

Decriminalizing Racialized Youth through Juvenile Diversion

Traci Schlesinger

Summary

In the context of juvenile justice, writes Traci Schlesinger, *diversion* can mean two things. *Informal* diversion includes police officers' decisions to warn and release, probation officers' decisions not to report violations, prosecutors' decisions not to prosecute, and judges' decisions to dismiss cases. Informal diversion sends youth out of the system, lets them remain at home, and asks nothing further of them. *Formal* diversion includes decisions by intake workers—including police, school resource officers, probation officers, and sometimes prosecutors or judges—to move cases away from formal court processing to programs that provide services but also include requirements.

Because diversion can keep young people from deeper involvement with the juvenile justice system, it has the potential to ameliorate the processes through which racialized youth become criminalized at much higher rates than legally similar white youth. The research evidence, Schlesinger writes, offers clear suggestions in three areas: which youth should be diverted, which officials make good gatekeepers for diversion programs, and which implementation principles are most important. Her key recommendation is that jurisdictions should use informal diversion to decriminalize low-risk youth and formal diversion to keep high-risk youth away from court processing and in their communities.

Schlesinger notes several challenges to making diversion policies successful. For one, she writes, jurisdictions must use risk assessments that don't replicate or exacerbate racial disparities. In addition, she says, formal diversion works best when youth can access services in the communities where they live, rather than in the justice system. This condition is becoming more difficult to achieve as cities and states have increasingly chosen to spend their limited funds on facilities within punitive systems rather than within communities, for example, by closing community-based mental health centers and then opening new facilities in a local jail. Finally, jurisdictions must ensure that diversion programs are properly implemented and that the youth who begin diversion programs actually complete them.

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Juvenile diversion has a unique role to play in decreasing inequality in the juvenile justice system. Research has consistently demonstrated that disproportionate minority contact (DMC) tends to be largest at the front end of the justice system, where criminal legal and juvenile justice workers make decisions with less oversight than at many other points, such as sentencing. Moreover, these front-end disparities accumulate into larger disparities throughout juvenile justice and criminal legal processing.¹ One place where researchers consistently find high levels of DMC is in juvenile arrests. Police are twice as likely to arrest black youth as they are to arrest white youth.² That has remained true even as overall levels of arrest have decreased.³ In particular, research finds that police tend to arrest youth of color at all risk levels; on average, only medium- or high-risk white youth are arrested.⁴ Informal diversion policies—for example, policies routinizing police warning and releasing of low-risk youth—could allay both the criminalization of low-risk youth and front-end DMC.

Research also finds high levels of DMC in secure confinement. In 2000, black youth made up only 15 percent of the US population, but 26 percent of arrested youth and 44 percent of detained youth.⁵ In 2005, jurisdictions continued to detain black youth and other youth of color at more than three times the rate of white youth. Confinement exposes youth to high levels of violence, including the use of excessive force and restraints by staff, sexual assault, and isolation. Since 2000, federal investigations, class action lawsuits, and reputable media investigations have documented systemic violence in juvenile facilities in 21 states.⁶ Experiencing secure confinement is also

associated with poorer educational and employment prospects.

Policymakers may worry that diverting youth rather than sending them to secure confinement is bad for public safety, but little evidence supports that concern.

First, only 12 percent of youth in secure confinement are there for serious violent crimes, and many youth are in confinement simply for being unruly or defiant. Second, and even more to the point, research finds that spending time in secure confinement increases youths' self-reported delinquency and their odds of rearrest and formal court processing, compared to youth who are formally diverted and those whom court officials decline to prosecute; this effect is largest among low-risk youth.⁷ In light of these facts, jurisdictions may wish to limit their use of secure confinement. Both informal and formal diversion policies can help them do so. Informal diversion policies can create off-ramps for low-risk youth; if they need services, jurisdictions can provide them outside the juvenile justice system. Formal diversion policies replace secure confinement for most high-risk youth with diversion to community-based programs with requirements and services.

However, formal diversion of high-risk youth to community-based programs can reduce DMC in secure confinement only if black, Latino, and Native American youth are proportionately diverted to and adequately supported in these programs. Unfortunately, current eligibility rules and program requirements often lead to the de facto exclusion of youth of color from formal diversion programs, while punitive responses to small rule violations produce sometimes shockingly low completion rates.⁸ To overcome these problems will require using

race-conscious eligibility criteria, prioritizing program completion, and developing teams of practitioners and researchers to ensure that diversion workers follow protocol. If jurisdictions adopt policies that respond to the best available research, both informal and formal diversion can help them make juvenile justice systems less punitive and reduce racial inequality, while still responding to the real harms committed by youth and to criminalized youths' needs.

