

Malleable Mandates: Liberal Ideology and the Politics of Protection and Punishment in the Juvenile Justice and Delinquency Prevention Act

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Abstract: *While the notion that youth warrant special protection has a lengthy and controversial history in juvenile justice dating back to the child saving movement, little research has examined how the idea has played out politically in law-making bodies at the federal level. Further, there is limited attention to how the core ideological foundation of our legal system may have paved the way for politically reshaping the notion of protection in a punitive direction in recent legislative efforts. In this paper, I explore the shifting political meanings of "protection" and "punishment" contained in the evolution of the Juvenile Justice and Delinquency Prevention Act (JJDP) and propose that their malleability partially stems from overlooked ideological forces in the liberal legal model including a weak, individualized version of public duty and variable understandings of youth autonomy and culpability. Together the underlying liberal dynamics engender an ideological affinity between protection and punishment that permitted their rhetorical vulnerability and political distortion.*

Keywords: law-making, legal liberalism, ideological affinity, Juvenile Justice and Delinquency Prevention Act, politics, protection, punishment, youth justice

INTRODUCTION

In the United States, rhetoric surrounding children pervades the popular media. If one casually surfs the web, watches television, or listens to the radio, children figure prominently as a subject of concern, a reason to hope, and a lucrative target for advertisers. As a country, we profess to care about kids. Yet, despite our proliferate rhetoric, children and adolescents are the hardest hit by serious social problems confronting our society. Under times of budgetary crunch, social programs receive "first cut" leaving youth most exposed under the vagaries of the market economy. Even during good times, budgets for social services have to fight for survival. Children's vulnerability in American social policy comes at a price. At least one in five children lives in poverty (U.S. Census Bureau 2011). Each year millions of youth fall victim to abuse, neglect, and serious violence (U.S. Government Accounting Office 2011) and suffer from its toxic fallout facing increased risks of delinquency, especially violent

delinquency, drug abuse and educational drop-out (U.S. Department of Health and Human Service 2006).

The mismatch between rhetoric and reality has caused some scholars, like Martha Minow (1987), to argue that children are "quite beside the point" and suffer from "societal neglect" in policy making efforts. Given their relative developmental, economic and legal dependence, children lack the "voice" to effectively marshal legal and political resources, and subsequently find their needs subsumed to other, more powerful interests. Yet, thousands of youth are processed through the juvenile courts each year in dependency and delinquency cases, and most states have multiple mechanisms that permit the transfer of youth to adult court (Griffin et al. 2011; Kupchik 2006). It seems that while children do appear "beside the point" in some important senses, they are certainly the subject of societal concern and social control, and debates about how best to handle youth in trouble with the law have a long, contested history (Blomberg and

Lucken 2000; Getis 2000; Platt 1977, 2002; Ryerson 1978; Schlossman 1977).

At the political level, critical criminologist and historian Thomas Bernard (1992) has argued that the policy debates in youth justice proceed in fairly predictable “cycles” that vacillate between an emphasis on rehabilitation and an emphasis on punishment. He argues that myths about the seriousness and frequency of juvenile delinquency as well as faulty perceptions of being “too hard” or “too soft” on juvenile crime propel the policy debate and drive the swings between rehabilitation and punishment over time. Bernard’s characterization identifies an important vacillation in our models of youth policy, and points to some of the reasons that empirical realities of juvenile justice seem incapable of penetrating hegemonic understandings about youth, crime and government interventions at the level of policy-making. Yet, the model also begs some larger questions about whether the problem is somehow partly intrinsic to the political process itself (McCorkell 1987), and perhaps to the dynamic tensions at work in our understanding of juvenile justice that are produced by a legal system founded on Lockean principles of maximum individual freedom and minimal government intervention, particularly in the zone of privacy surrounding family life (McCorkell 1987; Minow 1987; Ryan 1987).

In this article, I propose that the “individualized” version of public duty in the liberal legal model which subordinates collective social issues to the primacy of individual freedom creates an “ideological affinity” between the meanings of protection and punishment that have facilitated their malleability and interchangeability over time. Further, tensions springing from contradictory understandings of youth autonomy and culpability in the liberal legal model also promoted the punitive re-shaping of protection that occurred in the most recent re-authorization of the Juvenile Justice and Delinquency Prevention Act (42 USC §5601; §5602; §5633).

While the impacts of policy reforms have been studied extensively, the front end process of law-making has received comparably little critical attention (Ismaili 2006; Jones and Newburn 2002; Solomon 1981; Cullen and Wright 2002). Yet, exploring how legislation conceives of and drives particular models of justice for youth permits critical criminologists to understand and theorize about how changes in justice come about, and how to intervene more effectively at this level.

