

Eliminating Schools as a Point of Entry into the Juvenile Justice System

Calli Leigh Burnett

Introduction

While juvenile courts have traditionally been viewed as a service provider and rehabilitation avenue for troubled-teens this paper explores the disparate impact of the juvenile justice system specifically on low-income students who are pushed out of school and into the juvenile justice system for minor infractions and misbehaviors. The number of students affected by such practices is not small. In 2008, courts with juvenile jurisdiction handled 1.7 million delinquency cases.¹ At the same time, secondary schools suspend some estimated two million students annually.² To give some comparison to those figures, slightly more than three million students graduated high school in 2013 total.³ This article first briefly describes the history of the juvenile justice system and its disparate impact on low-income communities before examining some of the systematic devices that feed the juvenile justice system, one of the main points of entry being public schools. This article describes in-depth some of the causes for the “school-to-prison pipeline” and then offers a variety of next steps for policy makers, communities, and schools that can help stop the exclusion of students from school and the funneling into the juvenile justice system.

¹ See Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 Wash. U. J.L. & Pol'y 53, 82-83 (2012).

² See Jacob Kang-Brown, Jennifer Trone, Jennifer Fratello, & Tarika Daftary-Kapur, *A Generation Later: What We've Learned about Zero Tolerance in Schools*, Center on Youth Justice at Vera Institute of Justice, Issue Brief, December 2013, p 1-10.

³ *Id.* at 3.

The Juvenile Justice System and its Dual Impact

Originally the juvenile justice system was created to target children living on the streets, to bring them in and rehabilitate them through proper atonement and punishment, in a system that was separated from the perceived rough and hardened criminals of the adult justice system. The founders of the juvenile court were part of a larger humanitarian movement that helped elevate the status of children from “that of property to a dependent class in need of protection by the state.”⁴ The system though made little distinction between children who had committed crimes and those children who were simply victims of poverty and thus living on the street.⁵ The law closely merged the symptoms or indicators of poverty and those of crime.⁶ This meant children suffering from dependency, neglect, delinquency, and mental health issues were all lumped together and adjudicated “as a ward of the juvenile court in need of care and protection rather than as a delinquent or a dependent child.”⁷ Critiques of the juvenile system began in the early 1900s, with an influential study published in 1966 in the Harvard Law Review.⁸ The Harvard study used empirical evidence to conclude that the law enforcement element of the juvenile court system had far expanded its discretionary powers, that juveniles were largely discouraged from seeking counsel and the majority entered the system unrepresented, and that some of the judges imposed incarceration at disposition without

⁴ See Birckhead at 62.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 65.

⁸ *Id.* at 66.

regard for the individual facts.⁹ The Harvard study “offered additional evidence that the rehabilitative ideal was either fundamentally flawed or imperfectly implemented.”¹⁰

The critiques of the Harvard report still ring true today, though today’s juvenile court has also been criticized as a dual system: one system for upper and middle class offenders and another system for low-income offenders. As the history above indicates, the juvenile courts have traditionally been considered the courts of the poor and impoverished.¹¹ Nearly 60 percent of youth’s families within the juvenile justice system were either on public assistance or had annual incomes of less than \$20,000, while another 20 percent had incomes of less than \$30,000.¹² “While there are juvenile courts located in suburban, middle-class, or wealthier jurisdictions, these tend to be the exception rather than the rule.”¹³

This dual juvenile justice system has emerged largely due to two elements: i) perceived connection between services and the juvenile justice system, and ii) the discretion and variety of actors that can affect whether a student is pushed into the juvenile justice system or funneled out. The connection between services and the juvenile justice system is so ingrained in the current process to the point that in some jurisdictions a juvenile delinquency petition must not only establish reasonable cause to believe that the juvenile committed the crimes alleged, but must also include a statement that the juvenile “requires supervision, treatment or confinement.”¹⁴ These requirements result in both children who have committed a crime as well as children who simply need services

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 58-59.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 82-83.

to enter the juvenile system without any real regard for the difference between the two.¹⁵

Thus emerges the dual system, as upper and middle class offenders who have access to private services, such as boarding schools, drug and alcohol treatment centers, and mental health facilities, will be filtered out of the juvenile justice system while those low-income offenders who lack access to such resources are forced into juvenile adjudication.¹⁶ This means the family's ability to obtain services is a critical factor in the determination of whether a child will face formal delinquency charges.¹⁷

Similarly, throughout the juvenile justice system there are a variety of actors that make decisions to cumulatively impact whether a child ends up being adjudicated as a juvenile, whether that child is diverted out, or avoids the system completely.¹⁸ These actors range from teachers to service providers, police officers, civilians, probation officers, judges, and lawyers (both prosecutors and defense attorneys).¹⁹ For example an officer can decide to simply return a child home, call the parents, have an informal conversation, or pursue a case within the juvenile justice system.²⁰ While this discretion is designed to help make case-by-case decisions it becomes a problem when the system as a whole shows a bias towards using discretion for distinct racial or socioeconomic groups over others.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 57-58.

