge made against him... [and that]...when the offence is really serious and has been proved it is right that the gravity of the offence should be brought home to the offender” (Molony Committee, 1927: 69). Despite the Committee conceptualising ‘delinquents’ as wilful and deliberate offenders and therefore responsible for their offending, the influence of an alternative conceptualisation of ‘children in trouble’: “that of victims of social or psychological conditions beyond their control” (Morris, 1987: 69), led to the sedimentation of the ambivalence between ‘justice’ and ‘welfare’ approaches to sentencing at the heart of the juvenile court. The Molony Committee stated that juvenile courts should be staffed with individuals sympathetic to the plight of the children and young people who came before them, and that their primary function should be to take into consideration their ‘welfare’. The Committee recognised the specious dichotomy between the ‘child in need’ and the ‘delinquent’:

“It is often by 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 and delinquency is often the direct outcome of neglect” (Molony Committee, 1927: 71-72).

Its recommendations were largely accepted and were legally codified in the 1933 CYPA. The Act imposed a statutory duty upon the juvenile court to consider the ‘welfare’ of the child or young person appearing before it when deciding which disposition to impose. Morris et al (1987) espouse the view that: “...this... [represented]...a major change in the direction of the social welfare approach” (1987: 71). Indeed, a ‘welfarisation of delinquency’ (and a concomitant ‘jurisdiction of need’) was further evidenced by the 1933 CYPA’s abolition of the dual system of reformatory and industrial schools on the grounds that the ‘child in need’ was indistinguishable from the ‘delinquent’. It was asserted that there was no justification for dealing with each category separately, and the ‘approved school’ system was established as an all inclusive replacement (Harris et al, 1987).

By the time that the reformatory and industrial schools had been replaced they were already unpopular with sentencers, the populations of both being halved between 1880 and 1930 due to

criticism of their effectiveness from both the press and the inspectorate (ibid: 16). However, one of the central tenets of Foucault's analysis of power is that failure serves to multiply and proliferate the targets for its application (Foucault, 1977b). Harris et al (1987) here delineate the spread and penetration of power ever more deeply into the lives of working class children and young people from the mid-19th century, as each successive attempt to control them founders:

"...the failure of the separate and silent systems in the 1850s came to justify the development of the reformatories; the failure of the reformatories to do the same led to the placing of the youngest thieves in the industrial schools; the failure of the prisons led to the Borstal and probation systems, to the development of discharge on licence and hence the increasing penetration of power into the lives and families of the criminal" (Harris et al, 1987: 64).

By the time the reformatory and industrial schools had been phased out sentencers were already viewing the PO, made available nationwide following the 1925 CJA, as a more suitable option for 'young offenders' (ibid: 16). The increasing popularity of probation was to presage a shift from a governmental strategy of immobilising the *nomadic* lower class child in the artificial enclosures of the reformatory and industrial schools, to a supervised tutelage within a shored-up familial enclosure.

However, the juvenile court's journey towards a welfarist jurisdiction and the development of the tutelary strategy of 'government through the family' was incremental. Following the 1933 CYPA the juvenile court remained a criminal jurisdiction despite recommendations from the Molony Committee to make 'welfare' its primary function (Bottoms, 1974). If anything, this resulted in an incongruent court process. The adjudicative stage was performed within an adversarial model which conceptualised the child or young person as a responsible subject entitled to 'due process' protections and safeguards. However, at the sentencing stage when the court was obliged to have regard to the 'welfare' of the child in determining the appropriate sentence, their offence was to be considered the consequence of an underlying pathology (ibid).

The 'halfway house' which resulted from the 1933 CYPA institutionalised an ambivalent response to the 'child in need' and the 'delinquent' despite the promulgation of the Molony Committee that they both shared a common aetiological antecedent - parental neglect. The necessity to care for those victimised by social, familial or psycho-biological factors beyond their control was heavily counterbalanced by the need to enforce discipline upon those seen simply as 'bad' (Morris et al, 1987). In the same year that the 1948 Children Act granted new powers to local authorities to take into care children in need of care or protection, the 1948 CJA bolstered the range of dispositions available to the juvenile court to deal with 'delinquents' (ibid). One such disposal was the 'attendance centre order' (ACO), devised to deal with rising post-war juvenile crime rates.

The Attendance Centre Order

The ACO was introduced by the 1948 CJA as a community based disposition for children and young people aged 7-17. A court could impose it on a child or young person if they were found guilty of an offence for which an adult may have been punished by imprisonment. It could also be imposed if the child or young person had 'failed to comply' with a previous court order - including failure to pay a fine (Goldson, 2008). Under the provisions of section 60 of the Powers of Criminal Courts (Sentencing) Act (PCC(S) Act) 2000, it could be imposed for a maximum of 24 hours upon juveniles aged 10-16. In its initial manifestation it was primarily punitive. Its main purpose was to put: "a restriction on the young person's leisure time" (YJB, 2010b) for two to three hours on a Saturday afternoon. Those subject to an ACO were required to report to an 'attendance centre' (usually located within a school building) as instructed, typically weekly or fortnightly (Home Office, 1980a).

The ACO did not require the consent of the offender and was devised to deal predominantly with low level offending which: "went not much beyond a school boy's disobedience" (McClintock, 1961: 6). It was thus suitable for those who: "had not yet become anything in the nature of the habitual criminal" (Morris et al, 1987: 72). As the Home Office stated: "attendance centres are not a remedy for those who need the sustained influence of a supervisor or for those with a long record of offences" (Home Office, 1980a: 2-3).

The range of activities which the child or young person participated in at the respective attendance centre regimes were undertaken within a: "system of strict discipline" (McClintock, 1961). Often, centre programmes began with roll call, followed by an inspection, parade, an issue of clothing and foot drills (Home Office, 1980a). Goldson (2008), commenting upon the disciplinary and punitive characteristics of the attendance centre regimes, states: "the emphasis on discipline, physical fitness and exercise recalls Borstal regimes and 'short, sharp, shock' imperatives (ibid: 27). Attendance centres in England and Wales placed emphasis upon inculcating self-discipline through structured physical exercise, the content of which varied, with ball games, gymnastics and even swimming constituting aspects of some programmes (ibid).

Lord Templewood underlined the punitive ethos which underpinned the Labour government of the day's rationale regarding the introduction of attendance centres during the passage of the Bill which later became the 1948 CJA:

"Our objective... [is]... to deprive young offenders of a half holiday, to prevent their going to a football match or a cinema and, perhaps not less important, to make them ridiculous to their friends and relatives" (Parliamentary Debates, H.L. Deb. 1948 vol. 158 col. 297).

It was with reference to the ACO that the phrase ‘short and sharp punishment’ was first employed to describe a disposition available to the juvenile court (Parliamentary Debates, H.L. Deb. 1948, vol. 157 col.39).

This bifurcated governmental response to the ‘deprived’, considered to be in need of care and protection, and the ‘delinquent’, considered to be in need of punishment and suitable for punitive dispositions such as the ACO, was undermined by a Home Office Committee chaired by Lord Ingleby in 1960 which reiterated the sentiment of the Molony Committee concerning the: “lack of difference in the character and needs of the neglected and the delinquent” (Morris et al, 1987: 74). Reporting in 1960, the Committee stated that the aetiological antecedents of juvenile crime were invariably ‘broken homes’ and ‘child neglect’ - thus locating these antecedents within the familial enclosure of the working class child.

This view was congruent with positivistic theoretical paradigms of juvenile delinquency which were in ascendancy amongst child care professionals during the 1960s. Within these the aetiological antecedents of juvenile delinquency: ‘maternal deprivation, ‘oedipal failure’ and dislocation of the family structure due to urban decay (Harris et al, 1987: 24), all placed the working class familial enclosure, and its perceived malfunctioning and disintegration, at their epicentre.

Mindful of populist sentiment, the report argued for the juvenile court’s retention, however it also recommended raising of the age of criminal responsibility to 12 and eventually 14 (Bottoms, 1974). Below this, children who committed an offence would be dealt with via care proceedings. This recommendation did not remedy the juvenile court’s bifurcated response to the ‘deprived’ and the ‘delinquent’, it merely altered it by simplistically categorising the younger child as ‘in need’ and the older child as criminally ‘culpable’. As Bottoms (1974) states: “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” (1974: 324). Ingleby’s recommendations regarding the restructuring of the juvenile court were not implemented; the 1963 CYP A only raised the age of criminal responsibility from 8 to 10 (Morris et al, 1987). However its intentions, muted by fear of public opprobrium, signalled the beginnings of a seismic shift away from the juvenile court’s remit as a criminal jurisdiction to one based firmly upon a philosophy of social welfare (ibid).

For the Labour Party, the Ingleby Committee had not moved far enough towards a holistic social welfare approach. Ingleby had espoused the notion that delinquency’s major cause was ‘family breakdown’, yet there were no adequate suggestions as to how to deal with this (Jay, 1962: 231). In response, a newly elected Labour Party in 1965 introduced the White Paper, *The Child, the Family and the Young Offender* (Home Office, 1965) based upon the recommendations of a private committee on criminal policy chaired by Lord Longford, set up the previous year as the Party prepared for power. It sought to remedy the dilemmas caused by the existence of two

seemingly incompatible philosophies at the centre of the juvenile court, by abolishing it and providing for an alternative welfarist framework (Bottoms, 1974).

The recommendations of the Longford Committee aimed to rectify the deficiencies of the Ingleby Committee regarding its failure to recommend the introduction of measures designed to shore up the working class familial enclosure. Its proposals were underpinned by a social democratic philosophy which, echoing the sentiments of both the Molony and Ingleby committees before it, espoused the notion that ‘child neglect’ and ‘juvenile delinquency’ were primarily attributable to the inadequacies, or disintegration, of the working class familial enclosure. The Committee espoused the view that the child or young person’s criminality was due to circumstances beyond their control:

“Anti-social behaviour in a child may arise from difficulties at home, from unhappiness at school, from physical or mental handicaps or maladjustment, or from a variety of other causes for which the child has no personal responsibility” (Longford, 1964: 21).

As such it recommended the abolition of the juvenile court, arguing that the child’s criminality was evidence of the need for therapeutic intervention to address their welfare ‘needs’. The criminal law’s operation was considered stigmatising and disproportionately utilised against working class youth (ibid: 6). It thus sought to shore up the familial enclosure by replacing the juvenile court with a ‘family service’, comprised of the child, the family and a social worker. Here the circumstances leading to the offence would be discussed and the necessary welfarist response would be devised and implemented (ibid). When agreement could not be reached concerning the circumstances leading to the offence, or upon the appropriate response, the case was to be referred to a ‘family court’ which would determine guilt and the subsequent welfarist intervention to be taken. This proposed alternative structure to the juvenile court sought to help: “every family to provide for its children the careful nurture and attention to individual and social needs that the fortunate majority already enjoy” (ibid: 1). It aimed to utilise the familial enclosure as a mechanism of control, as a range of social service ‘experts’ penetrated it, highlighting the child’s therapeutically determined psycho-social ‘needs’ to their parents/carers and providing support to enable these to be met.

These recommendations formed the basis for the 1965 White Paper *The Child, the Family and the Young Offender*, except the ‘family service’ was replaced by a ‘family council’ (Home Office, 1965). It failed, however, due to the radical nature of the legislation and the fact that the Labour Government had the slimmest of majorities in 1965 (just three). Virulent opposition by the Magistrates’ Association also contributed to this failure (Morris et al, 1987). The magistracy were concerned with the shift in sentencing determination, and subsequent oversight of community based dispositions, from the judiciary to the executive and the concomitant erosion of the child’s legal rights they envisaged this entailing (ibid).

The Government produced a second White Paper in 1968 entitled *Children in Trouble* (Home Office, 1968) with a similar philosophy to the previous one. However, this was successful, forming the basis of the 1969 CYPA. The decisive manoeuvre contributing to its success was the symbolic retention of the juvenile court which placated the Magistrates' Association (Bottoms, 1974: 335). However, the magistracy failed to realise how radically the court's jurisdiction would be altered by the proposals. Despite the Act retaining the juvenile court, it made it impossible to try a child or young person below the age of 14 with a criminal offence (except homicide). Those of this age who committed offences were to be subject to care proceedings, and only if the court: "was satisfied... [that]...the offence, either by itself or together with other factors, indicate[d] that the child... [was]... beyond the control of his parents" (Home Office, 1968: 6). Preferably, children of this age were not to endure the stigmatisation associated with a court appearance. Therefore they were to be dealt with informally with *treatment* being voluntarily agreed between their parents and the social services (ibid). Those aged 14 to 17 could still be tried for criminal offences within the juvenile court but only after mandatory consultation between the social services and the police, followed by an application to a magistrate for a warrant, to be granted only in exceptional circumstances (Morris et al, 1987). Again, care proceedings would be preferred in most cases, with voluntary proceedings being the most desirable option (Bottoms, 1974).

Juvenile delinquency was no longer considered wilful and deliberate behaviour requiring punishment, but as a manifestation or 'presenting symptom' of an embodied psycho-social maladjustment requiring rehabilitative treatment. The 1969 CYPA aimed to efface the distinction between the 'child in need' and the 'delinquent' in order to deal with each in a symbiotic welfarist fashion. They were to be considered as indistinct from one another. Bottoms (1974) succinctly captures this rationality, which having been evident in governmental discourse since the Molony Committee (1927), was finally to be fully realised in policy terms:

"the problems of delinquents are similar to the problems of other children in need, and the two should be dealt with together and not separated by the accident of whether the symptom calling attention to the need happened to be an offence or (say) truancy or persistent bedwetting" (Bottoms: 1974: 320).

The Supervision Order

This symbiotic welfarist response to the 'child in need' and the 'delinquent' necessitated a readjustment of the juvenile justice system's focus away from the offence towards the offender. Considerable power was therefore placed in the hands of administrative 'experts of life' to determine, implement and vary the community based dispositions imposed by the juvenile court to enable them to address the embodied 'needs' of the child or young person through

individualised assessment and treatment. The case for these largely ‘extra-judicial’ powers was made by the 1968 White Paper *Children in Trouble*: “Increased flexibility is needed...to make it easier to vary the treatment when changed circumstances or further diagnosis suggest the need for a different approach” (Home Office, 1968: 20). To provide this ‘flexibility’ one of the main disposals introduced by the 1969 CYPA for those successfully prosecuted was the ‘supervision order’ (SO).

The SO was a community based disposition for ‘young offenders’ aged 10-17. It placed the ‘young offender’ under the supervision of the social services, with the responsible officer having a large degree of executive discretion and autonomy relating to the determination of the content of the disposition and its responsive and individualised management post-sentence (Home Office, 1968). The child or young person’s supervisor was obligated to ‘advise, assist and befriend’ them for the duration of the order (Goldson, 2008), thus the SO represented a foregrounding of the welfare principle contained in the 1933 CYPA, requiring sentencers to ‘have regard to the welfare of the child’. It had no minimum length and could be imposed for a maximum of 3 years. The semi-indeterminacy of the order was underscored by the fact that specifying the duration of the order at the point of sentence was not a statutory requirement (Nacro, 2002). Where the court made no specification, the child or young person remained subject to the order for the entire three years, unless the supervisor arranged for it to be discharged in the interim period (ibid).

Initially the SO could be imposed in two different forms: a ‘straight’ SO, or an SO with an ‘intermediate treatment’ (IT) attachment. The ‘straight’ SO or the ‘SO without attachments’ still had a number of requirements. The child or young person had to inform the supervisor immediately of any change of address or employment, ‘keep in touch with the supervisor according to instructions given’ and ‘receive home visits from the supervisor if instructed to do so’ (Nacro, 2002: 2). Supervision frequency, during the welfare-era, was left to the discretion of the social work practitioner (Harris et al, 1987: 122). Supervision meetings involved the discussion of the ‘young offender’s’ personal problems, with their supervisor advising on issues relating to access to benefits and social housing, whilst also offering help to any efforts to enter education, training or employment (Audit Commission, 1996).

With an SO with IT requirement attached, the supervisor had complete discretion over the treatment content of the disposition, as such the directions to the child or young person were not stipulated by the sentencer in the order at the point of sentence (Nacro, 2002). An IT requirement could require the ‘young offender’ to comply with a range of stipulated activities for a maximum period of up to 90 days (Home Office, 1968: 10). They could be obligated to ‘live at a particular place or places for a period as directed’, ‘attend appointments with particular persons at designated times and places’ and/or ‘take part in particular activities at designated times as directed’ (ibid: 10., Nacro, 2002: 2). IT encompassed an array of activities which could include: “offence-focused individual or group counselling, skill-based work placements or challenging

outdoor pursuits” (Brownlee, 1998: 124). Such treatment activities were considered ‘intermediate’ because they fell between forms of treatment which either required the offender to be completely removed from their home, or simply remain within it. IT therefore allowed the ‘young offender’ to remain within their home whilst still allowing for them to be exposed to a new environment (Home Office, 1968: 9).

Although it was standard practice for the ‘social inquiry report’ (SIR) writer to stipulate,¹⁵ at least in general terms, the tenor of the requirements which they intended to include in the IT attachment, in their SIR to the court this was not an obligation.¹⁶ It was up to the supervisor to exercise discretion when imposing any requirements deemed suitable for the ‘young offender’ (Nacro, 2002). Consequently the IT requirement was flexible and especially useful where: “planned interventions...need[ed] to be amended to accommodate rapidly changing circumstances without the need to go back to court on each occasion” (ibid: 2).

The SO had previously only been available for those children and young people in need of care or protection. As such it would largely be managed by social workers rather than probation officers.¹⁷ The 1969 CYPA envisaged a holistic response to the offender and their family (Home Office, 1968: 9) in an effort to shore up, and govern the child through, the working class familial enclosure (Rose, 1989). As such it stipulated that local authority social service departments, rather than probation and after care services, should provide professional expertise to the juvenile court (Harris et al, 1987).¹⁸ Consequently the PO was removed from the sentencing repertoire of the juvenile court. It is unsurprising that within the 1969 CYPA’s welfarist strategy the punitive dispositions of the detention centre order and the ACO were also considered contrary to the philosophy and workings of the Act, and were to be phased out (Home Office, 1968).

It is within this welfarist strategy of ‘government through the family’ or ‘therapeutic familialism’ (Rose, 1989) that the SO should be contextualised and perceived. The strategy aimed to: “maintain the functioning of the problem family rather than disrupting it through the removal of the child, not disabling the family but rectifying it under expert tutelage. Family technicians sought to align the social and the personal, soliciting the active cooperation - or at least the compliance - of family members in the re-jigging of their own human relations” (ibid: 179). The SO functioned within, and buttressed this strategy in two ways. Firstly, the SO shifted sentencing determination and oversight from the judiciary to the executive, empowering social work experts

¹⁵ SIRs were non-statutory reports written by probation and social services practitioners which gave sentencers information on the personal and social circumstances of the defendant. These were replaced with statutory pre-sentence reports by the 1991 CJA (Bateman, 2008).

¹⁶ Harris et al (1987) found in their 1978 study of SOs that: “a specific recommendation for supervision linked with an identifiable welfare strategy was found in...only 13% of...[SIRs]...written by social workers” (ibid: 126).

¹⁷ The 1969 CYPA stipulated that those offenders aged 10-13 should normally be supervised by social workers, whilst the supervision of those aged 14-16 was to be agreed locally between the probation service and the local authority social services departments (Harris et al, 1987).

¹⁸ This should also be seen as an attempt to protect the child or young person sentenced from the ‘stigma’ of probation service supervision (Raynor et al, 2002) as probation had, by the late 1960s, become firmly attached to the penal elements of the CJS (Brownlee, 1998).

to govern the child in an ‘individualised’ and ‘responsive manner’ within, and through, the familial enclosure. The ‘home visit’ supervision requirement allowed the parental rights of the child or young person’s parents to be bypassed and the familial enclosure to be penetrated by the ‘normalizing gaze’ of social service ‘experts’ (Donzelot, 1980: xxi). Shifting sentencing determination and post-sentence oversight to the executive where the SO was to be determined and managed in an individualised manner, responsive to the child’s scientifically determined idiosyncratic ‘needs’, potentially undermined the ‘young offender’s’ ‘due process’ protections and the criminal justice principle of ‘proportional sentencing’.¹⁹

Secondly, the IT requirement provided the court with a ‘middle-ground’ between forms of treatment removing the child completely from the home, or simply allowing them to remain within it, ensuring they were not removed to institutional care, thus preserving the familial enclosure. The temporary removal of the child which IT offered, allowed social service ‘experts’ to make the necessary adjustments to their familial environment, rectifying those elements contributing to their offending behaviour, prior to them returning to their home. As the Home Office (1968) states:

“This type of treatment will be available for use where the basic need is for help and supervision in the home, but a short period away from home also seems desirable. It will...enable the child or young person to be placed for a short time in a home or hostel, or with relatives...willing to receive him, while help is offered in remedying a difficult family situation” (1968: 10).

If parents or carers did not acquiesce to the dictates of social service ‘experts’, refusing to act as conduits for the articulation of this governmental strategy of control, the other main disposal for children or young people found guilty of an offence or in need of care or protection was the ‘care order’. This completely removed parental rights: “so that social work could choose from a range of tactics, supplementing or displacing the authority of parents, monitoring the outcome and making appropriate adjustments” (Rose, 1989: 179). The largely ‘extra-judicial’ powers this disposition invested the social worker with, when the family was considered irredeemably crimenogenic, included the removal of the child from home and into care (Morris et al, 1987).

Becoming integral to the exercise of governmental control over juvenile offenders, social services and its ‘expert’ practitioners transfigured the familial enclosure into a: “...‘relatively bounded locale or field of judgement within which their authority... [was]... concentrated, intensified and rendered difficult to countermand” (Rose, 1996: 50), with reference to judicial ‘norms’ and protections. It was a space of practice which seamlessly integrated executive and judicial powers, resulting in the empowerment of social service ‘experts’ who may have assumed the role of ‘petty sovereigns’, unhindered by effective judicial restraints upon their arbitrary

¹⁹ Harris et al (1987) found little ‘proportionality’ in terms of sentence length in their study of SOs: a two-year SO was predominantly used for both ‘non-serious’ and ‘serious offenders’ (ibid: 16).

exercise of power. The administrative determination of the SO's content - with reference to a pseudo-legal legitimising apparatus of expertise - ensured that it was regulated with reference to medical and administrative 'norms', often conflicting with and undermining judicial 'norms' and protections. In the familial enclosure of the child or young person subject to the SO, anything could potentially take place. Within this space of practice, where judicial 'norms' and protections may not have been able to reach, severely weakened judicial restraints were placed upon the arbitrary and overzealous exercise of medical power. The limits of coercion were therefore dictated not necessarily by the rule of law but by the expert's professional expertise and judgment, and of course the ethical standards of individual practitioners. Within the medicalised familial enclosure, the bio-political violence exercised by administrative 'experts' had the potential to convert to *exceptional sovereign violence* i.e., violence which is direct, unmediated and subject to severely weakened judicial regulation.

Chapter Summary

This chapter has shown that the obfuscatory paradigm of governance underpinning the YRO's modality of operation has animated youth justice policy and practice since the foundation of the juvenile court. It was demonstrated that its emergence is inextricably linked to the penal-welfare structure of the juvenile court and the resultant 'governmentalisation' of this age specific jurisdiction as it moved towards a welfarist jurisdiction at the apotheosis of the welfare-era in the late 1960s.

The juvenile court was established along a trajectory of child protection, child welfare and criminal justice legislation - illustrative of a shift from a sovereign to a disciplinary regime of power - which served to implant a concern for the 'welfare' of the children of the 'perishing' and 'dangerous' classes at its very centre. This legislation was informed by the 19th century 'Child Saving' movement's problematisation of the 'moral contamination' of the children of the 'dangerous' and 'perishing' classes, which was thought to engender juvenile delinquency. Influenced by an emerging Enlightenment conceptualisation of 'childhood' as a protective experience ensconced within the familial enclosure, these reformers attributed the 'moral contamination' of the children of the lower classes to two principle causes. Firstly, their *nomadic/vagrant* 'form of life' beyond the disintegrating or malfunctioning lower class family was thought to expose them to the degenerative and corrupting conditions of industrial urban life. Secondly, the unreformed prisons within which possibilities for moral contagion were considered rife, due to the uncontrolled coagulation of young petty criminals with older career criminals. It was shown that the precursor to the PO - *recognisance* - was developed as a judicial mechanism designed to prevent the contamination of young petty criminals in the unreformed prisons, utilising the familial enclosure (when stable) as an alternative means of immobilisation.