A Very Brief History of Diversion

During the last quarter of the twentieth century, the juvenile justice system has swung from viewing youth as children who required a rehabilitative approach to viewing them as dangerous superpredators and embracing the adult punitive model, and recently, due in no small part to an increased focus on the adolescent brain, back toward rehabilitation.⁹ Through these fluctuations, youth in conflict with the law and their families have consistently experienced the juvenile justice system as punitive. Since the late 1970s, politicians have often deployed public opinion to justify new punitive policy initiatives. Yet research finds that people are willing to pay more for juvenile rehabilitative and early intervention programs than they are for juvenile incarceration, thus complicating the vengeful public narrative.¹⁰ One possible way to rectify the tension between a justice system that sees itself as at least partially rehabilitative and youth who experience it as punitive is to recognize that the system is fragmented. Starting in the 1970s, states began simultaneously adopting both intensely punitive policies like mandatory minimum sentences and softer, more rehabilitative policies like community policing and diversion programs that rely on community partnerships.¹¹ This fragmentation also

occurred in juvenile justice policy, practice, and rhetoric. Mandatory adult transfer laws went into effect at the same time that jurisdictions were enacting juvenile diversion programs designed to steer youth away from formal processing in the juvenile justice system. Moreover, the distribution of punitive and rehabilitative sanctions varies widely from place to place. Jurisdictions with more racial segregation and inequality tend to use sanctions that are more punitive.¹²

Aiming to reduce both delinquency and youth detention, the Kennedy and Johnson administrations created the Committee on Juvenile Delinquency and the Committee on Law Enforcement Administration, respectively. In 1968, the Law Enforcement Assistance Administration established the Youth Services Bureau, which then created alternatives for court-referred youth, including diversion programs.¹³ Today, juvenile justice practitioners use the term diversion to mean two things: diversion out of the system (often called *informal diversion*), and diversion to programs with requirements and services (or *formal diversion*). Though both forms of diversion help youth avoid court processing, sentencing, and secure confinement, informal diversion does so with no further stipulations. Formal diversion requires youth to complete generally community-based programs with set requirements.

Informal diversion includes police officers' decisions to warn and release, probation officers' decisions not to report violations, prosecutors' decisions not to prosecute, and judges' decisions to dismiss cases. Informal diversion sends youth out of the system, lets them remain at home, and asks nothing further of them. Jurisdictions can use informal diversion to make their

juvenile justice systems less punitive by decriminalizing low-risk youth—for example, those who haven't had extensive prior juvenile justice contact and who weren't arrested for a felony. Because police are more likely to arrest black and Latino low-risk youth than they are white low-risk youth, with these disparities accumulating over youths' life courses, informal diversion can also help jurisdictions decrease racial disparities in their juvenile justice systems.¹⁴

Formal diversion includes decisions by intake workers—including police, school resource officers, probation officers, and sometimes prosecutors or judges—to move cases away from formal court processing to programs that provide services but also include requirements. Often, formal diversion means referral to specialty courts, also known as problem-solving courts, which seek to keep youth with mental health, social, or substance abuse problems from becoming more enmeshed in the juvenile justice system. Specialty courts—including drug courts, teen or youth courts, and mental health courts—refer youth to programs with requirements and services; in most jurisdictions, a specialty court's actions don't count as formal adjudication.

If formally diverted youth fail to complete a diversion program, juvenile justice workers send them back for formal court processing, at which point a judge could sentence them to secure confinement. Jurisdictions can use formal diversion to keep high-risk youth—for example, those who have extensive prior juvenile justice contact and who've been charged with a felony—away from court processing and in their communities, with access to the services they need. Formal diversion has proliferated throughout the United States—court officials and intake

workers divert approximately one-quarter of the youth they process.¹⁵ No reliable estimate exists of the proportion or number of youth whom police divert to programs; however, juvenile police diversion programs exist in jurisdictions throughout the country.¹⁶

Most juvenile justice outcomes are either clearly desirable, like receiving a suspended sentence or an acquittal, or undesirable, like being charged with a felony or sentenced to confinement. But being formally diverted is not clearly one or the other. If you are a low-risk youth and an intake worker formally diverts you into a long program with arduous demands and a low completion rate, the diversion program may be the mechanism through which you become likely to spend time in secure confinement. In contrast, if you are a high-risk youth and an intake worker diverts you away from near-certain secure confinement into a program with a high completion rate, formal diversion can offer a true path away from further criminalization. Formal diversion programs vary in many ways, including who can refer youth to the program, the risk level of the youth the program serves and how those risk levels are determined, the services the program provides, and their implementation. Nonetheless, research offers clear suggestions in the following areas: which youth should be diverted, which officials make good gatekeepers for diversion programs, and which implementation principles are most important.

Determining Risk

Suggesting that jurisdictions informally divert low-risk youth and formally divert high-risk youth raises two questions. First, for what are these youth at risk? In the context of diversion, jurisdictions are interested

in whether youth commit new offenses. Second, how should jurisdictions determine risk levels? The use of risk-assessment tools has caused controversy among practitioners, researchers, and the public.¹⁷ Yet a careful look at the research suggests that using risk-assessment tools to determine eligibility for diversion can help jurisdictions make their justice outcomes less punitive without increasing racial disparities.

Social scientists have made progress in developing an assessment tool that accurately predicts risk without obscuring racial discrimination.