The JJDP is one such law that merits critical consideration. Heralded as a victory for progressive youth justice advocates with its controversial passage in 1974 (Schwartz 1989), the JJDP supplies funding for all states in compliance with its four core mandates that dictate how states handle youth in their care. Even though much of the work of juvenile justice takes place at the local level, the JJDP is particularly important for critical scrutiny because it supplies a vital stream of funding for already

strapped local juvenile justice systems. Beyond serving as a funding source, the Act performs both practical and symbolic functions for the states as well. On a practical level, the law limits what the states can “do” with juveniles in their care if they desire access to federal resources. In the case of the original formulation of the JJDP, states were forced to do a better job of “protecting” youth by diverting them away from the system initially, separating them from adults when contact was unavoidable and deinstitutionalizing youth charged with status offenses like truancy and running away. On a symbolic level, federal law enshrines certain values into the infrastructure of juvenile justice, providing a tool for advocates interested in shaping social policy, and a basic philosophy that can guide future efforts at change.

METHODS

The material for this project derives from a legislative analysis of the Juvenile Justice and Delinquency Prevention Act from its inception, pre-1974, to its most recent authorization in 2002. In addition to the text of the laws themselves, congressional debate, committee and subcommittee hearing transcripts, and official committee reports were reviewed. The documents not only trace the change in language from pre-1972 to the present, they also illustrate the types of evidence presented in the debate and the rhetorical framing of that evidence, which provides a glimpse into the legislative manipulation that is often missed in much policy research focused on the back end of reforms. While it cannot tell the whole story, federal lawmaking represents a crucial site to examine how ideology and values about youth are channeled into the policy process and impact states’ ability to receive federal resources.

It is important to acknowledge that the changes to the JJDP developed within a complex legislative process where multiple versions of legislation, debate and hearings related to the JJDP were proposed before the final version became law. In order to examine how federal lawmakers construed protection and punishment in the JJDP, understanding both the official legislative history contained in the committee reports, and the more “messy” legislative process found in years of debate, drafting legislation and hearing testimony are necessary. Clearly, the entire lawmaking process for the Act will not be reflected in this analysis. Much of lawmaking that happens behind closed doors, in the hallways, and on the phone with lobbyists, or in the field with constituents will not be revealed here. Also, all the potential “voices” of the juvenile justice system are not included. Most notably absent include the voices of children and their parents. Yet, the focus of this study is on how federal lawmakers rationalized key changes in the JJDP and how those changes relate to philosophical underpinnings inherent within the legal infrastructure of the juvenile justice

system itself. In this sense, hearings, reports, and legislation are ripe for investigation.

For this paper, the analysis concentrated on the legislative history tracing recent amendments to JJDPa's purpose, rationale and core mandates. Quotes contained in this article were selected based on their relevance to the shifts in meaning from the original legislation. That being said, it is important to stress the debate itself was not one-sided. While the quotes selected here were most reflective of the legislative rhetoric that accompanied the new, more punitive conception of protection and the loosening of the core mandates in the revised act, not all lawmakers or testimony supported the legal changes. Indeed there was a fair amount of resistance to the punitive notion of protection, and calls for stronger state efforts to protect youth and more robust efforts at rehabilitation were proposed. However, the recorded changes to the law itself moved in a punitive direction, and the quotes selected here are emblematic of the rationale that justified these legal shifts. Furthermore, the quotes selected came from the final committee report (or hearing testimony relied on in the final committee determinations) that claims to contain the "official" rationale behind the revised Act and proffers the given explanation for shifts in each of the mandates.

While these quotes may appear to reflect the most "conservative" rhetoric, they are included here because it was this rhetoric that was relied on in revising the purpose and core mandates of the JJDPa. It can be argued that the voices of advocates and lawmakers arguing for stronger (not weaker) mandates succeeded in the sense that the mandates survived amid even more radically conservative voices calling for elimination of the JJDPa entirely. Given the strength of opposition to the changes, which were arguably not supported by a majority of practitioners called in to testify, it becomes necessary to understand how the legislative shift occurred, and to consider how the underlying liberal legal model may have contributed to this change, and the broader "cyclical" (Bernard 1992) nature of U.S. juvenile justice policy.

FINDINGS

Since its original authorization in 1974, the meanings of "protection" and "punishment" within the JJDPa have been re-worked in both the philosophy of the Act and its mechanisms specified in the four key mandates. Originally, protection was grounded in a philosophy of non-intervention that maintained youth should be kept out of the system wherever possible, and protected from punitive state action when contact was unavoidable. In the revised Act, protection was reframed as punishment, and non-intervention was reshaped to mean staying out of the state's way to punish youth in order to protect them from further criminality and to protect society from the harmful effects of delinquency. The shift in meaning materializes in the evolution of the law's four key mandates. Originally

promulgated as minimum level protections that attempted to minimize the harm of the state in youth lives, the more recent mandates were touted as punitive burdens on the states, and were re-formulated to allow states more freedom (termed 'flexibility') to handle youth in their care.

