

THE TREND TOWARDS TURNING PUBLIC EDUCATION INTO A GATED COMMUNITY

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INTRODUCTION

Recent laws and policies enacted in Massachusetts schools that come at the intersection of the juvenile justice system and the education system manifest a trend toward increasing the number of youth who are excluded from school and enmeshed in the juvenile justice system. The various methods by which the law enforcement system interacts with the education system results in such an increased exclusion of youth that it raises the question of whether public education can continue to be considered a common good. This paper argues that access to public education, heretofore recognized as this nation's crown jewel and symbol of democratic access to the American dream, is undergoing a systematic circumscription or enclosure. The excluded students are ones with special needs, those who parents who cannot advocate for them, and those caught in the crosshairs of the public concern for safety and administrators' frustrations or fear of liability.

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These competing concerns have resulted in paradoxical responses. American culture has become increasingly hostile to youth; this hostility has perhaps crested with the description of youth as “teen predators”¹ in the 1990s, succeeded by the Columbine High School shootings in 1999. The resultant change in attitudes toward youth has manifested itself in draconian legislative and policy changes that civil rights advocates previously had staved off. These advocates find less and less support in doing so with the constant invocation of Columbine. Law enforcement concerns are paralleled by the increased accountability demanded of schools through high-stakes testing, with little or no thought to schools’ or students’ special needs. This has resulted in principals’ and administrators’ interests in avoiding sanctions and revocation of funding being pitted against poorly performing, needy students.

The implementation of the policies described below has occurred at a time when youth crime rates have fallen nationally and especially in Massachusetts.² The rate of school-based violence declined nationally,³ even while access to mental-health services was being corroded or slashed.⁴ Ironically, while youth were being actively demonized and described as predators, the image of parents and adults who either attack, beat, or otherwise threaten their children or their children’s teachers did not change in any noticeable way and certainly did not result in draconian legislative responses.

The six areas that are crucial to understanding the enclosure of the public schools and diminution of access to them in Massachusetts are implementation of zero tolerance policies, school-based juvenile justice community roundtables, proposed legislation limiting access to youth with juvenile records, police treatment of youth going to school, high-stakes testing, and the decreased legal and financial support of special needs children’s rights and access to special services.

In this article, I attempt to draw parallels between the current trend to revoke or limit the right to public education and how the Enclosure

¹ Julia Duin, *Alarm over Crime Goes off as Nation Suffers Moral Rot: Many See Religion as Only Solution to Ethical Crisis*, WASH. TIMES, Nov. 1, 1996, at A2.

² FBI CRIMINAL SERVS. DIVISION REPORT (2000), FACT BOOK: TRENDS AND ISSUES IN JUVENILE DELINQUENCY 7–8 (Citizens for Juvenile Justice 2000) (indicating that from 1995 to 2000, the “Commonwealth’s youth population rose 15.9%, but delinquency declined by 13.6%”).

³ SCHOOL HOUSE HYPE: SCHOOL SHOOTINGS AND THE REAL RISK KIDS FACE IN AMERICA (Justice Policy Institute 1998); SCHOOL HOUSE HYPE: TWO YEARS LATER (Justice Policy Institute 2000) (reporting a forty percent decline in the level of school-based violent incidents in 1999, the year of the Columbine shooting, and estimating the likelihood of a child dying a violent death in America’s public schools, which work with fifty-two million children annually, was approximately one in two million).

⁴ Alice Dembner, *Many Children Can’t Get Mental Care*, BOSTON GLOBE, Apr. 10, 2001, at B1.

Acts in England at the end of the eighteenth century reduced access to the equivalent public good — the public commons. Just as education is viewed as the requisite stepping stone for success in the United States, the commons, upon which England's poor families farmed, was seen as the requisite stepping stone for survival in England.

I. ZERO TOLERANCE IN PRACTICE: TAKE ALL PRISONERS

Zero tolerance policies in Massachusetts, by many accounts, employ a highly energetic, arrest-first, “take no prisoners” and talk-later approach, which many perceive as a form of hysteria. Peter Leone, Director of the National Center for Education, Disability and Juvenile Justice at the University of Maryland, described the pressure on schools to adopt such policies as being “a convenient vehicle to convince the public that they're doing the right thing.”⁵

In the past eighteen months, the following conduct has led to arrests or expulsions of children aged six to eighteen in Massachusetts, as have similar or identical infractions in neighboring states:

- Threatening to shoot or “blow up” teachers and youth;
- Writing or drawing threats to shoot or explode teachers, schools and youth;
- Discussing a conspiracy;
- Taking aspirin, Midol, or prescription medicine in school;
- Bringing nail clippers or lighters;
- Taking a knife out of a teacher's desk and holding it up in the air;
- Bringing butter knives to school;
- Notifying teachers of a conspiracy;
- Striking teachers who are trying to stop fights between children.⁶

Zero tolerance policies are generally described as avoiding the use of discretion and relying, instead, on a “cookie cutter” or “one size fits all” approach to all infractions, big and small.⁷ A news article describing an eleven-year-old boy's arrest for threatening to shoot a classmate explained the implementation of the policy succinctly: “Make a threat and

⁵ Noah Bruce, *Zero Tolerance: As Maine Schools Enforce Harsher and Harsher Punishments Against Misbehaving Students, a More Rational Approach to Discipline Takes Root*, PORTLAND PHOENIX (Portland, Me.), Feb. 15–22, 2001, available at <http://portlandphoenix.com/archive/features/01/02/16/school.html>.

⁶ *Id.*

⁷ *Id.* (citing Russell Skiba, Director of the Safe and Responsive Schools Project at the University of Indiana, who notes that “the hallmark of zero tolerance is mandatory sentencing”).

no matter how idle it is, nobody's taking any chances. The police will be called."⁸ In one suburb, a youth who threatened to kill a classmate and blow up his school was given the dangerousness hearing typically given to violent criminal adults and was not released home prior to his trial.⁹

Those who implement these policies recognize they may be over-reacting. One Boston school official aptly describes the situation:

Principals and teachers hear kids making threats every day of the week, and they've been doing on-the-spot-assessments for 300 years . . . And for the last 295 years, they've been mostly empty threats. But the pendulum has swung rather dramatically. It's gone from people using their own judgment in each situation to them not wanting to take a chance any longer that this one case might be real.¹⁰

A police chief in a small fishing town north of Boston had a similar quandary after being summoned by three schools to arrest ten-, twelve-, and eighteen-year-old students on three separate days in one week:

Gloucester Police Chief James M. Marr . . . knows he and others will be accused of overreacting. "I think in some sense, we probably are," he said. "But, unfortunately, we are seeing the [shootings] occur, so we know it's reality. Our job is to try to figure out what's real and what isn't. I'm not sure how we do that in today's society. We know that some kids make these statements and don't mean it. But [what if there's] one that does mean it and we haven't responded? We have to jump on all of them."¹¹

This policy of "jumping on all of them," whether they are dangerous or not, not only diminishes interest in going to school but also does not address the root of the problem, according to attorneys and teachers union representatives alike.¹² Surely, arresting a ten- or eleven-year-old child in his classroom will make him feel branded.¹³ Choosing to expel

⁸ Yvonne Abraham & John Ellement, *Dealing with School Violence*, BOSTON GLOBE, Mar. 18, 2001, at B1.

⁹ *Id.*

¹⁰ *Id.* (quoting Elliot Feldman, Director of Alternative Education for Boston Public Schools).