Critics of risk assessment focus on three problems. First, risk-assessment scores may obscure racial discrimination behind seemingly race-neutral risk factors.¹⁸ Second, risk assessment may direct policymakers' attention away from structural causes of inequality in crime/delinquency to individual ones. Third, risk-assessment tools may be linked to policy solutions that make the people who suffer the harm of inequality responsible for bearing its cost. There is truth in all three concerns.¹⁹ Nonetheless, research suggests that risk-assessment tools are the best way for jurisdictions to radically decrease punitiveness and increase fairness, particularly if they tackle these three concerns through the following measures.

All risk-assessment tools obscure youths' experiences of racial discrimination. The question is one of degree. However, social scientists have made progress in developing

an assessment tool that accurately predicts risk without obscuring racial discrimination. For example, new risk-assessment tools often don't include measures of mental illness, because researchers have learned that despite many practitioners' expectations, living with mental illness doesn't predict future delinquency or criminality.²⁰ The Center for Court Innovation's recently released guidelines list predictors of recidivism in two categories, static and dynamic, noting that jurisdictions can develop strong assessment tools using only the former.

Thus, for example, even though residential instability predicts recidivism, tools that do not include this measure just as accurately predict recidivism risk. Static predictors of recidivism—including past arrests, convictions, and experiences of confinement and incarceration, as well as demographic characteristics like gender and age—are variables that are unlikely to change. These static variables reflect less accumulated discrimination than do many dynamic variables, such as whether a youth has experienced violence, residential or family instability, or intense anxiety.²¹ To limit obscuring racial discrimination, then, jurisdictions might adopt a two-stage intake process. In the first stage, intake workers would determine eligibility for informal and formal diversion by assessing youths' risk levels using only static indicators. Once intake workers decided that a youth is eligible for formal diversion, they could use a tool comprising dynamic indicators to predict which diversion program would best meet the youth's needs.²² Using dynamic variables such as residential stability at this stage wouldn't obscure discrimination, because jurisdictions wouldn't be determining either how harshly to punish youth or whether youth will be able to access services at all.

In doing so, jurisdictions gain substantially in terms of racial fairness and lose almost nothing in terms of predictive validity.

The most contentious variable category still commonly used on juvenile justice risk-assessment tools is prior juvenile justice contact. Youth with any, a certain number of, or certain types of prior convictions are often not eligible for diversion. Even if programs aren't officially closed in this way, juvenile justice workers are less likely to believe that youth with prior convictions will comply with diversion programs' requirements or that they are capable of rehabilitation. In this way, juvenile justice workers informally use prior convictions to question youths' credibility. Jurisdictions are comfortable with this practice to the extent that they presume that convictions reliably measure peoples' past criminal involvement.²³ Yet prior juvenile justice contact aggregates experiences of racial discrimination. Policing is concentrated in black and Latino neighborhoods, leading to more intense policing of black and Latino youth.²⁴ Moreover, gang registries lead police to zero in on black and Latino youth, often for reasons as trivial as who their cousin is, the corner they're standing on, or the fit of their T-shirt.²⁵ In schools, school resource officers disproportionately arrest black and Latino youth.²⁶ Studies examining racial disparities in processing youth in the juvenile justice system find that intake workers are more likely to formally adjudicate black, Latino, and Native American youth than legally similar white youth.²⁷ And judges are more likely to convict black and Latino youth and to sentence black and Latino youth to secure confinement.²⁸ This does not mean that the youth of color whose cases intake workers are considering for diversion have never engaged in delinquent behavior; it means that these youth were more likely

than were legally similar white youth to be criminalized and were criminalized more harshly at each point of contact with the juvenile justice system. When risk assessment tools include prior juvenile justice contact, then, they promulgate the accumulation of discrimination. However, because prior juvenile justice contact strongly predicts recidivism, most jurisdictions will likely want to include variables from this category in the near future, if not in the long term. Jurisdictions may look for measures of juvenile justice contact that hold the least accumulated racial discrimination, such as arrests for violent crimes (as one study suggests), or perhaps only include past convictions or experiences in secure confinement in their risk-assessment tools rather than past arrests.²⁹ Future research should continue to examine which prior juvenile justice contact variables most strongly predict recidivism while being the least predictively biased and producing the smallest racial disparities in diversion outcomes.

The Annie E. Casey Foundation is working to develop just such a predictive, non-punitive, racially fair risk-assessment tool. The foundation's Juvenile Detention Alternatives Initiative (JDAI) assessment tool doesn't rely on commonly used dynamic variables, such as past school achievement, family dysfunction, or residential stability; instead, it includes only static variables about the current crime and prior juvenile justice contact. Jurisdictions in the initiative also implement racial impact statements and continually collect data to monitor their progress. Though the JDAI assessment tool has not decreased racial disparities in detention, the 200 jurisdictions (in 39 states and the District of Columbia) that use the tool have seen a 44 percent drop in juvenile

detention as racial disparities have remained constant. This suggests that even tools that include prior juvenile justice contact can help black, Latino, and Native American youth by decreasing punitive sanctions.³⁰

To address structural inequality and the displacement of its costs onto minorities and the poor, jurisdictions can pair policies designed to decriminalize racialized youth with policies designed to transform the social conditions that produce delinquency and criminality. Because I'm writing about diversion, and thus partly about services, I restrict my arguments about structural transformation to those concerned with bringing services back to communities where youth can access them.

