

Separate and Unequal: The Disparate Impact of School-Based Referrals to Juvenile Court

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I. INTRODUCTION

In “You’ve Come a Long Way, Baby: Two Waves of Juvenile Justice Reform as Seen from Jena, Louisiana,” Sara Sun Beale draws attention to the systemic problem at the intersection of (1) the unconstrained discretion that prosecutors have to transfer juveniles to adult criminal court and (2) the conscious and unconscious racism that runs throughout each stage of that process.¹ This combination has led to an excessively large number of African American juveniles in the adult prison system,² a system whose punitive aims do not serve youth well. Beale concludes that neither state nor federal remedies provide adequate protection for youth defendants such as the Jena Six.³

To fully understand and address the overrepresentation of African Americans in adult court, it is important to consider the methods through which they are first referred to juvenile court. Historically, school discipline has served three main functions: to ensure the safety of students and staff; to preserve the decorum of the school; and to develop character.⁴ While most discipline policies are created with these goals in mind, policies that focus on police presence and exclusionary zero tolerance rules are in tension with the historical goals of school discipline. Many African American students are led along a path to the juvenile prison system, which increases their chances of exposure to the adult prison system.⁵

Part II of this Response focuses on the ways in which punitive school discipline policies—which include excessive security procedures and police involvement—feed this school to prison pipeline, and the disparate impact of these policies on African American youth. Turning to possible solutions, Part III suggests that both (1) reducing the prison-like atmosphere of

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¹ Sara Sun Beale, *You’ve Come a Long Way Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 HARV. C.R.–C.L. L. REV. 511 (2009).

² *Id.* at 514.

³ *Id.* at 544-45.

⁴ L. T. Kajs, *Reforming the Discipline Management Process in Schools: An Alternative Approach to Zero Tolerance*, 29 EDUC. RES. Q. 16, 17 (2006).

⁵ Beale, *supra* note 1, at 521-23.

schools, and (2) utilizing the potential for community, judicial, and legislative responses to establish procedural safeguards, can reduce the initial transfer of an inordinate number of African American students to the juvenile court system, while continuing to prioritize safety in the classroom.

II. PRESENTATION OF THE SCHOOL TO PRISON PIPELINE

School administrators and security personnel enjoy wide discretion to decide which students are referred to juvenile court for behavioral infractions. Combined with preconceived notions about the ability of African American children to succeed, this discretion works to push African American students out of school at significantly higher rates than their white peers for lesser or more subjective offenses.⁶ This phenomenon, known as the school to prison pipeline,⁷ exposes a disproportionate number of African American children to the criminal justice system.⁸ The educational experience of African American and white students in terms of punishment is therefore radically different and unequal.⁹

A. *The Presence of Security Personnel in Schools*

The analogy between schoolyards and detention centers has grown increasingly apt in urban, low-income communities of color.¹⁰ The emergence

⁶ RUSSEL J. SKIBA, ROBERT S. MICHAEL, ABRA CARROLL NARDO & REECE PETERSON, INDIANA EDUCATION POLICY CENTER, *THE COLOR OF DISCIPLINE: SOURCES OF RACIAL AND GENDER DISPROPORTIONALITY IN SCHOOL PUNISHMENT* 13 (2000), available at <http://www.indiana.edu/~safeschl/cod.pdf>.

⁷ The school to prison pipeline is the most common characterization, but it is also often described as the schoolhouse to jailhouse track, the schoolhouse to jailhouse pipeline, and the cradle to prison pipeline.

⁸ See generally ADVANCEMENT PROJECT, *EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK* (2005), available at <http://www.advancementproject.org/reports/FINALEOLrep.pdf>; CHILDREN'S DEFENSE FUND, *CRADLE TO PRISON PIPELINE REPORT* (2007), available at <http://www.childrensdefense.org/child-research-data-publications/data/cradle-prison-pipeline-report-2007-full-highres.pdf>.

⁹ See NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 2* (2005), available at http://www.naacpldf.org/content/pdf/pipeline/Dismantling_the_School_to_Prison_Pipeline.pdf.

¹⁰ Because school-based referrals to the juvenile court system represent such an important entry point to the prison system, the methods through which students are referred are incredibly important. In this context, an explicit focus on reducing racial disparities is essential. See Adira Siman, Note, *Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 CORNELL J.L. & PUB. POL'Y 327, 329 (2005); Howard Witt, *School Discipline Tougher on African Americans*, CHI. TRIB., Sept. 25, 2007, at C1. Witt reports:

“Most suburban schools, where the students are more likely to be white, purchase security equipment that is meant to protect children—for example, hand scanners that make sure that the parent/guardian picking up the child is legitimate,” said Ronnie Casella, an expert on the criminalization of student behavior at Central Connecticut State University. “In contrast, urban schools choose equipment such as metal detectors and surveillance cameras that are meant to catch youths committing crimes.”

of security policies focused on zero tolerance and other harsh measures began in the 1990s.¹¹ Several prominent politicians, spurred by the media's exploitation of a few high-profile juvenile crimes, convinced fellow legislators and the public that children had become incorrigible and that a generation of super-predators had begun to fill classrooms.¹²

Yet it was white students in predominately rural and suburban areas who in fact committed the high profile violent crimes that received the most press coverage at this time.¹³ While crimes certainly increased in urban areas as well, especially due to a rise in drug and gang activity,¹⁴ African American youths were only one-third more likely than white youths to commit a violent offense by the time they were seventeen.¹⁵ Nonetheless, statistical analyses show that excessive policing takes place primarily in schools with populations consisting of a majority of African American students,¹⁶ and "[f]our out of five new juveniles detained between 1983 and 1997 were youths of color."¹⁷

Heightened police presence in schools increases police involvement in non-criminal incidents, resulting in a spike of school referrals to the juvenile court system for largely childish misbehavior.¹⁸ For example, introduction

Id.