The emergence of the juvenile court represented the extension of the ‘Child Savers’ concern with segregation and reformation to the operation of ‘justice’ itself. The law’s operation was thought to be a potential source of contamination. Within the unreformed courthouses ‘young offenders’ came into contact with older hardened criminals and were also subjected to the stigmatising effects of a public court appearance. As such the 1908 Children Act, which established the juvenile court, stipulated that the public would be excluded from all court hearings, which would take place in a different building and at a different time to the hearings of the ordinary criminal court.

It was shown that the juvenile court was originally a criminal jurisdiction within which the criminal law ran an untrammelled course. However, its administrative integration of the civil and judicial spheres, and probation’s emerging psycho-therapeutic knowledge base, blurred the conceptual boundary between the ‘child in need’ and the ‘delinquent’. This conceptual ‘welfarisation of delinquency’ ultimately led to a welfarisation of delinquency proper, as the juvenile court was gradually ‘governmentalised’ in the welfare-era. The incorporation of the judicial institution into an administrative regulatory apparatus which valorised: “individualised sentencing, indeterminate sentences, classification...[and] treatment” (Garland, 2001: 28), led to the emergence of a paradigm of governance which obfuscated the distinction between executive and judicial powers, undermining the universality of criminal justice protections and the judicial regulation of governmental practices. The SO, determined by medical ‘experts’ with reference to bio-political ‘norms’ and policy objectives rather than the imperatives of ‘justice’, rendered it possible that criminal justice protections could not reach the ‘young offender’, immobilised within and governed through the familial enclosure. The formation of an apparatus of expertise to regulate this governmental technology also undermined its judicial regulation, potentially creating administrative ‘petty sovereigns’, relatively unhindered by judicial restraints. The ‘young offender’ may thus have been exposed to *exceptional sovereign violence*.

Chapter Three

The Return of the *Nomadic* Children of the ‘Dangerous Classes’: ‘Welfare’s’ demise, the rise of the neo-liberal state and the ‘justice-model’s’ ‘de-governmentalisation’ of youth justice

The strategy of the 1969 CYPA, which sought to ‘governmentalise’ juvenile justice by moving the juvenile court towards a welfarist jurisdiction, was only partially implemented. In 1970, due to ideological differences, an incoming Conservative administration: “decided to draw the teeth of the Act” (Priestley et al, 1977: 17) by not implementing sections 4 and 5. These would have effectively abolished the criminal jurisdiction of the court by raising the age of criminal responsibility to 14 and placing restrictions upon the prosecution of older children (ibid). This chapter aims to show, through an analysis of the SO’s introduction, that the failure of this strategy to severely delimit the juvenile court’s criminal jurisdiction served to inextricably conjoin the civil and judicial spheres, leading to a process of ‘net-widening’ and criminalisation. It will be demonstrated that the ‘governmentalisation’ of youth justice thus entailed not only a ‘welfarisation of delinquency’, but its partial implementation inadvertently instigated a ‘net-widening’ ‘jurisdiction of need’. The chapter will also delineate how the integration of these previously distinct spheres within a ‘penal-welfare complex’ had up-tariffing effects for those ‘young offenders’ who resisted, or were not amenable to, disciplinary normalisation in the familial enclosure.

The chapter will illustrate that the ‘governmentalisation’ of juvenile justice was a strategy of rule which was progressively undermined throughout the 1970s and early 1980s by resistance from the Magistrates’ Association to its implementation, and theoretical (Hood, 1974., Von Hirsch, 1976) and empirical critiques (Martinson, 1974; Lipton et al, 1975; Brody, 1976) of its underpinning ‘welfare-model’ which began to gain traction in the midst of a fiscal crisis. It will be shown how this crisis instigated a shift in the rationality of political rule from the communitarian and inclusive philosophy of social welfarism, to the individualistic and exclusionary philosophy of neo-liberalism in the early 1980s. The chapter will demonstrate that with the disintegration of the nuclear family enclosure and the concomitant return of the ‘dangerous classes’ following the neo-liberal retraction of the welfare state (Currie, 1991; Lea, 1997), a concern with finding novel ways to immobilise that perennial spectre – the *nomadic lower class child* – became discernible in the new ‘administrative criminologies’ (Clarke et al,

1997; Felson et al, 1998; Newman et al, 1997) institutionalised at this time. The manner in which this informed governmental crime control rationality will be explored through an analysis of the reconfiguration of the ACO's use and purpose during this period.

This chapter will illustrate how the 'justice-model', and its classical tenets of 'individual responsibility' and 'rational choice', were congruous with the prevailing ideological discourse of neo-liberalism, and as such began to displace the 'welfare-model' as the dominant theoretical framework informing youth justice in the early 1980s (Brownlee, 1998). It hopes to demonstrate how the 1982 CJA, informed by the central tenets of the 'justice-model', reigned in administrative 'petty sovereigns' and prevented the 'young offender's' exposure to *exceptional sovereign violence* through a 'de-governmentalisation' of youth justice. The chapter also outlines how this 'de-governmentalisation' served to arrest the 'net-widening' and up-tariffing consequences of the 'welfare-model', through strategies of pre-court diversion and adherence to the principles of 'proportionality', 'determinacy' and 'least restrictive alternative'. The function of the 'community service order' - imported from the adult court to the juvenile court by the 1982 CJA - within the community sentencing repertoire will be situated within, and explicated with reference to, these strategies of 'diversion, decriminalisation and decarceration' (Goldson, 1999).

The Criminalisation and Up-Tariffing of the 'Child in Need', and the Re-emergence of the 'Delinquent'

"The juvenile justice system exists as a function of the child care and criminal justice systems on either side of it, a meeting place of two otherwise separate worlds" (Harris et al, 1987: 9 emphasis added).

Symbolic of the failure of the social welfarist agenda of the 1969 Act to be fully implemented was the Conservative administration's retention of the ACO. The symbiotic welfarist response to the 'child in need' and the 'delinquent', which had rendered the ACO a superfluous disposition, was heavily criticised. A subcommittee of the House of Commons Expenditure Committee, established to review the workings of the Act in 1974, summed up this critique:

"It fails because it deliberately confuses the distinction between the functions of the court, the police and the local authority. It fails because it blurs what is often the very real distinction between a child in need of care and a juvenile offender. It fails because it deprives society of an important part of the courts criminal jurisdiction, namely to protect the public" (House of Commons Expenditure Committee, 1975, vol. 11, 303).

Due to the emasculating ramifications of the 1969 Act for the judiciary, the Magistrates' Association portrayed the courts as powerless to deal with a small group of sophisticated

offenders who were effectively allowed to: “commit offences with impunity” (Morris et al, 1987: 107). The judiciary had a lack of faith in the ability of the executive to control the ‘young offender’, particularly due to social workers’ perceived failure to remove those subject to a ‘care order’ from their home following a further offence (ibid). This was seen as evidence of social services’ willingness to exercise professional discretion against the court’s will. Consequently sentencers began to impose punitive sentences not left to local authority control or discretion. Between 1970 and 1979 there was a 109% increase in the number of boys aged 14-17 given ACOs. In contrast, by 1979 less than one in ten 14-17 year old young male offenders were sentenced to SOs, compared to one in six in 1970 (ibid).

The hybrid ‘penal-welfare’ structure of the juvenile court during the welfare-era also contributed to a criminalisation, and subsequent up-tariffing, of the ‘child in need’. The administrative integration of the civil and judicial spheres during this era extended the penal system’s reach: “by obliterating the separation between the assistanical and the penal... [it]...widen[ed] the orbit of the judicial to include all measures of correction” (Donzelot, 1980: 109). As the SO was a welfarist intervention previously only available for those in need of care or protection (Harris et al, 1987), seen as a ‘caring’ disposition imposed in the ‘best interests’ of the child or young person, it lowered the judicial apparatus’ threshold for intervention, facilitating its colonisation of the civil sphere. Harris et al’s (1987) 1978 study of the SO confirmed the ‘net-widening’ consequences of the SO. This study, which excluded all but those offenders who had been subject to the order for the first time: “served to highlight the existence as supervisees of a large number of predominantly unproblematic adolescents...who could almost certainly have been dealt with otherwise” (Harris et al, 1987: 118-119). Only 7% of a sample of 971 boys aged 14-16 were ‘recidivist offenders’ (had committed three or more offences), whilst 42% of the sample were ‘trivial’ first time offenders (ibid: 118).²⁰

This ‘net-widening’ could also lead to a process of up-tariffing if the ‘child in need’ subsequently breached the conditions of their order. Following the 1969 CYPA, the social worker became an officer of the court, and had an obligation to enforce the court’s disposals. The child or young person subject to the SO was forced to choose between a subjection to ‘norms’ within a familial ‘tutelary-complex’ or a delinquent career (Donzelot, 1980: 113). Those resistant to therapeutic normalisation within this familial enclosure were ‘relayed’ to the judicial sphere and the retributive justice of ordinary criminal law. Lowering the threshold of intervention and diluting the power to punish onto welfarist measures therefore placed the ‘child in need’ in: “the gear train of the judicial apparatus... overexpos[ing]... [them]... to a penal identification” (ibid: 110). Those who failed to take the ‘opportunity’ offered by a welfarist disposition, such as the SO,

²⁰ For the purposes of the study a ‘trivial’ offender was a child or young person who had committed a ‘property offence up to £10 value in total’, ‘common assault’, or a ‘minor public order offence (causing affray for example)’ (Harris et al, 1987: 182).

were often subject to a process of up-tariffing by sentencers dubious of the controlling ability of social workers (Morris et al, 1987). It is therefore perhaps unsurprising that the number of those sentenced to detention centres rose 155% between 1970 and 1979 (ibid). During the welfare-era, the juvenile court could be said to manufacture 'delinquency', the 'delinquent' being the end product of a process set in motion by their failure to acquiesce to normalising interventions within the familial enclosure (Donzelot, 1980).

This punitive judicial response was the opposite to that intended by the CYPA. Its attempt to re-align the power to control the 'child in trouble' to the executive, to be dealt with within a 'therapeutic-complex' comprised of professional 'experts', had largely failed. The magistracy retained control over the mechanisms of youth justice by rediscovering that 'wilful' and 'responsible' subject which the CYPA had wished to efface - the 'delinquent'.

Illustrative of the Magistrate Association's success in securing a hegemonic position for its narrative on juvenile offending, the House of Commons Expenditure Committee's critique of the Act as: "not...[being]...effective in differentiating between children who need care and the small minority who need strict control" (1975, para.: 167) was accepted as valid by a Labour inter-departmental White Paper responding to its recommendations in 1976:

"The government fully realise and share the widespread anxiety that is felt, especially by magistrates, about the continuing problem of how to cope with a small minority, among delinquent children, or serious and persistent offenders. It is in this area as the Expenditure Committee observed that the present measures under the Act are felt to be falling short" (Home Office, 1976: para. 3).

By accepting this narrative of critique concerning the intractability of a sizable minority of the juvenile offending population to welfare inspired responses, the symbiotic response to the 'child in need' and the 'delinquent' as envisaged by the CYPA was torn asunder. A bifurcated response to these two discursive constructions re-emerged within policy and discourse, illustrated emphatically by the Labour Government's u-turn on the use of the ACO as a suitable disposition for juvenile offenders. They argued in the White paper that the: "existing policy for junior attendance centres is to see them as a useful sanction...The system would already have been expanded in the past two years, had the resources been available" (Home Office, 1976: para. 39).

The White Paper argued that the fiscal restraints of the 1970s had prevented full implementation of CYPA's agenda: "...the transfer of responsibilities for supervising children from the probation service to the local authority social service departments has already been halted for the present because some local authorities are not able to undertake the additional commitment with their existing resources" (ibid: para. 35). When the Conservative Party came to power in 1979, the 'socialised management' of the risk posed by juvenile delinquency envisaged by the welfarist

strategy of the 1969 CYPAs had been discredited, and seemed profligate in the midst of an economic crisis.

The Rise of the Neo-liberal State, the Return of the *Nomadic Children of the 'Dangerous Classes'*, and the Re-Configuration of the ACO

In the late 1970s, the social democratic consensus, and the associated 'socialisation of risk' which it entailed, was becoming fiscally untenable. Around this time a neo-liberal critique of the welfare state was gaining traction in the midst of an economic crisis (Rose, 1996). This argued that expenditure on welfare services was deleterious to the health of the capitalist economic system, as it entailed an exorbitant tax rate on private profit (ibid). Margaret Thatcher's Conservative Government took political advantage of this deepening fiscal crisis to instantiate a novel rationality of political rule which sought a fiscal readjustment of economic and social policy: *neo-liberalism*.

Neo-liberal governance entailed a vast reduction in centralised expenditure in an attempt to engender an ethos of enterprise and entrepreneurialism to stimulate economic activity (Brownlee, 1998). With its retraction of the welfare state, neo-liberal governmental rationality departed from the collectivist and inclusionary responses to social maladies such as crime, of which the 'welfare-model' and the governmental technologies which it informed had been an integral part. In place of a 'bloated' welfare state, the neo-liberal political strategy of rule re-activated and re-emphasised the notion of 'individual responsibility', a strategy which essentially privatised the socialised management of risk (Rose, 1996). The state's role transformed from a 'universal provider' of individual and collective security and wellbeing to a 'facilitator' of individuals and groups in securing their own (Garland, 2001). With this, the normative subject of 'welfare', conceptualised as someone of 'need' and 'dependence' inducing the formation of an unaffordable welfare apparatus, was replaced. *Homo economicus* - that idealised 'rational', 'responsible' and 'prudent' subject of classical liberal thought who engaged in risk management (including that of becoming a victim, or perpetrator, of crime) as an everyday task of the 'self' - was resurrected and applied as a grid of intelligibility for human behaviour across a variety of policy areas, including crime (Foucault: 2008: 268).

The neo-liberal state's objectification of the purposive, self-determining individual provided ideological cover for the deleterious social consequences of the Thatcherite retraction of the welfare state. This retraction created a permanently socio-economically excluded 'underclass' which rendered the traditional objectives of welfarist dispositions such as the SO - rehabilitation

and social reintegration - unattainable.²¹ The plight of the socially excluded, and maladies which track poverty - such as criminality - were reconfigured as a 'failure of the self' rather than the consequence of an increasingly unfettered capitalist economy: "crime is a decision not a disease...[was]...the new conventional wisdom" (Garland, 2001: 198). The crime control strategy of the neo-liberal state would thus entail the management of those populations who were unwilling or unable to manage their own risks of 'criminality' (Rose, 2000).

The transference of this 'new conventional wisdom' across institutional sites and policy domains was evidenced by developments within criminological theory and youth justice policy and practice in the early 1980s. The institutionalisation of a new establishment criminology took place following the demise of positivist correctionalism and its rehabilitative ideal throughout the 1970s (McLaughlin et al, 2006). Empirical studies criticised and cast doubt on the 'welfare-model's' rehabilitative efficacy (Lipton et al, 1975., Brody, 1976). A 'nothing works' agenda (Martinson, 1974) was becoming dominant at the Home Office, which was sceptical of penal measures' rehabilitative effects. Within emerging 'administrative criminologies' (Clarke et al, 1997; Felson et al, 1998; Newman et al, 1997), the *rational, purposive offender* replaced the pathological offender compelled by a psycho-social predisposition. The focus of the 'new criminologies of everyday life' which now influenced Home Office rationale regarding crime control, were the 'criminal event' and the 'crimenogenic situation' in which it occurred. It was axiomatic of this rationale that the root cause of crime was 'opportunity' (McLaughlin et al, 2006). These situational criminologies focused upon manipulating variables in the environmental milieu to *deter* the 'rational' offender rather than *correcting* the 'abnormal' offender *ex post facto* (ibid).

The ACO: Revisited

The function of the ACO appears to have been modified by these changing criminological tenets and practices, increasingly being utilised to deprive the 'young offender' of opportunities to commit crime through spatio-temporally immobilising them, thus preventing their leisure time being used to engage in criminal activity. By the start of the 1980s the purpose of the ACO had radically changed. It began to be targeted at 'young offenders' who had found a new mobility, due to the disintegration of the 'underclass' familial enclosure, as a result of the social disorganisation and dislocation caused by neo-liberal economic policies, in particular, the retraction of the welfare state (Currie, 1991; Lea, 1997).

A Home Office (1980a) study of the ACO illustrated that the order was targeted at low-tariff offenders, a significant proportion of whom had committed opportunistic offences and came from

²¹ These were unattainable as welfarist objectives rely upon the acceptance of a normative morality: "involving essentially middle class values derived from the labour market" (Brownlee, 1998: 80).

'broken homes'. The sample for this study comprised a group of 589 boys aged 14-17 who were ordered to attend an attendance centre across 14 areas in England.²² Of these boys 30% were aged 14, 40% were aged 15 and the remaining 20% were aged 16 years old (ibid). There was no correlation between offenders' age and previous convictions. Magistrates were more likely to impose an ACO upon older offenders if it was their first court appearance, and upon younger offenders with previous appearances. For 45% of the sample, the ACO represented their first conviction. For 55% with previous convictions, there existed mitigating circumstances informing the imposition of an ACO, such as a lengthy period of time since their last conviction, or the relatively trivial nature of their latest offence (ibid). The most common categories of offence for which an ACO was made were opportunistic in nature. The categories of 'burglary and theft', 'theft and unauthorised taking of motor vehicles' and 'other thefts, handling stolen goods and deception' covered a combined 73% of index offences for which an ACO was made (ibid).

It was evident from the sample that: "some of the boys ordered to attend came from homes where there were considerable problems and, in particular, economic hardship" (ibid: 11). One sixth of boys had no father living at home, and at least one third had school attendance problems. A significant minority of the sample (42 boys) also had learning difficulties, being: "handicapped by limited or subnormal intelligence" (ibid: 12). Boys from materially deprived homes, and those without fathers, were statistically more likely to become absentees, and reoffend during their ACO (ibid).

The ACO's reconfiguration to immobilise the 'underclass child', whose *nomadic* 'form of life' beyond the familial enclosure presented them with ample criminal opportunities,²³ was further emphasised by the Home Office study's radical redefinition of the 'definitional parameters of success' to which the ACO would be subject for the purposes of the study. Under the regime of welfarism, longitudinal recidivism was used to determine the success of a particular intervention (Feeley and Simon, 1992). However, echoing the 'nothing works' penological zeitgeist, the study eschewed the notoriously intransigent indicator of rehabilitative success in favour of less ambitious objectives:

"Traditionally assessment, or evaluation of orders of the court has been concerned with long term effectiveness usually defined...in terms of conviction rates during a period after the court order was made. An abundance of research, however, has been unable to show that any order of the court is, in the long term, more or less effective than any other in reducing the delinquency of

²² Four attendance centres were in the London area, four in Yorkshire, two in Greater Manchester, and one each in North East England, Southern England, East Midlands and West Midlands (Home Office, 1980a).

²³ This use of the ACO was also exemplified with regard to the 'football hooligan'. In a 1977 House of Commons debate on football hooliganism the Labour Home Secretary Merlyn Rees was asked whether 'he would introduce further penal measures to combat football hooliganism'. He responded; "I have...begun consultations with a view to extending the junior attendance centre system...[in]...junior attendance centres...I think...that there are means now available for getting people away on a Saturday afternoon" (Parliamentary Debates, H.C. 1977 vol.931 col. 625).

comparable offenders... Bearing this in mind and recognising that, because of their limited and intermittent duration, long lasting effects on the boys' delinquent behaviour were even less likely after ACO's, short term measures of efficiency and effectiveness seemed much more appropriate to a new assessment of junior attendance centres" (Home Office, 1980a: 4).

Two 'short term' measures of 'efficiency and effectiveness' were used to evaluate the ACO's efficacy. The first was the 'explicit and unequivocal aim' of the court, defined as having the offender: "attend the junior attendance centre until they complete the number of hours specified in their ACO" (ibid: 4), depicted as the: "most important measure of whether the centres were fulfilling the court's requirement of them" (ibid: 4). The objectives of the court regarding the punishment, deterrence or correction of the offender were portrayed as 'implicit' to magistrates' reasons for imposing the order. The report posited that: "it seems logical to postulate that...[these]...objective[s] cannot be fulfilled unless the boys ordered to attend do so" (ibid:4). This logic redefined the ACO's *method* - attendance at an attendance centre – as the court's primary objective. Attendance, and spatio-temporal immobilisation accomplished through this, became tantamount to the attainment of the court's objectives. Sentencing guidelines at the time of the previous Labour Government reveal these to have been imbued with more longitudinal aims:

"Attendance centre orders are designed to deal with young offenders whose future conduct may be expected to be influenced by the deprivation of leisure time involved and by the endeavours of the staff to encourage them to make constructive use of leisure time and to guide them towards worthwhile recreational activities which they can continue on leaving the centre" (Home Office, 1978).

The eagerness of the study to avoid having to address any troubling questions concerning the longitudinal efficacy of the ACO regarding recidivism was accomplished by another methodological manoeuvre. The second measure used by the study to assess whether the objectives of the court were being met by the ACO, was: "whether the boy re-offends or not during the short period of time during which the order is in force" (Home Office, 1980a).

Even within these redefined 'parameters of success' the ACO was an unconvincing community based disposition. Despite it being less intense and onerous than most other community based sentences, only 52% of the sample completed their order without any unauthorised absences. A quarter: "made no attendance over a period of at least five weeks and a sixth did not attend for two periods of that length or for more than seven consecutive weeks" (ibid: 23). This was significant. Boys with considerable gaps in attendance, especially those with three consecutive non-attendances, were significantly more likely to reoffend during their ACO. Even when attendance was regular, the short term 'efficiency and effectiveness' of the order was less than impressive. Of the 29% of the sample known to have offended during their ACO (35% on more

than one occasion), 40% were regular attendees. Almost: “a quarter of ACO offenders committed their offences on a Saturday” (ibid: 34). However, only two did so when they were absent from the attendance centre suggesting it may have a short term preventative effect. The longer the order’s duration the less effective it appeared, with the largest proportion of ACO offenders found amongst those subject to orders lasting for a combined 24 hours (ibid).

The ‘Justice-Model’: Reigning in Administrative ‘Petty Sovereigns’

With the reconstruction of the offender as a rational subject rather than the victim of a psycho-social pathology within neo-liberal crime control rationality, they were no longer in need of a therapeutic response. On the contrary, retributive punishment was called for. This conceptualisation of the offender was thus conducive to the emergence of the ‘justice-model’ within youth justice in the early 1980s. Its retributive response to crime is likewise founded upon a conceptualisation of the offender as rational actor, and thus morally responsible and deserving of punishment. The ‘justice-model’ initially emerged in the 1970s. Its proponents (Hood, 1974; Von Hirsch, 1976) criticised the ‘net-widening’ and up-tariffing effects of the ‘welfare-model’. They also problematised the individualised, indeterminate sentencing which it necessarily entailed, and the professional discretion and autonomy it afforded administrative ‘experts’ in relation to determining the content, management and oversight of welfare based dispositions. In response they proposed the removal of non-criminal behaviour from the YJS, diversion from the juvenile court when possible: “procedures to make visible and...[judicially]... reviewable the discretionary practices of those working in the system and limiting sanctions available to the juvenile courts by reference to the principles of proportionality, determinacy and least restrictive alternative” (Morris et al, 1987: 246).

The rise to prominence of the ‘justice-model’ within youth justice policy and practice was also related to the congruence of its retributive philosophy with the law and order politics of the Conservative Party. When the Conservative Party came to power in 1979 the welfarist response to juvenile delinquency had been thoroughly discredited. The Tories’ views regarding the causes of crime and where responsibility for it lay, were encapsulated by Sir Keith Joseph at the Conservative Party conference in 1979: “...crime is the responsibility of those who commit it, and not of society...In the recent past we have diluted this idea by blaming crime upon social factors such as poor housing and deprivation” (The Times cited in Morris et al, 1987: 113).