Reclaiming Services

During the last quarter of the twentieth century, many parts of the New Deal welfare state were abolished and a sprawling punitive apparatus grew.³¹ Over time, helped by the fragmented and decentralized nature of the punitive state, juvenile justice systems began offering youth services that were born of the welfare state. Beginning during the Reagan administration and accelerating during each subsequent economic crisis, these services disappeared from communities, only to reappear later inside juvenile justice systems.³² Sometimes this happened quickly. Between 2013 and 2015, closures of Chicago community mental health centers affected over 10,000 people.³³ Since then, Cook County has expanded funding for its mental health diversion program, the Cook County Felony Mental Health Court Program, as well as a pretrial intervention program that screens arrestees during booking and processing and diverts those with diagnosed mental illness to secure mental

health services. Most of the time, however, communities lost services slowly, and the needs created by the loss of services were greater than those originally filled by lost services. By the time services reappeared in the juvenile justice system, youth and their families may have felt relieved to be able to access them at all. In 2013, Chicago Public Schools closed 53 schools, citing budget limitations, building underutilization, and underperformance. Of the 12,000 students CPS reassigned to new schools, 94 percent were from low-income families and 88 percent were black.³⁴ Arne Duncan, former US Secretary of Education and former CEO of Chicago Public Schools, said that fixing schools labeled as failing necessitated a "little pain and discomfort." This meant closing schools, firing entire faculties and staffs, and reopening the schools as institutions, often charter schools, managed by private entities.³⁵ The city sought to close schools because of low enrollments while encouraging the development of charter schools, despite evidence that charter school enrollment was producing the low public school enrollments in the first place and that charters weren't improving educational outcomes.³⁶ Moreover, school closures disrupted parent-teacher and parent-administrator relationships in communities where these ties are often weak. Finally, many Chicago school closures forced youth to cross into rival gang territories just to go to school. There isn't enough evidence to suggest that school closures in Chicago contributed to the spike in gun violence, but many South Side youth and their parents believe that they did.³⁷ Future research should examine the complex relationships between school closures, gun violence, and the possibilities for successful diversion of youth in resource-deprived neighborhoods.

Though we don't yet know whether school

closures contributed to the recent rise in gun violence in Chicago, a meta-analysis of 200 studies finds that indicators of concentrated disadvantage—including racial heterogeneity, poverty, and family disruption—are among the strongest and most stable predictors of delinquency and criminality.³⁸ To the extent that many of the services offered through formal diversion programs address harms created by these disadvantages, policymakers who want to reduce delinquency should ensure that youth and their families can access the services they need—such as childcare, mixed-income housing, tutoring, therapy, and job training and placement—outside of the juvenile justice system before they are arrested or prosecuted for a crime. That would mean shifting city and state budget priorities back to funding public services for all and away from responding to delinquency after it happens through policing, diversion programs, and confinement.³⁹

Policymakers who want to reduce delinquency should ensure that youth and their families can access the services they need outside of the juvenile justice system.

As jurisdictions begin to informally divert low-risk youth and formally divert high-risk youth, their use of secure confinement should fall substantially, with notable financial savings; they should even be able to close detention centers. The savings could be used to create community mental health centers and other services, or to

build mixed-income housing; since racial heterogeneity and poverty are strong and stable predictors of crime, mixed-income housing is a good way to reduce both. By informally diverting low-risk youth, formally diverting high-risk youth, and using the savings to recoup services, communities can respond to youth who engage in criminalized behaviors, reduce the harm of youth criminalization, and tackle structural problems that produce these problems in the first place.

Informal Diversion: Creating Off-Ramps

As soon as the Youth Services Bureau (and thus youth diversion) was established, scholars and community members began to worry that instead of an alternative, diversion could become an additional punishment, making criminal legal sanctions more pervasive, touching more people, and becoming more a part of our everyday lives. In other words, they worried about juvenile justice *net widening*.⁴⁰ This concern is not without merit. Studies from the 1970s to the present have found that this problem may arise when jurisdictions formally divert low-risk youth whom the police might otherwise have warned and released or whose cases prosecutors or court officials might have dismissed. Other scholars worried that diversion would lead youth with only tangential juvenile justice contact further into criminality and criminalization; they called this *net deepening*. Research offers more evidence of net deepening than of net widening.⁴¹

So how do jurisdictions divert low-risk youth out of the system? One way to

do so is to see that police routinely warn and release low-risk youth. And if low-risk youth end up in case processing, jurisdictions could see that intake workers, prosecutors, or court officials routinely dismiss their cases. Policies could also encourage probation officers not to formally process low-risk youth who are on probation and who have either a new arrest or a violation in the terms of their probation. Similarly, jurisdictions can encourage prosecutors not to prosecute and judges to dismiss the cases of low-risk youth if their cases do make it to the courts' attention. Jurisdictions throughout Australia and New Zealand have enacted similar policies with substantial success.⁴²

Some juvenile justice workers may hesitate to divert low-risk youth out of the system if it's apparent that they need services. These workers should bear in mind that research shows high-needs youth struggle to complete diversion programs.⁴³ Thus, diverting high-needs, low-risk youth may well lead them to court processing and secure confinement with all the consequences that this entails. If low-risk youth need services, research suggests, intake workers should refer them to services outside of the juvenile justice system. But they can do so only if these services exist in the community where the youth live.

