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**Young people in custody**



# Child imprisonment: exploring 'injustice by geography'

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## A good news story but ...

**The 'big story' in relation to child imprisonment is about numbers. From the early 1990s, custodial sentencing of children rose rapidly and remained stubbornly high for much of the first decade of the twenty first century. This surge in the numbers of children behind bars led the United Nations Committee on the Rights of the Child, in 2008, to register concern that the level of youth incarceration was indicative of a failure to ensure that detention was reserved as 'a measure of last resort', representing a breach of the United Nations Convention on the Rights of the Child.<sup>1</sup> At the point that assessment was published, however, things were about to change: whereas in January 2008, the population of the secure estate for children and young people stood at 2,832, by January 2011 (the latest month for which data are available at the time of writing) the equivalent figure was 1,945.<sup>2</sup> This fall, of more than 31 per cent in just three years, is clearly a welcome — though for many an unexpected — development. But the good news headlines should not obscure some underlying concerns.**

In the first place, while it would be premature to rule out further reductions over the coming period, the level of incarceration is still substantially higher than it was prior to the custodial surge of the early 1990s. Thus in excess of 900 more children below the age of eighteen years were sentenced to custody in 2009 than in 1992. At the same time, the reduction in imprisonment has not affected all young people equally. Between August 2007 and December 2010, the number of white children in the secure estate fell by 44 per cent while the equivalent decline for black and minority ethnic children was just 18 per cent, exacerbating the longstanding overrepresentation of the latter population among those deprived of their

liberty.<sup>3</sup> Similarly, while girls were disproportionately affected by the rise in custody, the recent fall has been more pronounced for boys.<sup>4</sup> Finally, the risk of incarceration continues to vary considerably from one area to another — and it is this particular concern which constitutes the focus of the current article.

## Injustice by geography?

Wide geographical variation in the use of custody has long provoked unease.<sup>5</sup> This phenomenon is frequently referred to as 'justice by geography',<sup>6</sup> intimating that the differentials are not explicable in terms of local patterns of offending or other legitimate considerations, although for obvious reasons the term 'injustice by geography' might be considered a more exact description.

In 2006/07, the year preceding the onset of the decline in the population of the secure estate, the rate of youth custody, measured as a proportion of all court convictions, ranged across government regions from almost 8 per cent to less than 3 per cent. By 2009/10, as youth imprisonment fell across England and Wales, the regional variation narrowed somewhat, but the spread — from 6.9 per cent to 3.4 per cent — was still considerable. At the level of individual youth offending team (YOT) area, the differential was substantially greater, ranging from one in five cases leading to a court disposal in Merthyr Tydfil to one in every one hundred and fifty in Dorset. The twenty YOT areas with the highest rate of custody and the twenty with the lowest level of incarceration are shown in the table opposite.

No doubt, demographic factors and the local prevalence and nature of youth crime account for some of the divergence between areas, but it seems intuitively improbable that the full extent of the variation could be explained on that basis. Research conducted in this area, and further analysis of the published data, tend to confirm that intuition.

1. United Nations Committee on the Rights of the Child (2008) Consideration of reports submitted by states parties under Article 44 of the Convention. Concluding observations: United Kingdom of Great Britain and Northern Ireland. October 2008. Geneva: United Nations.
2. Youth Justice Board (2011) *Youth justice system custody figures* available at [www.yjb.gov.uk/en-gb/yjs/Custody/Custodyfigures/](http://www.yjb.gov.uk/en-gb/yjs/Custody/Custodyfigures/) accessed 24 April 2011.
3. Puffet, N (2011) 'Proportion of ethnic minority children in custody rises' in *Children and Young People Now* 22 February 2011.
4. Nacro (2008) *Responding to girls in the youth justice system*. Youth crime briefing. London: Nacro.
5. See for instance, Bateman, T and Stanley, C (2002) *Patterns of sentencing: differential sentencing: differential sentencing across England and Wales*. London: Youth Justice Board.
6. See for instance, Richardson (1991) *Justice by geography*. Knutsford: Social information systems.