The Conservative Party utilised ‘law and order’ as a key theme during their election campaign to undermine Labour amongst its working class core vote. The White Paper *Young Offenders* (Home Office, 1980b), published the year after, marked a move to the political right, away from

a: “rehabilitative or correctional agenda towards an emphasis upon retributive sentencing deterrence, and just deserts” (Smith, 2003: 9). Punishment rather than treatment was emphasised as the appropriate response to youth offending. As such, the focus of the juvenile court was to centre once again on the offence rather than the offender, ‘deeds’ rather than ‘needs’. The White Paper was indicative of the emergence of the ‘justice-model’ as the dominant theoretical framework informing juvenile justice policy and practice. It was littered with references to restricting ‘administrative discretion’ and outlined the introduction of determinate, judicially determined and regulated sentences for ‘young offenders’. This shift in power from the executive to the judiciary, and focus from the offender to the offence, served to move the court back towards a criminal jurisdiction.

The White Paper proposed a bifurcated response, distinguishing between ‘serious offenders’ and ‘minor offenders’, the government advocated penal measures for the former and diversionary measures for the latter. It recommended bolstering powers to impose custodial sentences upon young adult offenders (aged 17-21) and ‘short, sharp, shock’ custodial punishments for those aged 14 and younger by retaining the detention centre but with shorter maximum and minimum periods (4 months and 3 weeks respectively) (Home Office, 1980b: 5). It also recommended the use of punitive and credible non-custodial provisions for ‘minor offenders’.

The Supervision Order: Revisited

The Government, spurred on by a neo-liberal ideological zeal to reduce state spending and minimise state interference in everyday life, wanted to reduce the number of ‘young offenders’ imprisoned (Smith, 2003). The benefit of the bifurcated approach was that the: “government was able to maintain its reputation as being tough on crime, while at the same time keeping costs down and relieving pressures on the system” (ibid: 10). In addressing the penalisation of youth justice which occurred during the welfare-era, the government identified the cause as judicial disenchantment with welfarist community based disposals such as the SO. The *Young Offenders* White Paper stated:

“...there is no single explanation, though it is hard to resist the inference that in many cases courts do not have sufficient confidence in some of the existing non-custodial options to make use of them instead of custodial sentences. This seems to be confirmed by the fact that, for boys aged 14 and under 17, the proportionate use of care orders and supervision orders has declined significantly” (Home Office, 1980b: 12-13).

The Government therefore sought to provide punitive and credible non-custodial penalties which the judiciary had sole power to impose, oversee and amend, in an effort to prevent the up-tariffing of ‘minor offenders’. The White Paper recommended introducing a ‘specified activities’

requirement, to: “restore the confidence of the courts in the effectiveness of the supervision order...and intermediate treatment” (ibid: 15-16). This was similar in form to the IT requirement except the sentencer determined the content at sentencing, thus the activities were specified within the order imposed by the court (Nacro, 2002). In contrast to the IT requirement, it removed professional autonomy and discretion from the social services ‘expert’, heavily restricting the order’s ‘extra judicial’ ‘flexibility’ by requiring an application to the court for variation by the supervising officer, before any post-sentence amendment (ibid).

With the ‘specified activities’ requirement, subsequently introduced by the 1982 CJA, the familial enclosure of the child would no longer be characterised by the seamless integration of executive and judicial powers resulting in the reign of administrative ‘petty sovereigns’ subject to severely weakened judicial restraints upon their arbitrary exercise of medical power. Dispositions and their content were now to be sanctioned, determined and regulated by courts of law not the executive, restricting the administrative expert’s professional discretion in these areas. This ensured criminal justice rights and protections, and judicial regulation of governmental practices, could reach the familial enclosure unhindered: reducing the likelihood of ‘young offender’s’ exposure to *exceptional sovereign violence*.

The 1982 CJA also provided for the ‘night restriction requirement’ (NRR) and the ‘refraining conditions’ requirement as potential attachments to the SO. The NRR required the ‘young offender’ to remain at one or more specified locations (one of which was typically their home) for a period of time stipulated by the court between the hours of 6pm and 6am (Nacro, 2002). The NRR could last for a period for up to 30 days within the first three months of the order. The court was permitted to impose this for a maximum of ten hours per day. The NRR was analogous to a curfew order but more ‘flexible’. The premises could be left with accompaniment by a parent/guardian (as specified within the order) or ‘supervising officer’. Thus the deleterious effects of curfew orders on other family members were avoided by restricting the ‘young offender’s’ activities: “without at the same time imposing a virtual curfew on the parents” (ibid: 4).²⁴

The ‘refraining conditions’ requirement required the ‘young offender’ to refrain from specified activities on certain days or for the order’s entire duration. The activities, stipulated within the order at sentencing, would be those which the sentencer perceived to be directly related to the young person’s offending behaviour or pattern of offending. Thus they could be required to refrain from attending football matches or discos (Morris et al, 1987; Ashford et al, 2000).²⁵

²⁴ Due to the viability of enforcement the NRR was relatively underused (Morris et al, 1987; Nacro, 2002; Nellis, 2004).

²⁵ This requirement was also underused due to the viability of its enforcement (Nacro, 2002).

These requirements radically transformed the nature of the SO. They eliminated executive discretion concerning content and management, and imbued it with an ethos of punitive control, diametrically opposed to its welfarist origins. This seemed a price worth paying to social services practitioners delivering the disposition in the community, to encourage magistrates to engage with the government's diversionary strategy (Smith, 2003).

The Community Service Order

To further support the bifurcated strategy of diversion outlined in the 1980 *Young Offenders* White Paper, the 1982 CJA imported the 'community service order' (CSO) from the adult court into the juvenile court.²⁶ The CSO was originally provided for in Section 15 of the 1972 CJA following recommendations by the Advisory Council on the Penal System (ACPS) in their 1970 Report - *Non-Custodial and Semi-Custodial Penalties*, known as the 'Wooten Report'. It was a community based disposition which: "empowered courts to order offenders to perform unpaid work as a service to the community" (Pease et al, 1975: 1) for a minimum of 40 hours and a maximum of 240 hours to be completed within 12 months. It was initially only available for offenders aged 17 and over, however it was later made available as a sentencing option to juvenile courts for offenders aged 16 by the 1982 CJA.

The administration of the CSO was the responsibility of the probation service, although supervision was frequently performed by staff of local voluntary organisations, and local authority departments providing work for community service schemes (Pease et al, 1975). This typically involved: "helping the elderly or handicapped with domestic tasks like cooking, decorating or gardening, renovating and maintaining community amenities or working in youth clubs and other facilities for the young and disadvantaged" (Brownlee, 1998: 116).

The sentencing philosophy underpinning the CSO appeared convoluted. It was conceptualised as a 'penal chameleon' (Pease et al, 1980), appealing to a disparate range of sentencing philosophies as this extract from the Wooten Report illustrates:

"...in general the proposition that some offenders should be required to undertake community service should appeal to adherents of different varieties of sentencing philosophy. To some, it would be simply a more constructive and cheaper alternative to a short sentence of imprisonment; by others it would be seen as introducing into the penal system a new dimension with an emphasis upon reparation to the community; others again would regard it as a means of giving effect to the old adage that the punishment should fit the crime; while still others would stress the value of bringing offenders into close touch with those members of the community who are most in need of help and support" (ACPS, 1970, para. 33).

²⁶ The CSO was renamed the 'community punishment order' by section 44 of the CJ&CS Act 2000.

Perhaps as a direct result of the convoluted sentencing philosophy underpinning the order, the Wooten Report was ambiguous in defining the function which it was to perform within the repertoire of community based disposals. It viewed the primary utility of the CSO as providing an 'alternative to custody', stating: "in general we would hope that an obligation to perform community service would be felt by the courts to constitute an adequate alternative to a short custodial sentence" (Wooten et al, 1970, para. 37). As such it considered the CSO unsuitable for trivial offences, arguing that it may be appropriate for: "some cases of theft, for unauthorised taking of vehicles, for some of the more serious traffic offences...[and]...some cases of malicious damage and minor assaults" (ibid, para. 37).

Crucially however, the report equivocated upon the disposition's explicit status as an 'alternative to custody', stating: "we would not wish to preclude its use in...certain types of traffic offence which do not involve liability to imprisonment...[and that]...community service should, moreover, be a welcome alternative in cases in which at present the court imposes a fine" (ibid, para. 3). Consequently, no statutory force was given to its status as an 'alternative to custody', causing significant variation in practice across different courts (Brownlee, 1998). This served to undermine an 'alternative to custody' approach within adult justice during the 1970s which was a response to an ever expanding post-war prison population, which by 1968 had reached three times its pre-war level (Bottoms, 1987).

During the CSO trials (Pease et al, 1975), which took place in six probation areas nationwide between August 1973 and August 1974,²⁷ ample evidence showed that the CSO was displacing non-custodial dispositions. Only three experimental areas viewed the CSO as an alternative to custody. The trial evaluations demonstrated that sentencers: "in many cases seem to regard community service as an alternative to non-custodial sentences at least as much as, and possibly more than, an alternative to custodial sentences" (ibid: 26). Where a probation officer's recommendation of community service was not endorsed by the court, across all six areas only a minority of offenders received a custodial sentence. Likewise, when courts asked probation officers to consider community service suitability in SIRs but subsequently failed to impose it, a custodial sentence was awarded in a minority of cases (ibid: 25).

This disparity in use posed a significant problem - the possibility of offenders who breached their order becoming subject to a process of up-tariffing. If a CSO was imposed in lieu of an offence which would otherwise have attracted a non-custodial disposition and the offender breached this, a different sentencer who conceptualised the CSO as an 'alternative to custody' would likely impose a custodial sentence, failing to discern the previous court's alternate use of the CSO (Pease et al, 1980).

²⁷ The CSO trials took place in the areas of Durham, Inner London, Kent, Nottinghamshire, Shropshire and South West Lancashire (Pease et al, 1975).

The characteristics of offenders during the trials suggest that community service was used freely as an alternative to other non-custodial dispositions, evidenced by the revelation that those subject to CSOs were: “run of the mill offenders and not a particularly villainous bunch” (Willis, 1977: 124). They had relatively little experience of custody, and criminal records suggesting they were relatively minor offenders. Of the 757 with a CSO during two years of trials, 435 (57%) had no experience of custody and 594 (78%) had received no more than one custodial sentence (Pease et al, 1975: 40). Analysis of the CSO cohort’s previous convictions demonstrates that while 78% had previous convictions for property offences and 14% for motoring offences, only 58 had been convicted of ‘offences against the person’ (ibid: 43). This pattern was similar to the index offence for which the CSO was imposed: 74% of offenders were sentenced for property offences and 12% for ‘offences against the person’ (ibid: 30). Thus as Willis (1977) states: “...these offenders, though not guilty of trivial offences, do appear to be convicted of those types of offences for which a term of imprisonment would not, normally, be regarded as inevitable and might not even be deemed appropriate” (1977: 124-125).

Empirical evidence appears to confirm that the CSO was not predominantly utilised as an ‘alternative to custody’. Home Office researchers (Pease et al, 1977) deployed four tests to establish the extent to which the CSO displaced non-custodial sentences during the trials. Each test was considered individually fallible but when taken together they were considered to have empirical validity. Three tests showed that community service displaced custody in between 45% and 50% of cases. The range of methods and sources used gives significant credence to these findings (Pease, 1980), demonstrating that the CSO functioned as an alternative to custody in a minority of cases.

Not only did the CSO appear to be underperforming as an ‘alternative to custody’, it also failed miserably in terms of its rehabilitative efficacy. Pease et al (1977) found that 44% of those sentenced to a CSO were reconvicted within one year of sentence, which compared unfavourably with a comparison group with a 33% reconviction rate one year after sentence.²⁸ It was also found that the CSO had no effect on the seriousness of further offences (ibid: 22).

During the trials, sentencers overwhelmingly imposed the disposition upon young adult offenders: 54% of 1124 orders imposed were given to those aged 17-20 (Pease et al, 1975: 29). The trial evaluation highlighted the concern of one community service organiser that: “community service may come to be seen as exclusively a young man’s punishment” (ibid: 31). The perceived suitability of the CSO for the ‘younger offender’ amongst sentencers encouraged the Conservative Government to extend its availability to the juvenile court in the 1982 CJA, as part of the diversionary agenda within juvenile justice.

²⁸ This must be qualified by the fact that although the community service sample had similar criminal histories to the comparison group, they were younger and thus statistically more likely to be reconvicted.

Despite the ambiguous function of the CSO in the adult court, it is clear from the Government's pronouncements in the *Young Offenders White Paper* that it wished the CSO to operate exclusively as an 'alternative to custody' within the juvenile court:

"Community service schemes are now established throughout the country, and the order has clearly provided the courts with a very effective alternative to custodial sentences, particularly with young adult offenders; about half of all orders are made in respect of offenders aged 17-20. The Government therefore thinks it right to make the order available to the juvenile courts for 16 year old girls and boys who have committed imprisonable offences and who might otherwise receive custodial sentences... The extension of the order to 16 year olds reflects both the Government's determination to keep young offenders, including serious offenders, out of custody whenever possible, and its more general wish to increase the involvement of juveniles in their communities" (Home Office, 1980b: 17).

Due to the measures introduced by the 1982 CJA and a growing consensus of 'minimal intervention' (Schur, 1973) and 'diversion, decriminalisation and decarceration' (Goldson, 1999) amongst policy makers, the police, social workers and academics, the number of juveniles in custody had halved by the decade's end (Allen, 1991). The lurch towards the 'justice-model' and its emphasis upon determinate, tariff-based and least restrictive penalties, emphasised by the explicit position of the CSO as an 'alternative to custody', appears to have been successful in diverting children and young people from custody. This governmental strategy ensured that the CSO did not slip down the tariff engendering a process of up-tariffing and a sizable proportion of the delinquent population were *managed* in a cost effective manner i.e., in the community.

Chapter Summary

This chapter has shown that the juvenile court's 'governmentalisation' during the welfare-era resulted not only in a 'welfarisation of delinquency', but the partial implementation of this governmental strategy of rule - through a failure to severely restrict the criminal jurisdiction of the juvenile court - led to a 'net-widening' 'jurisdiction of need' and a subsequent process of up-tariffing. The CYPA's introduction of the 'caring' welfarist community based sentence of the SO lowered the threshold for juvenile court interventions by effectively obliterating the separation between the civil and judicial spheres. This diluted and extended the power to punish onto welfarist measures and caught the 'child in need' in the 'gear train' of the judicial apparatus. During the welfare-era, the juvenile court acted as a relay or exchanger between two previously distinct spheres now implicated within a 'penal-welfare' complex. Those children and young people resistant to disciplinary normalisation within the familial enclosure were relayed or up-tariffed to the judicial sphere and the retributive 'justice' of criminal law.

It was shown how the ‘governmentalisation’ of youth justice was a strategy of rule progressively undermined throughout the 1970s and 1980s, as the magistracy fought to retain control of the mechanisms of juvenile justice and empirical (Martinson, 1974) and theoretical (Hood, 1974) critiques of its underpinning ‘welfare-model’ gained traction in the midst of a fiscal crisis. Following the decline of social welfarism, an emergent neo-liberal political rationality of rule resurrected that ‘rational’, ‘prudent’ and ‘responsible’ subject of classical liberal thought - *homo economis* - who rather than being a subject of need and dependence engaged in risk management (including that of becoming a victim or perpetrator of crime) as an everyday task of the ‘self’ (O’Malley, 1996). With the objectification of this rational, purposive subject within governmental crime control rationality, crime was increasingly viewed as a ‘decision’ rather than a ‘disease’ (Garland, 2001: 198). The crime control strategy of the neo-liberal state would thus entail managing those populations unwilling or unable to manage their own risks of ‘criminality’ (Rose, 2000).

It was demonstrated that the transference of this ‘new conventional wisdom’ across institutional sites and policy domains was evidenced by developments within criminological theory, and youth justice policy and practice throughout the 1980s. Within the emerging ‘administrative criminologies’ (Clarke et al, 1997; Felson et al, 1998; Newman et al, 1997) which began to inform Home Office rationale, the rational, purposive offender replaced the pathological offender compelled by a psycho-social predisposition. It was axiomatic of these criminologies that the root cause of crime was ‘opportunity’, and they would thus inform a governmental crime control rationality which focused upon pre-emptively restricting criminal opportunities rather than correcting the ‘abnormal’ offender *ex post facto*. This rationality served to re-configure the use and purpose of the ACO following the disintegration of the ‘underclass’ familial enclosure due to the social disorganisation and dislocation caused by austere neo-liberal socio-economic policies (Currie, 1991; Lea, 1997). The disposition was deployed to immobilise a *nomadic* population of extra-familial ‘underclass’ children and young people, restricting their opportunities to commit crime.

The chapter showed that the ‘justice-model’ and its classical tenets of ‘individual responsibility’ and ‘rational choice’ were congruent with the prevailing ideological discourse of neo-liberalism, and as such began to displace the ‘welfare-model’ of youth justice policy and practice in the early 1980s. The offence-centric ‘justice-model’ served to ‘de-governmentalise’ youth justice, by shifting the focus from the offender back towards the offence, resulting in a movement of the court back towards a criminal jurisdiction. Its valorisation of judicial sanctioning and oversight of governmental practices served to disentangle executive and judicial powers and reign in administrative ‘petty sovereigns’ by subjecting their professional discretion to effective judicial regulation, and ensuring judicial ‘norms’ and criminal justice protections could reach the ‘young offender’ subject to governmental interventions. It was thus espoused that the ‘justice-model’

inhibited the young offender's potential exposure to *exceptional sovereign violence*. The chapter concluded by situating the 1982 CJA's importation of the high-tariff CSO into the juvenile court within a justice strategy of 'diversion, decriminalisation and decarceration' (Goldson, 1999) which had arrested and reversed the criminalising and up-tariffing effects of the 'welfare-model' by the end of the 1980s.

Chapter Four

Towards *Control* - Managerial Systemisation, the Imposition of a Homogenous Culture of Control

“Today, how can we believe in imprisonment? If the prisoner was once able to declare....that the best way to escape an enclosed space is simply to walk out of the door (which in his day stood him in good stead), today it is by fleeing through the door that we find ourselves imprisoned”
(Virilio, 1990: 93).

“Today information is architecture by other means, framing and contouring the relative motility of social intercourse” (Bratton, 2007: 17).

From Discipline to Control

As suggested above, the disciplinary confinement of the child, and their exclusion (from the public spaces of a liberal polity) and normalisation, within the nuclear family enclosure was integral to the ‘welfare’ regime, exemplified by the juvenile justice strategy of ‘government through the family’. As the ACO’s re-configuration illustrated, this governmental strategy underwent a period of crisis in the early 1980s. The government re-configured the purpose and function of a primarily retributive disposition, attempting to find an alternative, artificial enclosure, within which to exclude and immobilise the ‘underclass child’, in place of an ‘underclass’ familial enclosure decimated by austere neo-liberal economic and social policies (Currie, 1991., Lea, 1997).

This crisis is perhaps unsurprising; Foucault (2007) alluded to the transience of these sites of enclosure and the corresponding disciplinary modality of power in his writings upon ‘governmentality’ (2007: 86-114). The disciplinary societies of modernity succeeded those of sovereignty which ruled by threat of death, with the exercise of power aimed towards ensuring the sovereign’s continued existence (ibid: 98-99). Bio-political disciplinary societies, by contrast, administered the life of the individual and the ‘species life’ of the population through the enforcement of social and psycho-biological ‘norms’, enhancing their strength, increasing their

forces and thereby increasing the strength of the nation state vis-à-vis other nation states (Foucault, 1977b; 1978., 1981).²⁹

This historical model of 'regimes of power' suggests that the transitional process is due to the inability of the prevailing modality to deal with new problems of governance created by rapid socio-economic change. As Chapter Two depicts, the transition from pre-modern societies of sovereignty to modern disciplinary societies, and the instantiation of new strategies and modalities of rule were catalysed by the limitations of the former. Their centralised technologies of governance were exercised in a spectacular fashion over the bodies of the few (Foucault, 1977b), rendering them unable to effectively regulate the mobile or 'floating' population engendered by huge demographic upheaval, occurring during 18th century industrialisation (ibid). The disciplinary societies and their techniques of enclosure and individualisation, exercised throughout the entire institutional structure of the social body from the 18th century, arose to meet an industrial society's needs for a disciplined population (ibid). It has been shown how these animated juvenile crime control strategies from the mid-19th century, culminating in the juvenile justice strategy of 'familial confinement' at the apotheosis of the welfare-era in the late 1960s and early 1970s.

However, at the beginning of the 1980s the 'underclass child's' extra-familial mode of existence confronted this strategy of 'disciplinary confinement', with a mode of resistance to which it could not effectively respond, necessitating the ACO's reconfiguration to function as an immobilising/control based disposition. 'Nomadism' was thus a critical tool of resistance against the disciplinary spaces of enclosure,³⁰ a 'line of flight' (escape) beyond the nuclear family and the order imposed within its enclosed space. A space which the 1969 CYP A had desperately attempted to shore up, yet had failed. The *nomadic life* of the 'underclass child' thus rendered him/her beyond the reach of an institutionally delimited power and the juvenile justice strategy of 'government through the family'.

Following Foucault's historical model of 'regimes of power', and the evidence delineated thus far, the disciplinary societies of modernity, and their immobilising and exclusionary spaces of enclosure, appear transient. If this is so, then what has been progressively substituted for these enclosures and the architecturally dependent modality of bio-political power exercised within them, in an effort to control an increasingly mobile and *nomadic* population of 'young offenders' within the strategies of governance exercised within the YJS over the past thirty years? The following chapters will show that disciplinary societies, and the concomitant strategies of enclosure which have animated the juvenile justice strategy of governance since its inception,

²⁹ Although transient, 'regimes of power' do not simply disappear. One form of power displaces another and reconfigures it to function towards its ends (Foucault, 2007: 107-108).

³⁰ For a theoretical analysis of 'nomadism' as a method of resistance against the modern state's strategies of enclosure and 'sedentarisation' see Deleuze and Guattari, (1988: 387-467).

have been progressively displaced by the logic, institutional forms and governmental technologies of what Gilles Deleuze termed postmodern *societies of control* (Deleuze, 1997).

Adding to Foucault's historical model of 'regimes of power', in his 1997 article *Postscript on the Societies of Control*,³¹ Deleuze argued that Western societies were undergoing a transition from the disciplinary modality of power to a new modality of power - *control*. With *control*: "the geographical/institutional delimitation of discipline, that is, the inside-outside distinction, has become obsolete...today, power itself goes nomadic" (Diken and Laustsen, 2005, emphasis added). In the disciplinary society: "the individual never ceased passing from one enclosed site to another", with the spaces of freedom found between these enclosed sites. In societies of control however the mobile individual is subject to: "ultra rapid forms of free floating control" (Deleuze, 1997: 309). Whereas the disciplinary individual was a man enclosed: "the man of control is undulatory, in orbit, in a continuous network" (Deleuze, 1997: 311). Within societies of control, mobile individuals are targeted by mobile technologies of power, and monitored by generalised and interconnected forms of surveillance, as discipline realises its dream by breaking through the wall of the disintegrating disciplinary enclosure (Diken and Laustsen, 2005),³² giving it the ability to capture the *nomadic* 'underclass child'.

For Deleuze the transition from disciplinary societies to societies of control was catalysed by: "a wide range of social and economic changes happening over the last few decades which amounted to a mutation in capitalism" (Deleuze cited in Jones, 2000: 9). He clearly had in mind the shift in the modality of political rule outlined previously - from social democracy to neo-liberalism - as he commences by outlining the adverse effects of these socio-economic 'mutations' upon the institutional enclosures of modernity. These mutations have rendered them incapable of performing their disciplinary and immobilising functions, necessitating reforms to temporarily shore up the disciplinary regime:

*"We are in a generalised crisis in relation to all the environments of enclosure - prison, hospital, factory, school, family. The family is an "interior", in crisis like all other interiors - scholarly, professional, etc. The administrations in charge never cease announcing supposedly necessary reforms: to reform schools, to reform industries, hospitals, the armed forces, prisons. But everyone knows these institutions are finished, whatever the length of their expiration periods. It's only a matter of administering their last rites and of keeping people employed until the installation of new forces come knocking at the door. These are the **societies of control** which are in the process of replacing the disciplinary societies"* (Deleuze, 1997: 309, emphasis in the original).

