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Lost Causes and Social Injustice: Going Beyond the Dominant Paradigms of Juvenile Justice Policy

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Lost Causes and Social Injustice: Going Beyond the Dominant Paradigms of Juvenile Justice Policy

DISSERTATION

submitted in partial satisfaction of the requirements
for the degree of

DOCTOR OF PHILOSOPHY

in Criminology, Law and Society

by

Sonya Marie Goshe

Dissertation Committee:
Professor Elliot Currie, Chair
Professor Ronald Huff
Assistant Professor Sora Han

2015
DEDICATION

For Nathan and Nora, who bring joy every day and have filled my life with more love than I ever thought possible.

To all the young people I have worked with over the years, thank you for sharing your lives with me. Your stories continue to inspire.
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To Aimee Munyon: Thank you for bringing your calm, stable, and nurturing presence into my life all of these years. I still remember when I was explaining why I felt the need to go back for yet another degree, and you ask me, somewhat quizzically, why I felt the need to justify it. In your mind, it made perfect sense that I should just do what I wanted to do. It empowered me and is a piece of wisdom I try to pay forward. I cannot wait to be neighbors!

To Deserie Charles: Girl, God bless the day I met you in grad school, round one. I walked away from meeting you knowing I had just found a best friend. It is hard to put into words how much your friendship has meant to me throughout the years. You have seen me through the highs and the lows, and have always helped me remember who I am as a person when I most needed reminding. Your commitment to your “kids” has been an ongoing source of inspiration, and is part of the reason I wanted to write this dissertation. We need more professionals like you, and we also need a system that better supports the hard work of sticking with kids through thick and thin.

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To Nathan and Nora: Thank you for lighting up my life. Thank you for being everything. You have brought me joy and perspective. You have showed me just how precious life is and how much further our country has to go to become a place where all children can grow and thrive.
CURRICULUM VITAE

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Education & Awards

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Dissertation: Lost Causes and Social Injustice: Going Beyond the Dominant Paradigms of
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Teaching Experience

Teaching Associate
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Developed and delivered course content for a class on legal sanctions and social control. It focused on critically evaluating selective policy approaches, with particular emphasis on current issues in policing, drugs, juvenile justice, immigration and terrorism. Each policy approach was discussed in terms of the relationship to social control, race, class and gender inequalities. Assessed learning through applied critical thinking and writing assignments, video and media exercises, role plays, oral presentations.

Teaching Assistant
University of California, Irvine

Promoted student learning through individual interaction, group discussion and activities. Assisted faculty with course administration and grading. Courses include ethics and politics of justice, hate crime (online Master’s class), policing, natural field research methods, American socio-legal theory, crime and gender, women and social control, white collar crime, and introduction to criminology, law and society.

Adjunct Faculty, Online Programs; New Faculty Mentor
Grand Canyon University College of Liberal Arts and Sciences

Instructed diverse student population, including working professionals, first generation students, and international students in a broad array of online liberal arts and justice courses including a Master’s level statistics class, ethics in criminal justice, an introductory political science course, and courses in personality and developmental psychology.

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Adjunct Faculty, Online Programs
International Institute of the Americas
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Developed online curriculum for courses in ethics in criminal justice, introduction to criminology, juvenile justice, corrections, and philosophy of public policy administration.

Taught a broad array of non-traditional students, typically first generation college students from diverse backgrounds in a range of online courses including: criminal law, introduction to criminology, juvenile justice, corrections, ethics, and introduction to sociology.
Lead Faculty, Legal Programs  
International Institute of the Americas

Instructed a diverse group of students, often first generation college students, working professionals, or individuals pursuing college immediately after obtaining a G.E.D. in a broad range of criminal justice, liberal arts, and legal studies courses including: juvenile justice; criminal law, criminal procedure, terrorism, and contemporary issues in law.

*Developed and administered internship program* for students which required identifying potential internship sites, and developing community partnerships with employers who would mentor, and potentially hire, students.

Facilitated program and curriculum development for the Criminal Justice and Paralegal Studies programs.

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**Research Assistant**  
University of California, Irvine

Coded inmate interviews and assisted with research activities, including data analysis, on project dedicated to understanding dispute resolution among prisoners

**Editorial Assistant, Theoretical Criminology**

Served as administrative and production editor for the journal *Theoretical Criminology.*

**Survey Research Project Manager**  
World at Work, Scottsdale, AZ

Managed all aspects of survey research program aimed at developing content for a nonprofit educational association. Generated survey topics and instruments, negotiated vendor contracts, coordinated survey production with internal departments. Analyzed data and disseminated written results via reports, articles, and press releases. Published article in company’s national magazine on workplace flexibility.

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Other Relevant Work Experience

Mediator-Juvenile Court
Maricopa County Juvenile Court Dependency Programs
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Mediated settlement conferences in juvenile dependency and severance cases and disputes involving probate guardianship. Assisted families with access to legal and social service resources. Generated, drafted, and implemented policies to improve understanding and participation in mediation process.

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Mental Health Liaison-Juvenile Court
New Horizons Youth & Family Center
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Staff Clinician
University of Virginia Center for Clinical Psychology Services
Conducted therapy with adolescent and adult clients. Performed psychological assessments, which included intelligence and personality testing as well as clinical interviews.

**School Psychologist Intern**
Albemarle County Schools, Virginia

Performed school psychological assessments to identify and address educational needs. Lead school individual education plan team meetings. Monitored student progress post-assessment to track effectiveness of educational plan.

**Teacher’s Assistant**
Westerville North High School, Severe Emotional Disturbance Unit, Ohio

Tutored individual students, created lesson plans, maintained grades. Coordinated with teachers to devise and draft individual education plans.

**Juvenile Court Intake Counselor/Intern**
Delaware County Juvenile Court
Delaware, Ohio

Conducted pre-sentence investigations with youth and families. Provided informal intervention and diversion counseling. Performed school visits and attended meetings to increase school success among court-involved youth.
ABSTRACT OF THE DISSERTATION

Lost Causes and Social Injustice: Going Beyond Dominant Paradigms of Juvenile Justice Policy

By

Sonya Marie Goshe

Doctor of Philosophy in Criminology, Law and Society

University of California, Irvine

Professor Elliot Currie: Chair

The longstanding reality of injustice for youth, particularly for those living in communities hardest hit by inequality, oppression, and disinvestment, deeply contradicts our rhetorical concern for youth welfare as well as the mission of juvenile justice and its dominant paradigms. Scholars have documented the pitfalls of juvenile justice for many years, noting that it issues too much punishment, offers too little support, and perpetuates systemic inequalities (Lemert, 1967; Schur, 1973; Platt, 1977; Bernard, 1992, Goldson and Muncie, 2009; Bishop 2004; Feld, 2000). But, what I see as currently missing or under-emphasized in the existing literature is how key ideas in the dominant policy paradigms, when considered in context, contribute to system conflicts and negative outcomes for youth. If we take seriously that how we think influences what we do, then we must consider more than if various policy models “work” to reduce recidivism, we must also think more seriously about the models themselves, and how they influence the meaning and reality of justice for young people. In this sense, I “take stock” (Cullen et al, 2006) of how we think about juvenile justice.
I analyze the major policy approaches that form the foundation of juvenile justice including rehabilitation, punishment, rights, nonintervention, restorative justice and risk. I examine the models’ key elements, main assumptions, the social contexts in which they are implemented, and their resulting philosophical and pragmatic implications. Despite the dominant models’ ostensibly different approaches, unique positive contributions, and goals for reform, I find that they all tend to lose sight of structural level injustice and leave little hope for kids at the deep end of the juvenile justice system. In this sense, I argue the dominant paradigms of youth justice perpetuate a philosophy of “lost causes”, which connects to our most harmful practices, including excessive punishment, discrimination, and the neglect of social justice and human rights. Such problems, while persistent, are not inevitable, and I conclude with principles for a transformative model that counters lost cause ideology and focuses on social justice.
CHAPTER 1: INTRODUCTION

*Know that many personal troubles cannot be solved merely as troubles, but must be understood in terms of public issues and in terms of the problem of history-making.*

C. Wright Mills, 1959

*Ideas shape the contours of our everyday lives through their ability to guide action.*

Ward and Maruna, 2007

*Reforms strategies that ignore powerful ideological and economic forces will fail or have unintended consequences.*

Austin and Krisberg, 1981

When I was 19 and began working in the field of juvenile justice, I heard the phrase “lost cause” frequently. It was a theme that pervaded my experience in four different jurisdictions with widely disparate political orientations, and I heard variations of it when I worked in other settings with youth and young adults considered “at risk”. Sometimes it referred to the “high risk” kids with a lot of problems and a family history with the court who were seen as unlikely to change. Invariably, “lost causes” also referred to the kinds of problems that youth faced. There was the sense that little could be done with poverty, exposure to violence, the lack of “stakes” in the community, and the histories of family and community dysfunction. They were too complex and beyond the scope of what an already strapped juvenile justice system could manage. If improvement was possible, it had to come from personal or political will, both of which fell
outside the scope of the juvenile justice system. The idea that the juvenile court could do its best and still do very little was seen as the unfortunate, but largely inevitable reality. The notion that some kids are “lost causes” is the implied message of throwaway sentences like life without parole, and in “non-amenability” findings that exclude youth from the juvenile justice system. It is what we imply when we send them to adult facilities knowing well that their risk of physical and sexual assault as well as suicide jumps exponentially (Mumola, 2005; Snyder and Sickmund, 2009). It is where we leave them when social policy needed to ensure their basic rights to safety, security and nurturance loses out to other priorities (Minow, 1987), and they are left with little to protect them from the harms of poverty, inequality and violence. We send the “lost cause” message to poor young black men who have come to expect that they will more likely go to prison than find a job, if they live that long. It quite literally refers to the lost and neglected causes of delinquency, namely those that are rooted in an unjust social order that have been subordinated or submerged in the potpourri of philosophies swirling in juvenile justice.

This dissertation analyzes the dominant policy models that form the foundation of youth justice, including their main assumptions, what they emphasize and what they neglect, and the social contexts in which they are implemented, and their resulting philosophical and pragmatic implications. I argue that in each of the models, key ideas get “lost” or distorted in ways that abandon youth, especially those who have been most seriously marginalized and those who have committed serious and chronic types of delinquency. Despite the dominant models’ different ideas, unique positive contributions, and goals for reform, they all tend to lose sight of structural level injustice and leave little hope for kids at the deep end of the juvenile justice system. In this sense, I find the dominant paradigms of youth justice perpetuate a philosophy of “lost causes”, which connects to our most harmful practices, including excessive punishment, discrimination,
and the neglect of social justice and human rights. Left unattended, it can threaten sustainable change and stifle the progressive imagination. Austin and Krisberg (1981) remind us that reforms do not take place in an ideological vacuum, and that failing to properly acknowledge how context shapes reform is a recipe for harmful unintended consequences. This project takes their warning seriously and documents how social and cultural forces shape key principles in the dominant paradigms of youth justice to form a “philosophical infrastructure” that perpetuates substantive injustice and racial oppression, primes punitive sentiments and facilitates punitive excess, encourages human rights abuses and further marginalizes those youth seen as permanently “lost” to crime.

The “dominant paradigms” that I investigate here include rehabilitation, punishment (incapacitation, retribution and deterrence), rights, nonintervention, restorative justice and risk. I chose these six models because they occupy a significant portion of the youth justice discourse surrounding “what to do” with youth. They are found in debates and political rhetoric, have been subject to empirical and critical scrutiny, and are located in the day to day practices of youth justice across the country. They have a historical legacy and a contemporary traction, and they form the primary borders of our youth policy today. While it is clear these models blend both in policy and practice in a variety of ways that I will also discuss; treating them as analytically distinct clarifies their philosophical contribution and informs their “hybridization” in practice.

I am certainly not the first to note that youth are suffering or that the juvenile justice system is rife with conflicts that negatively impact youth (Bishop, 2004; Scott and Steinberg, 2008; Schwarz, 1989). Plenty of scholars have critiqued the failings of the juvenile justice system (Platt, 1977; Feld, 1997; 1999; 2000; Martinson, 1974; Schur, 1973; Lemert, 1967; Dowd, 2011; Goldson and Muncie, 2006; Haines and Case, 2015), and the field is full of
critiques of various efforts to change the system (National Research Council, 2013; Vincent et al, 2012; Dowd, 2011; Haines and Case, 2015; Goldson and Muncie, 2006). Debates have proceeded to the point where the entire separate enterprise of juvenile justice has been called into question (Feld, 1997; 2000; Abrams, 2013). But, what I see as currently missing or under-emphasized in the current literature is how the key ideas in our dominant models of youth justice and their relationship to broader social, economic and cultural influences contribute to system conflicts and negative outcomes for youth. This project fills that gap. If we take seriously that how we think influences what we do, then we must consider more than if various policy models “work” to reduce recidivism, we must also think more seriously about the models themselves, interrogating what they emphasize and what they minimize, and how they influence the meaning and reality of justice for young people. In this sense, I “take stock” (Cullen et al, 2006) of how we think about juvenile justice.

Why do we need an ideological examination of the policy models of youth justice when we are ostensibly leaving the punitive period behind us? Certainly, we gave up on kids from about the 1970’s till the early 2000’s in the era of mass imprisonment, but now we appear to have moved beyond that. We know a lot more about “what works”, and governments in the grips of budgetary crises are finally willing to hear that rehabilitation works better and costs less. Arrests are down, violent crime is down, and confinement has dropped over 40 percent (Puzzanchera, 2013; Justice Policy Institute, 2014). There is increasing awareness that young people really do differ from adults, and scholars have proposed “developmentally appropriate” systems of juvenile justice (National Research Council, 2013; Dowd, 2011; Vincent et al, 2012). Based on the idea that kids are different, the Supreme Court has extended 8th amendment protections eliminating the death penalty and limiting life without parole. Why do we need a
project documenting “lost causes” when a progressive “sea change” (Annie Casey Foundation, 2013) is said to be occurring? Notwithstanding the ongoing reality of harshness in the U.S. punishment practices (Mendel, 2011; Travis and Western, 2014), there are three primary reasons related to substantive justice, unintended consequences, and constraints on the reformist imagination.

First, despite the optimism, youth continue to lose out on matters of substantive justice. The “lost causes” of poverty, inequality, racial oppression, community disinvestment and exposure to violence have been persistent problems that have remained largely unfazed by over 110 years of the youth justice system. Poverty rates in the U.S. are startling. One in three U.S. children under 18 live in poverty (UNICEF, 2014), and the U.S. ranks almost at the bottom when compared to countries of comparable resources. Unfortunately, the problem has worsened amidst rising inequality (Saez, 2013), and about one third of the “newly poor” children live in the U.S. Skin color continues to determine life chances, and those children living in the most extreme conditions of poverty tend to be children of color (Children’s Defense Fund, 2014). A recent, comprehensive study of children’s exposure to violence found that, far from being rare, youth are victimized and witness victimization all too frequently (Finkelhor et al, 2009). Sixty percent had experienced violence-either personally or vicariously-within the last year. Over half had been assaulted; one in 10 had been injured in the assault. Ten percent of youth report abuse and neglect, and one in 16 acknowledged they were sexually abused. Almost 25 percent had witnessed a violent act, and almost 10 percent witnessed family members harm each other. Repeated violence was common and nearly 40 percent of youth reported two or more victimizations; more than 10 percent reported more than five. Ongoing exposure to poverty and violence are linked to developmental problems, educational delays, and criminal justice system
involvement (Thornberry and Krohn, 2003; Farrington and Welsh, 2007; Greenwood, 2006). Substantive justice problems, far from being peripheral to juvenile justice, fuel the delinquency pipeline, and are especially evident in the most serious kinds of delinquency that trigger punitive sentiments and challenge progressive proposals for rehabilitation, rights, nonintervention and restorative justice. Yet, they are often overshadowed in the new optimism pervading the field, and they are left out, submerged or distorted in the dominant models that form the philosophical backdrop of youth justice.

Second, and relatedly, inattention to “lost causes” when implementing reforms can produce unintended consequences. For progressive reformers especially, non-punitive alternatives have often been co-opted by punishment or distorted in ways that reproduced the problems they were trying to solve. The nonintervention policy of diversion, to take one example, sought to keep kids out of the juvenile justice system, but unintentionally funneled larger numbers of youth into systems of social control that looked and acted fundamentally similar to criminal processes—effectively “widening the net” (Austin and Krisberg, 1981). Other reforms have been widely discussed, but poorly implemented. Despite the current rhetoric around “what works”, recent research has found that fewer than 10 percent of youth who could benefit from an evidence based program actually receive one (Greenwood et al, 2012) even when resources are available. The new optimism that we have left the punitive era behind appears more tenuous given the reality that U.S. levels of confinement still far surpass international norms, at levels 5-10 times higher than similarly situated countries (Travis and Western, 2014). Additionally, progressive reforms especially have had a hard time gaining a strong, sustainable foothold in juvenile justice and have fallen victim to what Thomas Bernard (1992) has called the
“cycles of juvenile justice”—the historical tendency for reforms to proceed in waves, followed by backlash, followed by reform in the opposite direction.

Third, and importantly, neglecting lost causes unnecessarily constrains the progressive imagination. When substantive justice falls out of how we think about juvenile justice, one side effect is the material persistence of systemic injustice, but its ideological counterpart also gains strength: that those problems are “too complicated” to solve or do not fall within the scope of the jurisdiction of juvenile justice. Other prominent social issues of our times such as medical advancement and technology seem to possess a boundless “imagination” necessary to improving them. A cure for cancer is seen as possible, even plausible as advancements in its treatment continue to improve. The technological imagination for new gadgets seems limitless and inevitable. Vacations to space one day? Absolutely. But social problems, especially devastating social problems linked to poverty, inequality, violence and racism do not engender that same sense of possibility or a similarly invigorated imagination. Even when they are conceived as “solvable”, such problems are often construed as especially intractable and complex. But other societies have made marked progress in these areas, and there is not some particular feature of social problems that makes them more inherently “difficult”. One common argument is that social problems invoke moral, political and cultural issues and that the diversity present within the U.S. makes improving them particularly difficult (Wilson and Hernstein, 1985). Yet, this claim presumes that other issues, like medical treatment, are not subject to those same social forces, and it does not hold up under even superficial scrutiny. The political, cultural and social implications of technology and medical advancements demonstrate that complexity is not a barrier to an innovative imagination and a strong will.
This project grows out of concern that we are losing sight of real justice for youth, and compromising our ability to imagine transformative possibilities. If substantive justice concerns and the structural and cultural roots of injustice continue to “fall out” of our current policy frameworks, youth will continue to face injustice on the social and cultural front with little help from the systems designed to help them. Importantly, failure to confront the ideology of “lost causes” permits the continued misdirection, increasing irrelevance, and eventual erosion of the concept of youth justice in America. If “lost causes” are rooted in the models of justice themselves, and if social and cultural realities further submerge or distort them, then, absent conscious attention and action, the fledgling optimism currently pervading juvenile justice may just become another brief footnote in the “punitive legacy” (Goshe, 2014) of juvenile justice, a temporary “cycle” (Bernard, 1992) whose progressive potential fails to convert to long-term change.

The following chapters examine the dominant models of youth justice, their key assumptions, and the realities of their implementation. They lay out the argument that, when considered in their social context, all the major policy models neglect substantive justice, and do not adequately address the needs of youth who have committed serious and chronic harm. The inattention to lost causes enables punishment, perpetuates racial injustice, and other unintended consequences, and suppresses innovation.

Chapter two analyzes how an “atomized” model of rehabilitation has lost sight of the social roots of youth problems. The atomized model favors a narrow “pills and programs” approach that ignores many of the harsh conditions youth face, like power inequalities and serious deprivation, not because these realities are overlooked, but because they are construed as inevitable and untouchable.
Chapter three examines how negligent social policy that fuels serious youth crime, an unacknowledged legacy of racial oppression, and cultural values that privilege individual blame “inflate” the idea that punishment is necessary. The heightened philosophy of punitive necessity fuels a set of ideologies that normalize exceptionally high levels of punishment, rationalize abusive practices, and taint alternatives with punitive ideals.

Given the reality of rehabilitative failures and excessive punishment, chapter four investigates the “rights” model, which has been held out as a potential alternative that would better protect youth from abuse by the system. But even a robust model of rights, like that found in the United Nations Convention on the Rights of the Child, does not offer sufficient protection to youth on its own. The model does not change the location or priority of youth rights, and in so doing, ignores a historical legacy of children as property that leaves them vulnerable to “rights neglect”. In the U.S., I argue that a culture of “justified exploitation” rationalizes basic disregard of youth welfare in the service of larger interests and enables an “ambivalent” philosophy of rights that offers little substantive protection, leaves notable gaps in coverage and enforcement, and encourages a climate of abuse.

Chapter five considers nonintervention, a model that frames the failures of rehabilitation, punishment and human rights as evidence of an incompetent and oppressive state. Since the state is a “lost cause”, the nonintervention model maintains that youth and their problems should be returned to their families and communities. But in a society highly tolerant of personal suffering and injustice, the core nonintervention principles of “getting the state out” and decriminalization contribute to a “neglectful” model of nonintervention that leaves most of the serious problems youth face untouched, and that stokes punitive sentiments when problems do not disappear and kids do not grow out of them.
Restorative justice, taken up in chapter six, emphasizes the principle of “restoration” as a healing process that seeks to repair the harm caused by crime for youth, victims and communities. In the U.S. context, however, the preconditions for effective restoration, including a just social order that promotes healthy relationships and communities where all have equal stakes and opportunities, are often not met in places hardest hit by policies of disinvestment. These requirements often fall out of a “diluted” model of restoration, which emphasizes largely nominal restorative gestures, backed up with the threat of punishment, that do little to serve young people or community members.

Chapter seven examines the risk paradigm. This model has done perhaps more than any of the others to “see” both the structural and individual aspects of risk. Unfortunately, ideology that shrinks what constitutes a “social” variable, severs personal struggles from public problems, and that emphasizes risk recognition over reduction creates a “disconnected” model of risk that loses touch with both the personal experience of suffering and its structural roots. The disconnected model encourages discrimination through risk based tracking, and discourages healthy risk taking necessary for youth to make meaningful change and for courts to develop innovative programs.

The “lost causes” in juvenile justice are not inevitable. In each chapter, I present how each model contains ideas that point toward an alternative, progressive vision. In chapter eight, I summarize those ideas and offer key principles centered on prioritizing “lost causes” within youth justice policy.
CHAPTER TWO: REHABILITATION

There is no one answer with respect to rehabilitation for anyone. Juvenile rehabilitation is an art and not a science. What works for one kid may not work for another. And so what you try to do is to do as many things as possible, hoping that something works. Juvenile rehabilitation might be a lot like taking swings at a piñata. And the more swings you take, the better the chance is that you will hit it right and something will come out...

Kurt Kumuli, Santa Clara Deputy DA

Hope is a state of mind, not of the world. Hope, in this deep and powerful sense, is not the same as joy that things are going well, or willingness to invest in enterprises that are obviously heading for success, but rather an ability to work for something because it is good.

Vaclav Havel

Our human compassion binds us the one to the other - not in pity or patronizingly, but as human beings who have learnt how to turn our common suffering into hope for the future.

Nelson Mandela

Chapter Overview

This chapter argues that “lost causes” are eroding rehabilitation. The idea that change has deep social roots (Rotman, 1990; Cullen and Gilbert, 1982; Raynor and Robinson, 2005; Robinson and Crow, 2009) falls out on the ground to an “atomized” model heavily influenced by “false realism”, ideology that fatalistically accepts that while kids can change, few really do, and there is little that can be done for them or the more socially rooted problems they face. In lieu of
a broader vision of change and intervention, the “atomized” model of rehabilitation centers heavily on individualized, fault based “pills and programs” to control behavior and manage risk. False realism and limited “pills and programs” lay the groundwork for the giving up on kids having done relatively little, perpetuating system oppression, and tracking kids and problems outside the juvenile justice system. But, this model of rehabilitation is not inevitable. A deep model of rehabilitation adopts a multilevel approach that considers social problems, commits to “sticking with” youth instead of giving up on them, and utilizes “transformative intervention” (Currie, 2012) that stresses hope, consciousness and solidarity among participants. The argument in this chapter begins with an overview of the literature of rehabilitation and some of its criticisms. I then proceed to lay out the atomized framework, including its lost causes, and negative consequences before concluding with thoughts on a different approach.

Literature Review

It is hard to overstate the ideological importance of rehabilitation in juvenile justice. The philosophy that children deserve individual treatment, tailored to their needs, and should be spared from harsh punishment afforded adults initially justified a separate system for young people (Gettis, 2000; Ryerson, 1978; Sanders, 1970; Schlossman, 1977), and it continues to wield powerful ideological influence amidst scholars and practitioners and the general public (Cullen, 2006; Ward and Kupchik, 2009; Cullen et al, 1988; Cullen et al, 1998; Cullen et al, 2000; Cullen and Gendreau, 2001; MacKenzie, 2006). It has survived a multi-decade onslaught of punitive crime policy that witnessed calls for the abolition of a separate youth justice system, spurred on by critiques from the left that it was often harmful, discriminatory, stigmatizing and ineffective, and from the right that it did not meet the moral demands of retribution or satisfy the utilitarian demand for public safety. Current debates about surrounding eligibility for juvenile
justice, rightly or wrongly, often turn on whether youth are perceived as amenable to rehabilitation. Litigation that ended the death penalty and narrowed life without parole emphasized that youth, even those accused of serious crimes, merit the opportunity to change for the better.

The rehabilitative ideal in juvenile justice reflects a broader, similarly contested trajectory in corrections more generally (Cullen and Gendreau, 2000; Rotman, 1990; Raynor and Robinson, 2005; 2009; Robinson and Crow, 2009). Reflective of its contested history, rehabilitation has many meanings (Raynor and Robinson, 2005). Within corrections, rehabilitation generally refers to a process of change for the better that leads to the desistance of criminal behavior (Raynor and Robinson, 2005; Ward and Maruna, 2007, Cullen and Gendreau, 2000) While desistance is often the presumed goal of rehabilitation, other social goals have been included in more inclusive models of rehabilitation such as the repair of relationships, the healing of communities, the restoration of citizenship, and the living of “good lives” (Ward and Maruna, 2007; Ward, 2012; Robinson and Crow, 2009)

Part of the change for the better involves a process of “undoing” that eliminates the causes of offending and the desire to offend as well as the stigma associated with criminalization (Raynor and Robinson, 2005; McNeill, 2012). For example, prior to its association with behavioral change, Garland (1985) argues that the original meaning of rehabilitation was juridical—that is it referred to the erasure of the offense and the reinstatement of citizenship. Relatedly, rehabilitation has also been defined as a process of restoration to a state of moral, physical and social health that may or may not have existed prior to the offense. For example, Rotman (1990) defines rehabilitation as a “right to an opportunity to return to (or remain in) society with an improved chance of being a useful citizen and staying out of prison” (p. 3). His
definition suggests much of the important work of rehabilitation also takes place outside the prison either before people go in and when they come back out. It encompasses social policies that help people live crime free lives as well a set of practices that help people fully return to society after offending. Despite an uneven trajectory and the failure to consistently live up to its ideals, socially conscious models of rehabilitation have humanized notions of justice preoccupied with punishment (Rotman, 1990) adding important elements of hope, compassion, and human rights. As Halleck and Witte put it:

“A prison that houses long-term offenders who have little hope of early release and no sense of usefulness to sustain their future visions cannot be anything but a jungle” (1977: 379).

While the definitions vary, they all agree that rehabilitation involves some sort of change process. Since the birth of the prison, change within prisoners was sought through removing people from corrupt social circumstances and reforming them through prayer, contemplation and repentance and labor (Cullen and Gendreau, 2000; Raynor and Robinson, 2005; Garland, 1990; Foucault, 1977). Prison, instead of various public methods of torture and execution, was seen as a humane step forward in dealing with lawbreakers, and promoting change was seen as a logical and moral extension of this more “civilized” process. Hudson (2003) distinguishes between historical reform efforts and what later became known as rehabilitation. He contends that reform referred to a more generalized program required of all offenders that was characteristic of the 18th and 19th century prisons, while rehabilitation emphasized individualized treatment (Garland, 1985). Foucault (1977) argues that the intense knowing of the individual subject possible in the modern prison created a technology of power over inmates that was itself disciplinary and self-regulating. The penitentiary model introduced the idea of the indeterminate sentence as a “carrot
and stick” method of rehabilitation (Rotman, 1990: 5) where the lure of getting out was used to motivate individuals to change for the better.

The power to change individual behavior was also at the root of the medical or therapeutic model. Under this model, criminality was an illness that could be cured. An update to the therapeutic model envisioned crime as learned behavior that could be unlearned (Rotman, 1990; Cullen and Gilbert, 1982). The rehabilitative ideal, at the core of the founding philosophy of the juvenile court, is a blend of the therapeutic and social learning theories of rehabilitation. The progressive founders combined the idea of individualized treatment, faith in scientific understanding of behavior, and the power and moral duty of the state to spare young people the harshness afforded adults. For the progressives, rehabilitation was particularly appropriate for young people, who because of their young age, were both more susceptible to improper influences and to reformation. In his speech in favor of a separate children’s court to treat the causes of delinquency, Elbridge Gerry, the President of the New York Society for the Prevention of Cruelty to Children, highlights both the therapeutic underpinnings of the rehabilitative ideal and the consensus that children were different from adult criminals:

“Crime is undoubtedly a moral disease. It is both contagious and infectious…and any youth of either sex is more susceptible to criminal influences than the adult, just as children are more susceptible to ordinary physical disease than grown persons” (quoted in Sanders, 1970: 437).

For the child savers, rehabilitation meant rescuing youth from abuse, neglect and abandonment as well as dependency and delinquency. Under the dictate of the rehabilitative ideal, the juvenile court judge endeavored to learn as much as possible about individual youth in
order to fully address the causes of delinquency. Rather superficially concerned with the details of the offense, juvenile court judges spent more time figuring out how to understand, diagnose and treat the child. In 1909, Julian Mack, the second judge at the first juvenile court in Chicago, told the American Bar Association, “The problem for determination by the [juvenile court] judge is not, has this boy or girl committed a specific wrong, but what is he, how has he become what he is” (quoted in Ryerson, 1978: 41). Judge Benjamin Lindsey, the famous juvenile court judge from Denver, reportedly attempted to understand a child “heart to skin” to get to the root of the problem. Kids were not only seen as more amenable to rehabilitation than adults because they were still “in progress”, but, for the child savers, their status as children triggered a moral duty to help change them for the better.

While the goals of the court ostensibly involved saving increasing numbers of youth from a life of crime, the reality often involved targeting lower class, immigrant families with state services aimed at reorienting the home life toward middle class definitions of morality and proper child rearing (Platt, 1977). The logic of reformatories to teach delinquent youth “the customs of neat, frugal American homes” (quoted in Platt, 1977:71) was premised on the theory that children, with proper guidance, could pull themselves up by their bootstraps and live the American dream. As one supporter put it: children should be taught “to speak gently, act politely, show courtesy, to allow no rudeness or roughness in speech or action” (quoted in Platt, 1977: 70)

Despite that many child savers and reformers sought to provide compassion and social justice and eschew cruel, stigmatizing punishment, the reality of rehabilitation in practice could be harshly punitive. Youth, often not guilty of any crime or guilty of only a minor offense, were removed from their homes and placed in reform schools indefinitely where the values of “self-denial and productive personal exertion” were implemented (Brockway, quoted in Platt, 1977:
William Letchworth, a reformatory leader, emphasized that compliance in the face of adverse reform conditions will make for lasting rehabilitation, “If he is truly reformed in the midst of adverse consequences, he gains the moral strength which makes his reform permanent.” (Letchworth, “Children of the State”, quoted in Platt, 1977: 71). One judge who was surveyed responded in a way that characterized the lack of regard for the espoused rehabilitative values of knowing the child and prescribing treatment, “Sometimes too much familiarity destroys control over the child. I think that fear is necessary in dealing with them…” (Report of the New York State Probation Commission, quoted in Ryerson, 1978: 86). Children who were not immediately receptive to the court’s benevolence incurred frustrated responses from the judges, who could quickly resort to punishment before rehabilitation efforts, as originally idealized, ever really began.

Progressive “faith in science” and the capacity of court staff to “treat” the pathology faced by individual youth both preceded and outpaced the actual development of an array of treatment “cures” that could be employed to treat individual youth. While the ideal might have envisioned juvenile court judges and probation staff as doctors diagnosing and treating diseases, the reality involved limited “prescriptions” that heavily resembled the punishment based reformatories that preceded the court (Ferdinand, 1989):

“If the state were to enforce a system of medical practice and were to provide that but one prescription should be given for all the ills that afflict the flesh, it would not be more absurd than is the present system of treating offenders” (John Peter Altgeld, 1884, quoted in Ryerson, 1978: 40.)
The critique of the rehabilitative ideal as being nothing more than a “noble lie” (Cullen and Gendreau, 2000), and a “benevolent” mask that disguised and even encouraged abuse also infused critiques of rehabilitation in corrections more generally (Platt, 1977; 2002; Rotman, 1990; Cullen and Gilbert, 1982). Critics from the left became concerned that state imposed rehabilitation relied on intimidation and coercion—it imposed far more stick than carrot and wielded the indeterminate sentence like a weapon. Youth, feasibly, could squander their lives waiting to be deemed “reformed”, and suffer harsh physical discipline in the name of rehabilitation. Even more “benign” rehabilitation was mostly mindlessly conformist, and consisted of “stultifying discipline, drugs, and even psychosurgery have been applied…as part of compulsory adjustment” (Rotman, 1990: 8). Stanley Cohen, in his work *Visions of Social Control* argued that the authoritarian model of rehabilitation had lost its important humanistic emphasis in favor of economic and administrative efficiency that produced “sullen citizens, performing their duties, functioning with social skills, and not having any insights’ (1985: 144, 151). Additional critiques from the left were more radical in nature, claiming that rehabilitation without structural change merely reinforced inequality and oppression (Rotman, 1990; Taylor, Walton & Young, 1973). Insights from labeling theory suggested rehabilitation reproduced the deviance it was seeking to eliminate through destructive stigmatizing processes that encouraged secondary deviance and “outsider” status (Becker, 1963; Lemert, 1972; Schur, 1973).