The Early JJDPa

In 1974, the purpose of the JJDPa was conceived primarily as a means of protecting youth from the harmful consequences of involvement in the state juvenile justice systems. At this time, the rehabilitative philosophy of juvenile justice was attacked as mere rhetoric overlaying what was considered a fundamentally punitive system. Senator Bayh, the sponsoring legislator of the original Act, critiques the rhetoric surrounding the importance of children in U.S. society as more "myth than reality" and calls for efforts to end the "second class status of children in the juvenile justice system" (U.S. Congress 1972:44). Dr. Jerome Miller, the Director of Youth Services in Massachusetts at the time, claimed in his testimony supporting the Act, "We will no longer engage in a bureaucratic game of calling punishment 'treatment' or neglect 'rehabilitation'" (U.S. Congress 1972:62).

The philosophy of the Act exemplified a deep concern that processing youth through the system produced damaging labeling effects that posed serious risks to the youth's development. In comments to the Congress in 1974, Senator Bayh remarked that rather than decriminalizing youth according to the founding mission of the juvenile justice system, present day state efforts were "criminalizing" the social problems that led to offending, and further processing the youth through the juvenile justice system only entrenched criminal behavior. The concern that youth needed to be protected from the system itself is captured by his blunt critique of the state treatment of youth.

Once a young person enters the juvenile justice system for whatever reason, he will probably be picked up again for delinquent acts, and eventually he will, more often than not, graduate to a life of crime...Our objective must be, therefore, to minimize the youngster's penetration into all negative labeling, institutional processes. (U.S. Congress 1974:25156)

Given the detrimental effects of entering the system, the goal for the advocates of the JJDPa centered on keeping kids out altogether and rerouting delinquency prevention to local communities and diversion programs. Entering state care should only occur as a last resort, and when it could not be avoided, the states' objective should focus on protecting youth from damaging state practices that disrupt development and deepen criminality. Toward this aim, the Act stipulated minimum requirements, now known as the core "protections," for states to follow once youth were in custody.

The first key protection reflects the JJDPA's focus on getting kids out of state custody. It compelled states to "deinstitutionalize" status offenders, including those charged with offenses such as truancy and running away. Advocates saw these behaviors as symbolic of larger social problems that incarceration would not address effectively. Consistent with the concern of protecting youth from the dangerous influences within the system, advocates argued that youth charged with relatively minor status offenses would simply get worse by sharing a cell with youth who commit serious offenses. In other words, they would go out of state custody in a worse state than when they came in, and potentially more prone to serious delinquent behavior. Thus, the first protection, now known as the "DSO" mandate, aimed to protect youth by keeping them out of state placement in the first place, particularly detention, jail and prison facilities.

The second and third protections in the Act reflect the JJDPA's related focus on protecting young people who must enter state care. At the time, states were holding youth out of convenience and budgetary constraints in the same facilities as adults. The proximity to adults was believed to place youth at increased risk for physical and sexual abuse, as well as heighten the chances to learn more severe criminal behavior from more experienced offenders. Advocates perceived youth as developmentally vulnerable to the influence of adults, and less equipped to maintain their safety in their presence. Thus, the second protection dictated that states take youth out of adult facilities, and in the limited cases where that simply was not possible, the third protection mandated that they develop and maintain complete "sight and sound" separation from adults.

The fourth protection in the Act was not authorized until much later in 1992, but it reflected the original law's central focus of protecting youth from the juvenile justice system itself, in this case protecting youth from unfair discrimination based on race. Advocates for this mandate identified that youth of color were more likely to have contact with all parts of the system, and were particularly more likely to face confinement and become entrenched in the juvenile justice system. To protect youth from institutional oppression, the JJDPA required that states advance efforts to reduce "disproportionate minority confinement" or DMC.

Taken together, the four core mandates construe protection as keeping the state away from youth where possible, and preventing harm at the hands of the state when contact becomes inevitable. The original mandates conceived protection as a "hands off" approach and concentrated on requiring states to reduce custody of juveniles, and restrict the manner in which they could be handled once in state care. During the most recent authorization in 2002, which took place during the height of the "get tough" movement in youth justice, the meaning of protection shifted toward punishment, and non-

intervention became a mechanism to free the states from the shackles of the original mandates, giving them greater latitude to punish youth in the interest of protecting society and deterring youth from delinquency.