¹¹ *Id.*; see also Anand Vaishnav, *School Safety Measures Are Delayed: Elementary School Checkups Top List*, BOSTON GLOBE, Dec. 24, 2001, at B1 (referring to Boston Schools' Superintendent Thomas Payzant's acknowledgement that officials might have proposed solutions too hastily to quell public outcry).

¹² Bruce, *supra* note 5; Abraham & Ellement, *supra* note 8, at B1.

¹³ See Abraham & Ellement, *supra* note 8, at B1.

and suspend youth pending trial, and sometimes in spite of dismissal of charges, will have much the same effect and inexorably result in the departure of such youth from school. If it is a matter of finding the “right balance” between being overly punitive and overly tolerant,¹⁴ the balance has decidedly inclined toward a punitive approach that is implemented capriciously and harshly.

According to Tony DeMarco, Director of the Juvenile Justice Center, “jocks don’t get treated with zero tolerance.” Such real-world observations give rise to the notion that zero tolerance rules are applied inconsistently. Nevertheless, cities like Boston initiated plans to make their discipline codes stricter post-Columbine, despite tremendous evidence that existing disciplinary policies often fail to deter certain problems and succeed at disproportionately excluding minority youth.¹⁵ It is such selective application of indiscriminate punishment that should give us pause.

Such policies breed distrust in students toward adults and nurture an adversarial, confrontational attitude, which often leads to increased tensions between youths and adults.¹⁶ Equally disturbing is the educational and social stagnation that results from such expulsion policies. As one Maine juvenile defender puts it:

We’ve been seeing more and more [expulsions] in the last two years and they are really affecting students adversely . . . These kids who wind up getting expelled, they’re home. They have no education going on. They’re home for months at a time. No one’s benefiting from that. There are cases where the punishment doesn’t come close to fitting the crime . . . What used to be school-yard posturing is now zero-tolerance stuff.¹⁷

From all reports, youth who experience the institutional violence of zero tolerance policies typically do worse in school and are more likely to drop out.¹⁸ As these students fall behind, schools’ incentives to help these troubled youths similarly decline. And the students leave.¹⁹

¹⁴ Anand Vaishnav, *School Crackdown Weighed*, BOSTON GLOBE, May 24, 2001, at B4.

¹⁵ Anand Vaishnav, *School Discipline Rules Delayed*, BOSTON GLOBE, June 28, 2001, at B2; DISPROPORTIONATE MINORITY EXCLUSION (Juvenile Justice Center 1999).

¹⁶ HARVARD UNIV., THE CIVIL RIGHTS PROJECT & THE ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCE OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES (2002), available at http://www.civilrightsproject.harvard.edu/research/discipline/call_opport.php.

¹⁷ Bruce, *supra* note 5 (quoting Chris Northrop, a Wells, Maine, lawyer).

¹⁸ *Id.*

¹⁹ See Abraham & Ellement, *supra* note 8, at B1, for an alternative to a police enforced zero tolerance approach, which involves using a civil rights team from the University of Maine Center for the Study of Prevention and Hate Violence “to change the culture of schools by

II. THE ROUNDTABLES

The legislation creating the Juvenile Justice Community Roundtables was enacted in 1995. This legislation authorizes district attorneys to hold roundtable discussions for the purpose of targeting for priority prosecution chronic, violent youthful offenders who pose a "threat to their community."²⁰ Individualized sanctions for the targeted youth were designed to help deter further misconduct.²¹ The district attorneys would "coordinate efforts of the criminal justice system in addressing juvenile justice through cooperation with the schools and local law enforcement representatives, probation and court representatives and, where appropriate, the department of social services, department of youth services and department of mental health."²² The district attorneys and police were empowered to gather information for priority prosecution of juveniles that they previously had no access to, or had previously required court approval to obtain.

For six years, roundtable legislation measures were passed in the outside section of the budget, which meant they were never reviewed by the entire legislature but were instead voted on as part of last-minute budget decisions, often in the middle of the night.²³ The statute²⁴ required district attorneys to submit an annual report to the Senate Ways and Means Committee that in turn had a policy of not sharing these reports with the public.²⁵

The roundtables are run in various ways. Typically, prosecutors convene a group of school officials, police, probation officers, court personnel (including judges), and social service agencies at public high schools to discuss lists of youth devised by police, schools, and district attorneys.²⁶ These lists reportedly include juvenile defendants, their siblings and friends, as well as other youth not involved in the juvenile

eliminating problematic types of speech." See also Scott Greenberger, *Threat Led School to STARS*, BOSTON GLOBE, Apr. 4, 2001, at B1, for another alternative, which would involve employment of a law enforcement model that attempts to gauge the reality of the threat, especially if it is anonymous, before moving for arrests, known as the School Threat Assessment Response System.

²⁰ MASS. GEN. LAWS ch. 12, § 32(b)-(c) (2002).

²¹ *Id.* § 32(b).

²² *Id.* § 32(a).

²³ See Letter from Tony DeMarco, Director, Suffolk University Law School Juvenile Justice Center, to Marc C. Montigny, Senator, and Robert S. Creedon, Senator (June 11, 1999) (on file with the Juvenile Justice Center).

²⁴ MASS. GEN. LAWS ch. 12 § 32(e) (2002); conversation with staffers of Senate Ways and Means Committee (Apr. 2000).

²⁵ See DeMarco, *supra* note 23; conversations with staffers of Senate Ways and Means Committee (2000 and 2001).

²⁶ Reports from Essex, Hampden, Middlesex, Plymouth, Cape Cod & Islands, and Suffolk County District Attorneys Offices (1995-1999) (on file with the Juvenile Justice Center).

justice system.²⁷ According to witnesses at roundtables in the Cape Cod District, prosecutors typically ask school officials to detail the misconduct of students.²⁸ For example, an assistant principal might reply, "This kid jumped up and started hollering during a school assembly." The district attorney would then suggest charges for which the youth could be punished. In this case, the district attorney might suggest charging the child with disruption of a public assembly. It would then be up to the assistant principal's discretion whether to pursue the district attorney's offer.

Families are not mentioned in the statute. In practice, district attorneys have pursued a forceful exclusion of family members from attending roundtables at which their children are discussed. In one Springfield community, a mother who attempted to attend a roundtable meeting after hearing her son was to be discussed claimed to have been threatened with arrest.²⁹ Juvenile defense attorneys are also barred from such meetings and are not even informed that their clients are discussed.³⁰ Meanwhile, the district attorneys not only convene roundtables but also invoke information shared at them in open court against youth, blindsiding many a juvenile defender.³¹ This use of the information is frequent in spite of vehemently repeated, public claims of district attorneys that not a single prosecution has originated from information shared at a roundtable. It is speculated that countless searches of students have resulted from such information sharing with police officers.³²

When the Juvenile Justice Center obtained the district attorneys' reports, we found that they were distressingly vague and did not adhere to any kind of reporting protocol.³³ Fewer than 200 youths are indicted

²⁷ NORTHEASTERN UNIV. SCH. OF LAW: LAW, CULTURE, AND DIVERSITY RESEARCH PROJECT, A CRITICAL ANALYSIS OF THE SUFFOLK COMMUNITY BASED JUVENILE JUSTICE PROGRAM (Mar. 31, 2000).

²⁸ *Id.*

²⁹ Client of Eileen Ryan, Attendee of Juvenile Justice Roundtable Symposium, Remarks at the Advanced Legal Studies Juvenile Justice Roundtable Symposium sponsored by Suffolk University Law School Juvenile Justice Center (Oct. 10, 2001).

³⁰ See DeMarco, *supra* note 23; see also MASS. GEN. LAWS ch. 12 § 32(a)–(e) (2002).