The infamous Martinson report was authored in the spirit of concern for the abuses of the therapeutic state (Cullen and Gilbert, 1982; Brown, 2009). In reviewing much of what passed for rehabilitation at the time, Martinson found very little to generate enthusiasm. State imposed change via rehabilitation was not working, or if it did work, did not work well for very long. The timing of his “nothing works” conclusion also coincided with a critique from the right that
rehabilitative “softness” was not creating safer communities. While Martinson was not aligned with the right, and was mostly concerned with practices where kids were being locked up indefinitely under the guise of needing reform, his report has been associated with fast tracking the “death” of rehabilitation (Brown, 2009; Cullen, 2005; 2006). While it likely never enjoyed the philosophical dominance that is sometimes claimed (Cullen and Gilbert, 1982; Rotman, 1990), by the 1970’s the rehabilitative ideal was “under attack”. Reports of an impending wave of juvenile “super predators” (Dilulio, 1995) and a conservative critique that rehabilitation is both morally wrongheaded, academically inaccurate, and fails to deters crime (Wilson, 1983; Wilson and Hernstein, 1985) spurred a policy shift toward youth accountability via increased punishment. In juvenile court, liberal focus turned toward a “justice” orientation, where due process rights were seen as essential to protect youth from potentially punitive abuses under the guise of therapeutic best interests as well as a focus on “nonintervention” that focused on keeping the potential labeling harms of the therapeutic state away from children (Lemert, 1967; Schur, 1973). To stem the harsh sentiments fueling punishment, liberals called for proportionality and “least restrictive” principles to guide a deserts based approach. According to Cullen and Gilbert (1982), liberal reformers had abandoned the rehabilitative idea of doing good and embraced a pessimistic principle of doing the least harm.

Despite the triumph of punitive crime policy and the retreat from rehabilitative principles the idea of rehabilitation has survived, and has been said to be enjoying a “renaissance” (McNeill, 2012; Cullen, 2005; 2006). Contemporary rehabilitation takes different forms. The liberal and radical leftist critiques of an abusive therapeutic state informed a series of proposals from the “new rehabilitationists” (Lewis, 2005). They maintained that a reformed rehabilitative model was the only one that promoted restructuring the social order as a matter of justice.
“In sensitizing us to the fact that much of the illegality that plagues society is intimately linked to existing social inequalities and injustices, rehabilitative ideology makes clear that a true solution to the crime problem ultimately rests in the support of reform programs that will bring about a more equitable distribution of resources through broad structural transformation of the social order. This is in notable contrast to the philosophy of just deserts…that ‘acquits the existing social order of any injustice’” (Cullen and Gilbert, 1982: 256; quoting Reiman, 1977: 144)

In contrast to liberal despair that settled for a principle of least harm, the new rehabilitationists reframed rehabilitation as a matter of individual rights that the state was morally obligated to honor (Cullen and Gilbert, 1982; Rotman, 1990; Carlen, 1984; 1994; Lewis, 2005). Pat Carlen (1984), for example argues that the state is obligated to address the social injustices that encourage law-breaking as part of a fair social contract. Once an offense has transpired, the state is further obligated to provide supportive, voluntary treatment that allows for an improved life. Rehabilitation, in this sense, is a “process whereby offenders are afforded the opportunity to be full members of society with the rights and responsibilities this entails” (Lewis, 2005: 123).

New life was also injected into the rehabilitative paradigm by rejecting the idea that rehabilitation did not work. Researchers went back to the literature and found that many things did, in fact, work better than prison in terms of reducing recidivism (Lipsey & Wilson, 1998; Lipsey, 1999; Lipsey, 2009) The empirical revival focused less on a deontological approach that conceived rehabilitation as a moral duty of the state, and adopted utilitarian justifications of efficiency, cost-effectiveness, and public safety (Aos et al 2006; Greenwood, 2006) If the state could provide treatment that reduced offending better than mere punishment in cost effective
ways, than the state should do that in the interest of the public good (Cullen and Gendreau, 2000). Lists of programs that “work” in this way are now available through the Office of Juvenile Justice and Delinquency Prevention (OJJDP, 2013) and the Blueprints Programs for Healthy Development (Blueprints, 2014).

The “what works” model also links to an empirically driven theory of intervention, the Risk-Need-Responsivity (RNR) theory (Andrews and Bonta, 1998; Andrews et al, 2010; Andrews and Bonta, 2010). RNR proposes that to encourage individuals to change their criminal behavior, intervention needs to follow three primary principles. The risk principle maintains that interventions are most effective in reducing recidivism when they target the highest risk individuals. The need principles contends that the content of an intervention will work best if it focuses on those criminogenic needs most directly tied to criminal behavior. The “big four” needs include antisocial attitudes, antisocial associates, antisocial personality, and a history of antisocial behavior, and the “moderate four” relate to marriage and family, employment, recreation, and substance use (Andrews and Bonta, 2010; Polaschek, 2012). Finally, the responsivity principle maintains that to the degree possible interventions should “match” the person’s learning style, motivation and other personality traits (specific responsivity) as well as employ strategies that help people change such as social learning and cognitive-behavioral approaches (general responsivity).

The RNR model follows a largely individual, psychological model of change that emphasizes personality and social learning theories of behavior. It presumes that other risk factors may exist, but focuses on those the individual possesses that have been most linked to crime. RNR has enjoyed broad appeal, and is now considered the “dominant” approach to rehabilitation (Ward and Maruna, 2007; Polaschek, 2012). It has been praised for being evidence
based, and theoretically open to a variety of psychological perspectives. RNR has also been said to have significant “explanatory depth” (Polaschek, 2012) in that it can explain why some programs “work” and why others do not, and has been credited with spawning new intervention designs.

Critics, however, contend that the model is overly focused on deficits at the expense of individual strengths, and discounts other relevant “whole” person criteria such as a sense of identity and personal narrative that also shape individual level behavior (Ward and Maruna, 2007). They also argue that it is eroding the notion of help more broadly, especially making universal, destigmatizing policies and programs less attractive (Haines and Case, 2008), and that it conflates needs with risks (Hannah-Moffat, 1999). In zeroing in on largely personality based correlates of criminal conduct, the RNR paradigm minimize the social context in which such personality traits arise (Raynor and Robinson, 2005; Muncie, 2002). Laws and Ward (2011) warn that circumscribing intervention so narrowly can have problematic consequences:

“There are real dangers that the broader causes of crime will be missed and, importantly, opportunities for actively supporting men and women in the process of turning their lives around overlooked” (quoted in Ward, 2012: 37)

In stressing the empirical validity of RNR, as well as “what works”, scholars have skipped over the normative dimensions of RNR and rehabilitation more broadly (McNeill, 2012), a field that is “saturated” by values of what counts as crime, who gets defined as criminal, what counts as risk and risk reduction, and what constitutes “good” intervention (Ward, 2012; McNeill, 2012).

Critics have also maintained that while it is empirically grounded, it offers little practical utility to practitioners seeking to motivate people to change and offers little to help people access “good lives” (Ward and Maruna, 2007). In contrast to the RNR model, the good lives model
(GLM) emphasizes client strengths and seeks their participation in the desistance of offending. Rather than merely understand what works to reduce offending, they seek to understand “what helps” people live good lives. They draw on positive and humanistic psychology that emphasizes the “whole person” and assumes that all people have certain basic needs in common that are necessary for fulfilling lives such as security, affection and meaningful purpose. As Ward and Brown (2004) see it:

“We argue the management of risk is a necessary but not sufficient condition for the rehabilitation of offenders. We propose that the best way to lower offending recidivism rates is to equip individuals with the tools to live more fulfilling lives... At the end of the day, most offenders have more in common with us than not, and like the rest of humanity have needs to be loved, valued, to function competently, and to be part of a community.” (244).

The good lives model has been linked to “desistance” based models of rehabilitation. Desistance theories focus on understanding the change process that allows people to eventually stop offending. While in many cases rehabilitation involves third parties, not all notions of rehabilitation require third party intervention (Raynor and Robinson, 2005). For example, in “naturalistic” rehabilitation, change happens over time as people grow up and gain new experiences that shape how they behave. It involves desistance largely without the aid of “professional experts” (Raynor & Robinson, 2005). Natural rehabilitation, for example, questions what types of intervention are really required given the fact that research has demonstrated most youth will “age out” of crime by their mid-late twenties. One source of natural rehabilitation comes from the biological and social forces of maturation. The Gluecks (1940), for example, argued for “maturational reform” whereby youth will “grow out” of
adolescent misbehavior. Moffit’s (1993) “two path” theory of delinquency also posits that maturation explains the “adolescent limited” type of delinquency where the impact of peer pressure, reduced impulse control, and other maturational factors influence the decision to partake in crime.

More sociologically rooted accounts of desistance based rehabilitation emphasize that life events that provide “social bonds” such as stable employment, education, and relationships encourage desistance (Hirschi, 1969; Sampson and Laub, 1993; 2005). New experiences can serve as “turning points” (Sampson & Laub, 2005)) that “knife off” the past from the present, allow people to develop routines around conventional, non-criminal activities and relationships that serve as informal controls, and reshape their identity accordingly. They tend to take a “process” view of natural rehabilitation where new opportunities and individual agency interact in a “progression toward desistance” (Kazemian and Maruna, 2009) and “making good” (Maruna, 2001). Other scholars in the “process” camp emphasize the non-linear path that natural rehabilitation can take. Youth may “zig zag” (Maruna, 2001) and “drift” (Matza, 1964) in and out of offending before desisting completely.

Another form of desistance based rehabilitation emphasizes the “expertise” from other parties outside the criminal justice system. The notion of “devolved” rehabilitation suggests that professional expertise is less effective in motivating desistance than engaging the individuals themselves, their families and communities. Reparative rehabilitation, such as that envisioned by restorative justice practices, seek to restore a person’s relationship and integration with the important people in their lives and their surrounding community. No “professional” expertise is required to help people “come back” to a community crime free. Instead, what is needed, is a process of change that allows both individuals who commit crime and the people most affected
by it to come together to work out a plan to repair harm and reintegrate. The devolved models of rehabilitation envision a more socially inclusive experience of desistance—where the people who have committed crime eventually enjoy social acceptance in the places where they live (McNeill, 2012).

While the devolved model has a strength in trying to promote a grass roots legitimacy for reintegration, it also runs the risk of losing touch with the broader structural arrangements that influence how families and communities adapt to and respond to crime. Without more inclusive social policies, for example, devolved rehabilitation may inadvertently place the burden of change on families and communities already strapped by deprivation and disinvestment. Relatedly, devolved rehabilitation presumes a degree of “familial” and “community expertise” on problems that may not exist, enjoy consensus, or that may have even contributed to the problems in the first place. Professional “expertise” need not be patronizing, demeaning or insensitive. Indeed high quality services in the context of a caring relationship may model the kinds of social bonds that youth in some places genuinely lack, and empower youth in the path to desistance.

*Atomized rehabilitation—overview*

While there are many models of rehabilitation, they all envision a process of change. What this change entails and where it occurs is up for debate, but more sociologically connected models stress that individual change can and should take place in a social context, across multiple levels of society. The change envisioned by a “deep” rehabilitative model—it is change that occurs within the social order, the institutions that serve youth, the communities where they live and the individuals and families themselves—is being eroded in a social and
institutional context of “false realism” that includes a presumptive powerlessness to tackle both the depth of suffering that youth experience and the social conditions that engender and sustain it. In this context, an “atomized” model of rehabilitation that centers on individual level change and fault becomes preoccupied with “who” is amenable to juvenile court intervention who belongs outside it, promotes a limited “ pills and program” approach that does little to help youth face the realities of their daily lives, and that provides a limited number of chances to “go straight”. Built into the atomized model is a “throwaway option”, where youth who fail to change quickly enough are tracked out of the juvenile justice system.

Atomized rehabilitation and false realism

The ideology of false realism embraces the central idea that kids can change, and acknowledges the reality that such change is not easy, but adds unnecessary pessimism and a kind of systemic learned helplessness that is disempowering for rehabilitative efforts for both youth and practitioners. According to this logic, many kids can change, but few ever really do, especially in a long-term, healthy way. And, the logic goes, there is not much we can do to help them along. Some kids are “worth” the effort, but “serious and chronic offenders” are probably going to end up in the adult system, like everyone else in their families. They come from dysfunctional families in dysfunctional communities, and there is little we can do to help them unlearn that way of life unless they really want to do the work that is required.

The ideology of false realism develops in a system that has invested far too little in social welfare. The vastness of human suffering created by policies of disinvestment end up on the doorsteps of the juvenile courts, which also have precious few resources to cope with it. Deeply unsettling levels of social suffering coupled with scarce resources triggers a kind of systemic
learned helplessness— the sense that there is not much that can be done to help kids, especially those that are the worst off. Kids in the juvenile justice system, particularly those who have histories of serious and chronic offending, have also endured lifetimes of trauma, abuse and insecurity. They may have developed significant mental health and substance abuse issues, and they may come from places and families where no one seems to really care. To envision a different life for youth, especially for those who appear deeply angry, defiant, or even scary is difficult. To help youth imagine that life for themselves when their experiences run so directly counter to such a vision is perhaps even harder. To do so without adequate resources may feel impossible. But while it is realistic to acknowledge the obstacles, it is disempowering to adopt a presumption against change at the outset. It fosters a kind of passive, pessimistic “knowing without knowing” that presumes an individual kid will not change when that conclusion is not only unknowable, it is out of step in a juvenile justice system committed to helping the kid do just that. False realism cultivates a tendency to give up on kids, a practice that, far from being transformative, merely reinforces the broader social abandonment many of them have already endured. Further, it discourages the kind of committed rehabilitative efforts that continue even when it appears that youth have given up on themselves.

If the youth themselves are perceived as unlikely to change under the falsely realistic mindset, the deep systemic disadvantage they face is seen as simply beyond the scope of the juvenile justice system. The youth themselves may change, if they are the right kind of kid and they are “ready”. But, the poverty, the racism, the drugs and violence in their communities, the under-resourced schools, the lack of meaningful opportunities to develop their talents and potential, while real and serious, are simply too much to take on. The juvenile justice system is already dealing with too much with too little, and these are deeply rooted social problems that
defy most solutions. Most people who work with kids understand that structural oppression plays a big role in creating the problems, which is perhaps at odds with a broader cultural skepticism, "structural nihilism" that discounts or minimizes the role of systemic explanations and power inequalities, preferring individual "fault based" accounts. But many of those same people also believe such structures are impervious to change, and not the job of the juvenile justice system, a philosophy that aligns with and reinforces the more extensive social proclivity for individualized solutions for social problems. False realism in this sense has been encouraged by a broader cultural ideology rooted in a divided, unequal social structure, where it is almost hegemonic to conclude that efforts to strengthen the social safety net, or ameliorate broad scale structural problems such as poverty, inequality, racism, and sustained community/educational disinvestment are almost futile. Accordingly, the juvenile court should focus on individual youth and behavior rather than waste its limited resources on what is much more difficult to alter. In this way, false realism promotes the tracking of collective problems outside the juvenile justice system—and disempowers the reformist imagination on how to address those problems.

In addition to disempowering deeper notions of rehabilitation, the atomized model encourages a preoccupation with amenability and eligibility for rehabilitation that makes it especially vulnerable to punitive distortion and discriminatory practices. The ideology of false realism projects unfavorable outcomes for youth before anything has really been done, and it seeks evidence of "signs" that kids want to change, and tracks them accordingly. One persistent, deeply unjust pattern of such "tracking" in the juvenile justice system is the long-standing reality of racial oppression, particularly at the deepest levels of system involvement. Those kids classified as "not amenable" to rehabilitation in the juvenile justice system and subject to the harshest practices such as adult prosecution and LWOP are kids of color (NCCD, 2007, Bell and...
Ridolfi, 2010). Under the logic of false realism prevalent in the atomized model, evidence of “wanting to change” is especially important because change, while possible, is rare. Evidence of “wanting” to change includes subjective impressions of factors like remorse, as well as seemingly tractable personality qualities such as a calm or laid back demeanor. Purportedly “objective” factors, such as risk scores, assume even greater importance in the atomized model as potential evidence of amenability. Deeply angry young men, for example, who are more likely to express defiance and toughness than contrition do not often appear “amenable” or score “low risk”.

Another presumed sign of amenability is the apparent receptivity to assistance, and the sense that kids want the help that is being offered. Many who work with youth know that profound lack of trust in the system and those individuals assigned to “help” is common especially when that help in the past has been marginal, sporadic and potentially abusive. Part of the damage that comes from living in traumatic circumstances is a lack of trust in adults. Given the oppression of mass incarceration, the prevalence of racial discrimination, and the targeting of certain communities more for punishment than for meaningful support (Clear, 2007), many youth and families come into the system highly suspicious of not just individual people at the court, but of the entire enterprise. Youth who do not trust those trying to help them change may in fact “resist” rehabilitation. Under the mentality of false realism, resistance signals that kids are not “changeable” —instead of being evidence of an expected, and rational response given power inequities and a pattern of systemic abuse by the system.

For kids with more serious offense histories or high risk scores, resistance could fast track them to adult court, or prison. Kids who resist, but have less serious offenses, may regularly find themselves subject to punitive measures as consequences for non-participation. In
the atomized model, punishment is the fall back mechanism for youth seen as “not amenable” or not participating. Even when youth do not resist, punishment may still be seen as necessary to anchor rehabilitation, since the mindset of false realism conceives change as difficult and youth difficult to motivate. While I will discuss the idea of punitive necessity more in the section on the punitive model, here it is important to note how an ideology of false realism in the atomized model could subject well-meaning rehabilitative reforms, such as those “what works” programs, to unnecessary punitive influence.

In addition to a potential, harmful alliance with punishment (see also Robinson 2008), the false realism in the atomized model also affects the nature of rehabilitative interventions. Instead of rehabilitation that helps youth lead “good lives” (Ward and Maruna, 2007) or helps them envision a better future, much of the intervention in the atomized model focuses on “pills and programs”. Medication, therapy, particularly cognitive-behavioral treatments, are designed to help youth overcome INTERNAL psychological or medical problems that might well stem from problematic social circumstances, but they are not designed to change them. In over-focusing on the internal states of behavior, atomized pills and programs are often ill-equipped to deal with cultural realities of oppression and do little to empower youth in these areas. Instead of raising their consciousness, youth are “medicated”, and “reprogrammed”. And, I want to be clear that there is plenty of merit in certain pills and programs—for youth who truly need them and when they are administered with restraint in the context of other supports. We know from the research literature that youth can benefit from these types of treatments. But the atomized model relies on them far too heavily. Cognitive behavioral therapy (CBT), for example, may target poor decision-making, anger management problems, negative peer choices, and other antisocial tendencies associated with criminal involvement. Getting along and staying straight is the focus
of this kind of “conformist intervention” (Currie, 2012), and the assumption under the mentality of false realism is that little will change in their social surroundings. Kids are “on their own” with new and improved thinking in the same situations that delivered them to juvenile court in the first place. Such “structurally blind” rehabilitation (Goshe, 2014) and “conformist intervention” asks youth to accept that their lives will probably not be very fulfilling, but figure out how to stay straight anyway.

Thus, philosophical pessimism in the atomized model fosters a paradoxical, and limited model of change. Even if the pills and programs work as they are supposed to, changed youth are sent back to unchanged surroundings where they are expected to maintain their changes even when it is overwhelmingly difficult, and potentially dangerous to do so. They are expected to transcend the insurmountable, and when they manage that, to keep it up even if opportunities to benefit from being a “changed youth” are few and far between, and opportunities to revert to their old selves are everywhere and the benefits, if not simple, are perhaps more obvious. Practitioners in juvenile justice realize this obstacle—sending changed kids back to unchanging circumstances sets youth up for failure, and works against long-term rehabilitative objectives. It is a source of great frustration and concern, but the false realism also promotes the resigned sense that this is unavoidable and inevitable. Depressingly high levels of recidivism, and equally dismal statistics about what we should be satisfied with in terms of rehabilitative outcomes make sense in light of the paradoxical model of change set up by an atomized model of rehabilitation.

In addition to a limited model of change, the ideology of false realism influences the number of “chances” a youth receives in the process of rehabilitation. The notion of “chances” is also important to multiple theories of rehabilitation. Rights based theories, for example, maintain that chances to change for the better must be provided by the state to justify punishment (Cullen and
Gilbert, 1982; Rotman, 1990; Lewis, 2005). In juvenile justice, the idea of chances embedded in rehabilitation tells youth they are not permanently bound or flawed because of past errors, but can learn and grow from them. Since its inception, the juvenile justice system acknowledges, at least rhetorically, that youth will make mistakes and that they merit more “chances” to learn from those mistakes and live productive, crime-free lives. It is hard to overstate the ideological heft of the concept of chances. The Supreme Court has overturned the death penalty and life without parole in non-homicide cases, in part, on rationale that maintains youth deserve “chances” to change, chances to “grow up” and chances to move beyond even serious errors of judgment.

The notion of chances embedded in the rehabilitative ideal also speaks to the responsibility of the system to promote change. Youth must have the chance or opportunity to change, and that opportunity must be provided by the juvenile justice system. Youth are “works in progress”, they are not yet “set”, and time and positive experiences have the capacity to change them, if they are given the chance to do so. Almost no one in the juvenile justice system, even advocates of harsh punishment, deny that youth should have a chance to “get it right”.

But the false realism prevalent in the atomized model also shapes what constitutes a chance and how many chances are available. Chance is a kind of opportunity, and in the U.S. there is a scarcity of opportunity that is unequally distributed. There are not enough chances to go around and the opportunities to “get it right” are limited. Chances are time bound—they can and do run out, perhaps before the youth has gotten it together. In many states, certain types of offenses or chronic offending can automatically disqualify a youth from any further “chances” to change in juvenile court. Resistance to rehabilitative efforts can also revoke a youth’s “chances” card. In the juvenile justice system where there is high demand and too few resources, chances are few
and they are finite. If the chances are squandered, youth can lose their amenability status. Almost half the states have no minimum age where youth can be found “not amenable” to the rehabilitative aims of the juvenile court and waived to the adult system.

The ideology of false realism in the atomized model require youth to change and change quickly or forfeit their chances at rehabilitation. The relatively narrow window of “chances” that the justice system provides is also especially notable given the longevity and severity of the social problems faced by the very youth who may have the hardest time making rapid change and the relative inattention to these problems in conformist interventions. In short, built into atomized model of rehabilitation is the idea that “chances” for youth can and likely will run out if the youth does not change quickly enough. This throwaway option represents the fallback position for what happens if rehabilitation fails to work before the chances run out. Youth who squander their chances to change forfeit their amenability status. They may be converted to “adults” for the purposes of punishment. In states with “once and adult, always an adult” laws (Griffin et al 2011; Arya 2011) the window for juvenile justice rehabilitation may shut permanently. Unfortunately, the types of youth and behavior most in need of more chances are those most likely to be disqualified from them. I want to be clear that I am not denying the very significant social harm that violent and chronic delinquency causes. There are kids who end up causing significant pain and suffering. But the throwaway option, in a context of systemic learned helplessness, enables and reinforces the tendency of the justice system to give up on kids. Indeed, the ideology of false realism anticipates this possibility before rehabilitation even gets under way. The throwaway option makes the U.S. a worldwide standout for harshness, and as long as it is there, continues to threaten other, more socially conscious rehabilitative reforms from taking hold or being co-opted by the embedded punitiveness in the atomized philosophy.
Kids who are ultimately thrown out of the juvenile justice system are often those who have made the worst choices. The ideology of false realism maintains that when kids change, they do so because of personal choice, and when they fail, it is because they persist in making bad choices. The zeroing in on personal choice lets the justice system and broader social order off the hook for the vicious cycle of suffering that policies of social abandonment and atomized rehabilitation enable and strengthen. Again, these realities are often seen, and lamented. But, the ideology of false realism construes them as inevitable and unbeatable—to be endured through grit, forbearance and personal choice. Thus, youth who make “choices” to engage in crime, even if we can see how the youth came to make that choice, how the choice might even be “rational” in light of the youth’s social surroundings, experience and developmental status, must nonetheless be held culpable for those choices. Again, I am not critiquing that choices have consequences, or that we should deny youth agency or see them as incapable of making positive choices in the face of personal struggle. Indeed I recognize the empowering possibilities of helping them see the potential of their choices. What I am suggesting, however, is that rehabilitation which emphasizes personal choice while resignedly accepting social injustice and doing precious little to support youth who endure it creates a dynamic that sets youth up for failure and exclusion from rehabilitative efforts. The kids who make the “worst” choices are the same kids in the very circumstances that the ideology of false realism considers unchangeable.

Conclusion

While more socially conscious models of rehabilitation recognize the need for multilevel efforts at rehabilitation, the atomized model loses touch with personal suffering and systemic injustice. The ideology of false realism acknowledges that while change is possible, it is also unlikely, especially for those kids in the worst situations who have made the worst choices. False
realism fosters a kind of learned helplessness where harsh realities are conceived as beyond the scope of juvenile justice intervention, and the best the juvenile court can do is focus on individual level thoughts and behaviors. Reflective of this embedded pessimism in the atomized model, too much of the atomized model relies on “pills and programs” to reduce personal deficits and endure ongoing social suffering without breaking the law. Youth who resist or fail to change quickly enough may run out of chances. The throwaway option is the fallback position in the atomized model, and its punitive undertones can distort rehabilitation reforms attempting to advance progressive change. Finally, the over-emphasis on personal choice in the atomized model absolves the justice system and the broader social order for the roots of social suffering and its attendant harms.

The atomized version of rehabilitation, however, is not inevitable. Deep rehabilitation that embraces a multilevel approach to change is an alternative whose central tenets already exist in more socially rooted models of rehabilitation. Deep rehabilitation operates on a philosophy of empowered realism. In contrast to false realism, empowered realism recognizes that change in the face of hardship is difficult, but that it is possible and, indeed essential. Multilevel rehabilitation promotes policies that directly reduce poverty, violence, and the abuse and neglect of children. Empowered realism does not engage in the passive privilege of declaring defeat before rehabilitation begins. Instead it plans for, indeed intends on, a sustained commitment to staying with kids through the “thick and thin” of improving their lives. Institutionally this means eliminating the throwaway option and all amenability considerations. All youth are presumed amenable to change. Empowered realism and deep rehabilitation embrace the principles that Elliot Currie (2012) refers to as comprising “transformative intervention” including consciousness, hope and solidarity that seek to recognize social injustice and encourage young
people to join in combatting it. Deep rehabilitation requires perseverance and hope in the face of circumstances that seem to call for giving up and defeatism. A deep model of rehabilitation does not shy away from hardship. It does not minimize it or glamorize it. But it also does not leave it alone. Deep rehabilitation is relentless in this way, and reflects the kind of sustained investment that many youth are craving and ultimately require to imagine and realize their potential.

In a climate that embraces false realism as actual realism and distrusts hopefulness as naïve optimism, the kind of deep rehabilitation and empowering philosophy proposed here may seem out of touch. But, multilevel rehabilitation—that which conceives the merger of social justice policy and transformative interventions—already exists. For example, deep rehabilitation could marry a rights based model of rehabilitation that maintains that social justice is a duty of the state, and which includes policies that allow people to participate fully and live useful lives (Carlen, 1984; Cullen and Gilbert, 1982; Rotman, 1990) with humanistic (Ward and Maruna, 2007) and “transformative” (Currie, 2012) interventions. Other countries of comparable wealth and democratic commitment have eliminated life without parole and adult prosecution that form the punitive backbone of the throwaway option. Embracing no throwaway policies also aligns with a human rights perspective (discussed more in the rights chapter). Further, youth development programs that reflect the kind of sustained commitment to social justice for youth also already exist (Goddard and Myers, 2011), and represent potential models of what empowering realism and deep rehabilitation resemble in practice.
CHAPTER 3: THE PUNITIVE MODEL

When you plant lettuce, if it does not grow well, you don't blame the lettuce. You look into the reasons it is not doing well. It may need fertilizer, or more water, or less sun. You never blame the lettuce.

Buddhist proverb

For decades, the United States has passed laws that discount other forms of punishment in favor of incarceration. But in its embrace of confinement as a medicine that cures all social ills, the country seems to have forgotten just how severe a punishment it is.

Human Rights Watch, 2014

Punishment is, perhaps, the original meaning of justice, and it is, no doubt, one of its most enduring aspects.

Solomon and Murphy, 2000

**Chapter Overview**

The idea that punishment is necessary is embedded in the legal justifications for punishment especially incapacitation, retribution and deterrence. Other Western, liberal countries have similar justifications for punishment, yet they do not punish their adults or their youth at even close to the rate in which the U.S. punishes. Many scholars have tackled punitive exceptionalism (Garland, 2001; Tonry, 2009; Frost, 2006; Currie, 1985; 1998; 2013; Wacquant, 2001; 2009; Alexander, 2010; Mauer, 2006; Goldson 2005), and my point here is to show how ideas embedded in the punitive justifications get “inflated” in the U.S. context by criminogenic social policy that neglects and degrades youth welfare, perpetuates a legacy of racial oppression,
and privileges individual fault and blame in explanations of personal struggle. The idea of punitive necessity is helped along by a “package” of ideologies including punitive optimism, which overvalues punishment’s ability to meet social and personal needs, and a presumption of punishment’s propriety and rationality. The ideologies work together in ways that support too much punishment, color progressive alternatives with punitive ideals, and that make it difficult to break away from punitive practices when they have become excessive, even deadly. The inflated role of punishment is not inevitable, however. The court’s parens patriae authority is a legal justification that permits the juvenile court to stand in as a parent. Taking the parental role seriously would require social policy that promotes healthy families, and a juvenile justice system that, like a parent, operates on a “full service model” geared toward nurturance and “discipline” instead of punishment.

Literature Review

The United States has become known for its “exceptional” punitive justice system. Since the 1970’s the United States has embarked on a sweeping prison expansion project that witnessed 2.3 million people incarcerated at the height of the punitive movement. Recent “limitations” on confinement, especially legal orders to end overcrowding, and policy changes designed to let out some of the lowest risk people have led some scholars to declare that mass incarceration is “dead” (Simon, 2012). But the volume of U.S. punishment, as measured by numbers incarcerated, remains staggeringly high, particularly compared to other countries of the world. While the U.S. incarcerates 25 percent of the world’s prisoners, they represent only about five percent of the world population (Travis and Western, 2014). Currently about 2.2 million people are in jail or prison (BJS, 2014) which means that about 1 in every 100 Americans is incarcerated (Travis and Western, 2014). Despite an overall decline in the last four years (states
and the federal prisons vary year to year and some have increased the number of prisoners), this means the U.S. still incarcerates at about 5-10 times the rate of other comparable nations. The racial demographics of mass incarceration are also exceptional. Black men are about six times as likely to go to prison as white men, and Latino men go to prison about three times as often (PEW, 2013). Black women are three times as likely and Latino women nearly twice as likely to go to prison as white women (Mauer, 2013).

The perception that punishment is in retreat has also generated a new climate of optimism in juvenile justice (Vincent et al, 2012; Howell et al, 2013; National Research Council, 2013). The Annie Casey Foundation, a progressive youth justice advocacy organization has reported that a “sea change” is occurring in juvenile justice where the winds of change are blowing away from punitiveness (2013). There have been hopeful signs. A largely conservative Supreme Court acknowledged that kids are different from adults and merit opportunities for rehabilitation in several landmark decisions. The death penalty for juveniles, a practice that made the U.S. a worldwide standout, finally became unconstitutional in 2005 (Roper v Simmons). Life without parole persists, but in a weakened form, no longer applicable to non-homicide offenders (Graham v. Florida) and no longer allowed to be “automatic” for any offense (Miller v. Alabama). Arrests have declined, violent crime is down, and youth confinement rates have dropped forty-one percent. (Puzzanchera, 2013; Sickmund et al, 2011). Budgetary constraints have also encouraged states to rethink their youth prison policies, notably California (Krisberg et al, 2010). A recent report estimated the long term costs of youth confinement range from 8 to 21 billion dollars (Justice Policy Institute, 2014). The message that prison is expensive and there are cheaper, more effective alternatives has found a more receptive audience in a time of recession and economic recovery.
The optimism, however promising, also sits uneasily with the reality of ongoing harshness and harmful practices. Like its adult counterpart, the United States incarcerates more children than any other industrialized country. In 2010, the United States incarcerated 225 youth for every 100,000, and this was celebrated as a significant reduction of 41 percent (Sickmund et al, 2011; Annie Casey Foundation, 2013). Yet, cross national comparison data make this “accomplishment” seem more like a testament to how punitive the U.S. has been and how punitive we still are. A cross national study had indicated that the U.S. incarcерates young people at five times the rate of the next highest industrialized country (Hazel, 2008). South Africa, after the U.S, incarcerated 69 youth for every 100,000. England and Wales, considered “punitive” by European standards (Muncie and Goldson, 2006) incarcerate nearly 50 per 100,000. Countries like Sweden, Finland and Japan incarcerate fewer than 5 kids per 100,000, or almost never (Hazel, 2008). Crime by youth, while higher in the U.S., does not account for the staggering differences in the use of incarceration as a punishment. The use of incarceration is high for everyone, but the racial disparities are startling. Even in ‘decline’, the US incarcerates 605 black youth for every 100,000, a rate that is five times higher than similarly situated white youth. Latinos and Native Americans are incarcerated at 2-3 times that rate (Sickmund et al, 2011).