Finally, research suggests that juvenile justice and criminal legal system policies work best when discretion is allowed. Though risk-assessment scales can help reduce bias in intake workers' evaluations of youth, jurisdictions may want to continue to grant them discretion in making their diversion decisions. For instance, a police officer might warn

and release a medium-risk youth who has substantial prior justice system contact but whose arrest is for a nonserious charge.

Formal Diversion: What Works Best

Evaluation research for formal diversion programs highlights three consistent findings. First, programs that divert only high-risk youth are the ones that lower recidivism rates for diverted youth the most (relative to legally similar court-processed youth). Second, on average, intake workers formally divert white youth substantially more often than they do legally similar black or Native American youth. Third, completion rates of formal diversion programs vary substantially, with great consequence for the youth who participate.

High-Risk Youth Only

Jurisdictions can use formal diversion to a program with requirements and services as a way to keep high-risk youth in their communities with their families and peers, so that they have as many normal life-course experiences as possible. To make sure that diversion programs reduce secure confinement rather than widening the net, jurisdictions should formally divert only youth at high risk for recidivism and ensure that services are provided in nonsecure community settings or in the home.⁴⁴ Formal diversion programs that serve low-risk youth cut recidivism substantially less than programs that divert only high-risk youth.⁴⁵ Even within a given diversion program, high-risk youths' likelihood of rearrest in the next six months to two years following program completion decreases the most. In fact, diversion often doesn't reduce recidivism at all among low-risk youth (and sometimes increases it).⁴⁶

Of all formal diversion programs, drug courts are the least successful at lowering recidivism.

Unfortunately, many jurisdictions have formal diversion programs for which only low-risk youth are eligible.⁴⁷ Moreover, jurisdictions continue to divert low-risk youth into formal diversion programs even when they implement programs that target medium- or high-risk youth.⁴⁸ This is particularly true among black boys and among girls of all races—intake workers disproportionately divert low-risk girls and black boys.⁴⁹ Certain kinds of diversion programs are particularly likely to face these problems. For example, a review by the National Drug Court Institute found that youth drug courts often divert youth with no former justice system involvement who have been charged with low-level drug crimes and who don't have substance abuse problems.⁵⁰

Perhaps as a result, youth drug courts reduce rearrest by only 8 percent on average, while the most successful diversion programs reduce rearrest by 75 percent, relative to court processing.⁵¹ Most diversion programs leave youth in the community; drug courts often send youth to inpatient treatment, limiting their capacity to form the positive peer or community attachments that life-course research finds necessary for desistance. Since drug courts too often divert youth at low risk for recidivism and send them to high-intensity treatment, it isn't surprising that of all formal diversion programs evaluated either in recent meta-analyses or in evaluation research, they are

the least successful at lowering recidivism.⁵² Nonetheless, youth drug courts aren't hopeless. A national review of drug courts found that when drug courts divert youth with serious substance abuse problems who have notable prior arrests or convictions and whose current arrest is for a serious offense—in other words, high-need, high-risk youth—their recidivism falls substantially compared to legally and socially similar court-processed youth.⁵³

In response to problems similar to those encountered in drug courts, some counties have introduced policies that make it harder for school officials to formally divert low-risk youth. To reduce the number of complaints about unruly youth filed by schools, Steuben County, NY, now requires schools to demonstrate that they have tried to resolve the students' problems through methods like school-based services and parent conferencing before initiating a complaint. Complaints dropped 33 percent in the first year after the county adopted the new protocol and remained constant in the following three years.⁵⁴

Including Youth of Color

For diversion to help make juvenile justice systems less punitive and reduce DMC, all legally similar youth must be equally likely to be diverted away from formal processing and possible secure confinement. Currently, a combination of racial differences in case characteristics, implicit bias, and racialized eligibility and program requirements work together to produce racial disparities in diversion intake and completion.