³¹ Further proof of the hard-line approach is found in the Suffolk County District Attorney's brochure on the program, circulated to the Senate Ways and Means Committee with the 1998 report, which describes "priority prosecution" and "individualized sanctions" to deal with high risk youth. Ralph C. Martin, *How to Handle High Risk Kids*, BOSTON GLOBE, Oct. 21, 1999, at A23 (referring to Suffolk County District Attorney Ralph C. Martin's denial of the use of roundtables for arresting and indicting youth); Kenneth Burke, *Collaborative Program Improves the Lives of At-Risk Youth*, BOSTON GLOBE, Oct. 18, 1999, at A13 (denying the use of roundtables for arresting and indicting youth by Kenneth Burke, the Essex County District Attorney).

³² SUFFOLK UNIV. LAW SCH.: POLICY AND SOCIAL CHANGE INITIATIVES, CENTER CHALLENGES THE JUVENILE JUSTICE COMMUNITY ROUNDTABLES AND HOSTS FORUM (Nov. 10, 1999), available at <http://www.law.suffolk.edu/academic/jjc/politxt.html#rtable>.

³³ See DeMarco, *supra* note 23.

annually in Massachusetts as youthful offenders, the category of youth targeted by the roundtable statute as violent, chronic offenders.³⁴ Yet in the five years between 1995 and 1999, more than 20,100 students were discussed at the roundtables,³⁵ indicating the district attorneys went far beyond their mandate solely to discuss violent and chronic juvenile offenders and instead investigated a much larger universe of children.

There were no privacy provisions, parental notification provisions, or reference to or tallies of requests for permission to discuss records in the district attorneys' reports.³⁶ As a demonstration of the level of disrespect for students' privacy concerns, one district attorney's office sent the Center a list of the names of all the youth who had been discussed at roundtables. In none of the reports submitted by the district attorneys was there a listing or accounting of proposed social service interventions or any sign that such interventions had been implemented for the youth and families under scrutiny. Further, three district attorneys revealed that 395 youth were indicted as a result of roundtable discussions, and commitments to youth jails were listed as resulting about ten percent of the time in another county.³⁷

In 1999, a bill was submitted to the legislature to extend the scope of the roundtable law to all children, not just chronic and violent offenders.³⁸ The bill attempted to statutorily authorize what was already occurring at the roundtables: canvassing schools for youth to ferret out possible arrestees. The new legislation would have permitted private industry to attend the roundtables. The manager of the local McDonald's would have a better chance of admission to a roundtable discussion about John Doe than John Doe's mother. Under this legislation, teachers, mental health, and social service providers faced the dilemma of divulging what their clients said and provoking legal consequences neither they nor their clients could have anticipated, or refusing to cooperate with district attorneys and police.³⁹ And in both the enacted and proposed

³⁴ MASS. JUVENILE COURT DEP'T, FISCAL YEAR 2001 STATISTICS, available at <http://www.state.ma.us/courts/courtsandjudges/courts/juvenilecourt/2001stats.html>.

³⁵ Lisa Thureau-Gray, Testimony to the Massachusetts Joint Committee on the Judiciary (Apr. 5, 2001) (opposing Senate Bill 968) (on file with the Massachusetts Joint Committee on the Judiciary).

³⁶ See DeMarco, *supra* note 23.

³⁷ See Reports, *supra* note 26.

³⁸ H. 4898, 181st Gen. Ct. (Mass. 1999).

³⁹ Mass. Sup. Jud. Ct. Comm. Jud. Ethics, No. 2001-7 (May 31, 2001) (finding it unacceptable that judges attend roundtables because "it may reasonably be thought that [they] would be exposed, in an essentially one-sided format, to the prosecutorial, police and probationary viewpoints on issues that may come before the juvenile court" and disallowing probation officers from making comments at the roundtables or to the judge as they are viewed as agents of the judge).

schemes, only the district attorney's office could demand sanctions for improperly disseminated information.⁴⁰

During a heated debate in May 2000, state Rep. Philip Travis asserted that he could not go home and tell his wife he had voted for legislation that forbade her from attending a meeting about their children.⁴¹ After all the complicated formulations that advocates had invoked to stoke concerns about this bill, challenging the exclusion of parents was the tactic that worked best. The House agreed with Travis and amended the bill to require parental notification, but not participation.⁴² The district attorneys were reportedly so incensed at the idea of parental participation that they stopped endorsing the bill altogether. It has been effectively scuttled since then.⁴³

The bill was reintroduced in 2001, adding school nurses to the list of roundtable participants,⁴⁴ as an extension of an effort in one county to determine who impregnated teenage girls in order to prosecute the offenders for statutory rape.⁴⁵ That approach led to such a decline in teenage parents' willingness to get prenatal and infant care that the local infant mortality task force begged the district attorney to halt his inquiries for the sake of the babies' access to prenatal care and to the Women, Infant, and Children nutrition programs.

At this juncture, it may be analytically useful to compare the roundtables with the description of a strikingly similar purported public health and safety measure. As a public health and safety measure, a state attorney organized a group of social service providers to take information from a group of people they were serving and give it to the police. The social service providers did not explain to the people that this information would be given to the police. In exchange for giving this information, some of which was incriminating, the people were not given special services. They were arrested.⁴⁶

This scheme was struck down by the U.S. Supreme Court in March 2001 in *Ferguson v. City of Charleston*.⁴⁷ The Court held that the South Carolina Solicitor General's use of public hospital nurses to collect information on drug use by pregnant mothers was a violation of their Fourth Amendment rights.⁴⁸ Justice Stevens, writing for the majority, held that

⁴⁰ See H. 4195, 181 Gen. Ct. (Mass. 2000).

⁴¹ Debate, H. 4898 (Mass. May 24, 2000) (referring to the statement of Representative Philip Travis), available at <http://www.statehousenews.com>.

⁴² Debate, H. 4898 (Mass. May 24, 2002), available at <http://www.statehousenews.com>.

⁴³ Interview with Massachusetts Senate staffers (June 2000).

⁴⁴ H. 968, 182d Gen. Ct. (Mass. 2002).

⁴⁵ Memorandum of Law, Oct. 10, 2000, stating concerns about this practice from care and protection attorney (on file with author).

⁴⁶ *Ferguson v. City of Charleston*, 532 U.S. 67, 67-69 (2001).

⁴⁷ *Id.*

⁴⁸ *Id.* at 86.

“law enforcement involvement was the means by which [the] therapeutic purpose was to be met.”⁴⁹ Justice Kennedy concurred, stating that, in some respects, the hospital acted as an “arm of law enforcement” which was an unacceptable practice.⁵⁰ The Court highlighted the procedural defects of the scheme:

While state hospital employees, like other citizens, may have a duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients for the specific purpose of incriminating those patients, they have a special obligation to make sure that the patients are fully informed about their constitutional rights.⁵¹

Similarly, school officials are being utilized by district attorneys through the roundtables as an arm of law enforcement. The roundtables remain in operation in a burgeoning number of junior high and high schools in Massachusetts and appear to constitute one of the major “feeder systems” of children into juvenile and adult criminal courts.⁵² The “blurring of school discipline and delinquency”⁵³ is especially evident even as the adults who run them seem to miss clear harbingers of school violence.⁵⁴ For instance, in October 2001, the New Bedford High School’s roundtable, intent on targeting youth, appeared blithely unaware of the school’s painful social divisions, which were reported as the reason why several students allegedly planned to bomb the school in the first place. The students later described school alienation and bullying as their impetus.⁵⁵

One of the students thwarted the bombing by confiding the details of the plan to her favorite teacher to ask for help in stopping it.⁵⁶ Assuming the bombing plan existed, it is critical to note that it was the strong, nurturing student-teacher relationship that preserved school safety, not the weekly roundtable meetings or the presence of law enforcement in the school. Ironically, it is exactly this kind of relationship, between stu-

⁴⁹ *Id.* at 83 n.20.