³¹ This article was first published in 1992: see Deleuze, G. (1992) Postscript on the Societies of Control, *October*, 59: 3-7.

³² Foucault also notes the *nomadic* potential of the disciplines to: "emerge from the closed fortresses in which they once functioned and to circulate in a free state" (Foucault, 1977b: 211).

The traditional institutional enclosures within the ‘social’, some of which have been utilised to immobilise and exclude lower class children and young people throughout modernity, such as the family and the school (Foucault, 1977b: 215-216; Donzelot, 1980: 41), are everywhere in crisis: “...they’re fighting a losing battle. New kinds of punishment, education and healthcare are being stealthily introduced” (ibid: 174-175). The new kinds of punishment curtail possibilities of resistance to power through a *nomadic* ‘form of existence’ beyond these enclosures. Although the walls of the institutional enclosure enabled the exercise of disciplinary power, they also limited its reach. Bio-political violence was confined within the walls of the enclosure. In the society of control: “as the walls of the institutions break down, the logic... [of control]...that previously operated within their limited spaces now spread[s] out, generalised across the social field... here arise the networks of the society of control” (Hardt and Negri, 2000: 329). The transition from discipline to *control* is thus characterised by a shift in emphasis from ‘intermittent bio-political violence’ within differentiated institutional enclosures to ‘generalised bio-political violence’ which no longer requires enclosure for its exercise: “(p)ower is expressed as a control that extends...throughout the entirety of social relations...the whole social body is comprised by power’s machine” (ibid: 24).

Symptoms of Passage to the Regime of *Control*

An exposition of the integral features of this new modality of power, and the identification of the new kinds of punishment and control which its logic has informed the implementation of within adult, and belatedly youth justice, over the past 30 years, shall underpin the genealogical analysis which comprises the remaining chapters. This chapter suggests that *managerialism*: “the incursion of practices and ideologies of business management into the public sector” (Jones, 2000: 12), is one such feature (ibid).³³ It shall be shown that the imposition of this organisational form, with its emphasis upon interagency systemisation (joined-up governance) and the establishment of a homogenous supra-institutional *culture of control*, across previously distinct and semi-autonomous sites within the adult and youth justice systems, represented: “a fundamental assault on the professional cultures...discourses and power relations embedded within the public sector” (McLaughlin et al, 2001: 303), thus incurring resistance from professional administrative bodies. However, it will be illustrated that this process had, by the late 1990s, facilitated the emergence of *control* as a coherent rationality and modality of power exercised within youth justice.

³³ Deleuze (1997) hints at this process of managerialisation: “in the society of control, the corporation has replaced the factory” (1997: 310).

Managerial Systemisation

“In the disciplinary societies one was always starting again (from school to the barracks, from the barracks to the factory), while in the societies of control one is never finished with anything - the corporation, the educational system, the armed services being metastable states co-existing in one and the same modulation” (Deleuze, 1997: 310).

As the above extract illustrates, an essential feature of *control* is the tendency towards a ‘unified social system’ (Jones, 2000: 9). Whereas the different enclosures of the disciplinary society were architecturally, operationally and culturally distinct, the organisational form of *control: managerialism* (ibid), imposes a *systemic* interagency structure, accompanied by a: “single deep, organising logic” (ibid: 10) which pervades the once separate institutional sites. Converse to the enduring welfarist logics and modalities of practice which characterised the professional enclosures of modernity, *control* is: “short term and of rapid rates of turnover” (Deleuze, 1997: 313). “Enclosures are moulds, distinct castings, but controls are a modulation, like a self deforming cast that will continuously change from one moment to the other” (1997: 310). Whereas the different enclosures within the CJS were once distinct and semi-autonomous, with their own logic, practices and objectives, a process of ‘managerial systemisation’ (Bottoms, 1995), beginning in the early 1980s within adult justice prior to percolating throughout the YJS in the 1990s, has rendered these now integrated sites culturally homogenous, and vulnerable to imposed change or *modulation* from central government.

The homogenous ‘organising logic’ and modalities of practice instituted by the regime of *control* across the increasingly integrated and fluid criminal and youth justice institutional landscapes are unconcerned with welfarist normalisation, engaging in a precautionary and control orientated regime of ‘risk management’ (Rose, 1999; Feeley and Simon, 1992; 1994). This section shall show, with reference to the introduction of the ‘curfew order with electronic monitoring’, how the Home Office sought to undermine the probation services’ welfarist modality of practice by systemically integrating it into the wider penal apparatus, resolving the tension between ‘care and control’ existing at its heart with the abrogation of the ‘care principle’. It will be demonstrated that despite administrative practitioners’ resistance to the adoption of a more punitive and surveillance orientated modality of practice, the ‘curfew order with electronic monitoring’ (CO with EM) enabled central government to circumvent and undermine the rehabilitative work traditionally undertaken by probation staff in an ‘embodied’ (one-to-one) situational context with offenders (Nellis, 2004) in favour of an ethos of ‘disembodied’ risk management and perpetual ‘*control-at-a-distance*’.

The Managerial Systemisation of Criminal Justice: the Erosion of the Professional Enclosure and the Imposition of an Homogenous Culture of *Control*

As suggested previously, as a result of Home Office pessimism regarding the rehabilitative efficacy of the 'welfare-model', and the government's inability to ensure the rehabilitation and reintegration of the majority of the permanently ostracised 'underclass' created by neo-liberal socio-economic policies during the 1980s, the dominant theme of governmental crime control rationality became the preventative delimitation of the movement of offenders (Brownlee, 1998). As such, administrative practitioners came under pressure from a Thatcherite neo-liberal government to assume a novel and anathematic role - the cost effective *management* of a permanently excluded population (Feeley and Simon, 1994), unable or unwilling to exercise a 'responsible' and 'consumerised' freedom (Rose, 2000).

The *managerialist* paradigm represented a departure from probation and social service practice's traditional welfarist approach. Rather than being influenced by an approach focusing upon the identification and correction of antecedent causal factors, the managerial approach has an overriding emphasis upon 'risk management', as social morbidities such as crime become issues to be cost effectively managed, rather than definitively resolved (Muncie, 2009). As such, managerialism is concerned with: "making crime tolerable through systemic co-ordination...[and]... represents a significant lowering of expectations in terms of what...[criminal justice practitioners]... can be expected to achieve" (ibid: 298).

As this managerial paradigm emerged throughout the 1980s, the CJS began to decouple performance evaluation from difficult to achieve, 'externally derived' social objectives i.e., the eradication of crime, the reintegration of offenders, and the maintenance of public safety, and began: "to measure its own outputs as indicators of performance" (Feeley and Simon, 1992: 456). The efficacy of penal programs was no longer to be measured in terms of the notoriously intransigent indicator of rehabilitative success but on 'indicators of internal system performance' (McLaughlin et al, 2001). This was evidenced by the changing function of the term 'recidivism' within post-disciplinary *control* practices. Once recidivism was used to measure the efficacy of a particular penal program: if large numbers of offenders re-offended and were returned to prison this would be seen as an indicator of failure. However, with the shift from *rehabilitation* to *control*: "high rates of parolees being returned to prison...[is]...offered as evidence of the efficiency and effectiveness of parole as a control apparatus" (Feeley and Simon, 1992: 455). As a result of this focus upon 'internal system performance' in an effort to limit exposure to internal variables which 'system managers' could control, the professional autonomy of the administrative practitioner within their semi-autonomous professional enclosure began to be

problematised as an obstacle to be overcome in the pursuance of (less ambitious) policy objectives (Pitts, 2001).

Probation's ability to subvert governmental policy objectives was to be severely curtailed by the gradual introduction of this new managerial regime of *control*, growing alongside and eventually displacing the 'justice-model' throughout the 1980s and 1990s (Hudson, 1996). Within this regime, punishment was not conceived as a form of therapeutic treatment (welfare-model), but as a pragmatic instrument of policy implemented in order to achieve policy ends (Peters, 1986). To achieve these, managerialism has sought to overcome the perennial tension between 'care and control' existing within administrative practice by the systemic integration of probation, and belatedly social services, into the wider penal apparatus, therefore finding the resolution to this tension through an abrogation of the 'care principle' (Brownlee, 1998). It will be shown that this has resulted in the imposition of a homogenous culture of *control* across previously heterogeneous institutional sites.

The Curfew Order with Electronic Monitoring

The systemic nature of managerialism has been one of its integral features in a criminal justice context (Bottoms, 1995). Within the managerial rationality which began to pervade Home Office policy documents throughout the 1980s, the probation service was increasingly perceived as part of a criminal justice *system*, not merely an administrative, semi-autonomous appendage to it. This statement from a Home Office official in the late 1980s encapsulates this *systemic* rationality, which pervaded governmental crime control rationality by the decade's end:

"The probation service is a criminal justice service. It is one of the five criminal justice services, the others being the police, the courts (perhaps more an institution than a service), the prison service and, a newcomer to the scene, the crown prosecution service. All five services are about crime and what to do about it - preventing or reducing it, dealing with its consequences and with those who commit it, and mitigating its effects. The different tasks fall on different services in different ways, and at an operational level they are fairly clearly and rightly distinguished; but at a more general level the services all share or ought to share a common purpose and common objectives, even though their character is very different. Each can frustrate any of the others, and action or lack of action by any of them can affect the workload and success of each of the others, so they must understand one another and they must work together. The point is obvious, but it does not easily happen" (Faulkner cited in Bottoms, 1995: 24 *emphasis added*).

Governmental disdain for the probation service's welfarist modality of practice, and its efforts to systematically integrate it with those institutions representing the hard edge of penal control, was demonstrated with the introduction of the CO with EM in the early 1990s. By the mid-late 1980s,

with the juvenile prison population dropping, and the adult prison population predicted to reach 70,000 by the year 2000 (Home Office, 1988), the service's refusal to adopt a control orientated modality of practice was becoming untenable. The Home Office began to direct the service to assume a new role as agents of 'punishment in the community' (ibid).

The 1988 Green Paper - *Punishment, Custody and the Community* gave the probation service a stark choice: acquiesce to the process of managerial systemisation and the resulting homogenous *culture of control*, or be sidelined in the delivery of the Home Office's 'punishment in the community' strategy (ibid: para. 4.4). The Green Paper, influenced by neo-liberal political rationality, problematised the use of prison, especially with 'younger offenders'. It was considered infantilising, rendering offenders incapable of exercising a 'responsible' and 'disciplined' freedom upon release. Punishment in the community was considered a more 'responsibilising' way of dealing with offenders:

"...if... [the offender is]... removed in prison from the responsibilities, problems and temptations of everyday life, they are less likely to acquire the self discipline and self-reliance which will prevent reoffending in future. Punishment in the community would encourage offenders to grow out of crime and to develop into responsible law abiding citizens" (Home Office, 1988: 1).

The Green Paper proposed only using prison sentences for those who committed 'very serious offences', thus aligning adult justice with the strategy of bifurcation exercised within youth justice throughout the decade. This strategy, as within youth justice, demanded credible and demanding community based sentences in which the courts and the public could have confidence. Electronic monitoring (EM) was therefore suggested as a technological means of overcoming problems associated with curfew order enforcement (ibid: para.: 3.20), which required continuous co-present supervision (Nellis, 2004).

The 1990 White Paper *Crime, Justice and Protecting the Public* (Home Office, 1990a) pledged to introduce the CO with EM as a bail condition and as a penalty following conviction (ibid). The order was subsequently introduced by the 1991 CJA for offenders aged 16 years and over who committed an offence where the sentence was not fixed by law (Mair and Mortimer, 1996). Following two years of pilots (Mair and Mortimer, 1996; Mortimer and May, 1997), the disposition was introduced nationally in December 1999. It was extended to offenders aged 10-15 by section 43 of the Crime (Sentences) Act 1997. Following a pilot between March 1998 and February 2000 (Elliot et al, 2000) the order was made available on a national basis in February 2001 for 10-15 year old offenders deemed suitable by the court (Nellis, 2003).

Those sentenced to a CO with EM had to remain at a court specified location for a minimum of two hours and a maximum of 12 hours per day for up to six months (Mair and Mortimer, 1996), or a maximum of three months if they were aged 10-15 (Elliot et al, 2000). This could amount to

an extensive deprivation of liberty; maximum sentencing could subject offenders to 2100 hours of curfew (Mair and Mortimer, 1996), or 1050 hours for those children aged 10-15 (Elliot et al, 2000).

The variety of EM typically associated with the CO utilises Radio Frequency (RF) technology. This monitors compliance with the conditions of their order by using a Personal Identification Device (PID) or 'tag', typically attached to their ankle or occasionally their wrist (Mair and Mortimer, 1996). The PID transmits a signal to a Home Monitoring Unit (HMU) in the offender's home, which relays the signal via a phone line to the monitoring company. If the curfewee goes out of range of the HMU, by leaving their house, the signal is broken and the monitoring company is informed in 'real time' of a curfew breach. However, RF tagging does not allow the offender to be tracked beyond the limited vicinity in which the signal operates (ibid).

The 1990 White Paper suggested that the CO with EM would prove efficacious in reducing crime associated with particular spatio-temporal settings, through immobilising the offender at specific times by restricting them to their home: "curfews could be helpful in reducing some forms of crime, thefts of and from cars, pub brawls and other types of disorder. A curfew order could be used to keep offenders away from particular places, such as shopping centres or pubs, or to keep them at home in the evenings or at weekends" (ibid: 23).

Opponents of the disposition viewed it as an infringement of civil liberties. The White Paper responded by situating it as a high-tariff disposition which would function as an 'alternative to custody', arguing: "most people would prefer electronic monitoring to a remand in custody or a term in prison" (ibid: 23). However, the probation service remained stubbornly opposed to the introduction of electronic enforcement. The 'punishment in the community' strategy, set out in the 1988 Green Paper and the subsequent 1990 White Paper, was seen as both a derogation of their humanistic approach and a tangible threat to the service's existence (Mair, 2001). When the Home Office held talks with representatives from the service before the first trials of EM as a condition of bail, the service emphasised that: "electronic monitoring was controlling, oppressive, an infringement of civil rights and not something that the probation service should be involved with" (ibid: 170). Their opposition rested upon the use of technology to carry out surveillance upon offenders, a development enabling a seismic shift in the method of control from 'co-present' support (welfare) to 'disembodied *control-at-a-distance*'. EM offered a form of remote surveillance which dispensed with the actual presence which the personalised professional-client relationship required. Mair (2001) encapsulates the de-humanising consequences of this shift succinctly: "probation work dealt with human beings: electronic monitoring meant treating human beings as objects" (ibid: 171).

The 1988 Green Paper acknowledged that the introduction of the CO with EM threatened to fracture the therapeutic patient-client relationship upon which the service's entire history had

been built: “the new order would contain additional elements of control which some members of the probation service might perceive as inimical to their approach to working with offenders” (Home Office, 1988: para. 4:1). The service was encouraged to accept their new role as agents of ‘punishment in the community’ or be circumvented in its delivery through the use of a private sector security agency (ibid: para. 4:3). Evidently the rehabilitative modus operandi offered by the probation service had no place in the ‘brave new world’ of virtual, ‘disembodied control’, rendering necessary either the service’s coerced managerial integration into the apparatus of penal control, or their ostracisation in the delivery of EM.

When the first trials of the CO with EM were finally rolled out in 1996 (Mair and Mortimer, 1996) the service had been thoroughly sidelined with regard to its implementation and management. Such contracts went to private security firms despite some recalcitrance from a few probation service managers who feared that the service would be consigned to a backwater, by being marginalised in the delivery of a technology which the then Home Secretary Jack Straw somewhat presciently referred to as the ‘future of community penalties’ (Mair, 2001).

The De-Professionalisation and Managerial Control of the Administrative Practitioner - ‘Managerial Technologies of Performance’ and ‘Competence-Based’ Training

The ostracisation of the probation service in the delivery of the CO with EM illustrates how the ‘*control-at-a-distance*’ enforcement technology of EM allowed central government to circumvent probation’s professional enclosure when it proved unwilling to acquiesce fully to the process of managerial systemisation and inter-agency cultural homogenisation promoted by the Home Office. However, the intransigence of these professional enclosures, and the welfarist modality of practice which the ‘experts’ within them engaged in, was to be undermined through the imposition of stringent managerial ‘technologies of performance’ (Dean, 1999:168-169) - initially in the guise of ‘national standards’ and ‘programme integrity controls’ - and new forms of ‘competence-based’ training. These were designed to: “penetrate the enclosures of expertise fostered under the welfare state... [and were]... utilised from above, as an indirect means of regulating agencies, of transforming professionals into calculating individuals within calculable spaces subject to particular calculative regimes” (Miller cited in Dean, 1999: 169).

National Standards

National Standards (NS) (Home Office, 1992; 1995) ensured that the probation service’s management of ‘young offenders’, was subject to more stringent supervision requirements. The

restriction placed upon the probation practitioner's professional autonomy by NS was illustrated by the requirements placed upon their management of the PO;³⁴ requirements which served to reconfigure it to function within a regime of managerial risk *control*.

NS required the offender to maintain regular contact with their supervisor, with the initial meeting scheduled for within five working days of the order's imposition. This appointment was to be made, if possible, prior to the offender leaving court. Within the first two weeks of the order the probation officer, in consultation with the offender, devised an individual supervision plan identifying their 'needs', 'risk of reoffending' and 'risk of serious harm to others' which informed the development of an individualised programme to address these factors. The plan also stipulated the frequency of contact between the offender and the supervisor. NS were prescriptive on this point, requiring the offender on a 'straight' PO to attend a minimum of twelve appointments with their supervisor in the initial three months of the order, followed by six in the next, and a minimum of one per month for the order's remainder (Home Office, 1995).

Although the requirement to attend appointments was contiguous with probation's traditional therapeutic-relational mode of practice, it also constituted a restriction upon the offender's liberty. This punitive/control aspect of attendance was accented by NS, which placed stringent recording requirements upon practitioners and: "linked non-attendance much more consistently to breach proceedings" (Brownlee, 1998: 11) with breach action taken: "after no more than three instances of failure to comply with the order" (Home Office, 1992: 40).

NS also imbued probation practice with a managerial concern with 'internal system performance'. Emphasis was placed upon 'key performance indicators', 'monitoring aggregate information', the 'efficient targeting of resources', 'interagency co-operation' and linking the level and type of intervention to the 'risk assessment' of the offender (Home Office, 1992: 32-35).

'Competence-Based' Training and 'What Works' Programme Integrity

Controls

The restriction placed upon administrative practitioners' autonomy was further compounded by their de-professionalisation, through new forms of 'competence-based' training which rendered them governmental policy technicians. The *Supervision and Punishment in the Community* (Home Office, 1990b) Green Paper suggested that the emerging managerial regime provided: "considerable scope for greater involvement of individuals who are not qualified probation officers" (ibid: 31-32). With a managerial Home Office's need for uncritical functionaries, which

³⁴ The PO was made available to 'young offenders' aged 16 and 17 by the 1991 CJA (which brought 17 year olds within the jurisdiction of the new Youth Court).

necessitated undermining the: “perceived ‘soft left’, social democratic ethos of university-based social work education” (Cross et al, 2002: 155), the legal requirement that all new probation officers should hold a professional qualification was repealed by the Home Secretary in 1995 (ibid; Worrall, 1997). Probation training moved away from: “the inculcation of ‘knowledge’ and ‘values’ towards the acquisition of ‘skills’ and ‘competences’...derived from a functional analysis of the tasks required by the organisation” (Brownlee, 1998: 92-93). The move towards competence-based training began in 1989 with the Central Council for Education and Social Work introducing its ‘competence’ based two-year Diploma in Social Work as a replacement for a largely generic social work qualification (Nellis, 1996). This represented the managerial neo-liberal state’s subordination of education and training to the discipline of the market, and the situation of: “employers in the forefront of... [the]... training system” (Issit and Woodward, 1992: 43).

As the training of the workforce becomes subordinated to, and determined by, ‘market needs’ in the society of control: “perpetual training tends to replace the school, and continuous control to replace the examination” (Deleuze, 1997: 313). This process was illustrated by the ‘on the job’ ‘competence-based’ training methods introduced within probation practice from the late 1990s, as part of centrally accredited, and nationally implemented (Home Office, 1998a), ‘What Works’ (McGuire and Priestley, 1995) programmes, and the concomitant controls instituted to ensure practitioner adherence to narrowly defined programme delivery strictures.

‘What Works’ programmes, representative of the re-emergence of governmental confidence in the rehabilitative efficacy of penal measures (Robinson, 2001; 2005), were often delivered by specialists with no prior training as probation officers (Hollin et al, 2002), bypassing professional resistance to the implementation of these new risk-centric and overwhelmingly cognitive behavioural therapy (CBT) based programmes (McGuire and Priestley, 1995). Those delivering these programmes, professionally trained or not, were considered ‘qualified’ after undergoing only minimal competence-based training with regard to the delivery of the: “expertly designed ‘off the shelf’ programmes” (Hollin et al, 2002: 10). For instance, a ‘What Works’ programme for violent offenders delivered by Derbyshire probation and aftercare services in 1999 and 2000 required practitioners to undergo only three days of training with ‘experienced programme co-ordinators’. This included ‘an introductory day to the principles of ‘What Works’ and cognitive behavioural work’, a programme overview, and staff participation in selected programme exercises (ibid: 26).

‘Competence-based’ training thus produced a pliable work force, subjected to a regime of perpetual training in the delivery of centrally accredited ‘What Works’ programme components, which they were required to mechanistically and un-reflexively implement. Their role was that of compliant functionaries whose autonomy was severely delimited by ‘What Works’ programme

integrity controls including: “management manual[s] containing detailed instructions for data collection... delivery manuals outlin[ing] the running of the programme...[and]...detailed procedures for monitoring and integrity” (ibid: 21). Video and audio taping equipment were also utilised extensively at programme venues to ensure practitioner adherence to programme delivery strictures. As such, ‘What Works’ ‘programme integrity controls’ and ‘effective practice guidelines’ are congruent with, and representative of, an extension of the managerial concern with uniformity in practice evidenced by the introduction of NS in the early 1990s.

These managerial transformations to practice and training aimed to reduce structural conflict to joined-up ‘interagency working’, and facilitate the achievement of governmental policy objectives. They sought to do this by rendering the actions of practitioners, and the culture within which they worked, susceptible to modulation from the centre. The management of community based dispositions by the probation practitioner was no longer to be dictated by their welfarist professional training, they were now to be managed with: “...reference to the relevant ‘value statements’ or codes of practice” (Pitts, 2001: 8).

The Managerialisation of Youth Justice

This process of managerial systemisation, and the concomitant imposition of a homogenous culture of *control* which took place within the adult justice system, also began to percolate throughout the YJS during the 1990s. It was initiated by the establishment of the new *Youth Court* in the 1991 CJA, which created an ‘overlapping jurisdiction’ for community penalties for 16 and 17 year olds (Bottoms, 1995). Although the 1991 CJA is usually perceived as a lurch towards the ‘justice-model’, it was also: “backed up by powerful elements of managerialist thinking” (ibid: 25). The ‘overlapping jurisdiction’ made the SO, previously available solely for juvenile offenders (those aged 16 and below), available for 17 year olds who were brought within the jurisdiction of the Youth Court. It also made the PO, only available for those aged 17 and over (post 1969 CYPA), available to those aged 16.³⁵ As social services previously had primary responsibility for the provision of community based dispositions for offenders aged 16 and below, and conversely the probation service had been solely responsible for the delivery of dispositions for those aged 17, these new arrangements necessitated a certain degree of interagency co-operation and inter-organisational systemisation (Bottoms, 1995).