¹¹ See CHILDREN'S DEFENSE FUND, CRADLE TO PRISON PIPELINE REPORT, *supra* note 8, at 113; see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY 60-61 (2007) (stating that in 2005, 68% of students around the nation between ages twelve and eighteen reported the presence of security guards and/or assigned police officers around their campuses).

¹² See Vincent Schiraldi & Mark Kappelhoff, *Where Have the "Superpredators" Gone?*, SALON, May 13, 1997, <http://www.salon.com/may97/news/news970513.html> (noting that legislators continued to advocate for harsh disciplinary laws under the guise of an increase in young career criminals despite publicly available Justice Department statistics proving that juvenile crime had actually decreased).

¹³ The most high-profile school shootings include the following (all of which were committed by white students): March 24, 1998, in Jonesboro, Arkansas, where Mitchell Johnson and Andrew Golden killed five people and injured ten; May 21, 1998, in Springfield, Oregon, where Kip Kinkel killed two teenagers and his parents and injured more than twenty; April 20, 1999, in Littleton, Colorado, where Eric Harris and Dylan Klebold killed twelve people and injured twenty-six. See *Country's Worst Mass Shootings*, THE STAR-LEDGER, Mar. 12, 2009, at 7.

¹⁴ See Barry C. Feld, *The Politics of Race and Juvenile Justice: The "Due Process Revolution" and the Conservative Reaction*, 20 JUST. Q. 765, 782 (2003).

¹⁵ ELEANOR HINTON HOYTT, VINCENT SCHIRALDI, BRENDA V. SMITH & JASON ZIEDENBERG, ANNIE E. CASEY FOUNDATION, 8 PATHWAYS TO JUVENILE DETENTION REFORM: REDUCING RACIAL DISPARITIES IN JUVENILE DETENTION 18-19 (2001).

¹⁶ NEW YORK CIVIL LIBERTIES UNION, CRIMINALIZING THE CLASSROOM, THE OVER-POLICING OF NEW YORK CITY SCHOOLS 20 (2007), available at http://www.nyclu.org/files/criminalizing_the_classroom_report.pdf (finding that the students attending high schools in New York City with metal detectors and significant policing are "disproportionately poor, Black, and Latino compared to citywide averages").

¹⁷ Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, NEW DIRECTIONS FOR YOUTH DEV., Fall 2003, at 9, 10. These figures represent juveniles detained for both violent and non-violent offenses.

¹⁸ For example, one kindergartner from Avon Park, Florida, was arrested and handcuffed after school officials called police when she threw a tantrum involving kicking and scratching in class. Police charged her with a felony and two misdemeanors. *Kindergarten Girl Hand-*

of police officers to schools in Clayton County, Georgia led to a 600% increase in referrals to juvenile court over a three year period.¹⁹ Yet during that time there was no increase in the number of serious safety violations.²⁰ At their peak in 2003, school referrals accounted for about a quarter of total referrals to juvenile court.²¹ Such an increase is not unique. In Philadelphia, between the 1999-2000 school year and the 2002-2003 school year, the number of arrests in schools increased from 1632 to 2194²²; in Denver, referrals rose 71% from 818 in 2000-2001 to 1401 in 2003-2004.²³

One reason for the rise in referrals for minor misconduct is that a large number of these security and police officers are not subject to the supervisory authority of school administrators, and they have not been adequately trained to work in educational settings.²⁴ Lacking this familiarity with the school community, they often operate with authority that extends far beyond the limited mission of ensuring the safety of students and teachers.²⁵ This exacerbates the gap in communication between police personnel and school administrators, who are predominately white, and the youth of color with whom they have limited interaction outside of school.²⁶ This disconnect in cultural understanding allows security officers to interpret student behavior in ways that lead to negative judgments about African Americans.²⁷ Such an environment produces two results: it reinforces common stereotypes about the criminality of African Americans and fosters the African American students' insecurity about a pre-determined future that looks very different from that of their white peers.²⁸

cuffed, Arrested at Fla. School, WFTV, Mar. 30, 2007, <http://www.wftv.com/news/11455199/detail.html> (last visited Mar. 26, 2009).

¹⁹ See M. Lynn Sherrod, Bryan Huff & Steven Teske, *Childish Behavior: Criminal Behavior*, HUNTSVILLE TIMES (Ala.), June 1, 2008, at A23.

²⁰ NEELUM ARYA & IAN AUGARTEN, CRITICAL CONDITION: AFRICAN-AMERICAN YOUTH IN THE JUSTICE SYSTEM 33 (2008), available at http://www.njjn.org/media/resources/public/resource_852.pdf (finding that felony referrals from schools remained constant).

²¹ Sherrod, et al., *supra* note 19, at A23 (summarizing the results of School Offense Protocol in Clayton County, Georgia).

²² ADVANCEMENT PROJECT, *supra* note 8, at 15.

²³ *Id.* at 23 (noting that African American and Latino students are 70% more likely to be disciplined—suspended, expelled, or referred—than their white peers).

²⁴ See New York Civil Liberties Union, *supra* note 16, at 6.

²⁵ See *id.*

²⁶ Cf. Mildred L. Rice Jordan, *Cultural Conflicts in the Urban Classroom: Black Student Alienation and Academic Failure*, EDUCATORS FOR URBAN MINORITIES, Fall 2001, at 5 (“Demographers predict that by the year 2010, school-age students of color will represent approximately 40% of the public school population, whereas only 12% of the teachers in America’s classrooms are minorities.”).

²⁷ See Feld, *supra* note 14, at 782-86 (noting how most whites’ knowledge of African Americans is derived from negative stereotypes of African Americans reinforced by the media, forming a “perceptual screen that admits supporting evidence and blocks contradictory data”); Debra Viadero, *Culture Clash*, EDUC. WEEK, Apr. 10, 1996, at 42 (“[T]wo distinct cultures are bumping up against one another, forming an invisible wall that stands in the way of learning and communication.”).