<b>Rates of custody by youth offending team areas 2009/10</b>			
<b>Twenty highest and lowest areas</b>			
<i>High custody YOTs</i>	<i>Rate of custody (%)</i>	<i>Low custody YOTs</i>	<i>Rate of custody (%)</i>
Merthyr Tydfil	19.9	Bournemouth and Poole	2.8
Derby	13.1	Swansea	2.8
Southend-on-sea	12.4	Barnsley	2.8
Rotherham	11.7	Northumberland	2.7
Lambeth	11.4	Hounslow	2.6
Bridgend	10.7	York	2.6
Stoke-on-Trent	10.4	South Tyneside	2.5
Calderdale	10.3	Sunderland	2.4
Southwark	10.1	Somerset	2.3
Kensington and Chelsea	9.9	Gloucestershire	2.2
Birmingham	9.9	Thurrock	2.1
Ealing	9.9	Hartlepool	2.1
Peterborough	9.4	Surrey	2.0
Nottingham	9.4	Torbay	1.9
North Somerset	9.1	Newcastle-upon-Tyne	1.8
Redbridge	9.1	Ceredigion	1.5
Liverpool	8.8	Pembrokeshire	1.3
Leeds	8.7	Sutton	1.2
Bath and NE Somerset	8.5	Wokingham	1.0
Oldham	8.5	Dorset	0.7

For instance, Chambers has demonstrated that the differential use of custody is not simply a function of the local resident 10–17 population, since considering the number of children in the secure estate as a proportion of the local youth population of the area from which they derive, does not significantly alter the picture.<sup>7</sup>

The pattern of youth crime, however, does differ between high and low custody areas. Robbery and violence against the person are generally considered to be among the most serious forms of offending; during 2009/10, those offence types each accounted for a quarter of the children detained in the secure estate. High custody areas, by comparison with areas with a lower rate of detention, are characterised by a greater prevalence of these serious offences. Nonetheless, the difference is relatively modest and not statistically significant: in YOTs in the highest quartile of users of custody, robbery and violence accounted for 24 per cent of all offences leading to a substantive disposal; the equivalent figure for YOTs within the low custody quartile was 21 per cent.

One might reasonably conclude, therefore, that while the nature of youth crime goes some way to

explaining variation in levels of child incarceration, it is unlikely to account for all of it. Such a conclusion is consistent with earlier research findings that 'differential levels of custody, and broader variations in the distribution of sentencing, are not fully determined by the seriousness of offending'.<sup>8</sup>

A second obvious candidate that might account for differential outcomes according to postcode is the sentencing inclinations of the bench: simply put, custody will be higher where the judiciary are more punitive. But this purported explanation too is over simplistic. Research has suggested that while there is considerable variation between magistrates as to what they consider an appropriate disposal in a particular case, the differences are as wide within high and low custody areas as they are between them.<sup>9</sup>

It would appear that sentencer decision-making at the local level is sensitive to a range of other factors which distinguish areas with a high use of detention from those which deprive fewer children of their liberty. The remainder of the article attempts to identify some of those other factors.

7. Chambers, M (2009) *Arrested development: reducing the number of young people in custody while reducing crime* London: Policy Exchange.

8. Bateman, T and Stanley, C (2002) *op cit*, p 22.

9. Nacro (2000) *Factors associated with differential rates of youth custodial sentencing*. London: Youth Justice Board.

## Changes in the level of custody over time

One way of approaching the issue is through an understanding of mechanisms that have impacted on the level of youth imprisonment over time. As noted above, the 1990s was a decade of rising child incarceration. The previous ten years or so was however marked by a declining use of custody: between 1979 and 1990, the number of custodial sentences imposed on children aged 10 — 16 years fell from 7,000 to 1,400. It is possible to trace an array of systemic changes in the configuration of youth justice arrangements that help to explain the shifting custodial trends over the two periods.

The 1980s were marked by a 'progressive minimalism' that mandated a youth justice practice focused on intervening only where necessary to promote the principles of decarceration, diversion, and decriminalisation.<sup>10</sup> The 1990s, by contrast, saw the emergence of a philosophy of early intervention that was accompanied by a political desire to be tough on youth crime in the wake of the murder of James Bulger in 1993.<sup>11</sup> These respective ideological frameworks were manifested in correspondingly different concrete practices which in combination made the use of custody less or more likely. For current purposes, the most important of these are: the extent of pre-court diversion; the distribution of sentencing options below the level of custody; and the manner in which youth justice practitioners responded to children who came to the attention of YOTs. Significantly, these historical correlations also serve as a partial explanation of 'injustice by geography'.