This theme of interagency co-operation within youth justice was to be formalised and extended by the 1998 C&D Act, which placed a duty upon local authorities to establish interagency ‘youth offending teams’ (YOTs). At an operational level these were to include: “social workers,

³⁵ The court had to consider the ‘maturity of the offender’ when deciding whether to impose the SO or the PO, the PO being thought more suitable for the mature ‘young offender’ (Home Office, 1990b: 43).

probation officers, police officers...education and health authority staff...[and]...people from other agencies and organisations, including those in the voluntary sector” (Home Office, 1997a: 25). The managerial systemisation, centralisation of control, and lack of autonomy at the local level - a result of the probation service’s systemic integration into the wider penal apparatus - was also evident with the formation of YOTs, which replaced the previous ‘Youth Justice Teams’ or ‘Juvenile Justice Teams’. The substitution of the term *justice* for *offending* is ‘symbolically vital’ (Goldson, 2000) in this regard. It not only represented a re-conceptualisation of ‘children in trouble’ as offenders first and ‘children’ (often with considerable ‘needs’) second (ibid), but it alluded to the systemic integration of the multi-agency YOTs into the wider penal apparatus, and the concomitant adoption of a *control* orientated modus operandi. This was emphatically demonstrated by the organisational location of YOTs. Whereas Juvenile Justice Teams were, ever since the 1969 CYPA, located within the Children’s Services divisions of local authority social services departments and thus nationally responsible to the Department of Health, YOTs represented a move away from: “the statutory childcare operations of social services departments” (ibid: 256). At the local level YOTs are managed by multi-agency ‘steering groups’ where they are *integrated* into: “broader corporate ‘crime and disorder’ and ‘community safety’ strategies” (ibid: 256). On a national level YOTs are rendered accountable to the YJB - a governmental quango established by the 1998 CDA responsible for devising strategic policy - a responsibility previously delegated to local authorities (Crawford, 1997; Pitts, 2000). The YJB’s Board members are appointed by the Home Secretary, and accountable to him/her via the Home Office (Cross et al, 2002: 153).

The agencies and actors within this systemic approach to youth justice service provision were to have a: “common approach...focused on addressing offending behaviour” (Home Office, 1997a: 25). Homogeneity was to be ensured through a ‘probationisation’ of youth justice (Cross et al, 2002: 159) entailing: the implementation of centrally audited NS (YJB, 2000) developed by the YJB and implemented alongside the establishment of YOTs in April 2000 (Eadie et al, 2008); the deployment of centrally accredited ‘What Works’ interventions within youth justice (Cann et al, 2005); the introduction of a standardised risk assessment tool informing interventions with ‘young offenders’ (*Asset* - YJB, 2006a); and the development of ‘competence-based’ training methods seeking to produce compliant functionaries, i.e., the ‘Youth Justice NQF’, structured around the ‘Professional Certificate in Effective Practice’ which aims to ‘standardise training across the sector’ (Ministry of Justice, 2011a).

Chapter Summary

This chapter has illustrated that a central feature of the regime of *control* is the formation of a ‘unified social system’ (Jones, 2000: 9). In contrast to the disciplinary regime, in which the

different institutional enclosures were architecturally, operationally and culturally distinct from each other, the regime of *control* imposes a systemic interagency structure, accompanied by a homogenous *culture of control*. The homogenous organising logic and modalities of practice instituted by the regime of *control* do not concern themselves with welfarist normalisation, but engage in a precautionary and control orientated regime of risk management (Feeley and Simon, 1992., 1994., Rose, 1999). It was demonstrated that the regime of *control* therefore sought to undermine the welfarist professional enclosures of probation, which had become a hindrance to the pursuance of *control* orientated policy objectives, by systemically integrating the service into the wider penal apparatus. The Home Office sought to instruct the service to adopt a more punitive and control orientated modality of practice - becoming agents of 'punishment in the community' (Home Office, 1988; 1990b) - or be circumvented in the delivery of new *control* based technologies such as the CO with EM. It was argued that this governmental technology consisted of 'disembodied surveillance' carried out via remote, 'real time' monitoring of tagged offenders far flung in space-time. This promised to circumvent and undermine the rehabilitative work traditionally undertaken by probation staff in an 'embodied' (one-to-one) situational context with offenders in favour of an ethos of 'disembodied' risk management and perpetual 'control-at-a-distance'. It was shown that probation resistance to the introduction of the order, with reference to their social welfare philosophy and social casework modality of practice, was circumvented through the use of private sector security agencies to deliver it.

The chapter illustrated that central government subsequently undermined the resistance posed by the probation service's welfarist professional enclosure, imposing a punitive and control orientated modality of practice through the imposition of new forms of 'competence-based' training and managerial 'technologies of performance' (Dean, 1999) which included 'national standards' (Home Office, 1992; 1995) and 'What Works' (McGuire and Priestley, 1995) programme integrity controls. These managerial developments in training and practice circumscribed the professional autonomy of probation practitioners, and represented an attempt to render them compliant functionaries whose modality of practice could be programmed from the centre.

The chapter concluded by outlining how this process of managerial systemisation, and the concomitant imposition of a homogenous culture of *control* across an increasingly fluid and systemic institutional landscape, within adult justice percolated throughout youth justice from the early 1990s. This resulted in the formation of multi-agency, risk-centric, YOTs - introduced by the 1998 C&D Act - and a 'probationisation' (Cross et al, 2002) of youth justice practice.

Chapter Five

Governing the Mobility of the *Nomadic* ‘Underclass Child’: The Three Operational Moments of *Control*

The managerial regime of *control*, legislatively enshrined by the 1998 CDA, introduced a panoply of new risk-centric community based sentences. The control of risk was to be a thematic concern of all new disposals and requirements introduced by New Labour in line with the new risk-centric ‘statutory aim’ of the YJS established by the 1998 C&D Act: the ‘prevention of offending’. The New Labour Government conceptualised youth crime within the schema of the ‘Risk Factor Prevention Paradigm’ (RFPP) - empirically supported by the *Cambridge Study in Delinquent Development* (West and Farrington, 1973) and the *Social Development Model* (Catalano and Hawkins, 1996). Both of these studies identified specific ‘risk factors’ said to be causally linked to offending behaviour, behaviour which they claimed could be prevented by introducing measures designed to counteract these risk factors (Haines et al, 2008). New Labour’s youth crime control agenda was heavily influenced by a: “confidence in the validity, generalizability and practicality” (ibid: 6) of such ‘risk factor’ research. This research, like that of the ‘What Works’ movement, has a narrow aetiological focus, persistently identifying interpersonal, familial, educational, environmental and peer factors as having the strongest causal relationship with offending behaviour (Farrington, 1996).

The following chapter will illustrate how these novel dispositions, along with those older community based dispositions which were re-configured to function within the regime of managerial risk *control*, contributed to the emergence of a coherent strategy, and modality of operation for the regime of *control* within youth justice practice which aimed to manage these ‘individual risks of reoffending’ (Hannah-Moffat, 1999). It will argue that this regime of *control* has three operational moments – *inclusive*, *differential* and *managerial* (Hardt and Negri, 2000: 198-201) – which are facilitated by the systemic institutional forms and generalised and unbounded forms of electronic surveillance and control which have replaced the disciplinary technologies of enclosure. It will demonstrate how these enable the governance - *at-a-distance* - of the *nomadic* ‘underclass child’s’ access to the interconnected institutional sites and societal ‘circuits of movement and mixture’ (ibid) which comprise the post-disciplinary society of control, in order to govern the risk they pose.

The Inclusive Moment

First, is the *inclusive moment*: the liberal face of control. “[A]ll are welcome within its boundaries, regardless of race, creed, colour, gender, sexual orientation... [and class]....In this first moment, then...[control]...is a machine for universal integration, an open mouth with infinite appetite, inviting all into its peaceful domain...Give me your poor, your hungry, your downtrodden masses” (Hardt and Negri, 2000: 198) is its mantra. Whereas the juvenile justice strategy of familial enclosure functioned by excluding the child or young person from the public spaces of the ‘social’ through confinement and immobilisation, *control* valorises and accents the ‘responsibilising’ elements of community penalties which facilitate the offender in exercising a ‘responsible’ and ‘prudent’ freedom.

It is indicative of the ‘responsibilising’ neo-liberal rationale informing the ‘punishment in the community’ agenda set out in the 1988 Green Paper ‘Punishment, Custody and the Community’, that the CO with EM was first introduced within it. Despite the populist punitive claims politicians made from the mid-1990s onwards, the CO with EM was not ‘incapacitative’: “an experience which removes choice, and prevents a particular course of action being taken regardless of desire” (Nellis, 2004). It may have offered definitive and ‘real-time’ evidence of breach, but it did not remove the offender’s ability to commit crime, as the high re-offending rate amongst those subject to the order illustrated (*see page 99*). The Green Paper was premised upon an objectified notion of the offender as a ‘rational, purposive actor’ needing to be incentivised in order to make prudent, self-interested decisions: “People have a choice whether or not to commit a criminal offence. If offenders can be helped to make the right choices then the risk of offending is reduced... It is better that people should exercise self control than have controls forced upon them” (Home Office, 1988: 1). Those not trusted to make the correct choices, i.e., those conceptualised within governmental rationality as unable to exercise a ‘prudent’ and ‘responsible’ freedom such as the mentally ill and ‘problem drug users’, were considered unsuitable for a CO with EM (Mortimer et al, 1999; Walter, 2002). EM appears to be a technology initially designed, in line with the neo-liberal strategy of ‘government through freedom’ (Foucault, 2008), to facilitate the offender’s exercise of a prudent and responsible freedom through developing a disciplined relationship with the ‘self’. This removed the necessity for their true incapacitation through technologies of enclosure.

However, this inclusive moment was to be achieved through illiberal means, being facilitated through the deployment of more demanding community penalties. As such, Home Office policy documents (Home Office, 1988; 1990a) informing the 1991 CJA marked an unmitigated lurch towards the ‘justice-model’ and an alignment with the strategy of bifurcation outlined in the *Young Offenders* (Home Office, 1980b) White Paper. The Home Office believed that in order for

community sentences to be utilised more extensively by sentencers, it was essential that they were viewed as: “demanding and punitive in their own right (‘punishment in the community’) rather than simply alternatives to the real punishment of custody” (Raynor et al, 2002: 62). To underline their status as ‘punishments in the community’ all *alternatives to custody* were renamed ‘community orders’ and section 6 of the 1991 CJA stipulated that these orders would be subject to a ‘serious threshold’. Community sentences for young and adult offenders were also restructured: “to reflect the concept of graduated restrictions on liberty...related to the seriousness of the offending...[and]...consistent with the just deserts principle” (Home Office, 1990a: 19).

To provide courts with credible and demanding non-custodial penalties, the 1991 CJA provided for the CSO’s attachment to the PO, forming a new community based disposition: the ‘combination order’.³⁶ Offenders subject to the order were required to perform a number of hours of community service work as specified by the court, whilst under the supervision of a probation officer, and subject to any specified requirements which were attached to their PO (Home Office, 1990a). It was designed as a high-tariff order suitable for recidivist property offenders (ibid), thus having a diversionary function within the sentencing framework. However: “in keeping with the underlying philosophy of the reforms, it was expected to achieve this primarily by establishing its punitive credentials” (Brownlee, 1998: 117). Therefore to the therapeutic-correctional component of the sentence was added the retributive element of compulsory, demanding work in the community (ibid).

Although the regime of *control* valorises community based penalties and endeavours to govern through the regulated freedom of ‘young offenders’, rather than through their mass enclosure and immobilisation, the deployment of more demanding community dispositions within youth justice illustrates that it is not characterised by an unrestricted mobility. Exclusion (from the public spaces of the political community) is still a feature of *control*. However, unlike the modern disciplinary regime, within which exclusion functioned in the binary sense of exclusion/inclusion (i.e., the subject was either enclosed within the institution or they were beyond the institution), within the postmodern society of control, where the institutional enclosures (especially the family) are in perpetual crisis rendering the strategy of mass enclosure untenable, exclusion has become merely a by-product of a strategy of ‘differential inclusion’ in postmodern ‘circuits of movement and mixture’ (Hardt and Negri, 2000: 198). Increasingly inclusion and exclusion from public space takes place not through techniques of enclosure, but through: “continuous, mobile forms of surveillance” (Diken and Laustsen, 2005: 64) such as EM. Thus the movement of the ‘young offender’ through physical space is now regulated by: “pulses of light as much as flesh and steel” (Bratton, 2007: 9). The *degree* and extent of this inclusion is dictated by the second

³⁶ The ‘combination order’ was renamed the ‘community punishment and rehabilitation order’ by section 45 of the CJ&C(S)A 2000.

moment of *control*, its *differential moment*, which involves the social sorting of a fluid and endlessly divisible population of children and young people, whose amorphous and metastable actuarial identities no longer correspond to the psycho-pathological identities of the disciplinary society (Hardt and Negri, 2000: 331-2).

The Differential Moment

Control is *digital*, “it turns everything into the logic of codes and passwords” (Diken and Laustsen, 2005: 64; see Deleuze, 1997: 311), including the body of the child or young person whose digitalised/coded body functions as a *password* informing their differential access to the public, private and institutional spaces of an advanced liberal polity. The emergence of the regime of *control* as the dominant modality and rationality of power exercised within youth justice thus corresponded to a new conceptualisation of the ‘young offender’. Whereas within the disciplinary societies: “the individual was the smallest socio-political unit, that which could not be subdivided any further, the social ‘atom’” (Jones, 2000: 10), the subject of the post-disciplinary societies of control is the *dividual* (Deleuze, 1997: 311) who is viewed as nothing more than a: “bundle of traits” (Jones, 2000: 10). The differential moment of the regime of *control* functions through ‘de-corporealising’ the body of the child, as these traits are selectively abstracted and reassembled into an actuarial ‘data *dividual*’. One such medium through which this is performed within youth justice are risk assessment tools, which actively *simulate* the post-disciplinary ‘young offender’.

Asset (YJB, 2006) is a standard risk assessment tool for ‘young offenders’ aged 10-17 within youth justice. Shortly after being established by a managerial New Labour Government in 1998, the YJB made the commissioning of a generic risk assessment tool one of its primary initiatives (Baker, 2005). *Asset*’s introduction was considered: “necessary for ensuring consistency of assessment practice in the emerging multi-disciplinary YOTs” (ibid: 107). When a PSR is requested by the court, the YOT practitioner must utilise the *Asset - Core Profile* assessment tool to determine the child or young person’s ‘likelihood of reoffending’ and ‘risk of serious harm to others’. The core assessment profile begins by covering basic information regarding the offender, such as their ethnicity and sex, the second page contains a ‘seriousness of offence score’ relating to their primary offence, with a small section included for some basic information regarding the victim. It then proceeds by focusing upon ‘static risk factors’ which are not amenable to change (YJB, 2006: 4-5) (such as criminal history and social services contact) but which are thought to improve the assessment’s predictive accuracy. The main section focuses upon twelve ‘dynamic risk factors’ which form the basis of any ‘rehabilitative’ intervention (ibid: 6-18). These include ‘living arrangements’, ‘family and personal relationships’, ‘education, training and employment’, ‘neighbourhood’, ‘lifestyle’, ‘substance use’, ‘physical health’, ‘thinking and behaviour’ and

‘attitudes to offending’. The *core profile* also contains a section for ‘protective factors’ such as education, training or work experience, the influence of positive role models, the availability of constructive activities to take part in and ‘a sense of direction or something to aim at in life’ (ibid: 20-22).

The *Asset - Core Profile* also includes a section to screen for vulnerability and risk of serious harm to others. If any of the questions in this latter section are answered in the affirmative then a separate *Asset - Risk of Serious Harm* form is used to assess the ‘risk of serious harm to others’ posed by the child or young person.

Within the Core Profile an accumulative rating for each section is required on a scale of 0-4, which should illustrate perceived links between specified problems and future likelihood of reoffending. The accumulative ‘risk score’ (out of 64) subsequently dictates an individualised intervention level based upon the ‘risk’ posed by the child or young person.

Asset performs what Jean Baudrillard (1983) defined as *third-order simulation*: the “reproduction of the real’ by means of codes and models” (Lyons, 2001: 116), rendering the image of the child or young person created via the risk assessment tool nothing but a *simulacrum* or representation without origin or reference to reality. To grasp Baudrillard’s concept of third-order simulation it must be situated within his genealogical analysis of representation. In ‘The Orders of Simulacra’ (1983) Baudrillard details a history of the logic of representation in which he identifies three different ‘orders’ or stages of simulation. The first he terms the ‘counterfeit’, spanning from the Renaissance to the Industrial Revolution (Baudrillard, 1983: 83). With first-order simulation, the representation of the *real*, in a painting or novel for instance, is patently exactly that: an artificial representation. However, during the period of second-order simulation, lasting throughout the Industrial Revolution, the boundaries between the representation and the real begin to blur. With mass-reproducible copies of items the representation of the *real* becomes so exact that it is impossible to discern the representation from reality; the representation becomes: “as real as the real” (Lane, 2000: 86). Baudrillard illustrates second-order simulation by depicting the Borges ‘tale’ of the “Exactitude of Science” in which: “the cartographers of the Empire draw up a map so detailed that it ends up exactly covering the territory...[but]...the decline of the Empire sees the Map become frayed and finally ruined, a few shreds still discernible in the deserts” (Baudrillard, 1983: 1). However, with third-order simulation: simulation proper, the representation *precedes* the real and no longer makes any reference to it. Third-order simulation is: “the generation by models of a real without origin or reality: a *hyperreal*” (ibid: 2 *emphasis added*). Hence, returning to Baudrillard’s analogy of the map, with simulation proper:

“...the territory no longer precedes the map, nor survives it. Henceforth it is the map which precedes the territory...it is the map that engenders the territory whose shreds are slowly rotting

across the map, whose vestiges subsist here and there, in the deserts which are no longer those of empire, but our own. *The desert of the real itself*' (ibid: 2, emphasis in original).

If we extend this analogy of third-order simulation to *Asset*'s function within youth justice, it can be perceived as a medium through which the child or young person's *hyper-real* 'data *dividual*' is simulated without reference to the complexities of the *real* embodied child. The strategy of simulation which today is characteristic of the differential moment of the youth justice regime of *control* produces a reality effect - the production of the child or young's *hyperreal* 'data *dividual*' - whilst concealing the absence of the *real* image of the 'underclass child', and the *real* world of material decay and embodied need within which they are socio-economically situated - *the neo-liberal desert of the real*. With *Asset*, it can no longer even be said that the real image of the child is distorted by the representation produced; the risk model precedes the *real* image of the child or young person and produces a *simulacrum* which hides its absence.

The *Asset* risk assessment tool should be conceived as a: "sort of 'genetic code' which controls the mutation of the 'real' into the hyperreal" (Kellner, 1989: 55). Just as the medium of: "language contains codes or models that structure how we communicate, and just as our cells contain genetic codes, DNA, that structure how we experience and behave" (ibid: 80) *Asset* provides a conceptual schema which controls how youth justice practitioners *simulate* the child or young person's *hyperreal* 'data *dividual*', and thus ultimately how they perceive them. The answers to the questions are pre-programmed and accounted for in advance (and based upon the narrow aetiological assumptions of 'What Works' and RFPP research), and the complexity of the *real*, the child with complex embodied 'needs' which require economic and structural, rather than individualised/atomised control orientated remedies, is short-circuited. Thus with *Asset* the: "entire system of communication has passed from that of a syntactically complex language structure to a binary...[tick box]...system of question/answer - of perpetual test", and as Baudrillard warns us: "tests are...perfect forms of simulation: the answer is called forth by the question, it is designated in advance" (Baudrillard, 1983: 116-117).³⁷

As the 'perspective space' between the medium (the risk model through which reality is perceived) and reality is effaced due to the former preceding the latter in third-order simulation - the medium diffracts or implodes into reality and the medium and the message merge; the medium becomes the message (Baudrillard, 1983: 49-58). As *Asset*'s loaded questions focus almost exclusively upon 'risk factors', it is a malevolent and threatening actuarial 'data *dividual*' of the child or young person which is simulated. The questions which inform this simulation focus upon negative factors; the 'positive factors' section is scored differently to the 'dynamic' or 'static' risk factor section which both form the sole basis for determining the child's 'risk score'

³⁷ An analogous example given by Baudrillard (1983: 128-129) to the type of simulation performed by *Asset*'s 'question answer cycle' is political polling.

(YJB, 2009c). These two sections focus almost exclusively upon negative factors which are individualised and divorced from their socio-economic context. It is thus a menacing ‘data *dividual*’ of the child, simulated through this predominantly ‘tick box approach’ (Smith, 2003), that determines the type and intensity of the control orientated intervention.

Body Surveillance

New forms of surveillance targeting the human body have been introduced which feed into and inform the simulation of the child or young person’s *hyperreal* ‘data *dividual*’. With body surveillance, as with the surveillance carried out by *Asset*, the ‘embodied’ child is distinctly lacking (Lyon, 2001). The child’s body is not approached as a single entity, but something whose internal processes must be: “broken down into a series of discrete signifying flows” (Haggerty and Ericson, 2000: 612). It conceptualises the human body as an: “assemblage comprised of myriad component parts and processes which are broken-down for purposes of observation” (ibid: 613). Drug testing for instance, a form of body surveillance coming to prominence within both adult and juvenile justice throughout the 1990s and 2000s by contributing to the discovery, and control, of ‘drug-related crime’,³⁸ functions by isolating flows of chemicals within the blood stream or urine. This technology was introduced within the Drug Treatment and Testing Order (DTTO) - introduced by the 1998 C&D Act as a community based treatment and rehabilitation programme for ‘young offenders’ aged 16 to 18.³⁹ The DTTO employed body surveillance in an effort to aid the construction of the child or young person’s ‘data *dividual*’, which subsequently constituted a target for intervention.

This governmental technology could last for between 6 months and three years and was targeted, through screening and subsequent recommendation by the probation or social services via a PSR, at: “serious drug misusers with a view to reducing the amount of crime committed to fund a drug habit” (Home Office, 1998b). It combined treatment with a regime of mandatory drug testing, requiring a minimum frequency of drug testing to be carried out by a treatment provider, with the results relayed to the court via a supervising officer. They were to be reviewed by the sentencing court at periods of at least one month, unless breach of the order (e.g. through multiple instances of detected drug use and/or failure to comply with the order’s conditions or supervision

³⁸ ‘Drug-related crime’ emerged within political discourse in the early 1990s due to technical innovations in body surveillance which discovered the correlation between these two morbidities. Key amongst these novel methods were testing for drug use upon arrest for adults (MacCoun et al, 2002), a power later extended to ‘young offenders’ as part of the *Updated Drug Strategy 2002* which sought to: “extend drug testing and referrals to treatment and care via the youth justice system” (Home Office, 2002: 5).

³⁹ The 2003 CJA replaced the DTTO with the ‘Drug Rehabilitation Requirement’, available for offenders over the age of 14. The DRR was a bespoke community order allowing for the attachment of other treatment or control based requirements (Bean, 2008: 109). These could include educational activities to address the cognitive or social skill deficits of the offender, or a curfew requirement (with electronic tagging) (ibid).

requirements) required them to be returned to the court for amendment or revocation sooner (Kothari et al, 2002).

The Managerial Moment

The differential moment of *control* is tactical (Baudrillard, 1983; Haggerty and Ericson, 2000: 614); it informs its third and final operational moment, its *managerial moment*. Here the newfound mobility of the ‘underclass child’ in the post-disciplinary society of control is governed by abstracting their de-corporealised ‘data *dividual*’ from its institutional/territorial setting and rendering it mobile across the smooth networked space of *control*. Decisions are subsequently made at ‘centres of calculation’ (Haggerty and Ericson, 2000) concerning the access of their physical body, far flung in space-time, to the institutional sites and post-disciplinary ‘circuits of movement and mixture’ (Hardt and Negri, 2000) which comprise the society of control.

The *dividual* emerges from the immobilising and exclusionary institutional enclosures which characterised the disciplinary society. Rather than being sedentary, he/she is: “undulatory, in orbit, in a continuous network.” (Deleuze, 1997: 311). These are the generalised networks and unbounded forms of surveillance and control which criss-cross like a fine mesh across the smooth interconnected space of the society of control, facilitating the capture and governance of the *nomadic* ‘underclass child’.