²⁸ See Feld, *supra* note 14, at 785-86.

The criminalization of schoolyards contributes more to the problems of a school than it does to alleviate them. Pedro A. Noguera, a professor at New York University's Steinhardt School of Education, explains: "Schools that rely on security guards and metal detectors to create safety may end up creating an environment that is so repressive that it is no longer conducive to learning."²⁹ Evidence that schools are already generally safe indicates that these security measures are not only counterproductive, but also unnecessary.³⁰ Indeed, "[l]ess than 1 percent of all violent incidents involving adolescents occur on school grounds."³¹

B. *The (In)Effectiveness of Zero Tolerance Policies*

In connection with an increase in the number of police patrolling school halls, legislators have reacted to the law and order movement of the 1990s by enacting punitive laws that contain exclusionary zero tolerance clauses.³² These laws and their resulting school-level policies further alienate the children who are most in need of stability and guidance because they mandate that schools severely punish disruptive students regardless of the circumstances surrounding the infraction.³³ The increase in suspensions and expulsions stemming from zero tolerance policies have proven to disproportionately affect African American students.³⁴

The Safe and Drug-Free Schools and Communities Act of 1994 ("SDF-SCA")³⁵ was the federal legislation that ushered zero tolerance policies into

²⁹ New York Civil Liberties Union, *supra* note 16, at 19.

³⁰ See, e.g., Lisa Kim Bach, *School Shootings: Metal Detectors Suggested*, LAS VEGAS REV. J., Mar. 12, 2008, at 1B, available at <http://www.lvrj.com/news/16591341.html> (noting that school safety experts recommend against installing metal detectors in schools, claiming that "the practice does not work and can lead to complacency and inconsistencies in application"); Bill Dedman, *Does Every School Need a Metal Detector? Experts Say Schools Rely Too Much on Physical Security*, MSNBC.COM, Oct. 3, 2006, <http://www.msnbc.msn.com/id/15111439> (noting that in 2004, the U.S. Secret Service and the U.S. Department of Education conducted a detailed study of school shootings indicating that metal detectors were insufficient).

³¹ Ralph C. Martin, II, American Bar Ass'n, *Zero Tolerance Policy Report*, <http://www.abanet.org/crimjust/juvjus/zerotolreport.html> (last visited Mar. 19, 2009) (citation omitted); see also Dedman, *supra* note 30.

³² See Joan M. Wasser, Note, *Zeroing in on Zero Tolerance*, 15 J.L. & POL. 747, 748 (1999).

³³ Liz Bowie, *Discipline's Cost: Thousands of Md. Students are Suspended Each Year, Often Those Who Most Need to Be in Class*, BALT. SUN, May 11, 2008, at 1A. See generally RUSSELL SKIBA ET AL., AMERICAN PSYCHOLOGICAL ASSOCIATION ZERO TOLERANCE TASK FORCE, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS (2006) [hereinafter APA REPORT].

³⁴ Terry Keleher, Program Director, ERASE Initiative, Applied Research Center, Racial Disparities Related to School Zero Tolerance Policies, Testimony to the U.S. Commission on Civil Rights (Feb. 18, 2000) (highlighting racial disparities relating to school discipline and zero tolerance and generally recommending against zero tolerance policies in favor of a more flexible approach to serious discipline problems). See generally ADVANCEMENT PROJECT, *supra* note 8.

³⁵ 20 U.S.C. § 7101 (2006).

schools. A subpart of SDFSCA, known as the Gun-Free Schools Act,³⁶ required states to mandate that school districts expel for at least one year any student found in possession of a gun, regardless of the reason.³⁷ The Gun-Free Schools Act served as a “catalyst for school zero tolerance policies that soon went beyond drugs and weapons to include hate speech, harassment, fighting, and dress codes.”³⁸

There are many examples of these far-reaching zero tolerance policies in action. They include the discipline of a student in Salt Lake City for wearing a T-shirt advertising his belief in veganism, which the school determined could be a gang symbol.³⁹ Upon appeal, a court agreed, citing the potential for another Columbine shooting.⁴⁰ In another instance, a principal referred to the police a 14-year-old disabled student with no criminal record for allegedly stealing \$2 from another student.⁴¹ The student was charged with strong-armed robbery and held for six weeks in jail, only to be released when a 60 Minutes television crew arrived at his hearing.⁴² Congress passed SDFSCA under the assumption that removing students who engage in disruptive behavior, regardless of the circumstances, would deter other potentially disruptive students and thereby create an improved educational climate.⁴³ Yet in 2006, the American Psychological Association (“APA”) published an evidentiary review of studies that evaluated both the effectiveness of zero tolerance policies in school discipline and whether zero tolerance policies made schools safer.⁴⁴ The APA concluded, after reviewing ten years of research relating to hyper-punitive school policies, that zero tolerance policies can increase bad behavior without creating a safer educational environment.⁴⁵ Some critics further point out that instead of “promoting learning in a safe environment, zero tolerance policies promote an irrational

³⁶ 20 U.S.C. § 7151(a) (2006).

³⁷ 20 U.S.C. § 7151(b)(1) (2006). The Act did permit school superintendents to modify the expulsion requirement “on a case-by-case basis if such modification is in writing.” *Id.*

³⁸ Zero Tolerance—Further Readings, 10 AMERICAN LAW ENCYCLOPEDIA, <http://law.jrank.org/pages/11439/Zero-Tolerance.html> (last visited Mar. 19, 2009).

³⁹ Brian Knowlton, *Zero-Tolerance Injustices Multiplying, Critics Say: A Backlash in the U.S.*, INT’L HERALD TRIB., Feb. 14, 2000, at 13, available at <http://www.ihf.com/articles/2000/02/14/rlash.2.t.php>.