The urge to declare the punitive siege over is understandable for juvenile justice advocates given that confinement often hurts and damages kids, frequently in serious and long-term ways. Far from being “houses of refuge”, residential placements in the U.S. have deplorable track records of failing to protect youth in confinement. A recent Bureau of Justice Statistics report surveyed a representative sample youth confined nationwide, and found that more than 1 in 10 had been sexually assaulted by staff (Beck et al, 2012), and in some
institutions, rates were as high as 20 percent. A study by the Associated Press found that over 13,000 claims of physical abuse and excessive physical force were alleged from 2004-2007 nationwide (Mendel, 2011). While 10 percent were officially confirmed, the statistics, while bad enough, likely underestimate the problem due to institutional discouragement of reporting, lack of investigation, lack of known, organized grievance processes, and young people’s fear of reporting. Since 1970, court ordered sanctions and remedies were required in 57 lawsuits nationwide, the overwhelming majority of them for institutionalized violence like excessive use of force, sexual assault by staff, and excessive use of isolation and restraint, while others involved excessive neglect of education, mental and physical health of youth inmates. Again, the number of successful lawsuits likely far underestimate the amount of “tolerable” abuses and neglect of youth in the system, a proposition borne out by persistent state by state reports of unsafe conditions in the recent decade (Mendel, 2011).

Even if youth are kept “safe” in the most basic sense, their health, education and opportunity to develop non-criminal identities are disrupted by incarceration both because facilities neglect these issues and serve as “schools for crime” (Mendel, 2011; Lemert, 1972; Schur, 1973), because of the negative, long term impacts of labeling and disrupted development (Gatti et al 2009). Kids that are in confinement, according to a recent study by OJJDP (Sedlak and McPherson, 2010) are among society’s most vulnerable youth, and incarceration usually compounds instead of ameliorating their problems. Three out of four youth in confinement have been exposed to serious violence and harm. Nearly one third had attempted suicide at least once and two of three reported serious substance abuse issues. They also suffer rates of mental illness and educational deprivation at several times the rate found in the general population, and
conditions of confinement often worsen these problems (Shufelt and Cocozza, 2006; Mendel 2011).

The sea change has not yet eliminated another exceptional U.S. practice: that of prosecuting youth as adults or housing them with adult offenders. Approximately 250,000 youth are tried, sentenced or detained with adults every year (Arya, 2011). On any given day, 10 thousand youth are in adult prisons or jails, a reality that makes them five times more vulnerable to sexual and physical assault (Equal Justice Initiative, 2014). The U.S. adult system is noteworthy generally for its reliance on solitary confinement and the use of restraint, and this is no different for kids in confinement. In 2009, a year-long study of Ohio’s confined youth population that the average kids spent an average of 50 hours in seclusion, and in California in 2003, a study found that on any given day 10-12 percent of kids in the largest institutions spent 23 hours a day in their cells. The problems associated with solitary confinement, particularly mental health issues (Haney, 2003; Haney and Lynch, 1997; Shalev, 2009; Scharf-Smith, 2006) are exacerbated for young people.

The legal justifications for punishment—especially that of incapacitation, deterrence and retribution gained a particular forcefulness in the punitive era. Legal philosophies of punishment justify the use of incarceration on four grounds: rehabilitation, incapacitation, retribution and deterrence (Williams and Arrigio, 2012; Duff, 2013). Since I covered rehabilitation extensively in another section, here I will focus on the last three that also form the backbone of the punitive model I cover in this chapter. Incapacitation simply states that confinement works by taking people off the street. Sometimes, according to this justification, confinement is the only option available to keep the public safe. Unfortunately, the new optimism in both juvenile and adult criminal justice may have underestimated the power of the incapacitation logic when faced with
serious crime rates and high recidivism, the consequences of living in a society that uses criminal justice policy as its primary social policy (Currie, 1998). Rates of serious violent crime—murder, robbery, serious assault and rape—remain significantly higher in the U.S. than in other comparable countries (Currie 2001; 2013).

The reality is that incapacitation logic runs deep with offenders, even juveniles, who have deprived someone of life or their sense of safety in a harmful and lasting way. This is evident as states now revamp their policies in response to the narrowing of life without parole. Massachusetts, for example, has eliminated the sentence. West Virginia, too, has eliminated LWOP and required that all youth prosecuted as adults be considered for parole after 15 years. But many other states have simply continued to issue very long sentences that are the functional equivalent of LWOP. Evidence from the risk literature also suggests that even in those states pushing for parole, youth may have significant difficulty gaining release after committing a violent act and having other high risk factors as many young people sentenced to life possess (Human Rights Watch, 2014). The deep incapacitation logic maintains that some kids simply cannot and should not ever leave prison; confinement is necessary for society’s protection. It is irrelevant if prison “works” in a broader sense; it serves its objective by acting as a warehouse for those too violent and unstable to be safe in society.

Retribution does not require that punishment work either; it is an ethically required response to a crime that is sufficient in and of itself. From a retributivist stance, the crime itself necessitates the moral duty to punish (Duff, 2013). The retributive philosophy has many variations (Walen, 2014 provides a review), but most are rooted in deontological theories of ethics that emphasize conforming behavior to a series of higher order rules and principles (Williams and Arrigio, 2012). According to a deontological view, punishment is necessary
because it fulfills a moral duty. Failing to punish properly when it is warranted is itself an injustice. While most retributivists do not see the consequences of the punishment as important (philosophers debate about how much utilitarianism seeps into retributivist ideas), retribution still poses other requirements that limit the amount of punishment and how it is delivered. Three common limits to retribution are culpability (person is guilty), determinacy (person is treated like others for the same offense), and proportionality (nature of punishment “fits” with nature of the crime). Retributive justifications continue to rationalize practices such as the death penalty and life without parole, and have underwritten much of the victims’ rights movement in the U.S.

The effects of punishment do matter for justifications grounded in deterrence, which traces its roots to utilitarianism. Punishment from this perspective is only justified when it benefits far more people than it harms (Williams and Arrigio, 2012). The deterrence ideal asserts that failing to punish properly neglects not the demands of justice per say, but the demands of a social order with an interest in public safety for the greatest number of people. Jeremy Bentham puts it this way “all punishment in itself is evil. ... if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil” (Bentham 1789 quoted in Walen, 2014). Bentham believed it was possible for lawmakers to precisely calculate the amount of punishment necessary to deter further crime either for that specific person (specific deterrence) and for the general population (general deterrence). Properly calibrated punishment, according to the deterrence position, “sends a message” that such offenses are intolerable.

Classical theorists such as Cesare Beccaria believed that punishment should only be just severe enough to deter the crime; beyond that it was too much punishment (Beccaria, 1963). Beccaria and other classical scholars stressed that deterrence is effective because people are rational, and make choices by actively and logically considering the consequences. They
thought certainty and swiftness, more than severity, were the crucial aspects of punishment, and were specifically against torture or other overtly harsh practices. Modern scholarship on deterrence continues to flow from classical conceptions and rational choice theory, and has consistently shown that excessive sentences do not deter, either specifically or generally (Apel and Nagin, 2011; Doob and Webster, 2003). Deterrence is most effective when the likelihood of detection is high (certainty), but in itself is a fairly limited means of generating sustained behavior change (Wright, 2010). Most scholars agree that the benefits of deterrence depend on the relative rarity of punishment, and that the U.S. has reached a point of diminishing returns (Apel and Nagin, 2011). As it becomes more common (and less stigmatizing), the deterrent effect drops.

The justifications for punishment provide a legal and philosophical guide for punishment in many countries that subscribe to political liberalism. Not all of them, indeed most of them do not, punish people at the level the United States does. Beginning in the 1970’s, changes in sentencing practices, not uniformly rising crime rates, resulted in steadily increasing incarceration rates. New laws sent more people in, kept them there longer, and returned them more frequently than had been the case in the past (Blumstein and Beck, 2005; Western, 2006; Travis and Western, 2014). Mandatory minimum sentences increased sentence lengths, truth in sentencing laws kept people in longer, and the War on Drugs sent more people in. Young people were affected by similar policy changes. More youth were sent to detention and prison. Waiver laws, which provided for transfer to adult court, were expanded to include a wider range of offenses that automatically required adult prosecution, and they lowered the age at which juveniles could be prosecuted as adults (Griffin et al, 2011; Arya, 2011). In New York, for example, all 16 and 17 year olds automatically go to adult court. Finally, some laws changed
who gets to decide to waive. Judges were deemed to “soft” on juvenile crime and were more likely to decide to keep kids in juvenile court. Prosecutors, who were perceived as more receptive to waiver, were vested with the decision during the punitive era. Florida vested the prosecutors with this decision, and it is a practice that knowingly increases the likelihood of adult prosecution.

The changes in sentencing practices themselves have been explained in a variety of ways. David Garland (2001) argues that they are a product of a new, complex culture of control where multiple forces of rising crime rates, fear, increased punitiveness among the professional classes, and the critique and contraction of the welfare state combined to produce mass imprisonment. Simon (2007) argues that the politics of fear based crime control have infiltrated other areas of social policy, such as education, in a phenomenon he terms “governing through crime” that also fuels prison growth. Michael Tonry (2009) provides a different politically grounded explanation. He argues that the U.S. “falls on the wrong side” of social predictors of limited use of confinement. These include low levels of inequality, strong social safety nets, de-politicized police forces, and high levels of trust and legitimacy in the state. According to Tonry, the U.S. fails in these categories because of a history of “paranoid politics”, intolerance and harsh attitudes toward punishment associated with religious fundamentalism, a constitution which encourages “elections” as a means for securing judges and prosecutors over-wedded to popular opinion, and the history of racial oppression and legacy of slavery. The characteristics work together to produce a political culture that encourages harsh punitive practices.

For some scholars, the political choices that led to mass incarceration reinforce patterns of class inequality and racial oppression. These scholars emphasize that punishment, far from being neutral policies of harshness, hit poor people of color particularly hard. For example,
young black men who have not graduated from high school are now more likely to go to prison that obtain a job (Western and Petit, 2010). At current levels of incarceration, it has been predicted that one in three black men will serve time in their lives, prompting some scholars to argue that prison has become a normative event that disrupts expectations and activities associated with other key life course events such as employment and marriage (Western and Petit, 2010). Loic Wacquant (2001) contends that criminalization became a dominant method of social control for the poor in the face of deindustrialization and a dismantled social safety net. According to Wacquant, prison became the fourth “peculiar institution” to maintain oppression following slavery, Jim Crow, and the ghetto. Michelle Alexander (2010) examines the racialized nature of mass incarceration and maintains it is the “new” Jim Crow. She argues that the criminal justice system legitimates the legal segregation of blacks under the guise of public safety and crime control.

Legitimacy is also maintained through political ideology that reinforces the use of harsh sentences. Elliot Currie (1998; 2013) asserts that the U.S. preference for incarceration is driven by a series of myths that he calls the myths of leniency, efficacy, and cost effectiveness. People have supported the punitive turn because they believe we are too lenient on crime, prison works in promoting public safety, and it is more cost-effective to incarcerate people than it is trying to reform them in terms of public safety. In the current spirit of optimism among reformers, with new narratives that show just how expensive and ineffective prison is, it may be tempting to believe that the science of reform has eliminated this ideology. But “populist punitiveness” (Bottoms, 1995) remains strong in America. Ways to make prison “cheaper” by offering fewer rehabilitative and social services is also a potential side effect of justifying punishment largely on
how much it costs. The answer to the claim that prison is expensive might just be “make it cheaper”, a solution with historical and contemporary traction (Lynch, 2010).

At the level of juvenile justice, Thomas Bernard (1992) has argued that cycles of political reform swing on a continuum between periods where juvenile justice re-commits to rehabilitation, and periods that stress a “get tough” approach. In times where the pendulum drifts toward punitiveness, myths about the “good old days” justify rehabilitation. These kids, so the mythology goes, did very little wrong in the first place, and rehabilitation was sufficient to meet the demands of justice. But, new “super-predators” (Dilulio, 1995) and an emerging group of serious criminal offenders require a harsh response. This view is summed up by Patricia West, the Director of Public Safety in Virginia who advocated for series of harsher laws at the federal level in the nineties:

“I believe that the fatal flaw in most juvenile justice systems and a reason the country has seen skyrocketing increases in juvenile crime can be summed up in one word---accountability—or actually lack thereof. The first juvenile justice system was established in the late 1800’s and over the years evolved into a system that made excuses for juveniles’ behavior, minimized their crimes and basically tried to shield juveniles from the reality of their criminal actions….A system that looked solely to the ‘best interests’ of a juvenile defendant may have been sufficient in an era when kids were shoplifting bubble gum or going for a joy ride in a neighbor’s car, but it is wholly insufficient to deal with today’s juvenile carjacker or cocaine dealer, or worse”. (March 20, 1997: p. 9-11)

Bernard might look at the current optimism in juvenile justice, and see it as just another period in the history of cycles. During periods where rehabilitation is in ascendancy, crime has
typically dropped, and the consequences of harsh practices become more notable and indeed the practices themselves seem out of step with reality. Rehabilitation was the guiding philosophy behind the original juvenile court. The child savers thought it was unnecessary to “legally” punish kids for criminal behavior in the same way that adults were punished. Punishment was seen as harmful and unnecessary for children (Gettis, 2000; Ryerson, 1978). But the idea that punishment is, in fact, necessary, especially in response to criminal behavior lives on in the juvenile court (Swartz, 1989; Krisberg, 2003; Platt, 1977; Ryerson, 1978; Gettis, 2000).

The reformatories and institutions that held juveniles prior to the reported triumph of the rehabilitative ideal continued to house children, now for rehabilitative purposes, after the juvenile court. The marriage between punishment and rehabilitation has a historical foundation (Ferdinand, 1989) as well as an ideological one. The court came into existence amidst cultural ideology that values punishment in the care and custody of children, embodied in the sentiment “spare the rod, spoil the child”. Punishment, especially the kind that involved physical discipline and hard work was considered reformative. While the child savers eschewed harsh punishment and the confinement of children with adults, they did not expressly tackle punitive practices that were customary in dealing with children and typical of raising them, and considered necessary for their healthy development.

The idea that physical punishment is necessary to raising children continues today. Physical discipline, while banned in thirty countries and prohibited by human rights treaties, continues to be a legal and social norm in America (Human Rights Watch, 2014). All fifty states permit corporal punishment in the name of discipline, nineteen states permit corporal punishment in schools. Approximately eighty percent of American parents acknowledge they have spanked their young children, and about 100,000 kids are subject to paddling in schools every year. The
American Academy of Pediatrics rejects the practice based on research that physical punishment or degrading, overly shaming punishment is harmful (regardless of whether it was done in anger or more “coldly” as a conscious strategy) and has been repeatedly, and positively associated with a range of adjustment problems (Gershoff, 2007; Afifi et al., 2012). A 2002 meta-analysis of 88 studies on the impacts of corporal punishment found that, in addition to direct harm to the child and the possibility for escalation, corporal punishment increased aggression, shame, reduced empathy and negatively impacted moral development, increased antisocial behavior, and increased risk for perpetrating and experiencing violence as an adult among other negative outcomes (Gershoff, 2002; 2008).

**Punitive Necessity-Overview**

The notion of punitive necessity has a long history in criminal justice, juvenile justice, and in cultural traditions surrounding raising children. The idea that we must punish in response to crime is exacerbated in the context of social practices that practically guarantee higher levels of serious crime. Even without the serious racial oppression that infuses the criminal justice system, the idea that we must punish would flourish alongside the serious crimes encouraged by policies that devalue welfare and support. Add in a legacy of racial oppression that insidiously links crime to race and punitive necessity becomes a justification for legal violence, brutality, and mass incarceration. The sense that punishment is essential also interacts with legal and cultural frames that privilege individual fault and blame. In this setting, the notion that punishment is necessary enables a kind of “punitive optimism” that sees punishments value before its harmfulness and sets up the kinds of institutional abuse and human rights failures that have plagued the juvenile justice system. Finally, punitive optimism enriches perceptions of punishment’s moral and rational legitimacy, creating a presumption favoring punishment’s
acceptability that makes it more difficult to know what constitutes unfair punishment, and that expands tolerance for injustice. The notion of punitive necessity and the spirit of optimism and presumption of propriety that it cultivates contribute to an inflated philosophy of punishment that renders the U.S. system particularly vulnerable to “punitive takeovers” such as the epidemic of harshness of the last 30 years, that increases the chances for harm and abuse, and which clouds alternative visions of justice with punitive ideals.

For my purposes, I am using the term punishment to refer to state based formal and informal practices that inflict or threaten shame, deprivation and suffering in response to an established (convicted) wrongdoing. It includes confinement, but is not limited to it. It might include shaming, social isolation, or other types of deprivation. The term “punitive model” refers to the key philosophical element of punishment—namely its necessity—that derives from the interplay of incapacitation, deterrence and retribution based ideals about punishment. While incapacitation, retribution and deterrence justifications for punishment are analytically distinct, here I consider them together because they are often fused together in practice and it would be difficult to map the philosophical contributions of punishment without considering them together.

Devaluation of youth welfare

The ideological element of necessity, rooted in the incapacitation, retribution and deterrence rationales finds additional encouragement in neglectful, iatrogenic social policy. The devaluation of youth welfare and a cultural disdain for help and support create a recipe for juvenile delinquency that triggers punitive sentiments, including the notion that punishment is necessary for social safety.
Rhetorical concern for children’s welfare notwithstanding, it is fair to say U.S. social policy effectively abandons youth and families. Historically, children have qualified more as private property than individual persons, and have occupied a zone of quasi-privacy (more true for elite white children than those at the bottom of the social hierarchy, particularly children of color) hostile to government intrusion (Minow, 1987). As partial property, children have not enjoyed the full “protection” of the U.S. Constitution, and continue to be subject to legal assault in the name of upholding the punishment rights of adults (Schwarz, 1989; Mohr, Gelles, and Schwarz, 2009). The dedication to the punishment of children underlies the reluctance to sign the UN Convention on the Rights of the Child (UNCRC) which prohibits corporal punishments by adults and places restrictions on the types of punishment youth can legally endure. From a human rights perspective, 1800 confirmed cases of abuse and neglect each day in the U.S. (Children’s Defense Fund, 2014) constitutes a crisis of human welfare. When considering the cycle of societal neglect and punitive excess, abuse and neglect stoke the punitive ideology as they are well substantiated precursors to delinquency, particularly the variety which causes serious social harm (Thornberry and Krohn, 2003, Loeber et al, 1999)

The crisis of human welfare becomes startling when considering child poverty and growing inequality. Especially considering the amount of wealth in the U.S., our levels of child poverty are staggering. One in five children is poor (UNICEF, 2014). The legacy of racial oppression becomes visible in child poverty where fully one third do not have their basic needs met and nearly half of the already poor face conditions of extreme deprivation. Child poverty delays cognitive development, stifles social opportunity, and increases the likelihood of a veritable buffet of bad outcomes including dropping out of high school, developing physical and mental health problems, and entering the criminal justice system (Farrington and Welsh, 2007).
Poverty in the context of inequality is particularly corrosive, particularly in ripening conditions for violence and serious delinquency. In the U.S., the story of the rich getting richer while the poor get poorer has continued and in 2012, 90 percent of the population earned less than half the income while the top 1 percent earned almost 25 percent (Saez, 2013). In a society where material gain is prized and the gateways to prosperity open only to a few, scholars have long recognized the links to social problems, particularly crime and violence (Merton, 1938; Messner and Rosenfeld, 1994).

Children are also failing to thrive in the nation’s schools. Half a million youth drop out of high school and two thirds of eighth graders in public school fall below grade level in reading and math (Children’s Defense Fund, 2014). For youth already caught up in the juvenile justice system, their educational performance lags even further behind (Kim et al, 2010). While school failure places kids on the path to delinquency and later social problems such as unemployment, substance abuse and graduation to the adult criminal justice system, it itself is becoming criminalized. The epic of harshness that gripped the criminal justice system in the last few decades infiltrated the education system as well (Simon, 2007) and the criminalization of education became an especially significant reality for marginalized students, particularly children of color (Kim et al, 2010). Schools have increasingly added police presence to schools to manage problems created by poverty, inequality and social neglect such as truancy and acting out giving further energy to the ideology of necessity at the heart of the punitive model. Black and brown children are twice as likely to be arrested, suspended and expelled for the same behavior as white children (US. Department of Education Office of Civil Rights, 2014) and the strengthening of the school to prison pipeline reflects yet another, related facet of racial injustice.
While a crisis of human welfare seems glaringly obvious, it is also consistent with historical and contemporary social policy of neglect (Minow, 1987). Then and now, social policy most helpful to youth and families, namely full, viable employment, comprehensive healthcare, universal high quality daycare and preschool, generous family leaves, high quality public education, and a thick safety net to ensure support in times of economic strain has met formidable political opposition. Funding to social welfare has traditionally been anemic, and simply dries up in the face of economic recession. Juvenile justice, the “step child” (Abramson, 2006) of even the human rights movement, has received comparably even less policy attention. Even with a relatively favorable political climate in the age of Obama, the resources dedicated to progressive juvenile justice reforms were not forthcoming. As one long time insider at the Office of Juvenile Justice and Delinquency Prevention commented to me during the recent elections where conservatives made significant Congressional gains, “If we couldn’t get it done before, how is it going to happen now?”

Her concern reflects a broader trend of youth abandonment at the policy level that transcends political climate. Even in favorable times, as she notes, it is hard to improve the collective the lot of youth, particularly youth in the juvenile justice system. While it is true liberals tend to support more generous social policy than conservatives, they are often just as guilty of gutting it as Bill Clinton did, or ignoring it in favor of more pressing political values such as Obama. The abandonment of youth is most certainly a political problem, but it is not solely one. Rather it is helped along by a corresponding cultural devaluation of help and support that transcends political affiliation. The need for help, particularly government help, is treated skeptically, even disdainfully. The cultural value on blame, discussed more below, emphasizes that personal struggle stems from personal failings and mismanagement. Help, in this context,
enables the weak and parasitic to leach off the system, and takes advantage of hard working taxpayers who have the good sense not to need anything from anyone.

If problems stem from personal fault, then help and support seem misplaced on the undeserving whereas punishment seems more fitting and just. A social policy of neglect, buttressed by a cultural degradation of social support, primes the punitive mentality of necessity in two ways. First, it enables the conditions where delinquency, especially the most harmful kind, thrives. In the face of serious delinquency, the ideological demand for punishment pulls with even greater force. It takes very few “high profile” cases of serious juvenile crime to trigger a veritable onslaught of punishment. The sense that it is necessary is especially keen when a juvenile has done something particularly harmful, even if that juvenile was long ago thrown away by society and has also seen the worst of social suffering. Such “punitive takeovers” are disturbingly common in the history of juvenile justice, notably in the harshest periods. Second, the cycle of neglect and punishment facilitated at the societal level is reproduced at the local level, creating an institutional climate ripe for harm and abuse. Youth who are already suffering seek respite in schools and social institutions like the juvenile justice system designed to help them, and instead of meaningful support, often find more neglect, abuse and a punitive mentality.

Legacy of racial oppression

The concept of necessity must also be understood in the context of our history of racial subjugation and marginalization. The idea of punitive necessity is problematic in a social order that devalues welfare, and it is especially disturbing when that systematic neglect reinforces and reproduces racial oppression. On one hand a legacy of oppression has produced social policy that segregates and marginalizes people of color (Alexander, 2010; Western, 2006; Massey and
Denton, 1993). The hardest hit places of societal neglect that breed serious street crime are the same places that have been hardest hit by the penal harm movement (Clear, 2007). On the other side, the products of that repressive social order interact with a repressive criminal justice system. We simply cannot consider the punitive model as separate from the “double system” of American Justice (Du Bois, 1903) that has historically and presently oppressed blacks and persons of color. The story is no less true for juveniles. We need only to scan recent (and numerous) headlines detailing the death of yet another young black male at the hands of the police, or notice the overwhelming numbers of black and brown faces at the deepest and harshest end of our criminal justice system to bear witness to the presently evolving legacy of racial oppression in juvenile justice.

From the inception of the juvenile justice system, black youth and youth from marginalized groups were the recipients of a different system of justice that treated black youth as more inherently criminal and less amenable to rehabilitation, a fact the black child savers worked to remedy (Ward, 2012), but that persists today albeit reframed in the discourse of risk. For black youth deemed worthy of rehabilitative “reform”, compliance with stereotypically “white” notions of how blacks should look, speak and act was critical to their “savability”, a problematic prejudice that has stayed with us, perhaps more insidiously disguised by the “at risk” and “good black kid” discourses (Marable et al, 2007). From the violence and brutality of slavery, to convict leasing, to Jim Crow, to our present racialized system of mass incarceration, surveillance, social out-casting, and the ever present reality of excessive violence in the face of police authority, punishment has been ideologically and practically connected to the suppression of racial groups.
The sense that punishment is necessary actively reinforces this two-part living legacy of racial injustice. In particular, scholars have noted the adaptability of racism and white dominance in a post-racial America professing “formal equality” and “color-blindness” and who elected a black man to the presidency twice (Alexander, 2010; Bonita-Silva 2006). Previously, undisguised racial hatred was the political norm used to justify slavery and the intricate legal web of Jim Crow segregation. Punishment was seen as an essential tool of slave control and later to “manage” the new population of freed blacks and its purported necessity seemed obvious and inevitable. But, successes in the civil rights era necessitated a mutation in the strategies of racial oppression. On one hand, seemingly race neutral non-criminal justice policies created a system of segregated deprivation (Massey and Denton, 1993; Sampson and Wilson, 1990), creating breeding grounds for serious crime where poor people of color tended to reside. At the same time, politicians linked crime with race, and justified harsh treatment in the name of “law and order”, also on seemingly race neutral grounds. The racialized ideology of necessity promoted the notion that overrepresentation in the criminal justice system was due to black criminality. It is not “targeting” or “persecuting” or “racial profiling”, but an unfortunate and rational response to the demographics of the people who commit the most crime. The reality of serious racial disparity even when controlling for criminal conduct has not budged the logic of racialized necessity much, and such logic lives on even when young black men continue to die in interactions with the police.

What now goes by “DMC” or “disproportionate minority contact” is a sanitized, underwhelming term that glosses over serious racial disparities at every level of the justice system, particularly on the harshest side (Piquero, 2008; Bell and Ridolfi, 2010). The overwhelming majority of youth serving life without parole sentences are kids of color, a
unsurprising outcome when they are seven to nine times more likely to be prosecuted as adults (National Council of Crime and Delinquency, 2007; Bell and Ridolfi, 2010), and are twice as likely to receive LWOP or functionally life depriving sentences as their white counterparts for the same offense (Equal Justice Initiative, 2014). There is a lot of head scratching about DMC in a system ostensibly committed to color-blindness and the belief that we exist in a “post-racial” America. While it has been extensively documented to the point where the Burns Institute claims we are “adoring the question” (2010), there continues to be a level of befuddlement as to how such extensive and sustained disparities exist. The idea of punitive necessity combined with the two-part system of social oppression and criminal justice discrimination can help shed light on the problem of DMC itself, and its resilience in the face of such extensive documentation and commitment to “pilot” programs.

The other, more insidious consequence, of the racialized ideology of punishment within criminal justice is that it focuses reformers on “formal equality” arguments. Scholars, rightly concerned about perpetuating myths of black criminality or the dangerous black male, tend to emphasize disturbing, persistent disparities between blacks and “similarly situated” whites, particularly at the deepest ends of the system for the most serious offenses. There is the sense that the oppression stems mostly from over-targeting, and other racially discriminatory processes within the criminal justice system. And while this is no doubt accurate, discriminatory criminal justice processes are not the only part of the racial oppression dilemma. What sometimes falls out of this discourse is attention to the other part of the legacy of racial injustice: policies of a racially stratified social order, which also subjects people of color to disproportionately more violence and crime (Nunn, 2008). When considering both sides of this dilemma, the idea that punishment is necessary is reinforced in two ways, both of which contribute to racial
discrimination. First, racialized social oppression continues to prime the punitive mentality through segregated deprivation. When conditions deteriorate to the point where crime becomes a routine feature of those communities, the idea that punishment is necessary is legitimated, even mandated. Add in the ideological quandary of effectively “seeing” a racial problem in a system that is “blind” to color, and a willful reticence to confront a living history of racial injustice, and the juvenile justice system is primed to punish kids of color more harshly.

Absent a racially informed structural consciousness that confronts how the legacy of race lives on in both a racially stratified social order and oppressive criminal justice system, we will continue to promote partial remedies such as mentoring that, while meritorious on other grounds, ignore the systemic roots of the racism and, indeed, the racism itself. A “hear no racism, see no racism” approach to eliminating DMC does nothing to alter the racialized sense of necessity put forth by the punitive model, and it does nothing to dismantle the politics of oppression that continue to further segregated deprivation that animate the idea of necessity and validate the DMC problem. Indeed, it may fuel them. If juvenile justice is going to dismantle DMC, it cannot continue to cling to “color blindness” and “have it both ways” where it talks a lot about DMC without confronting the enduring and evolving legacy of racial oppression that shapes the relationship between philosophy and practice in juvenile justice.

*The “blame ideal”*

The legacy of racial oppression at the core of the DMC problem also interacts with a legal and cultural value system that prizes personal fault and individual blame. The notion that blacks are the cause of their own demise and the sense that individual offenders are at “fault”, and therefore warrant punishment fuels the ideological power of the necessity of punishment. The
“blame ideal” refers to the ingrained belief that individual fault and personal blame comprise an essential element of why “bad things happen” to people. While structural level influences receive passing notice, the blame ideal’s primary method of conceptualizing and resolving systematic social problems revolves around the identification of fault and the assignation of blame. It reduces complex social phenomena to the actions of a few “bad apples” and it advances punishment as the rational antidote to problems stemming from personal fault. The blame ideal thrives in a sociologically neglectful society that devalues structural realities. It supplies a kind of immediate sociological analgesic—it soothes the public with simple explanations (i.e., it’s someone’s fault and he will be punished) while it numbs the underlying discomfort signaling deeper root causes need attention.

The DMC problem is particularly illustrative of blame ideology and its alluring, uneven rationale. Youth of color, their families and communities bear the bulk of responsibility for the reality that one in three black men will serve time, and that prison has become a normative “life course” experience for young black men (Petit and Western, 2004) much like marriage or entry into the workforce for young white males. They shoulder the burden of their children facing violence not only on the streets of their communities that have been stripped of social investment, but at the hands of authorities supposed to protect and serve them. The comfort of the blame ideal anesthetizes the living reality of “legal” racial suppression, growing inequality, shrinking “good” opportunities, and substantial social suffering including unjust and senseless death. Unfortunately, while the blame ideal makes it relatively easy to conceive fault on the part of criminal offenders, it works in the opposite direction in detecting the patterns of DMC. Ferreting out individual responsibility has been part of the DMC data gathering, but actually finding “racist” behavior at the hands of police, courts, or corrections has been much more
difficult. The blame ideal works in conjunction with colorblindness and racialized punishment to make it more palatable to blame individual victims for their own racial oppression, while it preserves the legitimacy of individual actions of abuse and systemic patterns of persecution.

The cultural elevation of fault and blame also help explain the problem of reforming punishment in juvenile justice that has plagued the system since its inception. Acceptance of blame for behavior is seen as an essential precondition to the reform of behavior, and punishment is the vehicle that not only assuages the public that blame has been assigned, but serves as the means by which youth come to accept that blame. However, the notion of fault and blame has also taken root in rehabilitation, justifying “tough love” type practices that reframe punishment, such as boot camps, restraints, and isolation as “therapeutic” practices that ultimately promote harm and encourage institutional abuse. Even therapeutic practices that ostensibly disavow punishment often come with a substantial dose of fault and blame. Take cognitive behavioral therapy, or CBT, for example. At the base of these programs is the notion that it is a person’s thoughts—not their deprivation or mistreatment—that forms the root of their behavior problems. CBT prescribes a therapeutic regimen of “reprogramming” that fundamentally ignores or downplays harsh social conditions and the reality of significant suffering, and encourages personal ownership of problems that have as much to do with structural level realities as “wrong thinking” and behavioral mismanagement.

Blame empowers the idea of the necessity of punishment already present in the incapacitation, retributive and deterrence rationales, giving it an extra boost that makes it difficult to conceive and implement alternatives apart from and beyond punishment. What I am calling “punishment plus” reforms attempt to address the problem of too much punishment while appeasing the ideological demand of its necessity by allowing punitive ideals to shape
purportedly non-punitive alternatives or by incorporating punitive practices, like confinement, into supposed non-punitive options. For example, some “alternatives” to prison use “shock” incarceration, a short “jolt” of confinement that is swiftly and certainly delivered in violation of drug treatment programs or community based probation and parole. “Punishment plus” reforms are problematic because they encourage the over-reach of punishment, and punishment itself, no matter how historically rooted or tied to notions of justice, is problematic from multiple vantages including developmental, psycho-social, labeling, human rights, and efficacy perspectives.

It is not as if alternatives to punishment have not been presented. I have already covered rehabilitation in some depth, but restorative justice and non-intervention, to take two significant examples, also claim to move beyond the punitive model. But even in these examples, the notion of “accepting blame” and “finding fault” so philosophically connected to the necessity of punishment, creeps in, tainting the practices with punitive ideals. Restorative justice, for example, has been critiqued for incorporating too much “shame and blame”, and for relying on traditional punitive sanctions instead of the broader idea of reparation to victims (Haines and O’Mahony, 2006; Levrant et al, 1999). Similarly, non-intervention began from the premise that most intervention was unnecessary and too punitive. But, doing “nothing” morphed into a lesser series of “informal” penalties that “widened the net” of social control (Austin and Krisberg, 1981; Cohen, 1985) and set the stage for the troubling “violation of court order” variety of delinquency that served as a gateway to detention and harsher sanctions.

_Punitive optimism_

The inflated philosophical role of punishment is evident in the disparity between pessimism surrounding social policy and faith in punishment. While the social policy most
helpful to kids and families fails to pass, the prison industrial complex flourishes. The degradation of youth welfare and mistrust of support, racialized ideology of punishment and the blame ideal create conditions whereby punishment must act as a kind of catchall for weak social policy in other areas (Currie, 1998). The juvenile justice system, in the absence of viable alternatives for marginalized youth, acts as a de facto education, medical and mental health centers, although, unsurprisingly it does not do these things very well. The failure of the justice system to use punishment for social good perpetuates the cycle of mistreatment and primes the punitive mentality when kids come out worse than when they went in and act accordingly. Recidivism rates, while often not tracked on any national level, remain high in the states that track it. In many states, three out of four youth return to confinement within three years after release (Mendel, 2011).