¹⁹ *Id.*

²⁰ *Id.*

The Funneling of Children and Families into the Juvenile System

Many studies and researchers suggest that in wielding the discretion discussed above many court officials and other actors will “consciously and affirmatively” take steps to direct low-income families into the juvenile justice system.²¹ They do so in the belief that the juvenile justice system is good and a benign system that will take the families and the children’s best interests to heart.²² There is also the belief, and in some ways real, connection between the juvenile justice system and access to services.²³ The current economic downturn, which has left more Americans in poverty than in the last 52 years, adds fodder to this belief.²⁴ This downturn affects individuals through job loss, stagnant wages, and has resulted in one in five children living in poverty.²⁵ The downturn also affects the budgets of local governments, which have been stripped down to the point that the social safety net is nearly nonexistent.²⁶ Again this can lead to a disparate impact on low-income families and children as “studies have shown that, in an environment of plentiful resources, decision-makers are more likely to evaluate a juvenile as amenable to rehabilitative interventions,” thus leading to the diversion of children out of the juvenile system, but if resources are scarce, “they are more likely to conclude that rehabilitation will not be effective.”²⁷ The police, teachers and school administrators who use their discretion to send young people to juvenile court may also believe they are

²¹ *Id.* 57-58.

²² See Barbara Bennett Woodhouse, *Youthful Indiscretions: Culture, Class Status, and the Passage to Adulthood*, 51 DePaul L. Rev. 743, 750 (2002).

²³ See Barbara Fedders, *Two Systems of Justice, and What One Lawyer Can Do*, 12 Whittier J. Child & Fam. Advoc. 25 (2012).

²⁴ *Id.*

²⁵ See Woodhouse at 750.

²⁶ *Id.*

²⁷ *Id.* at 758-59.

detering future crime and making the community safer, by giving children structure and services their parents obviously cannot provide.²⁸ There is a lot of assumption and bias within this last use of discretion.

Some other researchers suggest that there may exist a not so innocent or benign motivation for the disparate use of discretion within the juvenile system.²⁹ A study conducted in 1993 used a hypothesis developed with the use of conflict theory to examine data from more than 200 U.S. counties regarding the influence of poverty and race on formal petitioning, predisposition detention, and out-of-home placement of juveniles.³⁰ The study found that the data supported the hypothesis that “underclass blacks are viewed as a threatening group to middleclass populations and are thus subjected to increased control by the juvenile justice system.”³¹

Just as there is a disparate use of discretion to bring low-income youth into the juvenile system, in the same manner there are a disparate number of points of entry into the juvenile justice system for low-income children including the child-welfare system, petty theft and larceny, a larger neighborhood police presence, and the public school system. These points of entry illustrate the ways that considerations of juveniles’ needs outweigh the evidence against them in deciding which youth enter the system and those that are diverted away.³² This section will explore the first three points of entry briefly

²⁸ See Fedders at 32.

²⁹ *Structural Variations in Juvenile Court Processing: Inequality, the Underclass, and Social Control*, 27 Law & Soc’y Rev. 285 (1993).

³⁰ *Id.*

³¹ *Id.*

³² See Birckhead at 70.

while the public school system as a point of entry will be covered in more depth in the next section.

The first common point of entry into the juvenile justice system tends sadly to be the child welfare system, which is meant through early intervention to give youth safety and structure within a home that is better than the one they left. The child welfare system often produces trauma within children who have or do experience abuse, neglect, or other maltreatment, causing them to “cross over” from the child welfare system into the juvenile justice system.³³ Once a child from the child welfare system crosses over, studies show that child is twice as likely to recidivate as a youth who only entered the juvenile justice system.³⁴ Also children in out-of-home placements or group homes are twice as likely as children receiving services in-home to commit a delinquent act.³⁵