⁴⁰ *Id.*

⁴¹ Martin, *supra* note 31.

⁴² *Id.*; see also KIM BROOKS, VINCENT SCHIRALDI & JASON ZEIDENBERG, JUSTICE POLICY INSTITUTE & CHILDREN’S LAW CENTER, INC., SCHOOL HOUSE HYPE: TWO YEARS LATER 24 (2000), available at <http://www.eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED446164> (describing several instances of zero tolerance policies resulting in the referral of students for minor offenses).

⁴³ APA REPORT, *supra* note 33, at 23-24.

⁴⁴ *Id.* at 3.

⁴⁵ Press Release, American Psychological Association, Zero Tolerance Policies Are Not as Effective as Thought in Reducing Violence and Promoting Learning in School (Aug. 9, 2006), available at <http://www.apa.org/releases/zertolerance.html>.

climate of fear” where “the first casualty is the student-teacher relationship.”⁴⁶

C. The Disparate Racial Impact of Well-Intended Discipline Policies and Statutes

As Beale points out, the Warren Court, for all its groundbreaking decisions, neglected to discuss race when deciding the criminal procedure cases during the Civil Rights era.⁴⁷ As a result, legislatures and school boards lack the impetus to address the disparate racial impact of school disciplinary policies, even as race continues to be a determinative factor in the discipline of students. A meta-analysis of studies on race and the juvenile justice system found that “about two-thirds of the studies of disproportionate minority confinement showed negative ‘race effects’ at one stage or another of the juvenile justice process,” including the initial transfer from school.⁴⁸ Therefore, it is not surprising that the policies Beale recounts in her article, and the student discipline codes described here, have a disproportionate impact on the same group: African American youth.

Studies have shown that African American students are “far more likely” than whites “to be suspended, expelled, or arrested for the *same kind* of conduct”⁴⁹ In fact, one study found that African American students are disciplined more severely even for lesser offenses, such as “disrespect, excessive noise, threat and loitering” than their white peers.⁵⁰ For example, in 1995, African American youth with no prior criminal records were six times more likely to be incarcerated than whites for the same offense.⁵¹ And, as recently as November of 2008, African American students in West Hartford, Connecticut who got into fights on campus “were about twice as

⁴⁶ See Anne J. Atkinson, *Zero Tolerance Policies: An Issue Brief*, POLICY RELEASE (Va. Dep’t of Educ., Richmond, Va.), Nov. 2005, available at <http://www.ednews.org/articles/1609/1/ZERO-TOLERANCE-POLICIES-AN-ISSUE-BRIEF/Page1.html> (citing ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS (William Ayers, Rick Ayers & Bernardine Dohrn eds., 2001)).

⁴⁷ See Beale, *supra* note 1, at 524.

⁴⁸ EILEEN POE YAMAGATA & MICHAEL A. JONES, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, AND JUSTICE FOR SOME 1 (2000), available at <http://www.eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED442882>; see also CARL E. POPE, RICK LOVELL & HEIDI M. HSIA, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, DISPROPORTIONATE MINORITY CONFINEMENT: A REVIEW OF THE RESEARCH LITERATURE FROM 1989 THROUGH 2001, at 5 (2002), available at http://www.ojjdp.ncjrs.org/dmc/pdf/dmc89_01.pdf.

⁴⁹ American Civil Liberties Union, *Talking Points: The School-To-Prison Pipeline*, http://www.aclu.org/images/asset_upload_file590_35554.pdf, at 2 (last visited Mar. 19, 2009); see also NAACP, *supra* note 8, at 8; Associated Press, *ACLU Says Minority Students Arrested More*, NYDAILYNEWS.COM, Nov. 17, 2008, http://www.nydailynews.com/latino/2008/11/17/2008-11-17_aclu_says_minority_students_arrested_mor.html.

⁵⁰ SKIBA ET AL., *supra* note 6, at 13. The authors also noted that these infractions are more subjective than other offenses. *Id.*

⁵¹ YAMAGATA & JONES, *supra* note 48, at 3.

likely to be arrested” as whites.⁵² In East Hartford, African American students accused of offenses “involving drugs, alcohol or tobacco were ten times more likely to be arrested than were similarly situated white students.”⁵³ Experts on race and discipline issues, including Russell Skiba, a professor of educational psychology at Indiana University, describes this data as “structural inequity or . . . institutional racism.”⁵⁴

Whatever the name, this disproportionate minority contact with the juvenile court system reinforces stereotypes and race-based expectations that African American students are likely to require discipline. Such disproportionate punishments have resulted in an educational experience characterized by many as “learning while black.”⁵⁵ Skiba, however, notes that “there simply isn’t any support for the notion that, given the same set of circumstances, African American kids act out to a greater degree than other kids.”⁵⁶

III. SUGGESTIONS FOR REFORM

Sara Sun Beale concludes that there are few available remedies to combat either the unbridled discretion of prosecutors in deciding when to transfer juveniles to adult court, or the racism inherent throughout that process. However, viable solutions exist that address the underlying problem of the frequent referral of African American children to the juvenile court system. Set forth below are preventative—rather than reactive—suggestions to keep schools safe by shifting the disciplinary focus from one of punitive retribution to one of rehabilitation and reintegration. The suggestions include (1) de-criminalizing schoolyards and (2) providing consistent and clear procedural protections for the court referral of students for minor offenses.

A. *The Responsibility of Schools to Provide a Safe but Productive Learning Environment*

While security personnel do provide an important layer of protection in schools, an increase in their presence has proven to raise the number of youth arrests for non-violent offenses.⁵⁷ Historically, schools have dealt

⁵² AMERICAN CIVIL LIBERTIES UNION & ACLU OF CONN., *HARD LESSONS: SCHOOL RESOURCE OFFICER PROGRAMS AND SCHOOL-BASED ARRESTS IN THREE CONNECTICUT TOWNS 10* (2008), available at http://www.aclu.org/pdfs/racialjustice/hardlessons_november2008.pdf [hereinafter *ACLU, HARD LESSONS*]; see also Associated Press, *supra* note 49.