⁵⁰ *Id.* at 88.

⁵¹ *Id.* at 84–85 (emphasis omitted).

⁵² See generally Bernardine Dohrn, “Look Out Kid: It’s Something You Did”: Zero Tolerance for Children, in *ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS* 89, 95 (William Ayres et. al. eds., 2001) (explaining the policies of school-based arrest and exclusions) [hereinafter *ZERO TOLERANCE*].

⁵³ See *id.* at 98.

⁵⁴ Cf. *id.* at 93–98.

⁵⁵ Anand Vaishnav, *Underlying Questions Ahead in New Bedford*, *BOSTON GLOBE*, Nov. 28, 2001, at B6.

⁵⁶ Brian MacQuarrie, *Alleged Plot Seen Exposed Out of Loyalty to Teacher to Save Teacher, Teenager Revealed Plot, Police Say*, *BOSTON GLOBE*, Nov. 28, 2001, at A1.

dents and teachers, counselors, and therapists that law enforcement seeks to compromise in the name of safety. As an example of this punitive approach, Massachusetts is currently prosecuting the student who came forward to report the threat.⁵⁷ Other states, seeking to encourage such disclosures, have supported such students and forgone bringing charges against them.⁵⁸

III. ADMISSION TICKET

Just in case a school official missed some important information at a roundtable, Massachusetts Senate Bill 923 was introduced in 2001 and fast-tracked toward a vote. This bill, in the name of school safety, permits superintendents to review arrest, conviction, and sealed record data “for the purpose of evaluating prospective students’ appropriateness for enrollment, in order to further the protection and foster the learning environment of all students”⁵⁹ Should the superintendent deny admission, the superintendent would be required to provide alternative educational opportunities.⁶⁰

Needless to say, this legislation would increase dropout rates, especially since only two counties have formalized alternative education programs. The other districts rely on individualized tutoring.⁶¹ In succinct fashion, Senate Bill 923 subverts all goals of the juvenile justice system, namely rehabilitation and the availability of second chances. Under Senate Bill 923, the record of juveniles’ pasts circumscribes their access to a different future.⁶² Implicit in Senate Bill 923’s rationale is the credibility granted to police. But it is a Sisyphean task to challenge the assumption that all arrests are valid, especially when measures are applied disproportionately against children of color.⁶³ Recent studies show that given sim-

⁵⁷ *Id.*

⁵⁸ Bill Alexander, *Whistleblower: My Life Ruined*, YOUTH TODAY, Feb. 7, 2002, at 1 (describing the consequences of Amy Lee Bowman’s coming forward in the New Bedford case: While other states have gone so far as to authorize protections for such whistleblowers, Amy was “[o]stracized by her community and branded a criminal by a conspiracy to murder charge Her predicament raises questions about how teen whistleblowers should be treated by authorities who depend on them for crucial information rendered in an atmosphere of trust, and by peers who may liken these actions to ‘snitching.’”).

⁵⁹ S. 923, 181st Gen. Ct. (Mass. 2001).

⁶⁰ *Id.*

⁶¹ Arguments in favor of H. 2489 to create an alternative education system have languished in the legislature since 1999. See also Tony DeMarco, *From the Jail Yard to the School Yard*, in ZERO TOLERANCE, *supra* note 52 at 42, 43.

⁶² See Letter from Ernest Winsor, Staff Attorney, Massachusetts Law Reform Institute, to Mark C. Montigny, Chairman, Massachusetts Senate Ways and Means Committee (Feb. 11, 2002) (on file with author).

⁶³ JUVENILE JUST. CTR., JUVENILE JUSTICE CENTENNIAL INITIATIVE BRIEFING PAGE ON DISPROPORTIONATE MINORITY CONFINEMENT (on file with the Juvenile Justice Center) (citing the MISER/State Data Center July 1998 population estimates, the Department of Youth Services July 1998 Strategic Plan Report, and JUVENILE OFFENDERS AND VICTIMS: 1999 NA-

ilar rates of delinquent acts, African American and Latin American youths are not only arrested more but are also more likely to be given detention prior to adjudication including for adjudications, ultimately resulting in dismissals.⁶⁴

Worse yet, Senate Bill 923 would import the Criminal Offender Record Information (CORI) system into the schools. The CORI system is as flawed as the justice system in its attempts to track children much the way the justice system tracks adults.⁶⁵ It is close to impossible to get juveniles' records expunged in Massachusetts, even in instances where youths have not been arraigned prior to dismissal or where their cases have been nol prossed (not pursued by prosecutors).⁶⁶ How will excluding these youths enhance public safety? Youths branded by the system, who spend entire days with similarly troubled friends outside of school, alienated from school and other constructive activities, will not contribute to a recipe for public safety. In fact, if we review the life stories of the boys involved in school shootings, we see alienation and anomie as the preeminent triggers that led them to commit the killings.

IV. THE GAUNTLET TO SCHOOL

Another source of zero tolerance comes from the police.⁶⁷ Massachusetts Bay Transportation Authority (MBTA) police have routinely arrested youth waiting for subways or buses since 1998 in an effort to improve the quality of life, but not the quality of life of the children they arrested.

The MBTA police chief implemented a "community policing" policy in which he "redeployed and increased [the] presence [of officers] . . . [to] come down hard on the so-called trivial transgressions such as smoking, loud noise or youthful roughhousing."⁶⁸ He described his "zero tolerance" policy as based on the premise that: "both the community and the police are two aspects of the same entity . . . It is also important to enlist the help of community activists and activists organizations. These are people who care about the quality of their lives. Being a cop is all about protecting someone's quality of life."⁶⁹

TIONAL REPORT by the Office of Juvenile Justice and Delinquency Prevention of the United States Department of Justice).

⁶⁴ *Id.*

⁶⁵ See Winsor, *supra* note 62.

⁶⁶ See Commonwealth v. Gavin G., No. 08672 (argument heard Apr. 2, 2002) (briefs, including Juvenile Justice Center's amicus brief, are on file with the author).

⁶⁷ See Don Muhammad, Chairman of the Black Caucus, *Report of the Task Force on Combating Racial Profiling* (Feb. 2002).

⁶⁸ Press Release, Mass. Bay Transp. Auth., Massachusetts Bay Transportation Authority Police Institute Community Policing (Jan. 6, 1998).

⁶⁹ *Id.* at 3.

In a memorandum dated January 27, 1998, Chief O'Loughlin listed what constitutes quality of life arrests.⁷⁰ The list included disorderly conduct, trespass, alcohol possession by minors, graffiti, smoking, and fare evasion as the primary concerns. He recognized the leader and members of the plainclothes Anti Crime Unit for its six-month arrest record of:

an impressive 723 [arrests]. The greater portion of these arrests, 598, occurred during the day shift where youthful disorder has been repeatedly assaulted with a zero tolerance attitude, which is lauded by our patrons . . . The arrests being made by the Anti Crime Unit address quality of life issues that confront MBTA riders when no police presence is apparent. They range from disorderly behavior to controlled substances to the illegal possession of dangerous weapons (firearms, machetes, etc.). They are an integral line of defense against transit disorder . . . The continued attention to duty exhibited by this Unit is noteworthy and deserving of recognition.⁷¹

In another document, the MBTA claimed:

The people getting arrested on the railways and being charged with trespassing in Massachusetts are actually very lucky. As long as they are in custody, they haven't lost the game of chicken they were playing on the tracks . . . As a result of the seriousness of the outcomes that can result from trespassing, the MBTA has adopted a zero tolerance policy. Violators are immediately arrested and charged with trespassing.⁷²

Over 3,500 youth were arrested or stopped and frisked for Field Investigation Observations (FIO),⁷³ and more than half that number were arrested and detained at MBTA police headquarters. In 1999 alone, at least fifteen civilian complaints were filed against the Anti Crime Unit by parents, each and every one resulting in a finding of exoneration for the police officer.⁷⁴

⁷⁰ Memorandum from Thomas J. O'Loughlin to MBTA, Quality of Life Arrests (Jan. 27, 1998).