Research on racial disparities in juvenile diversion is still young. But so far most studies find that intake workers and court officials are less likely to refer black or

Latino youth to diversion programs than legally similar white youth.⁵⁵ Specifically, when examining data from the 1990s or later, studies have found that court officials are 12 to 39 percent less likely to divert black youth than they are legally and socially similar white youth, after controlling for current charge, prior juvenile justice contact, age, and gender. Several studies also control for school performance, family type, poverty, and even sexual promiscuity; they've found that court officials are least likely to divert black youth from single-parent households, holding all legally relevant characteristics constant.⁵⁶ When researchers have examined case processing of Latino or Native American youth, they have also found that court officials favor diverting white youth. Court officials are one-fourth less likely to divert Latino youth and 20 percent less likely to divert Native American youth than they are legally and socially similar white youth.⁵⁷

Because most jurisdictions either don't collect data on race and youth case processing or don't make that data publicly available, data for studies on racial disparities in diversion come from fewer than a dozen jurisdictions. Though it's clear that court officials are less likely to divert black, Latino, and Native American youth than legally similar white youth, more (and more comprehensive) data could give us a sense of the mechanisms that produce this outcome. Perhaps, for example, court officials hold implicit biases against black youth from single-parent homes.⁵⁸ Such a finding would support racial formation theory, which argues that members of each group are likely to experience racial oppression or subjugation in different moments or because of different triggers.⁵⁹ Court officials may supplement the partial data they have with implicit bias, which is differentially racialized,

gendered, and aged.⁶⁰ Thus, for example, courts penalize young black girls for being sexually promiscuous more consistently and substantially than they do either young black boys or young white girls.⁶¹ To counter the effects of implicit bias on intake workers' decisions, jurisdictions could use risk-assessment tools, which, as I've shown, can avoid most of the dangers of obscuring racial discrimination.

Risk-assessment tools can keep implicit bias in check, but they can't overcome institutionalized barriers to diversion to services for black, Latino, and Native American youth. To do this, jurisdictions must help youth with few resources to participate in programs and open formal diversion to youth without demanding an admission of guilt. Nearly all jurisdictions require an admission of guilt as an eligibility requirement for diversion.⁶² Black and Native American youth are less likely than legally similar white youth to admit guilt.⁶³ Though many things likely lie behind this fact, three are fundamental. First, because of overpolicing of black communities and police bias in arrests, black and Native American youth who've been arrested may be more likely to be innocent.⁶⁴ Second and third: relative to white youth, black and Native American youth have a more adversarial relationship to the justice system and view the justice system as less legitimate.⁶⁵ Regardless of why black and Native American youth don't admit guilt, doing so bars them from formal diversion—increasing the likelihood that they'll experience formal court processing and secure confinement, which exposes them to violence, doesn't decrease recidivism, and does lifelong harm to their educational and employment prospects.

Guilty pleas are often taken as symbols of remorsefulness and signs that a youth is likely to comply with program requirements. But those assumptions may be highly racialized. Jurisdictions interested in decreasing DMC could pair with researchers to create and evaluate a diversion program that admits youth regardless of guilty plea. Such an evaluation study could examine whether and to what extent pleading guilty predicts program compliance or completion, as well as whether and to what extent the relationship between guilty plea and program compliance or completion (if one exists) is mediated by race or gender. If pleading guilty either fails to predict program compliance or completion for any race/gender group or predicts compliance or completion for only some race/gender groups, jurisdictions should consider eliminating the guilty-plea eligibility requirement.

Studies have found other eligibility requirements for diversion—specifically, those concerned with travel and communication—that disproportionately impede resource-deprived and thus black, Latino, and Native American youth.⁶⁶ If youth lack reliable transportation to a diversion program, jurisdictions could give them transit cards instead of excluding them from diversion. Similarly, jurisdictions could reach youth through their families', friends', or partners' phones, rather than excluding them because they don't have phone service. Finally, jurisdictions that want to increase black, Latino, and Native American youths' participation in diversion programs shouldn't charge a fee to participate and shouldn't exclude youth who can't meet financial requirements.

The Right Gatekeepers

Diversion programs with police (including school resource officers) and social workers as gatekeepers are the most likely to divert low-risk youth—even when jurisdictions design these programs to divert high-risk youth. These gatekeepers tend to see diversion programs as serving unruly but “not yet” delinquent youth—perhaps because their training teaches them that it's best to intervene before a problem develops.⁶⁷ That may be the case when interventions don't include both threats and real instances of punishment, but the research doesn't support their position when it comes to formal diversion, which is a form of criminalization, even if a soft one. Instead, jurisdictions should work to get services to unruly low-risk youth and their families through mechanisms outside of the juvenile justice system.

Police diversion programs also disproportionately divert black and Latino youth, likely because of both structural and individual factors.⁶⁸ Higher police-to-resident ratios in black and Latino neighborhoods, including the saturation of youth of color's schools with school resource officers, is intensified by police policies like hot spot policing. This inundation of black and Latino youths' lives with police is overlaid by their relative lack of access to protected indoor space. The result is the overpolicing of black and Latino youth.⁶⁹ Hot spots policing focuses on small, usually urban areas or places where crime is concentrated. Research suggests that hot spots policing decreases crime, but it also disproportionately affects disadvantaged black and Latino neighborhoods and decreases police legitimacy in the eyes of blacks and Latinos.⁷⁰ Moreover, research on policing in Seattle suggests that police departments decide what areas are hot spots using racially

saturated ideas of what constitutes a criminal problem.⁷¹ Seattle police focus on black outdoor drug markets not because of larger public health risks, public complaints, related criminal activity, or other objective criteria, but because of a racialized belief that crack is a bigger problem than other drugs, despite the lack of evidence to support this claim. In addition, police officers' implicit racial biases may direct their interactions with youth.⁷² Though we all have implicit racial bias, police diversion programs are less likely than other diversion programs to curb this bias with risk-assessment tools.⁷³