The second common point of entry into the juvenile system that disfavors low-income youth again returns to discretion and the prevalence of bias and stereotyping that can impact whether a child is referred to the juvenile justice system or not. In 2008, over 300,000 juveniles were arrested for larceny or theft crimes, with 74 percent of all juvenile arrests for property crimes being for larceny or theft, with shoplifting being the most common.³⁶ In handling a youth who is caught shoplifting or stealing, merchants and private citizens have a variety of options available for dealing with the misbehavior without referring the case to the juvenile justice system, which can be high in cost and

³³ *Id.* at 70-71.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 77-78.

time and brings stigma and harm to the offender.³⁷ Decisions and judgments regarding how to handle a shoplifter must be made quickly and with limited information, however, causing personal biases and stereotyping to enter into the calculation.³⁸ Similarly large corporations may have policies that favor offenders who can make monetary amends immediately, meaning low-income offenders are almost automatically referred to the juvenile justice system.³⁹

The third common point of entry into the juvenile justice system comes from the policy of “Broken Windows policing,” or the upped presence of police within low-income neighborhoods.⁴⁰ This policing concept arose in the 1980s and was based on the idea that an increase of policing minor offenses “such as graffiti, vandalism, and public drinking” would lead to a reduction in more serious crime.⁴¹ Critics of the theory assert that police presence is itself a “criminogenic factor” in poor neighborhoods. Empirical research suggests that police officers are pre-disposed to find fault and make arrests in low-income neighborhoods while at the same time being more lenient, forgiving, and less likely to file criminal charges in a upper or middle class neighborhood.⁴² As a result, criminal charges are brought more frequently against children in low-income communities than in more affluent ones.⁴³

The Public School System as a Point of Entry

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 79-80.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

The fourth most common, and possibly most preventable, point of entry to the juvenile justice system is the public school system. There are three main ways in which public schools serve as a funnel, pushing students out of the classroom and into the juvenile justice system. The first is the enactment of “zero tolerance” policies and the enlarged police and secret presence within schools to deal with misbehaviors. The second is the lack of resources available to students and families and the need for parents to be proactive advocates in order to obtain such resources for their children. And finally the complicated interaction between special education needs, services, and student discipline. What is most concerning is that once a student is excluded or pushed out of school it is more likely that such an event will occur again, causing a cycle of exclusion that puts the same students further and further behind academically and socially.

The vast majority of low-income children attend public elementary, middle, and high schools in which disciplinary policies criminalize the same behavior that is traditionally addressed internally at private schools.⁴⁴ The criminalization of school misbehaviors has only increased with the implementation of so-called “zero-tolerance” policies that became popular in the 1990s.⁴⁵ The theory underlying zero-tolerance policies was that schools are safer and benefit when problem students are removed from the school setting.⁴⁶ However, there is no research actually demonstrating this effect. Only five percent of serious disciplinary actions nationally in recent years involve possession of a weapon.⁴⁷ In contrast, nationally 43 percent of expulsions and out-of-

⁴⁴ *Id.* at 75.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

school suspensions lasting a week or longer were for insubordination.⁴⁸ Thus zero-tolerance policies have in reality been invoked to justify the criminal punishment of public school students for everything “from profanity, to running in the hall, to doodling on a desk.”⁴⁹ Most disturbing is that “acts that may have resulted in an adolescent being sent to the principal's office now end up in juvenile court charged as disorderly conduct or vandalism.”⁵⁰ Studies also suggest that such prescribed discipline measures lead to the exclusion of more students and when students are excluded via suspension or expulsion they fall increasingly behind academically and the alienation leads to an increased likelihood of criminal behavior in the future.⁵¹

Secondly, public schools have limited resources.⁵² Low-income children are less likely to have parents who can serve as effective advocates for them, ensure that their educational needs are met, and provide appropriate supervision and support for them outside of school hours.⁵³ When a discipline issue arises low-income parents are less likely to be able to attend the meetings or complete the procedures needed to appeal the discipline decision.⁵⁴ Many studies have found that as a result of these factors, economically disadvantaged children are more likely to receive out-of-school suspensions and to be expelled than their middle- and upper-middle class counterparts, particularly if they are children of color.⁵⁵

⁴⁸ See Kang-Brown, *et al.* at 4.

⁴⁹ *Id.*

⁵⁰ See Birckhead at 75.

⁵¹ See Kang-Brown, *et al.* at 1.