⁷¹ Bulletin, Mass. Bay Transp. Auth., Police Commendation Bulletin Number 98-03 (June 24, 1998).

⁷² MASS. BAY TRANSP. AUTH. (June 5, 2001), available at <http://www.mbta.com>.

⁷³ MASS. BAY TRANSP. AUTH., POLICE ANTI CRIME UNIT REPORT 12 (1998-2000) (extrapolating numbers for the period extending into 2001).

⁷⁴ The Center is in possession of copies of eighteen "exoneration" memorandums from the MBTA Police; access to the other complaints is being pursued as part of our lawsuit.

During that time, the chief disbanded a federally funded program sending officers and elderly residents into public schools to speak directly with students about acceptable subway behavior.⁷⁵ Boston Public Schools (BPS), meanwhile categorically refused to challenge MBTA police conduct toward its students and claimed it was impossible to stagger release times of junior high and high school students to relieve the congestion in subway stations built for scores of users, not hundreds or thousands.⁷⁶

Since 1999, the Center has represented sixty-seven youth arrested by the MBTA police, interviewed approximately fifty others, and spoken with fifteen juvenile defenders who have handled such cases. The Center analyzed the sixty-seven cases and found that the majority of young people arrested by the MBTA police between 1998 and 2001 were going to or coming from school.⁷⁷ Most were arrested by groups of undercover officers who did not identify themselves or would often take their time when they did, increasing the youths' fear about the men touching them. Some youth were near railroad tracks; others were skateboarding, but most were simply waiting on platforms for emptier trains when they were arrested for trespass.

Rarely did youth have their rights read to them; none were given an opportunity to call their parents, and few were told the nature of their offenses. Some were chained to retaining poles for several hours at a time; few were fed or given anything to drink. Some had guns pulled on them during the FIOs; others were touched in sexually inappropriate manners, and some reported being grabbed from behind and dragged into police station offices. The language used with the youth was racist and derogatory; officers were also physically and verbally abusive with youth who tried to protect their friends by asking officers their badge numbers. Typically youths who questioned officers' treatment of their friends were arrested. At the police headquarters in Roxbury, officers delayed calling youths' parents to increase the amount of time spent locked up.⁷⁸

⁷⁵ Memorandum from the Mass. Bay Transp. Auth. Police Patrol Operation Division, Student Related Disorder/Problem Solving Grant 98-99 (Oct. 19, 1998) (referring to the grant). There are more such memoranda, but the Center awaits review of them pursuant to discovery in a case before the federal district court in Boston, *Farley et al. v. Mass. Bay Transp. Auth. et al.*

⁷⁶ This refusal remains difficult to comprehend in view of the fact that BPS staggers the arrival and departure time of its elementary schools.

⁷⁷ SUFFOLK UNIV. LAW SCH. JUVENILE JUST. CTR., FACT SHEET ON MBTA POLICE MISCONDUCT TOWARDS YOUTH (Oct. 18, 2001). The facts described come from this fact sheet, the "story bank" the Center created, and interviews with youth performed by the Center and the firm of Hale & Dorr.

⁷⁸ Mass. Bay Transp. Auth., Police Misconduct, Public Hearing Before the Massachusetts Black Legislative Caucus 27-86 (May 23, 2001).

At hearings held by the Massachusetts Black Legislative Caucus on May 23, 2001, the chief of police and other MBTA officials roundly denied that they implemented a zero tolerance policy.⁷⁹ The MBTA officials came unprepared to answer questions about police policies towards youth, even though they were notified in advance that the Caucus would ask them such questions.⁸⁰ After repeated denials about the use of zero tolerance policies, members of two of the three police officers' unions, which had a no-confidence vote of 178 to 3 on that same day, intervened in the Caucus hearings and provided documents manifesting directives to implement a zero tolerance policy.⁸¹

MBTA officials were unable to explain why they veered so far from the mandates of the MBTA department regulations for the treatment of youth. These regulations open with the following directive: "It is the policy of the MBTA Police Department that when dealing with a juvenile offender, the least coercive methods shall be used consistent with preserving public safety, order and individual rights."⁸² During the hearings, Rep. Jarrett Barrios insistently queried the MBTA police chief on this matter. The police chief finally conceded that arrest for trespass, including arrests of youth waiting on platforms for trains, is the MBTA's least coercive method.⁸³

The subjective impact of these incidents on the arrested teens was profound. Each one described a combination of fear, bewilderment, humiliation, shock, anger, and cynicism about the police.⁸⁴ Their parents exhibited similar reactions. The chilling effect on youths' sense of the right to dissent, by asking for an officer's badge number, for instance, is difficult to understate. Equally troubling was the chill cast over the willingness of youth to help friends in need, because if they did, the likelihood of arrest was increased. All were concerned about taking the train after the incident.

There was also the subsequent objective impact of having a record for the charge of trespass, even though the vast majority of cases were dismissed.⁸⁵ Imagine for a moment, a youth teetering on the edge of not wanting to go to school, who either experiences or witnesses such police conduct at 7:15 on a cold March morning in a windy station in Mattapan. Imagine what his decision would be.

⁷⁹ *Id.* at 126, 143, 144.

⁸⁰ *Id.* at 103-05.

⁸¹ *Id.* at 203-19.

⁸² MASS. BAY TRANSP. AUTH. POLICE DEP'T, GENERAL ORDER ch. 291, 90-114 (Dec. 1, 1990).

⁸³ See Public Hearing, *supra* note 78, at 145-56.

⁸⁴ *Id.* at 28-86.

⁸⁵ See Muhammad, *supra* note 67, at 4-15 (urging expungement of juveniles' records).

The selective application of the zero tolerance policy was not missed by many of the youth either. I asked one boy why he thought he had been arrested; he thought about it in silence. After a while he said slowly, "I think it was because I laughed. I still can't figure out what it was." He then asked me if fare evasion was against the law. Surprised at this turn in the conversation, I said yes and asked him why he wanted to know. He then asked me why the white kids who jumped the turnstiles had not been arrested but he had.

In October 2002, after negotiations failed, the firm of Peabody & Arnold, working with the Juvenile Justice Center, filed suit on behalf of eleven teenagers against the MBTA chief and eighteen officers. In their complaint, the plaintiffs alleged that "without the reasonable suspicion or probable cause required by the Fourth Amendment, and under the direction and with the approval of the MBTA, . . . officers have engaged in rampant stops, searches, arrests, and detentions of juveniles throughout Greater Boston" ⁸⁶

A task force convened by the state Secretary of Transportation in response to hearings held by the Massachusetts Black Legislative Caucus on the misconduct of the police similarly concluded:

The zero tolerance strategy adopted by the MBTA Police has been a mistake and resulted in increased tensions between MBTA Police officers and the youth who ride the system. The MBTA Police should immediately adopt a community policing program that . . . stresses broad based partnerships and creative problem solving. ⁸⁷

In addition, the task force recognized that "[a]rrest is a life-changing event for anyone, but particularly young people. Many youth arrested on the MBTA may suffer long term ramifications associated with an arrest record . . . it was strongly felt that arrest should be a final measure" ⁸⁸

By now, the Anti Crime Unit has been dismantled. Arrests are down, but there has been negligible institutional change otherwise. As of this writing, the police chief has not been removed, officers have not been re-trained, formal revocation of the zero tolerance policies has not occurred, school-based partnerships have not been implemented, systematic collection of data has not taken place, and there have been no revisions to the civilian complaints process. ⁸⁹

⁸⁶ Plaintiff's Compl. at 2, *Farley, et. al. v. Mass. Bay Transp. Auth., et. al.*

⁸⁷ Muhammad, *supra* note 67.

