

Center on Race, Law & Justice



Diversity and Inclusion Speaker Series

From the Classroom to the Courtroom: The Adultification of Black Girls



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CLE MATERIALS

Tuesday, March 13, 2018
4 - 5:30 p.m., Program
Fordham Law School
Hill Faculty Conference Room (7-119)
150 W 62nd St
New York, NY 10023



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UCLA Law Review
August, 2012

Symposium
Overpoliced and Underprotected: Women, Race, and Criminalization
II. Crime, Punishment, and the Management of Racial Marginality
Jyoti Nanda

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BLIND DISCRETION: GIRLS OF COLOR & DELINQUENCY IN THE JUVENILE JUSTICE SYSTEM

Abstract

The juvenile justice system was designed to empower its decisionmakers with a wide grant of discretion in hopes of better addressing youth in a more individualistic and holistic, and therefore more effective, manner. Unfortunately for girls of color in the system, this discretionary charter given to police, probation officers, and especially judges has operated without sufficiently acknowledging and addressing their unique position. Indeed, the dearth of adequate gender/race intersectional analysis in the research and the stark absence of significant system tools directed at the specific characteristics of and circumstances faced by girls of color have tracked alarming trends such as the rising number of girls in the system and the relatively harsher punishment they receive compared to boys for similar offenses. This willful blindness must stop. This Article discusses the history and modern status of the juvenile justice system as it relates to girls of color, showing how it does not, in fact, relate to girls of color. There is hope, however. This Article concludes with policy recommendations, focusing on practical solutions and tools that will help decisionmakers exercise their considerable discretion to serve, rather than disserve, girls of color. The message to system actors is simple: Open your eyes! We owe that to our girls.

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The first incarnation of this Article was presented at the UCLA Law Review symposium, Overpoliced and Underprotected: Women, Race, and Criminalization. I am indebted to my fellow symposium co-chairs, Kimberlé Crenshaw and Priscilla Ocen, for their vision and support in the framing of this project. For helpful conversations and comments, I am also deeply grateful to Devon Carbado, Cheryl Harris, Kavitha Sreeharsha, Harit Trivedi, and the symposium participants. Special thanks to the UCLA Law Review for the symposium platform, particularly Brittany Goodnight and Alisha Burgin and the Critical Race Studies Program for their support. This Article would not have been possible without the dedication of the UCLA Law Review editors, Kristen Johnson, Hunter Hayes, and Stan Molever, and of my faculty assistant, Randi Kusumi. In addition, I benefited from remarkable research assistance from Jackie Moon and Maya Uffenheimer and from Linda Karr O'Connor's support at the UCLA Law Library.

***1503** This Article is dedicated to my parents for their unconditional support, and to girls and their advocates, who keep hoping for a better tomorrow.

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***1504 Introduction**

Sara is a fifteen-year-old, female student of color, who is several years behind her peers in school and does not like school much. She has a learning, social, or emotional issue that has never been diagnosed. These issues arise at home and at school--with her family and sometimes among her peers. She has some abuse or violence in her home, and she was involved in an abusive dating relationship. Sara lives in a poor neighborhood with schools that are overcrowded and underresourced. When she is repeatedly late to school, she is expelled. Hanging out on the street one night past curfew, she is arrested and enters the juvenile justice system. Sara is a typical girl who enters the juvenile justice system.¹ And once she's in, she's never really out.²

***1505** When a girl³ of color⁴, like Sara, enters the juvenile justice system, a complex set of legal rules gives each system actor the discretion either to treat her as a child with background social problems for which she is not responsible or to commit her to the juvenile justice system as a delinquent who should be held accountable for her conduct. This discretion is at the heart of the juvenile court,⁵ and it has been seen as central to its function. However, the way juvenile justice decisionmakers exercise this discretion helps to explain the significant increase in the number of girls of color who are under the supervision of the juvenile justice system.

There has been virtually no acknowledgment of this overrepresentation either in case law or as a policy matter. This creates the impression that all girls in the system deserve to be there. What is particularly troubling about this state of affairs is that, as a formal matter, the juvenile justice system is explicitly structured to provide individualized, contextualized, case-by-case assessments.⁶ While this ***1506** commitment was developed with boys in mind since boys were the initial subjects of juvenile justice interventions, no one disputes that the commitment applies to girls as well.⁷

However, there is reason to believe that juvenile justice officials are not performing individualized, contextual assessments of girls of color. Instead of relying on their discretion to examine girls holistically, our current system treats them--as a group--as already a social problem.⁸ There is virtually no effort to understand how significantly the circumstances under which girls of color live create pathways to the system. The only real contextualization that juvenile justice officials

perform is to separate girls from boys.⁹ That “single axis” approach, to borrow a term from Kimberlé Crenshaw, elides the intersectional vulnerabilities many girls face, including those that derive from the intersection of race, gender, and class.¹⁰

***1507** Few scholars have paid close attention to these intersectional vulnerabilities, and public policy advocates and policymakers have largely neglected them as well.¹¹ Drawing on intersectional analysis,¹² this Article contributes to efforts to bring this problem into sharp relief. Central to intersectionality is the notion that race, gender, and class converge to produce distinct outcomes for individuals.¹³ One sees this quite clearly in the juvenile justice system. In addition to highlighting the scope of this problem, this Article offers some tentative ideas about how we might fix it.

The starting point for the analysis is the claim that race, gender, and class intersect to create a distorted image of girls of color. More concretely, actors in the juvenile justice system are likely to view girls of color and Black girls¹⁴ in particular as delinquents--as social problems themselves rather than as young girls affected by social problems. To some extent, every actor in the juvenile justice system exercises discretion consistent with that distortion, even while operating under nominally neutral rules. The cumulative effect of this is that girls of color find themselves effectively locked into the system and locked out of opportunities that would attend to the underlying causes of their social vulnerability.

***1508** In Part I, I provide a brief history of the juvenile court, the purpose of discretion within the system, and the treatment of girls and youth of color. The wide grant of discretion at multiple levels in the system creates conditions for potential abuse through discriminatory exercise of that discretion. In Part II, I explicate studies that reveal inequities within the juvenile justice system based on the intersection of race and gender. This Part highlights studies that show that (1) the number of girls entering the juvenile justice system is on the rise;¹⁵ (2) girls of color are disproportionately represented in this group, reflecting the role of race;¹⁶ and (3) the cause of girls' delinquency differs in important ways from that of boys¹⁷ in that ***1509** girls are more likely to receive harsher punishment than boys for similar offenses and for status offenses (for example, running away or truancy),¹⁸ and they are more likely to receive harsher punishment at younger ages.¹⁹ These studies further suggest that gendered difference is also racialized. That is, while girls generally are subject to harsher punishment for status offenses, girls of color are particularly vulnerable to discriminatory treatment. In Part III, I examine the various theories scholars posit to explain the delinquency of girls. As I show, each of these theories suggests that race and gender matter. Finally, Part IV focuses on solutions. One obvious solution to the problems I describe is to eliminate the juvenile justice system. In other words, one could advocate a kind of juvenile justice system abolitionism.²⁰ Such an approach would track arguments criminal justice advocates advance vis-à-vis the abolition of prisons.²¹ In principle, I support the notion of remaking the juvenile court, but as a matter of practicality the stakes are too high to ***1510** do so: If we eliminate the juvenile justice system, the default is our current, broken criminal justice system. Part IV thus proposes a more modest solution. I advocate that within the current system we approach the issues by individually assessing the circumstances of each child, including their intersectional vulnerabilities.

I. The Race and Gendered Origins of Juvenile Justice

It may come as no surprise that the founders of the juvenile court were purportedly interested in saving potentially criminal children--or rather, poor children--from becoming criminal.²² Berry Feld, a noted juvenile justice expert, has characterized it clearly: “From its inception, the social control of ethnic and racial minority offenders has constituted one of the juvenile courts' most important functions.”²³ Thus, from the start, the system developed with embedded notions of race and identity and the provision of discretion to system actors treating the youth.

Prior to the first juvenile court in Cook County, Illinois in 1899, there was a history of separating poor children from their families based on labor needs.²⁴ This began at the turn of the nineteenth century with the increase of poverty among urban children in New York, which was a direct result of industrialization, urbanization, and the immigration of Europeans and Asians.²⁵ In response to the increasing number of pauper children running the streets of New York, the State of New York authorized the New York City House of Refuge.²⁶ The House of Refuge (which eventually expanded to sixteen cities in the northeast) was authorized to house children who were vagrants or who were convicted of crimes by informal authorization--criminal conviction was not required.²⁷

***1511** While the House of Refuge expanded during the first half of the nineteenth century, reformatories²⁸ dominated the second half, and although they were created to be more progressive, detention in reformatories actually constituted “coercive, labor intensive incarceration.”²⁹ These institutions “conformed to gender and racial beliefs of the era by establishing separate departments for girls and blacks.”³⁰ After the Civil War, the demand for cheap labor was often satisfied through widespread arrests of Blacks for minor violations under Jim Crow laws.³¹ As a result, there was overrepresentation of Black youth in the penal system--a sign of times to come.³² Understood in this way, the juvenile justice system was part of the Jim Crow apparatus. And it was used not only as a vehicle for social control but also as a mechanism to facilitate economic exploitation.

By the early nineteenth century, however, questions had arisen about the legitimacy of this emerging system.³³ Those questions were largely settled in 1839. In that year, *Ex parte Crouse*,³⁴ a Pennsylvania state court decision, solidified the ***1512** legitimacy of the Refuge System.³⁵ More importantly, the case reinforced *parens patriae*, the notion that the court can assume the role of a parent--and, more particularly, the role of the father.³⁶ Family structure and formation in this context was, of course, deeply gendered. Men had full control over both their children and their wives.³⁷ The doctrine of *parens patriae* extended this authority to courts vis-à-vis children. That is to say, pursuant to *parens patriae*, the court--and indeed the state more generally--can legally stand in as the parent (historically, the father) of the child with many of the same explicit and implicit rights possessed by parents. This notion was quickly ratified with the founding of the juvenile court in Cook County, Illinois on July 1, 1899,³⁸ and it is a core feature of the juvenile justice system today.³⁹

Significantly, the notion that the state could stand in for the parent carried with it a very specific institutional imperative--that the state, like the parent, should act as a disciplinarian.⁴⁰ Notably, the court was founded on the premise that ***1513** children are different than adults and should therefore be treated differently.⁴¹ In other words, whereas rigid normative penalties may be appropriate for adults, the juvenile system was founded on the idea that actors within the system should exercise discretion to ascertain whether punishment is necessary or whether instead some other form of intervention might work. Animating this discretionary approach was the idea that the state, like a parent, should look at each child individually, taking into account his particular circumstances. Under this approach, the default was rehabilitation, not punishment.⁴² The thinking was that it is never too late to save a child from a life of crime and that each youth who appears before the court should be treated holistically and individually, which is essentially what parenting entails. The progressive so-called child savers who founded the court conceived of it as a nonpunitive and therapeutic institution.⁴³ And courts articulated a similar view. In 1909, Judge Julian Mack, one of the first judges to preside over the nation's first juvenile court in Cook County, described the goals of the juvenile court:

The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the courtroom are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.⁴⁴

In its ethos, then, the juvenile court was guided by a mission to rehabilitate. This does not mean, however, that this mission was carried out in an evenhanded way. It was not. Child savers were more invested in saving some (nonimmigrant, White) children than they were in saving other (immigrant and Black) children. Thus, some (Black and immigrant) children were more vulnerable to social control *1514 than other (White, nonimmigrant) children.⁴⁵ This explains why Black boys became overrepresented in the system relatively early in its institutional history.⁴⁶ This overrepresentation has comfortably coexisted with the notion that the juvenile justice system should treat each child individually. And the contradiction also characterizes the state of affairs with respect to girls of color today. That is to say, girls are overrepresented in the system, notwithstanding that the system is formally committed to treating girls individually. To understand why, one has to understand the structure of the system, a structure within which every system actor has a tremendous amount of discretion.

A. The Structure of the Juvenile Justice System and the Problem of Discretion

As a formal matter, the juvenile justice system today is structured around two guiding principles, both of which derive from the history I set out above. The first principle is that youth have “diminished culpability and greater prospects for reform.”⁴⁷ The U.S. Supreme Court has repeatedly upheld this principle and affirmed it most recently in *Miller v. Alabama*⁴⁸ in June 2012. And second, “the court declared itself *parens patriae*, or ‘father of the people,’ to intervene . . . ‘in the best interests of the child,’ as opposed to the ‘expressed interests’ of a client in the criminal justice system.”⁴⁹ To advance these interests, “juvenile courts adopted informal processes, excluded lawyers and juries, and conducted confidential hearings.”⁵⁰ Many of these vestiges exist today. For example, juveniles, while given legal counsel, are not afforded the same due process rights as adult criminals.⁵¹

*1515 In the late 1960s, the court underwent a transformation affecting the *parens patriae* concept of juvenile court. Two seminal cases effectuated this change. In 1966, the court began to dismantle *parens patriae* in *Kent v. United States*⁵² by holding that any transfer of children to adult criminal court required due process.⁵³ Ten years later, in *In re Gault*,⁵⁴ the court expanded the scope of due process rights for juveniles.⁵⁵ More specifically, *Gault* established the rights of juveniles to have notice of charges, to confront and cross-examine witnesses, to avoid self-incrimination, and to access counsel.⁵⁶ Scholars and juvenile justice advocates continue to debate whether this outcome advances the best interest of the child. Some argue that *Gault* greatly advanced children's interests because it expanded the scope of their rights. Others have argued that this expansion carried with it a significant cost--the treatment of children like adults. That is, to the extent that children have due process rights, we are more likely to think of them as fully formed legal actors. Proponents of this view maintain that *Gault* marks the beginning of the end of treating children as children rather than as adults.⁵⁷

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In some ways the debate about Gault can be mapped onto the debate about discretion. That is to say, a flexible, discretionary-based system can be both a strength and a weakness. One aspect of this discretion is that in the process of building cases for these girls, the actors at every stage are interpreting facts based on what ethnographic researchers have called the “background expectancies” of the girls.⁵⁸ For court actors, the expectation has included notions of the girls' moral character, which in turn guides processing decisions.⁵⁹ These decisions can include the most important one: whether to move the case into the system or whether to *1516 leave it out entirely. Moreover, and perhaps most relevant for girls, court actors rely on girls' moral character⁶⁰ in exercising their discretion.⁶¹ For girls of color in the system, discretion has been a weakness and has undoubtedly contributed to their overrepresentation in the system. In California, there are at least four institutional actors whose discretion is a key part of this overrepresentation problem: police officers, probation officers, district attorneys, and judges.⁶² I discuss each actor in turn, focusing mostly on judges because studies have shown that girls of color in particular are subject to the judge's extraordinary discretion and have been subject to discriminatory sentencing.⁶³

***1517** 1. Police Officer

A youth's first encounter with the juvenile justice system is most likely with a law enforcement officer. Thus, the police are the initial decisionmakers regarding the youth's entry into the juvenile justice system. The police decide whether the matter should be formally processed or handled informally. Depending on the surrounding circumstances, the police may give the youth a warning to stay out of trouble or bring the youth to a diversion program to handle the matter informally. The police could also give the youth a “notice to appear” citation or take the youth to a probation officer at juvenile hall. Because police work involves complex situations, it is within the discretion of the police to decide how to handle incidents involving the youth. Law enforcement agents usually talk to any victims, the juvenile, and the parents or guardians and review any prior contacts with the juvenile system before making the decision to process the youth formally.⁶⁴

2. Probation

If the police choose to bring the youth to the probation department, a probation officer must investigate the youth's circumstances and the need for further detention.⁶⁵ This is called the intake process. If there is insufficient evidence to prove the allegation, the probation officer may dismiss the case.⁶⁶ A juvenile may be offered an informal probation if the youth admits to committing a violation.⁶⁷ The probation officer may eventually dismiss the case if the youth meets certain conditions and terms of the probation.⁶⁸

3. Prosecutor

If the probation department decides to keep the youth, it will detain the youth for a maximum of forty-eight hours until the District Attorney (DA) chooses to formally file a petition or file a criminal charge against the youth.⁶⁹ The DA may *1518 decline to prosecute if there was insufficient evidence or no need for judicial intervention.⁷⁰ If the DA decides to file criminal charges, then he or she must determine whether the youth's case will be adjudicated in adult court or juvenile court. The decision to file a case directly to adult court is usually based on the age of the youth and the severity of the crime.⁷¹ If the case is being handled in the juvenile court, the DA files a delinquency petition.⁷² This petition asks the court to declare the youth delinquent, making her or him a ward of the court.⁷³ When the youth becomes a ward of the court, he or she is under the care of the state. In most situations, a detention hearing is held before a judge to determine whether the youth committed a crime. At this hearing, the judge will review the petition submitted by the DA and further

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decide whether the youth should remain detained. On occasion, if the child is over 14 and the crime is serious, a fitness hearing is then held to determine whether the child will be tried as an adult. Assuming the youth is detained in juvenile court, a jurisdiction hearing is held. Upon hearing the facts and evidence presented, the judge decides whether the youth was responsible for the violation. If the judge finds the youth to be responsible, there will be a final disposition hearing to determine the appropriate sentence for the youth.⁷⁴

4. Judge

Once a girl enters a courtroom, her fate is in the hands of a single person: the judge.⁷⁵ As a result, understanding the role of the juvenile court judge is crucial to understanding the vulnerability of girls of color in the juvenile justice system. The *1519 youth's punishment may range from probation, to group or camp placement,⁷⁶ to juvenile hall. The judge will consider the probation officer's report and sentencing recommendation along with any relevant evidence offered by the youth, the parents or guardians, or the attorney before making the final disposition.⁷⁷ The judge, at disposition (or sentencing), has the ultimate power to decide how and where the girl will be punished and rehabilitated.⁷⁸ The question becomes, on what basis will she make such a decision? The primary difficulty of answering this question is twofold. First, judges may not be required to articulate the basis for their decision.⁷⁹ And second, even when they do, the factors on which they rely are facially race and gender neutral. For example, in California, when deciding the appropriate disposition of a juvenile case, the juvenile court judge will consider the youth's age, the youth's previous history of delinquency, and the circumstances and gravity of the youth's offense, "in addition to other relevant and material evidence."⁸⁰ None of these factors are expressly marked in terms of race or gender. Moreover, there are no guidelines for how judges should weigh or apply these factors, and judges themselves decide what counts as "other relevant and material *1520 evidence."⁸¹ All of this discretion creates space within the judge's decisionmaking process susceptible to being filled by explicit or implicit racial and gender stereotypes.⁸² Empirically demonstrating that judges might be relying on stereotypes has proven elusive.⁸³

In a study that focused on two juvenile court jurisdictions in Philadelphia and Phoenix, Elizabeth Cauffman and her colleagues examined the extent to which demographic, psychological, contextual, and legal factors predicted dispositional outcomes of probation versus confinement.⁸⁴ The researchers found that legal factors had the strongest influence in both jurisdictions; that is, juveniles with prior records were more likely to be confined.⁸⁵ Thus, there were no direct findings about race or gender. At the same time, this study did not eliminate the possibility of race, class, and gender bias, particularly because the study was merely a snapshot that focused on serious crimes committed.⁸⁶ Moreover, the researchers made clear that their study "cannot specifically address how or whether certain factors (for example, maturity) are being considered by the courts when making disposition decisions, because the rationale behind each decision is unknown, and because, in most instances, it is unlikely that the court has access to much of the individual and environmental data considered in this study."⁸⁷ It is entirely plausible that judges differentially apply race- and gender-neutral factors like maturity. That is, given stereotypes about race and gender, a judge may view a girl of color as more mature than a White girl⁸⁸ and thus subject her to different normative *1521 expectations.⁸⁹ Distortions of this sort are precisely what might provide at least a partial explanation for the disparate outcomes in the juvenile justice system the next Part sets forth. Understanding the cause of any disparate treatment of girls of color is essential for advocates to understand when, where, and how girls receive harsh or lenient treatment and ways to work toward a more appropriate treatment.⁹⁰

II. Disparate Outcomes at the Intersection of Race and Gender

While numerous studies over the past decade have examined and documented that at every stage of the juvenile justice system⁹¹ youth of color “are more likely [than White youth] to be arrested, charged, detained, sentenced severely, and tried as adults,”⁹² very few studies have examined the intersections of race and gender.⁹³ Those that have further support the notion that at the intersection of race and gender, unacknowledged judgments are made about girls of color that have significant impacts on their engagement with the juvenile justice system. An intersectional analysis allows us to see how the marginalization experienced by girls of color is different from that experienced by girls generally and boys of color.⁹⁴

*1522 Studies have shown that gender and race play a role in the juvenile justice system.⁹⁵ However, these studies have been limited in scope, focusing mostly on the differences in gender variance among boys. These studies are compiled and presented here.

Table 1. Studies on Gender(G)/Race(R) Impact on Juvenile Justice System

Title Author(s) Year	G	R	Finding/Conclusion
Status Offenders in the Juvenile Court: The Effects of Gender, Race, and Ethnicity on the Adjudication Decision Tina L. Freiburger & Alison S. Burke 2011	✓	✓	After Native America boys, Black girls and Hispanic girls were most likely to be adjudicated. ⁹⁶
Racial and Ethnic Disparities in Girls' Sentencing in the Juvenile Justice System Lori D. Moore & Irene Padavic 2010	✓	✓	Racial and ethnic minority girls, except Hispanic girls, received harsher punishment than White girls. ⁹⁷
Urban African American Girls at Risk: An Exploratory Study of Service Needs and Provision Sarah Jane Brubaker & Kristan C. Fox 2010	✓	✓	Girls' needs are different from boys, thus girls require different types of programs and services. However, African American girls in particular face obstacles to meet their needs. ⁹⁸
Gender and Juvenile Justice Decision Making: What Role Does Race Play? Lori Guevara, Denise Herz & Cassia Spohn 2006	✓	✓	Juvenile court judges were more likely to take race into account when making preadjudication detention decisions for males but were more likely to consider race in determining the appropriate disposition for females. ⁹⁹
Gender, Race, and Urban Policing: The Experience of African American Youths Rod K. Brunson & Jody Miller 2006	✓	✓	Though boys were the disproportionate recipients of aggressive policing tactics, girls were typically stopped more than young men for curfew or truancy violations. ¹⁰⁰
Race and the Fragility of the Legal Distinction between Juveniles and Adults Aneeta Rattan, Cynthia S. Levine, Carol S. Dweck & Jennifer L. Eberhardt 2012		✓	When participants believed that the juvenile was Black, they were more likely to support life without parole for nonhomicidal crime and to perceive juveniles as equally blameworthy as adults. ¹⁰¹
Effects of Individual and Contextual Characteristics on Preadjudication Detention of Juvenile Delinquents Gaylene S. Armstrong & Nancy Rodriguez 2005		✓	Minority juvenile delinquents had a higher probability of preadjudication detentions. ¹⁰²
The Individual and Joint Effects of Race, Gender, and Family Status on Juvenile Justice Decision-Making Michael J. Leiber & Kristen Y. Mack 2003	✓	✓	African Americans were more likely to be referred to court processing but also were more likely to

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Detention Screening: Prospects for Population Management and the Examination of Disproportionality by Race, Age, and Gender Thomas J. Gamble, Sherrie Sonnenberg, John D. Haltigan & Amy Cuzzola-Kern 2002	✓	✓	be released. The negative effects of being African American were not gender specific. ¹⁰³ Girls and those younger than 14 were detained at a higher rate. ¹⁰⁴
Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms George S. Bridges & Sara Steen 1998		✓	Probation officers attributed negative personality traits or attitude for Blacks' delinquency. These attributions contributed to the assessment that Blacks are more dangerous and at a higher risk for reoffending, which was partly responsible for harsher sentence recommendations. ¹⁰⁵
Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis Donna Bishop & Charles Frazier 1996		✓	Nonwhite youths referred for delinquent acts were more likely to be referred for formal processing than White youths. ¹⁰⁶

***1525** The three studies most relevant for my analysis are Brubaker and Fox's study of providers within Richmond, Virginia's juvenile justice and social services agencies and nonprofit agencies that serve Black girls in an urban environment,¹⁰⁷ Moore and Padavic's examination of disparities in sentencing,¹⁰⁸ and Guevara, Herz, and Spohn's examination of gender and race within disposition.¹⁰⁹ Brubaker and Fox offer a glimpse into the myriad intersectional vulnerabilities facing Black girls and, by extension, girls of color¹¹⁰ within a system that is not created to address their specific needs. The researchers interviewed twenty system actors and found that, similar to findings in other literature regarding risks facing Black girls, the main problems facing the girls were "academic problems/truancy, mental health issues, sexual victimization/sexual promiscuity, dangerous neighborhoods, increased aggression/fighting, . . . interactions with boyfriends who engaged in criminal activity," and family instability.¹¹¹ Most of the girls were in custody because they were chronic runaways, and

providers described the families of the[se] girls . . . as single/female-headed households with low incomes and few resources and high unemployment, living in dangerous neighborhoods without reliable transportation, and subjected to an inferior urban public school system. This combination of challenges often overwhelmed caregivers and made it difficult for [the girls] to navigate, understand, access, or appreciate the systems providing services.¹¹²

The study recommended more collaboration between agencies.¹¹³ This study is novel in that it captures the intersectional vulnerabilities facing these girls and provides ways in which system actors can fill the unmet needs of these girls with a thoughtful approach.

***1526** Second, Moore and Padavic's study of girls in Florida whose sentences accounted for prior offenses found that race matters with respect to sentencing.¹¹⁴ The results of the study were consistent with prior findings that girls of color

received harsher punishment than White girls, with one important exception: the case of Hispanic girls in some circumstances. As expected, compared to White girls, Black girls received more severe dispositions even after taking into account the seriousness of the offense, prior record, and age. This finding provides evidence of Black-White racial bias in the juvenile justice system.¹¹⁵

Moreover, their analysis revealed striking commentary about the system's distorted perception of girls of color:

Our analyses revealed that the effects of race/ethnicity on disposition severity were conditioned by girls' current and prior offending behavior. In four of the six tests, White girls compared to Black girls were granted leniency in disposition decisions, but only up to a threshold, at which point their probabilities of receiving a harsher disposition either converged or surpassed their racial/ethnic minority counterparts. These findings suggest that the juvenile justice system is tolerant of White girls with minor-to-average offense severity levels and low-to-average prior records but relatively intolerant of their Black counterparts' [sic]. As White girls surpass what the juvenile justice system considers acceptable offending behavior for their racial group, it reacts in an increasingly punitive manner. The juvenile justice system appears to be unmoved by above-average levels of Black girls' offending behavior, perhaps because judges expect high levels of deviance from this group.¹¹⁶

Finally, a study that sought to examine precisely the issues presented in this analysis found results perfectly representative of the distortion facing girls of color. Looking at a sample of 1500 files, Guevara, Herz, and Spohn sought to examine pre-detention and post-detention outcomes.¹¹⁷ Interestingly, the researchers found that “although race had a significant negative effect on both [probation and placement] for females, it had no effect on charge dismissal and significant positive effect on probation for males.”¹¹⁸ Interestingly here, “White females . . . were less like than non-White females to have all charges dismissed or to be placed on *1527 probation (rather than given an out-of-home placement).”¹¹⁹ However, researchers suggested that the cause of this difference may be due to court officials' expectations based on the race of the girl:

Court officials, in other words, may be more likely to view delinquency on the part of White girls as a violation of sex-role expectations and as a result, may punish White girls more harshly than non-White girls. Court officials also may believe that White females have higher odds of rehabilitation and, thus, a greater likelihood of benefiting from an out-of-home placement than non-White females.¹²⁰

Researchers here do not hypothesize why these perceptions about the girls exist, but the existence and documentation of these perceptions illustrate the complexities of race.

The results of these studies collectively demonstrate that there are distinct outcomes when race and gender converge. Under the neutral rules of the juvenile justice system, decisionmakers exercise discretion in ways that heighten the social vulnerability of girls of color. Thus, the increasing number of girls of color entering the system is tied to the distorted way in which they are perceived.

III. Girls of Color: Intersectional Pathways to Delinquency and Judicial Discretion

Scholars have documented the many pathways by which girls enter the delinquency system, but often without a critical examination of how race and class affect their trajectory.¹²¹ It is important to understand these pathways in order to focus on whether girls of color, in particular, enter differently. Equally important is an understanding of the role

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of the juvenile court system in this path. As discussed earlier, each court actor relies on discretion at various points in the system.¹²² These decisions in turn can affect whether a girl enters the system at all. Significantly, girls of color in particular are economically and socially marginalized compared *1528 to other groups.¹²³ As a result, this often “locate[s] them in position[s] of disadvantage in terms of offending and official reactions to their offending.”¹²⁴

To begin, status offenses are a primary reason girls enter the juvenile justice system.¹²⁵ Status offenses are acts that are not deemed criminal when committed by adults but carry juvenile court sanctions for youth because of their legal status as minors.¹²⁶ The mere existence of status offenses reveals the irony of the juvenile court: The juvenile court was intended to rehabilitate rather than to punish children, yet the very reason that girls, in particular, enter the system is because of conduct that, if committed by an adult, would not be considered criminal. Thus, the juvenile court is trying to rehabilitate or reduce behavior that would not be punished but for the age of the defendant. The point of rehabilitation is to reduce the likelihood that the youth will commit the same offense later in life; thus, it is aimless to rehabilitate status offenses when the conduct is not legally offensive if committed by adults. The most common of these status offenses include truancy, running away, underage drinking and curfew violations--all behaviors that are considered evidence that the child is ungovernable or beyond the control of his or her parents.¹²⁷ In reality, the behaviors associated with status offenses are seldom isolated incidents of defiance; they are more often manifestations of unmet and unaddressed educational, emotional, and economic needs.¹²⁸

Research documents that police disproportionately detain girls for status offenses.¹²⁹ The arbitrary and discriminatory application of status offense laws *1529 occurs often and the inherent double standard has been criticized.¹³⁰ For example, one court in Virginia observed the following in 1977:

[S]tatus offender legislation discriminates against females. It is apparent that status offense petitions can easily be used to bring under control young women suspected by their parents or by other authorities of promiscuous behavior. Our society tends to condemn female promiscuity more severely than male promiscuity, and this tendency may explain why females often are unfairly classified and treated as status offenders.¹³¹

The harsher punishment meted out to girls ignores that girls are often a product of the “violence that shapes their lives.”¹³² It has been estimated that among detained females in the juvenile justice system, 70 percent had been exposed to some form of trauma, 65.3 percent had experienced symptoms of posttraumatic stress disorder (PTSD) sometime in their lives, and 48.9 percent of these incarcerated females were experiencing the symptoms of PTSD at the time of the study.¹³³

Second, recent research has found that girls tend to be punished for failing to meet gender expectations--that is, “anger and sex-role inappropriate behavior[, including sexually forward behavior] in girls evoke sanctions.”¹³⁴ Other research has documented that girls who had unprotected sex were perceived to lack moral character as they were violating gender norms, while similar behavior by boys was largely ignored unless it rose to a criminal level (behavior that was criminally punishable). More specifically, behavior that is perceived to be male like can also subject girls to harsh sanctions: A study of girls in a detention facility found that when girls did not act “ladylike” (that is, when they acted more aggressively than other girls), they were penalized more harshly with legal sanctions than *1530 verbal reprimands.¹³⁵ In essence, when girls did not follow feminine norms (behaviors or attitudes), they were seen “more like boys, and should be treated

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like boys would be.”¹³⁶ These attitudes, which have fueled the disparate treatment of girls, have been identified but not sufficiently addressed.

The lack of a gender analysis when examining pathways to delinquency is compounded by a lack of attention to the intersection of gender and race.¹³⁷ Within the broader pattern of gender disparity, racial difference also has significant impact. Race seems to matter with respect to girls and status offenses--a 1996 Florida study of the juvenile justice system found that White and minority girls¹³⁸ “were less likely than their . . . male counterparts to receive detention . . . , but minority girls were more likely to receive detention than Whites of either sex.”¹³⁹ A 2010 Florida study found that even more generally, Black girls received harsher punishment than White girls despite controlling for the seriousness of the offense, prior record, and age.¹⁴⁰ One possible source of this difference lies in the prevailing racialized and gendered perceptions of girls of color.¹⁴¹ That is, when juvenile court actors perceive that girls of color have inherent, negative attributes, that perception affects the decisionmaker's judgment and may even outweigh their concern about prior criminality, seriousness of offense, and possibility for rehabilitation. Stereotypes¹⁴² often operate at the subliminal level, are reinforced by prevailing cultural representations, and can have dramatic impact on offenders, *1531 particularly juveniles.¹⁴³ There has been little research on how stereotypes of girls of color affect juvenile court actors, but we do know that females of color are affected differently than White women.¹⁴⁴ The stereotypes that are most harmful to girls within the juvenile justice system have been documented.

