

## OTHERING IN YOUTH JUSTICE: CHARTING A COURSE TO A DIFFERENT PERSPECTIVE\*

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***Abstract: My intention in this paper is threefold namely: (a) To consider how portrayals of out-of-control youths can be deployed to facilitate a risk management strategy; (b) How that strategy can have long term consequences which affect the futures of the othered young people; and (c) To suggest a different optic of sacrificial solidarity, judiciously balancing justice and mercy, to facilitate restoration, and non-limiting of the future life choices of the othered youth.***

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### ***Constructing the othered youth***

If challenged, uncritically, to imagine the archetypal youth in trouble with the law, whether within the care or justice systems, we might fall back on tropes of urban, working-class children, living in sink estates struggling with addiction and perhaps pejoratively labelled spids or neds dependant on which side of the Irish Sea they may reside. These perceptions are fuelled not only by the media, both social and otherwise, but also by the narratives that governments deploy to construct the othered youth. Such portrayals provide justification for the risk management strategies deployed to manage their deviant behaviour.<sup>1</sup> Whilst there is no doubt more than a kernel of truth to aspects of this narrative in terms of social deprivation being a driver to criminality, perhaps a more rigorous critique than this anaemic analysis is called for. Mooney et al unpack the way in which the language of social exclusion is used to construct crime in these deprived areas as the logical, and in effect, inevitable consequence of a toxic mix of poor housing, unemployment, gang culture and family breakdown.<sup>2</sup> Within such a matrix of despair the question becomes one of how to manage or mitigate the worst consequences of this behaviour from leaking out of such areas and to maintain order as best as is possible within them. However, the prosaic

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<sup>1</sup> Gerry Mooney, Hazel Croall & Mary Munro, "Social inequalities, criminal justice and discourse of social control in contemporary Scotland" in *Criminal Justice in Scotland*, Hazel Croall, Gerry Mahoney & Mary Munro, eds., (London: Routledge, 2013), 21.

<sup>2</sup> Ibid, 32

symbiosis of media reporting and government pronouncements about the need to do something about the recalcitrant youth demands a scientific response to undergird criminal justice policy and the strategy increasingly deployed is risk management.

### *Dicing with deviance*

Within all jurisdictions in the United Kingdom the argument about how to best deal with challenging children has vacillated between welfare and justice impulses. Within Scotland the innovation of the Children's Hearing system, pioneered by the work of the Kilbrandon Committee, delivered a distinctively welfare - led approach to dealing with troubled children, as they were described by the report. This was in marked contrast to the justice-based approach in the rest of the United Kingdom, not least in Northern Ireland, where impressionable youths could be drawn into criminality of a more sectarian and paramilitary nature. McAra and McVie in analysing youth crime and justice in Scotland assert that whilst welfarism triumphed in the period 1968 to 1995 without in most cases criminalising the child, that approach has been superseded by the rubric of risk management. Indeed, they highlight that the Children (Scotland) Act 1995 enabled public protection to trump the child's best interests when considering how a child falling under the hearing system should be dealt with.<sup>3</sup>

In such circumstances the necessity for, and means of, intervention moved to early identification and management of the risky children, rather than addressing the underlying issues of the specific child and some of their structural bases and biases. With an assumption in the inerrancy of the risk management process in addressing deviant behaviour, justice, rather than welfare impulses have come more to the fore. Ironically this has been driven, rather than mitigated, by devolutionary pressure and the need to demonstrate at a more localised level that something was being done to control the perceived threat. Yet, it is interesting that statistics of youth crime within a Scottish context, at the time of writing by McAra and McVie, demonstrated a largely stable or slightly declining pattern of youth crime, contrasted with the high profile given to the issue by politicians and media alike.<sup>4</sup> Indeed their analysis presented a telling pattern in terms of

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<sup>3</sup> Lesley Ara, & Susan McVie, "Youth crime and justice in Scotland" in *Criminal Justice in Scotland*, Hazel Croall, Gerry Mahoney & Mary Munro, eds., (London: Routledge, 2013), 69-71.