⁵³ ACLU, *HARD LESSONS*, *supra* note 52, at 10; see also Associated Press, *supra* note 49.

⁵⁴ Witt, *supra* note 10; see also ADVANCEMENT PROJECT, *supra* note 8, at 8.

⁵⁵ See, e.g., JANICE E. HALE, *LEARNING WHILE BLACK: CREATING EDUCATIONAL EXCELLENCE FOR AFRICAN AMERICAN CHILDREN* (2001).

⁵⁶ Witt, *supra* note 10.

⁵⁷ See *supra* notes 15-20 and accompanying text; Matthew T. Theriot, Remarks at Society for Social Work and Research Conference on Research that Promotes Sustainability and (re)Builds Strengths: School Police Officers and the Criminalization of Student Behavior (Jan. 17, 2009) (transcript available at <http://sswr.confex.com/sswr/2009/webprogram/Pa>

with such misbehavior internally.⁵⁸ There is no reason to outsource this responsibility given that the ramifications from an unnecessary referral to the juvenile court system are often irreversible. Referrals also divert time and monetary resources that could be spent preventing violent crimes.⁵⁹ Lawsuits following disciplinary actions are largely due to “administrative ignorance or ineptitude.”⁶⁰ Accordingly, security officers should be trained not to intervene in merely minor in-school offenses, and schools should require officers to read and understand the school’s disciplinary policies and priorities.

The adoption of preventative systems can reduce school disciplinary problems by enhancing communication among students, teachers, and security personnel, and thus allowing the cultural values of the community to be included in disciplinary rules.⁶¹ Changes can begin with a commitment from individual school districts to focus on revising their own discipline structures to reflect these reforms. In addition, government funding could be used to support preventive approaches.⁶² Positive Behavior Support (PBS) is one approach intended to create an environment with a norm of appropriate behavior.⁶³ It does so by communicating clear expectations to students and helping them meet those expectations by providing rewards.⁶⁴ The promise of PBS is underscored by the fact that inconsistent punishment without positive strategies has been shown to be ineffective.⁶⁵

The PBS approach has produced positive results. Eastern District High School in New York City ranked among the city’s failing schools for twelve years, and was known for its violence, metal detectors, and absenteeism.⁶⁶

per9830.html) (describing study of one school district that finds presence of School Resource Officer predicts more disorderly conduct arrests but no more total arrests).

⁵⁸ Sherrod et al., *supra* note 19, at A23.

⁵⁹ See *infra* Part III.B.i (describing an alternative collaborative approach that has resulted in a decrease in the number of weapons on campus).

⁶⁰ Tobin McAndrews, *Zero-Tolerance Policies*, ERIC DIGEST, Mar. 2001, at 1, 2, available at <http://eric.uoregon.edu/pdf/digests/digest146.pdf>.

⁶¹ U.S. DEPT OF EDUC., EARLY WARNING TIMELY RESPONSE: A GUIDE TO SAFE SCHOOLS 21 (1998), available at <http://cecp.air.org/guide/guide.pdf>.

⁶² In 2007, then-Senator Barack Obama introduced the Positive Behavior for Effective Schools Act, S. 2111, 110th Cong. (2007), which would allow school districts to use federal funds for Positive Behavior Intervention and Support and other preventive approaches to discipline. The Act defines the term “positive behavior support” as “a systematic approach to embed proven practices for early intervening services, including a range of systemic and individualized strategies to reinforce desired behaviors and eliminate reinforcement for problem behaviors, in order to achieve important social outcomes and increase student learning, while preventing problem behaviors.” *Id.* at § 3.

⁶³ OSEP Technical Assistance Center on Positive Behavioral Interventions & Supports: School-wide PBS, <http://www.pbis.org/school/default.aspx> (last visited Mar. 19, 2009).

⁶⁴ *Id.*

⁶⁵ School District of Indian River County, Positive Behavior Support, <http://www.indian-river.k12.fl.us/SiteDirectory/Curriculum/PBS/Pages/default.aspx> (last visited Mar. 19, 2009); see also OSEP Technical Assistance Center, *supra* note 63.

⁶⁶ Lynette Holloway, *A Small Strategy for Troubled Giants*, N.Y. TIMES, May 16, 2001, at B8 (reporting that in 1995-96, 30% of students dropped out and only 62.3% attended class regularly).

The community reacted against excessive violence through a boycott, and the New York City Board of Education responded by removing the metal detectors and dividing Eastern District High School into three separate schools.⁶⁷ There was a move towards collaborative decision-making.⁶⁸ One of the new schools, Progress High School, now holds monthly meetings with staff, students, and parents regarding school policy and procedures.⁶⁹ PBS promises to teach students that “they will feel good about themselves when they do positive actions.”⁷⁰ The curriculum emphasizes “caring, concern, respect, responsibility, trust, honesty, tolerance, team spirit and unity.”⁷¹ The New York City Department of Education has since classified the high school as “very safe.”⁷²

Restorative justice is another peaceful problem-solving alternative to the use of excessive security personnel.⁷³ It works to repair the harm a student causes by engaging all those affected by the offense.⁷⁴ This model places a strong emphasis on re-building the relationships of all who were involved,⁷⁵ including the accused student, the harmed student, parents of both students, teachers, administrators, and community members.