White girls:	passive, in need of protection, nonthreatening, and amenable to rehabilitation;
Black girls:	independent, aggressive, loud, pushy, rude, sexual, unfeminine, violent, and crime prone;
Hispanic girls:	dependent, submissive, family oriented, domestic, and highly sexual. ¹⁴⁵

These stereotypes are particularly dangerous characterizations within a system that is built on subjective discretion. This discretion allows for stereotypes to play a role in decisions on how girls' cases should proceed in the delinquency system or, more importantly, whether they should enter the system at all.

For example, suppose we take Sara's case, the girl whose story I began with. Sara, as a young girl of color, has run away from home and, upon arrest, the police *1532 discover that she is carrying a box cutter--possibly to protect herself from physical and sexual assaults while on the streets.¹⁴⁶ The prosecuting authority can choose to treat this young girl as a runaway, or in exercising discretion, the prosecutor might choose to charge her with possession of a prohibited weapon and enter her into the delinquency system. Here, the personal judgments of the prosecutor reflect any stereotypes she may hold of the girl in question. To the extent that the youth is a girl, her choice to arm herself could be seen as violative of appropriate behavior; to the extent that she is Black, she could be perceived as potentially violent and aggressive and thus an appropriate candidate for a delinquency petition. A growing literature in social psychology has documented how stereotypes can influence decisionmaking. In addition, courts have acknowledged that stereotypes about females factor into institutional decisionmaking and workplace personnel decisions, which are subjective determinations made by one individual that is analogous to a juvenile court actor--be it a police officer, probation officer, or judge.¹⁴⁷ Without attention to how these stereotypes can distort the assessment of girls of color, discretion can work to discriminate. The juvenile justice system's formal recognition that a dual distortion (comprising of gender distortion and race distortion) exists when girls like Sara are arrested would allow the system to better address her needs by focusing on her symptoms, which are undoubtedly impacted by her age, gender, and race.

***1533 IV. Solutions: Acknowledging the Distortion for Effective Remedies**

To address the rise of delinquency among girls most effectively, it is imperative to address the issue without any distortion. Beyond the scope of this analysis are the myriad theories as to why there has been an increase in girls' delinquency. Some have argued that it is merely the relabeling of offenses and lack of alternatives to incarceration.¹⁴⁸ Meda Chesney-Lind, a leading expert, has found that the increases could be attributed to the rise in girls' involvement in gang activity; increasing attention to the problem of domestic violence, which has resulted in more arrests for both men and women; greater attention to normal adolescent fighting or girls fighting with parents; or a reflection of structural problems in modern society, including an increase in poverty, violence at home, poor education, and the "increasing acceptance of carrying and/or using weapons in our society."¹⁴⁹

For years, experts and policymakers have made a case for gender-tailored programming to remedy the specific needs of girls.¹⁵⁰ However, the recommendations fail to incorporate race into their analyses adequately, which I argue may limit the ability of effective implementation. This Part highlights a few of these recommendations and offers general suggestions for effective solutions.

The first, and perhaps, the most important intervention the juvenile justice system can make to improve the lives of girls and girls of color is to acknowledge and directly address these distortions so that decisionmakers can, at every stage of exercising their considerable discretion, apply that discretion to the benefit of girls and girls of color. This can be done through educating judges,¹⁵¹ police, probation ***1534** officers, and all the major decisionmakers who interact with the girls from start to finish.¹⁵²

The comprehensive studies recently put forth by the Girls Study Group (GSG), a group of juvenile justice experts, fail to sufficiently incorporate intersectional issues that affect girls of color in important ways. The GSG was funded by the Department of Justice Office of Juvenile Justice Delinquency Prevention (OJJDP)¹⁵³ and involved experts reviewing 2300 social science articles and book chapters that examined factors affecting girls' delinquency for girls aged eleven to eighteen.¹⁵⁴ "The goal of the GSG project was to develop a research foundation to enable communities to make sound decisions about how best to prevent and reduce delinquency and violence by girls."¹⁵⁵ Most critically, the GSG was responsible for "developing and providing scientifically sound and useful guidance on program development and implementation to policymakers, practitioners, and the researchers."¹⁵⁶ However, none of these six studies provides any serious consideration of a racial lens.¹⁵⁷ That is, nowhere do the studies themselves or the recommendations mention particularities with respect to racial groups. This is ***1535** particularly problematic with respect to both the factors that lead to delinquency and the solutions for preventing delinquency, both of which are critical for advocates seeking to prevent entry into the juvenile justice system and to provide adequate help to those girls who are caught up in it. For example, a GSG report provided the following recommendations, among many, that did not sufficiently address the racial dimensions but could benefit from adding an intersectional lens:

- Responses to mental health problems such as depression, anxiety, and posttraumatic stress disorder should be integral components of programming for girls. Depression and anxiety are more frequently diagnosed in girls than in boys and may accompany delinquency. Aggression by girls may indicate earlier victimization and signify that these girls need intervention to deal with these experiences. An increase in family-centered programming may be useful.

....

- Positive school involvement protects against delinquency in both girls and boys. School attachment is more significant for girls than for boys, while rule fairness and enforcement are more significant for boys.

....

- Interdisciplinary models that place behaviors in social, psychological, and biological context for girls are critical in understanding and responding to early puberty as a risk factor. Helping girls who enter puberty early to understand and deal with peer and parental response is one way of offsetting some of the biological/emotional maturity disconnect.¹⁵⁸

Each bullet point above would benefit from an acknowledgement of the particular needs facing girls of color. For example, in a study finding that Black girls perceive support or assistance from police and schools as unhelpful and counterproductive,¹⁵⁹ researchers found that instead of relying on system actors who should be helpful, the girls had rationalized that physical aggression was the most appropriate and efficient strategy for dealing with problems.¹⁶⁰ This investigation revealed how “[r]ace and gender (and class, although not specifically examined . . .) serve to structure girls’ day-to-day experiences.”¹⁶¹ More specific to schools, Black *1536 girls are often perceived as “loud”¹⁶² and are more likely (a) to be disciplined for talking “out” of what is considered nonconforming behavior,¹⁶³ (b) to have a parent be contacted for their in-school behavior,¹⁶⁴ and (c) to report having been suspended from school more than their White, Latina and Asian counterparts.¹⁶⁵ Given this, the GSG recommendations are limited in their ability to address effectively the concerns facing Black girls in particular. Each bullet point above should be modified: Physical aggression of girls should now take into account girls’ lack of faith in the police; positive school involvement should examine girls’ trust in schools and school actors’ perceptions of them; and any interdisciplinary models should explicitly discuss the racial dimension to ensure their effectiveness in remedying the problems.¹⁶⁶

A recent California report addresses the unique concerns facing girls within the juvenile justice system and is noteworthy. However, the absence of race is still prevalent. The Berkeley Center for Criminal Justice August 2010 Report on Gender Responsiveness and Equity in California’s Juvenile Justice System lists several thoughtful recommendations:

- (1) Provide staff training on how to respond to girls’ needs.
- (2) Use assessment tool validated for female populations.

- (3) Develop and utilize gender-responsive community-based programming.
- (4) Improve and increase the availability of programming for girls.
- (5) Equip detention centers and residential facilities to deal with the unique physical and mental health needs of girls.
- *1537 (6) Change policies and programs in detention facilities that re-traumatize girls.¹⁶⁷

Completely absent from these suggestions is any mention of race and the unique circumstances facing girls of color. Under the first recommendation--staff training--there is a suggestion that "[r]esearch-based training conducted by experts in . . . cultural differences would promote awareness of girls' needs."¹⁶⁸ While the mentioning of cultural differences may be a positive step in that it signals an acknowledgement of race, it still does not effectively address the intersectional vulnerabilities facing girls of color. Adding an intersectional framework to the recommendations above will allow for policymakers to address the myriad issues raised in this Article.

There has been a growing concern in the country over school discipline policies and their racial implications.¹⁶⁹ A 2011 report about school discipline by the Civil Rights Project at UCLA includes a thoughtful discussion of the racial implications of school discipline.¹⁷⁰ However, the report is completely devoid of a nuanced discussion of how this issue uniquely affects girls. Here is a slightly varied scenario: a discussion of race absent a gender frame. Given what we do know, the intersectional vulnerabilities of girls of color are critical to addressing the unique concerns they face. It is imperative to disaggregate the data and frame the analysis within a racial and gendered lens for effective remedies.

Experts have called for thoughtful remedies to help all girls within the juvenile justice system, all of which can benefit from an intersectional framework that includes a concerted effort to include girls and girls of color. These recommendations include: (a) involving system girls as activists in the advocacy work;¹⁷¹ (b) working closely with public health officials to frame juvenile delinquency issues *1538 as public health concerns and not criminal ones;¹⁷² (c) acknowledging and disclosing the ways in which the delinquency system seems to have two tracks based on racial inequalities;¹⁷³ (d) creating a Girls Court as part of a system of collaborative courts that focus on rehabilitation versus punishment;¹⁷⁴ (e) rethinking and remaking the structure of juvenile court operations;¹⁷⁵ (f) creating a multisystem approach to addressing runaway issues and status offenses;¹⁷⁶ (g) bringing legal challenges to ensure equal access and advancing gender-responsive programming for girls;¹⁷⁷ and (h) generally calling for data-driven decisionmaking that includes objective and validated risk/need assessments, which is fairer to both girls and boys.¹⁷⁸

*1539 Given the vast number of studies examining juveniles within the delinquency system, the numbers of studies that address girls of color is still minimal.¹⁷⁹ More studies should be undertaken examining the vulnerabilities of race and

gender but should be done with the complexities of both dimensions kept in mind.¹⁸⁰ With more proper documentation of these intersectional issues, decision makers within the juvenile justice system will be forced to face the complexities at each step in the process that leads girls to enter the system. Most importantly, they will then be better informed on factors essential to the exercise of their discretion to the betterment of girls of color, and possibly also begin to create and implement effective solutions. And in turn, the juvenile justice system will return to its original goal of seeking to rehabilitate girls rather than to punish them.

Conclusion

In today's juvenile justice system, Sara will encounter multiple decisionmakers. Each will exercise varying degrees of discretion without sufficient regard for how her gender and her race affect their decisionmaking. Sara's gender and race are essential components of a holistic rehabilitative approach to addressing juvenile delinquency. Yet blind discretion will result in Sara being ill served and disproportionately punished compared to other youth in the system. The system must open its eyes. It must acknowledge the existence of this distortion, its pervasiveness, and its exacerbating nature when coupled with broad discretion. Only through rigorous examination, accurate study of this issue, and direct intervention to educate decisionmakers does Sara stand a fair chance. We can do better, and we should do better. We owe it to our future girls.

Footnotes

- ¹ This anecdote is drawn from statistics of a typical girl within the U.S. juvenile justice system. See, e.g., Leslie Acoca & Kelly Dedel, *No Place to Hide: Understanding and Meeting the Needs of Girls in the California Juvenile Justice System* (1998) (reporting data from the largest and most detailed study ever conducted on girl offenders, including the official profiles of one thousand girls and the structured interviews of two hundred girls in detention facilities); Berkeley Ctr. for Criminal Justice, *Juvenile Justice Policy Brief Series: Gender Responsiveness and Equity in California's Juvenile Justice System* (2010); Christy Sharp & Jessica Simon, *Child Welfare League of Am., Girls in the Juvenile Justice System: The Need for More Gender-Responsive Services* (2004); Am. Bar Ass'n & Nat'l Bar Ass'n, *Justice by Gender: The Lack of Appropriate Prevention, Diversion and Treatment Alternatives for Girls in the Juvenile Justice System*, 9 Wm. & Mary J. Women & L. 73 (2001); Joanne Belknap & Kristi Holsinger, *The Gendered Nature of Risk Factors for Delinquency*, 1 Feminist Criminology 48 (2006); Kristen M. McCabe, Amy E. Lansing, Ann Garland & Richard Hough, *Gender Differences in Psychopathology, Functional Impairment, and Familial Risk Factors Among Adjudicated Delinquents*, 41 J. Am. Acad. Child & Adolescent Psychiatry 860 (2002).
- ² See M. Diane Clark, Hanno Petras, Sheppard G. Kellam, Nicholas Ialongo & Jeanne M. Poduska, *Who's Most at Risk for School Removal and Later Juvenile Delinquency? Effects of Early Risk Factors, Gender, School/Community Poverty, and Their Impact on More Distal Outcomes*, 14 Women & Crim. Just. 89, 113 (2003) ("It has been shown [for girls] that one adjudicated event (i.e., school removal) leads to additional adjudicated events (juvenile justice records). Not only adjudicated events are predicted by school removal, one finds a cascade of potentially negative outcomes that limit upward mobility, such as early pregnancy."); see also Matt Pearce, *Truancy? Honor Student Working Two Jobs Is Jailed; Outrage Ensues*, L.A. Times, May 29, 2012, <http://www.latimes.com/news/nation/nationnow/la-na-nn-texas-honor-student-20120529,0,589866.story> (detailing the recent story of Diane Tran, an honors high school student with two jobs, who was sentenced to a day in jail for violating a Texas truancy law of missing ten or more days of school in six months, and noting that Tran's absence was caused by the need for her to support her family after her parents' divorce).
- ³ When discussing children, rhetoric matters. The ways in which we refer to "children," "youth," "juvenile," "girl," or "boy" affects our framework and understanding of the juvenile justice system. This Article uses the terms "girls" and "youth" to refer to children under the age of eighteen who interact with the juvenile justice system. For a thoughtful discussion of rhetoric in the juvenile justice system, see Elizabeth S. Scott, *Essay, The Legal Construction of Adolescence*, 29 Hofstra L. Rev. 547,

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549 (2000) (“Since the establishment of the juvenile court in 1899, young offenders have been transformed in legal rhetoric from innocent children to hardened adult criminals.”); see also Steven Friedland, *The Rhetoric of Juvenile Rights*, 6 *Stan. L. & Pol’y Rev.* 137, 138 (1995) (“[A]ny reconfigured juvenile justice system...will be significantly shaped and influenced by the rhetoric used to describe juveniles. This is true because the descriptive rhetoric surrounding juveniles fashions society’s understanding of them”).

4 For purposes of this analysis, the term “of color” refers to girls and youth who identify as non-White. This Article is premised on a simplified notion of Whiteness that does not reflect the complexities of this issue, which is beyond the scope of this analysis. Among those who are considered White, there is considerable variation in the benefits Whiteness confers. See, e.g., Camille Gear Rich, *Marginal Whiteness*, 98 *Calif. L. Rev.* 1497 (2010).

5 Juvenile court is defined as “a superior court exercising limited jurisdiction arising under juvenile law.” *In re Chantal S.*, 913 P.2d 1075 (Cal. 1996); see also *Black’s Law Dictionary* 409 (9th ed. 2009). The discretionary nature of the court is synonymous with the broad jurisdiction given to the court at its inception. See U.S. Dep’t of Labor, *Juvenile-Court Standards: Report of the Committee Appointed by the Children’s Bureau, August, 1921, to Formulate Juvenile-Court Standards*, at vi (1923), available at <http://www.mchlibrary.info/history/chbu/20531-1923.pdf> (“[T]he [juvenile] court dealing with children should be clothed with broad jurisdiction, embracing all classes of cases in which a child is in need of protection of the State, whether the legal action is in the name of the child or of an adult who fails in his obligations toward the child.”) Moreover, the primary purpose of the formation of the juvenile court was to take it out of the formalistic nature of the criminal court. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in *A Century of Juvenile Justice* 42, 69 (Margaret A. Rosenheim et al. eds, 2002) (“Clearly, the ‘idea’ of a juvenile court--that children should be removed from the criminal justice system--was firmly entrenched.”).

6 See Part II, *infra*, for the origins of juvenile court and its informal, rehabilitative mandate.

7 Part of the problem of examining girls is the data limitations. Delinquency studies, in general, have limitations since most of the data are self-reported (and therefore either overrepresentative or underrepresentative, depending on the situation); since the delinquency studies rely on adult data, which is not accurate with respect to frequency; and since “most delinquency studies are based on samples of boys, and it is unclear whether the same risk and protective factors apply equally well to girls.” See Margaret A. Zahn et al., *Office of Juvenile Justice & Delinquency Prevention, NCJ 226358, Causes & Correlates of Girls’ Delinquency 2* (2010).

8 See generally Francine T. Sherman, *Justice for Girls: Are We Making Progress?*, 59 *UCLA L. Rev.* 1584 (2012).

9 Prior to 1992, girls were separate from boys without a formalized mandate for gender specific programming. See generally Francine T. Sherman, Annie E. Casey Found., *Pathways to Juvenile Detention Reform: Detention Reform and Girls 12-13* (2005), available at http://www.aecf.org/upload/publicationfiles/jdai_pathways_girls.pdf (“Federal attention to girls in the delinquency system began with the 1992 Juvenile Justice and Delinquency Prevention (JJDP) Act’s requirement that states analyze their juvenile justice system’s provision of ‘gender-specific services’ to female offenders and plan the delivery of gender-specific treatment and prevention services.”). Today we have a more complex response to girls’ needs but it is not enough. The JJDP Act was reauthorized in 2002 requiring that states “plan for providing needed gender-specific services for the prevention and treatment of juvenile delinquency,” 42 U.S.C. §5633(a)(7)(B)(i) (2006), and “assurance that youth in the juvenile justice system are treated equitably on the basis of gender.” *Id.* §5633(a)(15). However, as Sherman reported, “those core strategies by themselves--without specific policies, practices, and programs that address the particular challenges posed by girls--do not seem sufficient to eliminate disparities (e.g., girls’ higher detention rates for status offenses), to improve program performance, or to ensure appropriate conditions of confinement.” Sherman, *supra*, at 13.

10 See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Stan. L. Rev.* 1241, 1243-44 (1991) (“[T]he experiences of women of color are frequently the product of intersecting patterns of racism and sexism, and...tend not to be represented within the discourses of either feminism or antiracism.” (footnote omitted)); see also Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Stan. L. Rev.* 581, 585 (1990) (characterizing and criticizing “gender essentialism--the notion that a unitary, ‘essential’ women’s experience can be isolated

and described independently of race, class, sexual orientation, and other realities of experience"). Scholars have used a variety of different terms to describe this process including "compound discrimination." See Devon Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. Rev. 1467, 1518 (2000) (recognizing that discrimination may be compounded--that is, based on more than one facet of a person's identity). For a thoughtful discussion of the myriad ways to conceptualize compound discrimination, see Devon W. Carbado & Mitu Gulati, *The Fifth Black Women*, 11 J. Contemp. Legal Issues 701 (2001).

- 11 "Despite the existence of intersectionality theory to youth issues, its use within the juvenile justice literature is lacking. Only two known studies to date have specifically incorporated the intersectional approach in examining juvenile justice outcomes. These studies both find mixed levels of support for the intersectionality perspective, making future examinations of the theory worthwhile." Scott R. Maggard et al., *Pre-dispositional Juvenile Detention: An Analysis of Race, Gender and Intersectionality*, 35 J. Crime & Just. (forthcoming 2012) (manuscript at 3) (citations omitted) (citing Michael J. Leiber et al., *A Closer Look at the Individual and Joint Effects of Gender and Race on Juvenile Justice Decision Making*, 4 Feminist Criminology 333 (2009), and Lori D. Moore & Irene Padavic, *Racial and Ethnic Disparities in Girls' Sentencing in the Juvenile Justice System*, 5 Feminist Criminology 263 (2010)), available at <http://dx.doi.org/10.1080/0735648X.2011.651793>; see also *infra* Part III.
- 12 See generally Crenshaw, *supra* note 10; Maggard et al., *supra* note 11.
- 13 See generally Crenshaw, *supra* note 10; Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465 (2010) (arguing that our social and legal institutions should incorporate behavioral realism's finding that human beings are not perceptually, cognitively, or behaviorally colorblind).
- 14 This analysis speaks to issues impacting all girls of color; however, due to limited data available, many of the studies target the particular impact on Black girls. For a discussion of the data limitations, see *supra* note 7.
- 15 See Charles Puzzanchera & Benjamin Adams, Office of Juvenile Justice & Delinquency Prevention, NCJ 236477, *Juvenile Arrests 2009*, at 5-6 (2011) [hereinafter *Puzzanchera & Adams, Juvenile Arrests 2009*], available at <http://www.ojjdp.gov/pubs/236477.pdf> (noting that from 2000 to 2009, "in some categories (e.g., simple assault, larceny-theft, and disorderly conduct), female arrests increased"); see also Acoca & Dedel, *supra* note 1, at 2 (reporting that "in addition to serious, violent offenses, arrests of girls for larceny-theft and simple assault also increased significantly," and noting that, in the 1990s, "[i]ncreases in the number of delinquency cases involving young women handled by juvenile courts also outstripped those pertaining to young men"); Charles Puzzanchera et al., Nat'l Ctr. For Juvenile Justice & Office of Juvenile Justice & Delinquency Prevention, *Juvenile Court Statistics 2008*, at 12 (2011) [hereinafter *Puzzanchera et al., Juvenile Court Statistics 2008*], available at <http://www.ojjdp.gov/ojstatbb/njcda/pdf/jcs2008.pdf> (reporting that "the female delinquency caseload grew at an average rate of 3% per year between 1985 and 2008, while the average rate increase was 1% per year for males"). Nevertheless, overall youth crime has been on the decline. The number of adults arrested in 2010 increased 1 percent from 2001, whereas the number of juveniles arrested dropped a staggering 23.5 percent during the same time frame. See *Ten-Year Arrest Trends, Totals, 2001-2010*, FBI.gov, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl32.xls> (last visited July 21, 2012).
- 16 Leslie Acoca, *Investing in Girls: A 21st Century Strategy*, Juv. Just., Oct. 1999, at 3, 8 (analyzing a National Council on Crime and Delinquency (NCCD) study examining one thousand case files and interviewing two hundred girls in delinquency, see Acoca & Dedel, *supra* note 1, and noting that "[t]he disparate treatment of minorities appears to be an important factor in the processing of girls' cases[:] Nationally and in the NCCD sample, approximately two-thirds of the girls in the juvenile justice system are minorities, primarily African American and Hispanic."); see also *Puzzanchera & Adams, Juvenile Arrests 2009*, *supra* note 15, at 6 (showing that female arrests increased in some categories and that "Black youth were overrepresented in juvenile arrests"); Kim Taylor-Thompson, *Girl Talk--Examining Racial and Gender Lines in Juvenile Justice*, 6 Nev. L.J. 1137, 1137-38 (2006) (stating that African American girls are overrepresented in the juvenile justice system and that they often receive more severe punishments and lower dismissal rates than White girls).
- 17 Acoca, *supra* note 16, at 7. NCCD data revealed that, similar to offense patterns of the last forty years, the majority of girls surveyed were charged with less-serious offenses such as property, drug, and status offenses rather than with violent crimes

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such as assault or murder. *Id.* Moreover, “the highest percentage...of these girls were probation violators, many of whom reported that their first offense was running away, truancy, curfew violation, or some other status offense.” *Id.* Interestingly, the “small number of girls arrested for the most serious offenses--robbery, homicide, weapons offenses-- reportedly committed these crimes almost exclusively within the context of their relationships with codefendants. These relationships fell into two distinct categories: dependent or equal. The first group included girls who were following the lead of male offenders (often adults) who were typically the primary perpetrators of the crime. The second group included girls functioning in female-only groups or mixed gender groups (including gangs) as equal partners in the commission of their offenses.” *Id.* at 8.; see also Belknap & Holsinger, *supra* note 1, at 56, 66 (finding that girls report higher rate of abuse, have more frequent thoughts of harming themselves, and have lower self-esteem than boys).

- 18 See Acoca & Dedel, *supra* note 1, at 15 (“[T]he highest percentage of girls (36 percent) fell into the least serious offense category, probation violation. Many of these probation violators reported that their first offense was actually a status offense (such as running away or curfew violation....”); Meda Chesney-Lind, *Criminalizing Victimization: The Unintended Consequences of Pro-arrest Policies for Girls and Women*, 2 *Criminology & Pub. Pol’y* 81, 84 (2002) (suggesting that mandatory arrest in cases of domestic violence and the relabeling of status offenses into violent offenses could explain the recent trend of increasing incarceration rates of girls when studies show that girls are actually becoming less violent).
- 19 Barbara E. Bloom & Stephanie S. Covington, *Effective Gender-Responsive Interventions in Juvenile Justice: Addressing the Lives of Delinquent Girls 3* (paper presented at the 53d Annual Meeting of the Am. Soc’y of Criminology, Atlanta, Ga., 2001), available at <http://centerforgenderandjustice.org/pdf/7.pdf> (highlighting research that “documents that delinquent girls and young women have disproportionately high rates of victimization, particularly incest, rape and battering preceding their offending behavior,” and exploring evidence of harsher punishment for girls than for boys); see also Belknap & Holsinger, *supra* note 1, at 55 (discussing survey results that indicate that younger girls receive harsher sentences).
- 20 See generally Janet E. Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 *N.C. L. Rev.* 1083 (1991) (arguing that the juvenile court system began under the auspices of a traditional social construction of childhood that viewed juveniles as immature, distinct from adult criminals, and not morally accountable for their actions, which is becoming increasingly anachronistic).
- 21 Scholars like Dorothy Roberts have thoughtfully suggested that one way to heal the adult criminal system, which is plagued by racism, is to abolish the system as we know it. See Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 *Colum. Hum. Rts. L. Rev.* 261, 263 (2007).
- 22 See Barry C. Feld, *The Transformation of the Juvenile Court--Part II: Race and the “Crack Down” on Youth Crime*, 84 *Minn. L. Rev.* 327, 329-30 (1999) (discussing the “conception[s] of childhood and positive criminology,” which resulted in the formation of the juvenile court); see also Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, *Juv & Fam. Ct. J.*, Fall 1998, at 17.
- 23 Feld, *supra* note 22, at 330.
- 24 See Ventrell, *supra* note 22, at 22 (“In the case of the poor, the state felt authorized to remove poor children and apprentice them for the common good.”). During this time, children were not afforded political or social rights. See Patricia Soung, *Social and Biological Constructions of Youth: Implications for Juvenile Justice and Racial Equity*, 6 *Nw. J.L. & Soc. Pol’y* 428, 430 (2010) (“Until about 1830, social institutions regarded children primarily as property of their parents and a source of cheap labor. The notion of ‘childhood’ or ‘adolescence’ as a distinct state of life or a social category that afforded political and social rights was nonexistent.” (footnote omitted)).
- 25 Ventrell, *supra* note 22, at 17, 22.
- 26 *Id.* at 22.
- 27 *Id.* at 22-23. For an illustrative history of this movement leading up to the founding of the juvenile court, see Sanford Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 *Stan. L. Rev.* 1187 (1970).

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- 28 Reformatories were the first form of what we now call juvenile detention centers. The first juvenile reformatory was established in New York in 1824. These institutions “offered [their] inmates such employment as will tend to encourage industry, basic education in reading, writing, and arithmetic, and instruction in the nature of their moral and religious obligations.” Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820-1935*, in *A Century of Juvenile Justice*, supra note 5, at 3, 16-17 (citation and internal quotation marks omitted). Interestingly, these reformatories “lumped all disorderly and dependent [meaning children without parents] children together and offered them basically the same treatment.” *Id.* at 7. This is a similar characteristic of the American system today. *Id.*
- 29 Ventrell, supra note 22, at 23.
- 30 See Grossberg, supra note 28, at 17.
- 31 See James Bell & Laura John Ridolfi, *Adoration of the Question: Reflections on the Failure to Reduce Racial & Ethnic Disparities in the Juvenile Justice System 4* (Shadi Rahimi ed., 2008).
- 32 *Id.* Today, many states have overrepresentation of youth of color in the juvenile justice system, a concept known as Disproportionate Minority Contact (DMC). DMC describes the overrepresentation of minority youth in the juvenile justice system relative to the general population and as compared to White youth. Minority populations, or youth of color, include American Indian and Alaskan Native, Asian, Black or African American, Hispanic or Latino, Native Hawaiian or other Pacific Islander, and persons of mixed race or ethnicity. Andrea R. Coleman, *A Disproportionate Minority Contact (DMC) Chronology: 1988 to Date*, Off. Juv. Just. & Delinq. Prevention, [http:// www.ojjdp.gov/dmc/chronology.html](http://www.ojjdp.gov/dmc/chronology.html) (last visited July 22, 2012); see also National Disproportionate Minority Contact Databook, Off. Juv. Just. & Delinq. Prevention, <http://ojjdp.gov/ojstatbb/dmcdmcd/asp/display.asp> (last visited July 16, 2012).
- 33 See Grossberg, supra note 28, at 18 (“Concern about the jurisdiction and services offered by the reformatories led some parents to protest the incarceration of their children.”).
- 34 4 Whart. 9 (Pa. 1839).
- 35 The subject in this case, Mary Ann Crouse, a minor, was committed to the Philadelphia House of Refuge by a justice of the peace warrant. Crouse’s mother executed the warrant because Crouse was “beyond the control” of her mother. *Id.* at 9. Crouse’s father had appealed the case and argued that the law’s commitment of a child without a trial was unconstitutional. *Id.* at 10-11. The court summarily rejected the father’s argument on the basis that the House was not a prison (even though Crouse was not free to leave), and the child was there for her own reformation and not for punishment. *Id.* at 11-12. In essence, the court here both acknowledged and sanctioned the state’s authority to intervene in the family as ultimate parent via the *parens patriae* doctrine.
- 36 This notion is the underlying theory of juvenile court. “The child of the proper age to be under the jurisdiction of the juvenile court is encircled by the arm of the state, which, as a sheltering, wise parent, assumes guardianship and has power to shield the child from the rigors of the common law and from the neglect and depravity of adults.” Elizabeth S. Scott, *The Legal Construction of Childhood*, in *A Century of Juvenile Justice*, supra note 5, at 113, 131 (citation omitted) (quoting Miriam Van Waters, *Youth in Conflict 3* (AMS Press 1926) (1925)) (internal quotation marks omitted).
- 37 See Meda Chesney-Lind & Randall G. Shelden, *Girls, Delinquency, and Juvenile Justice* 161 (3d ed. 2004).
- 38 See Ventrell, supra note 22, at 26-27; see also Scott, supra note 36, at 116 (“[U]nder its historic *parens patriae* authority, the government has the responsibility to look out for the welfare of children and other helpless members of society. Thus, parental authority is subject to government supervision; if parents fail to provide adequate care, the state will intervene to protect children’s welfare.”).
- 39 See Chesney-Lind & Shelden, supra note 37, at 161. *Parens patriae* has its origins in medieval England’s chancery courts. At that point it had more to do with property law than children; it was, essentially, a means for the crown to administer landed orphans’ estates. *Parens patriae* established that the king, in his

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presumed role as the “father” of his country, had the legal authority to take care of “his” people, especially those who were unable, for various reasons (including age), to take care of themselves.

Id. at 160 (citation omitted).

40 See *In re Gault*, 387 U.S. 1, 16 (1967).

41 See, e.g., Michele Benedetto Neitz, A Unique Bench, A Common Code: Evaluating Judicial Ethics in Juvenile Court, 24 Geo. J. Legal Ethics 97, 99 (2011).

42 Id. Moreover, the court was designed to separate youth incarceration facilities and courts from those designed for adults, which is not always the situation today. See Charlyn Bohland, Comment, No Longer A Child: Juvenile Incarceration in America, 39 Cap. U. L. Rev. 193, 194 (2011) (arguing that juvenile justice institutionalization is not fulfilling the mission set forth by the original mission of juvenile justice as demonstrated by illegal practices and procedures within juvenile facilities in several states).

43 Feld, *supra* note 22, at 337.

44 Julian W. Mack, The Juvenile Court, 23 Harv. L. Rev. 104, 120 (1909).

45 See Feld, *supra* note 22, at 337-40.

46 In addition, services for Black children were minimal. See Bell & Ridolfi, *supra* note 28, at 3 (reporting that “the exclusion of Black children from rehabilitation services was rationalized as a waste of resources and a debasement of Whites”).

47 *Miller v. Alabama*, No. 10-9646, slip op. at 8 (U.S. June 25, 2012).

48 No. 10-9646.

49 *Soung*, *supra* note 24, at 435 (quoting Feld, *supra* note 22, at 337); see also Cal. Welf. & Inst. Code Ann. §202(b) (West 2008) (“Minors under the jurisdiction of the juvenile court who are in need of protective services shall receive care, treatment, and guidance consistent with their best interest and the best interest of the public.”).

50 *Soung*, *supra* note 24, at 435.

51 See Emily Buss, The Missed Opportunity in *Gault*, 70 U. Chi. L. Rev. 39, 39 (2003) (arguing that *Gault* contemplates a set of “rights ill-tailored to serve either the aims of the juvenile justice system or the interests of the children who hold those rights”); Rhonda Gay Hartman, *Gault's Legacy: Dignity, Due Process, and Adolescents' Liberty Interests in Living Donation*, 22 Notre Dame J.L. Ethics & Pub. Pol'y 67, 72-73 (2008); *infra* notes 54-57 and accompanying text.