<sup>4</sup> Ibid, 77-78.

the reduction in certain types of more serious offending as these young people matured in their teenage years.<sup>5</sup> Their analysis was that effectively addressing ongoing serious youth offending lay in reversion to the welfarism approaches of previous iterations of the Children's Hearing system, rather than the risk management strategies of a more justice - based hue of recent decades.<sup>6</sup>

### ***Why so risky?***

The contingency of life and the life choices of people in challenging circumstances is not new, so why have risk management strategies come to the fore in recent years? This transition to a risk management approach in youth justice can be seen as a response to societal fears of the consequences of the behaviours of the othered youth, and the need to mitigate and manage the risk and contingency of the real or perceived dangers of their behaviours. This response marks an aspect of the wider "risk society" in Western industrial society and is part of a wider range of technologies and processes that seek to manage and contain risk and contingency. Its management, according to Ulrich Beck, is intrinsically linked to the economic and social systems of modernity.<sup>7</sup> There is a cumulative layering effect of fears of the various risks which society is taken to face, in which risk management strategy is taken as the neutral arbiter by which the multiplicity of these risks and contingencies may be addressed.<sup>8</sup>

However, the way in which those risks are named, constructed, and defined are inherently determined by those in political and social control.<sup>9</sup> These apparently neutral risk management strategies are deeply embedded with narrative devices by which our perception of the deviant child is being shaped and justified, by governmental and non-governmental interests. Jacques Ellul's book *Propaganda*<sup>10</sup> highlights how these neutral "bare facts," say of youth crime statistics, have crafted to them a persuasive element whereby the narrative of cause, effect and solution are woven together. Ellul does not assert that this is a process of subconscious brain washing of the country's

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<sup>5</sup> Ibid, 80.

<sup>6</sup> Ibid, 84-84.

<sup>7</sup> Ulrich Beck, *Risk Society: Towards a New Modernity* (London: Sage, 1992), 19.

<sup>8</sup> Ibid, 31-32.

<sup>9</sup> Eric Stoddart, *Theological Perspectives on a Surveillance Society: Watching and Being Watched* (Farnham: Ashgate, 2011), 103-104

<sup>10</sup> Jacques Ellul, *Propaganda: The Formation of Men's Attitudes* (New York: Vintage Books 1973(1965)),

citizenry by the government, but that there is a degree of symbiosis in that the citizen is implicated in the argument as it affects them at an emotional, logical or financial level.<sup>11</sup>

Arguably even the selection of these “bare facts” is heavily implicated by the crimes selected, in which the preponderance of offenders are in conditions of deprivation, in opposition to those excluded, in terms of white-collar criminality, more often committed by more middle and upper class offenders. Mooney et al contend that the neoliberal underclass thesis is, at its most benign, utilised to reinforce the language of exclusion and less throughgoing responses to the structural reasons for it. In so doing the deleterious effects of market economics and its values on these communities, and their family and life prospects are ignored in the instrumentalisation of a functional risk-based analysis and response to the issues which arise.<sup>12</sup> Indeed, the reality that the criminal justice system, no matter how sympathetically dispensed, appears to be becoming the primary vehicle for behaviour modification and compelling formation of youths raises fundamental questions about what outcomes we expect from these processes which define and label such young people as criminal. Whilst the welfare approach has its limitations in addressing serious criminality, the creation of a culture of fear, with its concomitant medicine of risk management may not be the best approach to address complex questions of youth formation.

### *Fear of the what if*

If part of the task of the paper so far has been to highlight the implicated nature of our over-reliance on the lens of risk management, and its concomitant over-reliance on criminal justice responses, what is the alternative? For Bader-Saye, in critiquing a culture of fear, we must interrogate the basis upon which our fear arises, what we are seeking to protect and how that fear can be critiqued by the application of theological principles to be put it in a proper perspective.<sup>13</sup> So in our present example if our policy for dealing with troubled youth is driven by a view that youth deviance is ubiquitous, particularly in deprived areas, then a criminal justice approach to punish such bad behaviour as can be detected, without proper regard to the actual risk their behaviour poses will, in all likelihood, result in a punitive, and poor formational response. In so

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<sup>11</sup> Eric Stoddart, *The Common Gaze* (London: SCM Press, 2021), 76-77.

<sup>12</sup> Gerry Mooney, Hazel Croall & Mary Munro, “*Social inequalities, criminal justice and discourse of social control in contemporary Scotland*” in *Criminal Justice in Scotland*, Hazel Croall, Gerry Mahoney & Mary Munro, eds., (London: Routledge, 2013), 31-33.

