

Opportunities for Juvenile Justice Reform
*Paper prepared for the William T. Grant Forum on Reforming Publicly Funded Youth
Systems, New York, NY, March 2003*

Robert G. Schwartz
Executive Director, Juvenile Law Center

For all practical purposes, there is no federal juvenile justice system. Almost all juvenile justice policy, practice and funding occurs at state and local levels. Even there, the juvenile justice system is not a self-contained unit operated by a single entity. Every state has a different mix of decision-makers and services, and each divides power over juveniles in different ways. Within states there are wildly varying policies and practices across county lines. It is rare that a coherent philosophy governs the component parts— juvenile justice is an odd mix of supervision, succor, monitoring and punishment. While it is possible to create progressive policy at the state level, reform of practice will almost always require a local effort.¹ Even so, there are some broad generalizations about the system that suggest a road map for change.

First, we can divide the juvenile justice "system" into two sub-systems, both of which must usually be addressed by any reform effort: the *court system* determines whether a juvenile is delinquent and enters orders of detention and disposition; the *service-delivery system* includes juvenile probation (which may be in the executive or judicial branch) and executive branch agencies that have power to detain, rehabilitate, treat, supervise or punish young offenders. Depending on the state or county, judges may have extraordinary power; in other jurisdictions, reform efforts are promoted by the executive branch. No meaningful reform effort, however, will succeed without the blessing of at least the chief judge of the local juvenile court.

Several trends over the last decade have influenced today's juvenile justice population and the environment for reform:

- State legislation has made it easier to try youths as adults. A couple hundred thousand youth, under 18, are tried as adults each year. States lowered the age of criminal court jurisdiction, increased prosecutorial power to "direct file" youth into criminal court, and created offense-based transfer policies that automatically land youth in the adult system for enumerated offenses.
- Zero tolerance policies have sent more youth into juvenile justice from child welfare, mental health and, in particular, public schools. In particular, more special education students have been arrested, since it is easier to have a student arrested than to change an Individualized Education Program (IEP).

¹ Addressing conditions of confinement in congregate care facilities (except for detention centers, which are usually local), is an exception to this principle. There is usually a state agency with licensing and regulatory authority over residential care, and all states operate some training schools of their own.

- As “old fashioned” delinquent youth are tried as adults, and zero tolerance policies send a new, more troubled child into the juvenile justice system, there are higher prevalence rates of youth with mental health problems.
- In 2000, 2.4 million youth under the age of 18 were arrested, accounting for 17 percent of all arrests, and 16 percent of all arrests for violent crime. The violent crime arrest rate was the lowest since 1985. The juvenile murder arrest rate, which peaked in 1993 (with 3,800 arrests), declined to 1,200 in 2000. While violent crime creates headlines, only 1/3 of 1% of juveniles ages 10-17 were arrested for a violent crime in 2000 (and two thirds of those were for aggravated assault). 95 percent of adolescents were arrest free.
- Girls have entered the juvenile justice system at increasing rates. Girls 13-15 account for one third of all arrests in that age group, compared with one quarter of arrests of youth who are either younger or older. Overall, in 2000, arrests of females under 18 accounted for 28% of all juvenile arrests. The two largest percentage increases involved drug arrests and arrests for aggravated and simple assault.

Whether a youth enters the juvenile justice system is often as much about adult decision-makers— and how much blameworthiness they attribute to the youth— as it is about the youth’s behavior. Many children in the four major child serving systems— education, juvenile justice, child welfare, mental health— are remarkably similar, even though they wear different labels. Decision-makers allocate them to one of these systems based upon the conduct or traits of the children or of their parents. For purposes of assigning children into a system we label them as Bad, Sad, Mad or Can't Add. It is like attaching a mailing label— the Bad child gets sent to the juvenile justice system. The Sad child goes into the child welfare system. The Mad child enters the mental health system. Can't Add goes to special education. Sorting often depends upon issues of race or class. Minority and poor children are more likely to be labeled Bad. In addition, if one thinks of the four systems— dependency, special education, mental health and delinquency— as the four suits in the service delivery deck, one will find that delinquency is always the trump suit. If a juvenile court wants to find a child delinquent for misbehavior, it always can.

The boundaries between the four child-serving systems are like semi-porous membranes through which youth, dollars and services flow. The trend of recent years has been for education, child welfare and mental health to send increasing numbers of youth into the juvenile justice system. It has more and more become a one-way flow: the path from education, child welfare and mental health into the juvenile justice system is like a parking lot exit, where a forked grill prevents re-entry (this is particularly true of education, which sends more youth to juvenile court, and doesn’t want them back, but it is also difficult for dependent children, after arrest and placement in the delinquency system, to return to foster care). Any meaningful reform effort must address the flow of youth— by preventing their entry into the juvenile justice system

in the first instance, and by giving them a way out of the system. While some of the flow can be channeled by state law, it is at the local policy and practice level that the greatest opportunities exist.