Protection and Punishment in the 2002 Act

In 2002, the notion of the "protection" contained in the Act underwent two crucial shifts, and each reflects the malleability of the term and its vulnerability to punitive distortion. First, the new law altered the primary recipients of protection in a substantive way. Instead of identifying youth who come into contact with the justice system as the primary group of concern, the new Act emphasized "public safety", and added a section to the Act that stipulated the state's responsibility to protect the community through juvenile accountability. The punishment of youth, rather than representing a harm that must be avoided, was reconstituted during the debate surrounding the law as "protective" of youth and in their best interests. Second, what may be called the "mechanisms" of protection in the form of the four core mandates were redefined in the debates as burdensome and rigid, indeed punitive, toward the states. In other words, protecting youth in the manner the mandates required in earlier versions of the JJDPA was now perceived as overly punitive toward the states, and each mandate was loosened to allow states greater "flexibility" to handle youth in their care.

The first punitive manipulation of protection in the revised Act relates to the question "Who merits protection and how should it be achieved?" In the original Act, both advocates and lawmakers aligned on the issue that youth in contact with the juvenile justice system needed protection from the harmful labeling consequences of custodial placement and from the potential dangerous actions of the state in processing youth through the system. Essentially, youth should receive protection from punishment. In the reauthorization process for the 2002 Act, advocates and lawmakers were no longer of one mind. Despite protests from advocates, on-the-ground practitioners, and some legislators who pushed for even stronger protections from the state, key lawmakers succeeded in flipping the original goal of protection on its head, co-opting the language of protection in fundamentally punitive ways. First, lawmakers targeted the "community" as the key constituent meriting protection from the actions of delinquent youth. For example, at the beginning of the 2002 Act, a series "findings" are listed as evidence for the need for revision to the JJDPA. Even though the statement recognizes juvenile arrests in 1999 were the lowest in the decade, there was consensus that juvenile crime was still "too high" and lawmakers listed a number of significant public safety threats from juvenile crime:

SEC. 101. (a) The Congress finds the following:

(1) Although the juvenile violent crime arrest rate in 1999 was the lowest in the decade, there remains a consensus that the number of crimes and the rate of offending by juveniles nationwide is still too high.

(2) According to the Office of Juvenile Justice and Delinquency Prevention, allowing 1 youth to leave school for a life of crime and of drug abuse costs society \$1,700,000 to \$2,300,000 annually.

(3) One in every 6 individuals (16.2 percent) arrested for committing violent crime in 1999 was less than 18 years of age. In 1999, juveniles accounted for 9 percent of murder arrests, 17 percent of forcible rape arrests, 25 percent of robbery arrest, 14 percent of aggravated assault arrests, and 24 percent of weapons arrests.

(4) More than 1/2 of juvenile murder victims are killed with firearms. Of the nearly 1,800 murder victims less than 18 years of age, 17 percent of the victims less than 13 years of age were murdered with a firearm, and 81 percent of the victims 13 years of age or older were killed with a firearm.

(5) Juveniles accounted for 13 percent of all drug abuse violation arrests in 1999. Between 1990 and 1999, juvenile arrests for drug abuse violations rose 132 percent.

(6) Over the last 3 decades, youth gang problems have increased nationwide. In the 1970's, 19 States reported youth gang problems. By the late 1990's, all 50 States and the District of Columbia reported gang problems. For the same period, the number of cities reporting youth gang problems grew 843 percent, and the number of counties reporting gang problems increased more than 1,000 percent. (H.Rpt. 107-203:2).

After listing the threats to public safety that youth crime poses, the legislation states that without reform, the juvenile justice system will not be able to handle the imminent threat of more juvenile crime, based on projections that the youth population was due to increase.

(b) Congress must act now to reform this program by focusing on juvenile delinquency prevention programs, as well as programs that hold juveniles accountable for their acts and which provide opportunities for competency development. Without true reform, the juvenile justice system will not be able to overcome the challenges it will face in the coming years when the number of juveniles is expected to increase by 18 percent between 2000 and 2030. (H.Rpt. 107-203:3).

In order to “fix” the system and equip communities for the projected increase in the youth population (and youth crime), the JJDPA approach was revised to include an “accountability provision” alongside its prior emphasis on prevention that emphasizes punishment:

These problems should be addressed through a 2-track common sense approach that addresses the needs of individual juveniles and society at large by promoting—

(B) programs that assist in holding juveniles accountable for their actions and in developing the competencies necessary to become responsible and productive members of their communities, including a system of graduated sanctions to respond to each delinquent act, requiring juveniles to make restitution, or perform community service, for the damage caused by their delinquent acts, and methods for increasing victim satisfaction with respect to the penalties imposed on juveniles for their acts. (H. Rpt. 107-203:2).

Finally, a new “public safety” provision was added to the Act’s official purpose that was to be accomplished by juvenile “accountability” at the hands of the state, rather than rerouting youth away from the state justice system involvement.

