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What do we do with those kids? A critical review of current responses to juvenile delinquency and an alternative

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ABSTRACT

The public narrative of juvenile offenders has oscillated between images of the misguided and the superpredator. Consequently, public policy discussions have followed a similar path — swinging between offering treatment and implementing punishment. This paper discusses the impact of neoliberalism, high profile events, and recent legislative responses to posit that the discussion changes dyad of punishment and rehabilitation to a method to work with youth. Restorative justice used in Australia provides a starting point in discussing the types of programs necessary to change the conversation and improve the lives of juveniles in America. Policy implications are discussed.

Contents

1. Introduction

This article examines the development of the juvenile justice system in America, with a particular emphasis on the current status of our policy and in Australia where a restorative justice approach is the statutorily mandated. Through a broad, macro level perspective, we critically analyze the process behind our current focus on punitive approach to juvenile offending. By understanding how we have arrived at our current policy, we may avoid the continuation of easily stated policies (e.g. zero tolerance, tough love approach, etc.) in the post-punitive era of austerity approaches to government. Instead, we examine the systematic response to juvenile offending in Australia where restorative justice approach is the statutory mandated response. This article offers an alternative approach in which the dialogue moves beyond this limited dyadic conversation to include how political economy affects social phenomena related to juvenile justice and how to improve the chances

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of successful transition to a productive adulthood through engagement with the youths, themselves.

2. History of juvenile justice

The history of juvenile justice is one of periodic scrutiny and change. In large part, these changes comprise a kind of cycle (Bernard & Kurlychek, 2010) or pendulum (Snyder & Sickmund, 1999) where policy and practice sway back and forth between two conflicting impulses. The first impulse constitutes a concern for a juvenile justice system that is compassionate and whose goal is treatment of individual youth. The second impulse, on the other hand, is less compassionate and is oriented to punishment and protecting the community. In short, dominant ideology of juvenile justice is constantly shifting between a focus on a punitive approach and a focus on treating or rehabilitating them. While there are debates regarding the motivations of the actors responsible for these changes (see Feld, 1999), much of what drives this cycle are periodic emergences of youthful misbehavior as a social problem (Spencer, 2011) and a concurrent dissatisfaction or disenchantment with existing institutional practices.

Among the earliest juvenile institutions were the Houses of Refuge. Emerging in the early 1800s, the Houses were born from a concern with lower- and working-class urban youth and an increasing reluctance of juries to sentence these youth to adult facilities. The former was based on a broad culture view of these youth as potential indigents — which linked poverty with indolence and criminality. The latter was the result of a reconceptualization of the idea of childhood — from miniature adults to innocents in need of special protection and treatment (Aries, 1962). The Houses were designed to reform these youthful offenders by putting them to work (Bernard & Kurlychek, 2010). Despite periodic legal challenges, the Houses soon became the major method of dealing with youthful misbehavior. Eventually, however, disenchantment with both the practices and efficacy of the Houses led to their eventual dismantling by the 1890s.

This dismantling eventually led to the passage of the Juvenile Court Act of 1899 in Illinois (Snyder & Sickmund, 1999). Driven in part by the Progressive Era Reform movement (Schlossman, 1977), the new juvenile institution (the first juvenile court) was founded on the legal doctrine of *parens patriae* which granted the state the power and obligation to protect the welfare of children (Feld, 1999; Platt, 1977). Youthful offenders were primarily seen as youth in trouble and the ideology (if not actual practice) of the new juvenile court was primarily focused around treatment. In addition to the historical reconceptualization of childhood, a mosaic of cultural, legal, demographic, and economic changes during the 1800s resulted in the delay of adulthood and the "discovery" of adolescence (Bakan, 1971). This new institutional arrangement soon spread throughout the country and by 1925, all but two states had created their own versions (Snyder & Sickmund, 1999).