⁸⁸ *Id.* at 14.

⁸⁹ Doug Hanchett, *Report to Allege Cops Treat Teen Riders Unjustly*, BOSTON HERALD, Mar. 14, 2002, at 32.

V. EDUCATIONAL REFORMS

Factor into this context Massachusetts' move toward high-stakes testing and a decrease in the provisions for and access to special education. Serious problems in Massachusetts continue, with some of the poorest communities experiencing the largest array of educational underachievement and behavioral issues.⁹⁰ The means by which Massachusetts has chosen to redress these problems has been highly controversial.

A. THE MASSACHUSETTS COMPREHENSIVE ASSESSMENT SYSTEM

Massachusetts implemented the Massachusetts Comprehensive Assessment System ("MCAS"). These are high-stakes tests aimed at ensuring basic standards of achievement and will be required for receipt of a high school diploma by 2003.⁹¹ Reaction to the tests from teachers' unions and students has been overwhelmingly negative. Others support the tests as giving one of the few uniform indicia of students' achievement. To date, an editorial in *The Boston Globe* manifests both the mixed impact of the MCAS as well as the rhetoric justifying the use of such tests:

What is certain, however, is that the overall MCAS pass rates — 75% in math and 82% in English — are on the rise. MCAS failure rates remain highest in urban schools with many low income and minority students. But the vision of large numbers of seniors locked out of graduation exercises is starting to fade Students and teachers in the class of 2003 show mental toughness. Employers, colleges, and military recruiters can be confident that the diplomas presented to this class will be weightier than those of its predecessors.⁹²

Schools are held accountable for how well their students score.⁹³ If you were searching for a stronger structural incentive for schools to expel students, I am not sure you could find one better than holding schools accountable. If Texas is any guide to the impact of such testing, we will see test scores rise dramatically. In Texas, high-performing schools receive cash awards, while poorly performing schools receive sanctions

⁹⁰ Scot Lehigh, *Educationally, The Rich Get Poorer*, BOSTON GLOBE, Mar. 1, 2002, at A17.

⁹¹ MASS. GEN. LAWS. ch. 69, § 1D(i)–(iii) (Mass. Bar Ass'n/West 2002).

⁹² Editorial, *Class Act on the MCAS*, BOSTON GLOBE, Mar. 1, 2002, at A16.

⁹³ MASS. GEN. LAWS. ch. 69, § 1I (Mass. Bar Ass'n/West 2002). *But see* Megan Tench, *Onus of MCAS Put on School Boards; Education Chief Wants Those Elected Held Accountable*, BOSTON GLOBE, May 28, 2002, at A1.

and less support,⁹⁴ perhaps in an effort to attain internal consistency between the school and juvenile justice systems.

However, what was *not* trumpeted in Texas is that almost thirty percent of African American and Latin American youth were failing ninth grade and were retained at the highest grade nine retention rates of any states for which such data were available.⁹⁵ Not surprisingly, similar side effects of the relatively new testing regime are also becoming apparent in Massachusetts.⁹⁶ The single most predictive factor that a student will drop out, higher than even poor academic performance, is being retained in a grade. Not surprisingly, the dropout rates in Texas soared after the implementation of the tests, and most of the students retained in ninth grade were gone before the next round of tests was administered at the end of their sophomore year.⁹⁷

According to Walt Haney, who studied the Texas “miracle,” as it is called, and served as an expert witness in a challenge to the system’s disproportionate impact on minority children, 75,000 to 80,000 children left the Texas school system each year between 1992 and 1999.⁹⁸ In fact, one in three students dropped out of school after the advent of testing in Texas.⁹⁹ Where did they go?

It could be argued that the increased exclusion rate in Massachusetts is already validating this prediction. In 1999–2000, about twenty-three percent of the state’s students were children of color, but they astonishingly represented fifty-five percent of all school exclusions and were excluded at younger ages and for longer periods of time than their counterparts.¹⁰⁰ Massachusetts’ total school exclusion rate is half that of the national rate, but for African American and Latin American children it is twice the national rate.¹⁰¹ The primary reason for excluding forty percent of the 1,421 students excluded was listed as “other”; twenty-seven percent, or 383, were excluded for carrying weapons into the

⁹⁴ Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EPAA No. 41 (2002), available at <http://epaa.asu.edu/epaa/v8n41/part1.htm>.

⁹⁵ *Id.*

⁹⁶ Yawu Miller, *Race Gap Persists in MCAS Scores*, BAY STATE BANNER, Nov. 1, 2001, at 12.

⁹⁷ Haney, *supra* note 94.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ MASS DEP’T OF EDUC., STUDENT EXCLUSIONS 1999–2000, (May 22, 2002), available at <http://www.doe.mass.edu/inforservices/reports/exclusions/9900>.

¹⁰¹ *Id.*; see also JUVENILE JUST. CTR., LEAFLET, DISPROPORTIONATE MINORITY EXCLUSION (2000) (on file with author); Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 416 (2001) (discussing the disproportionality of blacks and Hispanics in special education classes); Rebecca Gordon, Libero Della Piana & Terry Keleher, *Zero Tolerance: A Basic Report Card*, in ZERO TOLERANCE, *supra* note 52, at 166.

school, three percent of which were guns and seventy-five percent of which were knives.¹⁰²

B. LIMITS ON ACCESS TO SPECIAL EDUCATION

Another critical change to factor in is the legislature's decision to reduce the state's obligation to provide special education services to youth from a maximum feasible benefit level to a free and appropriate public education level, effective January 1, 2002.¹⁰³ The legislature also "made changes to the eligibility process, adopting federal definitions for specific learning disabilities and emotional disability and rewrote the right to an independent evaluation."¹⁰⁴ At the same time, the state's Board of Education implemented restrictions on the availability of such services. School districts and child advocates were soon trying to reconcile the two reforms. The reforms are resulting in increased litigation, decreasing the number of youth who have access to educational resources and reducing the availability of such resources.¹⁰⁵ Moreover, the availability of rights to special education are meaningless for children without the presence of strong advocates, parental or otherwise. This conclusion comes from the Center's experience with indigent clients who, without any such advocates, have been promoted to and attended high school yearly without anyone noticing, much less taking action, to correct serious educational deficits, including total illiteracy. The availability of a strong advocate is a tremendous threshold for many children to access these services.

Concurrently, there has been a decrease in parents' rights to obtain attorneys' fees. Under the Individuals with Disabilities Education Act, "The Court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is a prevailing party."¹⁰⁶ The courts' move toward limiting this award is in turn limiting the number of private attorneys who can afford to take such cases. Recent cases include *April M. v. West Boylston Public Schools*,¹⁰⁷

¹⁰² MASS. DEP'T OF EDUC., *supra* note 100.