I am not dismissing that many recognize the serious limits to punishment, including that it is not a particularly effective “something” to keep kids out of trouble. Scholars have carefully documented the ineffectiveness of punishment (Bishop, 2004; Scott and Steinberg, 2008; Krisberg, 2003; Currie 1985; 1998; Piquero et al, 2011; National Research Council, 2013; Petrosino et al, 2010). It is well known that punishment is generally bad for kids. Even relatively minor involvement in the juvenile justice system tends to exacerbate existing difficulties and increases the risk that youth will commit more crime (Petrosino et al, 2010; Scott and Steinberg, 2008). It disrupts their development, erodes their education, compromises their future outcomes, exacerbates existing problems, stigmatizes their identity, and, too often, threatens their physical and mental health and sense of safety (Beck et al, 2012; National Research Council, 2013; Mendel, 2011). There has been concerted advocacy aimed at reducing punishment in ways that is developmentally appropriate for youth and that attempts to treat them more fairly (National
Research Council, 2013; Vincent et al, 2012; Scott and Steinberg, 2008; Bishop, 2012). But those positions have developed in response to punitive excesses; the legitimacy of punishment itself has been preserved. Despite its known limitations, punishment has a dominant place within juvenile justice.

Given what we know about punishment, and a long, fraught history of human rights abuses in juvenile justice, we should be punishment cynics, or at least realists deeply skeptical of the process of punishment as discriminatory, ineffective and damaging. Instead, infused into the philosophy of juvenile justice is a type of punitive optimism, part of a “package” of ideologies that accompany punitive necessity and increase its ideological weight. Punitive optimism is a spirit that sees punishments value before its harmfulness and relies on punishment as the default normative standard on which other alternatives are judged. On one hand, punitive optimism, ascribes punishment all manner of corrective benefits. A good regimen of punishment teaches responsibility, self-discipline and moral values. It motivates personal change, and a desire to do better. Even the mere “spectacle” of potential punishment conveys motivating benefits as the ongoing popularity of scared straight programs that persist in spite of their documented inefficacy can attest.

Again, I am not denying that many committed scholars and advocates thoughtfully and sternly critique punishment as ineffective and inappropriate for juveniles. But the spirit of punitive optimism and the ideology of necessity have survived in the face of conscious criticism, and creep into alternative practices sabotaging reform efforts. Consider the consequences when youth are assigned to diversion or community based rehabilitation efforts. Sanctions are often used to enforce compliance, reflecting the idea that not punishing or threatening to punish is somehow insufficient. Without the motivating effect of punishment, non-punitive reforms will
fail to achieve behavioral change. In fact, the threat of punishment is among the least effective ways to motivate change, particularly among adolescents facing significant social deprivation. Rarely in discussing with youth who turned their lives around, is the threat of punishment or punishment’s severity cited as a motivator (Ward and Maruna, 2007).

But the ideology of necessity and punitive optimism operates in other insidious ways. It grants punishment a kind of normative status against which all other responses are compared. Punitive optimism is at work when, despite mounds of evidence of its ineffectiveness, study after study continues to qualify the conclusion that it, in fact, does not work, a phenomenon Elliot Currie has called “spurious prudence” (2011). Faith in punishment makes it difficult to acknowledge its significant flaws, even when they have been repeatedly substantiated. Reforms, like rehabilitation, on the other hand, require even more documentation of efficacy to gain legitimacy and comparably little evidence to conclude they don’t “work”. The spirit of punitive optimism and the ideology of punitive necessity shed light on how one meta-analysis critiquing the effectiveness of rehabilitation in 1974 continues to generate skepticism about rehabilitation, but many reports, over many more years, documenting the ineffectiveness of prison have failed to generate such widespread disillusionment with punishment.

The use of punishment as a normative standard poses an additional, somewhat vexing problem. While more evidence of effectiveness may be required to transcend faith in punishment, we may, paradoxically, be satisfied with reforms’ comparably low level of success. When the relative ineffectiveness of punishment is used as the standard on which improvements are measured, reforms that do relatively little in terms of other outcomes that might be important like improved health, education, and employment may actually pass the relatively weak test of being “better than prison”.

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Thus, punitive optimism and the ideology of necessity mean that reformers and scholars may “spin their wheels” attempting to document success against a standard that is problematic in the first place. It places undue pressure on reforms in terms of producing a lot of evidence for success that, when judged against the comparably ineffective norm of punishment, is less than desirable. While this is a problematic outcome in and of itself, measuring reforms against a punitive standard and adopting punitive ideals as part of that reform process, slows progress on potentially more meaningful alternatives. In other words, the ideology of necessity and spirit of punitive optimism thwarts juvenile justice innovation. Historically, the juvenile justice system has struggled with too much punishment, trying to provide help that is not harmful, and widening the net. It has been intolerably slow in responding to punitive failures such as DMC, prosecuting youth as adults, and issuing harsh, life depriving sentences. Simply continuing to promote reforms hijacked by punitive ideals and judged on punitive standards will slow improvement, limit the potential of new ideas, and allow unacceptable levels of punishment and discrimination to persist within juvenile justice.

The spirit of punitive optimism assumes punishment’s value before its harmfulness, and a racialized intuition about the necessity of punishment perceives inherent fairness before its injustice. But the punitive model contributes a separate notion of legitimacy, grounded in moral righteousness and rationality, which the spirit of punitive optimism and racialized ideology of necessity reinforces. The retributive philosophy emphasizes that punishment should be accurate, proportional and determinate, but the fact that punishment often fails on these fronts does not disturb the legitimacy of punishment itself as a morally just response to crime. Wrongful convictions, blaming youth who are not culpable for developmental reasons, overly harsh punishment that is discriminately applied are failures of implementation, not punishment per se.
Similarly, the deterrence ideal preserves the morality of punishment in the name of crime prevention and public safety, and the fact that punishment does not actually prevent crime or increase safety very much does not disturb the integrity of punishment. Instead ineffective punishment represents failures of calibration—misapplications of certainty and celerity. In addition to its moral qualities, both retributivists and deterrence advocates conceive of a rational, calculable punitive ideal. Punishments are neither random, biased, nor haphazard, but systematic, neutral and carefully measured, issued precisely in order to meet the demands of justice and public safety.

Together the morality and rationality aspects of punitive legitimacy create a presumption favoring the propriety of punishment that masks injustice and renders juvenile justice vulnerable to punitive takeovers and human rights abuses. The racialized ideology of necessity in a climate of color blindness, the blame ideal and its numbing sociological effects, the neglect of youth welfare and cultural devaluation of support, its associated punitive optimism and presumption of propriety encourage acceptance of punishment when it should warrant rejection and faith when it should merit serious doubt. For example, the presumption of propriety has made it difficult to undo exceptionally harsh practices such as the death penalty, eliminated only a decade ago under serious international pressure, and life without parole, which was recently narrowed but still survives. Meanwhile, sizeable racial disparities that derail the lives of black and brown youth continue to accumulate, the prosecution of youth as adults persists, as do functional life sentences where juveniles charged with serious and chronic offenses can expect to spend the bulk of their lives behind bars.

In essence, the presumption of propriety makes it difficult to determine when punishment crosses the line and becomes racially unjust, too harsh, and too frequent. Exceptionally punitive
practices serve only to stretch our sense of what’s tolerable. Recent, modest progress on curbing the punitive explosion has encouraged, somewhat paradoxically given the excesses, the sense that the punitive era is behind us (Simon, 2012), and magnifies the sense that punitive rationality has been restored. Again, the idea that current levels of punishment have been restored to reasonable levels corresponds to ideology of punitive legitimacy, but fails to account for how little the punitive needle has budged, and how much harsh punishment remains. While the incarcerated population has declined from approximately 2.3 million people incarcerated to about 2.2 million (BJS, 2014), the present level of incarceration remains staggeringly, intolerably high especially in relation to the rest of the world. Some places continue to increase their prison populations even as the rate of growth has slowed. Others have changed the dynamic of incarceration, shuffling individuals in and out on more “temporary” stays that reduce overall counts. In juvenile justice, recent Supreme Court decisions limiting life without parole fuel the sense that reasonable punishment for youth has triumphed over punitiveness. But, again, the ideology veers away from the reality of ongoing severity. The story of Kenneth Young, a young black male sentenced LWOP for committing accessory to armed robbery when he was fourteen is illustrative. Kenneth sought resentencing after the Supreme Court outlawed LWOP in non-homicide cases (Graham v. Florida) Now twenty-five and a model inmate, Kenneth’s initial role in four armed robberies was that of a “lookout”, perhaps the most minimal role available to him. His attorneys were cautiously hopeful that Kenneth could earn release post-Graham, after spending eleven years in prison. Instead, he was issued four consecutive forty year sentences. He has the possibility of parole at age 45. He was not sentenced to life, certainly, and his sentence is legally permissible, but it is not reasonable. In other words, the presumption of
propriety creates a moving target of what’s an acceptable average level of harshness, and the recent epidemic of punishment seems to have moved the baseline upward.

Ultimately the presumption of propriety and the spirit of punitive optimism together create conditions that incentivize punishment, laying the philosophical foundation for periods of exceptional punitiveness, or “punitive takeovers” even when such practices seem far-fetched. The “get tough” movement in juvenile justice that expanded adult prosecution, increased the use of incarceration, and eroded protections against abuse corresponded to a broader pattern of mass incarceration that seemed to come on the heels of a rehabilitative “moment”. While it is certainly true that the amount of incarceration of the past several decades was unprecedented and unexpected, it is most doubtful that it came blindly out of nowhere (Currie, 1998; Tonry, 2009; Garland, 2001). Rehabilitation has typically been subordinate to the punitive model, and has always been in tension with and subject to punitive ideals (Ferdinand, 1989). The devaluation of youth welfare has remained generally consistent, stoking punitive sentiments when political conditions become favorable. The brief policies of the “Great Society”, so often touted as evidence of progressive triumph that heralded the end of the prisons, never enjoyed the default legitimacy afforded punishment. The programs were under-resourced and under-conceptualized, and encountered pitfalls of the blame ideal and deep cultural mistrust of social support. In other words, punishment has always carried disproportionate philosophical weight, enjoying a heightened legitimacy even in periods of relative openness to other models of justice. To borrow from a sports analogy, punishment enjoys the ideological equivalent of a “head start” while the other models start off “handicapped”, making it easier for punishment to shut out competition and dominate the philosophical field.
Conclusion

The idea that punishment is necessary is embedded in the punitive justifications of incapacitation, retribution and deterrence. The notion of necessity, however, contributes to an inflated role of punishment in the U.S. where the social policy is neglectful, racial oppression is furthered through segregated deprivation and discrimination within the criminal justice system, and principles of blame and fault receive undo weight in explanations of personal struggle. The idea of necessity engenders punitive optimism, and a kind of enduring faith in the propriety of punishment. The idea of punitive necessity, empowered in this social context, occupies too much of the philosophical field in juvenile justice. It “lurks” in many non-punitive reforms, ready to co-opt them partially, or take them over completely. The “throw away” option, described in the rehabilitative chapter, represents how punitive necessity forms the fallback position of the juvenile justice system that was founded on the idea that punishment was not necessary for kids.

The legal justification for the juvenile court rests on the idea that the state would act as a parent to children in trouble. When exercising parens patriae authority, the court stands in loco parentis, or in the shoes of a parent (Ex Parte Crouse). But, as we have seen, it has not performed the kind of parenting most would conceive as healthy or helpful to youth development. It does not, in short, practice what it preaches, and is legally required to do, very well or very often. But, what if the juvenile justice system took the idea of parenting youth more seriously? What is the role of punishment in a healthy parenting system?

The answer, according to the American Academy of Pediatrics among other public health organizations, is a very small, very limited one. In fact, most public health recommendations for
parenting practices, including some of the very parenting programs that juvenile courts will order parents and kids to take part in, argue punishment is almost always unnecessary. Punishment, especially harsh punishment, is harmful and should be avoided. Even “mild punishment” such as privileges removal or isolation from others should be used sparingly and in the context of praise and rewards, and opportunities to learn. According to child development experts, punishment actually does not teach particularly well. It does not help youth learn what they are supposed to do, and it removes responsibility from the kid to learn not just what is right but why it is right and how to get it right. When punishment is used regularly, it teaches youth to avoid punishment instead of the problem behavior, it stigmatizes them (the ability to internalize shame is very powerful in children), and it can increase their anger and aggression.

When thinking about raising healthy young people, discipline is distinguished from punishment (American Academy of Pediatrics, 1998; 2014; Center for Early Education and Development, 2009). Discipline involves teaching children acceptable and unacceptable forms of behavior (Center for Early Education and Development, 2009), and it is essential to healthy growth and development. Punishment is the least effective form of discipline (American Academy of Pediatrics, 1998; 2014). Healthy discipline, on the other hand, fosters self-esteem and self-direction as well as empathy, and “decision-making” skills. The most effective forms of discipline include those which build children up and help them learn including: praise and rewards for desired behaviors, opportunities to participate and “try” again, modeling what’s expected, emphasizing expectations with clear, consistent limits, and natural and logical consequences for violating limits. In contrast to punishment, consequences “teach” the behavior that is expected, and flow either naturally or logically to the behavior. Punishment, in contrast, is
not logically related to the behavior at hand. Sending a child to detention for a truancy infraction, for example, does not actually link logically to going to school.

According to the American Academy of Pediatrics, there are three basic disciplinary styles: permissive, authoritarian and authoritative. Permissive parents have few boundaries or limits. The child or adolescent does whatever they want to do either because the parent is absent, overwhelmed, or committed to the idea that children should be “free”. A permissive parent either does no discipline or swings between being too lax and being too harsh. Kids typically find this environment confusing as they do not know what the rules are or how to conform their behavior to different situations. Authoritarian parents, on the other hand, believe punishment is important, even crucial. They strictly enforce a wide range of rules and have little tolerance for even small infractions. This approach tends to govern with fear, and it often breeds defiance, escalates aggressive behavior and encourages avoidance of punishment instead of unethical actions. Finally, authoritative parents have a few important rules, and are clear about what they are and why they are there. They try to avoid punishment, and instead rely on setting situations up for children to succeed, communicate consistent, clear expectations, allow natural and logical consequences to “teach”, and offer a security for children and youth to try and fail. Kids with authoritative parents tend to develop self-esteem and purpose, empathy for others, responsibility and decision-making skills; qualities that most parents hope they instill in their children. This review of styles is not meant to demonize parents or say there is only right way to parent. Children are resilient and parents are not perfect. But, it is also true that we know quite a lot about punishment in the context of raising children. We know quite a lot about the problems of excessive punishment in the juvenile justice system. If the state were to begin to take its parental
role seriously, then society has an interest in the court parenting in a way that results in healthier kids and that path involves substantially less punishment than now exists.

So what does a state whose juvenile justice system takes its authoritative parental role more seriously look like? First, it creates social policy that supports healthy families and encourages youth development in the first place. This means social policies that guarantee families have a means of support while not having to sacrifice “being there” for their kids. Full employment at livable wages, generous paid parental leave, high quality day care, and high quality education that offers a variety of meaningful opportunities for growth and development need to be prioritized. It systematically and thoroughly tackles the issues of racial bias on both sides of the system. Continuing to fuel a delinquency pipeline through social neglect and policies that segregate deprivation will only stoke punitive sentiments and place political pressure for harshness on the juvenile justice system, even if it is committing to embracing discipline over punishment.

Second, the juvenile justice system needs to assume teaching and nurturing as its primary roles. Instead of warehousing youth or sending them in and out of institutions, the mission and practices of the juvenile court should center on the idea of discipline including the positive forms of it. Illogical punishments need to be eliminated. Detention, in most cases, would be unnecessary. Participation in activities that provide meaningful opportunities to learn expected behavior, in the broader context of social policy that supports their growth and development, would be the “norm” for youth, especially for youth dealing with aggression and violence. I am not simply proposing offering more kids anger management programs. Rather, I am proposing a kind of full service model that includes “transformative interventions” (Currie, 2012). The full service model is most analogous to what a parent provides: security, safety,
opportunities to participate, encouragement, structure and limits, and a “stick with it” mentality. Most parents do not abandon their children when things get difficult, and a juvenile justice system exercising its parental role should not either. Similarly, a parent cannot say “it’s not my job” to ensure their child is fed, safe, and educated. The current trend of bracketing off the social issues as the job of some other agency, or the family, or the community would not be an option if the juvenile justice system were to take its parens patriae authority seriously.

Given the U.S. penchant for punishment, these recommendations may seem downright unrealistic, and I would argue, knee jerk resistance is part of the “package” of ideologies that accompany punitive necessity. But, the knowledge that more punishment is not what most kids need, even those kids who have gotten in serious trouble has already prompted programs that attempt to do something different. The Homeboys program in Los Angeles, for example, provides this kind of full service model that includes teaching, services, and opportunities. Some robust models of restorative justice also envision a sustained effort at helping youth make amends, and find stakes in the community. Finally, multi-systemic therapy, which emphasizes teaching youth new skills at home, at school and in their communities, could also be extended along these lines (Henggeler, 2011)

A second critique of this proposal might be that favoring discipline over punishment ignores the needs of victims. Notwithstanding the well-known point that many kids who commit delinquency are also victims themselves (Finkelhor et al, 2009; Widom and Maxfield, 2001), it is not necessarily the case that punishment satisfies all, or even most, victims. Many victims want reassurance that the crime will not happen again, and punishment often cannot provide that assurance. Instead, punishment may make further offenses more likely. Second, the deeper issue is that victims suffer greatly and inflicting suffering seems necessary to respond to unjust and
senseless pain. This is part of the ideology of punitive necessity grounded in retribution. The pain and suffering are real, and I think provoke a much more serious set of questions. To what extent can we afford, in the interest of young people, victims and society as a whole, to continue with a set of policies that rely on reactive punishment to “satisfy” victims? What people want, and indeed need, is the sense that they are safe and secure in the most basic sense. It is ironic, and problematic, that the needs of victims are often placed front and center in criminal justice practices to justify punishment that does little and is often harmful, but do not come up with such fervor to pass social policies that could create public safety in the truest sense, in the sense where these sorts of crimes are not happening or are much more rare and where people feel safe in their homes and communities.

Based on the current state of U.S. juvenile justice, the bulk of what happens to kids involves punishment. It is illogical, unconnected to the offense, and degrades and demoralizes. Embracing discipline means adopting programs designed to promote learning and ensuring punitive ideals are not corrupting them. And, it means remaining vigilant and reflexive to the process of helping kids. Parents are not perfect and the juvenile court will not be either. It is not a matter of just adopting one program, or just decriminalizing all but the most serious and chronic offenses. Instead, it requires a sustained commitment to doing what it takes to teach youth without harming their development and compromising their learning. This is a commitment that needs to come from social policy more generally, not just juvenile justice. When parents realize what they are doing is not working or is not in line with their values, there is the opportunity to change it in the very next interaction. It requires paying attention, and being willing to change. It requires trying and trying again. It is modeling the very process that we hope that youth will internalize and implement.
CHAPTER 4: RIGHTS

The theories of moral, social, political and legal philosophy presuppose certain empirical propositions about man and society. If these propositions are false, then the theory (even if coherent or formally correct) is materially defective and practically inapplicable.

J.G. Murphy, 1973

You can’t talk civil rights to people who are hungry.

Eleanor Roosevelt

Historical skeletons are put in cupboards because the political need to be innocent of a troubling recognition; they remain hidden because of the political absence of an inquiring mind.

Stanley Cohen, 2001

Chapter Overview

A rights based juvenile justice system has been seen as the antidote to the failures of rehabilitation and the harms of excessive punishment. But, in the U.S., children’s rights lose out in a culture of justified exploitation that validates neglect of their welfare in the service of larger, more powerful interests. Even if the U.S. were to adopt a robust human rights model for children’s rights, the “ambivalent” model of rights would continue to prevail. The Children’s Convention on the Rights of the Child (CRC) does not require that states put youth first nor does it require that children’s interests trump other interests. In a battle of interests and “rights balancing” common in Western liberal democracies, especially within U.S. culture that also justifies children’s marginalization, children’s rights would continue to lose out. But robust human rights frameworks, along with additional shifts that reprioritize children, social justice,
and reject justified exploitation, do suggest how a “youth first” society could ensure meaningful protection of children’s welfare.

**Literature Review**

The use of a “rights strategy”, while complex, contradictory and contested, has been an important part of many sustained and successful social movements (Williams, 1991; Crenshaw, 1998; MacKinnon, 2006; West, 1998). According to some critical legal scholars (Gordon, 1998), rights are nothing more than “shorthand symbols for social practices that people collectively value and maintain” (p. 658), but to others they represent one of the strongest weapons against oppression (Freeden, 1991). Rights based social movements have been critical to advances in racial justice, feminism, sexual and gender identity equality, environmental protection, as well as child welfare. Grounded in “western” liberalism, rights refer to legally guaranteed freedoms, protections, and entitlements that are, at their best, universal, inalienable and indivisible (Freeden, 1991; Copelon, 1998). The notion of rights as “natural” and inherent to all mankind was advanced by political philosophers like John Locke, who maintained that rights to life, health, liberty and property belonged to all equally (Dunn, 2003). Locke, and others like him, argued the freedom to enjoy these “natural” rights with as little interference as possible from others shaped social contract theory and other fundamental political ideas adopted by Western democracies (Dunn, 2003). Cook (2009) argues that human rights guarantee full participation in civic life, and include civil, political, social, economic, cultural, and environmental rights. Negative rights offer protection from harmful actions of others such as the right to be free from torture or cruel and unusual punishment, while affirmative rights guarantee certain entitlements such as education, healthcare, and basic economic security (Scranton and Haydon, 2009; Mendez, 1997). A human rights “ideal” encompasses a range of substantive areas
and include both negative and positive freedoms that are universally guaranteed, interdependent on each other, and indivisible (Copelon, 1998)

The human rights movement, embodied by the Universal Declaration of Human Rights (UDHR) was adopted in 1948 after World War II. It emphasizes that every person, by virtue of their humanity, merit certain freedoms and protections including the rights to life, liberty, security (Article 3), movement (Article 13), affiliation (Article 16), thought (Article 18), expression (Article 19), and “economic, social and cultural rights indispensable for his dignity and the free development of his personality” (Article 22). The UDHR, while not expressly targeting children, nonetheless included them. People, in the UDHR, include children and adults from every nationality, religion, gender, and race.

The inclusiveness of the human rights movement, at the rhetorical level, was seen as essential to domestic and international peace and security in the wake of widespread crimes against humanity in World War II (Copelon, 1998). The abuses and atrocities perpetuated by many leading “enlightened” states through direct action, indifference, and complicity provoked an international preventative response in the form of the human rights movement. After the UDHR, a series of subsequent human rights treaties, emphasizing the indivisibility and universality of negative and positive rights were enacted including the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966), the Convention on the Elimination of All Forms of Discrimination Against Women (1979) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). All of these treaties applied to treatment of adults and

The CRC lays out a rights agenda in 54 articles that guarantees certain freedoms and protections to all youth regardless of race, class, gender, religion, or sexual or other status (Article 2). It holds that youth have a right to be free from all forms of physical and mental violence, abuse, neglect and exploitation (Article 19), a right to the necessities of life including subsistence (Article 27), healthcare (Article 24) and free and equal education (Article 28), and proscribes “torture or other cruel, inhumane, degrading treatment or punishment” (Article 37). Article 40 specifically addresses children in conflict with the law, and states that all children:

“have a right “to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society (Article 40, §1)

In terms of juvenile justice, the CRC further encourages a high age of criminal responsibility, ideally at least 18 years, and that all children, regardless of their offenses, are treated in a separate juvenile court. For kids who commit crimes, the CRC urges diversion out of court whenever possible and treatment oriented dispositions informed by the child’s best interests and legal protections, and that are proportionate to the offense (Article 40, §3(a), 3(b), §4)

The CRC has been one of the most widely and quickly adopted human rights treaties. Only two states –Somalia and the United States–have resisted ratification. While the U.S. is not
a signatory to the Convention, the model has received significant attention from rights advocates (Mohr, Gelles and Schwarz, 2009). The principles of the CRC, while in no way binding on the U.S., were used in Supreme Court litigation that finally ended the death penalty (Roper v. Simpson, 2005) and limited life without parole (Graham v. Florida, 2010; Miller v. Alabama, 2012), as both practices make the U.S. an international standout and directly contravene the popular CRC. In justifying its resistance to ratification, the U.S. has claimed that the CRC interferes too much with the constitutional rights of parents to discipline their children. Actions that would otherwise constitute assault, and that violate the CRC, are still permissible for parents as long as they are not “excessive”. But it is also clear that the U.S. juvenile justice system, especially practices involving excessive use of confinement, persistent, widespread racial disparities (Haywood Burns Institute, 2011), the continued use of life without parole, the prosecution of youth as adults, and other harsh dispositions also likely violate articles 2 (non-discrimination), 3 (best interests), 6 (right to life and development of potential), 37 (prohibitions on excessive punishment including LWOP for persons under 18) and 40 (high age of criminal responsibility; principles of diversion and minimal, treatment oriented intervention).

Despite the mobilizing power and widespread appeal of rights to “Western” notions of democracy and freedom, states often fall short of guaranteeing rights in reality. The CRC, for example, while widely endorsed is also commonly violated (Goldson and Muncie, 2009). A recent study of children’s exposure to violence worldwide found not only that violence against children was widespread in contravention to the CRC, but it was also often ignored, especially the most common forms found in homes, schools, institutions and communities (Pinheiro, 2006). Children in the juvenile justice system, according to the study, are especially vulnerable to the most severe forms of violence (Pinheiro, 2005). According to Abramson (2009) while youth
have been neglected in all areas, violations of the juvenile justice provisions of the CRC are often most serious, yet seen as most acceptable because juvenile justice is the “unwanted” child in the CRC. He argues that the convention itself marginalizes youth justice because crime violates the ideals of innocence, dependence, and vulnerability of the child that the convention was founded on. Adolescents were not part of the original conception of the children’s rights treaty, and were added on later. Instead of changing the document to “youth rights”, the convention retained the language and symbolic imagery of the “child”. Young people involved in the law, despite their histories of victimization and abuse, often contradict the image of the child the convention set out to protect.

The embedded processes of power and culture embedded in the idea of “rights” has also been neglected in the human rights movement, and sheds light on the problem with compliance of the CRC. The United Nations has been criticized for its “top-down” approach using state elites to draft and ratify rights documents without gathering local input, and failing to gain the necessary cultural legitimacy (Harris-Short, 2009). In excluding many of the people whom the rights were designed to protect, they orchestrated the rejection of the human rights movement as just more evidence of Western domination and imperialism. In the CRC, specifically, customs surrounding family life may have longer standing credibility than an abstract notion of “rights” that citizens were not involved in developing at the local level. While recent United Nations forums on children’s rights have involved young people, the initial document was drafted without consulting any actual children. To the extent that human rights would be endorsed if culturally legitimate, failing to respect the people whom rights are supposed to protect may also promote political manipulation that undermines the values of human rights more generally.

Representatives of countries can “sign on” to rights treaties that may have very little appeal or
rationale in their own countries for political bargaining power and then use “cultural diversity” to explain why their countries have failed to comply (Goldson and Muncie, 2009; Harris-Short, 2009).

Even among rights movements with plenty of grass roots support, democratic states can still can ignore those rights, limit their full potential through narrow interpretation, and fail to create the policy and institutional conditions necessary to ensure full access and protection from rights models (Gordon, 1998; Scheingold, 1974; 2004). For example, rights must often compete with other rights in messy battles of “interests balancing” where winning is contingent on the amount of wealth and power of the interests under consideration. (Scheingold, 1974; 2004; Kennedy, 1998; Crenshaw, 1998; Williams, 1991; Williams, 1998). Critical legal scholars such as Stuart Scheingold (1974, 2004) maintain that an ideology of rights can serve to reinforce existing power imbalances in society. To the extent that rights themselves exist, he argues, the myths surrounding them may hold more power than the protection they confer. For example, Scheingold argues that rights can perpetuate myths of equality and fairness and work to disempower efforts toward social change and limit the potential of rights to advance deeper, more widespread justice. The failure of the U.S. to ratify the CRC may also stem from such rights mythology reinforcing the misguided, and inaccurate perception of superiority of U.S. Constitutional rights (Copelon, 1998).

The Bill of Rights is the U.S. “gold standard” when thinking about rights and freedoms, and generally refer to a set of protections from abuse of power by the state. But the ideas of freedom and inclusion invoked by popular discourse on rights belies a much more restricted and exclusive history. Children, women, blacks and other marginalized groups have been historically excluded from the scope of the Constitution and the protections it affords. They have
had to fight and fight hard for legal personhood (as opposed to property status) whose rights are ‘equal’ to other people, particularly property owning white men (Williams, 1991; Krenshaw, 1998; MacKinnon, 2006; Minow, 1986; Goldberg, 2002, Freeman, 1998). The legacy of exclusion continues to infiltrate and complicate rights based jurisprudence. Voting rights, for example, went through a period of intense Jim Crow based obstructions, followed by the more inclusive and protective Voting Rights Act, to the present, where a resurgence in restrictions to the Voting Rights Act that will primarily impact the poor, transient, and persons of color once again signals retrenchment of this essential democratic right (Shelby v Holder, 2013).

In addition to excluding who has access to rights and limiting their expression, U.S. constitutional rights, even the most treasured, are often “negative” in the sense that they do not apply to “private conduct” and usually narrowly limit the state’s conduct, rather than ensuring secure, just outcomes (Copelon, 1998). The right to free speech, for example, is not really a positive right to say what one wants. Rather it is a negative right to be free from unwarranted speech regulation and suppression of certain types of protected speech by the government (Kairys, 1998). The state’s duty to ensure protection is often similarly restricted. For example, the Supreme Court found in Deshaney v. Winnebago Country (1989), that the state’s failure act to protect a child from repeated, documented, suspected abuse that eventually resulted in severe brain damage did not trigger the “life, liberty, property” protections of the Due Process Clause of the Fourteenth amendment. In this case because the actual injuries were not inflicted by state actors, but the child’s father, the court construed it as private violence, and even fairly significant evidence of “state indifference” to the known risk did not trigger the state’s duty to ensure the liberty protections of the Due Process Clause of the Fourteenth amendment.
Similarly, the “march” toward children’s constitutional rights in the U.S. has remained incomplete, inconsistent, and often irrational (Minow, 1986; 1987). Children have historically been considered privately owned family property, like women and slaves, who fell outside the scope of the constitution. Indeed it was the constitutional rights of the property owners that merited protection, and the legacy that the interests of children are “best represented” by the interests of their parents lives on as a vestige of their status as property. The idea of “shared interests” has influenced how judges determine if and when a juvenile’s right trumps a parent’s right. What happens in this line of legal reasoning is that the youth’s right is often seen as unnecessary because the parents’ rights are presumed to “cover” any needs the juvenile may also have, and introducing new, independent rights for children can actually harm them and disrupt the vested adults right to the custody and control of children. Recent trends in law affecting children’s fourth amendment rights, for example, continue to reflect parent’s interests trumping juvenile privacy rights, even when the circumstances are similar to an adult and when the youth would have the greatest expectation of privacy (Henning, 2011).

The story of children’s rights, however, is not one of uncomplicated abuse of paternal authority. Instead, progressives have secured protective legislation for kids on the grounds of their developmental immaturity and need for protection from potentially abusive, and exploitative adults. Education laws, labor reforms, child protection statutes were enacted in the spirit of “child saving” that also created the juvenile court (Minow, 1986; Gettis, 2000). The idea of the juvenile court was that children had a right to a separate system, one that considered their developmental status and helped meet their needs. While the altruistic purposes have been validly questioned (Platt, 1977), the idea that children merit protection on the grounds of being different from adults lives on today and was instrumental in ending the death penalty (Roper v
Simmons) and limiting life without parole (Graham v Florida; Miller v Alabama). Science has also endorsed the “children are different” principle with a blossoming body of neuropsychological findings that suggest children’s brains are different from adults particularly in the areas that influence impulse control and decision-making (Scott and Steinberg, 2008).

Like the quandaries of the “same/difference” debate that has complicated women’s rights advocacy (Minow, 1986; Taub and Schneider, 1998), treating youth as dependent and needing protection has been a double edged sword. Progressives who wanted to also protect children’s individual autonomy, for example with increased due process rights, criticized the paternalistic “protective” zones such as the juvenile court as being “out of sight, out of mind” havens for abuse and neglect. In this line of the thinking, the paternalism that had been used to “shield” youth from adult society, actually subjected them to the worst of it. In In Re Gault, a young Gault had been in a harsh institution for over seven years for a prank phone call, and he had no protection from having this “treatment” imposed on him for it was purportedly rehabilitative in nature and was in his “best interests”. The Gault decision paved the way for the due process revolution, which brought rights to notice, counsel, cross-examination, and other constitutional protections against unjust punishment typically afforded adults.

Paternalistic understandings of children as dependent, immature, and needing protection also coincide with ideas of them being “seen and not heard” and in needing competent authority more than they need a say in their own affairs. The idea of children’s having equal status challenges “adult like” conceptions of rights that include liberal presumptions of autonomy, equality, and individual culpability (Kennedy, 1979). Tensions embedded in paternalism and liberalism have helped shape an inconsistent, and often irrational body of children’s rights law. In her analysis of the inconsistent legal treatment of children, feminist legal scholar Martha
Minow acknowledges the problem, but rejects the idea that the patchy outcomes for children’s rights depend on a judicial analysis of youth “competence”—that is when they should be seen as dependent and when they should be seen as autonomous--that varies case to case. She states:

“Why would a 15 year old be competent to consent to her own abortion but not to miss school to meet the doctor, without parental permission? Why would the 17-year old be competent to be treated as an adult in criminal court, but not competent to sign a contract at that age?” (1987: 7).

The irrationality is also evident in clusters of rights involving relatively similar levels of competence. While the Supreme Court extended children’s due process rights in delinquency cases, they stopped short of granting the full constitutional protections afforded adults. Children in juvenile court have no right to a jury trial, for example (McKeiver v. Pennsylvania), and only “some” fourth amendment protection that is not equivalent to that of an adult (New Jersey v. T.L.O.; Henning, 2011).