There are three goals of any useful effort to reform the juvenile justice system:

1. Keep youth out of the system in the first place. This can be done by preventing decision-makers from labeling them as Bad (by re-directing them to other systems), to more traditional juvenile justice decisions such as district attorneys declining to prosecute, or making available different kinds of diversion programs.
2. Keep youth in the juvenile justice system, rather than in the adult criminal justice system. Movement between juvenile and criminal court is like Chutes and Ladders™. A reform effort succeeds when it eliminates ladders (such as policies that require transfer of youth to criminal court for prosecution as adults) or provides chutes (such as allowing judges to send youth to juvenile court even when they have been charged as adults).
3. Address what happens to youth when they are in the juvenile justice system to a) prevent the system from harming them, and b) giving them the best chance to leave the system with opportunities to be connected to caring adults, educational and employment opportunities. “In the juvenile justice system” means from the moment a youth is arrested to the youth’s final discharge from court supervision. It does not necessarily mean “in placement.” The juvenile justice system has great flexibility, and most youth in it are under some degree of community supervision by probation officers.

Each of these three objectives requires different strategies. For purposes of this paper, I focus on the first and third objectives.

The juvenile justice pipeline

It is useful to imagine the juvenile justice system as a pipeline through which water flows. Along the pipeline are diversion valves – the points of decision at which children are either diverted from the pipeline or continue through its various gates and locks. These are the points of arrest, detention, adjudication, disposition and disposition review. One of the signal characteristics of the juvenile justice system is that its diversion options extend across the pipeline's continuum, i.e., at every point of the system it may send some children home, some to other systems and others to noninstitutional care.

Despite differences across jurisdictions in policies and practices, the points of decision are essentially similar: diversion, referral, intake, detention, adjudication, transfer, disposition, and release.

Keeping Youth Out of the System

Diversion. Refusing to refer a youth to the juvenile justice system is one form of diversion. Diversion is less common today than it used to be, as parents and schools develop “zero tolerance” for misdeeds committed by other people’s children. For example, schools across the country are today routinely expelling children and referring them to the juvenile justice system for offenses that just a few years ago would have been handled in-house. Nothing in special education law prevents schools from having students arrested.

There are some efforts in the country to persuade schools, child welfare agencies and mental health programs from automatically referring youth to juvenile court for misbehavior. These efforts are almost always local and idiosyncratic. Police are loath to decline to make an arrest when they are called by another public agency.

Referral. Formal entrance into the pipeline begins with a referral to the juvenile justice system or a police arrest. James Bell, who directs the Burns Institute, has worked with local stakeholders in a number of cities around the United States (such as Seattle and Phoenix) to reduce the number of youth who are arrested for crimes such as Walking While Black. There are some indications that a change in police attitudes and behavior can have a small impact on whether youth are arrested in the first place.

Intake. If the child is arrested, should the case proceed, or be diverted? If the latter, should it be an informal diversion, without further involvement by the juvenile court, or should the child be sent to a program, such as a community panel or teen court (and returned to juvenile court if he or she fails to obey a community-ordered disposition)? Bernardine Dohrn’s Children and Family Justice Center has worked with the Cook County state’s attorney to divert cases to community justice panels. Some cases are diverted to other systems, such as the mental health system. Some cases are dropped entirely, as intake officers decide that the particular combination of youth and offense does not belong in the juvenile justice system. Many factors enter into the decision to divert a case, such as the youth’s age, prior history, seriousness of offense, explanation or attitude. In the 1970s, when community based mental health services flourished, it was more likely that a youth would be diverted for counseling than in the 1990s, when managed care and a host of other factors contributed to the decline of mental health services for children and families.

Serving Youth in the Juvenile Justice System

Detention. If the intake officer (usually a juvenile probation officer) decides that the case should proceed to a hearing, the officer must decide whether the child should be sent home (with or without supervision), or should be detained, either in a maximum security detention center or in a detention alternative. Pretrial detention has two valid purposes: reducing the risk of flight, and reducing the risk of reoffending prior to trial. Youth who are detained early in a case are much more likely to receive harsher sentences than youth who remain in the community pending trial. For the past ten years, the Annie E. Casey Foundation has focused most of its

juvenile justice reform energy on detention, which is the gateway drug of the juvenile justice system. Casey's Juvenile Detention Alternative Initiative works locally with stakeholders to create a detention system that manages risk while reducing the use of maximum security detention centers. In some communities, like Portland, Oregon, JDAI has also been able to eliminate disproportionate detention of minorities.