52 383 U.S. 541 (1966).

53 Id. at 553-54.

54 387 U.S. 1 (1967).

55 Id. at 33-34, 41, 55-57.

56 Id.; see Hartman, *supra* note 51, at 83-84.

57 See Buss, *supra* note 51, at 42-43; Ventrell, *supra* note 22, at 28.

58 Alexes Harris, The Social Construction of “Sophisticated Adolescents”: How Judges Integrate Juvenile and Criminal Justice Decision-Making Models, 37 J. Contemp. Ethnography 469, 477 (2008) (finding that judicial decisionmaking in cases where juveniles are waived into adult court involves court members evaluating the structural, value-based, and legal factors associated with the offenders' lifestyle). While the study did not specifically address girls, the evaluation process is useful to

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understand and can be applied at any stage of the process to both girls and boys. Indeed, it may be even more likely that girls' moral character is at play given the nature of status offenses as discussed in note 131, *supra*.

59 See *id.* at 477 (“[C]ourt officers rely on notions of youths' moral character to guide processing decisions. Initially decision makers make a distinction between trouble [sic] and untroubled cases; this categorization helps officials determine whether cases need special handling or could be let go.” (internal quotation marks omitted)).

60 An issue that affects girls and girls of color significantly, which in turn affects normative views of their morality and thus the attitudes of relevant decisionmakers, is prostitution of minors or sex trafficking. Although a discussion thereof is beyond the scope of this analysis, it is worth mentioning given its disproportionate impact on girls of color. See generally Sherman, *supra* note 8; Mike Dottridge & Ann Jordan, *Children, Adolescence and Human Trafficking: Making Sense of a Complex Problem* (Am. Univ. College of Law Ctr. for Human Rights & Humanitarian Law Issue Paper 5, 2012). Alarming, this issue affects young girls in every major city in the United States. Los Angeles County probation office 2010 data identified 174 sexually trafficked youth in the juvenile justice system, of which 92 percent were African American (in a county in which approximately 10 percent of the girls are African American, see American Factfinder, U.S. Census Bureau, <http://factfinder2.census.gov> (last visited July 31, 2012), and came from the most poverty-stricken areas of the county. See Domestic Minor Sex Trafficking Fact Sheet and Data, Saving Innocence, <http://www.savinginnocence.org/about/the-problem-1.html> (last visited July 21, 2012).

61 See Harris, *supra* note 58, at 477-78.

62 Juvenile courts usually involve six stages, several of which may be combined: intake, detention, petition, waiver, adjudication, and disposition (or sentencing). For most youth, initial contact with the juvenile justice system begins with a police officer--usually in their community. For example, in California, when a police officer stops a youth, the officer can let him or her go, issue a ticket with notice to appear, or take him or her into temporary custody. An officer has the right to take youth into temporary custody, without a warrant, whenever the officer has reasonable cause to believe that the youth committed an offense, violated a juvenile court order, or is in need of medical attention. Cal. Welf. & Inst. Code §§625 (West 2008). When a youth is taken into custody, law enforcement may (a) warn and release him or her without citation; (b) bring the youth to a diversion program, shelter, or counseling program; (c) give the youth a “notice to appear”; or (d) bring the youth to a probation officer at a juvenile hall. *Id.* §626(a)-(d). In making the decision regarding where to send the youth after temporary custody, the police officer must prefer the alternative that least restricts the youth's freedom of movement while being compatible with the minor's best interests and the interests of the community. *Id.* §626. Youth can be detained by a law enforcement agency for a maximum of six hours. *Id.* §207.1(d)(1)(B).

63 See Tina L. Freiburger & Alison S. Burke, *Status Offenders in the Juvenile Court: The Effects of Gender, Race, and Ethnicity on the Adjudication Decision*, 9 *Youth Violence & Juv. Just.* 352, 361 (2011); (finding that in juvenile cases, gender matters with respect to ultimate adjudication, and Black and Hispanic girls appear to experience joint effects of racism and sexism: “Black girls will have a harder time exhibiting traditional feminine behaviors that the court views as important....Hispanic girls in the juvenile justice system struggle with such things as discrimination, language barriers, and poverty.” (citations omitted)); see also Moore & Padavic, *supra* note 11.

64 See Case Flow Diagram, Off. Juv. Just. & Delinq. Prevention, [http:// www.ojjdp.gov/ojstatbb/structure_process/case.html](http://www.ojjdp.gov/ojstatbb/structure_process/case.html) (last visited July 21, 2012).

65 See Cal. Welf. & Inst. Code §628(a).

66 See Case Flow Diagram, *supra* note 64.

67 Cal. Welf. & Inst. Code §258(a).

68 District Attorney Guidelines for Juvenile Cases, Los Angeles County (on file with author); see Case Flow Diagram, *supra* note 64.

69 Cal. Welf. & Inst. Code §§631(b), 631.1; Cal. R. Ct. 5.752(b) (2012).

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- 70 District Attorney Guidelines for Juvenile Cases, *supra* note 68.
- 71 See *id.*
- 72 See Case Flow Diagram, *supra* note 64.
- 73 See *id.*
- 74 See generally Learning Rights Law Ctr. & UCLA Sch. of Law, Los Angeles County Juvenile Justice Manual: A Guide to Navigating the Juvenile Justice System (forthcoming 2012) (on file with author) (to be published at <http://www.learningrights.org>) (describing the process in Los Angeles County).
- 75 At disposition, the judge decides on how and where the youth should be punished and rehabilitated. Disposition is the equivalent of sentencing: The court will decide what services and punishment the youth should receive. The type of disposition handed down depends on whether the youth is considered a ward of the court or a non-ward of the court. The judge considers the dispositional report, a social study of the youth written by the Deputy Probation Officer (DPO). See Cal. R. Ct. 5.690(a) (2012). The DPO must include a recommendation for disposition of the youth in the dispositional report, although the judge does not have to do what the DPO recommends. *Id.* The judge should also consider any relevant evidence offered by the youth, his or her parent or guardian, or his or her attorney. *Id.* at R. 5.690(b).
- 76 In California, those deemed wards of the court under section 602 of the California Welfare and Institutions Code can be sent to ranches or camps. The Los Angeles Probation Department runs Camps. Many of these camps are like military boot camps with a lot of structure and strict rules. The camps may require wards to labor on the buildings and grounds thereof, on the making of forest roads for fire prevention or firefighting, on forestation..., or to perform any other work or engage in any studies or activities on or off of the grounds of those ranches, camps, or forestry camps prescribed by the probation department [and] the county board of supervisors.... Cal Welf. & Inst. Code §883 (West 2008).
- 77 Cal. R. Ct. 5.690.
- 78 In California, the judge has several choices in dispositions with the designation of wardship: (1) Send the youth home on probation, Cal. Welf. & Inst. Code §729.2, (2) send the youth home on informal probation, *id.* §727(a), (3) place the youth in foster care, *id.* §§706.5(b), 727(a), (4), send the youth to a juvenile home, *id.* §730(a), or (5) send the youth to the Division of Juvenile Facilities, *id.* §731.
- 79 See Barry C. Feld, Essay, The Transformation of the Juvenile Court, 75 Minn. L. Rev. 691, 695 (1991) (“Juvenile court personnel used informal, discretionary procedures to diagnose the causes of and prescribe the cures for delinquency. By separating children from adults and providing a rehabilitative alternative to punishment, juvenile courts rejected the jurisprudence of criminal law and its procedural safeguards, such as juries and lawyers.”). Most dispositions (or sentences) by juvenile judges are routinized decisions in that they adopt the recommendation of the probation officers. See Margaret K. Rosenheim, The Modern American Juvenile Court, in *A Century of Juvenile Justice*, *supra* note 5, at 341, 349-50 (“Although the typical juvenile court act is sufficiently flexible to accommodate individualized plans of disposition (or ‘treatment’), in fact the workload of the court encourages routinization of decisions....”).
- 80 Cal. Welf. & Inst. Code §725.5 (emphasis added).
- 81 *Id.*
- 82 In a 1996 study of Florida's juvenile justice system, researchers found that system actors indicated that “juvenile justice officials make decisions influenced in part by perceptions (or misperceptions) of youths' family backgrounds and circumstances.” Donna M. Bishop & Charles E. Frazier, Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis, 86 J. Crim. L. & Criminology 392, 409 (1996).

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- 83 This may be for a variety of reasons. For example, institutional actors may not have an interest in investigating and exposing implicit or explicit gender and racial stereotypes among judicial decisionmakers. Also, given the discretionary nature of the court system, it is difficult to isolate specific elements within the wide range of discretionary factors often applied.
- 84 Elizabeth Cauffman et al., *Legal, Individual, and Environmental Predicators of Court Disposition in a Sample of Serious Adolescent Offenders*, 31 *Law & Hum. Behav.* 519 (2007).
- 85 *Id.* at 529-30.
- 86 *Id.* at 523. “Eligible crimes included felony offenses against persons and property, as well as several misdemeanor weapons offenses and sexual assault.” *Id.*
- 87 *Id.* at 531.
- 88 See Bishop & Frazier, *supra* note 82, at 409 (asserting that juvenile justice officials’ perceptions and misperceptions of youths’ family background influence decisionmaking). System actors reported that when youths’ families are perceived as incapable of providing good parental supervision, the youths are more likely to be referred to court and to be placed under state control. *Id.* Further, system actors indicated that “at least in delinquency cases, black family systems generally tend to be perceived in a more negative light.” *Id.* Moreover, girls of color may have physical characteristics rendering them to be perceived as seemingly more mature than White girls. Studies have shown that, on average, African American girls mature physically at a faster rate than White girls and as a result can be perceived as older. Ronald E. Dahl, *Adolescent Brain Development: A Period of Vulnerabilities and Opportunities*, 1021 *Annals N.Y. Acad. Sci.* 1, 12. Since the perception of youth is critical to how they are treated by each actor within the juvenile justice system, particularly a judge, this psychical maturity may factor into a court actor’s decision to treat Black girls more harshly than White girls. See *id.* at 18.
- 89 See Bishop & Frazier, *supra* note 82, at 409.
- 90 It is my opinion that nearly all girls of color who engage with the juvenile justice system do not deserve “punishment” in the traditional sense but rather deserve a restorative justice approach to advocacy, which is beyond the scope of this analysis. See generally T. Bennett Burkemper, Jr., Nina Balsam & May Yeh, *Restorative Justice in Missouri’s Juvenile System*, 63 *J. Mo. B.* 128 (2007) (defining restorative justice as focusing on the harm to the victim, ways to repair that harm with the offender taking responsibility for it, and community support the victim while holding offender accountable for harm and find ways to minimize future harm); see also Monya M. Bunch, *Comment, Juvenile Transfer Proceedings: A Place for Restorative Justice Values*, 47 *How. L.J.* 909 (2003-2004).
- 91 See *supra* notes 62-90 and accompanying text.
- 92 Soung, *supra* note 24, at 436.
- 93 See Maggard et al., *supra* note 11 (manuscript at 3).
- 94 While class is also a critical part of this examination, the studies relied on for this analysis did not consider class. As a result, it is not part of this discussion, although it is an important factor to consider when discussing race and gender. See generally Crenshaw, *supra* note 10 (discussing the importance of exploring intergroup differences in the context of violence against women because women’s experiences are shaped by other dimensions of their identities, such as race and class); Maggard et al., *supra* note 11.
- 95 See, e.g., Leiber et al., *supra* note 11, at 351 (finding that African American girls received lenient outcomes especially at the intake and petition stage but that African American males were likelier to receive more severe outcomes at detention and intake). But see Maggard et al., *supra* note 11 (manuscript at 13-14) (finding that “[r]ace was not a significant predictor of the detention decision” but that females were treated with more leniency compared to males).

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- 96 Tina L. Freiburger & Alison S. Burke, Status Offenders in the Juvenile Court: The Effects of Gender, Race, and Ethnicity on the Adjudication Decision, 9 Youth Violence & Juv. Just. 352, 360-62 (2011).
- 97 Moore & Padavic, *supra* note 11, at 279-80.
- 98 Sarah Jane Brubaker & Kristan C. Fox, Urban African American Girls at Risk: An Exploratory Study of Service Needs and Provision, 8 Youth Violence & Juv. Just. 250, 262 (2010).
- 99 Lori Guevara et al., Gender and Juvenile Justice Decision Making: What Role Does Race Play?, 1 Feminist Criminology 258, 270-76 (2006).
- 100 Rod K. Brunson & Jody Miller, Gender, Race, and Urban Policing: The Experience of African American Youths, 20 Gender & Soc'y 531, 548-49 (2006).
- 101 Aneeta Rattan et al., Race and the Fragility of the Legal Distinction Between Juveniles and Adults, PLoS ONE (May 23, 2012), <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0036680>.
- 102 Gaylene S. Armstrong & Nancy Rodriguez, Effects of Individual and Contextual Characteristics on Preadjudication Detention of Juvenile Delinquents, 22 Just. Q. 521, 532-34 (2005).
- 103 Leiber & Mack, *supra* note 11, at 53-54, 57.
- 104 Thomas J. Gamble et al., Detention Screening: Prospects for Population Management and the Examination of Disproportionality by Race, Age, and Gender, 13 Crim. Just. Pol'y Rev. 380, 389-90, 392-93 (2002).
- 105 George S. Bridges & Sara Steen, Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms, 63 Am. Soc. Rev. 554, 567 (1998).
- 106 Bishop & Frazier, *supra* note 82, at 405-06.
- 107 Brubaker & Fox, *supra* note 98. The authors defined “providers” as men and women from social service agencies that serviced the girls in the area examined. *Id.* at 254.
- 108 Moore & Padavic, *supra* note 11.
- 109 Guevara et al., *supra* note 99.
- 110 Given the demographics of the area studied--Richmond, Virginia--the subject of this study is African American girls. The researchers state clearly that the findings represent the respondents' perception of the “experiences of poor, urban, African American girls, and their caregivers.” Brubaker & Fox, *supra* note 98, at 255.
- 111 *Id.*
- 112 *Id.*
- 113 *Id.* at 262.
- 114 Moore & Padavic, *supra* note 11, at 263.
- 115 *Id.* at 279.
- 116 *Id.* at 280 (emphasis added).
- 117 Guevara et al., *supra* note 99.
- 118 *Id.* at 273.

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- 119 Id.
- 120 Id. at 276 (emphasis added).
- 121 See Meda Chesney-Lind, Patriarchy, Crime, and Justice: Feminist Criminology in an Era of Backlash, 1 Feminist Criminology 6, 10 (2006); see also Moore & Padavic, *supra* note 11, at 265.
- 122 See *supra* Part I; see also Chesney-Lind & Shelden, *supra* note 37, at 189-90 (discussing that police have several options when they make contact with a juvenile, including “warn and release”).
- 123 See Cheryl Hanna, Ganging Up on Girls: Young Women and Their Emerging Violence, 41 Ariz. L. Rev. 93, 101 (1999).
- 124 Moore & Padavic, *supra* note 11, at 261.
- 125 Between 1995 and 2008, the relative increase in the female-petitioned status offense caseload outpaced that of the male caseload for curfew (42 percent versus 22 percent) and liquor law violation cases (60 percent versus 20 percent). Puzzanchera et al., Juvenile Court Statistics 2008, *supra* note 15, at 77. Moreover, females accounted for 59 percent of petitioned runaway cases in 2008, the only status offense category in which females represented a larger proportion of the caseload than males. *Id.* And after age eleven, rates for running away were higher for females than for males in 2008. See Easy Access to the Census of Juveniles in Residential Placement: 1997-2010, Off. Juv. Just. & Delinq. Prevention, [http:// www.ojjdp.gov/ojstatbb/ezacjrp](http://www.ojjdp.gov/ojstatbb/ezacjrp) (last updated Dec. 16, 2011); see also Chesney-Lind & Shelden, *supra* note 37, at 33-40.
- 126 See 28 C.F.R. §31.304(h) (2011) (defining a status offender as “[a] juvenile offender who has been charged with or adjudicated for conduct which would not, under the law of the jurisdiction in which the offense was committed, be a crime if committed by an adult”).
- 127 See Puzzanchera et al., Juvenile Court Statistics 2008, *supra* note 15, at 71-73.
- 128 See Alecia Humphrey, The Criminalization of Survival Attempts: Locking up Female Runaways and Other Status Offenders, 15 Hastings Women’s L.J. 165, 172 (2004).
- 129 See *supra* note 114.
- 130 See Taylor-Thompson, *supra* note 16, at 1144-47. Taylor-Thompson explains that although status offenses were not supposed to lead to delinquency, the U.S. Congress amended the Juvenile Justice and Delinquency Prevention Act in 1980 to “permit state juvenile courts to incarcerate status offenders who violated a valid court order.” *Id.* at 1145 (citing 42 U.S.C. §5633(a) (12)(A) (1994)).
- 131 State ex rel. Harris v. Calendine, 233 S.E.2d 318, 326 (W. Va. 1977).
- 132 Crenshaw, *supra* note 10, at 1241.
- 133 Elizabeth Cauffman et al., Posttraumatic Stress Disorder Among Female Juvenile Offenders, 37 J. Am. Acad. Child & Adolescent Psychiatry 1209, 1212-14 (1998); see also Leslie Acoca, Outside/Inside: The Violation of American Girls at Home, on the Streets, and in the Juvenile Justice System, 44 Crime & Delinq. 561, 562-63 (1998) (reporting that a majority of girl offenders have experienced emotional, physical, or sexual abuse in and outside the juvenile system and recommending programs that appropriately address the needs of these girls).
- 134 Moore & Padavic, *supra* note 11, at 264-65.
- 135 Laurie Schaffner, Girls in Trouble With the Law 129 (2006), cited in Moore & Padavic, *supra* note 11, at 265.
- 136 Moore & Padavic, *supra* note 11, at 265 (quoting Emily Gaarder et al., Criers, Liars, and Manipulators: Probation Officers’ Views of Girls, 21 Just. Q. 547 (2004)) (internal quotation marks omitted).

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- 137 Many other gender-based factors likely also are at play--for example, the actual or perceived maturity of girls compared to same-aged boys or the motherhood status of some girls--however the research in this field has to date been insufficient to provide a more complete picture. See generally Rebecca A. Maynard & Eileen M. Garry, Office of Juvenile Justice and Delinquency Prevention, Fact Sheet #50: Adolescent Motherhood: Implications for the Juvenile Justice System (1997), available at <http://www.ncjrs.gov/pdffiles/fs9750.pdf>.
- 138 Researchers in this study indicated that “minorities” included Blacks and any Hispanics who were coded as Black because of their dark skin color. See Bishop & Frazier, *supra* note 82, at 398 & nn.13-14.
- 139 Moore & Padavic, *supra* note 11, at 266 (citing Bishop & Frazier, *supra* note 82).
- 140 See *id.* at 279-81.
- 141 See *id.* at 266-67.
- 142 For a thoughtful discussion of stereotypes, see generally Jerry Kang & Mahzarin Banaji, Fair Measures: A Behavioral Realist Revision of “Affirmative Action,” 94 Calif. L. Rev. 1063, 1083-85 (2006). See also *id.* at 1084 (“Unconscious stereotypes, rooted in social categorization, are ubiquitous and chronically accessible. They are automatically prompted by the mere presence of a target mapped into a particular social category. Thus, when we see a Black (or a White) person, the attitude and stereotypes associated with that racial category automatically activate. Further, these attitudes and stereotypes influence our judgments, as well as inhibit countertypical associations.” (footnotes omitted)).
- 143 See Robert J. Smith & Justin D. Levinson, The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion, 35 Seattle U. L. Rev. 795, 797 (2012) (“[I]mplicit racial attitudes and stereotypes skew prosecutorial decisions in a range of racially biased ways.”). This implicit bias has also been documented for juveniles: Researchers found that when police and probation were primed with words that related to the category of Black, they judged an adolescent's behavior as more dispositional, of greater culpability, and more likely to lead to recidivism. See Sandra Graham & Brian S. Lowery, Priming Unconscious Racial Stereotypes About Adolescent Offenders, 28 Law & Hum. Behav. 483, 483 (2004). Researchers have also found that officials “consistently portray black youths differently than white youths in their written court reports, more frequently attributing blacks' delinquency to negative attitudinal and personality traits.” Bridges & Steen, *supra* note 105, at 567.
- 144 See, e.g., Dorothy E. Roberts, Unshackling Black Motherhood, 95 Mich. L. Rev. 938, 948 (1997) (“Despite similar rates of substance abuse, however, Black women were ten times more likely than Whites to be reported to government authorities [in the 1990s]. Both public health facilities and private doctors were more inclined to turn in Black women than White women for using drugs while pregnant. Just as important as this structural bias against Black women is the ideological bias against them. Prosecutors and judges are predisposed to punish Black crack addicts because of a popular image promoted by the media during the late 1980s and early 1990s.” (footnotes omitted)).
- 145 Moore & Padavic, *supra* note 11, at 266; see also Jody Miller, An Examination of Disposition Decision-Making for Delinquent Girls, in Race, Gender, and Class in Criminology: The Intersections 219, 239 (Martin D. Schwartz & Dragan Milovanovic eds., 1999) (reporting that a study of 244 Los Angeles County probation reports revealed that there was a more “paternalistic” discursive framework when describing the behavior of White and Hispanic girls and that, in contrast, more punitive constructs described African American girls).
- 146 This anecdote is adapted from a hypothetical in Taylor-Thompson, *supra* note 16, at 1145-46.
- 147 See generally Kang & Lane, *supra* note 13, at 473 (“Implicit biases--by which we mean implicit attitudes and stereotypes--are both pervasive (most individuals show evidence of some biases), and large in magnitude, statistically speaking. In other words, we are not, on average or generally, cognitively colorblind.”); Jerry Kang et al., Implicit Bias in the Courtroom, 59 UCLA L. Rev. 1124 (2012). See, e.g., *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 601 (9th Cir. 2010) (affirming expert opinion that “social science research demonstrates that gender stereotypes are especially likely to influence personnel decisions when they are based on subjective factors, because substantial decisionmaker discretion tends to allow people to seek out and retain stereotyping-confirming [sic] information and ignore or minimize information that defies stereotypes” (internal quotation

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marks omitted)), rev'd sub nom. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). There are, however, limitations to whether courts will actually acknowledge and redress any discrimination that is a result of intersectional identities. See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 Yale L.J. 728, 766 (2011) (“[E]ven if anecdotal and social science evidence reveals the real experience of intersectional discrimination, it will usually be impossible, as a practical matter, for an individual to find his or her negative mirror image to show that discrimination has occurred. As a result,... courts have basically given up on the complex subject.” (footnotes omitted) (quoting Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 Wm. & Mary L. Rev. 1439, 1462 (2009)) (internal quotation marks omitted)).

- 148 See Chesney-Lind & Shelden, *supra* note 37, at 53; Meda Chesney-Lind, *Challenging Girls' Invisibility in Juvenile Court*, 564 *Annals Am. Acad. Pol. & Soc. Sci.* 185 (1999); Shabnam Javdani et al., *Gendered Social Forces: A Review of the Impact of Institutionalized Factors on Women and Girls' Criminal Justice Trajectories*, 17 *Psychol. Pub. Pol'y & L.* 161, 189-90 (2011); Interview With Donna Groman, Judge, Superior Court of L.A. Cnty. (Apr. 2012) (informally discussing how the lack of appropriate placements affects decisionmaking).
- 149 Chesney-Lind & Shelden, *supra* note 37, at 15.
- 150 See, e.g., *id.* at 282-89 (discussing narrowly tailored programming); Barbara Bloom et al., *Improving Juvenile Justice for Females: A Statewide Assessment in California*, 48 *Crime & Delinq.* 526, 526 (2002) (“Effective programming for girls and women should be shaped by and tailored to their real-world situations and problems.”); Sherman, *supra* note 8, at 1592-1595; Taylor-Thompson, *supra* note 16, at 1162-64.
- 151 There are apparently no reports that have documented the effective study of educating system actors, which further speaks to its need.
- 152 For a thoughtful discussion of effectively tailored remedies for delinquent youth of color, see Brent Pattison, *Minority Youth in Juvenile Correctional Facilities: Cultural Differences and the Right to Treatment*, 16 *Law & Ineq.* 573 (1998) (arguing for culturally appropriate treatment for minority youth given historical context and providing model legislation for implantation). Pattison defines “culturally appropriate” as “treatment adapted to the unique needs of minority adolescents.” *Id.* at 577. While Pattison does not provide gender-specific remedies, his analysis makes a compelling argument for the right to culturally tailored programming. *Id.*
- 153 The OJJDP was founded in 1974 as a result of the Juvenile Justice and Delinquency Prevention (JJDP) Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended at 42 U.S.C. §§5601-5784 (2006)), and is guided by subsequent amendments. Its mission is to provide “national leadership, coordination, and resources to prevent and respond to juvenile delinquency and victimization. OJJDP supports states and communities in their efforts to develop and implement effective and coordinated prevention and intervention programs and to improve the juvenile justice system. About OJJDP, Off. Juv. Just. & Delinq. Prevention, <http://www.ojjdp.gov/about/about.html> (last visited July 22, 2012).
- 154 See Girls Study Group, <http://girlsstudygroup.rti.org> (last visited July 22, 2012).
- 155 About the Girls Study Group, Girls Study Group, [http:// girlsstudygroup.rti.org/index.cfm?fuseaction=dsp_study](http://girlsstudygroup.rti.org/index.cfm?fuseaction=dsp_study) (last visited July 31, 2012).
- 156 *Id.*
- 157 See Margaret A. Zahn et al., Office of Juvenile Justice & Delinquency Prevention, NCJ 223434, *The Girls Study Group--Charting the Way to Delinquency Prevention for Girls 2* (2008), available at [https:// www.ncjrs.gov/pdffiles1/ojjdp/223434.pdf](https://www.ncjrs.gov/pdffiles1/ojjdp/223434.pdf) (reviewing results from the six studies that compose the Girls Study Group, which comprises the following sections: introduction, violence by teenage girls--trends and context, causes and correlates of girls' delinquency, about the Girls Study Group, resilient girl--factors that protect against delinquency, suitability of assessment instruments for delinquent girls, girls' delinquency programs--an evidence-based review, development sequences of girls' delinquent behavior, and discussion).
- 158 Zahn et al., *supra* note 7, at 12 (emphasis added).

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- 159 In a qualitative study involving eleven Black girls, researchers relied on an ethnic-modeling approach in which culturally relevant factors (for example, race) were considered throughout the process and found that “many of them felt let down by the very institutions that were designed to protect them, such as schools and the police.” Aelace O. Pugh-Lilly et al., *In Protection of Ourselves: Black Girls' Perceptions of Self-Reported Delinquent Behavior*, 25 *Psychol. Women Q.* 145, 152 (2001).
- 160 *Id.* at 150.
- 161 *Id.* at 153.
- 162 See generally Signithia Fordham, “Those Loud Black Girls”: (Black) Women, Silence, and Gender “Passing” in the Academy, 24 *Anthropology & Educ. Q.* 3 (1993).
- 163 See *id.* at 17 (discussing the anecdote of how a particular Black girl breached the cultural assumptions valued in the school context by talking back to a teacher which often lead her teachers to erase their perception of her as a bright, intelligent person).
- 164 See Pamela J. Smith, *Looking Beyond Traditional Educational Paradigms: When Old Victims Become New Victimiziers*, 23 *Hamline L. Rev.* 101, 158 (1999) (citing data that 22.6 percent of Black females have had their parents notified more than once for their behavior compared to only 10.7 percent of White females).
- 165 See *id.* at 159 (presenting statistics from the U.S. Department of Education that placed Black females second only to Black males in order of highest percentage of eighth graders who had been suspended); *id.* at 160 (reporting that Black girls represent 8.31 percent of the overall student population yet almost 11 percent of all students suspended).
- 166 Moreover, with respect to understanding puberty, an intersectional analysis is again helpful here because, as discussed earlier, Black girls have been found to achieve puberty at a younger age than White girls. See *supra* note 88.
- 167 Berkeley Ctr. for Criminal Justice, *supra* note 1, at 9-11.
- 168 *Id.* at 9.
- 169 See generally Dignity in Schs., <http://www.dignityinschools.org> (last visited July 22, 2012) (raising awareness about and challenging notions of pushing children out from schools and advocating for the human right of every child to be treated with dignity and to have a quality education).
- 170 Daniel J. Losen, Civil Rights Project at UCLA, *Discipline Policies, Successful Schools, and Racial Justice* (2011).
- 171 See, e.g., Mission and History, Youth Just. Coalition, [http:// www.youth4justice.org/about-the-yjc/history](http://www.youth4justice.org/about-the-yjc/history) (last visited July 31, 2012) (“The Youth Justice Coalition (YJC) is working to build a youth-led movement to challenge race, gender, and class inequality in the Los Angeles County juvenile injustice system.”).
- 172 See Brandon C. Welsh, *Public Health and the Prevention of Juvenile Criminal Violence*, 3 *Youth Violence & Juv. Just.* 23 (2005) (reviewing the role that public health currently plays in preventing juvenile criminal violence and exploring how the law-and-order approach--the dominant response to juvenile criminal violence--can benefit from the involvement of the health community).
- 173 See Taylor-Thompson, *supra* note 16, at 1159-62.
- 174 Orange County, California has established a Girls Court:
Girls Court is a program for girls from 12 to 17 years of age who are in the dependency system, many of whom are living in foster care group homes. The goal of the program is to help the young participants facing mental health issues, substance abuse and academic failure to receive treatment and counseling, and to gain the skills and resources they need to achieve stable, productive lives....It features a dedicated judicial officer and a team that includes representatives from the Court, the Health Care Agency, the Social Services Agency, the Probation Department, and the Orange County Department of Education.

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Collaborative Courts, Orange County Superior Ct., [http:// www.occourts.org/directory/collaborative-courts](http://www.occourts.org/directory/collaborative-courts) (last visited July 22, 2012).

- 175 See Emily Buss, *Failing Juvenile Courts, and What Lawyers and Judges Can Do About It*, 6 Nw. J.L. & Soc. Pol'y 318, 331 (2011) (calling for judges and lawyers to reform the juvenile court hearing process by “bringing the young person to the center of the hearing,” giving him or her experience in decisionmaking skills, and making him or her feel like part of the legal system).
- 176 See generally Alecia Humphrey, *The Criminalization of Survival Attempts: Locking Up Female Runaways and Other Status Offenders*, 15 Hastings Women's L.J. 165 (2004) (arguing that girls are at a disadvantage because a majority of their encounters with the juvenile justice system are through minor status offenses like running away and suggesting gender-specific programs that minimize the effects of victimization that could be caused by sexual and physical abuse, the strongest indicators of girls' juvenile delinquency).
- 177 See Marsha L. Levick & Francine T. Sherman, *When Individual Differences Demand Equal Treatment: An Equal Rights Approach to the Special Needs of Girls in the Juvenile Justice System*, 18 Wis. Women's L.J. 9, 11 (2003) (discussing how the legal strategies brought under the Equal Protection Clause, state equal rights amendments and Title IX of the Education Amendments of 1972, 20 U.S.C. §1681(a) (2006), can be adopted to help girls in the juvenile system receive gender-specific programming).
- 178 See Meda Chesney-Lind & Francine Sherman, *Op-Ed, Gender Matters in Juvenile Justice*, N.Y.L.J., Dec. 7, 2010, at 6 (arguing that incarceration rates of girls are on the rise, particularly for African American girls, and recommending “data-driven decision-making” because it is “fairer to both girls and boys by reducing individual bias in decision-making and promoting clear-headed identification of a youth's needs and strengths”).
- 179 Among those that do consider the racial component of juvenile justice are Maggard et al., *supra* note 11, and Moore and Padavic, *supra* note 11.
- 180 See Laura Gómez, *Looking for Race in All the Wrong Places*, 46 Law & Soc'y Rev. 221, 237 (2012) (suggesting that social science and legal studies can benefit from “comparative research on race,” which includes “comparisons across racial groups, comparisons exploring heterogeneity within a racial group, and cross-national comparisons”).

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Girlhood Interrupted:

The Erasure of Black
Girls' Childhood

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Acknowledgements

This report was made possible by the generous support of the Open Society Foundations, the NoVo Foundation, and the Annie E. Casey Foundation. Views expressed in this report are the authors' alone, and do not necessarily reflect the opinions of these foundations.

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The **Georgetown Law Center on Poverty and Inequality**, which published this report, works with policymakers, researchers, practitioners, and advocates to develop effective policies and practices that alleviate poverty and inequality in the United States. The Center's areas of anti-poverty work include national, state, and local policy and program recommendations that help marginalized girls, promote effective workforce and education policies and programs for disconnected youth, and develop policy to combat deep poverty. Our strategies are to partner with agencies and non-profit organizations to host national conferences, produce and widely disseminate in-depth reports, engage in public speaking, and participate in national coalitions and working groups.