The Advancement Project, a policy, communications, and legal action group committed to racial justice, and Padres y Jovenes Unidos, a local grassroots community organization, worked with the Denver Public School system to implement restorative justice programs in four schools in 2006.⁷⁶ The same year, suspensions decreased at one middle school by 53.8%.⁷⁷ The program garnered such success that in March of 2008 the Colorado Legislature signed into law a bill promoting restorative justice.⁷⁸ The Juvenile Restorative Justice Programs Law revises Colorado’s Children’s Code to allow

⁶⁷ *Id.* The three new schools are Progress High School for Professional Careers, the High School for Enterprise, Business and Technology, and the High School for Legal Studies. *Id.*

⁶⁸ Progress High School, School Identity, http://www.progresshs.org/pages/about_pages/school_identity.html (last visited Feb. 16, 2009).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² John M. Beam, Chase Madar & Deinya Phenix, *Life Without Lockdown: Do Peaceful Schools Require High-Profile Policing?*, 19 VOICES IN URBAN EDUC. (2008), <http://www.annenberginstitute.org/VUE/spring08/Beam.php>.

⁷³ See generally Cara Suvall, *Restorative Justice in Schools: Learning from Jena High School*, 44 HARV. C.R.—C.L. L. REV. 547 (2009).

⁷⁴ See Rachel King, *Restorative Justice: How Law Schools Can Help Heal Their Communities*, 34 FORDHAM URB. L.J. 1285, 1289-90 (2007).

⁷⁵ *Id.*

⁷⁶ Monique L. Dixon, *Nooses and Zero Tolerance*, CMTY. JUST. RES. CTR., (Advancement Project, Wash., D.C.), Oct. 16, 2007, <http://www.advancementproject.org/cjrc-newsletter/10-07/nooses-and-zero.php> (reproducing statistics from grassroots community organization showing that before the restorative justice programs were implemented in Denver Public Schools, the number of referrals to the juvenile justice system from schools increased 71% from 2000 to 2004); see also ADVANCEMENT PROJECT, *supra* note 8, at 23.

⁷⁷ Dixon, *supra* note 76.

⁷⁸ See Joshua Wachtel, Colorado Children’s Code Authorizes Restorative Justice Conferences for Adjudicated Youth (Part 1 of 2) (May 21, 2008), http://www.iirp.org/realjustice/library/CO_RJ.html. The statute is codified at COLO. REV. STAT. § 19-1-103 (2008).

judges to offer juvenile offenders the legal option to participate in restorative justice programs.⁷⁹ Programs may include:

victim-offender conferences attended voluntarily by the victim, a victim advocate, the offender, community members, and supporters of the victim or the offender that provide an opportunity for the offender to accept responsibility for the harm caused to those affected by the crime and to participate in setting consequences to repair the harm. Consequences recommended by the participants may include, but need not be limited to, apologies, community service, restoration, and counseling. The selected consequences are incorporated into an agreement that sets time limits for completion of the consequences and is signed by all participants.⁸⁰

The legislation was drafted with the assistance of “children’s advocates, probation officers, public defenders, prosecutors, juvenile magistrates, and victims”⁸¹ and received almost unanimous support in the state legislature.⁸² Such legislation presents alternatives to court referrals that can cause irreparable and disproportionate harm to students.

B. Procedural Protections for School-Based Referrals to Juvenile Court

In addition to school-based solutions, the community, judiciary, and legislature should each participate in ameliorating the effects of the school to prison pipeline. The impact of court referrals for minor misconduct is detrimental not only to the specific student, but to our society as a whole. It should be the obligation of each of these groups to engage in repairing this broken system.

i. Collaborative Efforts to Counter the Arbitrary Effects of Discipline Policies

A direct community-based collaboration between the educational system and the juvenile court system offers a powerful model for combating the consequences of ineffective security personnel and zero tolerance policies. In response to the 600% spike in school-based arrests after three years of heavy harsh police presence, Judge Steven C. Teske of the Juvenile Court of Clayton County, Georgia took the lead in establishing a collaborative com-

⁷⁹ Wachtel, *supra* note 78; *see* COLO. REV. STAT. § 19-1-103.94.1 (defining “Restorative Justice” as “those practices that emphasize repairing the harm to the victim and the community caused by criminal acts”).

⁸⁰ COLO. REV. STAT. § 19-1-103.94.1.

⁸¹ Wachtel, *supra* note 78; Press Release, Office of Bill Ritter, Jr., Gov. Ritter Signs Restorative-Justice Bill into Law (Mar. 31, 2008), *available at* <http://www.colorado.gov/cs/Satellite/GovRitter/GOVR/1206950460679>.

⁸² Wachtel, *supra* note 78. The bill passed with overwhelming bipartisan support in both the State House (63-1) and Senate (33-0). *Id.*

munity designed to lower the number of referrals to the juvenile court system.⁸³ He enlisted the help of community leaders, law enforcement, the district attorney's office, child-serving programs, parents, and other local stakeholders to work together to create an agreement titled the School Offense Protocol.⁸⁴ This Protocol uses several tactics to minimize law enforcement referrals for minor offenses, such as fighting in school, truancy, and disorderly conduct.⁸⁵

First, the Protocol advocates that treatment levels be matched to the risk level and recidivism rates of the students, thereby diverting low-risk youth away from the juvenile court.⁸⁶ Second, the Protocol creates a graduated sanction system whereby officials may impose a warning for a first offense that does not present an immediate threat of danger to others.⁸⁷ The school's police personnel also have the discretion to issue three citations before a student is moved to the next sanction level, which in turn requires the student and her parent to attend a workshop conducted by the juvenile court.⁸⁸ After this workshop, security personnel are able to file a complaint against the student and refer them to juvenile court if the student commits another offense against public order.⁸⁹

This system has been successful in Clayton County, particularly with regard to its racial impact. From its implementation in 2004 until the end of the school year in 2006, the agreement resulted in a 52% overall decrease in school-based referrals to juvenile court and a 46% decrease in school-based referrals involving African American youth.⁹⁰ There was also a general change in the sentiments and level of trust between security personnel and students as the police are no longer required to spend time arresting students for minor infractions.⁹¹ This change in students' willingness to share information with police has contributed significantly to the 70% decline in the number of serious weapons brought to campus.⁹²

⁸³ Sherrod et al., *supra* note 19, at A23.