Programs with police and school resource officers as gatekeepers divert black and Latino low-risk youth who, in police officers' own words, they would have warned and released in the absence of these programs.⁷⁴ Thus, while probation officers disproportionately fail to divert high-risk youth of color away from court, the police, including school resource officers, disproportionately formally divert low-risk youth of color who are unruly into programs with requirements and services. Jurisdictions can use race-conscious eligibility requirements and risk assessment to address the first issue. To address the second, jurisdictions should consider directing resources away from front-end diversion programs, instead investing in programs in which probation officers or other juvenile justice officers make diversion decisions.

To Which Programs?

Compared to research on risk levels and recidivism or on gatekeepers and program success, evaluation research that assesses how to match youth to diversion programs is less developed, making policy suggestions in this area more tentative. But several well-crafted

studies have been conducted, and they've found that diversion can be more successful if diverted youth are carefully matched to programs that fit both their needs and strengths, using needs-assessment tools that include dynamic variables.⁷⁵

No diversion program is suited for everyone. The question is, How do jurisdictions sort youth into the programs that will help them most, given their available resources? Assessment tools can be an effective way to do so if they include dynamic variables in the categories of school participation, achievement, and discipline; prior and current mental health and trauma; substance use and abuse history; and personality strengths and future goals. Such tools can help place youth in the programs that they are most likely to complete and that are most likely to reduce their recidivism.⁷⁶

Youth who come into conflict with the law have often experienced or witnessed violence and deal with daily instability; as a result, they may struggle with anxiety, anger, and depression.

Not all youth come to diversion with the same needs. Girls who are diverted have disproportionately experienced high rates of poverty, special education tracking, and disruptions in their living situations.⁷⁷ Along with girls, diverted LGBT youth are likely to have current histories of moderate to severe depression and are disproportionately likely to have experienced sexual violence. Despite this, neither girls nor LGBT youth

are likely to have received treatment.⁷⁸ Furthermore, as among women, research documents strong ties between girls' and LGBT youths' experiences of victimization and their engagement in criminalized survival strategies.⁷⁹ For example, girls who leave home because of abuse or LGBT youth who are kicked out when they come out to their parents may engage in low-level drug trafficking, retail theft, or sex work to survive on the streets. Among high-risk youth, youth of color are less likely to receive any mental health care even when controlling for family income, functional impairment, and caregiver strain.⁸⁰ Though many states have programs or policies to help with the mental health needs of youth in conflict with the law, few of these are diversion programs.⁸¹ But some jurisdictions have begun to offer *multisystemic therapy* (MST) diversion programs, which show promise for treating both youths' mental health problems and their families' instability.⁸² Much like adults, youth who come into conflict with the law have often experienced or witnessed violence and deal with daily instability; as a result, they may struggle with anxiety, anger, and depression.⁸³ Evidence that MST works for young sex offenders is convincing.⁸⁴ Of course, only youth who have mental health and behavioral problems or are living with family trauma should be diverted to these programs. Other programs will be more effective for youth with other needs. For example, research suggests that programs that treat youths' trauma may decrease recidivism among girls and LGBT youth who've experienced sexual victimization.⁸⁵

Other promising diversion programs stem from restorative justice models. Restorative justice conferencing strives to meet the needs both of youth who have engaged in

violence and their victims.⁸⁶ A large majority of studies in this area have found that youth who are diverted to victim mediation and conferencing are less than half as likely to be rearrested in the following years than are randomly assigned or matched youth who are processed by juvenile courts. Such programs are, once again, most successful among high-risk youth. Among youth charged with violent crimes, those diverted to restorative justice programs are more than 75 percent less likely to be rearrested in the year or two following diversion than are court-processed youth.⁸⁷ Both conferencing and victim-offender mediation involve the victim and offender in an extended conversation about the crime and its consequences.⁸⁸ In conferencing programs, families, community support groups, police, social welfare officials, or attorneys may also participate.⁸⁹ Proponents of conferencing argue that including these additional people shows youth that many people care for them and instills a sense of accountability to their families, social circles, and society. In most programs, all the parties must agree to the plan for reparation, on the theory that unanimous support enhances youths' commitment by increasing the plan's legitimacy among all involved parties. Programs hope that this community consensus on the resolution, and condemnation of the unacceptable conduct, will lead the youth to internalize and adopt the community's norms and values.⁹⁰

Many jurisdictions divert youth into mediation or conferencing programs in cases of gendered harm, ranging from recess sexual harassment and inappropriate touching to dating violence and sexual assault.⁹¹ Post-conference interviews show that victims who participate are less likely to blame themselves and less likely to want to harm the perpetrator.⁹² Unfortunately, researchers ask

victims only a small number of questions and most often survey victims only immediately after their participation. To see whether mediation or restorative justice conferencing reduces trauma symptoms in the longer term, future research should assess matched groups of victims before, six months after, and at least one year after participation (or nonparticipation) in conferencing. At best, diversion programs that include therapy and conferencing may help youth transform their behavior while offering survivors a forum to voice and attenuate their trauma.