With all its complications, the story of youth rights also reflects and is nested in a deeper narrative of rights struggle in the U.S., where rhetoric about America as a beacon of human rights contradicts historically rooted law, policy and social engineering that sabotage the protective effect of rights and circumscribe their full social justice potential (Copelon, 1998). The power of rights is ultimately dependent on a society’s willingness to enforce them (Asquith, 2002; Cook, 2009; Goldson, 2005) and the progressive potential of the rights model will continue to suffer in conditions of substantive inequality (Quinney, 1991; Reiman, 1990) and structurally “unequal childhoods” (Cook, 2009). Even the broadest conception of rights, according to critical race scholar David Goldberg (2002), such as those that are universal and
inalienable, cannot be realized unless the social, political and legal institutions are set up to ensure them. He argues that even as rights theoretically include and empower, they are socially and legally “open to circumscription and constriction” (p. 298).

Ambivalent rights-argument summary

Building on the work of these scholars, this chapter analyzes how ideas of protection embedded in the rights model interact in a social context that disempowers and distorts them, and thwarts the progressive potential of a more comprehensive rights based framework. In the U.S., dissonance between social policy that produces mass injustice and countervailing, deeply held values of freedom and equality antithetical to the reality of that injustice create a culture of “justified exploitation.” Amidst the failure to confront past and present exploitation, rights and the idea of protection are often wielded to subordinate youth interests in the service other, often instrumental goals that reinforce social and power inequalities. The interplay of rights based notions of protection and public duty in such a rights corrosive context contributes to an ambivalent philosophy of rights in juvenile justice that encourages a hollow, but easily manipulated understanding of protection and public duty. In the ambivalent model, the traction for children’s rights is not very deep, and helps explain the legal and cultural hesitation to adopt children’s rights more completely, and the notable failures in rights coverage and enforcement (Feld and Schaefer, 2010; Feld, 2000). It places youth on the losing side of “rights battles” and “interest balancing” (Abramson, 2009; Harris-Short, 2009), and renders them vulnerable to harmful rights neglect.

In the rest of this chapter, I use the term rights model to refer to a broad framing of rights that, following Cook (2009), allows full participation in daily life including social, cultural,
economic, political, civil, and environmental rights. It includes negative rights to be free from harm and positive rights that provide for health and development. More specifically, the right to protection embedded in the rights model is double sided notion. On one side is the right to protection, broadly defined here as individual and collective protection from harm and of basic entitlements that provide for security and wellbeing. On the other side is the state based duty to protect and it refers to the states responsibility to take both proactive action to ensure protective outcomes and reactive measures in response to violations. While human rights frameworks like the CRC promote a much stronger notion of protection than the constitutional notions of rights in the U.S., here I argue that merely adopting this framework would not prevent the kinds of rights catastrophes that have plagued the juvenile justice system. Instead, a conscious rejection of the culture of justified exploitation, prioritizing youth rights, and improving the social conditions that breed ambivalence are necessary before the potential of the human rights model can begin to be realized.

Protection and “Justified Exploitation”

The ambivalent philosophy encourages a superficial idea of rights and a shallow, easily discarded commitment to protection. Far from the universal, substantive guarantees the human rights ideal envisions, rights that ensure the welfare of youth are especially fragile and tenuous in a market society like the U.S. (Currie, 1997; Sandel, 1998) that has a culture of “justified exploitation. Justified exploitation refers to a set of principles, values and explanations that validate the basic disregard for human welfare in the pursuit of “other”, often instrumental, goals. In this context, rights are highly contingent, and protection is a shallow, shifting concept. In societies where inequality far exceeds opportunities (Merton, 1938), where market principles invade many areas of social life (Currie, 1997; Sandel, 1998), and where high levels of
marginalization and exclusion link to history of racial and patriarchal oppression, a logic of protection can be co-opted in social policy that actually does the opposite. For example, the high rates of juvenile confinement in the U.S. have been characterized as “protective” for youth and society, even though confinement often subjects youth to more trauma (Mendel, 2011) and society is not safer from locking kids up (Lipsey, 2009; Cullen, 2006; Currie, 1998).

I am not arguing that people do not care about others, especially kids, or that social policy surrounding youth never attempts to promote their welfare. Instead, what I am referring to here is the relative reduction of the importance of young people’s basic human rights like dignity, safety and security in the service of other goals that are given primacy, such as the importance of private property. In the U.S., children were once considered property, and like other people (blacks, women) classified in this way, often find that rights either do not apply, do not protect them adequately, or that they are subordinated to other rights, such as parents’ “freedom” to custody and control. Youth’s reduced fourth amendment protections are often neglected, violated, or trumped on this logic. I am also not suggesting that the powerful unilaterally exploit the weak and that human rights principles have no cultural appeal. Indeed, the power of rights in part lies with their perceived legitimacy, at least in the Western context. The fact that exploitation requires justification occurs in places like the U.S. that strongly value notions of equality, freedom and rights that seem antithetical to, and indeed intolerant of the reality of exploitation, oppression and marginalization. Rights, in this sense, can be and have been perversely used to both preserve and reflect freedom and democracy and distinctly undermine it.

Far from universal, inalienable guarantees, rights in this context must be “won” often after long legal and social struggle, they are often “narrowed” in scope, and inconsistently applied, neglected, violated or forfeited. In other words, rights are hard to get, afford a minimum of
protection, and are easy to lose. While they do have more rights than they did at the advent of the juvenile court, children’s rights are also frequently violated or under-protected. Youth “waive” their rights when they often should not both “voluntarily” and under coercion (Feld, 2010; Ainsworth, 1996). They are entitled to a lawyer, but frequently do not get one (Feld, 1999; Feld and Schaefer, 2010) and when they do get the “protection” of a lawyer, the quality of representation often ranges from subpar to outright negligent, particularly when the clients are poor children of color (Stevenson, 2014.)

The ambivalent model also wields protection as a kind of threat that enables exploitation. If young people choose to exercise their rights, and not waive them, they potentially face the “consequences” of more punishment especially if they have also rejected a plea bargain. The pressure to “get it over with” and avoid more serious penalties are often cited as part of youth’s rational agency and right to participate in their own defense rather than a “threat based” approach to rights implementation. The idea that they now “own” their decision to “risk” honoring their rights and must face the potential negative consequences reflects the paternalistic distaste for youth challenging authority, and it illustrates the hollow framing of rights in the ambivalent model. It demonstrates how “other”, non-rights based principles such as prosecutorial efficiency and case load demands are elevated above the youth’s basic right to due process protections. And, it also shows how a rhetoric of protection is co-opted to justify a form of coercion where youth’s decision to not exercise their rights is more “protected” than exercising those same rights, which could bring them heightened punishment.

This does not deny that rights can, and have been forces of resistance to exploitation of youth. For example, rights limiting child labor have arguably reduced child exploitation in this context to some extent. Similarly rights to education have helped further cognitive and social
development of youth who would not otherwise have received an education. But the flexibility of the principles of justification for mistreatment operate in varied and insidious ways. For example, the paternalistic version of protection that depicted children as subordinate, dependent and “less than” that was used to justify their protection also facilitates exploitation in other areas. Employment “protections”, for example, have not translated into a set of social priorities that ensure youth have their material needs met apart from work, or that they are guaranteed decent jobs paying livable wages. Education is routinely deprioritized in the service of other social goals, with predictable declines in access and quality. According to the Children’s Defense Fund, half a million youth dropped out of high school in 2010 and about two-thirds of public school eighth graders fall below grade level in reading and math (2014).

The cultural justification of exploitation and the thin version of protection in the ambivalent model is perhaps most evident in the legal, cultural and social tolerance of violence against children. The right for parents and other custodial adults to legally assault young people stems from a legacy of the right of property owners to manage their property as they fit, including persons classified as chattel like slaves, women and children. It has been legally permissible to assault members of all three of these groups in the name of ownership rights, but children are the last remaining group where violence is legally protected under the auspices of parents’ “liberty” interests. Now re-classified as the “dependents” of adults, the legacy of their long propertied status has meant that youth rights have been afforded less legal weight and are readily subordinated in favor of more powerful rights and interests. For example, children’s right to be free from violence is trumped by a parents’ right to raise their children as they see fit, and the solution from an “interest balancing” perspective is to permit a “reasonable” level of violence against children, a situation that ideologically distorts what children’s safety and
security entail and that sets the baseline for abuse intolerably high from a protective rights perspective. Setting aside “legal violence”, there are 1800 cases of confirmed abuse and neglect every day in the U.S. (Children’s Defense Fund, 2014), a situation that not only violates their physical security, it harms their emotional health and overall development, and increases the likelihood of negative outcomes like educational failure and serious delinquency (Farrington and Welsh, 2007).

Further, the tolerance of the unacceptable treatment of children not only erodes the rights based notion of protection, it downgrades the status of personhood more generally and augments a broader cultural acquiescence of violence toward marginalized groups as a regrettable, but routine feature of social life. The spate of deaths of young black men at the hands of law enforcement provides a notable example. While the violence is spurring social movements like Black Lives Matter, the other reality it shields is the routine everyday violence that many young people face while growing up in their communities. Deaths in places where community life is harshest often do not make the news or generate as much social disturbance even as they also evidence the failure of human rights and the shallow meaning of protection in a deeply problematic way.

The high levels of violence against children also highlight the weak nature of the public duty to provide protection in the ambivalent rights model. The human rights ideal requires a substantial state duty to protect young people by actively providing for their safety, security and participation, by avoiding measures that undermine those rights, and by reacting quickly and meaningfully to rights violations. In the ambivalent model, however, weak state responsibility enables and strengthens a culture of justified exploitation. In the neoliberal context that especially emphasizes nonintervention and minimizes government responsibility in social affairs
(Rose, 1996), the responsibility for protection of youth has been offloaded to families and youth themselves. And that is not a new trend. Martha Minow argues the ambivalent status of children’s rights is best explained by the widespread, longstanding “societal neglect of children” (1987: 11) She states:

“The needs and interests of children, difficult enough to discern, are too often submerged below other societal interests, and it is the dominance of these other interests that helps to explain the inconsistent treatment of children…The confused legal treatment of children arises in large measure because the notion of children’s legal rights challenges the traditional allocation of responsibility that minimizes public responsibility for children.” (1987: 12).

The problem of weak public duty to children, however, would not simply be cured in the U.S. by adopting a stronger human rights model like the CRC. While the notion of children’s rights is substantially stronger in human rights treaties like the CRC, it does not require states to change the location and priority of those rights. In many Western democracies, like the U.S. where children started out as property and any rights that applied to them were property based, this is a major oversight and may help explain the failure of the UNCRC to reach its ‘potential’ of greater justice for youth. It also ignores the liberal legal phenomenon of “interest balancing”, where children’s rights compete with other rights and interests. In this context, power plays a crucial role, and the CRC does not address power driven interest balancing. This oversight, especially in the U.S., would not help end a legacy of societal neglect.

Failing to change the location and priority of children’s rights also means that the CRC does not strengthen public duty to honor rights more holistically. Instead, it may facilitate a
“piecemeal” approach where rights are separated and assigned as the “responsibility” of particular agencies. The piecemeal approach to rights has several important practical and ideological consequences. One is that some rights will be neglected if a youth does not get to all the relevant agencies charged with fulfilling his rights. If he ends up in juvenile court, there is a good chance is educational rights will be neglected, if current data has anything to say about it (Abramson, 2009). If a child’s educational rights are not being met, he might end up in the juvenile justice system where they are unlikely to be remedied even if his due process rights are handled properly. Neither the schools nor the courts usually address economic and cultural rights. As this thought problem illustrates, even a 50 article declaration of rights for children can create a vacuum that enables “rights neglect”—some rights get lost in the shuffle, and correspondingly, children lose out. Relatedly, the ideological ramification of the piecemeal approach to rights is a “not my job” mentality. Educational professionals, even if they are really good at ensuring rights to education, may not see economic or security rights as part of their responsibility. Courts may see their duty triggered only when a juvenile breaks the law. Rights to nurturing and self-actualization may be come to seen as “utopian” or simply the private duty of parents, if they are seen as relevant at all. Bureaucratization and “turf battles” between agencies that must compete for resources exacerbate the idea that certain troubles are the province of another department, another agency, or, as we can extrapolate, no one at all.

The shallow state duty in the liberal legal model also manipulates the meaning of protection to justify both its policies of neglect and its policies of punitiveness. On one hand state inaction fosters conditions of neglect and the outright abandonment of children. Compared to countries of similar wealth and development, the United States has exceptional levels of child poverty, where 1 in 3 children live in households making 60 percent below the median income
(UNICEF, 2014), a problem that disproportionately affects children of color. Leaving kids in poverty is a known public health threat, and increases the chances they will experience cognitive and educational delays, raises their risk of dropping out of high school, impairs their physical and mental health, and multiplies the likelihood they will be involved in the criminal justice system (Farrington and Welsh, 2007). Poverty and inequality result from social policies that actively promote or sustain them. They are not “inevitable” social arrangements, and the U.S., in particular, has maintained relatively severe, stable levels of child poverty over time. But the duty to provide for basic subsistence is not a public duty that is embraced in the U.S. and the grounds for allowing poverty to continue and deepen are often construed in the language of protection. Here, protection from hunger and of basic physical security are relegated below “market protection”, protection of business interests, and protection from the threats of “socialism”. Again, it is not as if most American lawmakers want America’s youth to live in poverty, but in the face of that reality and the option to change it, justify its existence on the grounds of protecting superseding interests.

Not surprisingly, children who come into conflict with the law feel the impact of societal neglect most keenly. Young people at the bottom of the economic hierarchy also tend to be the ones swept up in the criminal justice system (Platt, 1977; Clarke, 2002a; 2002b; Gray, 2011). This is not by chance and stems from the same weak public duty that creates and sustains policies of abandonment. Criminogenic polices of neglect on one side trigger over-regulation and harsh punishment on the other. The consequence of exploiting youth is that they also may exploit others. When kids who have been abandoned and exploited end up doing the same in socially destructive ways, the duty to safeguard their dignity and wellbeing is further subordinated to a “politics of fear and anger” (Stevenson, 2014) that justifies harsh crime policy.
This time protection of “public safety” is invoked as the controlling interest that trumps the rights of young people to be free from excessive punishment. The United States has the highest rate of child incarceration in the world (Human Rights Watch, 2014), and continues to allow harsh sentencing that violates several human rights treaties, especially the CRC. While life without parole has been narrowed, it is still constitutionally permissible. Currently, about 3000 youth are sentenced to die in prison (Equal Justice Initiative, 2014; Human Rights Watch, 2014).

Also problematic is the continued practice of prosecuting youth as adults. In Florida, a state standout for harshness, all juvenile transfers to adult court fall to the decisions of prosecutors, a practice known to increase the numbers of youth transferred to adult court (Human Rights Watch, 2014). New York, another state standout, automatically treats all 16 and 17 year olds as adults even for misdemeanors. Children are not only in special detention and prison facilities designed for them, they are also held all too frequently with adults. On any given day, approximately 10,000 of America’s youth are confined in adult jails and prisons, a practice that exponentially increases their risk for violent victimization, sexual assault and suicide (Equal Justice Initiative, 2014; Mumola, 2005). Children’s right to an education has also been eroded by punitive priorities (Kim et al, 2010). Zero tolerance policies and heightened reliance on the use of police in the classroom and other “governing through crime” (Simon, 2007) practices has fueled the school-to-prison relationship, particularly for youth of color who are more likely to be suspended, expelled or arrested at school than their white counterparts for the same conduct (US Department of Education Office of Civil Rights, 2014).

It is not as if the public duty to protect is absent, or permanently weakened in the liberal legal model. The problem corresponds more to a society that fails to contend with a set of social choices that create harsh, unequal conditions of existence and perpetuate legacies of oppression
that violate cherished values of freedom and equality. Public duty, in this context, employs rights and the rhetoric of protection in a divide and conquer strategy that pits various social groups and their interests against each other in a way that practically guarantees exploitation of one group at the expense of another. Such a strategy diffuses the power of rights based social movements just as it appears to legitimate them. Again, this is not to deny the potential power of strong human rights model for young people as a remedy to abuses within the current system. Greater state responsibilities are embedded in a strong rights model, so finding legal authority is not particularly difficult. It is a way to expand public duty and motivate legislatures. Additionally, a durable model of human rights fundamentally elevates the argument for juvenile justice reform above and beyond efficiency and efficacy arguments. It does not matter if rights “work” to reduce recidivism, and they are not contingent on how much money they are able to save per dollar spent. Rights apply because youth are people who require and indeed deserve respect and basic freedoms.

Conclusion

In contrast to a robust human rights ideal, the U.S. culture of justified exploitation enables an ambivalent philosophy of rights with weak, easily manipulated notions of protection. In the ambivalent model, rights for youth are hard to acquire, insufficient to protect, and easy to ignore. The deplorable conditions faced by many of America’s children reflect a shallow state responsibility committed to neglect on one hand, and punishment on the other. Both policies fail to protect youth, but both are justified on the grounds of protecting other interests deemed superior to youth human rights. That being said, there is nothing in the liberal legal model that would prevent the adoption of a resilient framework of human rights that contains a strong concept of protection and an equally strong set of state responsibilities to ensure children’s
rights. Indeed, a number of Western democracies with similar attachment to the liberal model have done so, most notably the Scandinavian countries. This is not to idealize other Western countries as having no problems with children’s rights, the point is to demonstrate that the existing social choices are not an inevitable side effect of our political system that are impervious to change.

A “youth first” society requires a more durable understanding of protective rights than is currently contained in our constitution, and in the CRC. Protection in this more primary and stable context does not arise from the paternalistic sense of their inferiority and innocence, but because they are the people who form the backbone of society. A comprehensive rights agenda in a “youth first” society would seek to protect positive and negative rights to safety (physical, emotional, psychological), security (food, clothing, shelter, healthcare, education), nurture (love, respect, dignity) and participation (a voice in the decisions that affect them, and meaningful opportunities to develop potential.) The state’s primary role in a youth first society where children’s rights are meaningful is more of ultimate family advocate. Instead of a policies of “hands off” neglect, it actively promotes social policy that ends child poverty and the negative impacts that flow from it. It ardently seeks to prevent abuse and neglect by eliminating legal assault and by providing for a comfortable standard of living that ensures parents can provide for their children’s needs, and allows them to also be fully present for their children’s development. In other words, it is the state’s duty to ensure that parents do not need to choose between putting food on the table and a roof over their children’s heads and doing ‘higher order’ parenting that being present and involved in their children’s lives permits. Policies like full, sustainable employment and extended paid parental leave, and universal high quality child care would
facilitate children’s rights to safety, security, nurture and participation by reducing the financial strain most families in today’s society face.

For children’s rights to be truly meaningful, we need to change where we locate their rights and the priority afforded them. Instead of conceiving children’s rights as an offshoot of parents’ and states’ rights, where they are positioned ‘against’ these usually more powerful rights, children’s rights need to be primary, separate, and serve to structure the duties of parents and the state. Rather than rights to children that the parents and state currently enjoy, a truly child centered society grants parents and the states the duty to uphold children’s rights: to keep children safe and secure, to nurture them and to help them realize their potential. This is not simply a semantic quibble. Under this framework, we would not allow corporal punishment in the interests of parents’ rights. We would not tolerate 20 percent of the youth population in poverty in the interests of the free market, nor would we permit illiteracy and dropout in the interests served by under-resourcing education.

Youth first societies also make youth rights and needs “salient” throughout social policy and institutions. One of the criticisms of the UNCRC is that it promotes a piecemeal approach to rights when a more holistic model is needed. Framing children’s rights around notions of safety, security, nurturing and participation would necessitate that all of these rights are the business of every agency that deals with youth, directly and indirectly. These rights are not within the sole jurisdiction of any one ‘camp’, but are the focus of a coordinated policy-institution collaboration that places children and their well-being at the center of organizational endeavors.

But such a project cannot merely exist at the rhetorical level. For example, as has already been illustrated, merely ratifying the CRC does not make for a youth first society. The U.S. must
first contend with a longstanding culture of justified exploitation. It must confront and dismantle the social, cultural, and political mechanisms of injustice. To do this, the U.S. must actively tackle legacies of racial and patriarchal oppression and vigorously eliminate subjugation and exploitation from the bottom-up and top-down. Moving to a child first society can be seen as a kind of ‘transitional justice’ (Curry 2007; Valls, 2003) analogous to states rebuilding after state sanctioned mass injustice. It demands a sustained, multi-level political and social intervention of truth telling and confrontation with the instances of exploitation and their causes accompanied by legal, political and institutional restructuring to move children and youth to the center of social policy. Such a project is neither quick nor simple, but it is also not impossible as countries such as South Africa have demonstrated. While such projects are long-term and must contend with their own challenges, they demonstrate progress is possible given political will and accountability.
CHAPTER 5. NONINTERVENTION

“Basically radical nonintervention implies policies that accommodate society to the widest possible diversity of behaviors and attitudes rather than forcing as many individuals as possible to ‘adjust’ to supposedly common societal standards. This does not mean anything goes, that all behavior is socially acceptable. But traditional delinquency policy has proscribed youthful behavior well beyond what is required to maintain a smooth running society or to protect others...Thus, the basic injunction for public policy becomes: leave kids alone whenever possible.”

Edwin Schur, 1973: p. 155

Chapter Overview

According to the nonintervention model, the juvenile justice system, and much of the social control aimed at youth, goes too far and does too little that is genuinely good for kids. The model has perhaps done more than any of the others to draw attention to the stigmatizing problems associated with criminalization. The theoretical insight that treating kids as “delinquents” actually creates more delinquency (Tannenbaum, 1938; Matza, 1964; Becker, 1963; Lemert, 1967; Schur, 1973) has been translated into public policy efforts that support deinstitutionalization, diversion, and decriminalization (Muncie and Goldson, 2006; Schur 1973; Shelden, 2003), policies that seem particularly useful in the wake of epidemic levels of harshness during the last 40 years of “get tough” (Dowd, 2011). What has remained unexplored, however, is how key ideas in the nonintervention model play out in a “do it yourself” (DIY) society, like the U.S., that is highly tolerant of deprivation, hardship and injustice. In this chapter, I argue that the core noninterventionist principles of limiting state interference and decriminalization, when
considered in the context of broader social and cultural realities of deprivation, DIY ideology and reactive punitiveness, contribute to a neglectful model of nonintervention that augments suffering by leaving youth alone to tough it out, and that primes the punitive mentality when ignoring suffering begets more suffering in the form of serious crime and violence. But, the insights of the nonintervention model hold promise, particularly when social policy prioritizes the welfare of youth and diversion and decriminalization target the “deep end” (Miller, 1998) of the system. Deep diversion and decriminalization practices avoid net widening and attack problematic racial disparities, both of which honor the spirit of the nonintervention paradigm.

Literature Review

The nonintervention principles of normalizing delinquency, diversion and community based alternatives still resonate strongly with academics and professionals committed to reform of the juvenile justice system (Dowd, 2011), particularly in the wake of too much harmful punishment, harmful rehabilitation, and harmful violation of youth rights that perpetually plague juvenile justice. Rather than focusing on the problem of juvenile delinquency, nonintervention models identify the problem as mostly juvenile justice “processing” (Schur, 1973; Lemert, 1967). State systems interfere with normal developmental processes in stigmatizing, discriminatory, and other harmful ways, and youth need to be kept out whenever possible. Grounded in social reaction and labeling theories (Tannenbaum, 1938; Becker, 1963; Lemert, 1967), the models of nonintervention contend that the primary reason delinquents are delinquents is not because of something internally different about them or because of something defective in their surroundings, but because they are processed as delinquents by the juvenile justice system (Lemert, 1967; Schur, 1973). Formal sanctions, according to labeling theory, carry a “stigma” which changes how youth are treated by others. Over time, social exclusion and other negative
treatment triggered by the label push youth to live up to the branding. As one of the kids I used to work with put it: “They think I am bad, and I have gotten pretty good at being bad.” Lemert called this type of behavior secondary deviance because it was behavior that occurs after the labeling, and it can produce a group of “outsiders” (Becker, 1963) whose exclusion reinforces the deviance. According to Becker: a delinquent youth would be “one to whom that label has been successfully applied” (9).

One of the most useful contributions of the nonintervention perspective is the recognition that delinquent youth are not “bad” kids; indeed much delinquency is “normal” at least in terms of incidence (Dowd, 2011; American Bar Association, 2010). For example, approximately 85-90 percent of young people report behaving in ways that, if caught, could subject them to arrest and the juvenile justice system (OJJDP, 2009). For example, over half of high school seniors report experimenting with illegal drugs, and three in four have tried alcohol. Minor property crimes such as stealing and vandalism are also a relatively common part of “rule breaking” and “boundary testing” that characterizes fairly typical adolescent development. Youth who end up in juvenile court, often do so for the very same behaviors that most kids do at some point (OJJDP, 2009). Lemert refers to this kind of behavior as “mickey mouse stuff” (1967: 95), and calls for its removal from juvenile court jurisdiction.

By normalizing delinquency, the nonintervention perspective also draws attention to the status of youth as youth. It is a developmental period in life that is different from adulthood, with its own trials and tribulations that are, in part, a function of the usual course of brain development and the cognitive, emotional and social maturation that normally accompanies it. Thus, it is often the case that youth do not assess the long-term consequences of their behavior very well, and miscalculate the costs and benefits even in the short-term. They can act
impulsively, and have trouble delaying gratification (Scott & Steinberg 2008). For a normal adolescent, peers often exert undue influence, and it can be difficult to regulate emotional responses, especially in stressful situations. Delinquents are not a unique brand of adolescent and delinquency is not a unique type of behavior. What is distinctive and has longer-reaching consequences is whether young people are labeled delinquent and treated as delinquents by the juvenile justice system and other institutions of social control (Schur, 1973; Lemert, 1967).

Notwithstanding that delinquent behavior is typical among adolescents, the nonintervention model also points out it is time limited (Glueck and Glueck, 1937; Sampson and Laub, 2005). It questions what type of state intervention is really necessary given that most kids will desist by the time they are young adults, especially if that intervention prolongs criminal involvement or generates other harms. The noninterventionist model finds support in recent studies that suggest that diverting kids away from formal court processing results in less recidivism compared to youth who are similarly situated but are put through the system (Petrosino et al, 2010, Huinziger et al, 2003; Bernberg et al, 2006).

The nonintervention argument also points to the historical and contemporary trend of the court to focus on poor youth, minority youth, and their families (Platt, 1977; Dowd, 2011). The argument forcefully comes from the conflict perspective and other theories that emphasize differential power and oppression (Vold, 1958; Turk, 1969; Taylor, Walton and Young, 1973; Chambliss and Seidman, 1971). According to this argument for nonintervention, the court should stay out because it fosters discrimination and reinforces power inequalities. Crimes by privileged youth, for example, are often not targeted for juvenile court processing. Families from the “wrong side of the tracks” or who are ‘othered’ in society receive the most serious and sustained attention—those kids and their families face increased surveillance and processing
through the courts—and all the attendant harms that such labeling and stigmatization produce (Rios, 2006; NCCD, 2007; Bell and Ridolfi, 2010; Dowd, 2011).

Since the state is implicated in perpetuating problematic labeling and reinforcing social oppression, the nonintervention framework is distrustful of state imposed social controls. But different iterations of the nonintervention model vary in how much they support other, non-state forms of intervention. Lemert proposes “judicious nonintervention” (Lemert, 1967), which maintains that, usually, the solutions for child problems lay in the community, the family, the schools and others in the child’s life. The juvenile court should only get involved when all other remedies have failed. In his recommendations for the 1967 Federal Task Force on Juvenile Delinquency, Lemert contends:

“If there is one defensible philosophy for the juvenile court it is one of judicious nonintervention. It is properly an agency of last resort for children, holding to a doctrine analogous to that of appeals courts, which require that all other remedies be exhausted…distinguished by a history of repeated failures of solutions by parents, relatives, schools, and community agencies (p. 96).

Instead, Lemert conceives “organized nonintervention” as a kind of moral duty of the court to protect kids from overzealous state social control. The role of the juvenile court, according to this perspective, should be reduced to enforcing the “ethical minimum of youth conduct necessary to maintain social life in a high energy, pluralistic society” (97). If judicious nonintervention were adopted, Lemert believes that resources previously wasted on unproductive state control can be redirected to building up services for youth in the community. For example, programs like “Ceasefire” operating in Chicago, where former gang members attempt to mediate
and ‘interrupt’ violence between rival gangs could receive greater funding if the juvenile justice system was not siphoning off funds that could be redirected to community services.

Radical nonintervention embraces a similar stance of ethical minimalism. This model, most thoroughly articulated by Edwin Schur (1973), specifically argues that jurisdiction over behaviors that are not criminal for adults should be entirely eliminated, and the majority of minor delinquency should not be prosecuted or handled in the community. But the radical version of nonintervention is skeptical that “intervention” is often cover for social control, and favors not just leaving kids alone most of the time, but whenever possible. Any sort of treatment youth undertake should be voluntary, non-state driven, and provided by members of the community instead of “professionals”. For example, a radical nonintervention model may support “devolved rehabilitation” (Tucker and Cadora, 2003). Instead of professional experts, people seek rehabilitation through the “experts” in their families and communities. Instead of “intervention”, the radical position maintains that decreasing delinquency is best achieved by a societal reaction grounded in respect for youth and not fear and paternalism.

Such respect can be earned by making the juvenile court a criminal court committed to the “rule of law” and due process for youth. In addition to the negative label and stigma that accompanies rehabilitative efforts, noninterventionists generally claim the court has lost legitimacy through “individualized” sentencing that varies widely even for similar offenses and that tends to discriminate according to skin color, class, gender and other extralegal factors. Drawing on insights from scholars such as David Matza (1964) that youth use the unfairness of the system to neutralize controls and persist in delinquency, the noninterventionists call for consistent, proportionate sentences across individuals and other practices which “deal evenly” with kids who commit crimes. Returning to the rule of law is not a call for harshness. Instead it
is a call for the juvenile court to act like a fair criminal court instead of punitive, ineffective social service agency. Since the court’s attempt to act in the “best interests” of youth usually fail, being upfront about when to punish and to punish more fairly will restore young people’s respect for the legal system.

_Neglectful nonintervention-overview_

Despite its powerful critique and ongoing relevance, nonintervention principles, when considered alongside social and cultural realities, contribute to a neglectful philosophy that reinforces existing hardships and stokes punitive sentiments. The DIY society routinely “looks the other way” when it comes to social suffering and prescribes more individual responsibility when kids struggle to meet their own basic needs, and “act out” in lives filled with hardship, pain, frustration and boredom. In the DIY context, the noninterventionist principle of limiting state interference merely reinforces “hands off” social policy that tolerates high levels of suffering and deprivation. Similarly the principle of decriminalization, no doubt one the most powerful and essential contributions from the nonintervention model, gets corrupted amidst ideology of punitive necessity and a reactive social system. It operates more like _deferred_ criminalization, where the state waits to step in until it can no longer avoid staying out and when the sense of urgency pulls for excessive punishment. Counter to the goals of progressive noninterventionists who hoped to extend the same “look the other way” benefit that kids in the middle and upper classes enjoy, the kids hardest hit by deferred criminalization are those who are already oppressed. When the nonintervention model focuses on “secondary” oppression via the juvenile justice system and neglects the “primary” oppression of an unjust social order in a DIY society, it can enable the cycle of neglect and punitiveness that it seeks to stop by staying out in the first place.
Limit state interference

To the extent that getting the state out of their lives actually allows kids to be kids and normalizes a wide range of behavior, it brings a refreshing attitude of tolerance for typical adolescent misdirection. Policies of decriminalization bring much needed temperance and restraint to the philosophy of juvenile justice. But, the question becomes if the existing social arrangements make nonintervention a productive juvenile justice approach that undoes the harms it is critiquing, or helps perpetuate those harms. In a “do it yourself” (DIY) society, like the U.S., that stresses personal grit, forbearance, and responsibility for personal problems, and tolerates exorbitant levels of deprivation and hardship as part of ordinary struggle, limited state interference in the lives of youth is not a revolutionary or particularly reformist principle. Rather, it reinforces policies of abandonment that do very little to promote the wellbeing of young people. Under the guise of honoring family privacy, for example, states often “stay out” of domestic problems, notably abuse and neglect, until they become quite severe (CDF, 2014; Browne, 1989). Similarly, states have been able to justify a weak commitment to child welfare using the argument that these responsibilities properly rest with families in the private sphere (Minow, 1987).

The DIY society distributes the tools and resources needed to “grow up well” sparsely and unevenly in the spirit of promoting “initiative” and “self-reliance”, and then “gets out of the way” while young people and their families get by with whatever they happen to have or can beg, borrow, or steal. In other words when “doing nothing” in terms of developing adequate supports to promote healthy lives predictably produces adversity and harsh adaptations that are themselves destructive, DIY societies “look the other way” until tragedy and instincts for societal preservation require intervention. We know that good decisions rarely occur under
duress, and so it stands to reason that juvenile justice and social “interventions” driven under reactive, stressful conditions are not particularly good for young people. Prohibiting the state from reactively oppressing youth is an important idea in the nonintervention model. But in targeting the repressive “over-reaction”, the model does not expressly take up issues of the more primary kind of oppression-DIY social policy that leaves too many kids on their own to figure out lives filled with deprivation, fear, and insecurity.

It is not that nonintervention fails to see the struggles kids face, and demands that everyone leave them alone. State imposed stigma and discriminatory social controls are conceived as the primary problems. The model presumes that letting the state in merely compounds problems such that the court should either let them go or return the problems to people better equipped to manage them. Nonintervention, in the DIY context, encourages an “offloading” of responsibility for the problems kids have back onto their families, communities, and schools. It is not that noninterventionists do this callously or blindly. Rather, the model simply does not trust that the state can do any good by getting involved, and that the people closest to kids are in the best position to manage the problem. The court should be a court, in this mentality, not a social service agency.