The process of managerial systemisation outlined in Chapter Four depicted the process whereby previously distinct institutional enclosures within the CJS and YJS, with their own unique cultures and internal modalities of practice and control, were subject to a process of ‘joining up’, not only between themselves but also with childcare agencies and extra-state institutions. This engendered an increasingly interconnected and ‘unified social system’ (Jones, 2000: 9), devoid of enclosures and characterised by a homogenous culture and logic of managerial risk *control*. A consequence of this tendency has been the coalescence of erstwhile discrete surveillance systems, practices, and technologies, once delimited by the walls of the institutional enclosure, creating a generalised ‘surveillant assemblage’ (Haggerty and Ericson, 2000) whose interconnected, and thus increasingly dispersed, forms of surveillance and control have served to swallow up the extra-institutional spaces of freedom within which the *nomadic* ‘underclass child’ once found themselves. The formation of this unified ‘surveillant assemblage’ thus represents: “the disappearance of disappearance” (ibid: 619).

The tendency towards the formation of a unified ‘surveillant assemblage’ within youth justice was demonstrated by the formation of YOTs. Although the surveillance systems of the different

criminal justice and welfare agencies which comprised them initially may not have been technologically linked, human contact served to systemically integrate these discrete systems. As Haggerty and Ericson (2000) state when referring to such multi-agency partnerships: “the coming together (face-to-face, or through electronic mediation) of social workers, health professionals, police and educators to contemplate the status of an ‘at risk’ individual, combines the cumulative knowledge derived from the risk profiling surveillance systems particular to each institution” (2000: 611).

The ‘surveillant assemblage’, formed by the multi-agency partnerships within youth justice, facilitates the institutional mobility of the child or young person’s abstracted and de-corporealised ‘data *dividual*’. The remainder of this chapter will show how this ‘additional self’ (Poster, 1990) is relayed across the YJS’s ‘surveillant assemblage’ by quasi-managerial practitioners and mobile forms of electronic surveillance. It is subsequently analysed at ‘centres of calculation’ (Haggerty and Ericson, 2000), and utilised to determine the differential access of their physical body, far flung in space-time, to the fluid institutional sites and societal ‘circuits of movement and mixture’ (Hardt and Negri, 2000: 198) which comprise the post-disciplinary society of control.

The Institutional Mobility of the Child

As illustrated previously, the ‘surveillant assemblage’ standardises the simulation of the child or young person’s de-corporealised ‘data *dividual*’. This process of *digitalisation* has facilitated the ‘comparability’ and ‘referability’ of the child or young person within the YJS by abstracting them from their institutional setting and rendering their ‘disembodied’ ‘additional self’ (Poster, 1990) mobile across the interconnected institutional landscape comprising the multi-agency ‘surveillant assemblage’. Although the increasing institutional mobilisation of the child or young person’s ‘data *dividual*’ is: “not so much immediately concerned with the direct physical relocation of the human body...this may be the ultimate consequence” (Haggerty and Ericson, 2000: 613) in order to govern the risk they pose.

The emergence of the ‘surveillant assemblage’ within youth justice entailed a change in role for the probation and social services practitioner, from that of a generic ‘social caseworker’, engaging in ‘co-present’, one-to-one therapeutic work with the ‘young offender’ in a situated professional enclosure, to that of a ‘quasi-managerial practitioner’ (Causer and Exworthy cited in Robinson, 2005), performing a prescribed ‘management’/referral role. These changes in probation’s modality of practice were first outlined in the 1988 Green Paper *Punishment, Custody and the Community* (Home Office, 1988). The Green Paper, for the first time, espoused the notion that supervision of offenders in the community could be shared with: “other services, and

private and voluntary organisations, to obtain some of the components of punishment in the community” (ibid: para. 4.4) with the probation service assuming a managerial or administrative role without being responsible for the provision of programme components. This process of ‘interagency co-operation’, or managerial systemisation, marked the emergence of a new modality of practice represented by the displacement of ‘social casework’ *genericism* by ‘case management’ *specialism* (Robinson, 2005). With the formalisation of managerial systemisation, the traditional ‘casework’ based delivery of community based dispositions, with its emphasis upon the continuity of the holistic one-to-one ‘therapeutic’ relationship between the practitioner and the offender, was gradually displaced. A fragmentation of practice and work tasks occurred due to the emergence of a ‘case management’ approach which viewed the offender as a ‘portable’ entity to be referred across the ‘surveillant assemblage’ to effectively manage the risk they posed (ibid). This development in practice resulted in the merging of the ‘practitioner’ and ‘managerial’ roles, effectively constituting the probation officer as a ‘quasi-managerial practitioner’ (Causar and Exworthy cited in Robinson, 2005). As Robinson (2005) states:

“Practitioners were no longer encouraged to think of individual probationers as their offenders, but instead to concentrate on the full and accurate completion of increasingly complex assessment paperwork with a view to enhancing offenders ‘referrability’ within the new systemic framework”. (2005: 10).

This shift in probation practice is substantiated by the governmental policy documents of the late 1980s and early 1990s which, keen to render the supervision of offenders cost effective and programmable from the centre, encouraged this transmutation in practice. The 1990 Green Paper *Supervision and Punishment in the Community*, designed to: “rationalise the structure and organisation of the service” (Worrall, 1997: 71), stated:

“the service will need to move even further away from seeing itself as an exclusive provider of services and facilities. There are tasks and services which are unquestionably for the service itself - but there are others where the voluntary or private sectors may have better skills and experience. Probation officers will need to make full use of the contribution which these skills can make to their work.” (Home Office, 1990b: para. 3.3)

This quasi-managerial modality of practice has subsequently been adopted by YOT practitioners, emphatically illustrated by the most recent *Case Management Guidance* (YJB, 2010a):

“YOT workers should ensure that they...[refer]...to other appropriate agencies...Where intervention plans are complex or have multiple components, such as combinations of criminal justice, health, safeguarding and welfare elements, multi-agency meetings provide an effective forum for engaging and co-ordinating other services.” (YJB, 2010a: 6-7)

The ‘core skill’ of the administrative practitioner emphasised by a managerial Home Office has thus become the thoroughness of their PSR writing. This ‘skill’ or ‘competence’ is viewed as essential to increasing the ‘referability’ of the offender by: “fostering optimum use of in house and partnership specialists” (Burnett, 1996: 67-68), and ensuring the correct allocation of scarce resources to individualised ‘risk profiles’.

Governing the *Nomadic* Child - Electronic Enforcement

“Now the presence and vehicular movement of people and objects through...space is tightly integrated with an infrastructure of software, and to send objects in motion or to impede their trajectory is a... labour performed by pulses of light as much as flesh and steel” (Bratton, 2007: 9).

Within the disciplinary regime, the child or young person moved from one enclosed site to the other, typically between the family and the school. Within the managerial regime of *control*, however, they are increasingly subjected to: “ultra-rapid forms of free floating control” (Deleuze, 1997: 309). The mobile child or young person is increasingly being: “submitted to a system of interior/exterior traffic control” (Virilio, 1997: 381), as categories of children and young people are channelled and blocked in prescribed ways as part of a strategy of ‘differential inclusion’ within postmodern: “circuits of movement and mixture” (Hardt and Negri, 2000: 198), which are replacing the disintegrating disciplinary enclosures. This is performed by: “continuous, mobile forms of surveillance” (Diken and Laustsen, 2005: 64) such as EM, which determine the ‘differential inclusion’ of the *nomadic* ‘underclass child’ within these ‘circuits of inclusion’ based upon the risk they pose.

The centrality of EM to the youth justice regime of *control* was illustrated from its introduction as a modality of enforcement within youth justice, by the 1997 Crime (Sentences) Act, to its inclusion as a requirement within the YRO. Within this time it had become an integral requirement within the community sentencing framework, being made available to enforce any requirement of a community based order by section 52 of the CJ&CS Act 2000.

EM has become central to the community sentencing strategy within youth justice over the past 20 years, as it represents a technology of power which escapes the institutional confines of the disciplinary enclosure, and *goes nomadic* in order to capture and interiorise the *nomadic* population of ‘underclass’ children and young people once beyond its grasp, disciplining their movement through physical space. EM technology functions by ‘decorporealising’ the child or young person’s ‘body in motion’ into a *virtual* raw data flow through tagging technology, which relays this data to ‘centres of calculation’ (Haggerty and Ericson, 2000) where it is reassembled

by computer systems into a *virtual* 'data *dividual*'. The computer system then monitors compliance with the conditions of the order, allowing or denying the 'young offender', far flung in space-time, access to physical/public space. EM is 'short term and of rapid rates of turnover': "the scheme involves a system whose parameters (day, time, place) are rapidly modifiable" (Jones, 2000: 14) in order to manage the fluctuating risk posed by the 'young offender'.

The high speed/'real time' technology of EM intensifies power by compressing/binding space and time, obliterating the notion of physical distance (Virilio, 1997), thus allowing instantaneous '*control-at-a-distance*' of *nomadic* populations. EM is thus a 'penalty of substitution' for the disintegrating institutional enclosures of modernity. The centrality of the enclosure and the restricted form of 'co-present' surveillance exercised within it to the regime of governance exercised within youth justice, has been replaced by the centrality of unbounded 'disembodied' surveillance carried out 'at-a-distance' by mobile forms of surveillance and control which rely upon computer systems to: "record discrete observations" (Haggerty and Ericson, 2000: 612). Thus a demise of the familial enclosure in postmodernity does not mean that the *nomadic* 'underclass child' finds himself/herself in an unbounded space of freedom. Within the managerial regime of *control* which has arisen within youth justice over the past 20 years, there no longer is 'an outside'. Due to the 'automation of a penal sanction' (Jones, 2000: 13-14) into a continuous, mobile electronic surveillance system, discipline breaks through the wall of the institutional enclosure and now spreads out generalised across the social field (Hardt and Negri, 2000: 196-197). The techniques of power which functioned within the institutional enclosures work all the better now that the enclosures are breaking down into a generalised 'surveillant assemblage', constituting a smooth, interconnected network of control (ibid). As a consequence, within the society of control the 'social' in its entirety begins to represent a virtual prison (Deleuze, 1997: 312; and final chapter).

The Curfew Order with Electronic Monitoring: Revisited

The targeting of the *nomadic* 'underclass child' through the mobile form of surveillance and control which electronic enforcement offered was evidenced through the targeted use of the CO with EM. This disposition was considered punitive by sentencers, however it was also thought to have: "scope for reducing...opportunities for offending" (Mair and Mortimer, 1996: x). In their analysis of the first two years of the CO with EM trials (*see* Mair and Mortimer, 1996., Mortimer and May, 1997), Mortimer et al (1999) found that probation officers and sentencers considered it to be suitable for 'pattern offending' occurring at particular times and places. This was a view also held by magistrates interviewed by Walter (2002) shortly after its national rollout, who thought that the disposition would be suitable for: "young offenders because they often offended at night or with peer groups" (ibid: 4) and had chaotic lifestyles which would benefit from the

self-discipline offered by the disposition. It is likely that the realisation of the suitability of the CO with EM to 'young offenders' informed its extension to offenders aged 10-15 by section 43 of Crime (Sentences) Act 1997.

The Home Office held pilots in Greater Manchester and Norfolk to evaluate the impact of the new measure for 'young offenders' aged 10-15, with 155 orders being imposed throughout the trial period - March 1998 to February 2000 (Elliot et al, 2000). The Home Office report of the pilots problematised the unregulated freedom of the *nomadic* 'underclass child' beyond an idealised familial enclosure, with parents with a: "capacity and willingness to supervise their children" (ibid: 13). It is evident that the disposition was designed to enforce this objectified, yet faltering, relationship between the parent/s and the 'young offender'. Explaining the Government's rationale behind its introduction to those aged 10-15 during the Crime (Sentences) Bill's passage through the House of Lords, Baroness Blatch stated: "this is...one opportunity to bring family and child together, enforced though that may be. There may well be positive aspects of that. We would at least like to see whether it will work" (Lords Hansard Debates, 1997: column 1322). Continuing, she stated that its introduction was underpinned by the aim of providing the courts with: "a means of keeping them at home, off the streets and away from shopping centres, clubs and other places where they may get in trouble" (ibid).

Within such governmental rationality, preventing youth crime seems to entail spatio-temporally banishing the 'young offender' from sanitised public spaces: "at times when many offenders are thought to be most likely to offend" (Elliot et al, 2000: 9), confining them to the home where 'responsible' parents are complicit in the strategy of control exercised over the child. However, a central paradox inherent within the government's rationale, acknowledged in the trial evaluation, is that although it considers youths from disrupted family backgrounds to be most suited to the constraining influence of the CO with EM, it also concedes that they may not be eligible as they lack a stable home address (ibid).

The theme imbuing the pilots concerning the spatio-temporal immobilisation of the child at specified times depending upon the individualised risk they posed was also illustrated by the provision of a power to the court to curfew the child to school, although no sentencers did so. Curfew periods were predominantly imposed outside of school hours (if the child was still in mainstream education) and during the school holidays. It thus appears that school attendance by itself, as with merely being part of a stable family, is conceptualised as a 'protective factor' - a form of immobilisation which reduces criminal opportunities and ameliorates the child's risk of harm to others. The power to curfew the child to school was designed to enforce attendance and shore up the institution of the school. However, it appears that with regard to the population targeted by sentencers during the pilot this specific measure was, like the curfew to the 'underclass child's' home, too late. From a sample of 25 'young offenders' interviewed during

the trial, 14 either had poor attendance records or had been excluded from formal education, rendering a curfew to school either ineffectual or unviable (ibid).

The emphasis upon re-institutionalising the 'young offender' at certain periods of each day depending upon their individualised risk profile is illustrative of a governmental rationality which conceptualises the delinquency of the post-disciplinary child as being characterised by an un-prescribed *nomadic* 'form of existence', to which the mobile form of surveillance provided by the CO with EM is a strategic response. This renders explicit a governmental rationality which views the school and the family less as bastions of socialisation, and more as *virtual* 'holding pens'.

Of the orders imposed during the pilots, 90 % were upon young male offenders and, similar to the adult trials, most orders were imposed when the primary offence was 'opportunistic' in nature, although this trend was even more pronounced with 'theft and handling' (36%) and 'burglary' (26%) constituting over 60% of all offences for which a CO with EM was imposed.⁴⁰ 25% of 'young offenders' were also subject to another order; additional orders being imposed for more serious offences. This is significantly below the 37% of joint orders imposed upon offenders in the adult trials, and is illustrative of a less constructivist and more punitive and control orientated response to the 'young offender'. This draconian use was exemplified further by the average length and daily duration of the orders imposed. Over two-thirds (105) were imposed for between two and three months (the legal maximum), whilst adult offenders on average were subjected to orders just over half the legal maximum.⁴¹ 84% of young offenders were also curfewed for between 10 and 12 hours per day (the legal maximum) (Elliot et al, 2000).

Throughout the adult trials sentencers, bound by the criminal justice principle of 'proportionality', had rejected the suggestion made by Home Office officials prior to the trials that the CO with EM was: "potentially useful for most petty offenders" (Mair and Mortimer, 1996: 26). However, sentencers were utilising the order more flexibly with regard to 'young offenders', targeting those further down the sentencing tariff. Over 50% of 'young offenders' upon whom a curfew order was imposed had previous convictions, however only 3% had subsequently been imprisoned (Elliot et al, 2000), compared to 59% and 47% of offenders who had previously received a custodial sentence in year one and two of the adult trials respectively (Mair and Mortimer, 1996., Mortimer and May, 1997). This belies Home Office rhetoric made prior to the introduction of the CO with EM, which situated it as a direct 'alternative to custody' (Home Office, 1990a).

⁴⁰ In year one of the adult trials 'theft' (25%) was the most popular offence for which the order was imposed, with 'burglary' (17%) being the second most popular (Mortimer and May, 1996). Year two was similar, with 'theft' (28%) and burglary (19%) constituting the main offences (Mortimer and May, 1997).

⁴¹ In year one those sentenced received on average an order which lasted 3.4 months (Mair and Mortimer, 1996). In year two those sentenced received a sentence which was on average 3.3 months in length (Mortimer and May, 1997). Six months is the legal maximum for those aged 16 and above (ibid).

The tariff slippage of the disposition with regard to the ‘young offender’ was further illustrated by the rationale evident within the pilot evaluation report. When calculating the order’s potential cost savings based upon its ‘market share’ in relation to other orders the report was of the opinion that it would be more likely to replace SOs (Elliot et al, 2000). This tariff slippage no doubt also contributed to a process of up-tariffing as the most common response to breach throughout the trials was to revoke the order (ibid).

The order’s projected displacement of the SO is a blatant example of managerial ‘control-at-a-distance’ displacing the ‘co-present’ therapeutic professional-client relationship favoured by probation and social services. This displacement was, however, to prove unnecessary. Both the welfarist dispositions of the SO and the PO were subsequently re-configured to function within the managerial regime of risk *control*. A CO with EM was made available for inclusion within the ISSP, which could be attached to the SO (as consolidated by para. 3 schedule 6 of the PCC (S) A 2000). It was also made available as a requirement to the PO (as consolidated by para. 7 schedule 2 of the PCC(S) Act 2000).

The completion rate for those who received a CO with EM during the trial period was 73%, which compared unfavourably to an average completion rate of 79% over the two years of the adult trials, adding credence to the belief of many sentencers and probation/YOT practitioners that in some cases ‘young offenders’ lacked the maturity or self-discipline necessary to exercise the ‘responsible’ and ‘prudent’ freedom that the order required. This view was further substantiated by a correlation between age and a higher completion rate in the trials, with 85% of fifteen year olds completing their order successfully compared to 61% of 14 year olds. However, some criminal justice practitioners believed the discipline that the CO with EM imposed upon their chaotic lifestyle to be conducive to rendering them (self) governable (ibid).

The CO with EM rapidly increased in popularity amongst sentencers following its introduction. In 2002/2003 shortly after the dispositions nationwide rollout it was the eighth most popular community based disposition from the nine available within the Youth Court, accounting for just 1,293 (4.6%) of orders imposed nationally (YJB, 2004). However, following a year on year increase in market share, the disposition was the second most popular by 2009/2010 - accounting for 6,494 (21.5%) of orders imposed, behind only the SO (Ministry of Justice, 2011b: 20). This rise in popularity was despite the order proving ineffective in ameliorating recidivism amongst ‘young offenders’. The average reoffending rate of those given the order from 2002-2009 (70.6%) was better only than the SO’s (71.7%) (Ministry of Justice, 2011c: 25). Those given a CO with EM were also more likely to commit a ‘severe re-offence’ than those subject to any other community based disposition.⁴² With rehabilitative efficacy no longer an exclusive

⁴² 3.4 per 100 re-offences in 2005, and 4.7 per 100 re-offences in 2006 (the only years this element of reoffending was recorded for the order) (Ministry of Justice, 2011c: 26).

indicator of success within a managerial regime predominantly concerned with ‘internal system performance’, the high re-conviction rate may well be interpreted within governmental rationality as evidence of ‘efficient system performance’.

The Exclusion Order with Electronic Monitoring

“*Prison without bars.*” (David Blunkett cited by the BBC, 2004).

“*It’s like having a probation officer on your leg.*” (An offender cited in Shute, 2007: 14).

The exclusion order with electronic monitoring (EO with EM), provided for under section 40a of the PCC(S)A 2000, as inserted by section 46 of the CJ&CS Act 2000, was another disposition introduced by the Home Office encouraging the probation/social service practitioner to control the risk posed by the *nomadic* ‘underclass child’ through a form of spatio-temporal exclusion responsive to their ‘pattern of offending’. The disposition imposed limitations upon the ‘young offender’s’ freedom of movement, with offenders prohibited from entering a particular place/s or area/s known as ‘exclusion zones’ for a specified period (Home Office, 2004). The order could be responsively adjusted so that the prohibition was only in effect during specified periods, and could also specify different prohibited places or areas for different time periods. The maximum length for which it could be imposed by the court was two years those aged 16 and over, and three months for ‘young offenders’ below this age. The disposition could be imposed as a standalone order but was usually imposed concurrently with other community sentences, being: “more likely to be considered as one element of a programme of intensive interventions” (ibid: 3). Like a CO with EM, it could be attached to a SO as part of an ISSP programme under paragraph 3 schedule 6 of the PCC(S) Act 2000 and could also be attached to a PO, as incorporated into the PCC(S) Act 2000.

GPS satellite tracking, which represented: “a new generation of electronic monitoring using satellite technology” (Shute, 2007: 2), was utilised for tracking offenders subject to the EO with EM. The technology consists of a tag attached to the offender’s ankle or wrist, and a tracking device worn on or around their waist. This tracking device communicates with the Global Positioning System (GPS) satellites and also with the EM agency’s ‘control centre’ (Home Office, 2004). To ensure the offender is the person carrying the tracking device, their tag emits a radio signal which the tracking device receives, ensuring the two pieces of equipment are in close proximity (ibid).

Two types of tracking were employed with regard to the EO with EM during the satellite tracking technology trials held in the areas of Greater Manchester, West Midlands and Hampshire/Wessex which began in September 2004: ‘passive tracking’ and ‘hybrid tracking’. ‘Passive tracking’ was

utilised to monitor the offender's whereabouts in the West Midlands and Hampshire/Wessex. With 'passive tracking', the information concerning the offender's whereabouts is gathered retrospectively by the EM contractor when, typically at the end of the day, the tracking device transmits the data concerning their whereabouts throughout that day to the control centre when attached to a landline telephone. Whereas with 'hybrid tracking', utilised in the Greater Manchester area and Hampshire/Wessex during the trial (Shute, 2007: 5), if the offender violated an exclusion zone the tracking unit would begin transmitting information on the offender's whereabouts in 'real time' at intervals of around 60 seconds, utilising a GSM component contained within the tracking device (ibid).

The court was to consider the order when it wished to prohibit the offender entering a specific address, such as that of the victim, or to prohibit the offender frequenting particular types of establishment or other privatised places in a limited area: "such as specified public houses or a shopping mall)" (Home Office, 2004: 2). It could also be employed to prevent the offender accessing larger public spaces, such as a town centre.

The order was designed to be individualised and responsive. Home Office advice to sentencers prior to the pilot encouraged them to adjust periods of exclusion to deal effectively with the offender's pattern of offending: "...it may not be necessary to exclude an offender from a town centre at all times if his offending typically takes place at night and where day time exclusion would interfere with his need to shop or take part in any intervention" (ibid: 3). Those targeted by the order were to be 'prolific offenders', subject to 'intensive community supervision programmes' such as the ISSP for 'young offenders'. Advice provided by the Home Office to probation and YOT PSR writers prior to the pilot stated that the order was to be: "made in cases where custody is the only other likely option" (ibid: 3), thus situating it as an 'alternative to custody'.

The 'exclusion zone' was required to be 'specific and proportionate', with the PSR providing its proposed geographical details on a map (ibid). Where possible the court was required to take into consideration the victim's wishes when determining the parameters of the exclusion zone, and to make its limits known to the offender to facilitate their compliance. Upon determining its conditions the court was to fax the order to the EM contractor, whose responsibility it then was to: "set up the exclusion zone on mapping software and tag the offender" (ibid: 4). The EM contractors would be responsible for monitoring the compliance of the offender with the conditions stipulated in the order. GPS tracking technology provided not only 'real time' evidence of breach but facilitated a 'real time' response from the police to the risk posed by the 'young offender'. If they breached their order whilst being subject to hybrid tracking technology, a provision was available which allowed the EM contractor to contact the police who would intervene immediately, especially where a victim was likely to be at risk (ibid). In May 2005 it

became a criminal offence for an excluded person found within an exclusion zone to: “knowingly contravene a direction by a police officer to leave that zone” (Shute, 2007: 3).

The EO with EM was largely unsuccessful during the trials of satellite tracking technology, with only 20 of the standalone orders being imposed throughout, 13 of these given to ‘young offenders’ (ibid: 12). This compared to 316 offenders during the pilots, 68 of whom were ‘young offenders’, who were satellite tracked having being released from prison on licence/notice of supervision (ibid: 7). An analysis of the use of satellite tracking technology more generally throughout the trials illustrated that it was utilised in a more draconian and control orientated manner with ‘young offenders’. The demographic of those offenders participating in the trials was 99% male, 72% of whom were ‘prolific and priority offenders’, which included 81% of all adult offenders and 35% of all young offenders. This illustrates a greater proportional use of satellite tracking technology with ‘young offenders’ with a lower risk profile than was the case with their adult counterparts.