<sup>13</sup> Scott Bader-Saye, *Following Jesus in a Culture of Fear* (Grand Rapids: Brazos Press, 2007)

doing resources will be focused not on addressing the underlying structural causes, thereby tying up future criminal justice and welfare resources in managing manifested behaviours rather than transforming the issues causing them.

Overreliance upon risk management tools and reliance on tracking can also have unintended consequences where certain behaviours and acts, emblematic of teenage experimentation and ill-considered judgment can negatively sound into adulthood. A recent House of Commons Justice Committee report into the Disclosure of youth criminal records concluded that, “*the current system undermines the laudable principles of the youth justice system and may well fall well short of the UK’s obligations under the UN Convention on the Rights of the Child.*” “Witnesses highlighted the adverse effect of childhood criminal records on individuals’ access to employment, education, housing, insurance and visas for travel, and its discriminatory impact on particular groups including Black and Minority Ethnic children and those within the care system.”<sup>14</sup> In a laudable report the committee highlighted the deleterious effects of the current system, and its injurious application to adults in terms of the above areas and sought to proffer an approach where the balance was in favour of not harming the futures of youth offenders. In so doing the othering which is both inherent and enduring for troubled youth can be addressed within a frame of reference of the possibility of redemption.

### ***Challenges for troubled youth?***

The House of Commons Justice Committee referred to took evidence in camera from a series of now adults, who for one reason or another had had brushes with the criminal justice system, which in most cases were at the low end of offending. The Committee highlighted, “*the Government confirmed that its primary objective in youth justice is to stop people being drawn into crime “with consequent blighting of their life chances”, as well as harm being caused to victims and communities. With regard to criminal records, it recognised: ...that children who offend may benefit from a second chance following their earlier errors, and that current legislation allows for appropriate rehabilitation.*”<sup>15</sup>(Emphasis added).

It is doubtful that the present approach to youth justice achieves either aim. Indeed, it appears not only to criminalize young people (admittedly for a more limited set of offences in

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<sup>14</sup> <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/416/416.pdf>, accessed 9.9.21

<sup>15</sup> Ibid, 11.

Scotland given the Children's Hearing System), but also blights their life chances with a criminal record disclosure system which extends its punitive effects indeterminately into adulthood. This disclosure system is premised upon a risk management strategy which assumes that past errant behaviour is indicative of its replication in the future. Perhaps, though, an alternative lens can be found from the perspective of the cross, which both countenances transformation of behaviours and circumstances, and critiques the present overreliance on risk management strategies and actuarial justice within the criminal justice and welfare limbs of the law. In so doing that critique may open the space for those in positions of authority to exercise a more equitable, and less destructive response to the present behaviours of challenging children.

### *Towards a new optic*

German theologian Jurgen Moltmann asserts that the cross casts a shadow from the future, and he believes eschatology to be founded upon the dialectic of the cross and the resurrection of Christ, which critiques society.<sup>16</sup> In distinguishing between what the future might be based on the created order as is (*futurum*), from that which is projected back into time in light of that redemptive suffering solidarity of the crucified God with humanity, new possibilities of the future are made possible (*adventus*).<sup>17</sup> Hence for Moltmann the creation remains an open system which continues to evolve and be shaped and critiqued by that divine act of identification and suffering. The ongoing activity of the Holy Spirit is focused on extracting the future reality of the Kingdom of God into the present reality of brokenness and suffering, and in so doing towards the new creation in the likeness of the solidarity of the suffering resurrected Christ.<sup>18</sup> In the crucified God the promise of control offered by risk management is reimagined as the ability to suffer in solidarity with the other, rather than to utilise risk to seek to avoid suffering at all costs.<sup>19</sup> The cross marks an iconoclastic lens to challenge the pervasiveness of the language and moral claims of risk, making it a subservient tool to a different ethic of suffering solidarity. It also highlights

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<sup>16</sup> Jurgen Moltmann, *Theology of Hope*, Translated by J.W. Leith, (London: SCM Press, 1967, Repr. 2002).

<sup>17</sup> Jurgen Moltmann, *God in creation: An Ecological Doctrine of Creation*, (London: SCM Press, 1985), 132-135.

<sup>18</sup> Richard Bauckham, *The Theology of Jurgen Moltmann*, (London: T & T Clark, 1995), 5.