Second, protection no longer meant shielding youth from punishment; rather, punishment was redefined as serving a protective function for both the community and for youth. Instead of producing damaging labeling and learning effects, punishment, under the new Act, allows youth to learn “accountability” and deters future criminality, thus protecting the youth from themselves and the community from their delinquent behavior. According to Mr. Boehner, in the committee report for H.R. 1900 that contained the revised JJDPA, punishment serves as one of the most effective tools of prevention:

The Committee believes that the two most important approaches to attacking juvenile crime are clear: prevention and holding juveniles accountable for the crimes they commit. Controlling juvenile crime must start early with juveniles in order to make them understand that there are consequences for their actions. Sending the message to our nation’s youth that they will be punished for their delinquent activities is one of the most effective means of crime control and prevention. (H.Rpt 107-203:24-25).

Comments from Congressman McCollum in Congressional hearing testimony following the expiration of JJDPA in 1996 foreshadow the punitive infusion that erodes the Act’s original construction of protection:

In closing I would like to comment on the Office of Juvenile Justice and Delinquency Prevention. It is my belief that any reauthorization of the Juvenile Justice and Delinquency Prevention Act should discard the outmoded anti-detention goals currently embedded in the Act and replace them with a new set of accountability-based incentives. It is sadly anachronistic that the only office of juvenile justice at the federal level has as its central goal the diversion of juvenile offenders from secure confinement. There is no question that there are many delinquent acts that should not be punished with secure confinement.

Nevertheless, it is important to note that the only federal juvenile justice office established to work with the States spends money to help States avoid confining juveniles. The Act is a rejection of the principle that youthful offenders must be held accountable for every act of wrongdoing. (U.S. Congress 1996:92).

The Congressman's philosophy was later cited in the final Committee Report for the revised JJDP:PA:

One theme, which echoed throughout the hearings held by the Subcommittee, was the need to hold juveniles accountable for their actions. Forty-four States have already strengthened their State laws with respect to violent juvenile offenders. According to noted criminologist James Q. Wilson, "There ought to be penalties from the earliest offense... so that juveniles are treated by the State the same way we treat our children. You don't ignore the fact that they're wrecking the house until they finally burn it down. You try to deal with it right away." (H.Rpt 107-203:30).

The next major shift centered on the reframing of the core mandates from essential minimum protections for youth to punitive burdens restricting the states. Senator Orrin Hatch offered his opinion on the "misguided" mission of the core mandates in the original Act:

Today's hearing is going to examine the problems related to the so-called mandates placed on the States in order to qualify for formula funding under the Juvenile Justice and Delinquency Prevention Act. These mandates were developed as a result of a well-intended, but somewhat misguided philosophy that preaches youth should be rehabilitated, not punished. (U.S. Congress 1996:34-35).

After establishing that the mandates misdirect juvenile justice practitioners toward rehabilitation instead of punishment, he goes further to denounce the mandates as "burdensome hoops." According to Hatch:

There are four major mandates, and countless regulations attached to the formula and incentive grant

money...this money has more strings than a symphony orchestra. Federal requirements dictate everything from who must sit on the State Advisory Committee, like youth currently under the supervision of the juvenile justice system...These requirements create numerous burdensome hoops that States must jump through in order to receive the limited funds available under the Act. (U.S. Congress 1996:35).

Jerry Regier, the Director of the Oklahoma Department of Juvenile Justice, agrees with Senator Hatch. During the same hearing, he argued for more "freedom" to punish youth while simultaneously demanding that federal lawmakers liberate states from punitive federal oversight:

It is time that we hold youth accountable from the early signs of delinquent behavior throughout their entire adolescent period within the juvenile justice system. The youth of today must realize that when they violate the law that there will be consequences to that violation. The consequence will be swift and it will be certain... We want to restructure the Oklahoma system to be responsive and flexible to local desires and needs...the federal strings should be cut....Communities and municipalities are tired of all the bureaucratic nonsense. They want to have the freedom to hold their youth accountable. (U.S. Congress 1996:76).

The DSO provision (42 U.S.C. 5633 (a)(23); H.Rpt 107-203:26), for example, was relaxed to allow holds in detention without social service review under the "valid court order"(VCO) exception that was added in 1980. The valid court order exception allows youth originally charged with status offenses to be held in detention if they violated a "valid court order". For example, youth ordered to go to school who failed to do so were now deemed delinquents that could be held in detention. In 1988, Congress recognized this problem and amended the VCO exception to require a measure of protection-social service review by an appropriate agency- before holding a status offender who had violated a court order in detention. Under the new Act, however, more "flexibility" was added to the VCO provision permitting judges to hold youth in detention while awaiting an appropriate agency to review the placement and provide a report to the court. The effect of the change was to make incarceration of youth charged with repeat minor offenses an easier administrative option. The increased leeway in the VCO exception demonstrates the infusion of punishment into a provision originally designed as a means of protecting troubled youth from the harmful exposure to secure confinement. The original law tried to keep them out; the new law makes it easier to put them back in.