‘Young offenders’ were also more likely to be subject to the most restrictive form of satellite tracking which monitored both compliance with a designated exclusion zone and ‘general whereabouts’. 19% of ‘young offenders’ were subject to this dual form of tracking compared to only 10% of adult offenders, despite the sample of ‘young offenders’ being comprised of ‘lower risk’ offenders (only 4% of adult offenders were not considered high risk).

The offences for which satellite tracking was imposed were dominated by opportunistic offences, with 35% of offenders being convicted of burglary, 17% for robbery, 9% for motor vehicle offences and 7% for theft, handling or fraud. Although the trial evaluation report (Shute, 2007) did not provide disaggregated information on the completion rate of those ‘young offenders’ subject to a standalone EO with EM, the aggregated data concerning all those ‘young offenders’ subjected to satellite tracking during the trials showed a completion rate of 56%. This compared favourably with the 39% completion rate for adult offenders. Of all those offenders who had breach action taken based upon satellite tracking evidence, in 37% of cases it was due to a violation of the satellite tracking requirements,⁴³ in 5% of cases it was due to an incursion by the offender within a designated ‘exclusion zone’ which was detected by satellite tracking technology, or a combination of these two reasons in 4% of recall/revocation cases. 26% of all offenders who participated in the trials were either reconvicted of a criminal offence which took place during their period of tracking (17%), were unlawfully at large following recall (4%), or were thought to have committed an offence by their supervisors during their period of tracking (5%) (ibid: 11).

⁴³ Violations included: “refusing to allow the equipment to be fitted, damaging or tampering with equipment, removing the PID from the ankle, allowing the battery to shut down, allowing the tracking unit to become separated from the PID, or failing to ‘allow whereabouts to be monitored by GPS’ (Shute, 2007: 10).

The reasons given for poor take-up of the new standalone EO with EM included a concern amongst sentencers regarding the unrealistic expectations of the general public and press in its efficacy, and that court ordered satellite tracking could only be imposed upon offenders for whom an ‘exclusion zone’ was thought to be suitable. Furthermore, some offenders identified by the YOT or the probation service as suitable for the EO with EM were considered by sentencers to deserve a custodial sentence due to the seriousness of their index offence (ibid: 12).

Despite poor take-up, magistrates interviewed during the pilot evaluations considered satellite tracked exclusion orders to be: “a helpful sentencing option” (ibid: 12). They viewed the most beneficial aspects of the order to be: it “gave meaning to court orders by providing hard evidence of non-compliance”; that it “might deter offenders from committing further crimes”; that “it might keep offenders out of their excluded areas”; and that it might contribute to diversion from custody if proved effective (ibid: 12).

YOT and probation officers were critical of satellite tracking technology throughout the trials, being especially worried about what they termed ‘GPS drift’: “where GPS plots are, for a short time, wildly aberrant” (ibid: 13), and loss of signal. They were unsure whether these technical difficulties were caused by the offender tampering with the equipment or equipment malfunctioning. They were also concerned with the lack of clarity provided by the GPS maps concerning the offender’s movements, the limited battery life of the equipment and that ankle tags needed to be replaced frequently (ibid: 13). The control orientated disposition also conflicted with the residual welfarist professional ideology held by probation and social workers, with some believing that the disposition was: “ ‘intrusive’ and infringed civil liberties” (ibid: 13).

Offenders were well aware of the continuous nature of the surveillance employed by satellite tracking technology. The most common response received from offenders when asked to describe what satellite tracking felt like was that it was like: “being watched” (52%). One offender stated that being subject to satellite tracking technology was: “like having a probation officer on your leg” (ibid: 14) whilst another said that:

“It helped me stay out of trouble because it was always at the back of my mind that they knew where I was and I thought if I do this I will go back to jail” (ibid: 13).

No doubt because of the disciplinary effects of this continuous, *nomadic* surveillance on the movements and behaviour of offenders, 46% answered ‘yes’ when asked directly if satellite tracking had helped them stay out of trouble (ibid: 13).

Chapter Summary

This chapter has shown that the homogenous and interconnected institutional landscape forged by the process of managerial systemisation outlined in Chapter Four has resulted in a coalescence of previously discrete surveillance systems, once geographically delimited by the walls of the institutional enclosure. This, coupled with the development of *nomadic* forms of unbounded surveillance and control, has served to create a generalised ‘surveillant assemblage’ (Haggerty and Ericson, 2000). This standardises the production of the child or young person’s decorporealised ‘data *dividual*’, a process which abstracts them from their institutional/territorial setting. Rendering their body mobile, this process of *digitalisation* (i.e., turning the body into pure information) facilitates the ‘referability’ of the child or young person across an increasingly fluid and interconnected institutional and social landscape in order to assess and govern the risk they pose.

It has been demonstrated that the regime of *control* has three *operational moments*, facilitated by the ‘surveillant assemblage’s’ smooth generalised space of *control* (Hardt and Negri, 2000). First, *control* has an *inclusive moment* exemplified by the neo-liberal state’s valorisation of community based penalties (Home Office, 1988; 1990a). Whereas the disciplinary regime governed the child through familial confinement, *control* accents their inclusion within post-disciplinary ‘circuits of movement and mixture’ (Hardt and Negri, 2000: 198). However, it was shown that *control* is not characterised by an undifferentiated inclusiveness, but has a second *differential moment* where the child or young person is ‘de-corporealised’ through the production of an actuarial ‘data *dividual*’ via risk assessment tools such as *Asset* (YJB, 2006), and mobile forms of electronic surveillance, which turn their body into a code. This informs the third *managerial moment*, in which their coded ‘data *dividual*’ functions as a ‘password’ determining the differential access of their physical body - far flung in space-time - to the public, private and institutional spaces of an advanced-liberal polity, depending upon the risk posed by their ‘data *dividual*’.

Chapter Six

The YRO's 'Re-Governmentalisation' of Youth Justice: the Legislative Consolidation of the Regime of *Control*

“The apparent acquittal of the disciplinary societies (between two incarcerations); and the limitless postponements of the societies of control (in continuous variation) are two very different modes of juridical life, and if our law is hesitant, itself in crisis, it’s because we are leaving one in order to enter into the other” (Deleuze, 1997: 310).

All fixed, fast frozen relations....are swept away, all newly formed ones become antiquated before they can ossify. All that is solid melts into air” (Marx and Engels, 1998[1848]: 6).

This final chapter will illustrate, through an analysis of the implementation of the SO and the CO with EM, how the operation of the regime of *control* was hindered by the legislative remnant/artefact of the ‘justice-model’. The residual artefact of the ‘welfare-model’ - the professional enclosure - which had proved a hindrance to the implementation of a managerial culture of risk *control* and the uncritical pursuance of centralised policy objectives which it entailed - had been swept away by managerial reforms in training and practice from the late 1980s onwards. However, it will be demonstrated that the hierarchical tariff-based sentencing structure, instantiated when the ‘justice-model’ was in its ascendancy throughout the 1980s and early 1990s, was inhibiting sentencers’ tailored use of community based dispositions in an effort to manage young offenders’ individualised ‘risk profiles’. It will be shown how the YRO, modelled upon the regulatory and risk-centric ‘action plan order’, sought to circumvent this hindrance to the effective operation of the regime of *control* by ‘re-governmentalising’ youth justice.

The chapter will argue that the YRO’s ‘governmentalisation’ of youth justice represents the re-emergence of an obfuscatory paradigm of governance, which seamlessly integrates executive and judicial powers, resulting in the creation of administrative ‘petty sovereigns’. It will show how the *nomadic* form of electronic surveillance at the YRO’s disposal may allow the *exceptional sovereign violence* - once exercised by these ‘petty sovereigns’ within the walls of the institutional enclosure - to spread out generalised across the social field, exercised remotely upon a *nomadic* population of children and young people.

The chapter concludes by suggesting that, as was a consequence of the governmentalisation of youth justice in the welfare-era, the hybrid welfare/care justice/punitive composition of the YRO is illustrative of a governmental crime control rationality which blurs the conceptual distinction between the ‘child in need’ and the ‘delinquent’, leading not only to a ‘welfarisation of delinquency’, but a ‘jurisdiction of need’.

Unresponsiveness of the Tariff-Based Sentencing Structure

The flexible and tailored use of risk-centric community based dispositions by sentencers in an effort to control the risk posed by the ‘young offender’ was hindered by the legislative artefact of the ‘justice-model’ - a hierarchical tariff-based sentencing structure necessitating a direct correspondence between ‘offence seriousness’, and the type, intensity and duration of the disposition imposed. This was illustrated by the inability of the most control orientated dispositions within the community sentencing repertoire to function optimally within such a rigid sentencing structure.

The SO: Revisited (2)

In the decade prior to its replacement by, and inclusion as a ‘supervision requirement’ within, the YRO, the SO had become increasingly surveillance and control orientated. It was the primary vehicle for the ISSP - the most intensive non-custodial intervention for ‘young offenders’ - introduced in 2001 by the YJB, with the quasi-compulsory DRR also available for attachment to the disposition.⁴⁴ The increasingly control orientated nature of the order was illustrated by its popularity amongst sentencers, it was the most utilised order from 2002-2010 (YJB, 2004b; 2005; 2006b; 2007b; 2008b; 2009e; Ministry of Justice, 2010; 2011b), and also by its movement up-tariff. The re-offending statistics for the order between 2002-2010 suggest that it was imposed upon a more serious population of ‘young offenders’. Those subject to the SO had the highest average one year re-offending rate of any community based disposition over this period (71%); the highest average number of re-offences per 100 offenders (328); and the highest average number of re-offences per 100 re-offenders (458) (Ministry of Justice, 2011c: 25).

For these risk based requirements to function optimally with this ‘high risk’ population of ‘young offenders’, administrative practitioners required the leeway to determine the content of bespoke

⁴⁴ Schedule 24 of the CJA 2003 amended Section 70 and Schedule 6 to the PCC(S) Act 2000 to allow for the provision of a drug treating and testing requirement to be attached to the SO. The DRR, like the DTTO, was quasi-compulsory as the consent of the offender, required for it to be imposed, was coerced. Refusal could lead to a custodial sentence, as the requirement functioned as an ‘alternative to custody’ (Bean, 2004).

orders tailored to an assessment of ‘individualised risk’. Practitioners also required a large degree of ‘flexibility’ to re-calibrate the components of the disposition post-sentence in response to changing risk levels. The ISSP requirement, for example, was to be managed under the provisions for IT, which provided much greater executive discretion in determining the content and management of the order (Nacro, 2002). The content and management of the DRR was also to be determined by the supervising officer (Bean, 2008). However, the SO’s flexibility and versatility was hindered by the rigidly hierarchical, tariff-based community sentencing structure, a remnant of the ‘justice-model’s’ previous ascendancy throughout the 1980s and early 1990s. Although the ‘justice-model’ paved the way for the managerial regime of risk *control* by helping to efface governmental concerns with the wider aetiological origins of youth crime (Hudson, 1996), its legislative artefact – underpinned by the criminal justice principle of ‘proportionality’ – was hindering the individually tailored and flexible use of the order which the managerial regime of *control* required. This extract from a Nacro youth crime briefing concerning ‘best practice’ clearly shows that the order was still being utilised within a graduated ‘desert’ based framework, rather than in the responsive manner needed to effectively control the ‘young offender’s’ ‘individualised risk’:

“Youth Offending teams should attempt to develop and maintain a range of programmes, of escalating intensity and involving increasing deprivation of liberty, in order to maximise the potential level of cases for which a supervision order will be suitable. Differential expectations associated with each step within that range should be transparent both to the court and to the young person, and to his her family, to reflect the fact that different levels of offending...ought to attract a graduated response” (Nacro, 2002: 9).

The CO with EM: Revisited (2)

The CO with EM appears to have been underused in the trials for those aged 16 years and over, because of the ‘rigid’ and ‘inflexible’ manner in which sentencers utilised the order.⁴⁵ Although sentencers were issued with no guidance by the Home Office on how to target the new disposition, in presentations prior to its introduction, officials suggested that the disposition was: “potentially useful for even the most petty offenders” (Mair and Mortimer, 1996: 26). This suggestion was perceived in a negative light by sentencers, who thought it portrayed an ‘over-keenness’ to use such a restrictive disposition (ibid). The Home Office’s decision not to provide guidance with the order, unlike with the ‘combination order’ for instance (Raynor et al, 2002), may have been a deliberate ploy to encourage magistrates to utilise it ‘flexibly’, rather than

⁴⁵ Only 83 orders were imposed in year one of the trials (Mair and Mortimer, 1996), and 375 in year 2 (Mortimer and May, 1997). Although year two appears to mark a significant increase, it still accounted for only 2% of all orders made by the courts (ibid).

within a typical, hierarchical tariff-based sentencing structure. However sentencers, bound by the criminal justice principle of ‘proportionality’, rejected this view. As the Home Office trial report acknowledges:

“Home Office views of its flexibility in terms of being potentially useful for ‘first time shoplifters’ and the like were rejected by some, who saw it as too restrictive for lower end offenders. One lay magistrate argued that as the sentence involved incarceration, albeit in the offenders own home, this naturally made it seem like an alternative to custody.” (Mair and Mortimer, 1996: 26)

Sentencers thus appeared to view the CO with EM as a high-tariff penalty, and predominantly utilised it towards the upper end of the community sentence tariff, or as an ‘alternative to custody’ (ibid). Although there was evidence that sentencers were using the order more flexibly during the trials with ‘young offenders’ aged 10-15 (Elliot et al, 2000) in terms of targeting those further down the sentencing tariff, it appeared sentencers were not ‘individualising’ the order to combat the ‘young offender’s’ ‘pattern of offending’. There was some evidence that the court was adjusting the order to combat offending which took place at a specific time and/or place, with some curfews being ‘split’ to ‘increase the impact of the order’. For instance, most curfews were imposed overnight, but five offenders were curfewed at times which seemed to coincide with their previous offending; two of these orders were imposed for ‘burglary’ and two were imposed for ‘theft and handling’: both ‘opportunistic’ offence categories heavily dependent upon a specific spatio-temporal context for their commission (ibid). However, as the diminutive numbers suggest, this ‘individualised’ use of the order was not prevalent amongst sentencers, despite its flexibility being extolled by the Home Office as one of its greatest assets.

The YRO: Legislative Consolidation of *Control*

The legislative artefact of the ‘justice-model’, hindering the individuated, flexible and control orientated use of risk-centric community based sentences and thus inhibiting the effective operation of the regime of *control*, was to be overcome through the development of the YRO. This generic community based sentence replaced the nine previous community based dispositions, incorporating their elements within a menu of requirements.

The concept of the YRO first appeared, in embryonic form, within governmental discourse in the companion document to the 2003 Green Paper for children’s welfare services: *Every Child Matters* (Chief Secretary to the Treasury, 2003), entitled *Youth Justice: the Next Steps* (Home Office, 2003b). In this policy document the Government proposed: “to simplify the range of juvenile sentencing options, in particular replacing nine non-custodial sentences for juveniles with just one, a broader Action Plan Order” (ibid: 5).

The Action Plan Order

An examination of the ‘action plan order’ (APO), provided for in sections 69 and 70 and schedule 5 of the 1998 C&D Act as a community based sentence for ‘young offenders’ aged 10-17, illustrates why this disposition was to provide the framework for the YRO. The APO was ‘risk’ rather than ‘offence’ centric, being tailored to meet the ‘young offender’s’ risk profile. It was introduced to meet the new risk-centric primary aim of the YJS, as stipulated by section 37 of the 1998 C&D Act, to ‘prevent offending by children and young people’ by: “providing the courts with a new three-month community sentence designed to provide a short but intensive and individually tailored response to offending behaviour” (Home Office, 2000: 3). It was available to the court where a child or young person was found to have committed an offence other than one for which the sentence was prescribed by law. The APO was a community order for the purposes of section 33 of the PCC(S) Act 2000, and thus the court had to be satisfied that the offence or combination of offences committed by the young person was serious enough to warrant a community sentence (YJB, 2004a). It was therefore provided as a disposition suitable for ‘relatively serious offending’. However, it was also introduced to provide the court with an early opportunity to ‘nip crime in the bud’, through targeted intervention to help prevent an escalation in the child or young person’s offending (Home Office, 2000: 3). Its targeted and individualised programme of interventions were devised to be: “flexible enough to deal with different types of offending and the different circumstances of the offender” (Holdaway et al, 2001: 41). When introduced, the APO was an addition to the array of community sentences already available to the Youth Court, and thus did not replace any other community sentences. However, it occupied the same low-mid tariff ‘niche’ in the sentencing structure as the ACO, and as a result it was found that the ACO had ‘fallen into disuse’ at various sites during APO pilots (ibid).

Under section 69(3) of the PCC(S) Act 2000 the court could impose an APO if it considered the disposition to be ‘desirable’ in the interests of ‘securing the rehabilitation of the offender’, or ‘preventing the commission by him of further offences’. Section 69(4) of the PCC(S) Act 2000 prevented an APO being combined with a PO, a CPO, a combination order, an ACO, a SO or a referral order, although it could be combined with a CO with EM (Holdaway et al, 2001).

The 1997 Government White Paper *Tackling Youth Crime*, which put forward proposals for the APO, intended the ‘action plan’ of requirements comprising the order to: “be drawn up by a member of the...[YOT], in consultation with the young person and his or her parents or guardian” (Home Office, 1997b: 5). It proposed that statutory *National Standards* be ‘drawn up’ by the newly formed YJB, to guide the YOT practitioner in determining the: “content, supervision and enforcement of orders” (ibid: 5), allowing the supervision of ‘young offenders’

by the administrative practitioner to be modulated and controlled from the centre. This shift in sentencing determination from the judiciary to the executive was provided for under section 70 (1) of the 1998 C&D Act, which stated that ‘before making an action plan order the court must obtain and consider a written report’ from the YOT. This report was to delineate the requirements to be incorporated within the order, which should be specifically devised to tackle the child or young person’s: “offending behaviour and the factors associated with it” (Home Office, 2000: 4). The report was also required to convey to the court how the proposed requirements would benefit the ‘young offender’s’ rehabilitation or prevent further offending.

The APO required the ‘young offender’ to comply with an ‘action plan’, containing requirements concerning their ‘actions’ and ‘whereabouts’ for a duration of three months. It placed them under the supervision of the YOT practitioner and required that they comply with any directions given to them with regard to the order’s implementation (ibid). Section 70(1) of the PCC(S) Act 2000 provided for the requirements which could be included within the APO, and stipulated that ‘all or any’ of them could be included in combination with each other. These requirements were congruous with the central themes of the managerial regime of *control* identified previously. Informed by the RFPP, they exhibited a narrow aetiological focus upon the cognitive functioning and interpersonal features of the ‘young offender’, and a concern to discipline and regulate the movements of the *nomadic* child.⁴⁶

The average one year reoffending rate of those subject to an APO from 2002-2009 was 62.6% (Ministry of Justice, 2011c: 26), giving it more rehabilitative efficacy than the ACO (63.8%), which occupied the same low-mid tariff position in the sentencing structure. Of all community based sentences, only the CSO/CPO had a better average one year reoffending rate over this period (61%). Perhaps for this reason the ACO proved extremely popular amongst sentencers, being the second most utilised community based sentence from 2002-2006 (behind only the SO), and third most popular from 2006-2010 (behind the SO and the CO with EM) (YJB, 2004b; 2005; 2006b; 2007b; 2008b; 2009e; Ministry of Justice, 2010; 2011b).

The individually tailored, risk-centric approach of the APO sought to bypass the hierarchal, tariff-based community sentencing structure. This ‘flexible’ and ‘responsive’ disposition was informed by notions of ‘regulatory justice’, an approach which undermines universal criminal justice principles and is critical of the: “hierarchical command and control style rule associated with criminal justice” (Crawford, 2009: 813). In recognition of the formal CJS’s inability to effect behavioural changes, it advocates: “increasing the range of regulatory sanctions...[and]...

⁴⁶ The requirements which could be attached to the APO included a requirement to ‘participate in specified activities at specified times’- generally offender behaviour programmes; to ‘present him or herself at certain specified times and places to a person specified in the requirements’; to ‘attend an attendance centre for a specified number of hours’; to ‘stay away from a specified place or places’; to comply with an educational requirement, to make reparation to the victim or the community at large; to attend a review hearing within 21 days of the order being imposed; a drug testing and treatment requirement (Home Office, 2000).

deliberately shift[ing] some of this (regulatory) activity away from the criminal courts to regulatory bodies themselves” (Macrory, 2006: 27). This approach recommends increasing the sanctioning toolkit, making it responsive to both the risks of the particular offender and the regulatory objective (ibid).

The YRO adopts the same regulatory approach as the APO, bypassing the judiciary’s unresponsive use of community based sentences by shifting sentencing determination and oversight to the executive. Here, administrative practitioners’ management and oversight of the order is governed through a raft of risk-centric ‘technologies of performance’ in the guise of centrally accredited risk assessment tools (YJB, 2006a; 2009c), National Standards (YJB, 2009d), Case Management Guidance (YJB, 2010a) and Key Elements of Effective Practice guidance (YJB, 2010b). Its abolition of the nine community based sentences analysed throughout this paper, and their replacement by the extensive choice of 18 requirements, forming this bespoke disposition, individually tailored to the assessed ‘risks’ of the ‘young offender’ (YJB, 2007a), flattens the hierarchical and rigid community sentencing structure. It is replaced with a regulatory menu-based framework informed by the ‘Scaled Approach’, in the name of ‘responsiveness’ and ‘flexibility’.

The incongruence of the risk-centric YRO, and the individualised and responsive operation of the managerial regime of *control*, with the tariff-based hierarchy of community based disposals linked to ‘seriousness of offence’ established by the 1991 CJA, was encapsulated by the Labour MP for Cardiff, South and Penarth Alun Michael in a debate in the House of Commons in 2007 during the passage of the CJ&I Bill. Problematising the unresponsiveness of the tariff-based sentencing structure to the individualised risk posed by the ‘young offender’ he stated: “...the idea of a hierarchy of disposals is a lazy way of sentencing. It means that the court could fail to use the appropriate disposal, which might end a criminal career, because the offender is too high up the tariff or not high enough on it. Either one is madness; what counts is getting it right in each case” (Commons Hansard Debates, 2007: Column 96).

The incompatibility of the YRO with the sentencing structure as it was in its then current form was also recognised by respondents to the ‘Scaled Approach’ consultation, who questioned: “how it would fit within the wider sentencing framework, in particular, the principle of proportionality” (YJB, 2008c: 6). This incompatibility had led, during the initial consultation, to the YJB rather farcically attempting to keep the YRO within the sentencing framework by formally linking ‘seriousness of offence’ with a: “specific number of hours of reparation” despite retributive responses being anathema to the restorative justice approach (Goldson, 2008). Unsurprisingly this proposal was dropped after the initial consultation. In the Sentencing Guidelines Council’s ‘over arching principles’ to sentencing released to coincide with the introduction of the YRO and the ‘Scaled Approach’ in November 2009, proportionality is

attached to the duration and content of the YRO (SGC, 2009: 15). However, as mentioned in Chapter One, this may be merely perfunctory now that, in line with the primary aim of the YJS as a whole, section 9(2a) of the 2008 CJ&I Act establishes ‘the prevention of offending and reoffending by the child or young person’ as the principal aim of sentencing. This will ensure that any remaining tension existing at the heart of the sentencing structure between ‘justice’ and ‘control’ may likely be resolved by sentencers opting for the latter option, with the up-tariffing of the ‘young offender’ with considerable welfare ‘needs’, and the abrogation of the criminal justice principle of ‘proportionality’, a likely result.