The belief that helping youth is the problem of other jurisdictions pervades juvenile justice to this day. However well-meaning and justified, the perspective’s pessimism that the state juvenile justice system cannot do anything useful in the social service context enhances a DIY tendency to marginalize help and make it difficult to obtain. In addition to the day-to-day struggle, people have to figure out where to go to get help and endure a series of “qualification” processes to ensure that they fall within the jurisdiction of the agency. This sort of bureaucratic line drawing enhances a “turf” mentality that can harm service coordination. For example, older
youth who may also need family based “dependency” services are often seen as “delinquent” kids whose primary issues lie in criminal conduct. There is a reluctance to get involved, and a tendency to seek “emancipation” instead of adoption. Such practices further a trend where kids who have been involved in the juvenile justice system longer are “on their own without a net” (Uggen and Wakefield, 2006). The schools also have a documented tendency for “getting out” once a kid becomes court involved, and kids are more likely to get sent back to the juvenile justice system or funneled into “alternative” education programs (Kim et al, 2010).

Nonintervention advocates can point to evidence that state “help’ often harms and contend that returning youth to their communities is less harmful. In a DIY context, however, the presumption that local help trumps state help, may be quite flawed. Families may not be healthy, communities may not be safe places for kids, and neighbors may be too busy taking care of their own to offer much assistance. Communities ripped apart by mass incarceration (Clear, 2007), and mutually reinforcing policies of disinvestment and discrimination may not be able to “absorb” the kids and solve their problems. The belief on the part of some noninterventionists that resources will follow kids to the community once the juvenile court sends them back there (Lemert, 1967: 96) may seem reasonable, but in a DIY society that has historically placed children’s needs at the bottom of its social priorities, absent a more concrete plan, such reinvestment seems unlikely. Indeed, the idea that resources would follow to build up the community services necessary to support the deinstitutionalization of the mentally ill in the sixties and seventies did not happen. Instead of rerouting funds previously absorbed by institutions into the community, people with sometimes debilitating levels of mental illness were just let out, and left alone, a problem that likely fueled their influx into another set of institutions: America’s jails and prisons (Daniel, 2007).
While probably abhorrent to progressive advocates of nonintervention, the unintended ideological impact of the nonintervention model is that it neatly aligns with the neo-liberal mentality that emphasizes ‘free market’ solutions to social problems. Under a neoliberal framework, the state ‘stays out’ of social problem solving, and puts faith in the market economy to sort out issues like poverty, inequality and crime. Neo-liberalism can be viewed as a type of nonintervention in the sense that it advocates a “hands off” approach to social problems and disperses most of the social responsibility onto communities, families and individuals (Rose, 1996). In keeping the state out of their problems, the nonintervention model also leaves the bulk of the problem solving responsibility on the kids’ shoulders, and the shoulders of their families and communities, and can unintentionally paralyze already scanty fiscal resources towards programs that work in helping prevent problems rooted in social injustice.

Even though noninterventionists do not eschew non-state support, the idea of “staying out” in a DIY society has the unintended ideological effect of constricting the reformist imagination over what is considered possible for the juvenile justice system to “fix”. The idea that we should stay out as often as possible neglects much of the social injustice that youth face, and in doing so, may contribute to a fatalistic sense among lawmakers and practitioners that some, particularly structural, justice matters cannot be fixed or even belong in policy discussions of youth justice. While this is contrary to the goals of many noninterventionists, it is a realistic risk given how noninterventionist principles work in a DIY society.

Relatedly, the noninterventionist suspicion of state based social control could make sustainable improvements in state-run agencies less likely. In essence, keeping the state out also lets the state off the hook for fixing the more primary oppression that creates criminogenic conditions and marginalizes youth in the first place. The well-earned distrust noninterventionists
direct toward state based social control makes it difficult to marshal political will for change in those very agencies that provide services for youth especially in a neoliberal political and economic climate. Prevention programs, too, could suffer under the noninterventionist desire to “stand back” and “stay out”. Even programs that might align with a nonintervention stance—those that are organic, community driven and non-stigmatizing may lose out if the mistrust of state based programs further enervates flagging political will in the DIY, neoliberal social context.

Advocates claim that nonintervention produces greater justice because the state will now leave all kids, not just those from white middle and upper class homes, alone. All kids, but particularly poor, minority youth, would benefit from being freed from state-imposed stigmatization. This makes particular sense give that the models tend to stress that most delinquency is ordinary, developmentally normal and minor, and most kids grow out of it. Privileged kids do this stuff too and they already have the benefit of nonintervention; marginalized youth are the ones who are “processed” for what is normal, non-serious, and temporary (Dowd, 2011). And certainly, less stigma and negative labeling, and less selective targeting driven by class and race are good things to be gained from the nonintervention approach.

It is also undoubtedly true that young people are the “same” in the sense that they all possess unique talent and potential and share in their capacity to grow up and be productive adults. But while all young people may equally warrant the benefit of the doubt and certainly of our trust and concern that they would be harmfully stigmatized, it does no good to pretend that their maturation and development is the same irrespective of the types of surroundings the kids find themselves in. All kids do not have the same access to quality education, legitimate work
opportunities, mentors and role models who can aid them on the path to adulthood. Even basic supervision and attention can be in short supply in communities hard hit by social problems or in families working long hours to “make it” or “keep it”. In keeping the state out, the nonintervention policy, without more, leaves kids right where they are in the existing social-economic hierarchy, and the pervasive inequality that the hierarchy reflects.

While there is no doubt that youth, as a group, are a smart and resilient lot, capable of creatively and resourcefully managing problems, there is also no doubt that filling their lives with serious suffering and hardship does harm their development, especially absent the types of support that are required to help ensure they survive the experience and come out of it for the better. Hungry kids have a hard time learning, it is tough to concentrate on algebra when you are afraid of walking home, it is tough to get to school in the first place when you are worried about getting shot, and it is even harder to see the merits of attending when you do not see any legitimate opportunities to keep ‘straight’. Witnessing violence causes trauma, experiencing it personally causes even more (Widom and Maxfield, 2001). These are the kinds of problems that make growing up very difficult and are far from “normal”. Kids do not simply grow out of their exposure to violence and poverty—the evidence suggests these types of problems, left unattended, grow and deepen over time (Thornberry et al, 2003; Greenwood, 2006; Farrington and Welsh, 2007). And even though many youth do desist from crime, the nonintervention perspective presumes desistance is the equivalent of wellness. While it is a testament to young people’s personal tenacity and resilience that so many kids grow up and get out of the system, it is also true that the suffering many youth experience on the path to “desistance” may wreak havoc on their mental and physical health and their ability to form healthy relationships, raise healthy kids themselves, and pursue a purposeful life.
These types of consequences are hard to ‘undo’ in a nonintervention model, and indeed the model gives short shrift to these kinds of problems. Since it sees the primary (although not exclusive) problem as oppressive social control at the hands of the state, the logical remedy is to get the state out, and promote a broad tolerance of “deviance” (Schur, 1973; Lemert, 1967). In returning the kids to their communities and families where they will presumably receive help if they need and want it, the deeper problems become ‘invisible’ and outside the scope of public consciousness. While keeping the state out attempts to undo the discriminatory injustices faced by poor kids and kids of color, it can reinforce the problems that create the initial inequalities and sustain them. The types of legitimate opportunities that more privileged kids have to help them ‘turn it around’ and grow in a healthy and productive direction are largely missing from many communities that have been devastated by economic hardship, oppression, slashing social supports, and America’s penchant for mass incarceration (Clear, 2007; Cullen, 1994; Currie, 1998; 2001; 2013).

Privileged youth fare better to the extent that they are more likely to have access to the kinds of opportunities that make growing up easier, but the nonintervention model does not actively promote their wellbeing either. As much as the nonintervention model does to show how kids’ experiences transcend class lines, in emphasizing the minor problems of youth and the more serious problem of a hyper vigilant, oppressive state, it also hides the severity of problems they experience as well. It perpetuates the DIY myth stemming from market ideology that privilege precludes suffering from serious mental health and emotional problems, hard drug use, physical and sexual abuse, depression and self-harm. In leaving the privileged kids alone too, the neglectful model of nonintervention, however inadvertently, downplays the serious problems young people face and shields them from public consciousness.
Deferred criminalization

While the call to decriminalize youthful misconduct contributes a crucial principle to the philosophy of youth justice, the promise of decriminalization remains constrained by the neglectful model of nonintervention in a DIY context. In a worthwhile effort to untie normal youthful misconduct from criminal sanctions, the noninterventionists support an already entrenched DIY tendency to ignore youth long before they commit their most serious offenses. Youth typically do not “wake up” one day and commit armed robbery or aggravated assault. The nonintervention model allows what I would call “symptomatic” or “warning signal” offending to go on with little attention as it simply does not rise to the level the noninterventionists would classify as serious enough to warrant intervention. Indeed, the crux of the noninterventionist critique is that this behavior does not distinguish delinquents from non-delinquents. While this may be technically true, the noninterventionists also minimize the fact that this type of behavior often does signal some sort of problem. It is “normal” for youth to act out in efforts to get attention and assistance. Much “warning signal” or “symptomatic offending” is of the minor, and status level variety. For example, regular running away often signals serious home dysfunction, especially abuse. But a nonintervention approach would not heed such warning signals, and would send the kid back into the community under the belief that other people and institutions can and should step in to deal with the problem.

Certainly, some noninterventionists may call for diversion to address symptomatic and warning signal offending. Diversion is a set of policies that either route youth away from the court entirely, but embrace community based services to address youth needs, or that rely on “informal processing” that does not push youth into the formal sanctioning system. Diversion practices have been shown to be more effective in curtailing delinquency than more formal
processing (Petrosino et al, 2010). There is much to be gained from decriminalization in the form of diversion. But the broader DIY policies of providing little support and of avoiding problems until they are quite severe is not cured by diversion. Diversion policies are not immune from punitive ideology either. It is difficult in a society that values punishment as a necessary response to problem behavior to completely divest diversion of punitive and stigmatizing elements. Critics of diversion in the U.S. have maintained that it has “widened” and “strengthened” the net of social control (Austin and Krisberg, 1981; Cohen, 1985) capturing youth who would previously have avoided it, and setting the stage for “violation of court order” delinquency that perpetuates system involvement. Take the running away example. A runaway youth may first be diverted from court involvement, but if she ignores orders to stop running away, and true to DIY form she receives little to no support to help her get out of the situation, she may be swept back into the system on the grounds that she violated the courts order or because the juvenile court has a greater access to resources to provide assistance, albeit meager and inadequate ones, than most community based agencies have at their disposal.

Indeed what is troubling about the core of the nonintervention perspective in a DIY society is that it leaves kids right where they are—at the mercy of harsh social conditions with little to nurture their strengths and coping skills. And that neglect, in turn, facilitates punishment at the hands of the state. Problems are left to deepen and evolve and when the situation becomes truly dire and something very serious occurs, there is nothing but punishment left to address the issue. Nonintervention offers little protection, except “even dealing” under the rule of law, from punitive social control if the delinquency does not stay minor, and the kids do not grow out of it. There is nothing in a nonintervention model, for example, that would prevent lowering the age of criminal responsibility, or expanding the jurisdiction of the adult court for
serious offenses like murder, assault, robbery. Indeed, much of that legislation already exists. Certainly, noninterventionists would advocate fair dealing, and perhaps a “youth discount” (Feld 1999; 2000), but the noninterventionists do not have much of an argument beyond that on how to handle what we refer to as ‘serious and chronic’ offending.

Rather than promoting the spirit of decriminalization, the neglectful model of nonintervention inadvertently opens the door for deferred criminalization. If we accept the idea that those kids with the most serious social problems are also the most likely to continue and graduate to ever more serious forms of law-breaking, then keeping the state out until the problems become inescapable is akin to giving up on them, and sets them up for potentially serious punishment. Here again, in an important sense, the nonintervention model in the DIY society works against itself. The non-intervention model seeks to forbid the state from criminalizing already marginalized youth, but they may inadvertently aid the state in criminalizing those very same kids. Serious social problems breed serious delinquency, and leaving kids alone in those circumstances does nothing to get rid of those serious social problems. When those problems take root in particularly destructive ways, the nonintervention model does not have a remedy, and indeed resigns itself to punishment and puts its faith in the rule of law to create justice.

In recognizing how the ideas embedded in the nonintervention model get corrupted by a DIY society and reactive punitiveness, it is important to not lose sight of a serious contribution of the nonintervention perspectives: state ‘help’ is often harmful. In response to my critique that ‘doing nothing’ might be as bad or worse, a noninterventionist need not look far for evidence that already vulnerable kids come into the system and experience more violence, and more abuse (Mendel, 2011; Human Rights Watch, 2014). And it is much more unethical because it comes
from people the kids are supposed to trust; from the system designed to ‘help’ them. In addition
to perpetuating a particularly virulent type of harm—abuse of the vulnerable by those in power—it
may, in fact, kill any residual hope that things could change for the better. In this scenario, doing
nothing at least preserves the theoretical belief that someday, somewhere, things can be different.
Hope, however, has social roots too. In places where harsh living conditions produce harsh
adaptations, hope may indeed be in short supply. Simply removing the state does not ensure the
existence of hope, any more than the presence of the state is sure to eradicate it.

In order to truly benefit from the nonintervention’s critique of the system, we must
directly tackle the problem that their critique illuminates: how to provide help that is not harmful.
Non-interventionists would likely advocate for transferring the source of the help from the state
to the people themselves. While this approach might indeed produce some useful interventions,
there are several key problems with it. First, it is overly simplistic to think such projects could
exist in isolation from the state. Many non-profit agencies rely on state funding directly or
indirectly from quasi-state agencies that provide grants, and these funding requirements often
dictate the type of the help that is provided and who gets it. Thus, the state may have quite a say
in how non-profit agencies help kids. Moreover, simply relocating the help to another agency
does not eliminate the potential for abuse or neglect. In other words, it is naïve to assume that
simply because an agency is ‘non-profit’ rather than state based, that stigmatization and abuse of
kids could not happen there. Similarly, non-interventionists might favor ‘privatization’, in the
sense that private individuals and entrepreneurs might get into the ‘helping kids’ business. This
keeps the state out, some of these places probably do good work too, but it would be
wrongheaded to suggest there is less potential for abuse simply because these agencies are not
‘state’ agencies.
It may be difficult to distinguish state from non-state help for another reason. States may ‘outsource’ their justice needs via a contract bidding process and stipulate how the private businesses must actually run, making them much more like state agencies than even the privatization advocates probably want to acknowledge (Stern, 2006). Indeed, research on the private prison industry has demonstrated few real differences between public and private agencies, and some studies have documented higher rates of violence in privately run facilities. Private and non-profit agencies may even have looser hiring standards in conjunction with lower pay than state counter-parts, providing fertile ground for high turnover, and poor training—two qualities that can lead to poor quality interventions and abuse of youth.

Third, the private and non-profit ‘helping’ agencies, like the state, are not immune from broader contradictions built into a capitalist economy. In order for these organizations to survive, they must have ‘clients’, and that can mean expanding the net of social control in ways that look suspiciously ‘state like’, but that are perhaps even more invisible to the taxpayers who now have a more limited ‘stake’ in the youth justice business. Insulating youth justice from public scrutiny by taking it out of the hands of the state can ripen, not lessen, conditions for expanded social control and abuse. Even if private and non-profit organizations are able to isolate themselves from the state, being ‘out of sight’ of the taxpayer, may also make youth justice ‘out of mind’. Abuse thrives in conditions where no one is looking.

Again, it is not to say that help could not come from the community or committed adults or kids themselves. It is simply misguided, however, to think that merely changing the location of the help from the state to another source would eliminate either the over-reach of the state or the potential for abuse and discrimination. This is, in part, because power, and the potential to abuse it transcends state boundaries. Youth who receive help are in a more vulnerable position
than those providing it. The noninterventionists clearly point toward the coercive power of the state in corrupting youth justice, but the state is not the only entity capable of coercion and abuse of authority. It is not the only agency capable of acting in an arbitrary and discriminatory fashion.

Conclusion

The nonintervention model remains an influential perspective in juvenile justice. It continues to have relevance for the propensity of the system to perpetuate further harms through stigmatization and discriminatory social control. But the model’s emphasis on “secondary” reactive oppression via the juvenile justice system at the expense of primary oppression in a DIY society helps perpetuate a cycle of neglect and punishment that hits already marginalized youth hardest. Limiting state interference and decriminalization in the context of DIY ideology promotes a neglectful model of nonintervention, one that does little to attack the suffering experienced by youth and that opens the door to further criminalization when kids do not grow out of their problems. The nonintervention perspective, while perhaps over-focused on repressive social control, still holds promise in a system that now incarcerates at 5-10 times the rate of similarly situated nations. A little nonintervention is sorely needed, but it needs to occur in the context that tackles both primary oppression and reactive punitiveness.

The first priority for limiting state intervention and decriminalization on the “reactive” side of the social order is to promote social welfare of youth at the outset. Universal social programs that end poverty, decrease the risk for abuse and neglect, increase meaningful opportunities, and invest properly in community based institutions such as schools and social service agencies are necessary to realize the promise of a decriminalization strategy. To truly
divert more youth, and not merely leave them alone until their problems evolve into more severe delinquency, community supports must be expanded and adequately resourced. Moreover, such diversion needs to focus on kids at the “deep end” of the system (Miller, 1998) in order to avoid widening and strengthening the net (Austin and Krisberg, 1981) and attack serious racial disparities that are most likely to accumulate when youth are “high risk”. Deep end diversion practices target high risk youth or youth destined for detention or prison.

One example, known as the Detention Diversion Advocacy Project (DDAP) in San Francisco, CA links youth at high risk for detention with individually tailored, intensive case management and community support services. Services are also offered to the youth’s family members such as employment assistance, income support, daycare and drug treatment (Shelden, 2003). A related program, known as “New Options” goes even further into the system and targets youth heading for the California Youth Authority. Instead of prison, youth go to a school called the “Challenge to Learn Academy” where they receive high quality education, mental health and substance abuse treatment (Shelden, 2003). Such programs challenge the reactive punitiveness and stigmatization that the nonintervention model targeted, and they serve as potential models to rethink how the juvenile justice system need not be a court of last resort forced to punish the most serious cases like Lemert and Schur envisioned. Deep end diversion, in particular, captures the spirit on nonintervention advocates without the pessimistic resignation, and offers an important alternative to the logic of mass incarceration.
CHAPTER VI: RESTORATIVE JUSTICE

No future without forgiveness.

Bishop Desmond Tutu

If you want to make peace with your enemy, you have to work with your enemy. Then he becomes your partner.

Nelson Mandela

If we pursue justice as respect, we do justice restoratively.

Zehr, 2002

Chapter Overview

This chapter demonstrates how a micro framing of restoration loses touch with the broader social justice implications of robust restorative approaches. The main preconditions for restoration include a just social order where all have meaningful stakes in the community and an investment in “restoring” the social fabric. Such understandings fall out of the “diluted” model of restoration that primarily emphasizes a piecemeal approach of isolated, short encounters containing largely nominal restorative gestures backed up with the threat of punishment. The diluted model risks irrelevance, and being corrupted with punitive ideals to the point it serves as another source of the punitive pipeline. But, fuller understandings of restoration that utilize robust strategies have the potential to serve as respectful, positive disciplinary alternatives to punishment.

Literature Review

Forgiveness, repairing the harms inflicted after crime, and pursuing respectful justice are potentially transformative principles inherent in the restorative justice model. Renowned world
leaders like Desmond Tutu and Nelson Mandela have looked to restorative justice principles to heal deep societal level wounds in countries ravaged by genocide and apartheid. Closer to home in the U.S., restorative justice has been hailed a potential antidote to the sweeping and harsh criminal justice system that has left two million people behind bars (BJS, 2014), and a more ethically defensible and constructive approach to juvenile justice. The notion of restoration refers to a healing process through inclusive, respectful participation of all parties affected especially victims, acknowledgment of responsibility, expression of remorse, and commitment to making amends and putting things right. Rather than stigmatizing youth who commit crime as bad kids, young people’s individual identities are separated from their “bad” behavior allowing the behavior to be properly “shamed” and criticized, and opening the possibility for forgiveness and reintegration of the youth as a worthy person in the community (Braithwaite 1989, 2002). Advocates claim a wide range of benefits including increased victim satisfaction, decreased recidivism, cost-effectiveness, community empowerment, and the potential for transformative social change (Menkel-Meadow, 2007; Sherman and Strang, 2012; Strang et al 2013, Marshall, 2014).

In the restorative model, crime hurts people in the context of their relationships and threatens the ability of people to live peacefully in their communities (Zehr and Mika, 1998; Mika and Zehr, 2003; Marshall, 2014). Restoration, the key idea in this framework, emphasizes “healing” for the victim, offender and the community by re-establishing trust, respect, mutual obligation, and making amends (Marshall, 2014; London, 2011; Zehr, 2002). Restorative principles expressly emphasize the victim-offender-community relationship, and more indirectly reference the social and cultural roots of restoration that form the deeper foundations of healthy relationships and communities. Under the philosophy of restorative justice, all parties have
mutual obligations to each other, and this includes the general welfare of all members of the community (Mika and Zehr, 2003). The theory maintains that if restorative justice were the dominant paradigm, such relationships would grow, norms as to how to treat people would change for the better, and the ability of communities to effectively manage social conflict would be substantially increased.

Restorative justice has come to mean many things to different people (Daly, 2006). It is a theory of justice, a policy paradigm, and a continuum of practices (Dorne, 2008; Classen, 1996; Walgrave, 2009) that have an evidence base and are used internationally in criminal, civil and political contexts (Menkel Meadow, 2007; Sherman & Strang, 2012). Broadly, the term restorative justice refers to a philosophy of justice that emphasizes repairing the harms caused by crime, and healing the people and communities who are affected by it (Zehr, 2002; Umbreit, 2001; Umbreit and Armour, 2010; Dorne, 2008; Menkel Meadow, 2007; Classen, 1996). As a policy model, restorative justice has transcended the confines of criminal justice, and has been employed as a means to resolve civil disputes and achieve political transformation after grave injustice (Menkel Meadow, 2007; Umbreit et al, 2005). In the U.S. criminal justice, and juvenile court context, restorative justice has come to include a diverse range of practices including restitution, apologies and other acknowledgments of harm, face to face meetings such as victim offender mediation and victim offender reconciliation programs (VOM, VORP), sentencing circles, family group conferences, and other direct encounters between people who commit crime and those who were affected by it.

Despite its wide “tent” (Umbreit et al, 2005; Braithwaite, 2002) and conceptual breadth, there are identified key principles that form the base of a restorative philosophy. Van Ness and Strong (2006) suggest that four values distinguish restorative justice: encounter, amends,
reintegration, and inclusion. The encounter refers to a direct meeting where the harms are addressed, stories and emotions are shared, and an agreement is reached on how to repair the harm. Amends refer to the offender’s remorse, apology and willingness to make restitution and the victim’s generosity and willingness to forgive. Reintegration refers to respectful interaction moving forward, help with making amends, and guidance needed to stay crime free. Inclusion refers to inviting all parties with a stake in the process, recognizing the interests of everyone, and maintaining an open mindedness to different approaches to the conflict. In a similar vein, Menkel-Meadow (2007) characterizes restorative justice methods as embodying the four “r’s” that apply to victims, offenders and their communities: repair, restore, reconcile and reintegrate.

Zehr (2002) argues that restorative justice can be philosophically and practically distinguished from the traditional justice system approaches of retribution or rehabilitation. First, he suggests that unlike retribution which focuses on the law violation and its “dessert”, and rehabilitation which focuses on the offender, restorative justice focuses on the harms and what is required for victims, offenders and communities to heal from those harms. Second, he argues that restorative justice does not seek punishment or treatment per se, but focuses on the obligations that flow from the harms for all parties involved. Unlike the traditional criminal justice system that represses offenders and excludes important people affected by crime through an adversarial process that silences defendants and victims and distances people in the community, restorative justice relies on collaboration between the people who have a stake in resolving the conflict. Finally, restorative justice seeks to “put right the wrongs” and heal the people who were affected by the crime as much as possible.

Walgrave (2009) argues that restorative justice, in contrast to retributive and rehabilitative options, is the only model of justice which serves three diverse types of interests: a
means of regulating community life, recognition, respect and reparation for the victim of crime, and limiting obligations on the offender to those that ensure community and victim interests are met. He claims that restoration is more inclusive and constructive than retribution and that it adds an element of proportionality for what is required of the offender that the rehabilitative model lacks. If the restorative model were to replace the traditional criminal justice system, the state’s function would be to include and respect all parties, as opposed to oppress offenders and exclude victims. It would function more as a “partner” that empowers the community to address the harm, and that ensures reparation is achieved without abuse of power by any of the parties (Zehr, 1990; Christie, 1978)

Restorative justice has also been held out as a ‘bipartisan’ model of justice that both progressives and retributivists can support (Bazemore and Schiff, 2005; Braithwaite, 2002). The “Balanced and Restorative Justice” model (BARJ) (Bazemore and Day, 1996; Bazemore et al, 1995; OJJDP, 2000), for example, emphasizes community safety and offender accountability that addresses “rightist” law and order concerns, as well as restoration and reintegration that appeals to “leftist” anti-punishment and pacifist perspectives. Progressives can claim the model promotes accountability without harsh punishment and coercion and promotes the youth’s successful reintegration into the community, and retributivists can support that it gives victims a voice, and forces youth to ‘face’ the consequences of their action and encourages public safety.

One of the fundamental contributions of the restorative model is that it takes the harm that crime causes seriously. Unlike nonintervention, which conceives much of what we now call crime as an overblown social construction that requires no response, or the retributive framework that primarily views crime as a legal violation, the restorative model redefines crime as a breakdown in relationships that causes harm to individuals and communities. It sees crime as a
“social conflict” (Zehr, 2002) between people in their communities, and places the resolution of the conflict back into the hands of those most impacted by it. Restorative justice brings people together to talk about the crime and to figure out how to “make it better” and keep it from happening again. Rather than leaving the state to figure out a proper sentence, the restorative model vests responsibility with the parties who were affected by it. It aims to promote healing: via redemption and reintegration for offenders, recognition and restitution for victims, and repair and restoration to the community who can now put the crime behind them and move on with a plan on how to heal the damage that was done.

The strength of the perspective lies in this important recognition of relational harm. Relationships are at the heart of the social order and healthy communities. By bringing attention to, and trying to heal a broken relationship, the restorative model offers the potential to bring understanding and healing between people who might otherwise remain angry and isolated. The restorative process can change norms regarding relationships by modeling healthy interactions through the encounter itself and the process of making amends and demonstrating what it means to show respect, repair trust, forgive harm, and move forward to try again.

The fact that youth are also able to see and hear from those who have been negatively impacted by the harmful consequences of their actions might also promote social responsibility. It presents an opportunity to help youth learn the principle of ‘doing no harm’ to others regardless of the injustices they themselves may face. In this important sense, the restorative model is also empowering for juveniles. It can help them recognize, rather than deny or avoid, that they have impact, and that impact need not be harmful or negative. By helping youth realize their actions impact a broader community, it can be used as leverage to help them strive for positive impacts on themselves and others. Further, restorative encounters offer the potential for
teaching and modeling conflict resolution. Youth can learn there are other, nonviolent, noncriminal ways to work out problems, and community members can learn more about the young people in their communities and the problems they face.

The restorative model could also provide a forum for young people who feel alienated the chance to realize they are part of a broader community. Instead of stigmatizing them as “offenders”, restorative justice, faithfully applied, treats young people as people who have made mistakes, often understandable mistakes that merit forgiveness and “integration” into their communities. If the anger that disenfranchised and neglected youth feel could be expressed and genuinely heard, it would not be a ‘magic bullet’ that would cure all their problems, but it would likely go a long way toward helping them ‘link in’ with the very people who might, through the restorative process, be willing to serve as caring, nurturing adults supportive of their development. By making relationships the center of its approach, the restorative model fills an important gap in the existing understandings of youth justice.

The restorative justice model, like nonintervention and rehabilitation, fundamentally reframes the problem of crime and punishment. All three models of justice view the state criminal justice system as oppressive, exclusive, and overly harsh. While the first priority for nonintervention is to label fewer acts as criminal and stay out whenever possible, and rehabilitation stresses that crime signals unmet youth needs that must be met, restorative justice redefines crime as a harm to relationships, and focuses on healing them by including those who were harmed, providing for reparation, and reintegrating the youth who committed the crime (Mika and Zehr, 2003). While the model implies the need for a just social order conducive to healthy relationships and restorative principles, it does not stress that aspect. Instead, most of the model’s attention, be it at the paradigmatic or practice level, goes toward distinguishing
restorative justice from the traditional criminal justice system (Walgrave, 2009; Zehr, 2002) or in determining points of affinity with the traditional system that can ensure broader acceptance of restorative ideas (Braithwaite, 2002; Marshall, 2014; Daly, 2006).

The relative ideological imbalance between correcting an unjust criminal justice system and an unjust social order presents several problems for the transformative potential of the restorative model. Trust, respect, and solidarity, key notions essential to meaningful restoration, thrive in communities where basic needs are met and where opportunities are sufficient for all community members to have a stake in a mutually respectful coexistence. For youth especially, there must also be conditions that nurture and support healthy adult relationships, such that when mistakes occur, there is a foundation to repair. It is difficult to “teach” or “expect” trust, respect and mutuality in a single encounter or short series of encounters that is not reinforced by the youth’s experience before they enter or once they leave the conference room. But, this crucial aspect of the model is given only passing attention, eclipsed by a much more detailed treatment of the micro level elements of restoration starting with the crime such as victim experience, offender accountability, restitution and reintegration.

When the more limited framing of restoration coincides with policies of disinvestment that are toxic to relationships and that sacrifice mutuality in favor of a survival, the transformative “healing” potential of the process is often undermined. Even when healing and transformation do occur and youth realize that people care about them and victims and community members forgive and want to be supportive moving forward, it may be much more difficult to sustain long-term when youth are “reintegrated” into the harsh and exploitative conditions that they knew before. Similarly, when the narrower version of restoration is adapted within a system that relies on the threat of punishment to create “stakes” in participating, and that
privileges bureaucratic efficiency, it is especially vulnerable to punitive takeovers where an over-emphasis on offender accountability and “punitive back up” further widen and strengthen the nets of social control (Austin and Krisberg, 1981; Haines and O’Mahony, 2006; Daly, 2006; Levrant et al, 1999)

_Diluted Restoration_

The _diluted_ philosophy of restorative justice combines the micro framing of restoration that only passingly acknowledges the social roots of restorative principles with a social system beset by forces that threaten healthy relationships and a bureaucratic process that emphasizes coercion and efficiency. The diluted model relies on “piecemeal” restoration, in the form of largely nominal “restorative gestures” such as apologies, victim statements and restitution contracts that are often divorced from the broader realities that youth and victims face when they leave the courthouse doors. It neglects the duty in the restorative ideal to create a social order conducive to restorative principles in the first place, and instead attempts to pick, choose, and adapt those aspects most convenient for a courtroom context that has not traditionally stressed them, and indeed has usually done the opposite. While the diluted model risks being relegated to the margins of youth justice policy, or worse, being co-opted to punitive goals the model itself seeks to replace, the restorative ideal that recognizes the need for a social order that embodies restoration “through and through” has important implications for transformative change in juvenile justice.

Relationships and the restorative process require a minimum of trust, respect and rapport in order to communicate effectively and allow for mutuality, empathy, and a desire to “make right” by each other. In order to “restore” effectively, there must be relatively healthy
communities that reinforce restorative norms as the basis for interpersonal relationships. For healthy relationships and effective restoration, all people must have a meaningful stakes in the welfare of the community. Unfortunately, such requirements are not found in many communities in America that have been most impacted by ongoing policies of disinvestment. One of the social costs of living in communities ravaged by joblessness, poverty, and violence is the relative lack of mutually beneficial, pro-social relationships, particularly with adults who are available, able and willing to provide nurturing and guidance for local youth. Instead, relationships are often fragmented, disrupted, predatory, or outright absent.

People living amidst what we euphemistically call “social disorganization” may quite legitimately try to avoid anything that resembles trouble, including a troubled youth as a rational survival strategy. Like avoidance, predatory exploitation is also a survival mechanism for getting by or getting ahead in brutal conditions (Anderson, 1999; Miller, 2008). Exhibiting trust and concern for others in the harshest places may even threaten survival and basic safety. Savvy youth find many ways to exist in these conditions, often at the expense of developing relationships grounded in mutuality, respect, positive communication and concern, trust and empathy. The stakes are often not there for them to do so, and indeed doing so may ultimately threaten their ability to navigate perpetually treacherous living conditions. Essentially, the model may try to “restore” what might never have existed, or that might have been seriously undercut by trauma, violence, school difficulties, and frightening, difficult home and community lives.

Here is where the diluted model of restoration—a micro level understanding of restoration coupled with a social order decidedly unfriendly to it—undermines the transformative potential of the model to build healthier relationships and communities. What does restoration mean in settings where there is not much to restore in the first place? When, the larger problem
involves creating conditions that are restorable? For example, is returning the youth to a situation where they face difficulty meeting their basic needs mean they have been restored if they have fulfilled their contract obligations? If they still face violence at home, at school, and on the streets, have they been reintegrated? If the lure of the monetary payoffs of the drug trade outweighs any legitimate income opportunities, do we think the restorative model has worked as long as both parties feel the process was fairer? It is possible to belabor this point with even more examples, but, at bottom, the diluted model of restoration raises serious questions as to what “just” restoration would look like. While some would likely argue that diluted restoration is preferable to harsh punishment, and that claim has some merit, it is also problematic in that it does little to prevent that harsh punishment down to road. Kids sent back to the same places may repeat the same behavior, and to the extent diluted restoration uses the threat of punishment as motivation for participation and compliance, may ensure that kids who do not fully comply are routed back through the punitive system, perhaps punished more harshly for failing in the “opportunity” to participate in restorative justice.