Similar "flexibility" was built into the provision prohibiting children from being housed in adult facilities. The "rural county" exception in the law was narrowly

construed to allow counties with limited resources and facilities to temporarily house youth for 24 hours in the same facilities as adults as long as sight and sound separation was strictly maintained. In the new Act, those same adult facilities can now keep youth for five days without a court hearing (42 USC 5633 (a)(13)(B); H.Rpt 102-203:28) Likewise, sight and sound separation, designed to protect youth from adult contact when separate facilities could not be established or used, was also relaxed in the 2002 reauthorization. In the original legislation, all contact was prohibited. Now, states are only required to prohibit “sustained” auditory and visual contact (42 USC 5603(25) as described in the Code of Federal Regulations, Title 28, 31.303(d)(1)(i) in effect in 1996; H.Rpt 107-203:23, 130).

In contending that these two mechanisms of protection unfairly burden states, Sheriff Bill Franklin from Alabama testified that the requirements forcing states to keep youth strictly separate from adults for their protection are financially “repressive” micromanagement techniques (aka “punitive”) that increase recidivism:

The Federal regulations by which local correctional facilities are required to comply in order to receive federal monies create undue impediments in the implementation of programs to house juvenile offenders. Particularly, those policies regulating contact with adult inmates (“sight and sound” separation) and those necessitating separate staff specifically for supervision are counterproductive. ..Certainly it is evident that these federal regulations have a negative impact on a system desperately in need of juvenile facilitation. Our national recidivism rate borders on 80%. It seems illogical that the micromanagement involved in the only area that can eventually reduce adult crime is so overbearing. (U.S. Congress 1997:34).

Finally, the goal of the DMC provision(42 U.S.C 5633 (a)(22)), which recognized racial injustice in the juvenile justice system as an oppressive state practice but was always problematically vague, was further disabled by rhetoric of “color blindness” and “no quotas.” Once required to protect youth from discrimination by reducing the number of confined minority youth relative to the state’s population, states were now free from pursuing any type of “quotas” and the language requiring a reduction relative to total population was removed. A committee report that came out shortly before the final reauthorization commented that the youth justice system was “color blind”, an outcome that was guaranteed as long as states were not required to make any meaningful, tangible numerical dents in the proportion of minority youth confined in the state system.

The Committee believes the criminal justice system should be colorblind. Individuals charged for the same

crime under the same circumstances must be treated uniformly by the juvenile justice system. The modifications made by H.R. 1900 to the current mandate will help ensure our efforts eliminate the true bias in the juvenile justice system and does not create quotas (H.Rpt 107-203:29).

Again, with each of the revisions in the core mandates, we see the ideological shift in the construction of protection that moves away from shielding youth from punishment and destructive state actions to sheltering the state from responsibility for youth in their care. This is perhaps made no more salient than in the changes to funding penalties for failing to comply with the mandates under the new JJDP. Under prior legislation, states out of compliance lost 25% of their federal funding per mandate. In the new Act, that amount lost was cut to 20% per mandate. In other words, a state could fail to comply with half the mandates and still receive a majority of their federal funds. With a weaker incentive to comply, the new JJDP practically prompts states to ease up on their responsibility to protect youth in their care by sheltering them from financial “punishment” they might incur from failure to comply with federal law. “It is the view of the Committee that States should not be denied important financial resources...simply because they are having difficulties meeting the four requirements” (H.Rpt 107-203:30).

DISCUSSION

While the shifting political meanings of protection and punishment in the JJDP can be traced in the legislative history, and are at least partly explained by the punitive turn that other scholars have critically analyzed (Currie 1998; Garland 2001; Rose 1996; Simon 2001, 2007; Tonry 2009), there is also an underlying philosophical weakness in our liberal legal system, whose perhaps hidden, but still powerful ideological impact merits critical review. I argue that key ideological forces inherent in legal liberalism enabled a conception of protection in the JJDP that was by itself problematic and insufficient, rendering it particularly susceptible to the punitive politics of crime that gripped lawmakers during the revision of the JJDP. The legal liberal model contains a relatively weak “individualized” notion of public duty that is further complicated by conflicting understandings of youth autonomy and culpability. While factors other than the ideal of legal liberalism also clearly influence the politics of law-making and the punitive changes in the JJDP, notably the evolving political economy in the U.S., it remains crucial to understand how the underlying liberal ideology shapes the “political frame” and the manner in which lawmakers define problems and propose solutions.

While critical scholars like Bernard (1992) also emphasize the ideological force of various “myths of

delinquency” whose hegemonic status fuels a cycling political debate over time, I am suggesting that those myths originate in a deeper context that shapes the boundaries of the political terrain and the debates that occur there. It is not merely the myths that create the cycle; the cycle itself operates in a hegemonic “philosophical field” that acts as a “gatekeeper” of the discourse that continuously allows for shaping and reshaping of the youth justice debate. Here, the discourse surrounding non-intervention, protection and punishment during the evolution of the JJDPA occurred in a philosophical field defined by the liberal model’s weak, individualized notion of public duty and variable understandings about youth’s relative autonomy and culpability. While on the surface the meanings of protection and punishment appeared to change in dramatic and contradictory ways, the terms themselves were ideologically aligned in the liberal legal model, allowing for their political malleability and distortion.