Goal: Completion for All

If formal diversion is to help jurisdictions make their juvenile justice systems less punitive and decrease racial disparities, youth must be able to complete diversion programs.⁹³ In a sample of studies on juvenile diversion published from 1975 to 2017, only 13 percent reported the proportion of youth who completed the evaluated diversion program; in those studies, completion rates ranged from 61 percent to 100 percent. These figures come from diversion programs that take a variety of approaches, including relational therapy, job training, mediation and restorative justice, and restitution and community service.⁹⁴ Still, they represent only a minuscule sampling of evaluated diversion programs—not to mention of all extant diversion programs. Thus we have little reason to believe that these rates are representative of diversion programs generally. In some programs, youth are sent back to the courts after one or two instances of noncompliance—even if they were diverted for being unruly rather than delinquent. In Nebraska, only 61 percent of cases referred to juvenile diversion successfully avoid the official court process; in other words, 39 percent of youth fail and

are formally processed by the courts.⁹⁵ Moreover, within a given diversion program, more punitive diversion leads to more delinquency. One analysis of 821 diverted youth—635 in teen court and 186 in other diversion programs—showed that increasing the number of sanctions was associated with earlier reoffending. This effect disappeared when the researchers removed youth who didn't complete the programs from the analysis, suggesting that increasing sanctions may lead certain youth to drop out of a program, and that this is associated with rearrest.⁹⁶ The jurisdiction in this study diverted youth who were unruly but not delinquent. If these youth were unable to complete the program because it was too punitive, the program then sent unruly, nondelinquent youth to the courts for processing.

Two policies can help avoid such an outcome. First, jurisdictions should formally divert only high-risk youth and informally divert low-risk youth out of the system. Second, formal diversion programs should prioritize completion. To do so, evaluation research finds that programs need reasonable requirements, early feedback and assistance, and helpful rather than punitive responses to requirement failures.⁹⁷ If a program has daily attendance requirements, program workers can check in with youth before the program starts, find out if a youth is worried about satisfying this requirement, and determine the source of the anxiety. Is one youth responsible for taking care of his younger siblings? Is another unsure that she'll be able to afford daily public transit? A diversion program set up to maximize completion will have an intake worker who helps youth solve such problems before the program begins. For example, the

program worker might help the first youth find alternate childcare and give the second a transit card.⁹⁸ And if youth commit minor violations, such as a single failed drug test, rather than sending them back to court for formal processing or ignoring the violation, program workers could ask what they need to avoid violating program requirements again and remind them about the high stakes of program completion.⁹⁹ Within the program's parameters, juvenile justice workers could decide how many missed program goals (for example, missing a mandatory program day) or what amount of new delinquency (such as being picked up for drinking) they will tolerate before tossing youth back to the courts.

Other Implementation Matters

By now, it should be clear that implementation determines much of whether and to what extent formal diversion helps make juvenile justice less punitive and reduces racial disparities. Jurisdictions should consider three additional implementation matters. First, reducing detention before adjudication is associated with substantial reductions in secure confinement after cases are adjudicated.¹⁰⁰ To avoid pre-adjudication detention, diversion must happen quickly, at the time of intake. Second, youth who receive at least two years of follow-up support show substantially larger reductions in recidivism than do youth who received only six months of support.¹⁰¹ Though longer follow-up may be costly, the larger reductions in recidivism justify the cost. Third, diversion programs thrive with consistent monitoring. To develop risk- and needs-assessment tools, and to assess disparities in diversion to a

program, completion rates and disparities in completion, and recidivism, jurisdictions require the capacity to conduct analyses. They should team with researchers and apply for grants to do this important work. If jurisdictions then make their data publicly available, we can continue to learn.¹⁰²

Conclusions

Many practitioners and policymakers want to decrease racial disparities and punitiveness in the ways they respond to the real harms committed by youth and to criminalized youths' needs. Smart use of juvenile diversion can help them achieve these goals. However, jurisdictions that wish to use juvenile diversion responsibly face three problems: austerity, overcriminalization of youth, and DMC. To respond to this context responsibly, jurisdictions should do the following three things. First, they should enact policies that promote the use of informal diversion to decriminalize low-risk youth. Second, they should enact policies that promote the use of formal diversion to keep high-risk youth in their communities, getting services they need, and away from court processing. To do so successfully, they'll need to use race-conscious eligibility criteria, prioritize program completion, and deploy implementation strategies like developing teams of practitioners and researchers. Yet these two measures aren't sufficient to ensure that informally diverted youth are able to access services and that youth need not be criminalized in order to access services. Third, then, jurisdictions must make robust social services available in the communities where youth live.

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