### Diversion and custody

The rate of diversion — understood as the proportion of all youth justice substantive outcomes that result in a pre-court disposal — has shown considerable variation over time. Moreover, there is a clear relationship between the extent to which children are diverted from court and the level of custody.

If the 1980s saw a sharp fall in child imprisonment, the decade was also characterised by a marked increase in the ratio of cautions to prosecutions: over the ten year period, the rate of diversion for indictable offences rose

from less than 50 per cent to almost 80 per cent. The dramatic decline in the court population was correlated with a fall not just in the numbers of children detained but also the proportion of all convictions resulting in custody. The relationship is not obvious. One might anticipate that, as minor offences were increasingly filtered out in the diversionary process, sentencing practice would compensate accordingly, leading to an increase in the proportion of the smaller number of court cases that led to incarceration.

That this did not happen might be explained by the psychological impact on sentencers of the number of children appearing before them. The fact that there was a rapid decline in the court population might foster an impression that youth crime was a lesser problem than it had been hitherto. A climate of increasing tolerance — particularly given that a commitment to custody avoidance was ever more the norm — might be the anticipated outcome.

In any event, the decade that followed provided evidence of the same relationship, but in reverse. The rise in custody during the 1990s was associated with a fall in the rate of diversion, from more than 72 per cent in 1993 to 56 per cent in 2000. Indeed, such was the impact of the latter trend that the number of children convicted in court over the same period increased from 35,400 to 49,200 despite a 12 per cent fall in detected youth crime.

Consistent with that pattern, the more recent decline in custody, from 2008 onwards, has also been accompanied by increased diversion of children from court, albeit though a rather different mechanism than hitherto. The *Youth Crime Action Plan* published in 2008, committed the government to reduce the number of children entering the youth justice system for the first time by one fifth by 2020.<sup>12</sup> The target was met early: the number of children receiving a reprimand, final warning or conviction fell by almost 40 per cent between 2007/8 and 2009/10. On the assumption that most of these children would otherwise have received a pre-court disposal of some sort, the current period — just as those before it — suggests an inverse correlation between the level of diversion from court and the use of child imprisonment. Crucially, from the perspective of the current article, the same pattern prevails when considering geographic differences in the use of custody.

The 1990s ... saw the emergence of a philosophy of early intervention that was accompanied by a political desire to be tough on youth crime in the wake of the murder of James Bulger in 1993.

10. Haines, K and Drakeford, M (1998) *Young people and youth justice*. Basingstoke: Macmillan.

11. Muncie, J (2009) *Youth and crime*. 3rd edition. London: Sage.

12. HM Government (2008) *Youth crime action plan*. London: Central Office of Information.

The rate of diversion varies considerably from one YOT area to another despite the existence of a statutory scheme of reprimands and final warnings that mandates a ‘three strikes’ mechanism whose introduction was intended to reduce police discretion and enhance consistency.<sup>13</sup> Moreover, there is a statistically significant correlation at the local level between the level of diversion and the rate of custody, shown for the year 2009/10 in the chart below.<sup>14</sup>

Injustice by geography it transpires is partly a function of the extent to which police and prosecution services make use of their powers to divert children from court in that locality.

### Tariff matters

The rate of child imprisonment is also related to the distribution of court disposals below the level of custody. The philosophy of minimum intervention that was a dominant feature of youth justice in the 1980s endorsed a careful management of the tariff, with practitioners concerned to ensure that lower level disposals were used wherever possible to delay the point at which deprivation of liberty appeared inevitable. By contrast, the punitive turn of the 1990s undermined any commitment to maintain a broad tariff and the focus on early intervention encouraged a rapid progression through the available sentencing options.