By introducing ‘the risk of reoffending’ as a consideration in attempting to determine which requirements to attach to a YRO, New Labour’s CJ&I Act 2008 has rendered the magistrate reliant upon the YOT practitioner to determine both the level of intervention and the specific requirements which equate to the ‘young offender’s’ ‘individual risk of reoffending’. This is likely to undermine their ‘due process’ rights and protections. The largely ‘extra-judicial’ determination of the YRO’s contents by the YOT practitioner, based upon the risk-led assessment tool of the ‘Scaled Approach’, attracted negative feedback from the judiciary during the ‘Scaled Approach’ consultation process. Some representatives of the judiciary voiced the opinion: “that it is their role and not the YOT’s to identify the sentence and that this should take into account seriousness of offence” (YJB, 2008c: 6). However, the governmental technology of the YRO obfuscates the distinction between executive and judicial powers, resulting in the empowerment of the YOT practitioner to ‘flexibly’ determine the content of the order; informed by executively designed and sanctioned practice guidance grounded upon ‘expert knowledge’. This also empowers the YOT practitioner to responsively regulate its intensity post-sentence to manage fluctuations in the risk posed by the ‘young offender’ (YJB, 2009c: 15). As it is determined by administrative practitioners, with reference to ‘expert’ knowledge, and regulated with reference to an apparatus of expertise and managerial guidelines, judicial ‘norms’, protections and regulation may not be able to reach the ‘young offender’ subject to this governmental technology. As such, the YRO may serve to create administrative ‘petty sovereigns’ whose exercise of biopolitical violence could easily transform into *exceptional sovereign violence*.

The Diffusion of *Exceptional Sovereign Violence* throughout the Hyper-Real ‘Social’

Prisons are there to conceal the fact that it is the social in its entirety, in its banal omnipresence, which is carceral” (Baudrillard, 1983: 24).

In the society of control as the institutional enclosures begin to break down, the exercise of *exceptional sovereign violence*, once delimited by the walls of the familial enclosure, may spread

out, generalised across the 'social'. As stated previously, inclusion and exclusion within the 'circuits of movement and mixture' (Hardt and Negri, 2000:198) which have replaced the disciplinary enclosures is performed by mobile forms of surveillance and control. These allow the administrative 'petty sovereign' - with the aid of computer systems - to deny the *nomadic* 'young offender' subject to the YRO (far flung in space-time) access to the public space of an advanced liberal polity depending upon their 'data *dividual*'.

The 'Scaled Approach' distributes the child or young person into one of three monolithic actuarial categories - *standard, enhanced and intensive* - each with a corresponding level of intervention. Those deemed 'low risk' are subject to a *standard intervention*. This subject is conceptualised as a 'rational offender', governed by a 'criminology of the self' (Garland, 1996) they are amenable to incentivised deterrence, accomplished through the insertion of unobtrusive situational controls into otherwise fluid situations (as advocated by administrative criminology). They are thus trusted to exercise a responsible mobility and refrain from crime with only minimal intervention and supervision; such as that entailed by a standalone attendance centre or unpaid work requirement (YJB, 2009c: 12).

As we move back, in concentric circles from this inclusive point and this idealised notion of the rational 'young offender', we are confronted with differential risk profiles which allow ever less mobility and ever less access to public space. The *enhanced intervention*, which conceptualises the offender as requiring help in exercising a responsible and prescribed mobility, deploys: "components to help change behaviour...[such as]...offender behaviour programme[s]" (ibid: 12) to render the 'young offender' self governable/rational (by installing a 'criminology of the self'), while increasing the intensity of the supervision and surveillance they receive (ibid).

Finally, the *intensive intervention* involves the relative immobilisation and exclusion of the 'young offender' from postmodern 'circuits of movement and mixture', due to the risk posed by their 'data *dividual*'. Those for whom intensive interventions are deemed necessary are subject to: "requirements/components to monitor or restrict movement...[such as]...prohibited activity, curfew, exclusion and/or electronic monitoring" (ibid: 12), not to mention the ISSP and the artificial enclosure of 'intensive fostering'.

The YRO, informed by its risk-led model of service delivery, can thus be conceptualised as a 'simulation model' or 'code' which programmes and structures social relations, ensuring that within the system of: "interior/exterior traffic control" (Virilio, 1997: 381) which constitutes the society of control, flows of 'data *dividuals*' (categorised differentially) do not: "intersect in unexpected... [or]... unwanted ways" (Diken and Laustsen, 2005: 67). For instance, it may be conceptualised as a simulation model designed to ensure that 'consumers' do not have their essential patterns of behaviour inhibited or restricted due to contact, or fear of contact, with a 'high risk' and stigmatised population of 'young offenders' during retail hours. It also ensures the

protection of private property, by restricting criminal opportunities for ‘young offenders’ by excluding them from crimenogenic social spaces at certain times of the day.

With the YRO the bio-political violence exercised by administrative ‘petty sovereigns’ now spills over beyond the porous institutional enclosure, being exercised ‘at- a-distance’ through mobile enforcement technologies like EM. The lack of effective judicial regulation of such governmental practices of violence, now largely automatised through the use of computer systems (Jones, 2000), ensures that the ‘social’ may transform into a space where the exercise of *exceptional sovereign violence* ‘at-a-distance’ proliferates.

As simulation models such as the ‘Scaled Approach’ implode into the ‘social’, constituting and programming social interactions and patterns of societal movement and mixture in advance, the ‘social’, as a place where genuine sociality takes place, disappears (Baudrillard, 1983). The ‘social’ becomes a simulated, *hyper-real* order, where conflict through the un-prescribed interaction of flows of differential populations of ‘data *dividuals*’ is designed out and sanitised aseptic public spaces proliferate (Zizek, 2002). Beyond these ordered public spaces, chaos reigns in the *real* world of material decay, mass unemployment and insecurity within which the ‘underclass child’ is situated - the neo-liberal *desert of the real*.

The Criminalisation of the ‘Child in Need’

One of the most salient and disturbing features of the YRO is that, as in the welfare-era, the ‘child in need’ and the ‘delinquent’ appear to enter into a conceptual zone of indistinction, leading to a ‘net-widening’ ‘jurisdiction of need’. This is exemplified by the hybrid composition of the YRO which combines both ‘welfarist’ and ‘justice’ based requirements within one generic community based disposition. The amalgamation of the ‘child in need’ and the ‘delinquent’ within the YRO is indicative of a process of ‘net-widening’ and ‘mesh thinning’ (Cohen, 1985) which has served to extend the reach of the YJS, capturing the ‘child in need’ within the penal net.

This process has been animated by the precautionary actuarial logic of the RFPP (Farrington, 1996), which has reconfigured ‘need’ as ‘individual risks of reoffending’ (Hannah-Moffat, 1999: 88) within governmental crime control rationality. As ‘needs’ become blurred with, and increasingly conceptualised as, ‘individualised risks or reoffending’ within the actuarial logic of the managerial regime of *control*, the responses of the state towards children and young people thought to be in need of care or protection are no longer influenced by holistic rehabilitative or inclusionary objectives, but are designed to control the risk these atomised risk factors pose

(Gray, 2005). As such, the childcare system has increasingly come to exhibit the same concern with surveillance and control as the YJS (Chief Secretary to the Treasury, 2003).

The: “blurring of need and risk” (Hannah-Moffat, 1999: 88) within governmental crime control rationality necessitated the integration of welfare and criminal justice service provision, and the extension of the process of managerial systemisation, and its related culture of control, beyond the YJS to the child welfare apparatus, in order to control the risk posed by the ‘child in need’. This was accomplished through the *Every Child Matters* (Chief Secretary to the Treasury, 2003; DfES, 2004) initiative which introduced multi-agency *Children’s Trusts*, which combined key welfare services (local education authority, children’s services, community and acute health services, Connexions service) with the YJS through their incorporation of YOTs.

The integration of the institutions of ‘welfare’ and ‘justice’ was facilitated by a shared electronic infrastructure for multiagency working: the Information, Retrieval and Tracking (IRT) system. This system allows all children and young people who have come into contact with any health, education, welfare or law-enforcement agency to be surveilled, ‘tracked’ and referred to other agencies, whilst allowing practitioners from these different institutional locales to access the child’s data file, containing details concerning contacts and risk assessments carried out by other agencies (Penna, 2005). *The managerial systemisation of youth justice, instigated in an effort to tame the risk posed by the nomadic ‘underclass child’, no longer recognises its own limits, today spilling over beyond the sphere of criminal justice it threatens to swallow up the ‘social’ in its entirety.* These developments have facilitated the increasing visibility, comparability and referability of the ‘child in need’, ultimately facilitating their mobilisation across the fluid and *virtual* institutional landscape of the ‘surveillant assemblage’, and into the YJS.

It is no coincidence that the nascent concept of the YRO first appears in the Home Office companion document to the Green Paper for children’s welfare services (*Every Child Matters*) - *Youth Justice: the Next Steps* (Home Office, 2003b). The YRO should be conceptualised as a drag-net within the sentencing structure for the ‘high risk’ ‘child in need’. Its amalgamation of those two previously differentiated subjects - the ‘child in need’ and the ‘delinquent’, is a direct result of the managerial re-construction and systemic integration of youth justice and child welfare services, first signalled by the formation of multi-agency YOTs, and exponentially extended by the *Every Child Matters* initiative. This process has had the effect of spreading the orbit of the YJS, and instigating a process of ‘net-widening’ and ‘mesh thinning’ (Cohen, 1985), which portends to the criminalisation of the ‘child in need’.

Chapter Summary

This chapter has illustrated how the individuated and flexible operation of the regime of *control* was being hindered by the legislative artefact of the ‘justice-model’: a hierarchical tariff-based sentencing structure. Administrative practitioners responsive use of the increasingly surveillance and control orientated requirements which could be attached to the SO, were not conducive to implementation within a ‘just deserts’ framework. Sentencers’ use of the CO with EM as a high-tariff ‘alternative to custody’ was also inhibiting its flexible deployment further down the sentencing tariff. It was also not being utilised responsively by sentencers, with the majority failing to tailor it to the ‘young offender’s’ pattern of offending. It was shown that the YRO - modelled upon the regulatory and risk-centric APO – sought to ‘re-governmentalise’ youth justice, overcoming the unresponsiveness of the judiciary, and circumventing the rigid tariff-based sentencing structure, by shifting sentencing power and oversight of the generic community based disposition to the executive. Here administrative practitioners’ responsive, individualised and risk-centric delivery of the YRO was to be ensured through the deployment of a raft of risk-centric managerial ‘technologies of performance’ which governed programme delivery.

It was argued that the YRO’s governmentalisation of youth justice is underpinned by the same obfuscatory paradigm of governance which informed the SO in the welfare-era. It seamlessly combines executive and judicial powers, potentially leading to the creation of administrative ‘petty sovereigns’ unhindered by effective judicial controls. This could expose the ‘young offender’ to *exceptional sovereign violence*. The chapter promulgated the belief that the effects and consequences of such violence may be compounded within the regime of *control*. The electronic enforcement offered by the YRO may allow the *exceptional sovereign violence* - once exercised by these ‘petty sovereigns’ within the walls of the institutional enclosure - to spread out generalised across the social field, exercised remotely upon a *nomadic* population of child and young people.

The chapter concluded by suggesting that, as was a consequence of the ‘governmentalisation’ of youth justice which occurred during the welfare-era, the blurring of the conceptual distinction between the ‘child in need’ and the ‘delinquent’ within governmental crime control rationality is illustrative of a process of criminalisation and ‘net-widening’ in which the child in need has been captured within the penal net. This is due to the systemic and *virtual* integration of child welfare services with the institutions of youth justice in an effort to govern the risk posed by the ‘child in need’. It was thus expounded that YRO’s hybrid ‘welfare’/‘justice’ composition was illustrative of this ‘net-widening’ process, a process exasperated by a multi-agency electronic infrastructure (IRT) which amplifies the ‘visibility’ and ‘comparability’ of the child, and thus their potential ‘referability’ across a fluid institutional landscape of the ‘surveillant assemblage’ and into the

YJS. It was therefore asserted that theYRO should be conceptualised as a drag-net within the sentencing structure for the ‘child in need’. Once within the YJS the ‘child in need’ is susceptible to a process of up-tariffing due to the regime of *control*’s ‘individualised’ actuarial sentencing.

Conclusion

The tendency to obfuscate the distinction between executive and judicial powers, resulting in the empowerment of the executive and administrative practitioners and ‘experts of life’ which pursue its bio-political policy objectives, is a paradigm of governance which not only informs youth justice policy and practice today but has animated the uneven and fragmented developmental trajectory of youth justice since its very inception.

This obfuscatory paradigm of governance is related to the hybrid penal-welfare structure of the juvenile court. The emergence of this age specific jurisdiction is situated along a trajectory of child welfare and child protection legislation (Priestley et al, 1977), which served to implant a concern for the welfare of the children of the ‘dangerous classes’, a concern intimately linked to the perceived danger posed to the social order by their *nomadic* ‘form of existence’, at its centre. With the ‘governmentalisation’ of youth justice in the welfare-era the SO’s ‘anti-*nomadic*’ strategy of disciplinary confinement constituted the familial enclosure of the ‘young offender’ as a site of practice which seamlessly combined executive and judicial powers. This transformed the ‘experts of life’ which colonised these sites into administrative ‘petty sovereigns’ - largely unhindered by judicial restraints. As such, the judicial protections of the law may not have reached the child immobilised within, and governed through, the familial enclosure. The normalising form of bio-political violence inflicted upon them thus had the potential to convert to *exceptional sovereign violence*, i.e., violence which is direct, arbitrary and subject to severely weakened judicial regulation (Oksala, 2010: 42).

It was shown, through an analysis of the SO’s introduction, that a consequence of the ‘governmentalisation’ of youth justice during the welfare-era was a ‘net-widening’ ‘jurisdiction of need’, as this welfarist disposition lowered the threshold for juvenile court intervention. The up-tariffing of those ‘young offenders’ not amenable, or resistant, to therapeutic normalisation within the familial enclosure was also another by-product. The ‘governmentalisation’ of youth justice was undermined as a political strategy of rule throughout the 1970s by a range of factors. These included resistance from the Magistrates’ Association, a theoretical (Hood, 1974; Von Hirsch, 1976) and empirical (Martinson, 1974) critique of the ‘welfare-model’ which underpinned it, and a fiscal crisis which rendered the collectivism of social welfare unfeasible. Neo-liberalism emerged as the pre-eminent, fiscally conservative, modality and rationality of political rule in the early 1980s. It resurrected that objectified figure of classical liberal thought – the rational and prudent *homo-economis* - which began to be applied as a grid of intelligibility for human behaviour across a range of policy areas, including crime (Foucault, 2008). This conceptualisation of the individual was conducive to the emergence of the ‘justice-model’ - which viewed the offender as a rational subject, and thus culpable for his/her actions and

deserving of punishment - as the dominant political programme informing youth justice policy and practice. Its advocacy of judicial determination and oversight of community based sentences, and emphasis upon the universality of criminal justice principles such as 'due process' and 'proportionality', served to 'de-governmentalise' youth justice, reigning in administrative 'petty sovereigns' by subjecting them to judicial controls. This also ensured that judicial protections could reach the 'young offender' subjected to governmental technologies, inhibiting their potential exposure to *exceptional sovereign violence*.

Following the disintegration of the 'underclass' familial enclosure due to the social dislocation and disorganisation caused by austere neo-liberal social and economic policies (Currie, 1991; Lea, 1997), the juvenile justice strategy of familial confinement, and the architecturally dependent mode of disciplinary power exercised within it, became untenable. The familial enclosure's disintegration led to the re-emergence of the *nomadic* children of the 'dangerous classes', resulting in a hasty reconfiguration of the ACO – a punitive disposition by origin – to shore up the disciplinary regime exercised within youth justice by spatio-temporally immobilising the *nomadic* 'underclass child'.

With the increasing inability of the disciplinary strategy of enclosure to immobilise and govern a *nomadic* population of children and young people existing beyond the modern enclosures, the disciplinary modality of power, and its corresponding institutional enclosures, have been incrementally replaced within youth justice since the early 1990s, by the systemic institutional forms, and governmental logic and technologies, of the managerial regime of risk *control* (Deleuze, 1997). *Control* does not seek the rehabilitative normalisation of the 'embodied' 'underclass child' within institutional enclosures, but the perpetual control *at-a-distance* of the risk posed by their 'disembodied' 'data *dividual*', rendered mobile by integrated surveillance systems and *nomadic* and unbounded technologised forms of surveillance (EM) (Diken and Laustsen, 2005). This mobility makes it more comparable, enabling decisions to be made at 'centres of calculation' (Haggerty and Ericson, 2000) concerning the access of the 'young offender's' physical body - far flung in space-time - to the fluid institutional sites and societal circuits of movement and mixture, which comprise the society of control (Hardt and Negri, 2000).

A plethora of new governmental technologies were introduced (CO with EM, EO with EM, APO), whilst older technologies were reconfigured, to govern the risk posed by the extra-institutional existence of the *nomadic* 'underclass child'. However, the legislative artefact of the 'justice-model', a hierarchical tariff-based sentencing structure necessitating 'proportional sentencing', served to hinder sentencers' tailoring of community based sentences to the 'individualised risk' posed by the 'young offender', and thus inhibited the effective operation of the regime of *control*.

The YRO, modelled upon the regulatory and risk-centric community based sentence of the APO, represented the legislative consolidation of the regime of *control* as the pre-eminent modality of rule exercised within youth justice today. It sweeps away the rigid and hierarchical tariff-based sentencing structure, overcoming sentencers' unresponsive use of community based dispositions, by shifting sentencing determination to the executive, where administrative practitioners' pursuance of governmental policy objectives is ensured through a raft of managerial 'technologies of performance'.

This thesis has contended that the YRO's 'governmentalisation' of youth justice is conducive to the re-emergence of the obfuscatory paradigm of governance which arose during the welfare-era, leading to the erosion of the 'young offender's' criminal justice rights and protections, and potentially exposing them to *exceptional sovereign violence* at the hands of administrative 'petty sovereigns'. With the *nomadic* technology of EM at the YRO's disposal *exceptional sovereign violence*, once restricted to within the walls of the institutional enclosure, now also has the potential to spread out generalised across the social field. It is now exercised at-a-distance by administrative 'petty sovereigns' with the aid of computer systems, which allow or deny the 'young offender' far flung in space-time access to post-disciplinary 'circuits of movement and mixture'.

It was concluded that, as in the welfare-era, the governmentalisation of youth justice - informed by 'expert knowledge' - blurs the conceptual distinction between the 'child in need' and the 'delinquent', leading to a 'net-widening' 'jurisdiction of need'. It was espoused that the hybrid 'welfare'/'justice' composition of the YRO was a consequence of the managerial systemisation of children's welfare services and the institutions of youth justice, accomplished through the *Every Child Matters* (Chief Secretary to the Treasury, 2003; DfES, 2004) initiative. It was therefore asserted that the YRO is but a drag-net within the sentencing structure for the 'child in need'. Once within the sentencing structure, the individualised actuarial sentencing of the regime of *control* may expose those with considerable welfare 'needs' to disproportionate sentencing.

A Future Not Yet Our Own: A Return to 'Justice'

"It is by deviation and not necessarily by physical movement that the nomad creates another space" (Diken and Laustsen, 2005: 75).

With the emergence of the post-disciplinary managerial regime of *control*, the youth justice landscape is increasingly characterised by connectionism. This is facilitated by an interconnected institutional landscape - incorporating criminal justice, welfare and extra-state institutions - and unbounded mobile technologies such as EM, which form fluid and generalised networks of

surveillance and control. With this generalisation of control beyond the disintegrating disciplinary enclosures, it: “no longer needs walls... it has, so to speak, become liquid” (Diken and Laustsen, 2005). Nomadism was once a ‘line of flight’ (escape) for the ‘young offender’ beyond the familial enclosure and the order imposed within its walls, but the boundless regime of *control* captures the *nomadic* ‘underclass child’, subjecting his/her mobility to continuous surveillance and control.

With the emergence of *control*: “there is nowhere to escape. It’s over, that was it, curtains” (ibid: 74). However, is that not precisely the conclusion demanded by the neo-liberal architects, who ushered in *control*’s regime of perpetual and cost effective risk management? “There is no alternative” to the neo-liberal economic project, rallied Thatcher in the 1980s, but what of the political programme which derives from it, necessitated by a population of permanently excluded children and young people which are a direct consequence of its socio-economic policies? Is *control* too, here to stay at the neo-liberal ‘end of history’ (Fukuyama, 1992)?

It is the contention of this genealogy that to create a space of freedom for the ‘underclass child’s’ *nomadic* ‘form of life’ in a post-disciplinary British society, we must learn from the lessons of youth justice history, using this history not only to rethink how we reached our present, but to map a future for youth justice which is not yet our own. This will involve a *nomadic* deviation by those within the arena of youth justice policy and practice from the current, seemingly inexorable, managerial trajectory of development.

The ‘governmentalisation’ of youth justice has been shown to be characterised by two deleterious outcomes. Firstly, ‘governmentalised’ approaches to youth justice, informed by bio-political ‘expert knowledge’ - either criminological positivism (welfare) or risk factor paradigms (RFPP) (managerial risk *control*) - have invariably served to blur the conceptual boundary between the ‘child in need’ and the ‘delinquent’. This is because within bio-political rationality the offence is dematerialised into a range of embodied ‘aetiological antecedents’ or ‘needs’ thought to engender criminality. This has animated not only a ‘governmentalisation of delinquency’ - with delinquents controlled by a plethora of administrative ‘experts’ with reference to bio-political ‘norms’ - but also a ‘net-widening’ ‘jurisdiction of need’ to control the risk of criminality posed by the ‘child in need’. This led in the welfare-era to a lowering of the juvenile court’s threshold for intervention, extending its reach. In the managerial-era, however, it has led to the ‘welfare’ and ‘justice’ spheres becoming systemically and virtually integrated, and imbued with an homogenous culture of *control*, in an effort to govern the ‘child in need’s’ risk of criminality.

Secondly, it has been shown to create a paradigm of governance which - through its empowerment of the executive - obfuscates the distinction between judicial and executive powers resulting in the creation of administrative ‘petty sovereigns’ who may expose the child or young person under their supervision to *exceptional sovereign violence*

These two consequences of youth justice's 'governmentalisation' are compounded within a managerial regime of *control*. An intensification and proliferation of surveillance and control throughout the virtually systemic institutional structure of the 'surveillant assemblage' spreads the penal net, by increasing the 'visibility', 'comparability' and 'referability' of the 'child in need'. *Nomadic* forms of unbounded electronic enforcement may also facilitate a diffusion of *exceptional sovereign violence* throughout the entirety of the 'social', exercised remotely upon 'young offenders'.

To prevent the criminalisation of the 'underclass child', and their potential exposure to *exceptional sovereign violence*, a 'de-governmentalisation' of youth justice through a return to the offence-centric, and criminal justice rights enshrining, 'justice-model' is therefore essential. The 'justice-model' of youth justice policy and practice, representing a moral/judicial framework centring upon the 'offence' rather than the scientific/managerial framework centring upon the 'offender', could inform a governmental crime control rationality which conceptually distinguished the 'child in need' from the 'delinquent' - rather than conceptualising the former category as liable for eventual inclusion within the latter. This would render the increasing managerial systemisation of 'welfare' and 'justice' spheres to control the risk of criminality posed by the 'child in need' illogical and unnecessary. This, allied with a re-invigoration of the 'justice' inspired policy of 'diversion, de-criminalisation and decarceration' (Goldson, 1999) which held sway amongst policy makers, the police, social workers and academics during the 1980s, could serve to delimit the orbit of the YJS once more, and prevent the up-tariffing of the child or young person within it.

The 'justice-model's' emphasis upon judicial determination, and oversight of community based sentences, would serve to disentangle executive and judicial powers, reigning in 'petty sovereigns' by subjecting them to judicial controls. Furthermore, its commitment to the universality of the criminal justice principles of 'due process' and 'proportionality of sentence' would ensure that criminal justice protections reached the 'young offender' subject to governmental interventions - preventing their exposure to *exceptional sovereign violence*.

Some may opine that the 'justice-model', with its emphasis upon responsibility and punishment, is un-constructivist and punitive. However, this genealogy has shown that despite the rehabilitative rhetoric, in practice 'governmentalised' approaches to youth crime – informed, sanctioned and legitimised with reference to 'expert knowledge' - have served to extend the control exercised by the YJS over both the 'child in need' and the 'delinquent' alike. They have spread the reach of the YJS to incorporate the entire welfare apparatus, whilst also creating the necessary legal conditions for the creation of administrative 'petty sovereigns' who may potentially expose the 'young offender' to *exceptional sovereign violence*. 'Justice' may be punitive, but it allows for a space of freedom for the 'underclass child' beyond the reach of the

YJS, whilst also enshrining their judicial protections within it. 'Governmentalised' approaches to youth crime extend control and erode criminal justice protections.

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