<sup>19</sup> Eric Stoddart, *Theological Perspectives on a Surveillance Society: Watching and Being Watched* (Farnham: Ashgate, 2011), 121-123.

that risk culture is both engendered by and creative of fear, which runs contrary to the virtue of solidarity, in constricting rather than generating hope.

Yet that countercultural approach must be rendered in a British society in which (Callum Brown asserts) Christianity's role as the dominant religious culture has been destroyed.<sup>20</sup> Whilst Brown's position may be unduly fatalistic, for the purposes of this paper it may safely be concluded that Christianity's influence in wider British society, and the legal and welfare systems in particular, is much diminished in theory and in practice in the years since the end of the Second World War. Whilst there are undoubtedly vestiges of Christian influence, in terms of individual Christian Social Workers, lawyers and members of the judiciary, and upon both the laws and structures of the criminal justice system, efficiency and risk management have come to the fore in conceptualising a response to challenging children. In this epoch of increasing secularism, it is not easy to agree on what justice means as a society and what level of risk and suffering as a community we might be willing to endure to allow for the possibility of restoring the othered or deviant child. Intrinsicly linked to that question is what level of discretion, and backing, as a society we are prepared to offer figures of authority such social workers or judges to take risks with youths in the present for the long term and contingent aim of allowing juvenile challenging behaviours and circumstances not to mar their futures. It is perhaps in the work of Oliver O'Donovan that some pegs can be provided to construct a more equitable and less actuarial approach.

In *The Ways of Judgment*,<sup>21</sup> O'Donovan considers various political ideas from a Christian viewpoint, but most germane to this argument are those of justice and mercy, which remain in creative tension. He does not argue that those exercising judicial or quasi-judicial functions are doing so to Christian standards, however those acts of judgment fall under the delegated authority given to civil governance. Each act of judgment though is an act of judgment upon the decision maker as that delegated authority is rendered in imperfection and requires humility in seeking the common good of the community for whom they judge. Given that the challenged child is but one member of the community which includes the victims, the weighing of the scales may in certain cases fall upon the justice, rather than mercy limb, but a proper evaluation of even that common

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<sup>20</sup> Callum Brown, *The Death of Christian Britain: Understanding Christian Britain 1800-2000*, (Oxford: Routledge, 2000, 2<sup>nd</sup> ed, 2009), 1.

<sup>21</sup> Oliver O'Donovan, *The Ways of Judgment*, (Grand Rapids: Eerdmans, 2005)

good must consider the long-term consequences of that decision and not just in dealing with the immediate issue that requires the judicial attention. Taking the long view may compel mercy for the ultimate hope of restoration and formation, where actuarial justice might require a harsh sanction for the immediate good of the community. Of course, this opens up the possibility that true redemptive justice may be justice delayed, carrying with it the risk that the particular child may not in fact ever be re-formed thereby placing themselves outside the common good of their community. However, by refocusing judicial functions upon the ethical principles of justice and mercy, rather than probabilistic calculations of risk, a challenge is laid down to the inevitability of the cause and effect of *futurum* by the possibility of *adventus*, as Moltmann describes.

Establishing risk as the dominant ethical standard upon which to judge people and their present and potential future behaviours ties their futures to their present. It depends on a linear assumption of how a particular risky behaviour or person might replicate past behaviours, based on statistical probability at a macro, rather than individual level. Hence the assumption that the best way to deal with a risky child is to criminalise their behaviour, whilst they are still in a fundamental formational stage in their lives, has huge potential implications for their future employment, education, housing, and place in society. Whilst risk assessment is a valid interpretative tool it acts to limit the subjective judgment and capacity of those who seek to address their issues and feeds the fears and biases of local communities towards those children deemed to be deviant, with its offer of apparent control. Furthermore, risk theory provides evaluation of statistical possibilities over a large cohort of individuals and is not aimed at the individual youth demonstrating risky behaviours, which may or may not be reflective of future adult behaviours or character. In using statistical probability as an inevitability, risk culture proffers apparent control of deviance by the othered youth but closes off the very possibilities of alternative futures envisaged by Moltmann, which might be gained through more painstaking and painful risky solidarity.

### ***Where Next?***

Having suggested an alternative optic by which we might view troubled othered young people through, what practical steps may become possible as a means of creating hope through identification and making risk management a tool, rather than a virtue?