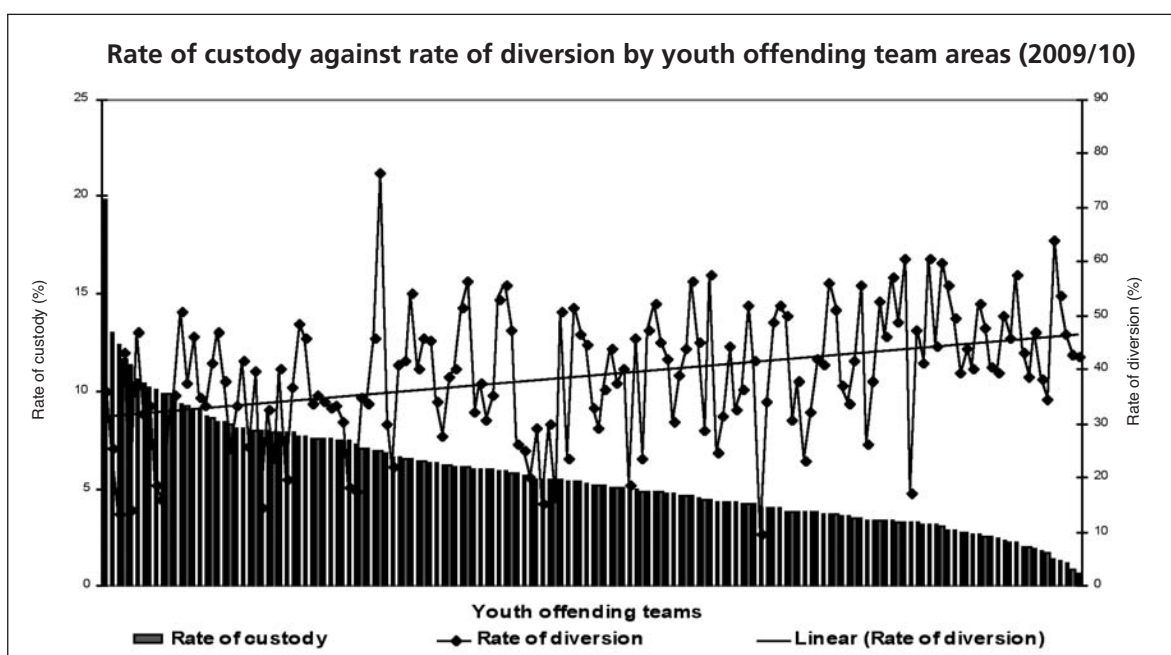
The conditional discharge — as a low level disposal that involves no further intervention once the court hearing is over — provides an instructive illustration of the shift in sentencing practice as levels of imprisonment declined in the 1980s and then subsequently rose. In

1978, discharges accounted for less than one in four sentences meted out to young people for indictable offences. By 1999, the equivalent figure was more than one in three. As the surge in custody began to bite, however, the popularity of the conditional discharge waned. By 2007, it represented just nine percent of all disposals.

Variation in the imposition of custody between different localities is similarly related to the extent to which lower tariff sentencing options are used. As shown in the table below, conditional discharges were made less commonly, in 2009/10, in YOT areas in the highest quartile of custody users than in the lowest quartile.

Conditional discharges as a proportion of all court disposals High and low custody YOT areas — 2009/10	
<i>Youth offending teams areas</i>	<i>Conditional discharge as a proportion of all convictions</i>
High custody quartile	7.2 %
Low custody quartile	9.3 %

This finding might be thought unexpected in two regards. First, as noted above, low custody areas have higher levels of pre-court diversion. One might accordingly anticipate that fewer low level offences would reach court, thereby reducing the range of cases where a discharge might be made. Second, there is a statutory proscription on the imposition of a conditional discharge within two years of a final warning other than in exceptional circumstances. In that context, a higher use of discharges in low custody areas is the more remarkable — since one would expect that such disposals are precluded



13. Pragnell, S (2005) ‘Reprimands and final warnings’ in Bateman, T and Pitts, J (eds) *The RHP companion to youth justice*. Lyme Regis: Russell House publishing.

14. It should be noted that the rate of diversion shown in the chart is drawn from Youth Justice Workload data which is not directly comparable to data presented in the article in other contexts.

by statute in a significant number of cases where they would otherwise be appropriate.

If, as argued above, the decline of the conditional discharge was a consequence of the abandonment of minimum necessary intervention, one might interpret the finding that children sentenced in high custody areas are less likely to receive a non-interventionist disposal as evidence that the abandonment has gone furthest in those areas.