⁵² See Birckhead at 74-75.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

Similarly, low-income and minority students are more likely to go undiagnosed or identified as requiring special education services.⁵⁶ Instead public schools are much more likely to impose punitive or even criminal sanctions on children for misbehavior that is in fact a manifestation of their disability.⁵⁷ Where a child should be receiving an individual education program or and a functional behavior assessment, the child is instead isolated from the classroom and excluded from instructional time.⁵⁸ Even if a child receives an individual education program, often it requires serious advocacy by parents or even outside counsel to keep a child in school. The following story regarding Anthony, a sixteen-year-old boy, who had been identified as having a specific education disability and was placed in a public school for such a diagnosis with an IEP, illustrates this point:

His Individualized Education Program (IEP) instructed his teachers to use words instead of physical restraint with him. He became upset because he had forgotten his lunch and when the teacher grabbed his arm, he pushed her away. The school called the police and they arrested him and charged him with assault on a school official, a third-degree felony. His attorneys fought the charge based on the theory that he was being punished for conduct that was an integral part of the condition for which he had been sent to this school and that faculty and staff had an obligation to follow their own procedures rather than resorting to the criminal justice system. Despite expert witnesses and excellent lawyering on his behalf, he was convicted of assault on a state official and sentenced to juvenile detention, but placed on probation.⁵⁹

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *See* Woodhouse at 752-55.

Anthony's story is not an isolated incident. A recent study found that Illinois had suspended nearly 42 percent of all black students with disabilities.⁶⁰

Studies show that once a child is excluded from school via suspension or expulsion, the child is more likely to perform poorly and more likely to drop out; "if they do, they are eight times more likely to be incarcerated as those who graduate from high school."⁶¹ In all these ways, the public school system has become one of the largest points of entry into the juvenile justice system, funneling a disproportional number of low-income and minority youth out of school and into the courts.⁶²

The Disparate Effects of the Juvenile Justice System

This article has been consistently critical of the juvenile justice system due to its historical, and still present, flaw in addressing children who commit crime and children with needs in the same category with little to no distinction as well as the fact that in practice the juvenile justice system disparately impacts low-income and minority youth. Alongside these systematic issues, arise two effects of the juvenile justice system and detention specifically that should give rise to concern from policy and lawmakers: i) stigma and health issues, and ii) recidivism.

Research indicates that when a child is adjudicated within the juvenile court system as delinquent, the impact "is not benign-even when the disposition is arguably

⁶⁰ See Daniel J. Losen & Jonathan Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, The Center for Civil Rights Remedies at The Civil Rights Project, August 2012.

⁶¹ See Birckhead at 76.

⁶² *Id.*

beneficial.”⁶³ The negative consequences of juvenile delinquency adjudications implicate such areas as “housing, employment, immigration, and education as well as enhanced penalties for future offenses.”⁶⁴ First and foremost, placing a child in detention disrupts a child’s life.⁶⁵ That child is isolated from school, from their education, from their community, from their family, from the natural consequences of their criminal action, and from their victim. This isolation brings with it a stigma.⁶⁶ Though the child learns to operate within the new institution the problem was that the child could not properly interact within the community and that goes largely unchanged when the reaction is exclusion from the community.⁶⁷ Detention not only prevents a child from reengaging with the community in a healthy way, but it also exposes the child to the risk of physical and sexual assault, as well as psychological stress and trauma which may exacerbate pre-existing behavioral or mental health problems, or may cause new ones.⁶⁸

“Further, longitudinal studies show that children exposed to juvenile court reoffend at higher rates and are stigmatized in the process.”⁶⁹ Studies show that even a single suspension or expulsion for a discretionary offense that did not include a weapon almost tripled a student’s likelihood of becoming involved in the juvenile justice system in the following academic year.⁷⁰ If a single exclusion from school has the power to

⁶³ *Id.* at 96.

⁶⁴ *Id.*

⁶⁵ *See* Fedders at 34.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *See* Birckhead at 96.

⁷⁰ *See* Kang-Brown, *et al.* at 5.

increase recidivism in youths, how much more influence will the exclusion from the community in the form of formal juvenile detention affect a youth.⁷¹

Moving Forward to Create Beneficial and Equitable Outcomes for Youth

As Birckhead so succinctly states, “Although the current economic downturn provides fodder for arguing that court involvement is the most efficient way for poor children and their families to access needed services, this is a cycle of disadvantage that must be broken, as it will perpetuate a permanent underclass.”⁷² This is unacceptable and as community members, teachers, policymakers, and lawmakers we need to be honest and creative in embracing new legal, procedural, restorative, and school-centered policies to return the rehabilitative aspect to juvenile justice. Many jurisdictions and schools have already begun to find more effective and cheaper ways of dealing with juvenile misbehavior than policing and prosecution.⁷³ Taking an honest look at the juvenile system shows that according to recent data nationwide, 350,000 youth are detained pursuant to their involvement in the system.⁷⁴ Of these a full 70 percent of detained youth are locked up for non-violent offenses.⁷⁵

Many states have already taken legal and procedural steps to directly reduce the number of cases coming into the juvenile justice system from schools.⁷⁶ Fedders describes, for example, how in Denver police are only allowed to charge students

⁷¹ *Id.*

⁷² *See* Birckhead at 60.