The authors extend their deep thanks to those who offered their expertise reviewing drafts of this report: **Peter Edelman**, **Anne Gregory**, **Daniel J. Losen**, and **Monique W. Morris**. We are also grateful for the assistance of the Center on Poverty's Assistant, **Becca Shopiro**; the Center's Research Assistants, **Greg Carter** and **Rachel Smith**; and Professor Blake's Research Assistants, **Asha Unni** and **Yan Wang**.



Executive Summary

This groundbreaking study by the Georgetown Law Center on Poverty and Inequality provides—for the first time—data showing that adults view Black girls as *less innocent and more adult-like than their white peers, especially in the age range of 5–14.*

The report builds on similar results that have emerged from studies of adult perceptions of Black boys. In 2014, for example, research by Professor Phillip Goff and colleagues revealed that beginning at the age of 10, Black boys are more likely than their white peers to be misperceived as older, viewed as guilty of suspected crimes, and face police violence if accused of a crime.¹

SNAPSHOT OF THE DATA

Compared to white girls of the same age, survey participants perceive that

- Black girls need **less nurturing**
- Black girls need **less protection**
- Black girls need **to be supported less**
- Black girls need **to be comforted less**
- Black girls are **more independent**
- Black girls **know more about adult topics**
- Black girls **know more about sex**

These results are profound, with far-reaching implications. Our findings reveal a potential contributing factor to the disproportionate rates of punitive treatment in the education and juvenile justice systems for Black girls.

IN THE EDUCATION SYSTEM

In light of proven disparities in school discipline, we suggest that the perception of Black girls as less innocent may contribute to *harsher punishment* by educators and school resource officers. Furthermore, the view that Black girls need less nurturing, protection, and support and are more independent may translate into *fewer leadership and mentorship opportunities* in schools.

IN THE JUVENILE JUSTICE SYSTEM

Given established discrepancies in law enforcement and juvenile court practices that disproportionately affect Black girls, the perception of Black girls as less innocent and more adult-like may contribute to *more punitive exercise of discretion* by those in positions of authority, *greater use of force, and harsher penalties.*

Call to Action

This report represents a key step in addressing the disparate treatment of Black girls in public systems. We challenge researchers to develop new studies to investigate the degree and prevalence of the adultification of Black girls—a term used in this report to refer to the perception of Black girls as less innocent and more adult-like than white girls of the same age—as well as its possible causal connection with negative outcomes across a diverse range of public systems, including education, juvenile justice, and child welfare. Further, we urge legislators, advocates, and policymakers to examine the disparities that exist for Black girls in the education and juvenile justice systems and engage in necessary reform. Lastly, we recommend providing individuals who have authority over children—including teachers and law enforcement officials—with training on adultification to address and counteract this manifestation of implicit bias against Black girls. Above all, further efforts must ensure that the voices of Black girls themselves remain front and center to the work.

Introduction.

The Construct of Childhood and the Consequences of Culpability

Children occupy a unique position in our public systems. Once treated as miniature adults, our perception of young people's innocence and ongoing development has led, over time, to granting children leniency when determining the consequences of their behavior.² The special legal status bestowed on youth, in particular, is based on a well-established understanding of children's social and psychological development—that they should be held less responsible and culpable for their actions, and that they are capable, through the ongoing developmental process, of rehabilitation.³ These foundational legal and moral principles protect children from criminalization and extend safeguards that shield them from the harsh penalties levied on adults.⁴

The United States Supreme Court has relied on these principles to establish that children are less culpable than adults.⁵ A seminal opinion, *Roper v. Simmons*, held that the Eighth Amendment's ban on cruel and unusual punishment prohibits the imposition of the death penalty in juvenile cases.⁶ In reaching this holding, the Court highlighted three key characteristics of youth that differentiate children from adults: their lack of maturity, which contributes to making impetuous decisions; their greater susceptibility to negative influences from peers or other outside factors; and their still-developing character and personality.⁷ Subsequent opinions further strengthened the Court's recognition of distinctions between children and adults.⁸ In *Miller v. Alabama*, the Court specifically noted that "[j]uveniles have diminished culpability and greater prospects for reform."⁹

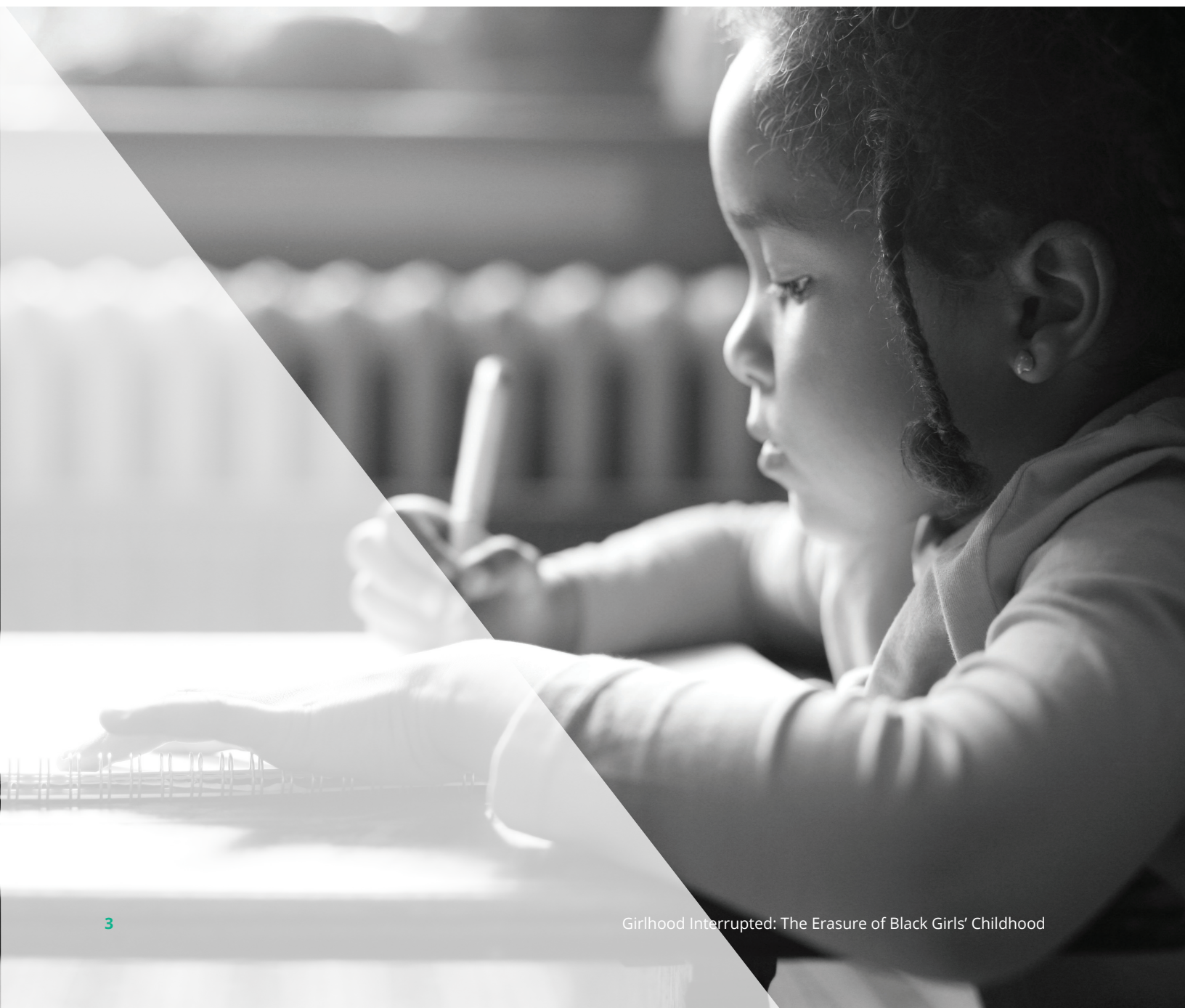
Despite widespread recognition of children's unique attributes and legal status, any single exercise of leniency is necessarily predicated on an initial recognition that the particular child who stands before the court is, in fact, a child—and this recognition is more nuanced than it might seem. The notion of childhood is a social construct—one that is informed by race, among other factors.¹⁰ Research has shown that Black boys, in particular, are often perceived as less innocent and more adult than their white male peers and, as a result, they are more likely to be assigned greater culpability for their actions, which increases their risk of contact with the juvenile justice system.¹¹ This report refers to this phenomenon, which effectively reduces or removes the consideration of childhood as a mediating factor in Black youths' behavior, as "adultification".¹²

To date, limited quantitative research has assessed the existence of adultification for Black girls—that is, the extent to which race and gender, taken together, influence our perception of Black girls as less innocent and more adult-like than their white peers.¹³ However, preliminary hypotheses based on research and guided by ethnographic and historical studies support this theory.¹⁴

Given the dearth of existing research and the significance of adultification to understanding the experience of Black girls, the Center on Poverty and Inequality and Professor Jamilia J. Blake of Texas A&M University conducted a precedent-setting study to measure this phenomenon. This groundbreaking study provides data for the first time revealing that adults surveyed view Black girls as less innocent and more adult-like than white girls of the same age, especially between 5–14 years old.

This report and its underlying findings represent a key step in addressing the disparate treatment of Black girls in public systems. The report first introduces the concept of adultification as it has been applied to Black children. It then presents the results of our research assessing whether Black girls are viewed as more adult and less innocent than their white peers. Finally, it discusses the implications of these results for Black girls in two major public systems: education and juvenile justice.

While the scope of our research is limited, the potential implications are profound. Further exploration of the implicit bias manifested in adultification could lead legislators, advocates, and policymakers to engage in reform to counteract negative outcomes for Black girls. We challenge researchers to develop new studies to investigate the degree and prevalence of adultification of Black girls, as well as its causal connections to harmful outcomes for girls across a diverse range of public systems, including the education, juvenile justice, and child welfare systems. In any such work, the voices of Black girls themselves should remain at the center.



The Theory of Adultification of Black Children

In tracing the legal history of differential treatment of children based on race, Professor Priscilla Ocen has written: “[A]s the notion of the innocent, developmental child emerged, white children began to enjoy greater [legal] protections[,] while Black children’s position remained relatively unchanged.”¹⁵ This result is rooted in the legacy of racial discrimination in this country, which historically included responding to Black youths’ child-like behavior more punitively.¹⁶ According to Professors Michael J. Dumas and Joseph Derrick Nelson:

Beginning in slavery, Black boys and girls were imagined as chattel and were often put to work as young as two and three years old. Subjected to much of the same dehumanization suffered by Black adults, Black children were rarely perceived as being worthy of playtime and were severely punished for exhibiting normal child-like behaviors.¹⁷

Recent research reveals that differential treatment of Black male youth based on race continues today.¹⁸ Most notably, in 2014, Professor Philip Goff and colleagues published an experimental study demonstrating that from the age of 10, Black boys are perceived as older and more likely to be guilty than their white peers, and that police violence against them is more justified.¹⁹ Even seasoned police officers sampled in the study consistently overestimated the age of Black adolescent felony suspects by approximately 4.5 years.²⁰ In addition, these officers assigned greater culpability to Black male felony suspects than to white felony suspects—whom they estimated as *younger* than their actual age.²¹ In essence, consistent with other studies, Goff’s study found that Black boys are afforded the privilege of innocence to a far lesser extent than their white counterparts.²²

Adultification Can Take Two Essential Forms:

1.

A process of socialization, in which children function at a more mature developmental stage because of situational context and necessity, especially in low-resource community environments;²³ and

2.

A social or cultural stereotype that is based on how adults perceive children “in the absence of knowledge of children’s behavior and verbalizations.”²⁴ This latter form of adultification, which is based in part on race,²⁵ is the subject of this report.

Scholars have observed that Black girls, too, are subject to adultification. Noting that our society “regularly respond[s] to Black girls as if they are fully developed adults,” Dr. Monique W. Morris has observed:

The assignment of more adult-like characteristics to the expressions of young Black girls is a form of age compression. Along this truncated age continuum, Black girls are likened more to adults than to children and are treated as if they are willfully engaging in behaviors typically expected of Black women This compression ... [has] stripped Black girls of their childhood freedoms [and] ... renders Black girlhood interchangeable with Black womanhood.³⁰

These perceptions are consistent with viewing Black girls as older than their age. In the words of one teacher captured in a recent study by Professor Edward W. Morris, “[T]hey think they are adults too, and they try to act like they should have control sometimes.”³¹ Such comments demonstrate that stereotypes of Black girls, interpreted as “loud,” are imbued with adult-like aspirations, and perceived, in turn, as a threat. The same study recorded teachers’ describing Black girls as exhibiting “very ‘mature’ behavior ... socially (but not academically) sophisticated³² and ‘controlling at a young age.’”³³ This interpretation of Black girls’ outspokenness may be associated with the stereotype of Black women as aggressive and dominating.³⁴ Differences in physical development based on the onset of puberty may also play a role in adultification, in light of evidence that “on average, African American girls mature physically at a faster rate than [w]hite girls and as a result can be perceived as older.”³⁵

Another important aspect of adultification for Black girls lies in culturally rooted fantasies of Black girls’ sexualization.³⁶ The commonly held stereotype of Black girls as hypersexualized is defined by “society’s attribution of sex as part of the ‘natural’ role of Black women and girls.”³⁷ Noting the long history of perceiving Black women as hypersexualized, Monique W. Morris has observed that adultification results in applying these stereotypes to Black girls:

Caricatures of Black femininity are often deposited into distinct chambers of our public consciousness, narrowly defining Black female identity and movement according to the stereotypes described by Pauli Murray as “‘female dominance’ on the one hand and loose morals on the other hand, both growing out of the roles forced upon them during the slavery experience and its aftermath.” As such, in the public’s collective consciousness, latent ideas about Black females as hypersexual, conniving, loud, and sassy predominate However, age compression renders Black *girls* just as vulnerable to these aspersive representations.³⁸

Three dominant paradigms of Black femininity that originated in the South during the period of slavery have persisted into present-day culture, which “paint Black females as hypersexual, boisterous, aggressive, and unscrupulous”²⁶:

- **Sapphire** (e.g., emasculating, loud, aggressive, angry, stubborn, and unfeminine);
- **Jezebel** (e.g., hypersexualized, seductive and exploiter of men’s weaknesses); and
- **Mammy** (e.g., self-sacrificing, nurturing, loving, asexual).

These images and historical stereotypes of Black women have real-life consequences for Black girls today. According to Blake and colleagues, “these stereotypes underlie the implicit bias that shapes many [adult’s] view of Black females [as] ... sexually promiscuous, hedonistic, and in need of socialization.”²⁷ For example, “teachers may subconsciously use stereotypical images of Black females ... to interpret Black girls’ behaviors and respond more harshly to Black girls who display behaviors that do not align with traditional standards of femininity in which girls are expected to be docile, diffident, and selfless.”²⁸ Such “tainted perceptions ... result in patterns of discipline intended to re-form the femininity of African-American girls into something more ‘acceptable.’”²⁹

The consequences of educators’ tendencies to associate Black girls’ behavior with stereotypes of adult Black women can be far-reaching. For example, Edward Morris observed that Black female students “appeared less restrained by the ... view of femininity as docile and compliant, and

less expectant of male protection than [w]hite girls in other educational research.”³⁹ Morris found that teachers trained their focus on condemning such comportment at the expense of guiding their academic progress—effectively disciplining Black girls for perceived loud and un-ladylike behavior that challenged their authority.⁴⁰ Others have similarly observed that Black girls are under greater surveillance of their decorum than their white peers.⁴¹

Perhaps most concretely, researchers suggest that the phenomenon of adultification may contribute to increasingly disproportionate rates of school discipline for Black girls.⁴² This theme is explored in detail in this report.

“The dominant discourses that frame Black girls as less innocent and feminine than all other girls likely influence these [disproportionate] exclusionary discipline outcomes.”⁴³

The adultification of Black girls in school can be viewed as a reflection of similar inequities in other public systems. As Edward Morris has noted, “[S]chools not only serve as sites for the construction of race, class, and gender identities[;] they also reproduce existing inequalities in these areas [S]chools solidify, or even exaggerate, the inequalities children bring with them to school.”⁴⁴ One example is the differential treatment of Black girls in the juvenile justice system. Ocen argues that the legacy of gender and race discrimination has been layered onto Black girls to contribute to higher rates of criminalization: “[H]istories of racial and gender subordination, including slavery and Jim Crow, have interacted with the category of childhood to create a liminal category of childhood that renders Black girls vulnerable to ... criminalization.”⁴⁵ Indeed, Goff’s study showed just this result for Black boys: officers not only perceived Black boys as older, but also assigned them greater culpability for suspected felony

crimes.⁴⁶ The potential effects of adultification in the juvenile justice system for Black girls are explored in more detail below.

Adultification Can Be Straightforward

In addition to being perceived as more adult-like, Black girls are also often mistakenly perceived to be biologically older than they are. Recently, for example, a 15-year-old Black girl in New York was arrested by police for using a student Metrocard that is valid only for youth younger than 19. The officers did not believe the girl’s claim that she was 15 years old, nor the affirmations of her age that they obtained from each of her parents when reached by phone. Police held the girl in handcuffs until the girl’s mother brought her birth certificate to the police station. The girl was treated at a hospital for the damage the handcuffs inflicted on her wrists.⁴⁷ The role of stereotypes in mistaken calculations of biological age for Black girls is a phenomenon that merits further research.

Ultimately, adultification is a form of dehumanization, robbing Black children of the very essence of what makes childhood distinct from all other developmental periods: innocence. Adultification contributes to a false narrative that Black youths’ transgressions are intentional and malicious, instead of the result of immature decision-making—a key characteristic of childhood. In essence, “the adultification stereotype results in some [Black] children not being afforded the opportunity”⁴⁸ to make mistakes and to learn, grow, and benefit from correction for youthful missteps to the same degree as white children. Our study shows that Black girls experience this stereotype directly.

Our Study: Adults' Perceptions of Black Girlhood

METHODOLOGY

Our study sought to determine whether adults assign Black girls qualities that render them more like adults—and less innocent—than their white peers. To do so, we adapted a scale assessing childhood innocence that was originally developed by Goff and colleagues. Our scale was comprised of items associated with adultification and stereotypes about Black women and girls.⁴⁹ Similar to Goff's study, we divided the period of childhood and adolescence into four age brackets: 0–4; 5–9; 10–14; and 15–19 years old.

We surveyed 325 adults from various racial and ethnic backgrounds and different educational levels across the United States who were recruited through an online service in order to obtain a community sample of typical adults.⁵⁰ Participants were predominantly white (74 percent)⁵¹ and female (62 percent). Thirty-nine percent were 25–34 years old. Information regarding respondents' occupations was not assessed, but sixty-nine percent held a degree beyond a high school diploma.

Participants completed a nine-item questionnaire. Respondents were not informed of the survey's purpose, but instead were asked only to complete a questionnaire about their beliefs about children's development in the 21st century. Each participant was randomly assigned either to a questionnaire that asked about the respondent's perception of Black girls, or to a questionnaire that asked the same questions about the respondent's perception of white girls. This allowed us to obtain an independent evaluation of respondents' views of Black and white girls irrespective of girls of other ethnic/racial groups. The questionnaires asked participants to respond to inquiries for each age bracket, including the following:

How often do Black [or white] females take on adult responsibilities?

How much do Black [or white] females seem older than their age?

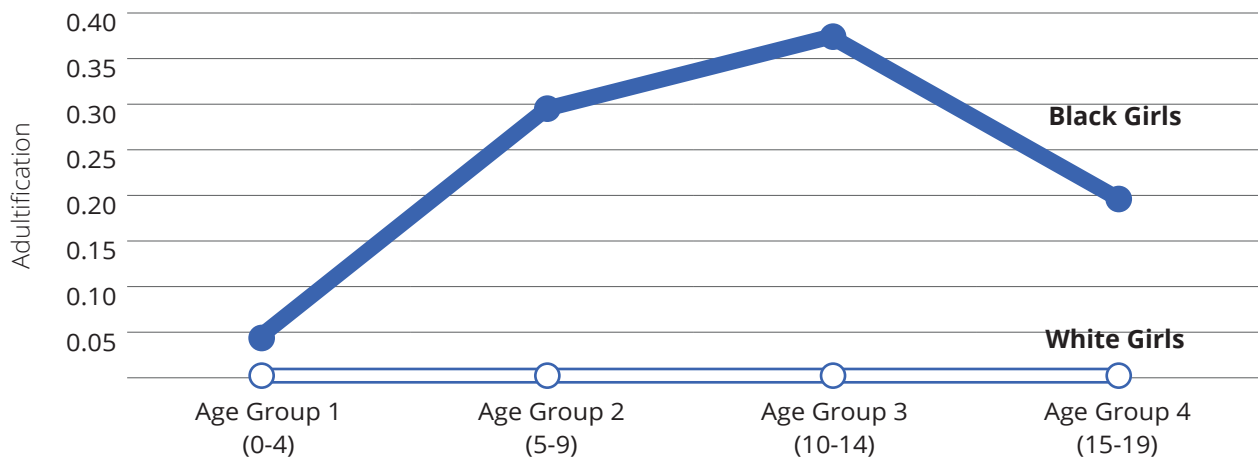
How much do Black [or white] females need to be supported?

How much do Black [or white] females need to be comforted?

How independent are Black [or white] females?

How knowledgeable are Black [or white] females about sex?

For each item, respondents used the following 5-point response scale: (1) not at all; (2) a little; (3) undecided; (4) somewhat; and (5) a great deal. We compared the ratings by respondents who completed the questionnaire for Black girls to those by respondents who completed questionnaire for white girls using measurement invariance analyses. This advanced statistical technique allowed us to examine whether differences existed in adults' perceptions of Black and white females at differing age groups and provided a test of mean differences in the latent construct of adultification between Black and white girls. Latent mean comparisons better account for measurement error across groups that might bias or undermine results, which could contribute to misinterpretation of the findings.⁵² This approach strengthens the basis of our findings of adultification ratings.



Note: Adultification scores presented in the figure represent latent mean scores. White females serve as the reference group (i.e., the control group), and as such their adultification score is fixed at zero. The magnitude of the latent mean scores for each group shown is not based on the response scale as it represents a latent composite of all the items. Thus, the magnitude of these scores cannot be interpreted literally (e.g., as a percentage). Higher latent scores of adultification presented on the y-axis in the figure reflect respondents' greater perceptions of adultification for that group.

RESULTS

Across all age ranges, participants viewed Black girls collectively as more adult than white girls. Responses revealed, in particular, that participants perceived Black girls as needing less protection and nurturing than white girls, and that Black girls were perceived to know more about adult topics and are more knowledgeable about sex than their white peers. The most significant differences were found in the age brackets that encompass mid-childhood and early adolescence—ages 5–9 and 10–14—and continued to a lesser degree in the 15- to 19-year-old age bracket. No statistically significant differences were found in the age group 0–4.

That is, beginning as early as 5 years of age, *Black girls were more likely to be viewed as behaving and seeming older than their stated age; more knowledgeable about adult topics, including sex; and more likely to take on adult roles and responsibilities than what would have been expected for their age.*

SIGNIFICANCE

These results suggest that Black girls are viewed as more adult than their white peers *at almost all stages of childhood*, beginning most significantly at the age of 5, peaking during the ages of 10 to 14, and continuing during the ages of 15 to 19. In essence, adults appear to place distinct views and expectations on Black girls that characterize them as developmentally older than their white peers, especially in mid-childhood and early adolescence—critical periods for healthy identity development.

The significance of this result lies in the potential for adultification to act as a contributing cause of the demonstrated harsher treatment of Black girls when compared to white girls of the same age. Simply put, if authorities in public systems view Black girls as less innocent, less needing of protection, and generally more like adults, it appears likely that they would also view Black girls as more culpable for their actions and, on that basis, punish them more harshly despite their status as children. Thus, adultification may serve as a contributing cause of the disproportionality in school discipline outcomes, harsher treatment by law enforcement, and the differentiated exercise of discretion by officials across the spectrum of the juvenile justice system.

Potential Implications of Our Findings

Although the precise nature of the causal connection between adultification and punishment/criminalization lies beyond the scope of this report, this section outlines potential implications of our findings in two public systems: education and juvenile justice. Future research is needed to delve deeper into these and other consequences of adultification.

ADULTIFICATION'S POTENTIAL ROLE IN SCHOOL DISPARITIES FOR BLACK GIRLS

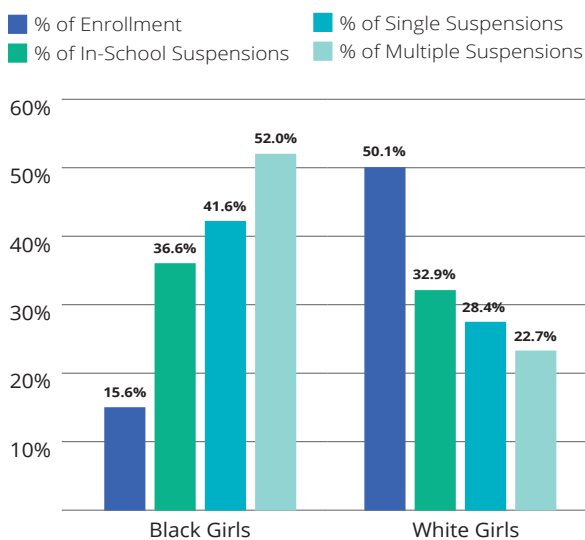
DISCIPLINE

The disproportionate rates of school discipline for Black girls are well established.⁵³ Significant to the results of our study, Black girls are more likely to

“experience exclusionary discipline outcomes for subjective reasons, such as disobedience/defiance, detrimental behavior, and third-degree assault, all of which depend on the subjective judgment of school personnel.”⁵⁴ Some research indicates that Black girls may also be punished more harshly than their peers for the same behaviors when referred to the disciplinary office.⁵⁵ These subjective determinations can turn on school authorities’ adultification of Black girls.

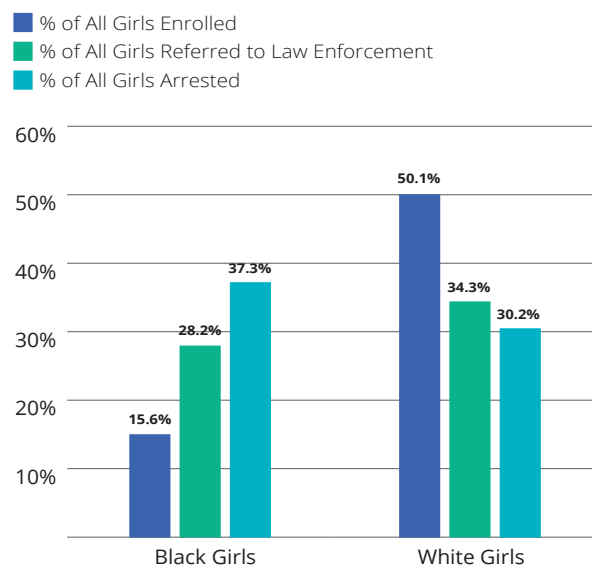
The consequences for such punishment are profound: researchers have determined that students are more likely to be arrested on days they are suspended from school, and that suspensions are connected to higher dropout rates and increased risk of contact with the juvenile justice system.⁵⁶

Rates of Suspensions for Girls in K-12 in the 2013-2014 School Year by Race



Source: NAT'L WOMEN'S LAW CTR., STOPPING SCHOOL PUSHOUT FOR GIRLS OF COLOR 15 fig.6 (2017).

Percentage of Girls Referred to Law Enforcement or Arrested at School in the 2013-14 School Year by Race



Source: NAT'L WOMEN'S LAW CTR., STOPPING SCHOOL PUSHOUT FOR GIRLS OF COLOR 13 fig.5 (2017).

Black Girls Are More Likely to Be Disciplined for Subjective Infractions*

For Minor Violations

(Dress code violations, Inappropriate Cell Phone Use, Loitering)



For Disobedience



For Disruptive Behavior



For Fighting



For Bullying/Harassment



* Note: This study was conducted in one school district in Kentucky

Source: Edward W. Morris & Brea L. Perry, *Girls Behaving Badly? Race, Gender, & Subjective Evaluation in the Discipline of Af. Am. Girls*, 90 *SOCIOLOGY OF EDUC.* 127 (2017).

Suspension Risk for Black Girls Across Developmental Periods (2013-2014)

Black Girls in K-12 Schools:

8%
OF ENROLLMENT

13%
OF STUDENTS
SUSPENDED*

* One or more out-of-school suspensions

Source: OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., CIVIL RIGHTS DATA COLLECTION: A FIRST LOOK: KEY DATA HIGHLIGHTS ON EQUITY & OPPORTUNITY GAPS IN OUR NATION'S PUBLIC SCHOOLS (2016).

“Exploring disciplinary discrepancies for Black girls, including in relation to white girls, is critical. “When studies have explored the discipline experiences of Black females[,] research has mainly focused on Black girls’ discipline sanctions in relation to Black boys, with Black girls rarely mentioned outside of descriptive statistics.”⁵⁷

Few scholars have thoroughly investigated *why* Black girls are subjected to this differential treatment. However, our findings on the adultification of Black girls may shed new light on a potential cause of these trends. Similar to Goff and colleagues’ finding that adults’ perception of Black boys as older is intertwined with holding them more culpable for their actions, educators and school-based police officers, among others, may also be more likely to view Black girls as older and less innocent. In other words, adultification may result in disciplinary decision-makers’ viewing Black girls’ behavior as “more [intentionally] harmful than [similar behavior exhibited by] other girls”.⁵⁸

“Black girls possess varied experiences and skills, all of which need to be viewed as strengths. In other words, there are a multitude of ways of being a Black girl, and no one set of behaviors should be expected or demanded from them to be given equal access to educational opportunity.”⁵⁹

Leadership and Mentorship Opportunities

The consequences of adultification in school may not necessarily be limited to discipline. For example, some scholars have argued that teachers’ perceptions of students as adult-like may interfere with providing leadership development opportunities. As revealed in a study in a public middle school, in which students overlap with the age ranges in our study that demonstrated the most significant rates of adultification: “the adultification of Black girls can lead to a perception of them as aggressively feminine, which can justify restriction of their inquisitiveness and assertiveness in classrooms.”⁶⁰ Adultification may also affect mentorship opportunities. A recent report published by the African American Policy Forum and the Center for Intersectionality and Policy Studies noted: “Black girls sometimes get less attention than their male counterparts early in their school careers and ... are perceived to be more socially mature and self-reliant. The lack of attention can become the touchstone of benign neglect that may diminish school attachment in high-achieving female students.”⁶¹ A related vignette in *Push-out: The Criminalization of Black Girls in Schools* describing a teacher’s response to a Black girl’s question appears to illustrate this phenomenon: “You already know that; you are just asking to get attention.”⁶² The perception that Black girls do not merit nurturing or that their leadership qualities should be restricted could be associated with our finding that adults believe that Black girls do not need protection or nurturing and could affect opportunities for success.

JUVENILE JUSTICE SYSTEM

As stated above, the differential treatment of Black girls in public systems extends beyond the classroom and into the juvenile justice system. Broad discretion is granted to decision-makers across the juvenile justice system, including police officers, probation officers, defense attorneys,⁶³ prosecutors, and judges. And from arrests to prosecutions, Black girls face more punitive treatment compared to their peers.⁶⁴ For example, past research has shown that prosecutors exercised discretion to dismiss, on average, only three out of every ten cases for Black girls, but

dismissed seven out of every ten cases involving white girls.⁶⁵ In addition, Black girls do not receive equal opportunities for diversion compared to their white peers—i.e., strategies offered at the discretion of prosecutors that hold youth accountable for their actions but which avoid formal processing.⁶⁶ Further, Black girls are three times more likely to be removed from their homes and placed in state custody in either a secure or locked facility⁶⁷ or a residential facility⁶⁸ than their white peers.⁶⁹ In fact, Black girls consistently receive more severe dispositions even after accounting for seriousness of the offense, prior record, and age.⁷⁰

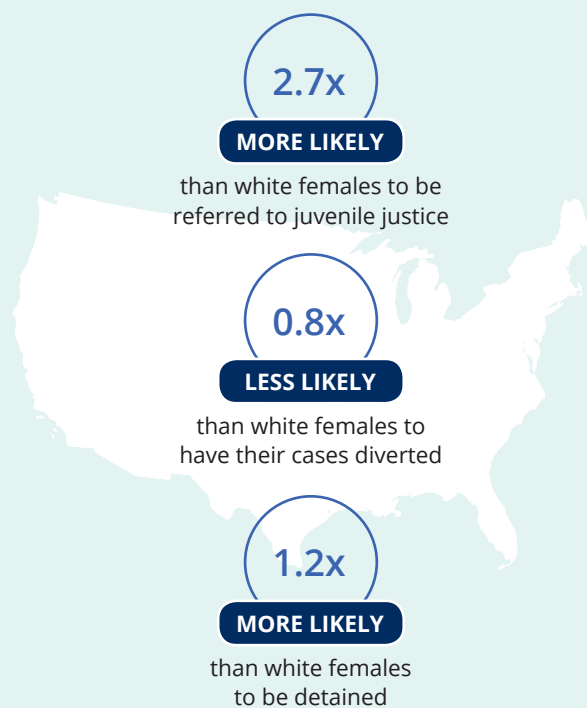
Racial Disparities in Formal Petitions



Source: FRANCINE T. SHERMAN & ANNIE BALCK, GENDER INJUSTICE 6 (2015), <http://nationalcrittentonten.org/gender-injustice> (citing Charles Puzzanchera & Sarah Hockenberry, *Nat'l Disproportionate Minority Contact Databook*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T. OF JUST., <http://www.ojjdp.gov/ojstatbb/dmcd/b/> (last accessed May 24, 2017)).