### Practitioner responses to children in trouble

Sentencers do not of course make decisions as to disposal in isolation; a range of actors contribute to the process. Certainly, the role of youth justice practitioners was central to the development, and maintenance of, progressive minimalism during the 1980s, although the courts on occasions subscribed to the same philosophy. By the same token, it has been suggested that front-line staff were not immune to the 'baleful influence of the punitive climate' that set in during the 1990s.<sup>15</sup>

An instructive illustration of changes to the culture of youth justice practice is given by the shifting nature of proposals contained in court reports. When pre-sentence reports (PSRs) were introduced in 1992, the National Association of Probation Officers advised that report conclusions should recommend a 'sentencing option that combines minimum intrusion with the reduction or containment of offending', a clear indication of the continuing sway of progressive minimalism and of a commitment to managing the tariff.<sup>16</sup> But within a short period of publication, it is clear that such advice was no longer being heeded. The Home Office evaluation of the first two years' operation of Medway secure training centre, which opened for business in 1998, found that 22 per cent of reports prepared on children sentenced to a secure training order during that period contained an explicit proposal for custody; a further 7 per cent carried no proposal (a coded form of custodial recommendation) or were equivocal.<sup>17</sup> By 2006/07, according to Youth Justice Board data, more than one in four sentences of child imprisonment were actively proposed by the PSR author. Analysis conducted in the same year, confirmed that report writers in high custody YOTs were more than twice as likely to propose detention as those in low custody areas. The waning of the anti-custody ethos, as evidenced by practitioners inviting the court to impose imprisonment, was more pronounced in areas that lock up higher numbers of children. Equally striking was that

report authors in low custody YOTs were significantly more likely to recommend low tariff penalties than their counterparts in areas where the rate of detention is higher. It would appear that part of the explanation of variations in custodial sentencing is that advocacy of minimum intervention has survived to a greater extent where the level of incarceration is lower.

Another indication that differential youth justice practice contributes to variation in custodial sentencing derives from an examination of the enforcement of court orders. Returning children to court for non-compliance with supervision was extremely rare prior to 1992. However the practice subsequently gathered apace. Separate figures are not available for those below the age of eighteen years, but official data indicate that, between that year and the passage of the Crime and Disorder Act in 1998, the number of custodial sentences imposed for breach of community sentences rose by 199 per cent.<sup>18</sup> By 2009/10, 13 per cent of children in the secure estate were imprisoned for breach of a statutory order.<sup>19</sup>

At the local level, analysis of high and low custody YOT areas indicates a positive correlation between rates of detention and breach as a proportion of all substantive disposals.<sup>20</sup> Disparities in the use of child imprisonment incarceration are thus explained in part by a more rigorous enforcement practice in areas of higher rates of incarceration.

### Concluding thoughts

The risk that a child might be confined to the secure estate depends to a large extent on the post code of the court in which he or she is sentenced. Moreover, the full extent of variation cannot be explained by local patterns of youth crime, but is rather indicative of a form of injustice.

Understanding injustice by geography is a prerequisite of reducing it. The considerations adduced here suggest that an adequate account will need to go well beyond the sentencing impulses of the local bench to include a broad range of systemic considerations. In developing an adequate appreciation of the phenomenon, a useful starting point is to recognise that areas where the level of child imprisonment remains relatively low retain elements from an earlier era of youth justice — an era committed to decriminalisation, diversion and decarceration. By contrast, features associated with the punitive turn of the early 1990s are more advanced in localities with higher rates of incarceration.

15. Bateman, T (2005) 'Reducing child imprisonment: a systemic challenge' in *Youth Justice* 5(2): 91–105.

16. National Association of Probation Officers (1992) *CJA 1991 and National Standards: limiting the damage*. London: NAPO.

17. Hagell, A, Hazel, N and Shaw, C (2000) *Evaluation of Medway secure training centre*. London: Home Office.

18. Bateman, T (forthcoming) 'We breach more kids in week than we used to in a whole year: the punitive turn, enforcement and custody' in *Youth Justice* 11(2).

19. Ministry of Justice (2011) *Youth justice statistics 2009/10*. London: Ministry of Justice.

20. Bateman, T (forthcoming) op cit.