The main tenets of legal liberalism, espoused by philosophers like John Locke (Dunn 2003), emphasize the principles of individual freedom and minimum government intervention. At its best, liberal legal government ensures and “protects” maximum individual freedom, which it accomplishes most productively by “staying” out of the private life of individuals, only intervening when it becomes necessary to protect the freedom of citizens or control that freedom when it threatens to harm others. If we define public duty in the liberal legal model as government action necessary to ensure individual freedom, it is effectively captured in three facets of government action: non-intervention or “staying out,” protection, and control or punishment.

Liberalism not only influences the types of action that comprise public duty, it colors the nature and dynamics of those actions. In particular, the heavy emphasis on individual action and the principle of limited government create a relatively “thin” model of public duty where the sense of the collective is subordinated to the primacy of the individual. Root causes and macro level realities such as poverty, inequality, educational and community disinvestment, racial discrimination, and other social problems fall outside the scope of the public duty because they occur at the collective, rather than the individual, level. Thus, the liberal model’s individualized version of public duty fosters an “ideological affinity” between non-intervention, protection and punishment in a way that expedites their rhetorical malleability and interchangeability in political decision-making.

Consider the stance of non-intervention that originally infused the early versions of the JJDPA. While this idea has generated substantial critical attention and support (Lemert 1971; Ohlin 1987; Petrosino, Turnpin-Petrosino and Guckenberg 2010; Schur 1973), it also possesses an inherent weakness. It does nothing to shore up the collective sense to address social problems whose

staggering cost affects those at the bottom, particularly youth who do not have the same political, economic or developmental ability to “raise themselves.” Getting out of the way does not readily stir up a sense of injustice over poverty, inequality, violence, and racial, class, and gender oppression whose toll is perhaps greatest on youth. Staying out could even shield those problems from critical public scrutiny. Early JJDPA advocates were aware of these systemic problems, and wanted to keep youth out to protect them from further harm. Yet, the infrastructure of support needed to shore up communities’ shared sense of injustice and motivation to address the broader social problems influencing delinquency was insufficiently developed as well, and the ideology of non-intervention may even have unintentionally enabled an anemic response.

Under the thin public duty contained in the liberal legal model, a well-intentioned protective effort that relies on non-intervention may actually fail to protect, as it can merely leave youth in the place that they are, and that place is often the same one ridden with social problems that provoked delinquency in the first place. I would argue that this constitutes neglect instead of protection, and can instigate greater punitive control as the social conditions worsen, and the delinquency does not disappear. Here, the individualized version of public duty, as it applies to non-intervention, means that staying out of the way of social problems rather than building up a communal sense of public injustice to combat them leaves youth to face those problems, and their attendant consequences, alone. When delinquency persists or worsens, the punitive facet of public duty emerges to fill in dangerous gaps left to deepen during a climate of neglect. In the language of legal liberalism, dangerous actions of individuals prompt punishment in order to protect the freedom of others. Punishment is now justified to “protect” communities from the harms of dangerous juvenile delinquents, and the delinquents from themselves. In a sense, the liberal version of non-intervention fosters a paradox where the argument for non-intervention, or neglect, on one hand facilitates the argument to over-regulate, or punish, on the other, with both arguments equally capable of drawing on a rhetoric of protection to justify their position and doing little to substantively address the unjust social conditions that youth face in the midst of their delinquency.

Such an ideological paradox becomes especially salient when examining the shifting politics of the JJDPA over time. What began as a protective effort grounded in non-intervention became a punitive effort grounded in a different, but ideologically aligned version of non-intervention that also relies on the rhetoric of protection. In the early JJDPA, non-intervention was seen as a way of protecting youth from harmful state action. Youth needed protection from the unjust effects of punishment, and the state should ‘stay’ out in order to ensure their protection. In the later version, non-intervention was reconstituted to

mean getting out of the state's way to punish youth. States needed "freedom" and "flexibility" to punish youth in order to protect communities from delinquency and youth from themselves and their harmful choices. Both versions rely on the thin, individualized form of public duty where root causes, or macro-level social injustices that befall youth receive only peripheral attention. Essentially, the non-intervention and protective groundings of the original JJDPAs were, by themselves, well-meaning yet inadequate in that they did little to expand the notion of public duty beyond its traditional liberal confines. By staying within the same political frame that encourages views of non-intervention, protection and punishment that ideologically "fit" with the thin public duty of the liberal legal model, the original meanings lent themselves neatly to political manipulation and punitive distortion.