* Note: A formal petition "is the charging document filed in juvenile court by the state. A petition formally initiates a juvenile proceeding alleging that a juvenile is delinquent and describing the alleged offenses committed by that child. It is similar to a complaint in adult court." See <http://njdc.info/juvenile-court-terminology/>

National Portrait of Black Girls' Experience in Juvenile Justice (2013)



Source: Charles Puzzanchera & Sarah Hockenberry, *Nat'l Disproportionate Minority Contact Databook*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T. OF JUST., <http://www.ojjdp.gov/ojstatbb/dmcd/b/> (last accessed May 24, 2017).

As with school discipline discrepancies, adultification may be an important contributing factor to Black girls' disparate referral rates in the juvenile justice system, given the degree to which decision-makers rely on subjective discretion, which can turn on explicit or implicit bias. That is, if law enforcement, probation officers, prosecutors, and judges view Black girls as less innocent and more adult, they may adultify Black girls and view their behavior as intentional, threatening, or otherwise non-compliant on that basis and deem these girls less deserving of leniency.

[W]hen juvenile court actors perceive that girls of color have inherent, negative attributes, that perception affects the decision-makers' judgment and may even outweigh their concern about prior criminality, seriousness of offense, and possibility for rehabilitation. Stereotypes often operate at the subliminal level, are reinforced by prevailing cultural representations, and can have dramatic impact on offenders, particularly juveniles.⁷¹

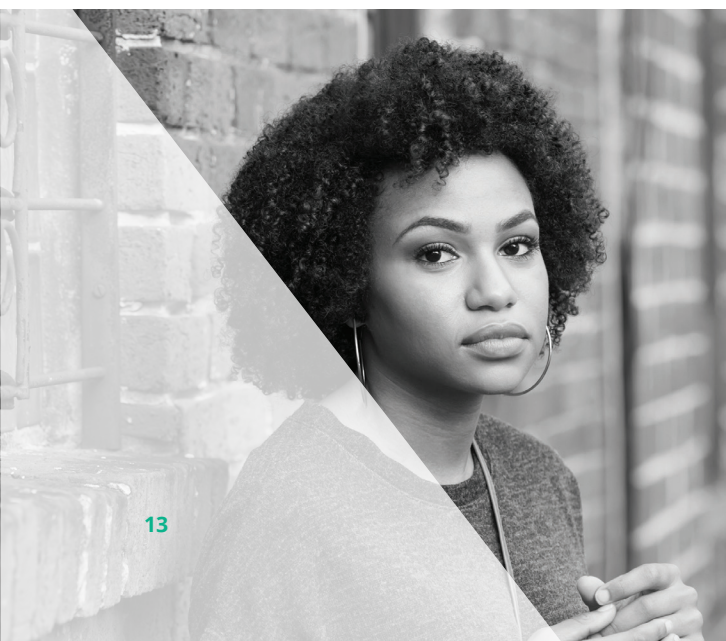
In light of this new evidence, we suggest that, consistent with studies of the adultification of Black boys, police officers may view Black girls as older and hold them more culpable for their actions.⁷² And at the other end of the decision-making process, Professor Jyoti Nanda has suggested a similar potential bias by judges: "Given stereotypes about race and gender, a judge may view a girl of color as more mature than a [w]hite girl and thus subject her to different normative expectations."⁷³

A recent incident in Texas, in which an officer knelt on a 15-year-old Black girl's back to restrain her, may be viewed as an illustration of an officer's use of force based on bias that lies at the heart of the adultification of Black girls.⁷⁴ The incident took place during a pool party, and the girl wore a bikini. One commentator described:

Black female bodies have long been sites of trauma, carrying not only the weight of the past, but present **stereotypes that dehumanize and sexualize young girls** before they even hit puberty. **[The officer] did not think he was restraining a helpless teenaged girl, but a 'black woman,' with all the stereotypes and stigma that includes.** This, it seems, was justification enough for her treatment.⁷⁵

The phenomenon of adultification has the potential to play a particularly invidious role in adults' responses to Black girls who are victims of gender-based violence. In particular, the perceptions of Black girls as more knowledgeable about sex and adult topics, among other factors, may influence officials to inaccurately attribute complicity to victims of sexual harassment or assault, resulting in blaming and ultimately criminalizing Black girls for their victimization.⁷⁶ As Ocen observed in the context of sex trafficking, discretion "enables racial bias—implicit or explicit—to shape who is viewed as a perpetrator and who is viewed as a victim."⁷⁷

In essence, our findings indicate that adults impose differential views and expectations about the development of Black girls, stripping them of their identity and innocence as children⁷⁸ and potentially diminishing their access to the very rights the system was designed to protect.



Conclusion

While a full exploration of potential implications of adultification lies beyond the scope of this report, consequences may be found in other public sectors as well. For example, adultification may play a role in the child welfare system, which is based on the foundational principle of serving to nurture and protect youth. Authorities in this system who view Black girls as more independent and less needing of nurture and protection may assign them different placement or treatment plans from white girls. Regardless of the specific context, all Black girls are entitled to, and deserve, equal treatment, including equal access to the protections that are accepted as necessary and appropriate for children. Recognizing the bias underlying the adultification of Black girls is an important step toward that goal.

New studies are needed to determine the causal links between adultification of Black girls and punitive treatment in child-serving public sectors

and to investigate differences in results among the various age brackets. Future research should also examine whether the same or similar forms of bias is manifested against other girls of color. The results of such research could help inform the development of trainings and shape the contours of policy and practice reform.

The results of our research suggest that Black girls bear the brunt of a double bind: viewed as more adult than their white peers, they may be more likely to be disciplined for their actions, and yet they are also more vulnerable to the discretionary authority of teachers and law enforcement than their adult counterparts. As Ocen writes, “[L]iminal children ... are viewed as dependent, limited rights-bearing subjects while at the same time imbued with adult characteristics such a sexual maturity, individual agency and criminal responsibility. Thus, they are directed into rather than out of the juvenile justice system.”⁷⁹ Only by recognizing the phenomenon of adultification can we overcome the perception that “[i]nnocence, like freedom, is a privilege.”⁸⁰



Research Citations

- ¹ Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. OF PERSONALITY & SOC. PSYCHOL. 526 (2014).
- ² For a discussion of the evolution of child development theories, see, for example, SPENCER A. RATHUS, *CHILDHOOD & ADOLESCENCE: VOYAGES IN DEVELOPMENT* (5th ed. 2013).
- ³ The MacArthur Foundation’s Network on Adolescent Development and Juvenile Justice website lists several resources on this topic, including research finding that psychosocial maturity is delayed for several years beyond 16, when adolescents reach cognitive maturity, affecting adolescents’ impulsivity, susceptibility to peer pressure, sensation seeking and ability to assess risk at least until the age of 18 and in some cases for years thereafter. See Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults? Minors’ Access to Abortion, the Juv. Death Penalty, & the Alleged APA “Flip-Flop”*, 64 AM. PSYCHOL. 583 (2009).
- ⁴ These principles led to the establishment of the juvenile justice system. Steven M. Cox et al., *Juvenile Justice in Historical Perspective*, in *JUVENILE JUSTICE IN PERSPECTIVE: A GUIDE TO THEORY, POLICY, & PRACTICE* 8-9 (6th ed. 2008) (“The delinquent child had ceased to be a criminal and had the status of a child in need of care, protection, and discipline directed toward rehabilitation.”) (internal citation omitted).
- ⁵ See *Roper v. Simmons*, 543 U.S. 551, 602 (2005).
- ⁶ *Id.* at 568.
- ⁷ See *id.* at 569-70.
- ⁸ See *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010) (establishing that life sentences without possibility of parole are inappropriate for juveniles convicted of non-homicide crimes); *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (holding that mandatory life-without-parole sentences for juveniles violate Eighth Amendment’s prohibition on cruel and unusual punishment); see also Goff, *supra* note 1.
- ⁹ *Miller*, 567 U.S. at 471.
- ¹⁰ See Priscilla A. Ocen, *(E)racing Childhood: Examining the Racialized Construction of Childhood & Innocence in the Treatment of Sexually Exploited Minors*, 2 UCLA L. REV. 1586, 1600 (2015); Goff, *supra* note 1, at 527.
- ¹¹ *Id.* The topic of adultification of girls of other races has been even less explored, and should be pursued.
- ¹² See Goff, *supra* note 1. Note that the term “adultification” is sometimes used to refer to a distinct phenomenon in which children who are assigned adult responsibilities behave in ways that are more adult-like than their peers. For purposes of this report, adultification refers to adults’ generalized perception of Black girls as more adult, without reference to their individual behaviors.
- ¹³ See, e.g., Jamilia Blake et al., *Unmasking the Inequitable Discipline Experiences of Urb. Black Girls: Implications for Urb. Educ. Stakeholders*, 43 URB. REV. 90 (2011) (“[L]ess is known about the types of behavioral infractions Black female students exhibit and the discipline sanctions imposed for Black girls for such fractions”); Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juv. Just. Sys.*, 59 UCLA L. REV. 1502, 1521 (2012) (“While numerous studies over the past decade have examined and documented that at every state of the juvenile justice system youth of color ‘are more likely [than white youth] to be arrested, charged, detained, sentenced severely, and tried as adults,’ very few studies have examined the

- intersections of race and gender.”) (internal citations omitted); Lori Guevara, *Gender & Juv. Just. Decision Making: What Role Does Race Play?*, 1 FEMINIST CRIMINOLOGY 258, 264 (2006) (“To date, only a few studies examine the influence of both race and gender on juvenile court outcomes.”).
- ¹⁴ See Jamilia J. Blake et al., *The Role of Colorism in Explaining Afr. Am. Females’ Suspension Risk*, 32 SCH. PSYCHOL. Q. 118 (2017).
- ¹⁵ See Ocen, *supra* note 10, at 1600.
- ¹⁶ WILMA KING, AFRICAN AMERICAN CHILDHOODS: HISTORICAL PERSPECTIVES FROM SLAVERY TO CIVIL RIGHTS (2005).
- ¹⁷ Michael J. Dumas & Joseph Derrick Nelson, *(Re)Imagining Black Boyhood: Toward a Critical Framework for Educ. Res.*, 86 HARV. EDUC. REV. 27, 33 (2016).
- ¹⁸ See Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes about Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 493, 496 (2004); Aneeta Rattan et al., *Race & the Fragility of the Legal Distinction between Juveniles & Adults*, 7 PLoS ONE e36680 (2012).
- ¹⁹ Goff, *supra* note 1.
- ²⁰ See *id.*
- ²¹ See *id.* at 535-39.
- ²² See *id.* at 539-40. See also WALTER S. GILLIAM ET AL., YALE UNIV. CHILD STUDY CTR., A RESEARCH STUDY BRIEF: DO EARLY EDUCATORS’ IMPLICIT BIASES REGARDING SEX & RACE RELATE TO BEHAVIOR EXPECTATIONS & RECOMMENDATIONS OF PRESCHOOL EXPULSIONS & SUSPENSIONS? (Sept. 28, 2016) (finding that when expecting challenging behaviors from preschool students, teachers gazed longer at Black children, especially Black boys”).
- ²³ See Linda Burton, *Childhood Adultification in Economically Disadvantaged Families: A Conceptual Model*, 56 FAMILY REL. 329 (2007).
- ²⁴ See Blake et al., *supra* note 14, at 119.
- ²⁵ See *id.*
- ²⁶ Jamilia J. Blake, Bettie Ray Butler & Danielle Smith, *Challenging Middle-Class Notions of Femininity: The Cause of Black Females’ Disproportionate Suspension Rates*, in CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 75, 76 (Daniel J. Losen ed., 2015).
- ²⁷ *Id.*
- ²⁸ Blake et al., *supra* note 13, at 93.
- ²⁹ Edward W. Morris, “Ladies” or “Loudies”? Perceptions & Experiences of Black Girls in Classrooms, 38 YOUTH & SOC’Y 490, 511 (2007).
- ³⁰ MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS 34 (2016).
- ³¹ Morris, *supra* note 29, at 502 (emphasis added).
- ³² *Id.*
- ³³ *Id.* at 502-03.
- ³⁴ See *id.* at 503.
- ³⁵ Nanda, *supra* note 13, at 1520-21 n.88.
- ³⁶ Morris, *supra* note 29, at 502-03; MORRIS, *supra* note 30, at 129 (discussing critiques of media representations of Black girls, which “reflect fantasy, which often reduces Black femininity to the size of her backside—and how fast or forcefully she can make it gyrate”).
- ³⁷ Sika Dagbovie-Mullins, *Pigtails, Ponytails, & Getting Tail: The Infantilization & Hyper-Sexualization of Af. Am. Females in Popular Culture*, 46 J. OF POPULAR CULTURE 745 (2013). Muhammed and McArthur define the hypersexualization of Black women and girls “as others in society’s attribution of sex as a part of the ‘natural’ role of Black women and girls.” Gholnecsar E. Muhammad & Sherell A. McArthur, “Styled by Their Perceptions”: Black Adolescent Girls Interpret Representations of Black Females in Popular Culture, 17 MULTICULTURAL PERSP. 133, 138 (2015).

- ³⁸ MORRIS, *supra* note 30, at 34. One girl interviewed by Morris summarized the more general issue this way: “No matter what her age, and no matter how small or big she is, a man is going to always look at [a Black girl] sexually.”
- ³⁹ Morris, *supra* note 29, at 499.
- ⁴⁰ Blake et al., *supra* note 13.
- ⁴¹ See Connie Wun, *Against Captivity: Black Girls & Sch. Discipline Policies in the Afterlife of Slavery*, 30 EDUC. POL’Y 171, 183 (2015); Morris, *supra* note 29, at 501-03; see also, e.g., Blake et al., *supra* note 13; Subini A. Annamma, *Black Girls & School Discipline: The Complexities of Being Overrepresented & Understudied*, 22 URB. EDUC. 1, 19-20 (2016).
- ⁴² See Blake et al., *supra* note 13.
- ⁴³ Annamma et al., *supra* note 41 (citing Monique W. Morris, *Race, Gender, & the School-to-Prison Pipeline: Expanding Our Discussion to Include Black Girls*, AFRICAN-AM. POL’Y FORUM (2012)), https://www.academia.edu/7871609/the_school-to_prison_pipeline_expanding_our_discussion_to_include_black_girls. See also Blake et al., *supra* note 13.
- ⁴⁴ Morris, *supra* note 29, at 492 (discussing the tenets of reproductive theory).
- ⁴⁵ Ocen, *supra* note 10, at 1600.
- ⁴⁶ See Goff, *supra* note 1, at 534.
- ⁴⁷ Rocco Paraschandola, *Teen: Cop Cuffed Me Wrong*, N.Y. DAILY NEWS (Aug. 4, 2012 3:10 AM), <http://www.nydailynews.com/new-york/harlem-teen-cuffed-held-metrocard-flap-article-1.1126674>.
- ⁴⁸ Blake et al., *supra* note 13, at 119. See Blake’s discussion of adultification as a social stereotype, *id.*; see also Graham & Lowery, *supra* note 18 (noting that juvenile probation officers are more likely to view Black youth as older).
- ⁴⁹ See generally Dionne P. Stephens & Layli D. Phillips, *Freaks, Gold Diggers, Divas, & Dykes: The Sociohistorical Dev. of Adolescent Afr. Am. Women’s Sexual Scripts*, 7 SEXUALITY & CULTURE 3, 3-49 (2003); Carolyn M. West, *Mammy, Sapphire, & Jezebel: Hist. Images of Black Women & Their Implications for Psychotherapy*, 32 PSYCHOTHERAPY: THEORY, RES., PRAC., TRAINING 458, 458-466 (1995).
- ⁵⁰ This online platform, Amazon Mturk, is increasingly used in social science research to enable researchers to recruit community samples. We used a community sample of typical adults, as research shows that survey results may differ from a sample of adults from the larger community than from a college-enrolled sample – the sample which most psychological research is based. See Robert A. Peterson, *On The Use Of College Students In Soc. Sci. Res.: Insights From A Second-Order Meta-Analysis*, 28 J. CONSUMER RES. 450 (2001).
- ⁵¹ A more detailed breakdown of the race of participants follows:
74% White or European American,
11% Black or African American,
7% Hispanic or Latino/a,
4% Asian American,
4% Native American or Other.
Although this was not a nationally representative sample, the racial demographic of the sample closely mirror the US population. *United States QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/00> (last accessed May 24, 2017).
- ⁵² Philipp Müller & Svenja Schäfer, *Latent Mean (Comparison)*, in THE INTERNATIONAL ENCYCLOPEDIA OF COMMUNICATION RESEARCH METHODS (Jörg Matthes, Robert F. Potter & Christine S. Davis eds., 2018).

- ⁵³ Annamma, et al. *supra* note 41, at 3-4. (citing OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE 1, 3 (2014)); Blake et al., *supra* note 13; KIMBERLÉ WILLIAMS CRENSHAW ET AL., BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED, & UNDERPROTECTED (2015). For more on subjective infractions, see Blake, Butler & Smith, *supra* note 26; Edward W. Morris & Brea L. Perry, *The Punishment Gap: Sch. Suspension & Racial Disparities in Achievement*, 63 SOC. PROBLEMS 68, 70-71 (2016).
- ⁵⁴ Annamma et al., *supra* note 41, at 22. In determining third-degree assault, the actor must be found to meet the legal standard of "recklessness." *Id.* at 19-20. Because recklessness is defined by the actor knowing the consequences of her actions, it entails a subjective determination that may be vulnerable to the consequences of adultification bias. *Id.*
- ⁵⁵ *Id.*
- ⁵⁶ See Kathryn C. Monahan et al., *From the Sch. Yard to the Squad Car: Sch. Discipline, Truancy, & Arrest*, J. YOUTH & ADOLESCENCE (2014); DANIEL J. LOSEN ET AL., THE CIVIL RIGHTS PROJECT, OUT OF SCHOOL & OFF TRACK: THE OVERUSE OF SUSPENSIONS IN AMERICAN MIDDLE & HIGH SCHOOLS 20 (Apr. 8, 2013).
- ⁵⁷ Blake et al., *supra* note 13, at 91.
- ⁵⁸ Monahan et al., *supra* note 56, at 19-20.
- ⁵⁹ Annamma et al., *supra* note 41, at 23.
- ⁶⁰ Morris, *supra* note 29.
- ⁶¹ CRENSHAW ET AL., *supra* note 53.
- ⁶² MORRIS, *supra* note 30, at 40.
- ⁶³ Although defense attorneys are often left out of analyses of potential bias in the juvenile justice system, they are not immune from making assumptions and stereotypes about their clients' likely guilt or innocence, and should be a part of any conversation about equitable treatment of juveniles. See, e.g., Kristin Henning, Director, Georgetown Juv. Just. Clinic & Initiative, Address at The Right to Remain Children Conference: The Reasonable Black Child (May 16, 2017), <http://apps.law.georgetown.edu/webcasts/eventDetail.cfm?eventID=3127>.
- ⁶⁴ In addition, nationally, "Black girls represent 31% of girls referred to law enforcement by school officials and 43% of those arrested on school grounds, yet only constitute 17% of the overall student population." NAT'L WOMEN'S LAW CTR. & NAACP LEGAL DEF. & EDUC. FUND, UNLOCKING OPPORTUNITY FOR AFR. AM. GIRLS 19 (2014).
- ⁶⁵ Kim Taylor Thompson, *Girl Talk—Examining Racial & Gender Justice in Juv. Just.*, 6 NEV. L. J. 1137 (2006) (citing American Bar Association & National Bar Association, Justice by Gender: The Lack of Appropriate Prevention, Diversion and Treatment Alternatives for Girls in the Justice System, 9 WM. & MARY J. WOMEN & L. 73, 79 (2002)).
- ⁶⁶ See *Performance Measures*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T. OF JUST., <https://www.ojjdp.gov/grantees/pm/glossary.html> (last accessed May 24, 2017).
- ⁶⁷ Ocen, *supra* note 10, at 1634 (citing Meda Chesney-Lind, *Jailing "Bad" Girls: Girls' Violence & Trends in Female Incarceration*, in FIGHTING FOR GIRLS: NEW PERSPS. ON GENDER & VIOLENCE 62-63 (Meda Chesney-Lind & Nikki Jones eds., 2010)).
- ⁶⁸ Residential placements can include secure (locked) confinement, non-secure (less restrictive) confinement, group homes, foster care, shelter care, etc.

⁶⁹ NAT'L COUNCIL ON CRIME & DELINQ. CTR. FOR GIRLS & YOUNG WOMEN, GETTING THE FACTS STRAIGHT ABOUT GIRLS IN THE JUV. JUST. SYS. 7 (2009).

⁷⁰ See Nanda, *supra* note 13, at 1527-28 (citing Lori D. Moore & Irene Padavic, *Racial & Ethnic Disparities in Girls' Sentencing in the Juv. Just. Sys.*, 5 FEMINIST CRIMINOLOGY 263 (2010)). See also Taylor-Thompson, *supra* note 65, at 1142 (in a study of girls' delinquency cases in Los Angeles during 1992 and 1993, a review of the probation investigation reports, which juvenile court judges use in determining the appropriate sentence and placement for juvenile offenders, revealed the influence of race and ethnicity. Specifically, the study found a significant effect of race and ethnicity on the depiction of the girls' conduct and in the recommended disposition of their cases); CRENSHAW ET AL., *supra* note 53.

⁷¹ See Nanda, *supra* note 13, at 1530-31.

⁷² See Goff, *supra* note 1.

⁷³ Nanda, *supra* note 13, at 1520-21.

⁷⁴ Zeba Blay, *For Black Women, Police Brutality & Sexual Harrassment Go Hand in Hand*, HUFFINGTON POST (June 8, 2015), http://www.huffingtonpost.com/2015/06/08/black-women-police-brutality_n_7536896.html.

⁷⁵ *Id.*

⁷⁶ See MALIKA SAADA SAAR, REBECCA EPSTEIN & LINDSAY ROSENTHAL, SEXUAL ABUSE TO PRISON PIPELINE 5, 9 (2015).

⁷⁷ Ocen, *supra* note 10, at 1591.

⁷⁸ See, e.g., Mark McKechnie, *The 'Adultification' of Underage Lawbreakers*, THE OREGONIAN (May 17, 2014), http://www.oregonlive.com/opinion/index.ssf/2014/05/the_adultification_of_underage.html (describing how an investigation determined that taking a 9-year-old girl into custody, placing her in handcuffs, and transporting her downtown for fingerprinting and photographing violated no existing policies or statutes).

⁷⁹ Ocen, *supra* note 10, at 1594.

⁸⁰ Nicole Dennis-Benn, *Innocence Is a Privilege: Black Children Are Not Allowed to Be Innocent in America*, ELECTRIC LITERATURE (July 12, 2016), <https://electricliterature.com/innocence-is-a-privilege-black-children-are-not-allowed-to-be-innocent-in-america-2c7ba2b005b3>.

CENTER ON POVERTY and INEQUALITY

GEORGETOWN LAW

69 Hastings L.J. 583

Hastings Law Journal
February, 2018

Article
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REALIZING RESTORATIVE JUSTICE: LEGAL RULES AND STANDARDS FOR SCHOOL DISCIPLINE REFORM

Zero-tolerance school disciplinary policies stunt the future of school children across the United States. These policies, enshrined in state law, prescribe automatic and mandatory suspension, expulsion, and arrest for infractions ranging from minor to serious. Researchers find that zero-tolerance policies disproportionately affect low-income, minority children and correlate with poor academic achievement, high drop-out rates, disaffection and alienation, and greater contact with the criminal justice system, a phenomenon christened the “School-to-Prison Pipeline.”

A promising replacement for this punitive disciplinary regime derives from restorative justice theory and, using a variety of different legal interventions, reform advocates and lawmakers have tried to institute restorative justice as a disciplinary alternative. But, as this Article argues, the resulting legal directives are flawed and, therefore, unlikely to roll back the damage caused by zero-tolerance disciplinary practices. They fail both to account for the ambiguity inherent to restorative justice and to provide clear instructions on how to “build” a restorative school. With the aim of advancing school discipline reform and ending the School-to-Prison Pipeline, this Article employs jurisprudential theory to propose a collection of legal rules and standards that formalize school-based restorative justice and translate it into actionable policy.

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***584 INTRODUCTION**

When the Los Angeles Unified School District, the second largest school district in the United States, decided to overhaul its disciplinary system and implement a new “restorative justice” regime, things did not go smoothly.¹ Like almost every school system in America, Los Angeles ***585** had, for decades, employed a punitive “zero-tolerance” discipline policy required under state and federal law. Such zero-tolerance laws mandate automatic suspensions, expulsions, and arrests for a wide range of serious to not-so-serious infractions. Students face these harsh, exclusionary punishments for behavioral infractions such as “insubordination,” “willful defiance,” disrupting class, and violating school dress code.² Bringing alcohol, controlled substances, or a potential weapon on campus,³ even when no actual threat to campus safety exists,⁴ all trigger automatic expulsion and calls to police. In recent years, zero-tolerance has been roundly criticized for its harmful impact on young people, especially low-income, minority students who are disciplined at disproportionate rates.⁵ These criticisms center on students' loss of valuable learning time in the classroom, disaffection and alienation, and increased likelihood of dropping out of school or becoming diverted into the criminal justice system.⁶ Los Angeles, and other school districts like it, aimed to change this dynamic, widely referred to as the “School-to-Prison Pipeline,”⁷ by instituting “restorative justice” as a disciplinary alternative.

Restorative justice is a broad philosophy, a modern amalgam of ancient world views that centers on repairing harm rather than exacting retribution from rule-breakers.⁸ Restorative justice ideology provides the basis for diverse legal reforms, including Truth and Reconciliation Commissions, alternative criminal prosecution and sentencing diversion programs, and victims' rights initiatives.⁹ However, when applied to the educational context, restorative justice philosophy takes yet another, specialized form.

***586** The most comprehensive form of school-based restorative justice, referred to by education experts as a “whole school approach,” combines a proactive, conflict prevention pedagogy with specialized processes for addressing conflict when it arises.¹⁰ Restorative school communities utilize an array of non-hierarchical, consensus-based practices-- dialogues, circles, conferences, and mediations--for both the preventative and responsive components of school-based restorative justice.¹¹ Despite the specialized procedures, application, and demand for practitioner skills required by these different practices, they all address harmful behavior by focusing on repairing relationships. When problems or conflicts do arise, students and adults confront the consequences of their actions, explore ways to make amends, and voluntarily agree to recompense.¹² Thus, this restorative justice approach to managing student behavior offers a stark contrast to zero-tolerance discipline: rule-breaking students, including the root of their behavior, are engaged directly rather than dismissed; held accountable rather than let off the hook; shown how their actions affect others; and taught that what they do matters to their community, all of which helps them develop as self-regulating adults.¹³

The potential for restorative justice to fix the damage caused by zero-tolerance policy has captured the attention of school discipline reform advocates and resulted in widespread legal reforms. At all levels of government, reformers have successfully secured legislation, court orders, and regulations attempting to institute restorative justice in schools.¹⁴

The problem, however, is that curbing zero-tolerance discipline with an abstract philosophy like restorative justice proves very difficult.¹⁵ Return, for example, to the story of the Los Angeles Unified School District and its struggle to

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concretize a restorative ethos across more than 900 campuses, in a school district containing more than 60,000 employees and 660,000 K-12 students.¹⁶ School administrators *587 complained about the lack of resources and personnel to construct an alternative system for addressing student misconduct.¹⁷ Teachers felt as if they lacked adequate training in restorative justice principles, not to mention sufficient class time, to engage students in restorative dialogues.¹⁸ Some thought that troublemaking students were being allowed to stay in school to the detriment of other children's learning.¹⁹ Similar complaints emerged in other school districts, like Chicago²⁰ and New York City,²¹ also trying to implement restorative justice.

This Article argues that formal law-based interventions are necessary for reforming school disciplinary practices but that, thus far, such attempts to do so by formalizing restorative justice have been wholly insufficient.²² To date, legislation, regulations, and court orders mandating schools to use “restorative justice” leave too much discretion to various public and private actors and fail to issue necessary guidance on a whole school approach to restorative discipline. Standing alone, the term “restorative justice” is not a legally realizable or enforceable directive but rather an inherently ambiguous idea, around which there is little consensus, that has spawned numerous, incompatible legal reforms.²³ This confusion extends to the educational setting, where schools have difficulty implementing appropriate, high quality, and ethical restorative practices.²⁴ Thus, to remove zero-tolerance discipline, which became entrenched policy through legislation and school board regulations, a new disciplinary policy based in restorative justice requires equally clear, executable legal mandates. These new legal directives will change the way school boards, administrators, and teachers make disciplinary decisions and allocate finite resources.²⁵

*588 To translate school-based restorative justice into actionable policy, this Article proposes a collection of legal rules and standards. Regardless of whether the legal mandate takes the form of a court order or a statute, whether it regulates a school administrator or a school board, whether it applies at the local or the federal level, it should include the same collection of legal rules and standards to advance a consistent application of ethical restorative practices in schools.²⁶ To do otherwise endangers the reform mission by allowing zero-tolerance to endure or for schools to engage in pseudo-restorative practices that do not deliver the intended benefits of a restorative approach.²⁷

This strategy of more, rather than less, formalization of school-based restorative practices may be an uncomfortable proposition. Some reformers argue that sustainable education reform depends on a bottom-up commitment from teachers and administrators, not top-down directives.²⁸ Restorative justice proponents further maintain that building a restorative school requires a shift in community values that cannot be imposed externally and that government regulation of restorative practices privileges experts and disregards intrinsic, community expertise.²⁹ Others may worry about the unintended consequences of formalizing inherently informal processes.³⁰ Such skepticism and concern is not to be discounted. *589 Nevertheless, the effort to institutionalize restorative justice in schools using legal mandates has already begun. To safeguard our children and support those charged with their education, we should ensure these mandates for restorative justice are crafted with care.

To make this argument, this Article proceeds in four parts. To understand the backdrop of the restorative justice discipline reform movement, Part I briefly explains the legal regime responsible for zero-tolerance discipline and summarizes the social science research documenting its negative impact on young people. Part II introduces the concept of a restorative school and why reformers want it to replace zero-tolerance discipline. Part III argues that existing efforts to formalize restorative justice in law at the federal, state, and local levels fail to account for both the ambiguity inherent in the term itself and the difficulties schools have had in implementing this promising alternative. Finally, Part IV applies

Duncan Kennedy's framework for making policy legally realizable to the restorative school discipline reform project. It concludes with proposals for rules and standards that, if formalized in law, would translate school-based restorative justice into an actionable policy.

I. THE PROBLEM WITH ZERO-TOLERANCE SCHOOL DISCIPLINE

To see why the school discipline reform movement needs clear legal mandates to accomplish its goals, one must understand zero-tolerance discipline--the status quo reformers seek to change. The label "zero-tolerance" describes a formalized, centralized, disciplinary policy designed to be both inflexible and extremely punitive.³¹ Zero-tolerance is formalized in that it is legally constructed, a product of interlacing federal, state, and local statutes and regulations that set uniform disciplinary standards across schools. Zero-tolerance discipline relies on suspension and expulsion, also called "exclusionary discipline," which punishes students by denying access to classrooms and exiling them from the school environment. These harsh exclusionary punishments apply automatically to a number of different *590 pre-determined violations, which are enumerated under state law and captured in student "Codes of Conduct" set out by school district boards.³²

The negative impact of zero-tolerance disciplinary policy on young people is well documented. The national adoption of zero-tolerance laws has resulted in a marked increase in the numbers of students arrested, suspended, and expelled from school, particularly low-income students of color, and students with disabilities.³³ Researchers consider zero-tolerance one of several factors³⁴ contributing to a School-to-Prison Pipeline, the term for this problematic interaction between educational and criminal justice institutions.³⁵ Zero-tolerance practices *591 contribute to this problem by diverting young people out of their regular classrooms and into the criminal justice system.³⁶

The damaging effects of zero-tolerance discipline have drawn considerable attention and spurred widespread calls for reform. Leading civil rights groups,³⁷ the National School Boards Association,³⁸ the American Academy of Pediatrics,³⁹ the American Psychological Association,⁴⁰ the American Bar Association,⁴¹ former President Obama,⁴² former senior leadership at the Department of Education and Department of Justice,⁴³ and members of the U.S. Congress,⁴⁴ have all *592 denounced zero-tolerance discipline, especially for its disparate impact on children of color, and called for its replacement.⁴⁵

This Part briefly explains the legal regime responsible for zero-tolerance disciplinary policy and then synthesizes the considerable social science research documenting the negative impact of harsh punitive discipline on young people. It concludes by identifying important lessons provided by the history, legal structure, and implementation of zero-tolerance discipline. To replace zero-tolerance discipline with restorative justice practices, reformers not only have to target current zero-tolerance laws, but must also construct a new legal framework that is just as clear and just as executable. Otherwise, they risk allowing today's inequities to persist.