⁸⁴ *Id.*

⁸⁵ Cooperative Agreement between the Juvenile Court of Clayton County, the Clayton County Public School System, the Clayton County Police Department, the Riverdale Police Department, the Jonesboro Police Department, the Forest Park Police Department, the Clayton County Department of Family & Children Services, the Clayton Center for Behavioral Health Services, Robert E. Keller, District Attorney, and the Georgia Department of Juvenile Justice 4-5 (July 8, 2004), *available at* http://www.gpdsc.com/docs/resources-juvenile-cooperative_agreement_070804.pdf.

⁸⁶ *Id.* at 3-4.

⁸⁷ *Id.* at 5-6.

⁸⁸ *Id.* at 6-7.

⁸⁹ Sherrod et al., *supra* note 19, at A23.

⁹⁰ *Clayton County Reduces School-Based Referrals of African-American Youth by 46%*, JDAI NEWS (Annie E. Casey Found./Juvenile Det. Alternatives Initiative, Wash., D.C.), Jul. 2006, at 7.

⁹¹ Sherrod et al., *supra* note 19, at A23.

⁹² *Id.*; *see also* Judge Steven Teske, Presentation to Juvenile Detention Alternatives Initiative, Annie E. Casey Foundation: Using Collaborative Strategies to Reduce Disproportionate Minority Contact, A Case Study in School Referrals & Reducing the Schoolhouse to Jailhouse

This Protocol did not require a large budget; it required that every stakeholder in the community come to the table and develop a comprehensive plan to ensure that students receive the respectful, safe educational experience they deserve. While advocates should not expect the disparate impact of harsh discipline rules on African Americans simply to disappear when a school adopts a plan like that of the Protocol, they should understand that there are strategies available to begin reducing the number of students of color in juvenile court. In this way, a more fair and equitable system is possible.

ii. A Judicially Established Right to Due Process in Schools

Within a school, the “teacher . . . stands in loco parentis to [her students] and may exercise such powers of control, restraint, and correction as may be reasonably necessary to enable [the teacher to] properly perform [her] duties . . . and to accomplish the purposes of education.”⁹³ There are, however, constitutional bounds to this authority.⁹⁴ In *Goss v. Lopez*, the Supreme Court recognized that a student faces severe consequences for even a brief removal from the classroom.⁹⁵ The Court held that due process requires that a public school provide any student facing removal from school for more than a “trivial period” with notice and a hearing.⁹⁶ The Court announced the requirement that the “student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.”⁹⁷ In arriving at this conclusion, the Court relied on the principle set forth in *Tinker v. Des Moines School District*⁹⁸—that “young people do not ‘shed their constitutional rights’ at the schoolhouse door.”⁹⁹

Pipeline Effect (Sept. 2008), at 11, available at <http://childlaw.sc.edu/doc/School%20Referral%20Reduction.pdf>.

⁹³ NEA-Goodland v. Bd. of Education, 775 P.2d 675, 678 (Kan. Ct. App. 1989) (citation omitted); see also People v. Ball, 317 N.E.2d 54, 57 (Ill. 1974) (comparing role of teacher in loco parentis to role of parent).

⁹⁴ Dothan City Bd. of Educ. v. V.M.H., 660 So. 2d 1328, 1330 (Ala. Civ. App. 1995) (“The authority vested in school boards and officials to maintain order and discipline in school must be exercised within constitutional bounds.” (citation omitted)).

⁹⁵ 419 U.S. 565, 575 (1975).

⁹⁶ *Id.* at 574-76.

⁹⁷ *Id.* at 581.

⁹⁸ 393 U.S. 503 (1969).

⁹⁹ *Goss*, 419 U.S. at 574 (citing *Tinker*, 393 U.S. at 506). Although *Tinker*’s famous dictum specifically refers to the “constitutional rights to freedom of speech or expression,” *Tinker*, 393 U.S. at 506, the *Goss* Court cited *Tinker* in terms of students’ constitutional rights generally. See *Goss*, 419 U.S. at 574.

Despite the expansive language in the *Goss* opinion,¹⁰⁰ and its subsequent application to suspensions and expulsions,¹⁰¹ the Court has not extended such a hearing requirement to school-based referrals to the juvenile court system.¹⁰² Generally, school officials remain free to refer a child without an in-school pre-adjudication hearing to determine whether the violation is serious enough to warrant the referral.¹⁰³ This is despite the evident deprivation of a student's public education during the arduous and lengthy process a referral entails, including multiple missed school days.¹⁰⁴

It might be argued that imposing procedural protections before school-based referrals are unnecessary because due process is already satisfied once the case is in the court's jurisdiction. However, the procedural protections that I propose address the school-imposed punishment that results from the *referral* itself—the denial of the “property interest in educational benefits”¹⁰⁵ for more than a trivial period. The proposed protections are not aimed at the punishment, likely a prison or probation sentence, that results from a judicial adjudication of whether the individual is guilty of the violation; that is an issue entirely within the purview of the court. Instead, they focus on the harm caused by judicial referrals, particularly the need for the student to be absent from school during the proceedings, regardless of the case's eventual outcome.

Courts rely on several justifications in denying procedural rights: that expulsion only temporarily removes a student from an educational setting;

¹⁰⁰ *E.g.*, *Goss*, 419 U.S. at 574:

The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.

¹⁰¹ *See, e.g.*, *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 926 (6th Cir. 1988) (observing that an expulsion hearing need not take the form of a criminal trial or juvenile court delinquency proceeding).