Even in a best case scenario where the restorative conference achieves some healing, and all parties are able to link in, perhaps for the first time, to a sense of solidarity and community, those linkages will be difficult to sustain without ongoing follow through, particularly when they are subject to repeated threats and are not yet the established norms in the broader communities. Instead, the piecemeal restorative justice that typifies the U.S. approach tends to ‘close cases’ once the restorative contract has been completed. Critics of the restorative model rightly claim victims may desire total severance from the person who harmed them (Acorn, 2004; Daly, 2006), much less sustained relational involvement, but even assuming that all parties seek to restore some minimum sense of future safety and mutual obligation, the piecemeal approach makes it
difficult to sustain changes in relationships that were “righted” in this sense. There is little
follow-up after the initial restorative encounter except largely nominal “checks” to ensure the
restorative contracts were completed. There is also little in the diluted model that ensures kids go
back to conditions where they themselves are safe and where they can act safely around others.
For example, a young person may promise and genuinely mean that he will not harm this
particular person again, but pressures in his life, such as gang involvement, that go unattended
after the restorative encounter, do little to help ensure he will not harm someone else.

But, in the more typical scenario, even assuming motivated parties, relationships are less
often righted after more “nominal” gestures of restoration. Real restorative “healing” is
exceptionally challenging when the social fabric being mended does not hold together on
restorative principles. Even in places that are not ravaged by brutal living conditions, restorative
principles are threatened by the “predatory individualism” in a market society (Currie, 1997) that
justifies doing what it takes to get by and get ahead. Having been a mediator in restorative
conferences in both civil and child abuse/neglect cases, I can attest that the ideals of trust, respect
and mutuality do not readily appear even with cooperative parties and experienced practitioners.
The work is even harder when parties have little reason to “trust” the system and its
representatives, other people, and when trust is not something regularly practiced in their
everyday lives. In the confines of the average, short restorative conference (usually one session
of a few hours), it is quite challenging to establish the kind of “pre-relationship” markers that set
the stage for effective healing. In cases where restorative justice has been successfully “scaled
up” in countries trying to heal after grave injustices, the restorative process involves deep
commitment, hard work over a sustained period, and restorative efforts across many levels and
institutions within the society. It is not a “one shot” deal that the diluted model of restoration tends to prefer.

Furthermore, it is often not the case that all participants in the restorative process share similar moral values and stakes in the “community”. While it is true that many youth who commit delinquent acts often share conventional moral values (Matza, 1964), it does not mean they feel rooted to the local community and broader society that promotes that morality. It does not mean that their stakes in that morality are equivalent to their victims’ stake, nor does it mean that to the extent they subscribe to conventional morality, they don’t also feel substantially unmoored from social roots and deeper connections that make that morality go deeper than nominal, knee jerk ideology. In short, even though they may ideologically express similar values, they may not feel rooted to those values, and they may also keenly feel the injustices that Matza (1964) recognized as enabling drift from those values. Restorative justice has the potential to help kids link in to those values, but the diluted model does offer much to help do this. The short-term nature of a restorative conference, coupled with the emphasis on developing the terms of the restorative contract, may impede this worthy goal of restorative processes. Further, the nature of the restoration itself may pose difficulties if we move beyond the assumption of consensus. Quite practically, what may seem like a rational, obvious consequence to one community member may appear completely unfeasible and unfair to a juvenile, particularly one without resources, assistance, or positive nurturing at home.

The diluted model avoids these deeper conflicts by emphasizing restorative “gestures” such as victim statements, offender apologies, and the commitment to restitution. It is not as if these gestures lack merit. Even if they are not transformative in a philosophical sense, piecemeal restorative options are often hailed as much more humane and logical consequences to the
largely harmful and expensive forms of punishment traditionally available. They are also seen as more “deliberately democratic” in that they bring together all parties most closely connected to the crime and charge them with resolution of the cases, which also aligns neatly with bureaucratic agendas of encouraging youth admission to crimes and the conservation of judicial resources. But the diluted version of restorative justice avoids the more difficult question of whether restoration was achieved. Instead, it focuses on measuring alternate “outcomes” such as higher “satisfaction” with the process itself as compared to a traditional courtroom experience, and reduced recidivism compared to traditional punishments. While these measures also point to legitimate benefits, they do not advance an agenda of healing and reintegration as much as improved client satisfaction and bureaucratic efficiency.

Whatever their other benefits, restorative gestures, severed from a deeper restorative foundation, can advance objectives antithetical to a reformist restorative agenda. For example, the infusion of punishment into the restorative process has been a reality for many programs in the U.S. that are more supplemental to traditional youth justice processes. In the U.S. and many jurisdictions outside it, youth are often referred to restorative programs as part of a sentence or as a means to avoid harsher sanctions. Ostensibly “voluntary”, youth who refuse to participate or fail to comply face the traditional punitive system, and perhaps even a harsher penalty than what they would have received based on the offense alone (Daly, 2006; Levrant et al, 1999). Similarly, restorative processes may be a part of probation orders, or led by police officers as part of diversion orders (Haines and O’Mahony, 2006). The “punitive backup” to restorative programs creates superficial investment in the process that may compromise the integrity of restorative principles and make meaningful progress difficult to generate and sustain.
It can also further color the process in ways that make it seem like punishment, such that it can be difficult to avoid the “stigmatizing” elements seen as most problematic by reformers. For example, in a cultural context that conceives punishment as necessary and healthy, the centrality of the victim’s harm and emphasis on offender accountability in the diluted restorative philosophy can overtake other restorative principles such as reintegration, creating further imbalances in the process that advance punitive objectives in the name of restorative justice. Advocates maintain that recognizing how a properly functioning punitive system operating as a “backup” to the restorative approach lends legitimacy and helps reassure victims and community members that justice is important and will proceed if the offender does not act in good faith or if the victim does not wish to participate (Marshall, 2014). Furthermore, some advocates maintain that mainstreaming restorative justice requires compromises within the punitive system, and is also necessary to avoid needless “regulation” and micromanagement of restorative processes (Braithwaite, 2002; Daly, 2006; Sherman and Strang, 2012). But, the larger problem concerns the degree to which punitive ideals can corrupt the restorative process. Youth who feel like they are being punished may not invest in the program the way restorative advocates intend, and community members may also emphasize the punitive aspects, lending to over-shaming or unreasonable reparative demands.

The diluted model of restoration, operating in a context that emphasizes punitive necessity and bureaucratic efficiency, can play out in other potentially unintended and problematic ways. The “reintegrative shaming” model, for example, presumes that shame is healthy, and suggests that it need only be done properly, in a “non-stigmatizing” way that communicates moral disapproval but preserves individual dignity. But, shame is a complex emotion with complex roots. For many youth who are in serious trouble, the primary problem is
not the lack of proper shaming or ignorance of moral transgressions. Instead, they are acting out of a sense of worthlessness, of hopelessness. Deep shame at who they are, at what they have experienced, and guilt at the abuse they may have suffered or witnessed can be at work in youth who, on the surface, appear tough and uncaring (Currie, 2004). In fact, a lack of respect, or perceived lack of respect may be a much bigger part of the problem than the lack of properly communicated shame. Excessive shame breeds the constant need for validation and respect, and this respect may be sought at any cost, and at any means. The diluted approach to restoration that stresses nominal gestures, bureaucratic efficiency and punitive “backup,” may be inadvertently insensitive to the potential of “over-shaming” youth, and undercut the respect and validation youth are ultimately seeking and the more robust restorative model seeks to supply.

In shedding the portion of the restorative framework that recognizes injustice as a threat to the social order, the diluted model also heightens the potential for replicating power imbalances through restorative practices. For example, restorative methods require communication, perception, empathy, and interpretation and all these elements are also infused with thorny issues related to power and inequality. Institutional processes, like a restorative conference taking place at a juvenile court, are similarly situated within broader structural forces that will impact how the conference itself proceeds. It may affect who is brought into the conference and, indeed, which youth and what relationships are counted as “restorable”. In many states, violent offenses or serious types of delinquency are still not referred for restorative justice processes (Dorne, 2008; Walgrave, 2009; Sherman and Strang, 2012), although increasing evidence suggests that serious cases present the greatest opportunity for restorative methods (Strang et al, 2013). Other research has shown racial bias plays out in who is referred for restorative justice measures even when controlling for the offense type (Rodriguez, 2005).
Embedded structural inequalities can also affect how the encounter proceeds, what types of verbal and nonverbal communication are privileged and how each party perceives the process and its outcome. The resulting blind spot, left unattended, leaves the diluted restorative model vulnerable to replicating the types of oppressive practices that most restorative advocates, who emphasize equality, would condemn.

Conclusion

Despite the limitations of a diluted model of restorative justice and a preference for piecemeal, nominal gestures that are perhaps “too” compatible with a punitive system, the fuller model of restorative justice that advocates transformative social change offers important ideas for reform in youth justice. A restorative model embraced “through and through” and not just in piecemeal, “one shot” fashion once kids are in court is a starting point for creating restorable communities. By “through and through” restoration, I mean a sustained multi-level policy approach that creates restorable conditions on the front end, employs robust restorative processes when there is harm, and sees the restoration through in a “thicker” process of reintegration that supports youth moving forward.

Rather than avoiding the problems created by an unjust social order, a truly restorative society tackles them directly. This does not mean “pie in the sky” idealism that seeks to create monolithic, oppressive kinds of consensus, but conscious social policy that seeks to create conditions that make restoration meaningful and realistic. Some “through and through” policies include economic reforms that reduce inequality, alleviate poverty, and universalize a decent standard of living such that people are not fighting and clawing to survive. Also relevant are policies that support healthy family relationships by ensuring access to basic needs and the
presence of caring, attentive adults including generous parental leave and universal high quality day care and early education. Youth need to have access to meaningful opportunities that give them a stake in the community and encourage trust and respectful interaction. There is nothing new about these recommendations—they are the basics for creating a just social order that would create something to “restore” when social harm occurs, and that would provide all people with meaningful investments in opportunities and other people that would make restoration “stick”. Such programs already exist in a more localized way. One example includes peer mediated conflict resolution, operating in schools as a way to address bullying, truancy and other social conflicts. Successful programs are those where the principles of restoration—respect, equality, mutual obligations, trust—are infused and modeled throughout the school activities, and not just imposed when someone gets in trouble.

In addition, robust restoration and thick reintegration are needed to ensure that youth can move forward after they leave the juvenile justice system. Robust restoration, in addition to the “through and through” foundation I discussed above, also needs to provide youth with a fully blank slate. It involves legal expungement, and a sense that the debt is paid, but also informal practices that ensure that youth are fully accepted and integrated back into communities. Robust reintegration, for example, would entail adults working with youth to lay the groundwork for their reintegration in schools, families, recreational and religious settings and other community venues. Thick reintegration means that there are a system of supports and services to help youth desist, and help them find safe, satisfying opportunities to participate in social life. Thick reintegration means that communities supply a rich array of opportunities that give them something meaningful to work toward and that is worth keeping. Education, training, volunteering, work, recreation and other types of developmentally appropriate activities are
necessary to help kids find their way and help them develop a sense of mutuality and “stakes” in the community.
CHAPTER VII: RISK

To the extent that risks become the all-embracing background for perceiving the world, the alarm they provoke creates an atmosphere of powerlessness and paralysis

Ulrich Beck, 1997

Paradoxically, I argue, we are attracted to the actuarial in criminal law largely because we believe it helps us get closer to the truth, closer to reality, closer to knowing each individual, each delinquent. We believe that it helps us align our carceral practices with social reality. But surprisingly quite the opposite is true: social reality aligns with our carceral practices.

Bernard Harcourt, 2007

Chapter Overview

The contemporary dominance of the risk paradigm has “lost” touch with social conditions that produce and shape risk, and the deeply personal ways youth experience it. It is a “disconnected” model of risk that corresponds to a broader cultural social tendency to “shrink” what constitutes a social level variable, and an epistemological tendency in academia that severs “proximate” from “distal” causes. In losing touch with both key structural components and the personal, lived experience of risk, the disconnected model forces youth to move past suffering too quickly, emphasizes efforts to recognize and “track” risk more than reduce it in meaningful ways, and inhibits adolescents from taking healthy risks needed to change their lives and courts from taking risks on innovative programs. However, nothing in the risk paradigm precludes a more socially grounded model, and a reform project grounded in “what matters” that reconnects structural risks with improvements in lived experiences offers transformative potential in
The argument proceeds in the following way. First, I lay out the varied and interdisciplinary literature on the risk paradigm, including existing strengths and criticisms. Building on prior critiques, I then lay out the disconnected model and its key elements including the shrinking of the social, the premature resolution of suffering, risk recognition vs. reduction, the perils of high risk tracking, and risk aversion and threats to the imagination.

**Literature Review**

The concept of identifying factors that predict delinquency and then designing sound intervention has a long history in academic criminology. Clifford Shaw and Henry McKay identified problems associated with social disorganization in communities and developed the Chicago Area Project (CAP) as a community based approach to build solidarity and create alternatives to delinquency and gang activity (Shaw and McKay, 1942). Richard Cloward and Lloyd Ohlin also developed the idea that delinquency thrived where legitimate opportunities for success were absent (Cloward and Ohlin, 1960). Opportunities for success can be conceptualized as an early prototype of a “protective factor” that could reduce risk for delinquency. The Mobilization for Youth (MOBY) project applied their idea by creating employment opportunities, participation and social support services. While Shaw and Mckay and Cloward and Ohlin would likely not consider much of what passes for the risk model in juvenile justice as emblematic of their approach, it is possible to think of them as important forerunners of risk paradigm. Risk, from this perspective, reflected a set of social conditions that made delinquency more likely. Kids were not seen as risky per se, instead it was their environments that were conceived as problematic, and the interventions that flowed from them were designed to improve life on the streets. In earlier crime theory and research writings, risk for youth lay in their environmental surroundings, not somewhere inside themselves. Put simply, risk was a
social notion. Similarly, the responsibility for the risky conditions was conceived as a social responsibility, grounded in the sense that communities needed to be livable places with structures in place that promote the wellbeing of kids.

The social conception of risk lives on in the most robust version of the public health model, which expressly incorporated the language of risk and protective factors into criminology (Farrington et al, 2012). Public health scholars, interested in the epidemiology of disease, rely on a social ecological understanding of behavior (Centers for Disease Control, 2014; Brofenbrenner, 1979). A social ecological understanding of crime, for example, examines the entire context in which crime occurs. It classifies risk factors into individual, peer, family, community, and societal levels that each represent targets for multi-level preventative action. The public health paradigm of problem solving uses research to identify risk and protective factors within a community, and develops intervention strategies to target those factors, implements them, and then follows them to determine efficacy and make changes (Rosenbaum & Schuck, 2012; CDC, 2014). Early pioneers of the risk model (Hawkins and Catalano, 1992), for example, applied this approach to develop the Communities that Care (CTC) program. CTC is a multi-level community based prevention program designed to prevent substance abuse and delinquency using a range of evidence based interventions at the individual, family, school, peer and community levels (Rosenbaum and Schuck, 2012).

In addition to community based interventions, the public health model of risk also reflects its social orientation in emphasizing the availability of universal prevention and early intervention strategies. Consider the public health framing of violence. Individuals who have a history of violent victimization, low attachments with family, experience school failure, and live in socially disorganized communities tend to become more violent (Farrington and Welsh, 2007).
Recommended violence reduction strategies include universal prevention programs aimed at reducing child abuse and neglect, developing cognitive and educational abilities, and early intervention to support families and improve community functioning. Examples of each of these types of program include nurse-family partnerships, prenatal care, high quality early childhood education and multi-systemic therapy (Blueprints for Violence Prevention, 2014).

To social theorists, risk has become a dominant feature of modern life. Beck, for example argues that risk has become an “all embracing background for perceiving the world”. Proponents of the “risk society” thesis (Giddens, 1991; Beck, 1992; 1997) maintain that risk focuses thoughts and actions toward future threats, and encourages a preoccupation with safety in the face of social uncertainty. For example, risk profiling, according to Giddens (1991), has become a normal part of science and “expertise” in a risk society relied on to inform decision-making. But, the role of social structures in the risk society is debated. Giddens, for example, asserts that structural influences such as class and race play a visible role in how people experience and deal with risk (Furlong & Cartmel, 2007). Beck, however, downgrades the role of where people fall in the social hierarchy. He contends that navigating risk is a more personal, subjective experience, unmoored from controlling structural influences.

To the extent that government considers a unitary social order in policymaking, Nicholas Rose has declared the social is dead in “advanced” liberal democracies (1996). The death of the social refers to the passing of the state’s tendency to place social welfare and other holistic social concerns at the center of its action. Instead, community based partnerships and “self” regulation are encouraged in a hands off approach that “governs at a distance”. From this perspective, it could be argued that risk management replaces broader social issues as a driver of public policy. Feeley and Simon (1992) provide an example of the death of the social in crime
policy. They argue that risk assessment and management lie at the heart of the “new penology” that replaces both the old, social welfare notions at the heart of rehabilitation, and notions of desert and moral condemnation associated with retribution. Here, risk management is severed from social issues like morality and reintegration. Offenders are “managed” either through incapacitation, surveillance, or other technologies designed to deal with their risk level. David Garland (2001) goes farther arguing that risk identification and management constitute administrative adaptations to a more widespread “culture of control” preoccupied with public safety in the face of persistently high crime rates.

While some scholars see the socially severed risk model as a form of the “new penology” (Feeley and Simon, 1992) signaling the “end of treatment” (Raynor and Robinson, 2005) and administrative best practice in the “culture of control” (Garland, 2001), others have focused more on the “hybridity” of discourses in juvenile justice (Muncie, 2002) with which risk has become associated, infiltrated, and dominated (Kemshall, 2002; O’Malley, 2001; Gray, 2005). For example, Ward and Maruna (2007) argue that the “risk model” is now the dominant theory of rehabilitation. Rehabilitation as a social project committed to improving offender welfare through treatment has been replaced by the risk-need-responsivity “theory”. The risk-need-responsivity (RNR) theory reframes the purpose of rehabilitation away from what it conceives as unfocused treatment and narrows it to the individual treatment of risk. RNR, according to its proponents, is guided by three principles developed from extensive empirical study (Andrews and Bonta, 1998, 2010; Cullen and Gendreau, 2000). First, rehabilitation should link directly to risk for reoffending with higher level risk dictating the most serious and sustained intervention. Aimlessly targeting low risk individuals can actually increase recidivism. Second, interventions should solely target criminogenic needs or dynamic risk factors, those individual attributes most
closely linked to recidivism and theoretically most “changeable”. In contrast, static risk factors, such as prior criminal history, which cannot be changed, or other “needs” that are not closely linked to recidivism should be ignored. Finally, “responsivity” means that the intervention should “match” the offender’s individual characteristics such as motivation and learning style.

Critics argue that risk based rehabilitation (Kemshall, 2008, Gray, 2005; 2009; O’Malley, 2001; 2004) conflates needs with risks (Hannah-Moffat, 1999), and minimizes the social context that shapes personal experience of risk (Raynor and Robinson, 2005; Muncie, 2002; O’Malley, 2001). Indeed the only needs that matter in an RNR model are ‘criminogenic’ ones that most directly relate to recidivism (in largely linear focused statistical models). For example, there is an emphasis on “job training” to target the criminogenic need or dynamic risk of unemployment, but job training does not actually provide people with offense histories a job. It does not envision a shift in structural inequalities, nor does it support policies that would universalize employment at livable wages. The risk paradigm has been critiqued on the grounds that it discourages such universal de-stigmatizing measures under the alluring, if limited, rationale of cost-effectiveness (Haines and Case, 2008; Goshe; 2014). The RNR version of rehabilitation, accordingly, offers little to help people access “good lives” (Ward and Maruna, 2007) and provides limited practical guidance to rehabilitation practitioners who are trying to help actual people who have identifies and personal stories, as opposed to a narrow set of risk factors (Ward & Maruna, 2007).

Risk has also become influential in the delivery of punishment, particularly in sentencing and parole decisions. Courts now widely use risk assessment to decide which youth (as well as adults) receive confinement or who are transferred to adult court. Essentially, there are six areas where risk assessment informs juvenile court decisions: intake, pre-trial detention, adjudication,
Risk assessment, at the core of Harcourt’s critique of the risk model, refers to a series of practices that attempt to determine who will commit crime before they in fact do so. Risk assessment is also not a new phenomenon. What is relatively new is the statistical methodology now relied on to predict who will become criminal, and its growing importance in not just “back end” decision making such as parole, but “front end” processes such as diversion and sentencing. The “professional judgment” of probation and parole officers, psychologists and other correctional staff have long attempted to identify who will reoffend long before the advent of statistical methods. Such judgements are often called “first generation” risk assessments (Schwalbe, 2007), and have been subjected to vigorous critique based on findings that clinical predictions are often worse than what would occur by chance. So called second generation risk assessments, with emphasis on statistical determinations, have also been around for some time.
In 1928, Ernest Burgess of the famous Chicago School of Sociology developed a risk assessment instrument designed to determine parole eligibility. Second generation instruments--such as the Hare Psychopathy Checklist (PCL-R) designed to identify people with psychopathic personality disorder believed to be more prone to criminal and specifically violent behavior, and the Violence Risk Appraisal Guide (VRAG)—were developed primarily to identify risk. Newer third and fourth generation instruments theoretically inform case planning. The Youth Level of Service/Case Management Inventory, the juvenile version of the Level of Service Inventory (Andrews, Bonta & Wormith, 2006) is a 42 item questionnaire that assesses risk in 8 categories of both static (prior history) and dynamic (employment, attitudes, family relationships).

Despite their increasing popularity, actuarial methods also have problems with prediction. While “a good bit better” than 50 percent accuracy (Slobogin, 2012), they are by no means extremely accurate (ranging from 55-85 percent), and risk both false positives and false negatives. Actuarial methods essentially say that one person with a particular risk score is similar to a group of people with that risk score, and a certain percentage of that group offended during a given period of time. There are problems with validating the instruments on sufficiently diverse groups to capture the populations who might be subjected to it. The potentially relevant factors for an individual may not actually exist on the risk assessment instrument being used. Relatedly, there are problems with using the instruments for purposes they were originally not developed for. For example, the VRAG was designed to predict any offense against a person, not other types of offending. Even within the violence category, however, this broad definition has a lot of nuances that are not captured by the VRAG. For example, the instrument is not sensitive to the difference between rape and shoving while purse snatching.
Consistent with the broader adoption of the risk philosophy, “risk”, “risk factors”, and “at risk youth” have become commonplace terminology and, one might argue, ubiquitous in juvenile justice. The “Models for Change” initiative, for example, a youth justice research based reform group that is part of the MacArthur Foundation, claims that a “cultural shift” has taken place in juvenile justice. The proposed shift focuses on risk assessment and evidence based interventions to reduce recidivism and improve youth competencies (Vincent et al, 2012) instead of the traditional emphasis on rehabilitation and punishment, and is driven by research on what predicts delinquency and what prevents it. This framing of the risk paradigm, as equal parts prediction and prevention, has been part of the vision of early interventionists like David Farrington, Rolf Loeber, and Brandon Welsh, whose pioneering longitudinal research generated the “Risk Factor Prevention Paradigm” or RFPP. The RFPP seeks to identify key risk factors for offending in order to prevent them, and the paradigm has paved the way for the flurry of science on risk factors, “protective factors” that mitigate risk or independently prevent delinquency, risk assessment, and evidenced based interventions in youth justice (Farrington, 2000; Farrington and Welsh, 2007; Farrington et al, 2012, Greenwood and Welsh, 2012). The RFPP’s pragmatic emphasis on what predicts delinquency and what works in preventing it is viewed by advocates as an antidote to irrational, damaging punishment and coercive, unfocused rehabilitation. Slobogin and Fondacaro (2011) believe the apparent rationality of the RFPP should make it the new philosophical justification of the juvenile court. In this philosophy of juvenile justice, risk assessment guides decision-making, and reducing recidivism guides intervention. Social factors are relevant only to the extent that they either predict or reduce recidivism.

The RFPP’s empirical focus avoids theoretical problems of causality; an approach Farrington (2000) praises, but confesses it poses a “major problem” in that it is difficult to
distinguish between causal mechanisms and those risks that are merely related to a deeper root cause. Risk factors tend to “cluster” and “co-occur,” further complicating the process of understanding the relationship between risks and outcomes. It is also evident that the pathways leading from “risk factor” to negative outcome are far from direct, resembling more of a tangled trail with many offshoots, than a linear, clearly marked route. A further critique of the RFPP suggests that the emphasis on risk identification has come at the expense of efforts to reduce risk and has driven scholars away from a deeper understanding of crime. (Haines and Case, 2008; Squires and Stephen, 2005). As Armstrong (2004) bluntly puts it: “The focus of the investigation into the causes of crime becomes the relationship between the amoral individual within the context of dysfunctional communities.” (p. 108) Armstrong (2004) also takes issue with the quantitative emphasis of most risk research, and critiques the absence of qualitative work with people who experience “risk”, and what it means to have that label. As he argues:

“…the representation of certain behaviours solely in terms of individual, or micro-social dysfunctionalism both obliterates from public view the social and cultural upheavals of the last 20 years and dismisses any attempt to understand the relationships between processes of social change and identity formation in young people.” (p. 109).

Beyond methodology, other “social” critiques maintain that the thrust of the recommendations coming from the youth based RFPP have “de-centered” the structural, preferring to emphasize individual level risk factors (Furlong & Cartmel, 2007) such as low IQ, anger, poor coping skills, impulsivity, poor school performance and relationships, and problematic peer associations at the expense of the structural antecedents of these problems (Pitts, 2003; Bessant et al, 2003). Such “de-centering” also encourages reframing collective
risks, such as those created by economic inequality, into individual ones produced by skills or attitudinal deficiencies (Kemshall, 2008; Rose, 1996). In the most narrow implementation of RFPP, individuals “own” their risks and are expected to navigate them successfully (Kemshall, 2008; O’Malley, 2001; Gray, 2009). The risk model is by no means alone in its tendency to “lose” sight of the social and require personal ownership of problems, but the expansive capacity of the risk model and its ability to “reach” into new reforms means that this tendency must also be taken seriously if alternatives are to succeed.

Disconnected risk-overview

While the risk model can be ideologically molded in different directions, the contemporary framing that drops or substantially shrinks the social aspects of risk has ideological and pragmatic consequences for juvenile justice policy and practice. The remainder of this chapter builds on previous critiques and focuses on how key ideas embedded in the risk model—namely risk recognition and reduction——interact in a context that further shrinks the social and too quickly “moves past” youth suffering to create a disconnected philosophy of risk. In losing touch with both the structural roots of risk and the individual experience of it, the disconnected model disservices youth through creating a juvenile court focused more “recognizing” and “tracking” risk than alleviating it, and that fosters, somewhat ironically, risk aversion in youth who need to take healthy risks in order to change their lives. That being said, the expansive ideological capacity and “reach” of the risk model, along with notable resistance to overly restricted framings of risk, offer hope for a more socially rooted model that links structural risks with lived experience. Instead of the narrowly focused “what works” reductionism that the disconnected model favors, a reform project grounded in “what matters”
that links policy based structural improvements with actual improvements in young people’s lived experiences offers transformative possibilities in juvenile justice.

**Shrinking the “social”**

The loss of the social in the disconnected model corresponds to a more widespread downgrading of what constitutes “environmental” and “structural forces” and, even, what is the most meaningful level of social organization. The increasingly smaller conceptions of what counts as the “social order” corresponds to the related, previously discussed phenomena of structural nihilism—the distrust of social explanations—and cynicism—the idea that social structures cannot be changed. The persistent disregard of the social either because of skepticism of its explanatory value or cynicism over whether it can be changed encourages us to “look away” from the social all together, or downsize it into a smaller entity. In the disconnected model of risk, for example, “peer” and “family” factors have been collapsed in some studies as the largest “social” forces (Haines and Case, 2008). The broadest framings of risk research tend to focus on community and neighborhood variables, such as percent living in poverty, or number of single heads of households (Wikstrom and Loeber, 2000; Haines and Case, 2008). The ideology that leaves the broader societal forces behind or relocates them to more immediate location allows an unequal status quo to go largely unchallenged, and makes the existing state of affairs appear natural and just (Gramsci, 1971).

An epistemological “logic of severance”, rooted in academic, quantitative positivism further supports the “chopping up” of risk factors and splitting them from people and their social surroundings. The measurement of risk, according to Farrington, is usually “dichotomized” (i.e., attachment is present or absent) (Farrington et al, 2012: 46). Other risk studies have examined
risk as an extreme category (i.e., poor attachment) or as a continuous variable (i.e., attachment on
a Likert scale). While construing risk this way may be necessary for a set of statistical methods
that also presume linearity and “all things being equal”, it also promotes an ideology that such
“severing” of factors from individual lived reality and their “shrinking” into a dichotomous
variable reflects the natural state of affairs as well. Looking at risk in this more isolated way
loses touch with the biographical understanding of how the presence or absence of risk is
actually felt and experienced (Armstrong, 2004). Understanding how people actually
experience risk and “what helps” them (Ward & Maruna, 2007) gets lost in this quantitative
depiction.

The logic of severance underlies what Elliot Currie (1985) has called the “fallacy of
autonomy”, the belief that individuals and their families can be mostly separated from their
surroundings, and it aligns with a system that distrusts the structural or construes it as impervious
to change. But, the logic of severance also promotes a paradox between recognition and denial.
On one hand, it fosters the documentation of the structural risk factors—indeed it facilitates their
recognition so that they can be split off from more proximate variables—just as it serves an
ideological climate all too ready to deny the power of structural influences. In a publication for
judges and corrections professionals, two leaders in the risk assessment field illustrate how
splitting people from their surroundings oversimplifies and misconstrues the relationship
between unemployment and offending:

“Unemployment…by itself is not that much of a risk factor. After all if most of us are
out of work we don’t start selling drugs or robbing people; we would start looking for
another job. But if you think work is for someone else, if you have no problem letting
someone else support you, or if you think you can make more in a day illegitimately than
you can legitimately, then being unemployed does add considerably to your risk of offending”. (Latessa and Lowenkamp, 2005: 15-16)

While the researchers may know that the power to earn more in a day illegitimately is a risk factor grounded in a particular set of social arrangements that spread the “good jobs” around unevenly, they do not focus on this problem. They do not focus on the reality that much of the available work, if there is any available, is likely marginal, dull and fails to meet basic needs, much less the wants and desires in a consumerist country like the U.S. Instead, the bulk of their argument is that unemployment is a risk factor because lazy criminals think work is for someone else. In other words, the most proximate individual variables-antisocial attitudes about work—are privileged, while the social factors that likely influence how those attitudes come about are vaguely implied or left off all together. The logic of severance supports this framing because it considers scientifically legitimate and advisable to split the “proximate” from the “distal” and to look for the “most direct” relationship as points of intervention. It is not as if looking at risk in this way is by itself problematic. In the disconnected model of risk, however, the proportion of the research emphasis is on work that severs and narrows social variables. Far fewer studies (indeed very few) examine how risk is socially constructed, how individuals experience risk, or what makes for “societies at risk”.

The reduction of the idea of “society” to what lies immediately beyond the doorstep aligns with Beck’s theory of the risk society (1992, 1997). In his conception, risk is “free floating”, unmoored from previous structural constraints like class and race. Instead it infuses the day to day life of each person in unique ways. Giddens (1991), however, still sees the experience of risk as more tied to structural forces. The most robust framings of the RFPP, such as those posited by Farrington, acknowledge that structural forces play a role even as those
forces are classified as “indirect”. In a study of risk for homicide offending (Farrington, Loeber and Berg, 2012), for example, rather stark racial disparities disappeared when controlling for structural variables. They conclude that structurally rooted differences in exposure to risk factors explains racial variation in risk for committing homicide. In a recent review of the RFPP as a guide to crime prevention, however, society based variables were largely passed over in favor of more proximate, community based factors. While it may seem logical to focus on immediate surroundings---after all this is where kids live-- it also misdirects attention away from larger “root” risks like deepening social inequality, and the uneven spread of serious deprivation that affect some communities profoundly. Communities do not get to have a high percentage of poverty, violence, infant death, poor education and health care by accident. The communities themselves are nested in a broader set of social arrangements that make exposure to those risk factors more likely. In downsizing the social, even inadvertently and in the service of understanding risk in order to prevent it, scholars bypass this important element.

While the public health framings of the RFPP, especially, understand that the structural plays a role, even a vital one, this fuller rendering of risk falls out in the disconnected model, and I would argue, represents the exception in most risk literature rather than the rule. In shrinking the conception of what constitutes relevant social variables in favor of more “proximate” explanations, the sense of urgency required to address them is similarly attenuated. Cutting out or minimizing the public sources of personal problems weakens the sociological imagination when it is most needed. While the benefits of local problem-solving should not be shortchanged, failing to also deal with the broader unfair social arrangements places the burdens on the most disadvantaged communities, where the disinvestment that creates risk in the first place works against efforts to combat it.
Premature resolution of suffering

The logic of severance lops off the social, and it also facilitates the splitting off of the personal experiences of risk. Armstrong (2004), for example, notes that much of the risk research fails to talk to people actually living with risk—both the reality and the label. In some very real senses, the risk label itself is a euphemism for personal suffering. Labeling a young person “at risk” when they have witnessed and experienced violence, when they live lives filled with insecurity and potential danger, and when they lack stable relationships with caring adults substantially minimizes the harm they have suffered and avoids the real problems they face. Proponents of the risk society thesis argue that more and more of life struggles are interpreted personally, as a product of personal failure rather than collective social problems. And I certainly see this as part of the cultural influence on the risk model, but it also misses a significant amount of the deeply de-personalizing philosophy that the disconnected model of risk contributes.

By losing touch with the lived experience of risk, those working closest to youth also lose touch with biography (Mills, 1959), with the youth’s own understanding of how their personal experiences correspond and interact with the broader society. The “individualized” risk story, common to the disconnected model, is not really a personal story. It acts more like an imposed script that requires personal ownership of the consequences of risk. Layered on top of significant levels of personal suffering, the ownership script ultimately minimizes it. Again, it is not as if the suffering is missed or overlooked. Indeed a glance through most “high risk” youths’ court files will likely detail a lifetime of personal struggle. Instead it is an imposition of the “ownership script” on top of those details that has the dismissive impact. Academics and professionals who work with youth are probably familiar with the basic examples of the script:
“Youth must learn to take personal responsibility”; Youth must learn to make better choices; Youth must learn to self-regulate” etc… This script is almost ubiquitous in juvenile justice discourse—its structural analogue may be found in the “personal responsibility” rhetoric associated with welfare or the social safety net. It is present regardless of the severity of the social experiences or the degree of harm that the youth have experienced.