Adjudication. If the child continues to be detained, an adjudicatory hearing (comparable to the trial in criminal court) will usually be held within 10 to 30 days. At the adjudicatory hearing, the juvenile has a constitutional right to counsel. Many states provide a statutory right to counsel at all stages of the juvenile justice system, although the actual availability of counsel at the adjudicatory hearing or at other stages varies widely within states and across states. Youth in the juvenile justice system have often been ill served by their lawyers. While there are excellent examples of quality lawyering around the country, for the most part, the juvenile defense bar has been beset by high caseloads and low expectations. High quality defense counsel who enter a case when a youth is arrested can promote diversion. They will, of course, also have an impact on what happens at trial and at disposition (sentencing). Investment in training, and in augmenting defender's offices with social workers, would create for the juvenile justice system an internal advocacy component. (The ABA Juvenile Justice Center, Youth Law Center and Juvenile Law Center have created the National Juvenile Defender Center, with nine regional offices, to address access to quality counsel.)

Disposition. If the juvenile is adjudicated delinquent, the court will proceed to disposition (comparable to the sentencing decision in adult court). In many states, delinquent youth can receive the same dispositions as youth in the child welfare system; in other states, delinquent youth are treated in a separate service-delivery system operated by a juvenile justice or corrections department. Juvenile dispositions historically have aimed to provide "treatment, rehabilitation or supervision" in a way that best serves the needs of the juvenile. Such interventions have been thought to offer the best opportunity for public protection. In some states, like Wisconsin or Pennsylvania, the juvenile court retains power over the child at and after disposition: the court has wide latitude, from ordering that a child return home under supervision – probation – to placing a child in maximum security institutions, known as training schools, reform schools or youth development centers. In other states, like California or Massachusetts, which use a "youth authority" model, the court will either order probation or, if placement is warranted, transfer custody of the child to the youth authority, which will then determine the level and type of care.

Release. Most juvenile court dispositions are for indeterminate periods of time. In states in which the juvenile court controls all aspects of the juvenile's treatment, the court will usually "review" the juvenile's case every six to nine months. Sometimes the reviews are formal hearings, sometimes informal reviews of reports provided by probation officers or institutional staff. In states that have youth authorities, there are administrative procedures for reviewing the need for continued confinement. In almost every instance, the review of placement focuses on whether the child is behaving, or showing an improved attitude. Reviewing authorities rarely compare the youth's progress with a clear treatment or aftercare plan.

Aftercare probation. When juveniles are released from institutions, they are placed on "aftercare probation," analogous to parole. Aftercare usually relies upon the probation officer—i.e., aftercare worker— as case manager and, at its best, advances five goals: preparing youth for progressively increased responsibility and freedom in the community; facilitating youth-community interaction and involvement; working with the offender and community support systems; developing new resources to support youth in the community; and monitoring. If it is done well, aftercare forces a system to imagine a youths' future *at the time the juvenile court or state youth authority fashions its first order of disposition*. It is impossible to plan for youths' disposition, for example, unless you know where they are going. How will they be linked to other publicly funded systems (child welfare, education, mental health)? To which school will they return? Where will they live? With which adults will they need to be connected? How will the order of disposition make the answers to those questions possible? Aftercare that begins with those questions will follow a youth along a developmental pathway: through institutional care, planning with institutional staff for the future, involving family and other concerned adults, and preparing the child for school or work. Aftercare is an aggressive course of re-integrative services and supervision that should build upon a youth's strengths in a ceaseless re-imagining and recreation of the youth's future.

Miscellaneous Observations

States vary widely in their distribution of juvenile justice dollars to publicly versus privately operated services. Title IV-E, Chafee Act (Independent Living) and Medicaid dollars are generally available to cover the cost of services to youth in privately run programs, but not for youth in public institutions. For youth who are in private programs, however, promising approaches include strategies that leverage federal/state foster care and Medicaid regulations.

There may also be opportunities in some states to link juvenile justice with those who work on youth employment. "Competency development"— a component of the late-1990s notion of *restorative justice*— offers this opportunity. Restorative justice was an effort by juvenile justice proponents to preserve the system from attack by finding a philosophical middle ground between retributive justice — which gained in favor as states sought to "get tough" on juvenile crime — and rehabilitation, which was seen as being "too soft" on crime.

The Balanced Approach to restorative justice proposes that at every stage of the juvenile justice pipeline, three principles should operate. 1) The system must hold the individual youth accountable (satisfying the needs of the victim and community). 2) Public safety must be advanced. 3) The system must improve youths' competencies to be productive members of their communities.

Over a dozen states have adopted Balanced Approach principles in their juvenile justice statutes. Most state efforts to re-align their juvenile justice systems with a Balanced Approach philosophy have fallen short. It was easiest for states to begin by focusing on public safety and accountability, rather than by figuring out the meaning of competency development. We at

Juvenile Law Center have been trying to get the Pennsylvania juvenile justice system to adopt, as the content of competency development, the skills and competencies promoted by those who do workforce development and youth employment. Such a change would require a transformation of the training and cognition of juvenile probation officers and judges, and would also require a re-tooling of both public and private sector services to youth who are in the juvenile justice system.