¹⁰³ In 2000, the Massachusetts legislature enacted sweeping reforms of MASS. GEN. LAW ch. 766, repealing the maximum feasible benefit standard as of Jan. 1, 2001. In addition, the following laws reflected the lowering of the standard: MASS. GEN. LAWS. ch. 71B, §1-3; CMR § 149, 151, 154, 163, 167.

¹⁰⁴ Tim Sindelar, *Introduction to SUFFOLK UNIVERSITY LAW SCHOOL, ADVANCED LEGAL STUDIES, REPRESENTING STUDENTS WITH DISABILITIES IN A CHANGING ENVIRONMENT* (Sept. 2000).

¹⁰⁵ Alice Dembner, *Parents Eye Suit over Special Education*, BOSTON GLOBE, Mar. 24, 2002, at B1.

¹⁰⁶ 20 U.S.C. § 1415(I)(3)(B) (2002).

¹⁰⁷ *April M. v. W. Boylston Pub. Schs.*, Civil Action No. 99-40181-CBS, Aug. 15, 2001 (granting settlement agreement foreclosing child plaintiff's right to attorney fees).

*L. v. Sloan, The Norwalk Board of Education*¹⁰⁸ and *Jose Luis R. v. Joliet Township H.S. District 204*.¹⁰⁹

CONCLUSION

The concern for safety in public schools is not negotiable and is always valid. In the wake of Columbine and other school shootings, it appears especially pressing. I am not trying to posit an idyllic view of schools pre-Columbine or pre-standardized testing. I am trying to argue that the public policy choices embraced in the name of public safety and higher educational performance do not ensure school safety, and may, in fact, by imposing institutional violence and a clear effort to circumscribe access to public education, breed problems far worse than the problems they are supposed to address.

What conclusions can we draw from these policies and legal reforms?

First, we can conclude that kids who do not conform to school rules for whatever reasons — inability, being in the wrong place at the wrong time, social awkwardness, or because they are unable to engage for reasons that may or may not involve learning disabilities — are in serious trouble.

Massachusetts schools are being pressured to progressively out-source treatment of children who do not learn, perform or conform — also known as the bad, mad and sad children — to the juvenile justice system. Prosecutors and police have been more than willing to move into the schools and widen their sphere of influence and have been welcomed. As a result, Massachusetts schools abound with stories of youth being expelled for carrying butter knives, pagers, and can openers, and for making statements like “I’m gonna get you” during public assemblies. The fact that youth did not previously experience arrests for such behavior and that adults could not be arrested and charged for such behavior suggests that there has been an implicit broadening of the scope of conduct considered status crimes for youth and the punitive responses to them.

Second, we can conclude that the operating assumption about youth is primarily predicated on a model that views teenagers as a mixture of hormones and aberrant, criminal behavior. The responses therefore are increasingly punitive for what heretofore fell under the rubric of normal, albeit enervating and disconcerting, adolescent behavior.

¹⁰⁸ *L. v. Sloan, The Norwalk Bd. of Educ.*, Civil Action No. 397CV02074, Aug. 14, 2001 (stating fees of a parent who is a successful plaintiff are not covered by the statute).

¹⁰⁹ *Jose Luis R. v. Joliet Township H.S. Dist. 204*, 2001 WL 1000734 (N.D. Ill. Aug. 29, 2001) (illustrating plaintiffs’ resolution of dispute in mediation does not entitle them to reasonable attorneys’ fees).

As a result of this change in approach to youth, it would appear that schools and police have surrendered the idea that part of their responsibility is to *train* youth about proper interpersonal relations. Instead, the perception of adult authority appears to be limited to an assertion of power and position. But the lack of proportion and consistency in institutional responses to young people's behavior is profoundly confusing to youth generally and to juvenile offenders specifically and is having at least two serious unintended side effects. One effect is to make youth disrespect authority and assume punitive reactions will occur. This causes some to go so far as to purposely trigger or provoke institutional reactions in order to get the hammer to fall faster.

Gloria Ladson-Billings neatly captures the second side effect, which is to use one youth to make an example for all — regardless of the ramifications to that individual youth:

[Zero tolerance] essentially writes off the individual in an attempt to intimidate the group. The school's responsibility to the individual ends once he violates a zero tolerance policy rule. The schools use the policy to send a message to the rest of the student body that they too will be excluded if they violate the policy.¹¹⁰

However, because violations are hardly uniformly noticed and much less consistently punished, the capriciousness of the system breeds fear and distrust. Serious damage is done to young peoples' notions of civil rights, much less America's claims of democratic freedoms and the right to dissent, especially when in their daily lives youth experience such oppressive forms of institutional socialization.

The various zero tolerance policies hold no incentive for school administrators, district attorneys, or MBTA police officers to be more sensitive to the social chasms or to mediate *The Lord of the Flies* social environments that drive kids to extreme acts of bravado and despair. Instead, these various punitive policies have enabled school officials and police officers to further criminalize "in the name of safety"¹¹¹ all sorts of behavior without getting to the heart of the social dissonance producing it.

According to Bernardine Dohrn, "It is paradoxical but fundamental that a handful of high profile school shootings mask a broader and deeper criminalization of school life . . . which has transformed public schools across America into a principal referral source for juvenile justice prose-

¹¹⁰ Gloria Ladson-Billings, *America Still Eats Her Young*, in ZERO TOLERANCE, *supra* note 52, at 80.

¹¹¹ Dohrn, *supra* note 52, at 89.

cution.”¹¹² Bernardine Dohrn’s conclusion also applies to a correlated paradox, namely that while the school shootings have occurred in white, middle class neighborhoods in suburban and rural America, the most draconian institutional responses to these incidents have been in urban areas where minority youth live and where metal detectors and the police are the pillars of school entrances.

These particular legal responses to violence among youth and to the rationing of educational opportunities must be viewed in the context of policies the government has *failed* to pursue, including strict gun control, funding smaller class sizes, system wide alternative education, counseling to change the “culture” of school social environments, interventions for children living with domestic violence, after-school programs, and so forth. Furthermore, the policy choices made by child-serving institutions must be viewed in the context of how American culture extols and profits from violence in sports, the movie industry, and, let’s not forget, politics. In the United States, youths’ violent social or physical behavior will provoke even more violent institutional adult responses, especially if they are members of a minority group, while at the same time adults are both encouraged and rewarded for such conduct.

These institutional responses make clear that “responses to violence that do not take into account the ways in which it is rationalized, legitimate and sanctioned within schools, communities and society are unlikely to succeed in reducing or eliminating it.”¹¹³ It would appear that the current legal and political responses to children are more likely to breed opportunities for institutional and individual violence. Such initiatives cause consequences which inflate their *raison d’être* and its corollary, namely increased funding of law enforcement institutions, often at the expense of educational and children’s services.

The increased use of such policies by schools and police do not “solve a problem — it shifts it . . . we seem to forget that making [students] disappear from school does not make them disappear from society.”¹¹⁴

¹¹² *Id.* at 95.

¹¹³ Pedro A. Noguera, *Finding Safety Where We Least Expect It: The Role of Social Capital in Preventing School Violence*, in ZERO TOLERANCE, *supra* note 52, at 202, 216.

¹¹⁴ Dohrn, *supra* note 52, at 89, 96.