¹⁰² In regard to a juvenile's transfer, the Court has only required a hearing upon the waiver of the juvenile court's exclusive jurisdiction to permit her to be prosecuted in the criminal system. *See Kent v. United States*, 383 U.S. 541, 554 (1966).

¹⁰³ A pre-adjudication intake decision is made only *after* the student has been referred to juvenile court. *See* MELISSA SICKMUND, U.S. DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *JUVENILES IN COURT 2* (2003), <http://www.ncjrs.gov/pdffiles1/ojjdp/195420.pdf>.

¹⁰⁴ *See* Wald & Losen, *supra* note 17, at 13 (“Once referred to the juvenile justice system, students often miss multiple days of school to make court appearances, even if their cases are ultimately dismissed.”). In imposing procedural requirements for suspensions, the *Goss* Court reasoned that “[i]f [the 10 day suspension is] sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.” *Goss*, 419 U.S. at 575.

¹⁰⁵ *Goss*, 419 U.S. at 576.

that the exclusion is justified by an increase in school safety;¹⁰⁶ and that additional procedures are too impractical¹⁰⁷ or costly.¹⁰⁸ Yet the potential loss of education, physical freedom, and the high likelihood of subsequent exposure to the adult criminal court from referrals are too great not to install some level of protection against excessive unilateral transfers, particularly for non-violent offenses. A referral to juvenile court often leads to countless days of missed school, even when the student is proven innocent or the case is ultimately dismissed.¹⁰⁹ Given these consequences, one might surmise that a student should be given notice and an opportunity to present, at least informally, her reasons why referral to juvenile court is inappropriate.

There should, of course, be recourse for school officials when a student presents a severe threat to school safety. However, courts are too deferential in permitting a school to discipline a child immediately if the student's presence "poses . . . an ongoing threat of disrupting the academic process."¹¹⁰ If this discipline takes the form of a court referral, there is no way for school administrators to retract it.¹¹¹ An immediate referral should be used only in instances where the student poses a serious threat to school safety, not merely to the general tranquility of the academic process.

iii. The Legislature's Role in Creating Procedural Protections Before Referrals

Zero tolerance policies and a strong police presence in schools allow for the easy referral of children to the prison system, especially in the absence of any affirmative right to procedural protection. Should courts remain reluctant to recognize the benefits of establishing procedural rights for school-based referrals to juvenile court, legislative approaches could change the incentive structure that leads to student expulsion.¹¹²

One example of an effective state procedural statute is Connecticut's PA 08-160, An Act Concerning School Learning Environment,¹¹³ which man-

¹⁰⁶ Maureen Carroll, *Educating Expelled Students After No Child Left Behind: Mending an Incentive Structure that Discourages Alternative Education and Reinstatement*, 55 UCLA L. REV. 1909, 1963 (2008) (citations omitted).

¹⁰⁷ *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

¹⁰⁸ *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89 (1978) (citations omitted). Due process advocates might respond to this argument with the claim that this additional cost is desirable, because it would make referrals more expensive and thus might limit their application to only the most serious offenses.

¹⁰⁹ Wald & Losen, *supra* note 17, at 13; *see also Goss*, 419 U.S. at 575.

¹¹⁰ *Goss*, 419 U.S. at 582.

¹¹¹ Once referred by the school to the juvenile court system, it is the choice of the juvenile probation department and/or prosecutor's office to determine whether the case will be dismissed. *See SICKMUND*, *supra* note 103, at 2.

¹¹² Carroll, *supra* note 106, at 1909. Unfortunately, states have too often drafted loosely-defined educational legislation that contains loopholes through which schools can exclude students with impunity. *Id.* at 1944.

¹¹³ 2007 Conn. Pub. Acts 08-160 (2008).

dated in-school suspensions except for those situations in which a student “poses such a danger to persons or property or such a serious disruption of the educational process” to warrant an out-of-school suspension.¹¹⁴ The Act directs Connecticut’s Commissioner of Education to issue guidelines for deciding which violations are disruptive or dangerous enough to warrant out-of-school suspension.¹¹⁵ Moreover, beginning in July of 2009, a hearing will be required before a student can receive an out-of-school suspension.¹¹⁶ This focus on both substance and procedure should help school officials determine when an offense is serious enough to warrant an out-of-school suspension.

The Connecticut Act appropriately concentrates on disciplining students through reintegration and rehabilitation rather than myopically focusing on their removal from school. Other states should similarly adopt guidelines that help ensure students are uniformly bestowed with protections, particularly against the generally irreversible consequences of a referral out of class and into the school to prison pipeline, by limiting referral to only dangerous or seriously disruptive offenses. This is particularly important when current discipline policies result in the disparate exposure of African American students to the juvenile justice system.

IV. CONCLUSION

The problem of transferring students to juvenile court is one that must be addressed alongside Sara Sun Beale’s discussion of the frequent transfer of juveniles to adult court. Although this response aims to bring attention to, and redirect, the school to prison pipeline, it shares a common goal with Beale’s article: to protect the welfare of children. These changes—including a shift away from one-size-fits-all school discipline tactics and ineffective security personnel, and the implementation of procedural protections for children faced with referral to the court system—will not only provide important safeguards against the premature referral of non-violent students to juvenile court, but will also reduce the probability of their future exposure to the adult prison system. In so doing, they will work to create a safe *and* productive learning environment for all children.

¹¹⁴ *Id.* at § 2(g). Upon signing the bill, Governor Rell emphasized: “Students should be removed from the school setting only under the most exceptional circumstances. . . . Keeping children out of school is a direct line to delinquent behavior.” Press Release, State of Connecticut, Executive Chambers, Governor Rell Signs In-School Suspensions Bill (June 28, 2007), available at <http://www.ct.gov/governorrell/cwp/view.asp?A=2791&Q=385306>.

¹¹⁵ § 3, 2007 Conn. Pub. Acts 08-160.

¹¹⁶ *Id.* at § 2(g).