A. HISTORY AND LEGAL STRUCTURE

It merits mentioning that school disciplinary policy in the United States has always been about more than responding to misbehavior. A deep history, dating back to the country's founding, entwines school discipline with theories of social control and the politics of nation-building.⁴⁶ Current arguments about whether a retributive or restorative disciplinary philosophy best serves young people and larger society offer the latest installment in a two-hundred-year-old American

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debate.⁴⁷ However, what makes today's debate about punitive discipline ***593** unique is that zero-tolerance policy is more than a widely practiced cultural norm--it is formalized in legal requirements making it, quite literally, the law of the land.

The history behind, and different rationales for, formalizing zero-tolerance discipline begins in the 1950s. In some parts of the country, school districts started requiring schools to impose harsh disciplinary penalties because of a perception that rising crime and delinquency among young people threatened social stability.⁴⁸ In other parts of the country, concerns about race and school desegregation spurred school district decisions to impose automatic suspension and expulsion for predetermined infractions.⁴⁹ Proponents of school integration believed that predetermining grounds for suspension and expulsion would *help* Black students by ensuring greater consistency and fairness in student treatment and removing discretion from racially biased teachers and principals.⁵⁰ In contrast, particularly in states and school districts resistant to racial integration, zero-tolerance rules became a way to impose order and keep black students "in line."⁵¹

Thus, state and local communities across the U.S. began formalizing zero-tolerance discipline for different reasons. Some believed that strict rules and tough punishments would have a deterrent effect on young people and result in less frequent student misbehavior.⁵² Some pushed for the codification and publication of ***594** school discipline rules into Codes of Student Conduct as a way to increase transparency and decrease biased and unfair treatment of minority students.⁵³ And, finally, some used automatic penalties to remove undesirable students or those with non-conforming (non-White, non-middle class) behaviors from classrooms, leaving an improved learning environment for those who remained.⁵⁴ Over time, the shift toward punitive and rule-based disciplinary practices grew, particularly as the turbulence of the Civil Rights and anti-Vietnam War movements reached more communities around the country.⁵⁵

However, zero-tolerance discipline stopped being simply a state or local practice and instead became a nationally disseminated policy after the successful passage of the Gun-Free Schools Act in 1994.⁵⁶ The Gun-Free Schools Act required states receiving federal funds to enact legislation mandating a minimum one-year expulsion for possession of a firearm or prohibited weapon on school grounds.⁵⁷ Although the new federal law dictated zero-tolerance only for one kind of violation, a dangerous weapon on campus, the scope of "zero-tolerance" expanded rapidly once adopted by state legislatures.

Within four years, all fifty states had zero-tolerance discipline laws covering far more than firearms on campus.⁵⁸ States imported "get ***595** tough" philosophies from the War on Drugs and applied them to schools.⁵⁹ Students faced "mandatory minimum sentences" of automatic exclusionary discipline⁶⁰ if found possessing drugs, other controlled substances, tobacco or alcohol.⁶¹ Equally tough punishments soon applied to fights, sexual assault, sexual activity or any "obscene act."⁶² Similar to "broken windows theory," minor, disruptive student behaviors were punished with equal rigor, often leading to absurd results.⁶³ Offenses like nibbling a Pop-Tart toaster pastry into the shape of a gun,⁶⁴ keeping a nail file in a backpack, or giving a friend an aspirin resulted in suspension, expulsion, and arrest.⁶⁵ In keeping with the tough on crime sentiment imported from the War on Drugs, states also ***596** developed "three strikes" rules for school discipline, expelling students or notifying law enforcement upon a third "offense," even if all were minor, nonviolent infractions.⁶⁶

States and school boards also developed strict exclusionary penalties for misbehavior that offered no immediate safety threat.⁶⁷ For example, some state statutes direct schools to notify, or make referrals to, law enforcement for chronic

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absenteeism.⁶⁸ Students could receive suspensions for repeatedly violating school dress code;⁶⁹ “willful disobedience” or “defiance;”⁷⁰ talking back, using curse words or foul language;⁷¹ “insubordination” and “habitual indolence;”⁷² “disrupting the academic process of the school;”⁷³ and defacing school property.⁷⁴ Ironically, whether a teacher or principal views these behaviors as infractions re-inserts adult discretion into school discipline, thereby undermining one of the original rationales for a formal, centralized disciplinary policy. And indeed, as the next Subpart examines, disciplinary decisions based on these subjective behavioral standards have disproportionately impacted the minority students that formal rules were supposed to protect.

***597 B. IMPACT ON CHILDREN, SCHOOLS, AND COMMUNITIES**

Zero-tolerance reaches all students, from preschool to high school, and affects certain demographic groups, such as Black, Hispanic, and Native American,⁷⁵ even more sharply.⁷⁶ According to the most recent data from the U.S. Department of Education's Office for Civil Rights, 2.8 million students, from kindergarten-to-twelfth grade, received one or more out-of-school suspensions in the 2012-2013 school year⁷⁷ and more than 130,000 students were expelled during the 2011-2012 school year.⁷⁸ The overwhelming majority (ninety-five percent) of suspensions are issued for nonviolent offenses or violations of behavioral standards, such as profanity, disrespect, and failing to comply with dress code.⁷⁹ Arrest rates and referrals to the juvenile justice system have also become a routine part of school discipline practices.⁸⁰

Students of color⁸¹ and students with disabilities⁸² bear the brunt of exclusionary discipline at rates disproportionate to their representation in the school population. Black and Hispanic students ***598** are 3.6 times more likely to be punished⁸³ --and they are punished more severely⁸⁴ --than their White counterparts. In Florida, even though black males and females represent only twenty-one percent of the total population of young people aged 10-17, they account for almost half of all school-related arrests.⁸⁵ Black male students are more likely to be arrested for disorderly conduct, fights, and trespassing while white male students are more likely to be arrested for alcohol and drug violations.⁸⁶ And, once their cases reach the juvenile courts, black males are more likely than their white counterparts either to have their cases dismissed entirely (presumably because they should never have been arrested) or to receive more severe treatment than their white counterparts by being sent to residential commitment facilities or having their cases transferred to adult court.⁸⁷

In addition to documenting the marked increase in sheer numbers of suspensions, expulsions, and school arrests, which include disproportionate percentages of children of color, researchers have also identified a number of collateral consequences of zero-tolerance discipline. Specifically, as the empirical literature suggests, exclusionary discipline is linked to: (1) poor academic achievement; (2) damage to students' emotional and mental health; (3) greater risk of contact with the criminal justice system; and (4) economic losses for schools and communities.

First, zero-tolerance discipline impacts academic performance. Exclusionary discipline undermines one of the long-standing postulates of modern education: the time students spend in the classroom engaged in academic learning positively correlates to their academic achievement.⁸⁸ Not surprisingly, then, when students miss class due to ***599** suspensions, they miss out on learning.⁸⁹ Research demonstrates a strong relationship between high suspension rates and low academic achievement.⁹⁰ This achievement gap has racial dimensions as well: one study suggests that disproportionately high rates of suspension for Black children contributed to lower reading and math test scores

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compared to their White peers.⁹¹ Additionally, studies of states and cities around the country demonstrate that out-of-school suspension is one of the primary indicators of high school dropout and failure to graduate.⁹²

Second, zero-tolerance discipline negatively affects children's emotional and mental health. Feelings of school-connectedness are strongly associated with higher self-esteem and less risky behavior,⁹³ both of which are undermined by exclusionary discipline.⁹⁴ Being pushed out of class causes students to feel frustrated, embarrassed, and stigmatized, particularly if they fall behind their peers due to lost learning time.⁹⁵ Students who are suspended are more likely to engage in further antisocial behavior.⁹⁶ Indeed, suspension may act as a ***600** “negative reinforcement for maladaptive behavior” and serve “only to perpetuate a cycle of violence.”⁹⁷ Even non-punished students suffer negative effects from overly punitive discipline: schools with police presence, high-security surveillance, or that rely heavily upon suspensions for nonviolent behaviors are associated with “declining academic achievement among non-suspended students”⁹⁸ as well as poor ratings on school climate and safety.⁹⁹

Third, exclusionary discipline increases the likelihood that students, particularly minority students, come into contact with the criminal justice system. Zero-tolerance discipline policy includes direct referrals to police¹⁰⁰ and, for some schools, means stationing police officers inside school buildings.¹⁰¹ Schools with high degrees of security are associated with increased Black-White disparities in total numbers of suspensions.¹⁰² Because school attendance is one of the protective factors in young people's lives that reduces their risk of engaging in antisocial or criminal activity, suspensions and expulsions erode that protection, particularly for children of color, and put them at risk for delinquent conduct.¹⁰³ Out-of-school adolescents are significantly more likely to get in fights, carry weapons, and engage in risky behavior.¹⁰⁴ ***601** Indeed, research shows that the odds of arrest doubled in months when a student was suspended or expelled and that, among students receiving exclusionary discipline, those *without* any previous disciplinary history were *more* likely to be arrested than their peers who had early problem behaviors.¹⁰⁵

Fourth, research demonstrates additional, societal costs associated with zero-tolerance discipline. Schools lose Average Daily Attendance funds for each student absence, which can add up to millions of dollars in unrecovered public revenue over the course of an academic school year.¹⁰⁶ When students fail to graduate from high school, they earn less income,¹⁰⁷ pay fewer taxes,¹⁰⁸ cost society more in public health services,¹⁰⁹ and rely more on public assistance.¹¹⁰

As if all of the collected costs and harmful effects of zero-tolerance disciplinary policy were not worrisome enough, zero-tolerance does not make schools safer.¹¹¹ The overwhelming majority of student discipline ***602** is directed at “insubordination” and nonviolent behavior, not students bringing guns to school, the objective of the Gun-Free Schools Act that universalized zero-tolerance legislation.¹¹² In addition to failing to improve safety, zero-tolerance discipline also fails to reach its objectives of deterrence and reduced arbitrariness.¹¹³ Suspension appears to perpetuate, not deter, cycles of violence, anger, and aggression among students.¹¹⁴ Arbitrariness continues, within individual schools and across entire school districts, as studies repeatedly show that minority students make up the majority of disciplinary targets, with some schools responsible for a significant portion of all disciplinary action in a state.¹¹⁵

C. LESSONS FOR REFORMERS

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Advocates seeking to recalibrate school disciplinary practices, to make them more effective and less reactionary, should heed the lessons provided by the history, legal structure, and exercise of zero-tolerance discipline policy. First, reformers must introduce new legal interventions in order to override existing laws on the books and these new laws should be just as easy to operationalize as zero-tolerance. Trying to impose a disciplinary philosophy without changing the legal regime behind it would be futile.

A second important lesson from zero-tolerance discipline derives from its usage of legal rules.¹¹⁶ For example, zero-tolerance discipline issues clear legal rules mandating automatic penalties for seemingly bright line offenses, such as possession of weapons and drugs on campus. When there are explicit legal requirements, regulated actors will channel resources toward compliance. The legal directive under zero-tolerance was easy for schools to grasp: *remove children who do not obey our rules*. To comply, schools directed their resources toward *603 identifying and removing rule-breakers by installing security cameras, metal detectors, and school police.¹¹⁷ Advocates for school discipline reforms such as restorative practices should enact similarly clear mandates so that schools allocate their resources toward compliance.

Another lesson for school reform advocates is that, when it comes to school discipline, ambiguity can be dangerous. In addition to its strict legal rules, zero-tolerance discipline also imposes penalties for violating ambiguous behavioral standards, such as “insubordination” or “willful defiance,” that exist solely in the eye of the beholder. This ambiguity poses a problem because disciplinary practices do not happen in a vacuum. Instead, as the historical and sociological context of zero-tolerance school discipline policy demonstrates, adults channel racial and class-based anxieties when disciplining young people, a phenomenon further evidenced by the social science research examining the racial disproportionality in discipline. Even the best intentioned teachers and principals can bring biases to bear in their disciplinary decisions--who they view as redeemable and who is perceived as a threat, who deserves the benefit of the doubt and who deserves a tough lesson. Where there is ambiguity in the law, regulated actors will develop their own interpretations, opening the door to the exercise of discretion that may yield outcomes inconsistent with reform objectives.¹¹⁸

Thus, even a formalized disciplinary program like zero-tolerance can be executed in a discriminatory way and school discipline reformers seeking to institute alternatives like restorative justice by legal means should heed its cautionary example. Not only must reforms be constructed with clear and enforceable legal directives, but they also should take into account discriminatory practices that may be ingrained in some school communities. Without being careful, reformers run the risk of creating an alternative disciplinary program for some students (those who are viewed as curable and non-threatening) but not all, a risk already materializing in some schools.¹¹⁹ Constructing new legal rules and standards that effectively advance restorative practices in schools is the primary objective of this Article and is discussed in greater detail in Part IV.

*604 II. THE POTENTIAL OF A RESTORATIVE SCHOOL

For those seeking to end zero-tolerance school disciplinary policy and its concomitant School-to-Prison Pipeline, one popular alternative derives from restorative justice theory.¹²⁰ Reform advocates consider a restorative justice approach to discipline not just an alternative, but also an antidote¹²¹ or a prescription¹²² for what is ailing American public schools. In contrast to zero-tolerance discipline, which attempts to deter student misbehavior by imposing automatic harsh punishments post factum, school-based restorative justice formulates behavior modification and response to harmful conduct in a very different way.

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A restorative school combines a conflict prevention and community-building pedagogy with specialized alternative dispute resolution processes to address conflicts when they arise.¹²³ Students learn pro-social conflict resolution skills, personal accountability, and impulse control,¹²⁴ which can then improve day-to-day interpersonal *605 interactions and the overall school climate.¹²⁵ These preventative or proactive interventions, which constitute the vast majority of restorative practices in schools,¹²⁶ have nothing to do with discipline but instead aim to develop trusting, respectful relationships and build conflict-resolution capacity within the school community.¹²⁷ Additionally, rather than using traditional exclusionary punishments that remove students from the classroom and exile them from the school community, students participate in dispute resolution processes to confront and learn about the harmful effect their actions have had on other people. Thus, in a restorative justice paradigm, addressing student behavior becomes a problem-solving exercise to help all affected people learn, grow, and move forward.¹²⁸

This Part begins by explaining the theoretical basis for school-based restorative justice and the specialized processes used to effectuate this restorative philosophy. It then synthesizes some of the promising results reported by schools piloting restorative approaches to discipline.

A. THEORY AND PRACTICE OF SCHOOL-BASED RESTORATIVE JUSTICE

A restorative school aspires to build a culture grounded in the principles of relationships, respect, responsibility, repair, and *606 reintegration.¹²⁹ These principles must permeate the whole school--classroom teaching, extra-curricular programs, faculty and staff meetings, engagement with parents and the wider community, as well as school administrative operations.¹³⁰ In theory, the voices of all members in a restorative school community, including students, teachers, staff, and administrators, are heard and respected, all are treated with dignity, and worthiness is assumed regardless of behavior.¹³¹

When conflict arises or someone is harmed, the incident is framed as a violation of the trusting and respectful relationship that exists between students, teachers, and staff. A restorative justice approach positions the community to address the needs of those directly involved in a harmful incident, which often includes the rule-breaker herself. A restorative response asks who has been harmed, what is the extent of the harm, and how the situation can be repaired, or put right.¹³² When trust and respect are established, individuals are able to take responsibility for their actions and the effect they have had on others. When individuals take responsibility for causing or contributing to a harm and volunteer to make things right, the process of rebuilding damaged relationships can begin and those who have been alienated by conflict--both those harmed and those who caused harm--can be reintegrated into the community.¹³³

*607 This school-based restorative justice philosophy is actualized on the ground through a continuum of specialized practices. Some practices are designed to facilitate communication and prevent conflict while others are designed to respond to a particular type of harm or problem. Thus, practices range from preventive-to-reactive, informal-to-formal, less-to-more structured, and addressing less serious-to-more serious harms.¹³⁴ Each practice has its own unique structure, facilitation style, need for preparation, and participants. Nevertheless, in keeping with the principles of mutual respect and equal dignity, all practices are non-hierarchical and horizontal, voluntary, and non-coercive.¹³⁵

On one end of the continuum lie less formal processes, such as *talking circles* and *restorative dialogue*, which may be used proactively, to build trust and empathy among students, or reactively for less serious incidents. These informal processes require basic restorative communication and facilitation skills and, because they demand little preparation

or follow-up, can occur quite spontaneously, for example, during a pause in classroom instruction.¹³⁶ Talking circles are guided processes where participants sit in a circle and take turns, using a “talking piece,” to respond to a group question or to incidents.¹³⁷ A proactive or community building circle might ask students to share their values (“who is your role model and why?”) and emotions (“I feel happy when ...” “I feel stressed when ...”). In contrast, restorative dialogue is a one-on-one mode of inquiry that can come from a teacher *608 or student peer.¹³⁸ For example, if a disruption occurs during a class activity, the teacher might intervene immediately and ask open-ended, non-threatening questions like, “can you tell me what happened?,” “what led you to do X [for example, scribble on J's assignment]?,” and “how do you think this impacted J and what can you do to improve the situation?”¹³⁹ In a restorative school, students, teachers, coaches, school staff, and even school resource officers¹⁴⁰ are trained in these communication methods and therefore can all respond directly to incidents when they arise. Rather than punishing students or sending them away from the class, students engage in discussion about their behavior, its consequences, and whether anything might be done to prevent such disruptions in the future. Some schools report that students, once trained in this practice, affirmatively request circles when they have an issue they want to talk about.¹⁴¹

In the middle of the continuum lie processes called *community conferences*¹⁴² and *problem-solving circles*, which are used to address an issue of shared concern or an ongoing problem that requires a group to resolve. For example, truancy and persistent lateness, conflicts among a group of students, or a student returning to school after a period of incarceration, might be addressed through one of these problem-solving processes. Unlike the less formal circle dialogues, these processes happen in a closed, confidential setting and are convened and facilitated by an adult with specialized training.¹⁴³ They also take more time to set-up because a larger group is needed to participate.¹⁴⁴ *609 Facilitators conduct a series of pre-meetings in advance to learn about the underlying problem and prepare the participants.¹⁴⁵ Because participation is voluntary, these pre-meetings help ensure participants' willingness to participate and enable the facilitator to address their concerns. Once all of the participants have agreed to the circle or conference, the facilitator begins by reminding everyone why they are present and that they have all agreed to participate to try and make the situation better.¹⁴⁶ After introductions, the facilitator then guides the participants through a series of open-ended questions tailored to the specific problem being addressed by the conference, with everyone in the circle responding, one at a time, to each question. Other than ensuring that everyone has a chance to respond and introducing the next query to the group, the facilitator remains neutral and refrains from substantive contributions.¹⁴⁷ At the end, the conference participants collaborate to write up any agreements and develop a plan for monitoring and review.¹⁴⁸ Other than the written agreement and monitoring plan, no other records are kept and discussions are confidential.

At the other end of the continuum sit the most formal, structured processes, such as *restorative conferencing*¹⁴⁹ and *restorative mediation*, sometimes called “victim-offender mediation.”¹⁵⁰ Unlike problem-solving circles and general community conferences, these processes react to specific, harmful incidents. For example, they might be used to address an assault, bullying or harassment, hate crimes, theft, arson or vandalism, as well as external conflicts that permeate the *610 school environment.¹⁵¹ Mediations usually involve only the two or three people directly involved in an incident while a restorative conference might involve a wider circle of stakeholders.¹⁵² Unlike the less formal processes discussed above, these processes tend to be more scripted and follow a structured format.¹⁵³ Additionally, because these processes bring together individuals who committed a wrong with the people directly harmed, these processes require high-level facilitation skills and careful preparation to ensure participants' safety and well-being, as well as monitoring and review of any agreements and action plans.¹⁵⁴ Participation is strictly voluntary--individuals who have suffered a harm should never be pressured to participate--and, importantly, respondents, or the rule-breaking individuals, must

have acknowledged prior to the restorative conference or mediation their role in causing a harm.¹⁵⁵ Again, facilitators remain neutral: any outcome of both restorative mediation and restorative conferencing must be generated by the participants themselves and cannot come from the facilitators. An agreement requires consensus from all participants involved in the process. Examples of some agreements include specific changes to behavior in the future, an apology to victims and school staff, restitution or in-kind service to the victim, a community service project, plan for mentoring, as well as programs for pro-social reflection or instruction.¹⁵⁶ It is the responsibility of the facilitators to help the *611 participants draft an agreement that is realistic and that clearly lays out action items and expectations for timely completion.¹⁵⁷ Once all participants consent to the terms as drafted in the agreement, and sign it, it is closely monitored for compliance either by the facilitator or by a school administrator.¹⁵⁸

As the description of preventative and responsive restorative practices illustrates, this comprehensive, whole school approach to managing school behavior offers a stark contrast to the automatic, mandatory punishments that constitute zero-tolerance discipline. Reform advocates hope that, by using restorative practices instead of zero-tolerance discipline, students will not suffer the same disaffection and alienation, nor will they fall behind in their work and be at increased risk of dropping out of school altogether. The added focus on relationships and responsibility aims to hold students *more* accountable than if they were suspended or expelled. And, their feelings of connectedness to school, the same connectedness that protects young people from dangerous behavior and that is broken by exclusionary discipline, can be forged and strengthened.¹⁵⁹

B. PROMISING EVIDENCE FROM PILOT PROGRAMS

Reform advocates' excitement about using restorative practices in schools is fueled not only by the potential, theoretical benefits of restorative justice, but also by promising results from schools piloting restorative programs. These schools report reductions in overall exclusionary disciplinary actions and racial disparities, as well as improvements in students' academic outcomes and social and emotional competencies.¹⁶⁰ However, these outcomes are self-reported *612 by individual schools and school districts, all of which are piloting different models of restorative justice, and are not based on independent empirical research.¹⁶¹ As will be discussed in Part III, there is reason to temper some of this excitement because, when some of these models and their implementation receive closer scrutiny, the picture becomes less rosy and the benefits less pronounced.

Nonetheless, reports from schools about instituting restorative justice are promising. Schools report reductions in suspension and expulsion rates as well as police referrals.¹⁶² Denver Public Schools, which initiated a pilot Restorative Justice Project in 2005 to reduce suspensions and expulsions, reported in 2010 a forty-five percent decrease in school suspensions and a fifty-percent decrease in expulsions from the previous academic school year.¹⁶³ Chicago Public Schools report a nineteen-percent drop in calls to police to respond to disciplinary incidents.¹⁶⁴ And, the Oakland Unified School District, *613 which implemented some form of restorative practice in twenty-four of its eighty-six schools, reports significant declines in suspensions in its restorative schools, particularly among Black students, whose suspensions for disruption or "willful defiance" decreased by forty percent, with more modest improvements for Latino students, whose out-of-school suspension rate for the same offense decreased by fifteen percent.¹⁶⁵

Schools also report a decrease in the racial disparities that existed under an exclusionary discipline regime. In Oakland, the difference in suspension rates between Black and White students fell over two years from 24.7 to 18.7.¹⁶⁶ A more

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recent comparison study of two east coast high schools found that, in classrooms where restorative practices were used more often, there existed a smaller discipline gap between Asian/White and Latino/African American student groups.¹⁶⁷

Finally, schools report not just reductions in overall suspensions and expulsions and disciplinary disparities, but also report additional benefits such as improved scholastic achievement and emotional well-being of their community members. After instituting restorative practices, some schools report less disorderly conduct and fewer violent incidents--student assaults, assaults on teachers and administrators¹⁶⁸--especially among repeat offenders.¹⁶⁹ Additionally, schools report improvements in academic outcomes and social skills competencies: fewer instructional days lost to suspension, fewer failing grades, as well as improvements in class attendance and timeliness.¹⁷⁰ In Oakland, the high schools that implemented restorative justice *614 reported a 128% increase in reading levels from 2011-14, compared to an 11% increase in non-restorative justice high schools over the same three-year period.¹⁷¹ Students in restorative schools rate themselves as better able to adapt and cope with stress, a perspective shared by their teachers, who reported that more than half of their students demonstrated improvements in self-control and externalizing behavior.¹⁷² Another study found that restorative justice discipline programs positively transformed teacher-student relationships, with students reporting greater respect for teachers and teachers making fewer disciplinary referrals.¹⁷³

These positive reports have convinced reformers that restorative practices can resolve the problems caused by zero-tolerance disciplinary policy--lost learning time, disaffection and alienation, and increased contact with the criminal justice system--and therefore should be instituted more widely. However, as the next Part explains, legal interventions used thus far to institute school-based restorative justice exhibit significant shortcomings and do a poor job of translating restorative philosophy into actionable policy. If left uncorrected, these legal interventions may jeopardize the restorative school reform project.

III. LEGAL INTERVENTIONS TO INSTITUTE RESTORATIVE JUSTICE AND THEIR SHORTCOMINGS

Reformers seeking to roll back harmful zero-tolerance policies and to institutionalize restorative justice advocate from multiple directions and through a variety of legal interventions. They have used legislation, regulation, and structural reform litigation to secure policy changes at local, state, and federal levels of government. Some of these reforms remove zero-tolerance mandates from the books, but that cannot undo the decades of policy, ingrained practices, and infrastructure built up to enforce zero-tolerance.¹⁷⁴ Other reforms affirmatively require public schools to use "restorative justice" as school discipline.

While these restorative justice mandates might seem like a good idea, they are in fact problematic. Simply requiring schools to use "restorative justice" is not a meaningful or realizable legal command. To begin with, there is no consensus around what the term "restorative *615 justice" means and how it should be practiced. Restorative justice philosophy has been interpreted differently when applied not just in the education context but also in such varied arenas as criminal justice, child welfare, employment, and democratic transition in conflict societies. The principles, practices, and objectives of restorative justice in each of these settings differ considerably; thus, when "restorative justice" is issued as a legal command, it remains unclear which of the competing philosophies, practices, and objectives the command evokes.

This general ambiguity problem is further compounded by the fact that, in just the educational setting alone, schools interpret restorative justice divergently. An examination of school-based restorative justice programs reveals considerable confusion and poor practices, with very few attempting to implement the most comprehensive, whole school approach. Reform advocates seeking to institutionalize restorative justice in schools should neither assume that

“restorative justice,” on its own, offers a coherent, concise concept or methodology for schools nor that schools will pursue the most promising, whole school approach.

Thus, by failing to issue policy guidance and clear instructions on what constitutes a restorative school and how to implement restorative practices, reformers squander an opportunity to ensure the outcomes of their intended policy reform take hold.¹⁷⁵ With such open-ended and poorly formulated legal interventions, reformers will not dislodge entrenched zero-tolerance policies and, as a result, students, teachers, and their school communities will miss out on all the potential benefits of a restorative school. This Part analyzes the variety of legal actions used thus far to attempt to institute restorative justice in schools and argues that they are insufficient.

A. LEGAL ACTION TAKEN THUS FAR

Not surprisingly, early efforts to implement restorative justice across jurisdictions look very different from each other and target different players within the school system. While some legal formulations of restorative justice provide a good start and a solid foundation for building a restorative school, others are wholly inadequate and will not advance reformers' goals. Regardless of which legal avenues advocates choose to pursue, it is critical to pay greater attention to how restorative justice is articulated into the law.

**616 1. Legislative Reform*

In a number of U.S. jurisdictions, lawmakers have proposed and enacted legislation that falls into three different categories: (1) revising the zero-tolerance mandate for schools; (2) supporting disciplinary alternatives; or (3) mandating restorative justice.¹⁷⁶

The first tactic for reforming zero-tolerance consists of legislation to shrink exclusionary discipline back down to weapons on campus, as it was originally envisioned in 1994. For example, a new Florida law clarifies that automatic exclusion should only apply to dangerous weapons¹⁷⁷ while new laws in California and Illinois prohibit suspensions and expulsions for minor behavioral infractions, truancy, or tardiness.¹⁷⁸ While these new laws may help rein in the abuses of zero-tolerance, they provide no guidance to schools on what they should institute as an alternative.

Legislatures in other states have considered or enacted laws providing ancillary support for restorative justice in schools. Bills recently proposed in South Carolina and Illinois, respectively, call for a committee to study the “Schoolhouse to Jail House” phenomenon and to issue matching grants for schools that divert funds away from law enforcement and into alternative restorative justice programs.¹⁷⁹ Another approach has been to advance restorative justice by targeting the training and continuing education of teachers and other school personnel. Texas and Utah passed new laws requiring School Resource Officers to receive training in restorative practices.¹⁸⁰ Indiana and Louisiana require schoolteachers to receive training in how to use restorative justice to establish and maintain supportive classroom environments.¹⁸¹ While it does seem useful to target the training of *617 adults in the classroom and on school grounds, these laws do nothing to replace the zero-tolerance legal regime currently in place. Furthermore, they focus on either preventative practices or responsive practices, not both, therefore adding to the confusion about whether restorative justice is a preventative, classroom management technique or a disciplinary diversion.¹⁸²

Finally, a third legislative approach has been to require schools to offer restorative disciplinary practices as an alternative to exclusionary discipline. Colorado has gone farther in this direction than any other state by requiring schools to

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use restorative justice as the first disciplinary response¹⁸³ in order to “minimize student exposure to the criminal and juvenile justice system.”¹⁸⁴ The statute also defines “restorative practice” and enumerates appropriate outcomes in victim-offender conferences.¹⁸⁵ Importantly, Colorado's legislation conceives of restorative intervention as a substitute for, not a complement to, exclusionary discipline.¹⁸⁶ The problem with Colorado's approach, however, is that it, too, frames restorative justice as a purely reactive, disciplinary diversion. It does not include the preventative, community building work that is a necessary component of the most comprehensive, whole school approach.¹⁸⁷

All of these efforts to use legislation to reform school discipline do not advance institutionalizing restorative justice or preventing implementation difficulties. First, these laws continue to perpetuate confusion about whether school-based restorative justice is preventative or reactive, when it should be both. Second, while Colorado's law explicitly identifies the reparative objective of restorative justice and mentions potential practices to use, it does not elaborate further. Lawmakers seem to assume that school boards and administrators will know, and agree upon, what constitutes “repair.” As the next Subpart discusses, assuming consensus on how to repair harm is a mistake. And, third, these laws fail to articulate who may access restorative practices, leaving that decision to schools' discretion. The problem with this approach is that it ignores the racial and socio-economic biases at play *618 in school disciplinary decisions and creates the potential for some students to be diverted to less punitive, restorative practices while others continue to receive harsh punishments. To avoid the racial gap in exclusionary school discipline and its associated collateral consequences, all students must be able to participate equally in a restorative school.

Constructing clearer legal requirements for schools to develop and implement both preventative and responsive restorative practices, and for those practices to be made equally available to all students regardless of age or racial or ethnic identity, would ensure that all students have an opportunity to experience the potential benefits of a whole school approach to restorative justice. Without clearer legislative mandates, the problems schools have had with implementing restorative justice, discussed below, will continue. All of these legislative interventions, although surely well intentioned, fall far short of institutionalizing an effective, restorative justice alternative to zero-tolerance discipline.

2. Rule Change

Similar shortcomings in legal formulation are also present in new regulations designed to remove harmful zero-tolerance disciplinary policy and institute a restorative justice alternative in its place. These regulations appear at the state, local, and federal level but all are insufficient in institutionalizing effective restorative justice programs.

At the state level, state departments of education have promulgated new rules regulating school boards and school administrators.¹⁸⁸ For example, the Massachusetts Department of Education issued new regulations that require school principals to consider alternatives to suspension, including “evidence-based strategies and programs such as mediation, conflict resolution, restorative justice, and positive interventions and supports.”¹⁸⁹ The Maryland State Board of Education promulgated new regulations that target school boards and their codes of conduct. Under these new rules, all school boards in the state must redesign their disciplinary policies to be “based on the goals of fostering, teaching, and acknowledging positive behavior” and to “keep students connected to school so that they may graduate college and career ready.”¹⁹⁰ Long-term suspensions and expulsions are to be *619 “last-resort options” and their use is strictly curtailed.¹⁹¹ The phrase “restorative justice” is not mentioned but these reforms aim to cease harsh zero-tolerance discipline practices that push children out of school. While these regulations are positive moves away from the zero-tolerance status quo, they do not come close to what is needed to institute systematized, restorative programs in school.

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All of the implementation problems--confusion about what *is* restorative justice, how to structure a program so that all students are treated fairly and equitably in schools--go unaddressed.