Perhaps the first reform to be considered is how alterative processes can be adopted whereby a criminal sanction is not the first weapon of choice in dealing with deviant behaviour.

Whilst many such behaviours can be visited upon similarly othered members of the children's locale, early intervention which seeks wholistically to address the needs of the individual child in their community, should be the first port of call. The Children's Hearing system in Scotland is clearly an exemplar of the impulse to decriminalise the responses to troubling behaviours, in all but the most serious cases, but shoots of growth of alternative pilot projects such as Northern Ireland's Children's Diversion Forum, should be commended and resourced. Sadly, a risk culture approach adds pressure to professionals working with children, whether judges, social workers, prosecutors, or teachers to fear the inevitable complaint or enquiry when something goes wrong. Yet, it is often only when such individuals are resourced and enabled to work creatively and collaboratively for the good of the child, rather than slavishly following the rubrics of a prescribed policy, that enduring and innovative changes can be made in troubled young people's lives.

Secondly, in line with the recommendations of the recent Parliamentary Committee on disclosure of youth criminal records, root and branch reform is required to make the Rehabilitation of Offenders legislation fit for purpose, without casting an unnecessary shadow over their adult futures. Again, the risk culture drives unnecessary retention of records of relatively minor juvenile offences, which in many cases are not replicated in their adult lives. In reality if the individual adopts recidivist criminal behaviour into their adult lives their adult criminal records are likely to form the basis of any ongoing Bad Character application, without the necessity of reference to childhood misdemeanours. Hence an effective filtering process for only the most serious childhood offences not to be deemed spent at aged 18, should be adopted, with such entries being expunged from any Criminal Record or indeed from any police records used to complete disclosure requests. Furthermore, the establishment of a Board, in a similar vein to the functions of the Parole Board, could be established to consider whether an applicant is entitled to have more serious offences filtered from any disclosure search. Such a process would be based on the person they have become, rather than a statistical modelling of risk on the basis of the offences which they have committed in their childhood.

Finally, whilst being cognisant of the inevitable constraints upon public spending in the post - Covid era, perhaps greater emphasis on collaborative working and on therapeutic work, rather than assessment within the welfare functions of the courts and social workers, may produce more enduring formational results. Whilst the no - delay principle enshrined in Children's welfare legislation is laudable to avoid developmental and other evils, it may be that a more wholistic focus

on addressing underlying generational issues within family dynamics, in a non-judgmental forum, might produce better results for troubled children and their wider family units. It is of note that many communities of faith already make huge contributions in opening their buildings up as contact centres and in many cases staffing the supervision of these contact sessions. However, perhaps for those in the church who would seek to replicate the solidarity of the crucified God to these othered youths will involve greater commitments of our time and financial resources. With a reduced public purse to fund these areas perhaps the church will have to go deeper in their efforts to view social relations from the perspective of the solidarity and self-sacrificial perspective of the cross. In so doing the means to open up, rather than close off opportunities for othered youth, may be provided both in practical support and in advocacy of an alternative narrative to the short-term control responses of government or the media.

### *In sum*

In conclusion we have considered the way in which troubled youths can be othered by selective choices of what types of criminality, and in which locales, are given prominence in media and governmental pronouncements, often on selective and ill-founded evidence. We have seen the way in which that othering is used to justify risk management approaches in addressing the behaviours of such troubled youths and how these responses are shaped by the selective narratives both governments and governed tell about othered children. We have considered how risk culture is not a neutral construct, but is intimately embedded within market economics, in which fear of the other is deployed to bolster the case for risk responses and control behaviour, without more careful attention to interrogating those fears and the enduring consequences of its attendant responses. The deleterious consequences of allowing that fear to drive a more risk based criminal justice response has been highlighted in the initial criminalising of the othered youth, but also in the suspended sentencing in terms of their later life opportunities in education, employment, and housing. We have sought to provide a new optic through a consideration of Moltmann and O'Donovan's work and to proffer practical solutions to counteract the ways in which risk society and youth justice can close off possibilities of human flourishing, rather than reduce its impact on their future lives. The challenge of this alternative vision is to the hard and enduring labour of helping the othered youth to maturity, rather than functionally processing their troubling behaviours in such a way as to bind their future to their present.

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