For the most part, the juvenile court remained unchanged until the 1960s but changes were on the horizon. Delinquency re-emerged as a social problem in the 1950s (Gilbert, 1986) and, as is typically the case, constructed the problem as getting worse. This idea led to a growing dissatisfaction with the efficacy of the treatment model of juvenile court (Bernard & Kurlychek, 2010; Feld, 1999; Snyder & Sickmund, 1999). At the same time, there was an increasing perception that the juvenile court might talk about treatment but was in fact punishing youths for their offenses. If this were the case, critics of the court argued, youth needed more due process protections to balance things. Historically, the lack of due process protections for youth was seen as balanced by the intent to treat or rehabilitate them. In short, the argument was that youthful offenders did not need protection because the court was acting in their best interest. A number of legal challenges were filed and eventually some made their way to the US Supreme Court. In a series of rulings between 1966 and 1984, the Court mandated a series of changes – mainly in the adjudication phase – that reshaped the juvenile justice process in significant ways. For example, in *Kent v. United States* (1966), the Court mandated formal hearings in waiver proceedings and in *In re Winship* (1970) it ruled that adjudication required proof beyond a reasonable doubt rather than of a preponderance of evidence. In two separate rulings (*Oklahoma Publishing Co. v District Court* [1977] and *Smith v. Daily Mail Publishing Co.* [1979]), the Court expanded and upheld the right of the press to publish the names of youth involved in juvenile court cases. The result of many of these rulings was a juvenile court that in structure and process began to look more like the adult criminal court. For its part, the US Congress passed the Juvenile Delinquency Prevention and Control Act in 1968 and the Juvenile Justice and Delinquency Prevention Act in 1974. In combination, this legislation resulted in changes that – perhaps in ways contradictory to the effects of the Supreme Court rulings – sharpened the differences between the juvenile and adult systems. For example, the 1968 Act required the diversion of status offenders and the 1974 Act required a greater physical separation of juveniles from adult offenders when confined in the same facility.

During the 1980s, delinquency again emerged as a social problem – largely in the form of urban gangs and youth violence and, once again, the juvenile justice system was accused of being as ineffective in the face of this "new" and growing problem. As with the criminal justice system, the public increasingly called for a "law and order" approach with juveniles. States responded with a host of changes that made it easier for the juvenile court to transfer or waive cases to the adult court. Mandatory sentences were introduced in some states. This trend continued into the 1990s — a time when youth violence came to occupy an increasingly visible place on our cultural radar (Spencer, 2011). The superpredator emerged as a kind of poster child of our cultural image of the youthful offender during the decade — remorseless, calculating, brutally violent and not easily redeemable (Muschert, 2007; Spencer, 2011).

Juvenile justice reforms are typically not studied and systematic but rather often made during times of fear and anxiety (Schwartz, 1992). Thus, not surprisingly, increasingly vocal calls for getting tough on youthful offenders further sharpened and focused the turn to law and order begun in the prior decade. Even though official rates of delinquency – and youth violence in particular – had begun a precipitous decline by 1995, state legislatures continued – and expanded – the transformation of the juvenile court began a decade earlier; a transformation that is arguably the most significant since its inception (see for example, Bernard & Kurlychek, 2010). Some states changed their purpose clauses toward a greater focus on punishment of youthful offenders, justice for victims, and protection of community safety (Feld, 1999). Even those that did not go this far, revised the language of purpose clauses to include a "balanced" approach that talked about treatment and punishment. Other states – if they had not already done so – expanded waiver and transfer provisions and an increasing number of states began implementing blended sentencing options.

Mostly recently, the Supreme Court has re-entered the dialogue regarding the juvenile justice system with two landmark case decisions: *Roper v. Simmons* 543 U.S. 551 (2005) and *Miller v. Alabama* 132 S. CT. 2455 (2012). In *Roper v. Simmons* 543 U.S. 551 (2005), the Court ruled that the execution of individuals for crimes committed prior to age 18 was unconstitutional because it constituted cruel and unusual punishment. At that time, the United States was the sole country who legally sanctioned the execution of individuals for those types of crimes in the Western world (Kalbeitzer & Sevin Goldstein, 2006). The decision relied strongly on the consensus among other nations to view such state action as "inhumane" and as violation of many international treaties and the UN Convention on Children's Rights (*Roper v. Simmons*).

Then again, the Supreme Court ruled on the practice of sentencing youth to life without possibility to parole in *Miller v. Alabama* 132 S. CT. 2455 (2012). In 2005, Amnesty International reported that four countries, one of which was the United States, had used the practice of sentencing juveniles to life without possibility of parole. The United States has used it more than anyone else (Amnesty International & Human Rights Watch, 2005). In *Miller*, the Court ruled that juveniles