Absent action at the state level, new initiatives at the local level and the federal level also attempt to reform zero-tolerance discipline. The New York City Council revised its school discipline code to incorporate training and funding for restorative programs¹⁹² and San Francisco's School Board adopted a resolution underscoring its commitment to changing the disciplinary culture in its schools and calling for a student discipline framework based on restorative justice.¹⁹³

More wide-reaching reform initiatives at the federal level include a joint initiative between the U.S. Department of Justice ("DOJ") and the Department of Education ("DOE"). Together, both federal agencies issued a "Joint Dear Colleague Letter" condemning the racial inequities in schools' use of suspension and expulsion and calling on schools first to exhaust alternatives using processes like "restorative justice."¹⁹⁴ Although non-binding, the DOE has also issued "Guiding Principles" for reforming school discipline and improving school climate through restorative practices.¹⁹⁵ There has also been federal funding in the form of grants to schools piloting restorative justice programs.¹⁹⁶ Providing funding and training is certainly important but funding and training in what, exactly? These regulations rely on the term "restorative" but, as this Part further discusses below, there is fundamental confusion about what that means and how to achieve "restorative justice" in the school setting. Thus, those seeking to reform public school discipline by instituting restorative justice need clearer legal mandates if they want to achieve their policy objectives.

620 3. *Institutional Reform Litigation

Efforts to reform school discipline and institute restorative justice have also been brought before the courts and the civil rights enforcement arm of the DOE. As discussed in this Subpart, lawsuits challenging schools' zero-tolerance discipline policies on various legal grounds ask courts to provide, or enforce, alternative discipline, in the form of restorative justice, as a remedy. Because, thus far, these cases have resolved in negotiated settlements, the action of the court has been to enforce their settlements as Consent Decrees to be monitored by a federal judge.¹⁹⁷ Institutional reform litigation involving school discipline reform falls into two primary categories, DOJ enforcement actions on the one hand and class actions brought by public interest law firms.

The first category consists of civil rights cases brought by the DOJ against school districts with disciplinary policies disproportionately impacting minority children. For example, the DOJ reopened a 1965 desegregation enforcement case against Mississippi's Meridian Public School District ("Meridian"). After investigating, the DOJ concluded that Meridian's harsh and punitive student discipline policy violated its "obligations under Title IV of the Civil Rights Act of 1964 to administer discipline without discrimination on the basis of race and in a manner that does not perpetuate or further the segregation of students on the basis of race."¹⁹⁸ It further found that Meridian's over-reliance on exclusionary discipline resulted in "significant racial disproportionality in disciplinary referrals and exclusionary consequences," meaning that "black students frequently received harsher consequences, including longer suspensions, than white students for comparable misbehavior, even where the students were at the same school, were of similar ages and had similar disciplinary histories."¹⁹⁹

To resolve the problem of racial disproportionality in discipline, the DOJ and Meridian negotiated revisions to school district disciplinary policies and practices that, in turn, were formalized by the parties into a Consent Order ("Order") signed by the Court. The terms negotiated by the parties offer, by far, the best formulation of what a restorative

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school should aspire to be. In the Order, parties agreed that *621 Meridian would institute “restorative practices,” defined in the Order as “an approach to student discipline that focuses on resolving conflict, repairing relationships, and assisting students to redress harms caused by their conduct, and may include positive interventions and processes such as mediation, family group counseling [*sic*], and peer mentoring.”²⁰⁰ The Order requires training for classroom teachers in classroom management and corrective behavior skills based in a restorative approach.²⁰¹ It further requires Meridian to use restorative practices in place of discipline referrals that remove students from instructional time and their home schools.²⁰² And, Meridian must provide written clarification to the Meridian Public School District Police Department and School Resource Officers on school police officers' roles and responsibilities in the school, including that school police conduct be consistent, among other things, with restorative approaches.²⁰³

While this Order makes important progress toward formalizing school-based justice, it could go even further. Unlike any of the other legal interventions, this Order is the only one to articulate both the preventative and responsive roles for restorative justice, laying a foundation for the most comprehensive, whole school approach to restorative justice. Combining both the preventative, community building work and the restorative response to misbehavior offers the greatest potential benefits to students. What the Order does not address, however, are finer details about what each of the articulated restorative practices entails: did the parties mean family group *counseling* (a form of therapy) or family group *conferencing* (the problem-solving ADR process)? What are students' rights to access restorative discipline procedures and what principles will guide mediations, family group “conferences,” and peer mentoring? These elements are left open-ended and, while the DOJ has the right to review the new Code of Conduct before it goes into action, the Order itself does not provide guidance on best practices or constraints on bad practices.²⁰⁴

A second approach to institutional reform by adjudication arises out of class action complaints brought by students--often represented by nonprofit, public interest advocacy firms--against their schools for *622 violating constitutionally or statutorily protected rights. For example, in 2015, students and teachers brought a class action against the Compton Unified School District and its Board of Trustees alleging that the District's reliance on “punitive and counter-productive suspensions, expulsions, involuntary transfers, and referrals to law enforcement ... push them out of school, off the path to graduation, and into the criminal justice system.”²⁰⁵ The plaintiffs, which include young people exposed to violence, severe personal loss, homelessness, and complex trauma, seek injunctive relief and request the court to order, among other things, implementation of “restorative practices to build healthy relationships, resolve conflicts peacefully, and avoid re-traumatizing students through the use of punitive discipline.”²⁰⁶ There is no other indication in current court filings of what, precisely, the plaintiffs consider acceptable “restorative practices.”²⁰⁷ Another effort by students to challenge zero-tolerance discipline practices takes place in the administrative, rather than judicial, context. The Southern Poverty Law Center filed complaints with the U.S. Department of Education's Office for Civil Rights “on behalf of African American students disproportionately subjected to arrests and seizures in Jefferson Parish Public Schools in violation of Title VI of the Civil Rights Act of 1964” that seek to implement restorative justice in parish schools.²⁰⁸ Just as efforts to reform school discipline through legislative and regulatory interventions do not provide sufficient guidance on how to institutionalize restorative justice, adjudicative efforts appear equally ineffectual.

Despite the creativity and zeal with which reform advocates are working to accomplish their goals of replacing zero-tolerance with restorative justice, they will not achieve those goals without legal mandates that are just as explicit as those that established zero-tolerance decades ago. As the next Subparts argue, reformers cannot rely on the term “restorative justice” as a coherent concept and they should strive for clearer instruction on how to systematize the distinctive practices that constitute a restorative school.

***623 B. FAILURE TO ACCOUNT FOR A CONTESTED, INHERENTLY AMBIGUOUS CONCEPT**

One of the mistakes the school reform movement makes is assuming that the term “restorative justice” has distinct meaning and can, on its own, have legal effect. To the contrary, restorative justice has no single origin, and instead is a synthesis of different spiritual philosophies, indigenous practices, ideologies, and political movements, all of which have combined into a worldview expressed through many (sometimes contradictory) activities.²⁰⁹ Restorative practices appropriate for one setting, such as schools, look very different than restorative practices in the criminal justice setting. And, even within each of those settings there are disagreements about what programs are truly “restorative.” Indeed, if there were one thing about which the restorative justice field could agree it would be that there is no agreed-upon definition or model of “restorative justice.”²¹⁰

The origins of the restorative justice worldview are diverse and the concept is riddled with inherent contradictions. Dr. Howard Zehr, a pioneer in developing a field of restorative justice, observes that restorative justice is “a compass not a map”²¹¹—a moral philosophy, not a formal process or methodology²¹²—that investigates how to respond to wrongdoing.²¹³ This philosophy derives from a particular worldview that everything is connected through relationships.²¹⁴ Thus, a crime, or wrongdoing, signifies “a wound in the community, a tear in the web of relationships.”²¹⁵ Because “a harm to one is a harm to all,”²¹⁶ the response to harm must therefore include three groups: (1) those who suffered directly from the harm, (2) those who caused the harm, and (3) their collective community. Restorative justice is about “healing rather than hurting, moral learning, community participation and community caring, respectful dialogue, forgiveness, responsibility, apology, and *624 making amends;” it is about “restoring victims, restoring offenders, and restoring communities.”²¹⁷ And what, precisely, is to be restored? The answer to that question depends upon participating stakeholders and “whatever dimensions of restoration matter to the victims, offenders, and communities affected by the crime.”²¹⁸

Because there are many ways of orchestrating this kind of response to harm, there are many models of restorative justice.²¹⁹ Communities all over the world, each with distinct ethnic and cultural origins, have developed restorative applications for different types of problems. For example, the idea of assembling a problem-solving conference was appropriated from the Maori indigenous peoples of New Zealand who used *whanau hui*, or gatherings of extended family to restore, or confront, threats to community cohesion.²²⁰ The Bantu concept of *ubuntu*, the idea that an individual's humanity exists only through relationships with others, informed the mission of the South African Truth and Reconciliation Commission and the entire nation-building project for the transition from apartheid to democracy.²²¹ The Diné Navajo belief in interconnectedness, solidarity, and egalitarianism inspired a unique paradigm of dispute resolution practiced through peacemaking circles.²²² Restorative justice's moral imperative to repair harm and restore community finds its spiritual roots in the foundational beliefs of Buddhism, Christianity, First Nations holism, Hinduism, Islam, Judaism, and Taoism.²²³

Added to these spiritual and cultural bases are ideologies from different social and political movements of the 1970s, which often had competing aims. For example, one element of “restorative justice” *625 focuses on reforming punitive carceral systems and improving treatment of prisoners.²²⁴ This objective came from the civil rights movement, which confronted White racial domination and the over-criminalization and incarceration of African Americans, Native Americans, and other ethnic minorities.²²⁵ Another restorative justice movement emerged from anti-colonial efforts of indigenous peoples in Australia, Canada, New Zealand, and South Africa who denounced the role of state institutions

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in the subjugation, segregation, and forced assimilation of aboriginal peoples.²²⁶ They sought “restorative justice” as a means to regain cultural and political autonomy by restoring authority to deliver justice to local communities rather than state institutional actors.²²⁷ In contrast to both the civil rights and anti-colonial movements, the feminist movement called for restorative justice from a victims' rights perspective. Feminist advocates protested against the failures of the justice system to respond seriously to victims of crime and to treat them fairly and with dignity.²²⁸ Some victims' advocates lobbied for “restorative justice” in the form of fiercer punishments for crimes against women, like rape and domestic violence, while others prioritized support for victims as trauma survivors.²²⁹ In very different ways, each of these movements configures and then reconfigures “restorative justice” into a conceptual vehicle for challenging the status-quo.

Because these movements all had distinct ideological roots and objectives, they developed distinct (and often contradictory) alternative models for determining and delivering justice, further adding to the confusion about what constitutes “restorative justice.”²³⁰ For example, *626 some prioritized the concept of *encounter*, an orchestrated dispute resolution process by which all stakeholders involved in misconduct or impacted by a crime come together and discuss what occurred, its effects, and how it should be addressed.²³¹ Others emphasize the *reparative outcome* of restorative justice, or the need for the harm to be repaired through, for example, restitution or in-kind service.²³² And finally, others argue that, rather than focusing on processes or outcomes, true restorative justice must be *transformative* in nature in that it changes how individuals view themselves and one another.²³³ Thus, what makes restorative justice “restorative”—its process or its outcome—and whether restorative justice is a collection of practices or a value system remains contested.²³⁴

The confusion and disagreements over whether restorative justice is about the *encounter*, the *outcome*, or the *transformative experience* is demonstrated by the wide range of initiatives labeled “restorative justice” in the criminal justice setting.²³⁵ For example, community policing programs²³⁶ are considered “restorative justice,” as are ADR processes that replace criminal prosecution or sentencing.²³⁷ These restorative victim-offender encounters differ, in turn, from court-ordered “therapeutic sentences,” sanctions like restitution or community service or mental health treatment that may be included in a traditional criminal sentence or as terms of probation.²³⁸ There are *627 also “restorative justice” programs for victims of crime that include financial compensation, the right to be notified of court hearings or considerations for prisoner probation or release, as well as opportunities to give victim-impact statements at criminal sentencing.²³⁹ This victim-oriented category of “restorative justice” clashes with those “restorative justice” initiatives designed to support prisoners and their families²⁴⁰ or victim-offender dialogues that bring together perpetrators of crime with victims of crime or their families.²⁴¹ Thus, in just one single context, criminal justice, an array of different “restorative justice” programs, each with its own unique participants, objectives, and context, exists because of a different emphasis on encounter, reparative outcome, or transformation, or all three.

While the fluidity of restorative justice philosophy enables it to adapt to all sorts of circumstances, this same capacity for adaptation can also be a weakness. One consequence of the “many identities and referents” of restorative justice is that “[c]ommentators, both advocates and critics, are often not talking about or imagining the same thing.”²⁴² This poses two problems. First, the lack of clarity about what is “restorative” and what is not results in the proliferation of non-restorative processes that then become difficult to rein in.²⁴³ And, second, a restorative process meant for one setting can be transposed into another. For example, restorative justice in the school setting is *628 distinct from, but gets confused with,²⁴⁴ restorative justice in the criminal justice or transitional justice settings.²⁴⁵ As Judge Charlie

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Falconer observes, confusing the educational and criminal justice systems, and by extension their affiliated restorative justice programs, is a mistake:

The education system provides a learning experience that is designed to improve and do something for pupils, helping them to develop a sense of responsibility. The criminal justice system, including the youth justice system, is not for that purpose. Its purpose is to provide protection for the public from crime. Its purpose is also to ensure that the public accept that the State is there to provide punishment and retribution in relation to crime.²⁴⁶

Thus, reformers are wrong if they assume that restorative processes are fungible. Those applied to the criminal justice system do not translate to the educational system because each system serves a different societal function and the particular restorative process adapted for each system grows from different ideological roots.

Given the conceptual and contextual ambiguity of “restorative justice,” it is especially important that legal interventions aiming to establish restorative justice in schools be precise in articulating what “restorative justice” actually means for the school setting. Because there is no consensus about what constitutes “restorative justice,” relying only on the term means there is no control over what program gets implemented in schools. If the goal of implementing school-based restorative justice is to improve interpersonal relationships for all members of the school community, to teach students conflict resolution skills, personal responsibility, and impulse control, and to remediate the problems of zero-tolerance discipline, legal reforms instituting restorative justice should ensure that programs put in place in fact address the problems caused by zero-tolerance. To do otherwise imperils the important policy objectives of the school discipline reform movement.

***629 C. FAILURE TO FORESTALL OBSTACLES TO SUCCESSFUL IMPLEMENTATION**

Restorative justice's ambiguity problem is not purely theoretical; incompatible and divergent applications of restorative justice have already appeared in the school setting.²⁴⁷ An examination of different school-based programs reveals confusion about what constitutes “restorative justice” in schools--what it takes to build a restorative school as well as how and when restorative practices should be used. Second, and relatedly, when schools fail to implement a whole school approach and fully integrate restorative practices into school operations, these schools either drift away from core restorative justice principles or apply restorative justice superficially. In both cases, the positive benefits of using restorative practices disappear and zero-tolerance discipline remains the status quo. And, third, it appears that racial inequity in discipline persists, particularly in schools that do not implement a comprehensive, whole approach to restorative justice. If reform advocates used better legal interventions--both to help schools implement effective restorative practices and avoid bad applications of restorative justice--then they would be more likely to achieve their reform goals of replacing zero-tolerance discipline and counteracting its negative effects.

Current legal interventions do little to correct confusion about what constitutes a restorative school; on the contrary, examples discussed earlier perpetuate this confusion. For example, sometimes restorative justice is applied in elementary schools but not secondary schools, or only introduced in certain grades or classrooms but not others.²⁴⁸ One school will use restorative practices only for nonviolent infractions and retain automatic, exclusionary discipline for those that are violent, while another school will do the reverse.²⁴⁹ Where some ***630** schools use consensus-based, voluntary restorative processes (conferences, mediations, circles), others utilize “peer juries,” processes lifted from the criminal justice context that, depending on how they operate, may be neither voluntary nor consensus-based.²⁵⁰ Schools also appear confused about where restorative justice philosophy should “live” in the school setting. Some schools use

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restorative justice purely as a classroom behavior management tool or curricular subject²⁵¹ while other schools use it purely as a disciplinary diversion program.²⁵² Sometimes even adults at the same school are confused about whether restorative practices are their responsibility or someone else's.²⁵³

These discrepancies pose problems for reformers because it means schools, when left to their own devices, attempt restorative practices in isolated fragments, choose “restorative” practices that are not appropriate for the school setting, or fail to secure community buy-in. If legal interventions lack the specificity needed to forestall these potential problems, then restorative practices will not take root throughout the school community and be sustained long-term. As a consequence, the full benefits of restorative practices, those that go beyond simply reducing numbers of suspensions and expulsions but are tied to changing the culture and climate of a school--the improved social and emotional learning, accountability, and school connectedness that excited school discipline reformers in the first place--will not materialize for all students.

Current legal interventions also fail to set clear standards for school-based restorative practices, enabling low-quality restorative processes and poor adherence to restorative principles. This is particularly prevalent among those schools that conceive of restorative justice only as a way to respond surgically to problem students or ***631** problem behaviors.²⁵⁴ For example, at one such school, adherence to program standards slipped over time. Over a three-year period, despite an increase in disciplinary referrals and truancy notices for seventh and eighth grade students, fewer restorative processes were held (only a total of two restorative conferences for the whole year) and, when circles did take place, they frequently lacked monitoring agreements or action plans, with little follow-through to ensure compliance.²⁵⁵ At another school, students reported not having a choice about whether to take part in restorative conferences. And, when they did participate, some conference facilitators would go “off script” and use the conference to dictate what students had to do to make amends.²⁵⁶ If restorative practices fail to adhere to foundational principles--respect and dignity, relationship and voice--they run the risk not only of failing to repair relationships and reintegrate alienated community members, but also of creating new harms.

By offering guidance and setting clear standards, legal interventions could also avert problems that arise when implementation of restorative practices is taken to scale, across an entire school district. For example, in Los Angeles, Chicago, New York, and Washington D.C., attempts to change disciplinary policy from zero-tolerance to restorative justice have been rocky. All districts report dramatic drops in suspensions and expulsions after implementing “restorative justice,”²⁵⁷ ***632** but these reports come amid complaints from teachers, parents, and students that change is superficial. United Teachers Los Angeles, the union of public school teachers for the L.A. Unified School District, while generally supportive of the District's new restorative discipline policy, argued that the new discipline program had merely been created “rhetorically”--the superintendent announced the new program and the need to keep children in school, but made no investments in this alternative approach by hiring school psychologists, counselors, and support staff--causing teachers to feel unsupported and without means to address disruptions in their classrooms.²⁵⁸ Chicago school teachers complained about a revised Student Code of Conduct requiring schools to replace punishment with restorative alternatives, saying they could not effectively implement the new policy due to lack of resources (some schools lacked a space that could be used as a “peace room”²⁵⁹) and trained personnel, such as behavioral specialists, to intervene with disruptive students.²⁶⁰ In New York, despite reductions in suspensions and expulsions after restorative justice reforms took effect, teachers' responses to school climate surveys report less order, discipline, and mutual respect and students report more violence, drug and alcohol use, and gang activity.²⁶¹ Even more alarming are allegations that, in some Washington D.C. public schools that have adopted a restorative justice policy, administrators are manipulating their disciplinary records by continuing to rely on exclusionary punishments but not recording them as “suspensions.”²⁶²

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Thus, it seems clear that changing one school's culture, let alone an entire district's, requires more than new language in a disciplinary policy. Better legal interventions can help by providing resources, guidance, incentives, and accountability.

*633 Finally, legal interventions must do a better job of addressing disparities in discipline for minority children and children with learning disabilities. Studies and school reports show that these disparities still persist, within individual schools and across school districts, after the adoption of restorative practices. Even after three years of using restorative practices, the Oakland Unified School District reports that African American students receive suspensions at a disproportionately high rate compared with their White peers.²⁶³ At another school, while overall suspension rates dropped, racial and ethnic gaps for discipline referrals actually *increased* over the three-year restorative justice pilot program.²⁶⁴ One study of 294 public, non-alternative secondary schools found that schools with high Black student composition were less likely to use restorative justice techniques to respond to student behavior and to implement an overall model of restorative discipline.²⁶⁵ Furthermore, after controlling for a wide range of factors, researchers found that the only significant predictor for the use of restorative discipline models was the effectiveness of the principal.²⁶⁶ Thus, an important lesson for school discipline reformers is that adults, and especially school administrators, exercise considerable discretion over who is referred for discipline, who is diverted to a restorative process, and who is punished with exclusion.²⁶⁷ Simply announcing a new alternative to zero-tolerance discipline policy will not eradicate the racial inequity associated with it. Legal interventions should therefore do a better job of regulating these school actors and channeling their choices toward a restorative, rather than a zero-tolerance, disciplinary policy.

Taken together, these difficulties with implementing restorative justice send a clear message: changing school culture is hard work. Any effort to institutionalize restorative justice in schools through legal interventions must be carefully crafted because restorative justice is a philosophy and a value system, not a program to enact. Building a restorative school necessitates changing a school's culture, which means *634 students, teachers, administrators, staff, and parents all have to participate in creating a community based on mutual respect. In some schools and some school districts, that kind of trusting community may not yet exist.²⁶⁸ For these schools, the heavy-lift of implementing restorative practices lies at the level of community building and preventative work.

If the formulation and implementation of restorative justice is left too open-ended, then the prospect of it taking root in a school is left to chance (for example, schools lucky enough to have strong and respected leadership) or, worse, to pre-existing dynamics (for example, socio-economics and racial make-up) that make a school more or less receptive to restorative justice's ideology of repairing community relationships. The consequence will be that schools without an established ethic of community and poor school climate scores, schools with high percentages of Black students, and schools that are under-resourced--the same schools that over-rely on zero-tolerance discipline and are targets of reform efforts--will not adopt a comprehensive approach to implementing restorative justice. Thus, restorative justice is no exception to the already established understanding in education policy reform: for a new discipline philosophy to reach down into individual schools, it needs to have a "strong intervening program" of implementation; "merely imposing a discipline code on a school 'from on high' will not solve the problem."²⁶⁹ The inherent ambiguity of "restorative justice" makes the need for a strong intervening program of implementation even greater.

Legal interventions cannot mandate a restorative ethos, but they can play a role in offering guidance, enabling certain choices and constraining others. The challenge of how to formulate restorative justice into a legal mandate, so that it can be institutionalized consistently and effectively, is taken up in the remainder of this Article.

IV. FORMALIZING RESTORATIVE SCHOOL DISCIPLINE INTO LAW

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Given the inherent incoherence of the term “restorative justice” and the different, sometimes incompatible, processes it has spawned, it is crucial that new laws intended to institutionalize restorative justice in schools formalize appropriate approaches for the educational setting. *635 Not only does formalization remedy the ambiguity problem presented by the term “restorative justice” but it also can preempt obstacles to effective implementation by clarifying how to develop and utilize restorative practices in the school setting. The intention is to make school-based restorative justice legally realizable policy: ensuring that high quality restorative practices reach all students, are applied fairly and uniformly, within schools and across school districts, and sustained over the long term.

However, at the same time, for schools to absorb restorative philosophy and truly change their disciplinary culture, they must also have space to craft home-grown restorative practices that feel authentic and meet the needs of their community. Too much external pressure without local ownership can render restorative practices as one more impossible-to-meet educational outcome, resulting in cut corners and superficiality. Too much space for schools to self-direct can lead to the adoption of harmful, pseudo-restorative approaches. At either extreme, the outcome of the legal intervention is no meaningful change, which, in turn, means that the discrimination borne out by zero-tolerance disciplinary policy and the collateral consequences of the School-to-Prison Pipeline perpetuate. Thus, for any legal interventions to be effective in institutionalizing restorative philosophy in schools, they have to offer a balance of external mandates and opportunities for authentic ownership.

One way to achieve this balance and make restorative justice legally realizable is to formalize restorative justice through both legal standards and rules. This Article proposes rules and standards, as opposed to a model statute or school board regulation, because of their versatility and universality. First, a mixture of legal rules and standards enables the necessary balance of top-down, external mandates with ground-up adoption and tailoring of new policy. Second, rules and standards are compatible with various legal instruments--statutes, regulations, and court orders--and can therefore be used by reformers in many different advocacy channels.

This Part begins by explaining the theoretical basis for why both rules and standards are needed to make policy formally realizable. It then proposes some key elements of restorative school discipline that, if formalized into clear rules and standards, can help both advance the benefits of restorative justice in schools and overcome some of the difficulties with its implementation.

A. JURISPRUDENCE OF RULES

The German jurist Rudolph von Jhering maintained that, for a rule of law to fulfill its purpose, it has to be precise and “formally *636 realizable.”²⁷⁰ Duncan Kennedy borrowed this term for his meticulous study of the multi-dimensional relationship between the words or language of a law (its form) and its application to, or resolution of, a substantive problem (its meaning).²⁷¹ Kennedy considers “formal realizability,” or a legal directive’s “ruleness,” as one dimension (among many others) of this relationship.²⁷² He pictures *formal realizability* as an axis with two different kinds of legal directives situated at its poles. Strict rules lie at one end and standards, principles, or policies, lie at the other.²⁷³ Rules articulate clear directives for permissible conduct²⁷⁴ whereas standards provide the “substantive objective of the legal order” such as “good faith, due care, fairness, unconscionability, unjust enrichment, and reasonableness.”²⁷⁵ To illustrate the difference between rules and standards, consider the following example: “A rule might prohibit ‘driving in excess of fifty-five miles per hour on expressways.’ ... A standard might prohibit ‘driving at an excessive speed on expressways.’”²⁷⁶ Thus, the rule issues a clear mandate without explaining its underlying purpose; the standard identifies a purpose or substantive objective without clear instructions for achieving it.

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Each of these legal forms, both rules and standards, presents benefits and downsides.²⁷⁷ Rules are beneficial for two important reasons. First, such laws provide certainty: civic and private actors know what the law expects them to do and can adjust their activities accordingly.²⁷⁸ And second, the clearer a law, the more likely it is to restrain official arbitrariness, like corruption or racial bias, because it leaves minimal room for interpretation.²⁷⁹ (Driving over fifty-five MPH on the interstate is illegal whether you are the mayor or the dogcatcher.) Yet the benefit of rules' clarity is also their downside; their rigid inflexibility means they may be applied unfairly or fail to account for all *637 situations.²⁸⁰ (A person driving fifteen MPH on the interstate may be in compliance with a fifty-five MPH speed limit rule but poses a greater threat to safety than someone driving sixty MPH, only slightly over the limit.)

The history of zero-tolerance school discipline evidences the problem with rules' inflexibility. Hardline rules, such as legislation mandating pre-determined punishments for certain infractions, do not account for all situations. For example, a zero-tolerance rule forbidding weapons on campus will apply even if the student confiscated the knife from a suicidal friend²⁸¹ or forgot to take it out of his backpack after a weekend Boy Scouts trip.²⁸² Zero-tolerance rules also treat dissimilarly situated students in the same way: A rule punishing students for providing drugs or controlled substances will apply equally to a student who deals marijuana as to a student who gives a friend an aspirin.²⁸³ Using these fixed, unyielding rules in the school discipline context resulted in school administrators suspending and expelling students in record numbers, to devastating effect.²⁸⁴

On the other hand, rules' rigidity can be useful tools for reformers seeking to institute restorative justice. In order to comply with zero-tolerance discipline rules, schools and school districts directed their limited resources and personnel toward implementing and enforcing zero-tolerance policies--hiring school police, installing security cameras and metal detectors.²⁸⁵ New rules directing schools to provide training in restorative practices or to hire an administrator of restorative programs would require school administrators to reallocate finite resources from enforcing zero-tolerance to complying with restorative practices.

Legal standards, while they may lack the precision of rules, offer their own important benefits. First, standards explain the law's goal, its *638 purpose and intention.²⁸⁶ As Karl Llewellyn wrote, "If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense."²⁸⁷ Although Professors Llewellyn and Kennedy were writing specifically about judges interpreting written laws, statutes are also read and interpreted by a broader audience, for example the school board officials tasked with developing disciplinary codes, the school principals who enforce them, and the teachers who report violations. If the law elucidates its purpose, for example that students should be held accountable for their disruptive behavior without having to miss in-class learning time, as both Colorado legislation and Maryland regulation have done,²⁸⁸ then school board members can craft a Code of Conduct that reserves exclusionary discipline in only the most serious cases. A second benefit of standards is that they can serve as a compromise when lawmakers cannot agree on a particular rule²⁸⁹ or lack the expertise to formulate a clear rule themselves.²⁹⁰ For example, a standard like "reasonableness" offers a floor for determining appropriate conduct in a given situation without having to spell out what that conduct should actually be.

Again, as in the case of rules, the very characteristics that make legal standards beneficial also present downsides. Standards articulate a law's intended purpose but do not provide instructions for accomplishing that purpose. This is particularly difficult in the case of implementing "restorative justice," an adaptable philosophy that can take many, incompatible forms. A school administrator, therefore, might think she is implementing a restorative school program

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by requiring restorative practices only for students with high GPAs and no past disciplinary record, when in fact her actions are not what lawmakers intended.

Another problem with standards is they fail to issue clear instructions ahead of time, which means that determining compliance with the law necessitates analysis after-the-fact. For example, a law requiring a school disciplinary code to focus on “repairing harm” sets down a standard but provides no concrete actions for how to accomplish this objective or evaluate whether it has been met. This is particularly challenging for the Consent Decrees that, if allegedly breached, will have to be interpreted by a judge; for example, *did Meridian comply with the court order to create a new Code of Conduct* *639 that “focuses on resolving conflict, repairing relationships”?²⁹¹ The prospect of this ex post facto analysis can cause actors subject to the law to feel insecure and uncertain about whether their actions will fit the bill. It also adds official arbitrariness and second guessing, thus undermining the realizability of the legal command.

A third problem with standards, as discussed earlier in Part I, is that they exist in the eye of the beholder and therefore can result in unequal or prejudicial application. Relying on standards in the school discipline context proves particularly troubling, with research demonstrating that teachers and school administrators punish Black and Latino children, as well as children with disabilities, for violating behavioral standards at rates disproportionate to their percentage of the student body.²⁹²

These observations on how legal mandates are formulated, as hard rules and principle-based standards, should inform the effort to formalize restorative justice in schools. In order to benefit from their strengths and compensate for their weaknesses, good policy should include *both* rules and standards.²⁹³ The ways in which reform advocates have thus far attempted to formulate restorative justice into law--through legislation, regulation, and judicial orders--do not make good use of rules or standards and the vast majority²⁹⁴ are therefore legally *unrealizable*.

B. RULES AND STANDARDS TO FORMALIZE RESTORATIVE JUSTICE

This Subpart identifies characteristics of school-based restorative justice that should be formalized as rules and standards.²⁹⁵ If, in conjunction with sharply curtailing the reach of zero-tolerance laws, school discipline reformers include the language of these proposed rules and standards in a statute, regulation, and order, they will support a new legal regime that not only overrides zero-tolerance discipline, but also provides much needed instruction to schools and school boards on how to effectuate a restorative school.

Drawing on both the successes and challenges of schools' experiences implementing restorative justice, discussed above in previous Parts, there are two primary areas in need of greater formalization. First, legal mandates should promote a whole school *640 approach to restorative justice. And, second, such mandates should require adherence to the core principles and best practices of restorative justice in the school setting. Without clear guidance on how restorative practices should be integrated into the school community, school reform advocates run the risk either of allowing the status quo to persist or for worse practices to develop.

1. Promote Whole School Integration of Restorative Philosophy

The first principle that should be formalized by new legal requirements is that school-based restorative justice necessitates a “whole school approach” consisting of both preventative *and* reactive interventions. The preventative component of school-based restorative justice includes classroom management techniques and a conflict resolution curriculum while the reactive component focuses on responding to student misbehavior and redressing harm. As pilot restorative

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justice programs demonstrate,²⁹⁶ and school educational psychologists explain,²⁹⁷ a restorative justice philosophy must permeate throughout the school community to reach its full potential. Classroom teachers and administrators alike must take responsibility for implementing restorative practices. Restorative practices should not be used in some classrooms and not in others, nor should they apply only to certain infractions or age groups. Allowing restorative practices to exist only in isolated pockets of the school community misses the whole point of a restorative justice approach to teaching young people about how they impact the people around them. Thus, reformers seeking to institutionalize effective restorative practices should construct new legal requirements--formulated both as broad standards and as strict rules--to promote this comprehensive, whole school approach.