And there is a problem with it, although at first glance it is hard to pinpoint exactly what that problem is. We have become so inundated with the language of “personal responsibility” and “individual accountability” that it has become practically hegemonic. And, it is important to note that learning to take responsibility and make good choices is part of healthy development too. No one can say they do not want young people to make good choices. But what is going on here is more insidious and ultimately more harmful than merely trying to teach good decision-making skills. While it reflects the ‘responsibilization” process associated with neo-liberal governance (Rose, 1996; Gray 2005, 2009; Muncie, 2006; Muncie and Hughes, 2002; Phoenix and Kelly, 2013), it also bypasses an essential step that youth need to take in order to make better decisions-namely to be authentically seen and heard and to disown what is not their fault.

While the script generally follows an acknowledgment of lives filled with hardship, its ideological message is akin to “That’s hard, but it happens, so move on.” It pushes for youth to move past their trauma quickly without much acknowledgment, and urges what I am calling a premature resolution of suffering. The premature resolution of suffering pushes youth to take ownership of their lives before they have sorted through and understood their experiences. It is hard to re-teach youth who have not disowned their victimization, who have not deeply learned that the facts of their birth or their abuse, or the community violence they have witnessed is not their fault. Disowning is a pre-requisite to helping most youth imagine a different kind of
existence. It is not simply a “reframing of their choices” that youth need, but an insightful examination of what they have experienced—in disavowing “fault” for harms beyond their control, youth can be empowered to see their personal strength, and the possibility of other options. Once they have gotten to a place where they are ready to make new choices, then they need to real support in implementing those choices—including supports that go beyond sending them right back to the same social harms that delivered them to court in the first place.

In losing touch with what connects the personal with the public, we are also losing an ability to make those connections ourselves. The loss of connection reflects more than a tension between objectivity and subjectivity, with subjectivity mattering more as proponents of a post-modern worldview and risk society supporters might suggest. Instead, the risk philosophy corrodes subjectivity; imposing a script detracts from our own ability to make meaning especially when that script is handed down in the midst of psychic suffering. By depersonalizing the fundamentally personal experience with suffering, the risk paradigm diminishes individual subjectivity, and harms young people’s ability to make sense of, and ultimately move beyond their own victimization. While no one would argue for using the power of the justice system to keep youth “stuck” in their victimization, this is perversely what we accomplish in our zeal for pushing kids to take responsibility prematurely.

Recognition vs. Reduction

However “sliced and diced”, efforts to recognize risk factors surpass efforts to reduce them in the disconnected model. Risk assessment has been accused of over-focusing on containing threats rather than helping people (Harcourt, 2007; Haines & Case, 2008; Armstrong, 2004; Squires & Stephen, 2005; Kemshall, 2003) and this drive appears to manifest at ever
earlier ages and at more microscopic levels. Efforts to identify “life course persistent” offenders (Moffitt, 1993) at even prenatal stages of development are occurring (Moffit and Caspi, 2001). Even risk assessment advocates suggest that the earlier, more internalized forms of risk assessment present ethical problems and acknowledge that differences between “bio-prediction”, using genetic or neurobiological evidence to predict criminality, and current actuarial methods are ones of degree and not kind (Slobogin, 2012: 205).

In contrast to the strong impetus to identify risk, the corresponding push to reduce it is either lacking or overly limited. This does not deny the presence of a serious “what works” program designed to encourage juvenile courts to adopt research based risk reduction programs. For example, The Blueprints for Healthy Development, an organization that reviews evidence based programs since 1996, now lists 56 model and promising programs and has reviewed over 1200 programs to date (Blueprints, 2014). Despite this acknowledged push, the adoption of what works programs has been much smaller than the extent to which risk assessment measures have been adopted. For example, approximately eighty-five percent of juvenile courts have implemented some form of risk assessment (Slobogin, 2012), while less than ten percent of youth who need an evidence based intervention actually get one, even given adequate resources (Greenwood et al, 2012). More specifically, multi-systemic therapy (MST), a more socially grounded evidenced based practice that attempts to help youth change their behavior in multiple settings, has been implemented in only about 5 percent of juvenile court jurisdictions (Henggeler, 2011).

Advocates emphasize “resistance” surrounding implementation as well as funding priorities and program fidelity as being obstacles to the evidence based movement. No doubt these are problems, and they also exist within an ideological climate, promoted by the
disconnected model, that over-focuses on risk identification and expends less energy on reduction of risk factors. This does not disparage the worthy efforts of scholars and practitioners who are trying to improve the lives of youth through research based programs instead of incarceration. It merely highlights that the problems that have complicated and slowed the implementation of potentially helpful interventions are likely a product of the same forces that downsize the social, sever the public from the personal, and focus on a narrow construction of risk identification and its management.

Risk management in the disconnected model mostly refers to lowered recidivism, itself a detached concept lopped off from larger, more textured narratives about what it means to be “at risk” (Armstrong, 2004). While recidivism is undoubtedly important, it is also perhaps not the only thing we should care about. As previously discussed in the chapter on punishment, it may not be the best indicator of how well youth are doing. In other words, the lack of measured recidivism does not mean all is well, or even that something “worked” in a deeper sense that youths’ lives are measurably better and society is ultimately safer. But beyond that, the focus on risk identification at the expense of its reduction has had other implications even for a relatively narrow outcome like recidivism. For example, recidivism, itself, is often not tracked at all or very effectively. According to a recent report (Siegle et al, 2014), 20 percent of juvenile justice systems do not track recidivism at all. Of those that do, few examine the concept in a very thorough way that captures the many ways a young person might have contact with the criminal justice system following their initial offense. When more rigorous studies of recidivism have been conducted, recidivism tends to be high, with typical levels of about 75 percent, where three out of every four youth reoffend within three years.
A stubborn recidivism problem may be improved by implementing evidence based programs, but it is also important to note that attempting to reduce recidivism in the narrow way that the disconnected model encourages, that is by zeroing in on individual, or largely local, forces may not work *that* well for *very long*. Even the best programs boast modest reductions of 10-15 percent (Lipsey, 2009), and when they do achieve reductions, those changes have been difficult to sustain over time. This is not to take away from the fact that we know these programs often work better than harsh punishment, and thus represent better alternatives. It also highlights, however, that we are far from making a major dent in even a narrowly construed risk management problem of recidivism. The disconnected model’s disproportionate emphasis on risk identification helps explain the gaps in our understanding about what matters in helping youth turn their lives around, and it illustrates the need to further investigate how to help youth reliably and sustainably improve their lives.

*The perils of being “high risk”*

Scholars have attacked the purported “value free” rationale of the RFPP, noting that who is risky, and what behaviors are seen as risky are subject to race, class and gender influences (Gray, 2009; Garland, 2002; Kelly, 2001; 2012; Riele, 2006) and acts to further social exclusion of already marginalized youth more than it reduces their risk. In particular, research has held that poor male youth of color are construed as particularly “high risk”, where white youth in the middle and upper classes engaging in the same problematic behavior may never see the inside of a juvenile court or private facility to undergo “risk assessment”. Despite its “value free” veneer, the modern risk paradigm’s tracking of high and low risk youth is poised to create a juvenile justice system available to only some youth—furthering the system’s struggle with racial oppression and marginalization of youth from “risky places”. As mentioned in the prior
discussion of rehabilitation, the problem of sorting and tracking the savable from the unsavable in juvenile justice has a long history. The disconnected model of risk reinforces and elevates tracking to a new level—one that is ideologically “rational” and “scientific”. In a political climate preoccupied with the idea that prison or some form of incapacitation equates to “public safety”, youth who earn a label of high risk may have a hard time avoiding prison in the first place or getting out on parole. This trend has already been noted in the adult system, where a high risk classification makes it “nearly impossible” to lower one’s risk sufficiently to secure release (Slobogin, 2012). The risk model’s emphasis on risk assessment over risk reduction, when considered in context of a narrow ideology surrounding public safety, makes the high risk label particularly perilous.

Left to persist unquestioned, the tracking of high risk youth may become a “legit” way to give up on kids, particularly already marginalized youth of color, even before they have done anything wrong, and creating a label difficult to transcend once they do. Existing ideology that holds that you “can’t reach” some kids is reinforced by risk tracking, particularly if it is guided by the politics of public safety, and if it overemphasizes risk identification at the expense of its reduction. The trend of trying to identify high risk youth at ever earlier ages is particularly problematic when considered from this angle. It is plausible under the disconnected model of risk, for example, to imagine that there is little to be done with a three-year old “hard wired” for persistent offending. Even if that child was inundated with services, especially if none of them target root risks, the potential damage from labeling a young child, and their family, in such a way could produce counter-productive effects. Goldson (2000), for example, expresses concern at the potentially new, legitimate way to label very young children in his critique of risk based early intervention, something he refers to as “evidence irrationality” because it fails to account
for potentially labeling impacts. The “high risk” label can be especially disempowering. What I noticed in working with previously “high risk” young adults trying to turn their lives around was that many had the sense that they were forever trapped by their “risk”. Namely, they worried that their actions put their children at “high risk”, and felt disempowered and trapped by this labeling, even as they were doing what they could to change their lives for the better.

The disconnected model of risk shares a common tie with nonintervention where it is most useful in diverting those “low risk” kids out of the system. Similarly, however, they both run into problems with those offenders labeled high risk. Like the nonintervention paradigm, the risk model may theoretically contend that “least restrictive” options are best, but for high risk kids, in the context of public safety narratives, community based approaches are a hard sell. Recently, a shift in the dynamics of mass incarceration illustrates this problem. In a current budget conscious economy, reformers have been somewhat successful in convincing lawmakers that low-level offenders, especially minor drug offenders, are not necessarily appropriate candidates for prison, on the grounds that it is expensive and counter-productive to keep them there. But, to really reduce the prison population, individuals labeled high risk need to get out too. And this is where the reformer’s use of the same, narrow “prison equals public safety” narrative to justify letting out low risk offenders runs into problems when those offenders are, in fact, high risk. When the disconnected model of risk continues to perpetuate the broader trend of avoiding social explanations and interventions, it also compromises the ability of the model to reform problematic practices of tracking as well as help produce the kinds of social arrangements that actually make for a “low risk” society.

The problems with tracking are especially troublesome in light of the seeming ideological neutrality of the RFPP. This reflects a real ideological “malleability” (Maurutto and Hannah...
Moffat, 2006) and “indeterminacy” (Goddard, 2014), perhaps stemming from its purported “pure” empiricism. The risk model can fit with a range of academic disciplines, theoretical positions, and policy recommendations (Gray, 2009; Kemshall, 2008; Rose, 2000). For example, it can support inclusive practices such as universal prevention (Farrington and Welsh, 2007; Greenwood, 2006), and exclusionary practices that “sequester” (Rose, 2000) ranging from over-surveillance to chronic incarceration. Its flexibility or “indeterminacy” (Goddard, 2014) only makes it more pressing that we recognize the philosophical implications of the risk approach, as it has an “expansive capacity” that makes it amenable to and capable of shaping a wide range practices and philosophical approaches in perhaps unintended and counterproductive ways. More hopefully, its expansive capacity also enhances its ability to advance a progressive agenda, should it be channeled in that direction (O’Malley, 2008; Goddard, 2014).

Risk aversion and threats to the imagination

Fear is the enemy of progressive vision and imagination, and continuing to give power to the idea that public safety is ensured by prison and high risk youth may not be “changeable” can curtail innovation that is sorely needed within the juvenile justice system. Especially troubling is the “expansive capacity” of the disconnected approach, which could, left unchecked, continue to infiltrate and erode other promising models of youth justice, such as rehabilitation, rights and restoration (Kemshall, 2008). Todd Clear, for example, has become concerned that forcing “program fidelity” and a narrowly construed “what works” agenda could potentially threaten rehabilitative innovation and create a “slavery to the present” (Clear, 2010) If courts are forced to only adopt only “evidence based” programs, then they are discouraged from trying new, untested things, foregoing the type of social justice experiments (O’Malley, 2008) that could
stimulate the “progressive imagination” necessary to tackle the persistent problems facing youth justice.

The hyped emphasis on risk recognition and classification may impede court innovation, but it also can instill unhealthy risk aversion in the very youth it seeks to help. A philosophy that places undue emphasis on the potential negative consequences associated with risk also downplays the healthy aspects of risk-taking that all adolescents need to grow and develop their identities and potential, and that are especially critical to youth who are trying to imagine alternative, pro-social, lives for themselves. Thus, the disconnected approach achieves a perverse, yet logical victory—youth can become more risk averse, but not in the way most youth justice advocates want. They may become averse to the idea of change. After all, change is risky and the threats to sustaining that change are very real, and often stem from the same sources of suffering that brought them into court in the first place. What’s known and familiar often feels less risky, even when it may involve startling amounts of danger and threat. It is why changing circumstances is crucial (and why minimizing those circumstances is so harmful)—it provides a real glimpse into how things can be different and allows youth to imagine different possibilities for themselves. When nothing outside changes, it is difficult to both imagine and sustain the vision of a new life or a new identity, no matter how much the desire is there. For many of us, and youth are no exception, our sense of possibility is shaped by our surroundings and experiences and those of our families and communities. Sampson and Wilson (1990) refer to this psychic feature as “cognitive landscapes”. In order to expand what’s even considered possible, let alone plausible for youth who endure the reality of deprivation, violence, and exclusion, efforts to “cognitively restructure” or “medicate” our way out of the problem do little until we also give youth better lived experiences to ground their new thoughts and spur their
imaginations. New experiences can serve as “turning points” (Sampson and Laub, 2005; Maruna, 2001) that allow the process of change to take root and grow.

But when the definitions of success are narrow, the real world conditions seem bleak, and their own sense of threat is high, which is where the disconnected model leaves many, especially high risk, youth, the idea of taking a leap of faith, of investing time, energy, effort, and hope into a changed life may not make sense. In fact, it might seem like a foolish and wasteful set-up for failure. Indeed, empirical studies with youth have demonstrated that our current set of practices leaves youth feeling alone, abandoned, “on their own” (Myers, 2013; Phoenix and Kelly, 2013) and less likely to see a new way of life as realistic (Kemshall, 2008). Risk reproduces itself in this way—it is identified and then allowed to persist, and possibly strengthen the face of ongoing exposure to “risks” and the experiences of being labeled “at risk”.

Conclusion

Ultimately, I argue that the ideas of risk identification and reduction, when considered in context of ideology that shrinks the social, severs the relationship between the public and personal and that over-emphasizes risk recognition over its reduction creates a disconnected model of risk. The disconnected model reinforces problematic, discriminatory practices of tracking, especially for high risk youth, and discourages healthy risk taking necessary for courts to develop innovative programs and for youth to imagine and enact meaningful change. Somewhat ironically, the risk model, especially the more complex versions of it, “sees” both structural and individual risks, but the disconnected model loses touch with the essence of both. Again, I do not want to minimize the social justice potential of the risk model (Goddard, 2014; O’Malley, 2008). Part of the power of the risk paradigm could lie in helping empower youth to
face and transcend their negative life experiences. But that is an empty promise if the sources of that suffering are left unattended, and if youth are discouraged from disowning what is not their fault. These two aspects are currently minimized in the disconnected model, but they are not precluded entirely by the risk paradigm, especially a fuller rendering of it.

A potentially transformative model of risk emphasizes “what matters”, a policy program that envisions what makes for a “low risk” society, and that ensures all children have the opportunity to grow up in a “livable” place. While such a vision sounds utopian, especially in an ideological climate that construes efforts to change society as too “grand” and “naïve”, there are already what we might think of as “progressive hot spots” where communities have sought to make universal health a goal of their residents (CDC, 2013). While the CDC’s “Healthy Communities” program expressly focuses on the prevention of disease, we might also imagine how such a program could be adjusted to focus on what makes for healthy communities more broadly, with specific attention on youth welfare and creating “livable” places. There are plenty of communities in the U.S. where crime is relatively rare, and those places often are livable in the sense that people have decent jobs with good wages, wide access to stable, affordable housing and high quality services such as healthcare and education. But even beginning to imagine a social policy that distributes “livable places” more evenly requires a sustained and serious re-examining of both the structural and personal experiences of risk. Continuing to shirk the social, lose touch with the personal, and provide for a narrow range of risk identification techniques at the expense of risk reduction threatens to needlessly shortchange youth and the capacity of the justice system to create broader change.
CHAPTER 8: CONCLUSION

*There is nothing more practical than a good utopia.*

Lode Walgrave, 2009

*You can’t kill ideology with a bullet. You can only kill it with a better idea.*

Queen Rania of Jordan, 2014

The field of youth justice is full of competing and, as we have seen, contradictory ideas about how to treat youth. Such a finding is nothing new, and plenty of scholarship has addressed the apparent incompatibility and ostensible incoherence of the different models of youth justice (Feld, 1997; 1999; Muncie and Hughes, 2002). In examining the models’ key principles, and how they interact with broader ideology and systemic realities, what I find most striking is what these seemingly disparate approaches have in common. Regardless of their clear differences, and notwithstanding each model’s unique positive contributions, all of the models neglected matters of substantive justice and often abandoned youth at the deepest end of the juvenile justice system in ways that perpetrated excessive punishment, discrimination and abuse of human rights. Over and over, I found that structural level problems were simply neglected, distorted or “lost” to other ideology or competing interests, and that the models, even those seemingly progressive ones, often deserted the most marginalized youth or even pushed them further into the criminal justice system.

The biggest threat facing progressive change in juvenile justice is not the seeming incoherence of youth justice policy or the inability to deal with the system’s competing goals. Instead, I argue the passive acceptance of “lost cause” ideology is eroding the ability of the juvenile justice system to resolve its conflicts and support youth in meaningful ways. The idea
that some kids and some kinds of problems are “lost causes” that we can do very little about fuels some of our most destructive practices such as the throw away option, racial oppression, harsh punishment, and human rights violations. It justifies and perpetuates a self-defeating cycle where abandonment of social welfare on one side creates conditions that enable serious delinquency, which triggers the ideology of punitive necessity and the potential for harshness on the other. Inattention to “lost causes” threatens to make the new found optimism within juvenile justice nothing more than a temporary respite in between punitive takeovers. It undercuts our existing models of justice, and limits their ability to improve youth welfare or make communities safer, enables harmful unintended consequences, and ultimately constrains the progressive imagination in ways that thwart innovation and derail the possibility for long-term, sustainable change.

Based on the analysis in the previous chapters, I want to offer some key principles for a system of youth justice committed to youth welfare, public safety, democratic principles and sustainable social change. Here I recommend four key principles that counter the limitations and “lost cause” ideology embedded in our current models of justice. The four related, interdependent principles include: 1) a focus on social justice 2) a preference for the “social” account of problems and solutions 3) the notion of universal amenability and its related ideas of supportive decriminalization and deep diversion and 4) robust restoration and thick reintegration. This is not to say these are the only principles that flow from this analysis or that these are the only relevant principles that could inform a transformative model of juvenile justice (see, for example, Muncie and Goldson, 2006; Currie, 1991; 2004; Haines and Case, 2015). Instead, based on my analysis, these represent the “big four” that link to the most common and powerful
problems that cut across all the models, and that directly tackle some of our most harmful and counterproductive practices.

_Principle 1: Focus on social justice_

Each and every model of justice analyzed here fell short of its ideals and goals because it neglected the requirement of a just social order. An “atomized” model of rehabilitation is one where the social needs of youth are subordinated to the need for “controlling” their behavior via “pills and programs”. States that routinely subject young people to conditions of deprivation, insecurity and violence will reap the consequences when those youth adapt to what they know and act out in harmful, socially destructive ways. Avoiding the social by emphasizing reactive crime policies, no matter how rehabilitative, rights based, or restorative they may be will do little until the health, safety, and wellbeing of youth and their families are ensured.

Each model of justice currently in place within juvenile court needs to place social justice at its core. The idea of social justice is already included in some versions of the rehabilitation, rights, restorative justice and risk paradigms, but “falls out” in practice. Instead of getting “lost” or minimized, social justice needs to be central and salient to any model of youth justice policy. The focus on social justice creates “livable places” and “restorable communities” such that serious crime is much less common, and all people have sufficient stakes for co-existing in peaceable conditions. Social justice focused policies include universal measures such as poverty elimination, full employment at livable wages, security measures that protect jobs in the event of economic distress, generous paid parental leaves, high quality day care and early education, high quality health care and parent support, and wide access to meaningful opportunities to learn and develop potential (Currie, 1998; 2013; Muncie and Goldson, 2006).
Certain countries (The Netherlands, for example) have made these practices central to their public policy and are properly considered “youth first” societies. This is not to say that the Netherlands lack social problems merely that they have chosen to prioritize kids and families in meaningful ways. Not surprisingly, violent crime is low and incarceration rare by U.S. standards. It is also not to suggest that wholesale importation of one country’s model into another country is practical or realistic (Muncie and Goldson, 2006), but that does not deny the possibility for making similar kinds of choices that make youth “salient” within social policy generally and youth justice policy specifically. There is nothing predetermined that prevents federal and state governments from making these policy shifts. We have the knowledge on how to largely eliminate poverty. Likewise, nothing prevents the juvenile court from taking its parental role seriously and operating as a “full service model” to kids and families. Some isolated progressive programs already operate this way, and could, if fully supported, be extended in meaningful ways (Goddard and Myers, 2013).

Principle 2: Prioritize the “social” account of problems and solutions

Related to the need to focus on social justice is the requirement that juvenile justice policy reframe problems in expressly “social” terms. As we have seen, many models of justice are eroded or distorted by an overly individualized account of social difficulties. The idea of punitive necessity gets inflated by an overemphasis on personal fault and individual blame. The “disconnected” model of risk favors internal, individual risk factors such as antisocial attitudes or problematic peers, with much less attention to how those variables came to exist. Juvenile justice must resist the broader social tendency to sever the social, and to divorce the personal from the public. Such accounts minimize youth suffering and compromise personal change, and they also shortchange the realities that produce and reinforce “risk” more generally. Failing to properly
examine the social fosters the kind of narrow, reactive responses that have proven so damaging, and it detracts from our ability to advocate for a more meaningful kind of “public safety” that means people feel safe and secure going about their daily lives and are mutually invested in the safety and security of others (Wildeman and Western, 2010).

Losing touch with the social has also reinforced serious problems of oppression and exploitation. In order to stop young black men from dying in interactions with those who are supposed to protect and serve them, a full social account of the historical and contemporary sources and consequences of racial oppression are necessary. A sustained, multilevel project of confronting and eradicating racial oppression in our society is urgent. Such projects have been undertaken in countries in transition after mass injustice to promote healing, offer justice, and prevent the abuses from happening again. South Africa, for example, committed to a broad scale “transitional justice” project that engaged the public in confronting the experiences and legacies of apartheid in order to reimagine a different system of justice (Curry, 2007). While such a project takes time and is not without its own obstacles, it is also crucial if we are to avoid the continued demolition of democratic principles. It is necessary to dismantle the systemic denial and overly individualized versions of racial discrimination that either discount it as opportunistic “playing the race card” or acknowledge it as harmful but minimize it as the product of a few “bad apples”.

Relatedly, re-engaging the social is necessary for juvenile justice to more effectively become part of a multi-level, system wide effort to promote the well-being of children. A social system that underinvests in child welfare also, not surprisingly, underinvests in and then overwhelms its juvenile justice systems. Narrowing the gaze to individuals and conceiving the social aspects of delinquency as “lost causes” only reinforces the broader trend of isolation and
disinvestment. I am not referring to the kind of system coordination that merely passes kids back and forth in various systems of social control, each trying to limit caseloads and maximize resources. Instead, I am promoting a robust social model where the understanding of problems and their solutions are multilevel conceptions. The social ecological model, for example, recognizes that a variety of social systems play important roles in youth behavior (Bronfenbrenner 1979). In its model of violence prevention, the Center for Disease Control makes a variety of interdependent recommendations that would help protect youth from violence at that societal, community, family and individual levels. Such practices would include policies that eliminate poverty, end corporal punishment, reduce abuse and neglect, promote family health, and foster safe schools and communities (CDC, 2014).

*Principle 3: Embrace universal amenability; supportive decriminalization; deep diversion*

In addition to embracing a social vision of problems and their solutions, youth justice policy also needs to reject the idea that any young person could be a “lost cause”. In this sense, a transformative model of youth justice embraces universal amenability. By this, I mean that all youth are considered worthy and deserving of help and guidance regardless of the seriousness or frequency of the offense. Practicing universal amenability means eliminating prosecuting youth as adults under any circumstance, and it eliminates tracking to the adult system based on perceptions of criminal sophistication, “hardness”, and other “signs” of non-amenability such as resistance. Resistance to help, from the vantage of universal amenability, is a normal and healthy adaptation for youth who have been mistreated, and for young people seeking a sense of control in their lives. Instead of “giving up”, the principle of universal amenability prescribes sticking it out while working to build trust. It also involves examining the kinds of “help” being offered. Deep rehabilitation approaches that stress “transformative intervention” (Currie, 2012), respect,
and youth participation are more likely to engage young people than fault focused “pills and programs”.

Universal amenability also means adopting broad practices of “supportive decriminalization”. This principle incorporates the wisdom of the nonintervention model that criminalizing youth often harms them more than it helps them. For example, raising the age for juvenile justice jurisdiction for all types of offending would fall in line with international human rights recommendations. But instead of just ignoring warning signal or symptomatic offending until youth reach a certain age or the problems worsen into more serious forms of harm, supportive decriminalization pays attention to the messages youth may be trying to send. A multilevel system that seeks to support youth with socially appropriate services and positive discipline techniques could be applied to kids for most types of offending. For example, a young woman who runs away from home may need a safe place to stay, counseling to address abuse, opportunities to give and receive healthy nurturance. She may well need these services for a sustained period of time. There are residential communities like this that already exist, but there are too few of them and this principle requires a fuller investment in these and other community based services. Detention facilities have become de facto safety centers. In lieu of sending youth back to a problematic home, some judges may end up inadvertently criminalizing warning signal behaviors in a well-intentioned effort to provide safety and support. So the better option involves developing a system of supportive services that can offer safety, counseling and other services. The principle of supportive decriminalization also eschews punitive necessity and eliminates the option of converting repeated status offending into “violation of court order” delinquency charges.
Universal amenability does not just mean assuming the best in youth who have done very little wrong in the first place. It also means “sticking with” kids who have done very hurtful and damaging crimes. It presumes that a young person who has murdered someone can still become a contributing member of society. As well-known civil rights attorney Bryan Stevenson has said: “Just because kids commit murder, they are still kids”. The principle of universal amenability rejects any throwaway option, such as life without parole, or any sentence in an adult system. It expressly assumes that all kids, no matter what they have done, can engage in rehabilitation. The concept of “deep diversion” (Miller, 1998) reflects this inclusive notion of amenability in serious cases. Deep diversion targets young people likely to be placed in detention or prison and either keeps them in the community or sends them to an alternative placement that surrounds them with services that match their needs and provide opportunities for treatment, education and development. Embracing amenability for kids who have done serious wrong does not mean their actions are swept under the rug or minimized. Restorative justice practices, especially victim offender mediation, have been shown to be most promising in serious cases. Indeed the VOM model has been used on the national level to deal with the ravages of apartheid and genocide. But, in practice, kids who have committed serious crimes are often forbidden from participating, and a transformative model grounded in universal amenability does not exclude kids seen as “lost causes” from processes that could help them.

**Principle 4: Provide thick reintegration and robust restoration**

Finally, youth who have been a part of the juvenile justice system need to be able to move past it. This incorporates desistance, but I mean quite a bit more than that. A transformative system offers “thick reintegration” and “robust restoration” to help youth find their way and fully participate in safe, meaningful lives. By thick reintegration I am referring to
a system of community supports and services aimed at “sticking with” youth even if they are “pulled” back toward criminal behavior on the road to desistance. Such supports also provide youth with meaningful opportunities to find their “path” and develop a positive social identity. For many youth I have worked with, discovering their “voice” through education helped them realize they had something to offer the world. Another such opportunity came with the discovery that they could help others who had been through similar struggles.

Youth, regardless of what they have done, need to be able to have hope that such acts will not forever define their identities and experiences. Confronting harms is important, but so is the idea of redemption. While redemption has religious connotations, here I use it to mean that all youth should have hope that they are not forever doomed by their past misdeeds. This does not mean someone ever “forgets” a serious crime, but it does mean that youth are not robbed of the opportunity to be more and to do more in their lives. It is part of a series of practices of “robust restoration”. Robust restoration includes full legal restoration in the sense that prior history cannot permanently brand young people. It provides youth, legally speaking, with a “blank slate”. Such conceptions are part of the original meaning of rehabilitation (Garland, 1985) where once individuals had “paid their debt”, they effectively started over. While legal expungement is still technically available to kids in the juvenile justice system, the protection it affords is much more minimal in practice, especially for youth with serious and chronic offense histories. What I am talking about here is full legal restoration, where youth no longer have the threat of “discovery” of their juvenile past haunting them at every turn. Robust restoration also involves more informal practices, where youth are accepted into communities as full members and not “bad kids”. This is difficult to legislate (McNeill, 2012), but it is not impossible. Providing meaningful opportunities for kids is part of ensuring their informal acceptance, and robust
restoration also means that people who work within institutions who help youth facilitate that transition. Often all it takes is for key members in a social group to demonstrate acceptance, and others soon begin to act accordingly. Programs like multi-systemic therapy emphasize this kind of coordination between systems where kids who have learned new skills are not hamstrung by people refusing to let them practice them.

_Potential criticisms_

Lost causes ideology perpetuates a pessimistic worldview skeptical of the ability to advance systemic change for social problems. Such proposals can be attacked as utopian, insensitive to victims, or simply beyond the scope of what is possible in our diverse, complex society. That nihilistic logic is part of what spurred me to do this dissertation. The criticism that such a project is utopian (or perhaps naïve) appears to presume the status quo is realistic and defensible. Such a premise seems difficult to accept given the vast failure of mass incarceration and the damage it has caused. What seems more naïve is the notion that we can continue to eviscerate democratic principles of freedom and equality, compromise real public safety, and waste the potential of so many young people who form the backbone of society by continuing to endorse a failed crime policy. Indeed what is most likely at the root of this criticism is not so much that the ideas in a transformative model are themselves naïve, it is that the political will to instigate them is lacking. While that claim may have some legitimate basis, unfortunately, it does not obviate the need for transformative proposals. Indeed, it makes the need for clear, cogent alternatives that much more pressing. Civil rights advances, and other successful social movements, have resulted from the sustained, clear and persuasive repetition of an alternative vision. We have entered a reformist period, and the time is ripe for the kinds of transformative proposals that could secure lasting change within juvenile justice. Martin Luther King has
suggested that such commitment is required for a more just society: “The hope of a secure and livable world lies with disciplined nonconformists who are dedicated to peace, justice and brotherhood”.

A related problem of ideology stems from punitive necessity and the package of ideologies that make transformative models seeking to break away from punishment appear “soft” on crime and insensitive to victims. The idea that punishment is the only way we can stay safe was part of the rationale sold to the public to justify mass incarceration. Plenty of scholars have attacked this ideology and it is becoming increasingly known that prison does not make us safer (Currie, 1998; 2013; Mauer, 2006; Cullen, 2006; Lipsey et al, 2010). The idea that punishment is necessary, however, also encompasses notions of moral duty. As I have discussed at some length earlier, it is seen as necessary to justice itself. But, the time is ripe for questioning whether victim satisfaction is best achieved by creating policies that make that victimization more likely, by locking up kids who are themselves among the most victimized in our society, and by doing little to ensure that such harms will not happen again to someone else. My proposal, and others like it, take the idea of a moral duty to victims to a much higher level. Instead of a moral duty to merely punish crime, this proposal argues that we have a moral duty to systemically root out the deeper causes of victimization and create a society where people can feel safe, secure and capable of leading productive lives.

Finally, a set of potential criticisms relate to the seeming “impossibility” of changing the system. How do we combat ideology that has social and cultural roots? As the quote from Queen Rania of Jordan suggests, ideology can be successfully fought with better ideas. Ideology, by its nature, is tenuous and contains the seeds of its own destruction (Scheingold, 2004). People are not powerless against ideology and can effectively resist in small and large
ways (Foucault, 1977). Such resistance is already occurring in juvenile justice. As I noted, there are people and programs already embracing the principles I have outlined here. Expanding and strengthening the resistance is one way to continue to tackle ideology. Another is through training and education. Ideology is at its most powerful when it remains hidden and insidious, but it can crumble when rendered visible and problematic. Scholar and practitioner partnerships dedicated to rooting out “lost cause” ideology can help eliminate it and pave the way for different approaches.

Finally, a related “impossibility” criticism concerns how to pay for a transformative model. While laying out a full budget is clearly beyond the scope of this project, it goes without saying that budgets reflect a series of political choices and priorities (Currie, 1998). There is nothing inevitable about how we treat youth; nothing is predetermined or set in stone. Other countries punish far less, and the diversity among jurisdictions in the U.S. is notable even given the broader reality of harshness. The expenses of youth confinement are exorbitant. A recent study estimates the long term costs between 8 and 21 billion dollars (Justice Policy Institute, 2014). I hesitate to even engage in cost savings rhetoric as it can just as easily be used to justify harsh, degrading, dehumanizing wasteful punishment that is inexpensive (Lynch, 2010). While the austerity mentality has helped let some people out of prison, it has also meant a deep slash in rehabilitative programs and even further cuts to an already fragile safety net. Thus, a cost-savings rhetoric must be used carefully. But, it is worth restating what others have said: that our crime policy and juvenile justice policy reflect a series of choices (Currie, 1998; Muncie and Goldson, 2006) that come with a price tag. Some of that price tag can be captured in dollars and cents, and some of it occurs in the loss of real public safety, democratic ideals, and human
potential. These are the real lost causes in juvenile justice, and a transformative vision is needed to bring them back.
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