EPILOGUE

AN HISTORICAL PARALLEL: THE ENCLOSURE ACTS

It is instructive here to consider the historical example of the Enclosure Acts by which Great Britain, using the powers of “local government and local courts, and the influence of the church . . .” accomplished “social exclusion on a grand scale”¹¹⁵ while “actively impoverishing and punishing the landless.”¹¹⁶ It was these Acts that led Karl Marx to declare, “The law itself becomes the instrument of the theft of the people’s land . . . the parliamentary form of the robbery is that of Acts for enclosures of Commons, in other words, decrees by which the landlords grant themselves the people’s land as private property, decrees of expropriation of the people.”¹¹⁷

Between 1770 and 1830, through the passage of over 3,280 bills in Parliament, more than six million acres of the commons, used by the majority of the English population to engage in small plot farming and shepherding, was put into the hands of the aristocracy for private gain.¹¹⁸ As Sir John Sinclair bellowed to his fellow Lords in Parliament, “Let us not be satisfied with the liberation of Egypt, or the subjugation of Malta, but let us subdue Finchley Common; let us conquer Hounslow Heath; let us compel Epping Forest to submit to the yoke of improvement.”¹¹⁹

The term “enclosure,” much like the terms “school safety” and “educational standards,” developed “a certain chameleon like quality in that it took on particular colorations of meaning depending on the intentions of its user.”¹²⁰ Its effect was “the limiting of access to open fields and the exercise of rights held in common by broadly defined and diffuse groups of individuals.”¹²¹

The acts were legitimized on various grounds. Even as

[Y]eomanry’s longstanding rights in the commons were to be denied, transformed into criminal acts, and reasigned to the large landowners[,] in almost the same breath, use of the commons would be slandered as unproductive and economically useless, as an aimless and wasteful traipsing about lands that would be put to much better use by their new owners, the “capital” or

¹¹⁵ Ann Pettifor, *Stealing the Common from the Goose*, RADICAL ECONOMICS (May 22, 2002), available at <http://www.wrightslaw.com/info/discipl.suspend.crabtree.html>.

¹¹⁶ *Id.*; see also Frank A. Sharman, *An Introduction to the Enclosure Acts*, J. LEGAL HIST., 44, 46–66, (1989), for a detailed description of how the Acts were implemented.

¹¹⁷ *Id.* at 44 (quoting KARL MARX, *DAS CAPITAL* 45 (1989)).

¹¹⁸ KIRPATRICK SALE, *REBELS AGAINST THE FUTURE* 34 (1995).

¹¹⁹ *Id.*

¹²⁰ Charles J. Reid, Jr., *The Seventeenth Century Revolution in the English Land Law*, 43 CLEV. ST. L. REV. 221, 243–44 (1995).

¹²¹ *Id.* at 245.

“merchant” farmers The true rights holders were those who enclosed the commons, expropriated the yeomanry, and exploited the land more intensively.¹²²

Another justification was that pushing the poor off the land was “nature’s medicine.”¹²³ In process were the laws of war named fair competition. One contemporaneous observer wrote, “[We] have profoundly forgotten everywhere that cash-payment is not the sole relation of human beings.”¹²⁴

The recourse to a system of justice or democratic appeal did not exist.¹²⁵ Petty and grand crime skyrocketed. Denied the possibility of self-sufficiency, farmers turned to poaching and food theft, and sometimes the weapons of the weak were trained on destruction of the threshing machines that were marginalizing them.¹²⁶ Punishment was extreme for major and minor crimes alike. “Common offenses included going absent without leave from work, drunkenness, misconduct, stealing and prostitution.”¹²⁷ The impact of the various Enclosure Acts was visually apparent. The shrinking of the commons after the enactment of these different Acts meant that:

the new plots [were] enclosed, hedges were planted, fences constructed and stone walls built. The poorer members of the village could not afford this and ended up selling their plot to the adjacent landowner. Along with losing the common and grazing rights, they also were not allowed to trespass in the woods. Man traps were introduced as deterrents. Hanging and even deportation for sheep stealing was common!¹²⁸

The resulting pauperization led to the “Pauper Laws” that aimed to decrease the duration and amount of benefits to paupers to decrease their numbers.

The result was a larger and more efficient commercialized agricultural production, profiting the aristocracy tremendously. The costs were equally enormous: Cottagers, freeholders, tenants and squatters were forced off the land and turned into paupers or grist for the Industrial

¹²² Hannibal Travis, Comment, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L.J. 777, 789 (2000).

¹²³ Pettifor, *supra* note 115 (discussing the philosophies of Smith, Malthus, and Ricardo).

¹²⁴ SALE, *supra* note 118, at 39.

¹²⁵ Pettifor, *supra* note 115.

¹²⁶ Graham Tong, *Rural Unrest in the 1830's*, THE PEEL WEB (May 22, 2002), available at <http://dspace.dial.pipex.com/town/terrace/adw03/peel/swing.html>.

¹²⁷ Mary Lee, *Convicts in Australia*, LITERATURE IN AUSTRALIA AND NEW ZEALAND (May 22, 2002), available at <http://scholars.nus.edu.sg/landlow/post/australia/convicts.html>.

¹²⁸ BERNARD O’CONNOR, THE EVERTON ENCLOSURE ACT (2000), available at <http://www.coprolite.care4free.net/page70.html>.

Revolutions' urban mills.¹²⁹ This occurred at a time when the population of England doubled.¹³⁰ As one observer of this transformation wrote, "To the enclosure of the common more than to any other cause may be traced all the changes which have subsequently passed over the village. It was like knocking the keystone out of an arch."¹³¹

England had an out. It expelled about a third of its convicts, generally the most violent, abroad.¹³² England sent them to Georgia, and later in the eighteenth century to Australia.¹³³ Transporting convicts to Australia was about forty percent less costly than keeping them in penitentiaries in England.¹³⁴

Losing the right to an education is not identical to losing the right to farm one's land and support one's family. However, there are remarkable similarities in the way current laws hedge in the access to public education and disproportionately punish and exclude those who insist on their entitlement to an education. There are and will be many displaced people who, without a high school diploma, are likely to face similarly difficult futures¹³⁵ as the relevance of earning a college diploma increases for securing a job that earns more than minimum wage.¹³⁶

There are similarities in the terms used in the Enclosure Acts to zero tolerance policies. Both use the framework of medicine, efficiency, and clearing-the-way. The Enclosure Acts may serve as a broad construct and basis of concern about the school-based and juvenile justice reforms considered around the country. In an effort to reduce access to the educational "common," in the name of school and public safety, the criminalization of youth and the massive movement towards involvement of legal authorities in the functioning of schools — replacing and sometimes preempting opportunities to socialize youth in more benign ways (i.e., to train them) — inexorably leads to the exclusion of kids from schools and to the de facto revocation of access to public education. In the name of and under the cover of commitment to educational excellence and high standards, education reform policies including high stakes testing, and reduction of services to learning disabled children are resulting in the exclusion of children from public schools. The United States

¹²⁹ See SALE, *supra* note 118, at 39.

¹³⁰ *Id.*

¹³¹ *Id.* at 35.

¹³² Lee, *supra* note 127.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ This is especially the case in view of the fact that the access to vocational skills training has been tremendously circumscribed in the past twenty years, both in school and outside of it.

¹³⁶ It will be interesting in years to come to see if there is any relationship between education and juvenile justice policies and the rate at which the minimum wage increases.

has no foreign land to which it can expel its troubled students. It does, however, have the largest prison population of the developed world.¹³⁷

I would like to end today by quoting an old English poem and urge us all to keep our eyes on the value of the common prize:

They hang the man and flog the woman
Who steals the goose from off the Common;
But let the greater criminal loose
Who steals the Common from the goose.¹³⁸

¹³⁷ The United States has an internal redistribution scheme by which urban populations are a source of profit for the increasing numbers of privatized prisons located in equally impoverished rural areas.

¹³⁸ Pettifor, *supra* note 115.