⁷³ *See* Fedders at 39.

⁷⁴ *Id.* at 34.

⁷⁵ *Id.*

⁷⁶ *Id.* at 39-40.

criminally for a few serious offenses while school officials are prohibited from referring other offenses to the police.⁷⁷ A group of legal stakeholders in Alabama developed a “set of graduated consequences” for certain student offenses, which has decreased juvenile court referrals by 50 percent and decreased racial disparities by limiting automatic referrals and arrests.⁷⁸ Clayton County, Georgia implemented a similar plan and had huge drops in referrals for fighting and disruption, less instances of weapons on campus, and an increased graduation rate of 20 percent.⁷⁹ The Florida Legislature passed a new law that discourages schools from arresting students for misconduct such as minor fights and disturbances.⁸⁰ As Fedders points out, these examples show that children “don't need to be policed to be productive; and we don't need schools to feed children to the criminal justice system in order to be safe.”⁸¹ Instead children need love, trust, support, services, and second-chances.

Research also suggests that such restorative justice practices such as teen courts, family therapy, and youth mediation, are more humane, less expensive, and are either better at or at least as good at diverting youth from future involvement with either the juvenile or adult justice systems.⁸² Restorative justice is an alternative approach to crime that focuses on the interests of multiple justice clients.⁸³ It may also be referred to as the

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ See Gordon Bazemore & Susan E. Day, *Restoring the Balance: Juvenile and Community Justice*, Vera Institute of Justice, 3 (1), 3- 10.

balanced approach, and balanced and restorative justice.⁸⁴ The restorative justice model is viewed by a growing number of juvenile justice professionals as a way to reengage the community in the juvenile justice process, rather than the exclusion and isolation that arise from the current juvenile justice system.⁸⁵ The key to this model is to engage the community and the offender in the justice.⁸⁶ Instead of a passive offender receiving intervention and service from a judge on high, this approach looks to engage the offender, victim, and community as meaningful members of the justice team with the goals of rehabilitation and public safety.⁸⁷ For example family conferences may be facilitated by an officer, and are designed to ensure that the offender hears community disapproval for their behavior, is made to see the harm that was caused, and hear preferably straight from the victim what amends need to be done to make it right.⁸⁸ Participants in the family conference develop an agreement to repair the victim, while also reintegrating the offender into the community.⁸⁹ Overall restorative justice is focused on accountability, competency, and public safety.⁹⁰ Such restorative justice practices can be implemented on a school or school district level or on a national level.⁹¹ In New Zealand, implementations of restorative justice measures have shown reduced court workloads and use of incarceration.⁹² In Chicago Public Schools there have also been additions made to

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

the Student Code of Conduct to integrate restorative justice approaches while cutting down on suspensions and expulsions.

Lastly, researchers and experts argue that we need to start integrating and localizing resources and services to more equitably and efficiently meet the needs of youths in order to keep them out of the juvenile system. This means closing ineffective and harmful youth prisons for non-violent offenders and instead investing in community-based programming with the local public school serving as hub for such integration.⁹³ The latest guiding principles from the U.S. Department of Education focus on the school as the key to this holistic approach.⁹⁴ Schools need to: i) create positive climates that focus on prevention, ii) develop clear, appropriate, and consistent expectations and consequences to address disruptive student behaviors; and iii) ensure fairness, equity, and continuous improvement.⁹⁵ Critical to this approach is the implementation of an in-house disciplinary system that helps students develop new behavior skills and strategies that will prevent future instances of misbehaviors, while removal from the classroom should be the last resort.⁹⁶

As a society we need to start taking ownership over the current disparities of the juvenile justice system and the harmful effects it has on too large a number of our youth. As the visionary novelist James Baldwin once said, “For these are all our children, we will all profit by or pay for what they become.”⁹⁷ If we do not begin to embrace more creative and equitable ways of dealing with juvenile misbehavior within schools and

⁹³ See US. Dept of Education, *Guiding Principles: A resource guide for Improving School Climate and Discipline*, January 2014.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See Fedders at 41.

outside of them, then we are bound to create and carry a generation of under-educated and isolated youth who are unable to live and participate fully in our communities.