While an under-developed public duty in the liberal legal model can frame the parameters of political debate and shed light on the shifting meanings of non-intervention, protection and punishment in the evolution of the JJDPAs, the unstable social position of youth in the liberal model also played a role in the change. For individuals to merit and exercise maximum freedom idealized in the liberal model, they must also possess full autonomy and culpability. Children's dependent economic and developmental status complicates the legal interpretation of their autonomy and culpability, which raises another problem for the liberal legal model (Minow 1987). Even at its most zealous in protecting individual rights during the "due process revolution," the Supreme Court has remained reluctant to attribute full autonomy to children and afford them complete constitutional status (Fellmeth 2006; Zimring 1982). Children and youth are deemed variably autonomous and culpable, and fluctuating notions about when to treat them as autonomous and culpable and when to treat them as dependent and innocent also complicate the notions of when to "stay out," when to "protect," and when to "punish." The uncertainty of children's status within the liberal legal model coupled with the relatively "thin" notion of public duty contributes to the political malleability of the meaning of non-intervention, protection and punishment that transpired in the evolution of the JJDPAs.

Advocates of earlier versions of the JJDPAs saw children as less autonomous and culpable, preferring to emphasize their incomplete developmental status and susceptibility to peer and adult influences as worthy of protection, but by the most-recent authorization, advocates of a punitive version of protection conceived youth as a dangerous group of potential super-predators, stressing their autonomous decisions and need for sanction based accountability. One conception of youth in the liberal model prompts protection, and the other punishment, creating a shaky ideological foundation that permits quick vacillation from one to the other, particularly when the politics of crime control have gained sufficient traction.

The original JJDPAs may have imagined youth as more dependent and innocent, but it did not take into account the potential for that idea to quickly shift, despite an articulated understanding of the hegemonic power of punishment and its political resonance with communities concerned with crime control.

CONCLUSION AND RECOMMENDATIONS

Despite the insufficiencies in the meanings of the early JJDPAs, and its subsequent vulnerability to punitive distortion, it has served an important symbolic purpose and has been built into the infrastructure of youth justice. Even amid calls for the complete dismantling of the JJDPAs, juvenile justice advocates on the ground actually called for stronger protections, not weaker ones, during the flourish of punitive rhetoric from politicians and certain branches of the criminal justice system that occurred throughout the reauthorization process. The strength of their resistance and the long-standing history of the JJDPAs as a tool to help youth support the potential of the JJDPAs to expand the notion of public duty and embolden ground level resistance and future policy reform. While I am arguing that the original goals of the JJDPAs have been eroded with recent revisions to the Act, and that the weak conception of public duty contained in even the most robust version of the Act enabled its erosion during a punitive political era, I am also suggesting that the Act could still serve as a starting place for reform.

In order for reform to be meaningful, however, it needs to move beyond the confines of the traditional liberal model in two crucial ways. First, a deeper and more robust sense of public duty for youth is needed, and it must include the neglected elements of the existing political frame, namely sustained attention to broad social realities such as poverty, inequality, education neglect, community disinvestment, racial and class oppression among other urgent social problems. While ground level, "local" resistance can inspire similar changes in other areas, it is not enough to allow states the "option" or "flexibility" to expand their conception of public duty. Merely allowing states to handle youth in their communities as they see fit leaves the fate of individual youth vulnerable to the whims of particular states with varying degrees of political will and resources, generating a "justice by geography" approach which would likely leave youth in areas hardest hit by social problems such as violence, racism and community disinvestment particularly vulnerable.

Second, lawmakers need to sever the perceived degree of youth autonomy and culpability from the decision to improve unjust social conditions that befall youth. Put differently, notions of autonomy and culpability need to be untied from public duty. The degree of sophistication or innocence present within given youth should not dictate

whether the social conditions in which they are inevitably nested receive prompt and persistent attention.

Given that the JJDPa has already secured a position in the infrastructure of youth justice and enjoys broad support from practitioners and many legislators, it could serve as a starting point for reform. An initial option to shore up public duty that is not contingent on the perceived autonomy or dependence of youth would involve adding a “sustainable community” provision to the existing core mandates. Rather than pulling funds for non-compliance, the sustainable community provision would incentivize states for improving social conditions affecting youth and their families including, but not limited to decreasing poverty, increasing employment, providing for livable wage laws, providing universal, high quality child care, as well as educational and other social support programs that promote the intellectual and social development of children. Instead of receiving less money for non-compliance with the core mandates, states could maximize federal funding by full compliance with the core mandates and receive incentive funds by developing sustainable community programs. In the process, a deeper, more substantive conception of public duty obtains a foothold in the infrastructure of youth justice potentially expanding the political terrain on which youth justice policy debates occur, and opening an avenue for social justice with greater resiliency to political manipulation and distortion.

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