Broad standards can explain the principles or goals of a whole school approach to implementing restorative practices. For example, all statutes, regulations, or court orders should articulate the purpose of a restorative school: To teach students to be accountable for their behavior to the people around them, to repair relationships, to engage students directly in thinking about the consequences of their choices, to understand and address harm, to keep children in school and out of the criminal justice system, and to establish a sense of belonging within the school community.²⁹⁸ A law might also require school board policies to align with these restorative justice principles and for institutional *641 decisionmaking to accord with the goals of restorative justice.²⁹⁹ To clarify the role of restorative justice as both a community building tool as well as an alternative mechanism for discipline, a law could require schools to adopt both proactive community building and reactive disciplinary procedures in accordance with restorative justice philosophy.³⁰⁰

In conjunction with these broad policy standards, legal requirements should also be formulated as strict rules that give explicit instructions for implementing a whole school approach to restorative justice. For example, reform advocates should propose legal rules mandating school boards to initiate a conflict communication and resolution curriculum in all grades, kindergarten through twelfth, and to rewrite student and teacher handbooks to accord with restorative philosophy. Another rule should require schools to provide all students and school personnel with biannual training in restorative dialogue, circle processes, and conferencing.³⁰¹ There could also be a rule requiring teachers, administrators, and staff to practice restorative methods of dispute resolution in all school operational settings, meaning not just academic and extracurricular settings but also staff meetings and parent-teacher conferences. To define the shared responsibility between classroom teachers and administrators, another rule might require teachers to utilize restorative dialogues before making a disciplinary referral.

Collectively, these legal standards and rules advance the institutionalization of a whole school approach to restorative justice. Standards set the policy goals of a whole school approach (such that restorative philosophy should permeate the school community), which serves as a lodestar to guide future decision-making by school boards, administrators, and teachers. In contrast, to complement these legal standards, legal rules give specific instructions for what these regulated entities must do to effectuate a restorative school.

***642 2. Enumerate or Require Adherence to Core Principles and Best Practices**

Formalizing the procedural elements of school-based restorative practices is particularly tricky. These practices are informal, unscripted, and often determined in the moment by the participants. Also, some worry that setting standards or establishing mandates for restorative practice privileges outside experts, thereby diminishing the expertise to be found within the affected community and discouraging innovation and practitioner diversity.³⁰² On the other hand, failing to establish standards allows harmful and “pseudo-restorative” practices to proliferate unchecked³⁰³ and can result in “surrendering conflict to the existing power constellations.”³⁰⁴ In the school discipline context, this means that

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those children who have suffered disproportionately under zero-tolerance discipline--low income, minority children and children with disabilities--remain just as vulnerable to harsh and unfair treatment under a restorative discipline regime. However, by using legal standards to guide school communities on fundamental restorative principles as well as legal rules to compel new behaviors, reformers can strike a balance between these competing interests of self-regulated autonomy and protective constraint.

There are a number of different strategies for formalizing best practices through the use of articulated legal standards. One strategy is to enumerate the core values or principles of school-based restorative justice directly in statutes, regulations, and court orders. A few organizations have already begun to develop principles and professional standards for restorative practices in many contexts, including schools. While specifics vary, they share five or six common themes: non-domination, voluntarism, and informed consent; respectful listening; accessibility and fair process; neutrality and equal concern for all stakeholders; and outcomes determined by those who are directly *643 affected.³⁰⁵ Articulating each of these values as legal standards explains the objective of school-based restorative justice and guides school communities as they construct their own restorative programs.

Legal rules can help formalize best practices by issuing explicit instructions on how to adhere to, or incorporate, best practices for school-based restorative justice. One approach is to mandate schools to engage third party resources.³⁰⁶ For example, schools could be legally required to use accredited restorative trainers or for programs to be regularly assessed and certified by a restorative justice organization.³⁰⁷ Colorado created its own third-party resource by enacting legislation to establish a "Restorative Justice Coordinating Council," a state funded entity tasked with developing restorative justice programs, providing technical assistance and training, and creating uniform assessment tools to evaluate the impact of restorative practices used around the state.³⁰⁸ Legal interventions that enable schools to access these third party resources can promote institutionalization of best practices in schools. Additionally, an advantage of incorporating best practices by reference to an external entity, as opposed to enumerating best practices directly in a legal mandate, is that it allows for the best practices to grow and evolve alongside our understanding of effective school-based restorative practices.

In addition to these methods for formalizing core restorative principles, legal rules should mandate schools or school boards to develop written protocols for each of the restorative processes they *644 choose to institute in their schools. This approach enables school communities to take ownership of restorative philosophy and is also more practical than issuing rules mandating procedural steps for each restorative practice--dialogues, circles, conferences, and mediations. Instead, these legal directives should instruct schools to convene community meetings involving parents, students, teachers, and school administrators, in order to select different procedural interventions (for example, circles and conferences) and the situations in which they will be used (for example, bullying or drugs on campus). Additionally, schools should be directed to develop their own rules and protocols in accordance with the articulated, core restorative principles. For example, what procedures should be in place to ensure non-domination, respectful listening, accessibility and fair process, neutrality, and outcomes determined by those who directly affected? When someone in the community is harmed, what does it mean to "repair" the harm? What does respect look like? Are there additional community values that need to be reflected in how the school community responds to harm? These protocols should be published in student and faculty handbooks and there should be a process to review and revise them at regular intervals.³⁰⁹ Together, all of these rules impose external mandates to change behavior of regulated school actors but they also leave enough space for school communities to take ownership of restorative philosophy. This ground-up approach to developing protocols fosters greater participation in developing restorative school philosophy and also allows for the school community to exercise self-determination.

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In laying out these areas where restorative justice should be better formalized, the intention is to ensure that best practices in restorative justice become formalized into statutes, regulations, and court orders. If lawmakers are serious about replacing zero-tolerance with a policy grounded on restorative justice principles, they must provide clearer directives than they have up to now. By articulating both legal rules and legal standards, an abstract concept can be translated into actionable policy.

CONCLUSION

For decades, a legal regime mandating a zero-tolerance policy of automatic and mandatory suspension, expulsion, and police referral has contributed to a School-to-Prison Pipeline and stunted the futures of *645 children, schools, and communities. Studies show that reliance on suspensions and expulsions correlates with poor academic performance, high dropout rates and low graduation rates, as well as increased feelings of alienation and disaffection among students. Reliance on police to enforce discipline brings young people into greater contact with the criminal justice system, which can have devastating and long-lasting consequences. Additionally, researchers consistently show that in schools around the country, Black, Latino, and Native American children, from pre-K through high school, endure harsh, exclusionary punishments at disproportionate rates compared to their White peers.

As recognition of a School-to-Prison Pipeline grows, so do demands for policy change. To affect change, the laws on the books that made zero-tolerance a legal imperative must be removed and replaced with an alternative. Without a new policy in place, the zero-tolerance practices and procedures ingrained in American schools will continue.

In searching for an alternative to zero-tolerance, reformers have seized on restorative justice as a promising corrective to the consequences of exclusionary discipline. “Restorative justice” is a philosophy, a synthesis of diverse worldviews, centered on the belief that, when individuals break rules, they cause harm to those around them. The theory of restorative justice is unique because it is the community that must hold rule-breakers directly accountable for repairing the harm.

How to hold rule-breakers accountable and what constitutes acceptable reparations are questions deeply contested by restorative justice theorists and practitioners. Indeed, restorative justice has inspired a broad array of divergent programs in many different contexts. In the education setting, using restorative justice means that a student's misbehavior is addressed not by sending her home but by keeping her in school to confront the consequences of her behavior and to participate in determining appropriate amends. The objective of this restorative approach is to teach students that what they do matters and has real impact on the people around them; they can learn to solve their problems constructively, engage with their emotions, and develop habits of self-regulation.³¹⁰

School discipline reform advocates, excited by restorative justice and its potential to roll back the harmful consequences of zero-tolerance, have used many legal avenues to institutionalize restorative justice in schools. Unfortunately, thus far, the law-based formulations of restorative justice remain inadequate. To advance restorative practices in schools, reformers must not assume the term *646 “restorative justice” speaks for itself. They must ensure that key principles of school-based restorative justice become institutionalized through clear and executable legal directives. Such reforms should combine, on the one hand, legal standards that articulate the substantive objective of the restorative principle and, on the other hand, specific rules that instruct, or foster, its implementation. Failing to translate restorative principles into rules and standards jeopardizes the reform mission and its ability to improve the future for millions of American children.

Footnotes

- a1 Associate Professor of Law and Associate Director of the Saltman Center for Conflict Resolution, William S. Boyd School of Law, University of Nevada, Las Vegas. I sincerely thank Jean Sternlight, Deborah Thompson Eisenberg, Eve Hanan, Jonathan Scharrer, Kay Pranis, David McClure, and the members of the 2015 AALS Dispute Resolution Section Works-in-Progress Conference; all errors are my own. I am grateful to the UNLV William S. Boyd School of Law for supporting my research and to the library faculty at the Weiner-Rogers Law Library for their assistance.
- 1 See Teresa Watanabe & Howard Blume, *Why Some LAUSD Teachers Are Balking at a New Approach to Discipline Problems*, L.A. TIMES (Nov. 7, 2015, 10:00 AM), <http://www.latimes.com/local/education/la-me-school-discipline-20151108-story.html> (discussing difficulties with the transition to restorative justice alternatives by the Los Angeles Unified School District). For a listing of the largest public school districts in the United States, see also NATIONAL CENTER FOR EDUCATIONAL STATISTICS, <http://nces.ed.gov/> (last visited Jan. 20, 2018).
- 2 See, e.g., Noah Feldman, *A Belch in Gym Class, Then Handcuffs and a Lawsuit*, BLOOMBERG VIEW, July 27, 2016, (discussing the case of a seventh grader who was arrested and then suspended for the remainder of the school year for continuing to make fake-burps in gym class despite having been asked to stop); *A.M. v. Holmes*, 830 F.3d 1123 (10th Cir. 2016) (concerning legal action brought on behalf of the seventh grader arrested for burping).
- 3 DEREK W. BLACK, *ENDING ZERO TOLERANCE: THE CRISIS OF ABSOLUTE SCHOOL DISCIPLINE* 1-6 (2016) (providing several examples of school suspensions given for harmless situations).
- 4 Consider the example of Ahmed Mohammed's home-made alarm clock, which was mistaken for a bomb. Ashley Fantz et al., *Muslim Teen Ahmed Mohamed Creates Clock, Shows Teachers, Gets Arrested*, CNN (Sept. 16, 2015, 6:03 PM), <http://www.cnn.com/2015/09/16/us/texas-student-ahmed-muslim-clock-bomb/>.
- 5 U.S. DEP'T. EDUC., CIVIL RIGHTS DATA COLLECTION, <http://ocrdata.ed.gov/>.
- 6 See *infra* Part I.B.
- 7 See *infra* Part I.
- 8 Edward Sellman et al., *Contextualised, Contested and Catalytic: A Thematic Introduction to the Potential of Restorative Approaches in Schools*, in *RESTORATIVE APPROACHES TO CONFLICT IN SCHOOLS: INTERDISCIPLINARY PERSPECTIVES* 1-2 (Edward Sellman et al. eds., 2013).
- 9 See, e.g., *HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE* (Dennis Sullivan & Larry Tifft eds., 2006). Peruse the table of contents and note the diverse origins of restorative justice and its varied applications around the world.
- 10 Brenda E. Morrison & Dorothy Vaandering, *Restorative Justice: Pedagogy, Praxis, and Discipline*, 11 J. SCH. VIOLENCE 138, 147 (2012); *RESTORATIVE JUSTICE COLO., RESTORATIVE JUSTICE PRACTICES DEFINITIONS AND MODELS* (2014) (explaining that restorative practices are aligned with, but distinct from, restorative justice). Indeed, school-based restorative justice practitioners do not talk about restorative justice and instead prefer to use the terms “restorative practices,” “restorative approaches,” and “restorative methods” to describe how restorative justice is applied in schools.
- 11 See *infra* Part II.A.
- 12 Morrison & Vaandering, *supra* note 10, at 146.
- 13 Tom R. Tyler, *Restorative Justice and Procedural Justice: Dealing with Rule Breaking*, 62 J. SOCIAL ISSUES 307, 315-17 (2006) (identifying the goals of restorative justice); SONIA JAIN ET AL., *RESTORATIVE JUSTICE IN OAKLAND SCHOOLS: IMPLEMENTATION AND IMPACTS* 4-7 (2014).
- 14 See *infra* Part III.A.

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- 15 *See infra* Part III.C.
- 16 *The LAUSD Restorative Justice Implementation Roadmap*, LOS ANGELES SCH. DIST., https://achieve.lausd.net/site/handlers/filedownload.ashx?moduleinstanceid=34066&dataid=42310&FileName=RJ_RoadMap.pdf; LOS ANGELES UNIFIED SCH. DIST., FINGERTIP FACTS: 2017-2018 (2017), https://achieve.lausd.net/cms/lib/CA01000043/Centricity/Domain/32/NewlyUpdatedFingertip%20Facts2017-18_English.pdf.
- 17 Watanabe & Blume, *supra* note 1.
- 18 Watanabe & Blume, *supra* note 1.
- 19 Watanabe & Blume, *supra* note 1.
- 20 Juan Perez, Jr., *Teachers Complain About Revised CPS Discipline Policy*, CHI. TRIB. (Feb. 25, 2015, 2:48 PM), <http://www.chicagotribune.com/news/ct-cps-discipline-concerns-met-20150225-story.html>.
- 21 Sascha Brodsky, *Is Discipline Reform Really Helping Decrease School Violence?*, ATLANTIC (June 28, 2016), <https://www.theatlantic.com/education/archive/2016/06/school-violence-restorative-justice/488945> (describing a recent class action against the New York City Department of Education for failing to administer disciplinary punishments); Second Amended Complaint, *Doe v. New York City Dep't of Educ.*, No. 15-cv-1684 (E.D.N.Y. May 24, 2016).
- 22 The question this Article addresses is not *whether* restorative practices should be used but rather the subsequent question of legal implementation: *how* restorative practices should become formalized in law and *why* they should be formalized with greater precision than they have been.
- 23 *See infra* Part III.B.
- 24 *See infra* Part III.C.
- 25 Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in *THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW* 241 (Eyal Zamir & Doron Teichman, eds., 2014) (discussing how legal regulations work directly and indirectly to change regulated actors' behaviors).
- 26 The proposal to distill best practices into clear rules and standards in order to ensure consistent, high quality implementation has been raised in other fields as well. *See generally* ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* (2009).
- 27 Indeed, this implementation problem has played out in other areas. Past efforts to institutionalize alternative dispute resolution (“ADR”) in courts and federal agencies are analogous to school reform advocates' efforts to institutionalize restorative justice in schools. When Congress passed a variety of legislation designed to incorporate ADR into each branch of government, it neither prescribed which forms of ADR federal courts, administrative agencies, and legislative agencies should use nor how they should use ADR. *See, e.g.*, Civil Justice Reform Act, 28 U.S.C. §§ 471-482 (1990); Administrative Dispute Resolution Act, 5 U.S.C. § 571 (1990); Congressional Accountability Act, Public L. 104-1, 109 Stat. 3 (1995); Alternative Dispute Resolution Act, 28 U.S.C. § 651 (1998). While this open-ended approach to institutionalizing ADR may have been politically expedient, the consequence has been that implementation and program quality varies widely and Congress' intent has not been fully realized. *See* Tina Nabatchi, *The Institutionalization of Alternative Dispute Resolution in the Federal Government*, 67 PUB. ADMIN. REV. 646 (2007) (analyzing the implementation of the ADR Acts of 1990 and 1996).
- 28 *See, e.g.*, Michael G. Fullan, *Coordinating Top-Down and Bottom-Up Strategies for Educational Reform*, in *SYSTEMIC REFORM: PERSPECTIVES ON PERSONALIZING EDUCATION* (1994), <http://michaelfullan.ca/wp-content/uploads/2016/06/13396035630.pdf>.
- 29 *See, e.g.*, Carolyn Boyes-Watson & Kay Pranis, *Science Cannot Fix This: The Limitations of Evidence-Based Practice*, 15 CONTEMP. JUST. REV. 265 (2012).

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- 30 See James R. Coben, *My Change of Mind on the Uniform Mediation Act*, 23 DISP. RESOL. MAG. 6, 6 (2017) (recounting fears that uniform rules would “stymie mediation creativity and evolution”); Sarah R. Cole et al., *Where Mediation is Concerned, Sometimes “There Ought Not To Be a Law!”*, 20 DISP. RESOL. MAG. 34 (2014) (cautioning against creating rules that undermine mediation principles); Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903 (1997) (identifying consequences, even if inadvertent, of formalizing mediation); Richard C. Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, J. DISP. RESOL. 99 (2003) (summarizing the critiques of the Uniform Mediation Act); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).
- 31 Am. Psychol. Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 852 (2008) (defining zero-tolerance as a “philosophy or policy that mandates the application of predetermined consequences, most often severe and punitive in nature, that are intended to be applied regardless of the gravity of behavior, mitigating circumstances, or situational context.”). The term “zero-tolerance” is language borrowed from the War on Drugs. Russell F. Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, 92 NEW DIRECTIONS FOR YOUTH DEV. 17, 18-19 (2001).
- 32 See, e.g., MISS. CODE ANN. § 37-11-55 (2017) (requiring local school boards to adopt a code of conduct at the beginning of each year and detailing which topics need to be addressed); ARIZ. REV. STAT. ANN. § 15-843 (2016) (outlining disciplinary rules and procedures that school districts must develop); OR. REV. STAT. ANN. § 339.240 (2016) (mandating the State Board of Education to promulgate rules setting minimum standards for school students' conduct and discipline).
- 33 DANIEL J. LOSEN & TIA ELENA MARTINEZ, UCLA'S CIVIL RIGHTS PROJECT, OUT OF SCHOOL & OFF TRACK: THE OVERUSE OF SUSPENSIONS IN AMERICAN MIDDLE AND HIGH SCHOOLS 8 (2013) (tracking suspension rates of elementary and secondary school students from 1973 to 2010 and finding increases for elementary school students of .9% (1973) to 2.4% (2010) and secondary school students of 8% to 11.3% over the same period).
- 34 Researchers point to other contributing factors: increased presence of police in schools, see Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1 (2013); pressure on schools to meet testing standards, see Deborah Gordon Klehr, *Addressing the Unintended Consequences of No Child Left Behind and Zero Tolerance: Better Strategies for Safe Schools and Successful Students*, 16 GEO. J. POVERTY L. & POL'Y 585 (2009); and deep budget cuts, including for school counselors, see George Joseph, *Where Charter-School Suspensions Are Concentrated*, ATLANTIC (Sept. 16, 2016); also see MICHAEL LEACHMAN & CHRIS MAI, MOST STATES STILL FUNDING SCHOOLS LESS THAN BEFORE THE RECESSION (Oct. 16, 2014), <http://www.cbpp.org/sites/default/files/atoms/files/10-16-14sfp.pdf>, and Kirsten Weir, *School Psychologists Feel the Squeeze*, 43 MONITOR ON PSYCHOL. (2012), <http://www.apa.org/monitor/2012/09/squeeze.aspx>. In addition, teachers lack training in classroom management and have their own unconscious biases about which students are disruptive. PUBLIC AGENDA, TEACHING INTERRUPTED: DO DISCIPLINE POLICIES IN TODAY'S PUBLIC SCHOOLS FOSTER THE COMMON GOOD? 3 (2004) (a survey of 725 middle and high school teachers found that 85% reported feeling “particularly unprepared for dealing with behavior problems” and for every three teachers, at least one reported having “seriously considered leaving the profession--or know a colleague who has left--because student discipline and behavior became so intolerable”); Walter S. Gilliam et al., *Do Early Educators' Implicit Biases Regarding Sex and Race Relate to Behavior Expectations and Recommendations of Preschool Expulsions and Suspensions?*, YALE U. CHILD STUDY CTR. (Sept. 28, 2016); Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCH. SCI. 617 (2015) (explaining results of a controlled study that found teachers' racial stereotypes led them to recommend more severe punishment of minor infractions for Black than White students; and, further, teachers were more likely to perceive misbehavior from Black students as part of a persistent pattern of misconduct than from White students); Shi-Chang Wu et al., *Student Suspension: A Critical Reappraisal*, 14 URBAN REV. 245, 258-59 (1982) (“Students' chances of being suspended are not only affected by their teachers' interest in them personally, they are also affected by the ways in which teachers perceive them [i]n other words, it is the *belief* of student incompetence among teachers that causes a high suspension rate, and not the other way around.”).

- 35 See CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 4 (2010) (“The School-to-Prison Pipeline thus refers to the confluence of education policies in underresourced public schools and a predominantly punitive juvenile justice system that fails to provide education and mental health services for our most at-risk students and drastically increases the likelihood that these children will end up with a criminal record rather than a high school diploma.”).
- 36 BLACK, *supra* note 3; NAACP LEGAL DEF. & EDUC. FUND, DISMANTLING THE SCHOOL-TO-PRISON PIPELINE (2005), http://www.naacpldf.org/files/publications/Dismantling_the_School_to_Prison_Pipeline.pdf; Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919 (2016); ADVANCEMENT PROJECT, TEST, PUNISH, & PUSH OUT: HOW “ZERO TOLERANCE” AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 9-10 (2010), http://b3cdn.net/advancement/d05cb2181a4545db07_r2im6caqe.pdf.
- 37 For examples, see Press Release, Am. Civil Liberties Union, California Enacts First-in-the-Nation Law to Eliminate Student Suspensions for Minor Misbehavior (Sept. 27, 2014), <https://www.aclunc.org/news/california-enacts-first-nation-law-eliminate-student-suspensions-minor-misbehavior>; Rhonda Brownstein, *Report Highlights Racial Disparities in School Discipline--Once Again*, SOUTHERN POVERTY L. CTR. (Sept. 4, 2015), <https://www.splcenter.org/news/2015/09/04/report-highlights-racial-disparities-school-discipline-%E2%80%93-once-again>; ADVANCEMENT PROJECT, ENDING THE SCHOOLHOUSE TO JAILHOUSE TRACK (DEC. 12, 2012), <https://advancementproject.org/issues/school-to-prison-pipeline>; *School to Prison Pipeline*, NAACP LEGAL DEF. & EDUC. FUND <http://www.naacpldf.org/case/school-prison-pipeline> (last visited Jan. 20, 2018).
- 38 NAT'L SCH. BDS. ASS'N, ADDRESSING THE OUT-OF-SCHOOL SUSPENSION CRISIS: A POLICY GUIDE FOR SCHOOL BOARD MEMBERS (2013), <https://www.nsba.org/sites/default/files/0413NSBA-Out-Of-School-Suspension-School-Board-Policy-Guide.pdf>. Other contributors and advisors to this policy guide include the American Federation of Teachers, the National Education Association, the National Association of Elementary School Principals, the National Association of Secondary School Principals, Council of Urban Boards of Education, National Black Caucus of School Board Members, National Caucus of American Indian/Alaska Native School Board Members, and National Hispanic Caucus of School Board Members.
- 39 See Jeffrey H. Lamont, *Policy Statement: Out-of-School Suspension and Expulsion*, 131 PEDIATRICS e1000 (2013).
- 40 See Am. Psychol. Ass'n Zero Tolerance Task Force, *supra* note 31, at 852.
- 41 See A.B.A. CRIM. JUSTICE SEC. RES. 103B (adopted by the House of Delegates, Feb. 9, 2001); Laurel G. Bellows, President A.B.A., Testimony submitted to U.S. Senate Subcomm. on the Constitution, Civil Rights and Human Rights (Dec. 12, 2012).
- 42 “Rethink Discipline” was included in President Barack Obama's initiative, “My Brothers' Keeper,” aimed at supporting students and improving school safety. See, e.g., Press Release, White House Report: The Continuing Need to Rethink Discipline (Dec. 9, 2016), https://www.whitehouse.gov/sites/default/files/docs/school_discipline_report_-_120916.pdf.
- 43 See U.S. DEPT. JUSTICE & U.S. DEPT. EDUC., DEAR COLLEAGUE LETTER: NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE (Jan. 8, 2014).
- 44 See LOCATION CHANGE: Ending the School-to-Prison Pipeline, U.S. SENATE, COMM. ON THE JUDICIARY (Dec. 12, 2012), <http://www.judiciary.senate.gov/meetings/location-change-ending-the-school-to-prison-pipeline>.
- 45 See EMILY MORGAN ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR., THE SCHOOL DISCIPLINE CONSENSUS REPORT: STRATEGIES FROM THE FIELD TO KEEP STUDENTS ENGAGED IN SCHOOL AND OUT OF THE JUVENILE JUSTICE SYSTEM (2014).
- 46 See CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780-1860 (Eric Foner ed., 1983). Leaders of the young American republic, including Thomas Jefferson, sought to

institutionalize public education as a means of nation building. By educating its populace, the state could achieve political conformity, disciplined behavior, and a commitment to the new nation. As reformers pushed for public education to become centralized and bureaucratized under the state, so did decisions about appropriate discipline. *Id.* at 112, 114. Children were viewed as “the property of the state” and disciplinary difficulties at school “traced to one single source, and that is the undue interference of parents with their government.” *Id.* at 158-59 (internal citations omitted).

- 47 See JUDITH KAFKA, THE HISTORY OF “ZERO TOLERANCE” IN AMERICAN PUBLIC SCHOOLING 17 (2011). Debates over the purpose of public education and school discipline have existed, in various and no less urgent forms, since the beginning of American history. Take, for example, post-colonial civic leaders' different ideas about using school discipline to create a moral citizenry. One group, “traditionalists,” believed teachers should use strict punishment to scare students into moral submission. *Id.* at 19. “Order was Heaven's first law” and the teacher held “the double authority of Parent and Monarch ... [h]is word must be received and obeyed as law, within his little realm” *Id.* at 23 (citing THOMAS PAYSON, ADDRESS DELIVERED BEFORE THE ASSOCIATED INSTRUCTORS OF BOSTON AND ITS VICINITY, ON THEIR ANNIVERSARY, OCTOBER 10, 19-20 (1816)). Another group wanted to spread responsibility for maintaining discipline to students themselves, using systems of peer monitoring and surveillance to identify and report infractions. *Id.* at 25-26. And a third group, which included reformers like Horace Mann and Catherine Beecher (sister of Harriet), sought to instill discipline not through fear but by having students think rationally through the consequences of their behavior. *Id.* at 27. Variations on these different disciplinary philosophies returned after the Civil War and continued through the Progressive Era, the Cold War, and the civil rights movement, and appear again today, dressed as zero-tolerance discipline and restorative justice.
- 48 *Id.* at 53-54, 59, 120-24 (describing popular perceptions of youth criminality in the 1950s, including the 1955 movie *Blackboard Jungle*). Unfortunately, stereotypes of violent and antisocial children, particularly from low-income non-“model minority” groups, persist today. See, e.g., Katherine Kersten, *No Thug Left Behind*, CITY J. (Winter, 2017), <https://www.city-journal.org/html/no-thug-left-behind-14951.html> (critiquing efforts to restore “racial equity” to school discipline as misguided and blaming out-of-wedlock birth rates in the black community for a disordered family life that produces children with poor socialization and impulse control).
- 49 DOUGLASS S. REED, BUILDING THE FEDERAL SCHOOLHOUSE: LOCALISM AND THE AMERICAN EDUCATION STATE 59, 65-69 (2014) (examining how desegregation policy interacted with school discipline rules in Alexandria, Virginia).
- 50 CHILDREN'S DEF. FUND, CHILDREN OUT OF SCHOOL IN AMERICA 139 (1974) (criticizing school districts for their lack of clear, written disciplinary policies and noting that “[p]rincipals determine what constitutes an offense, which offense is to be punished, by what means and with what results.”); CHILDREN'S DEF. FUND, SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN? 81 (1975), (criticizing the arbitrary and discriminatory use of school suspensions and calling on schools to provide clear guidance on punishments so “that there will be consistent and fair enforcement of these expectations” and elimination of “[c]urrent arbitrary, school by school, teacher by teacher rules ...”). Unfortunately, as Derek Black highlights, advocates misjudged the source of discriminatory discretion, thinking it was the principal's office when instead it began in the classroom. BLACK, *supra* note 3, at 13.
- 51 BLACK, *supra* note 3, at 32-42 (citing REED, *supra* note 49, at 66) (explaining how harsh school discipline was an expression of the “politics of order,” and a way for schools in White communities to keep black students “in line,” and under control).
- 52 Am. Psychol. Ass'n Zero Tolerance Task Force, *supra* note 31, at 854 (citing B.F. SKINNER, SCIENCE AND HUMAN BEHAVIOR (1953)); Abigail Thernstrom, *Where Did All the Order Go? School Discipline and the Law*, BROOKINGS PAPERS ON EDUC. POL'Y 299-366 (1999).
- 53 KAFKA, *supra* note 47, at 120. Centralized Codes of Conduct, in removing principals' and teachers' discretion, have unintended consequences. “Rather than rely on their personal judgment as ‘acting parents,’ teachers [are] expected to defer to rules and regulations established by the bureaucratic institution, and to frame discipline as something distinct from teaching.” KAFKA, *supra* note 47, at 120. Despite the many problems with school disciplinary systems, “earlier understandings of school

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discipline envisioned youth as educable--not just academically, but socially and morally. Teachers and schools were expected to *teach* students how to behave. Today, however, the educative purposes of discipline have been eclipsed by a system of punishment.” KAFKA, *supra* note 47, at 120 (emphasis in original).

- 54 Skiba & Knesting, *supra* note 31, at 20. The authors reference Charles Ewing's opinion that troublemakers need to be sent clear and consistent messages that their behaviors are not tolerated and will be punished. *See* Charles Patrick Ewing, *Sensible Zero Tolerance Protects Students*, 16 HARV. EDUC. LETTER 7, 7-8 (2000).
- 55 KAFKA, *supra* note 47, at 75-96; David Simson, *Exclusion, Punishment, Racism and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. REV. 506, 508 (2014).
- 56 Gun-Free Schools Act, Pub. L. No. 103-382, 108 Stat. 3907 (1994). Ironically--or maybe not?--1994 was also the last year Congress chose to re-designate January 16th as National Good Teen Day, a day to highlight the inherent goodness of young people in America. Pub. L. No. 103-463, 108 Stat. 4807.
- 57 *See, e.g.*, ARK. CODE ANN. § 6-18-502 (c)(2) (West 2016); N.H. REV. STAT. ANN. § 193:13 (West 2017). Some jurisdictions also incorporated referrals to law enforcement in their statutes. *See, e.g.*, D.C. CODE § 38-232 (West 2016). The federal law, however, also required that states, when they created their mandatory expulsion laws, make provision for case-by-case review. KIM ET AL., *supra* note 35, at 79.
- 58 By 1998, zero-tolerance school discipline was on the books in all fifty states and, of all public schools in the U.S., ninety-four percent had zero-tolerance policies for firearms, eighty-seven percent had zero-tolerance for alcohol, eighty-eight percent had zero-tolerance for drugs, and seventy-nine percent had zero-tolerance policies for violence and for tobacco use. SHEILA HEAVISIDE ET AL., U.S. DEPT EDUC. NAT'L CTR. EDUC. STATISTICS, VIOLENCE AND DISCIPLINE PROBLEMS IN U.S. PUBLIC SCHOOLS: 1996-97 18 (1998).
- 59 ADVANCEMENT PROJECT, *supra* note 36, at 9-10. Just as there are parallels drawn between the War on Drugs and zero-tolerance in schools, there are parallels between the collateral consequences of both policies. *See, e.g.*, S. David Mitchell, *Zero Tolerance Policies: Criminalizing Childhood and Disenfranchising the Next Generation of Citizens*, 92 WASH. U. L. REV. 271, 304-16 (2016); Aaron Kupchik & Thomas J. Catlaw, *Discipline and Participation: The Long-Term Effects of Suspension and School Security on the Political and Civic Engagement of Youth*, 47 YOUTH & SOC'Y 95 (2015).
- 60 The U.S. Supreme Court has established certain due process protections for public school students facing disciplinary action; however, when it comes to zero-tolerance, courts tend to defer to School Boards' decisions, with only a few rare exceptions. *See* Seal v. Morgan, 229 F.3d 567 (6th Cir. 2000) (finding the School Board's Zero-Tolerance Policy of automatic expulsion not rationally related to legitimate government interest and therefore would not survive student's due process challenge). For an expanded discussion of the constitutionality of zero tolerance discipline, see Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823 (2015) (arguing that courts need to intervene on behalf of students by placing constitutional limits on schools' ability to expel and suspend students).
- 61 *See, e.g.*, DEL. ADMIN. CODE tit. 14-600-612, §§ 2, 3, 7 (West 2016) (setting mandatory minimum suspension of 5 to 10 days if a student is found in possession of alcohol, drugs, and drug paraphernalia); CAL. EDUC. CODE § 48900 (c)(4) (West 2016) (punishing possession of tobacco products).
- 62 *See, e.g.*, CAL. EDUC. CODE § 48915 (c)(4).
- 63 Skiba & Knesting, *supra* note 31, at 20 (explaining “broken-window theory” that, in order to prevent crime, one cannot ignore “relatively minor incidents that signal disruption or violence”); Nance, *supra* note 36, at 922 (describing law enforcement referrals for low-level offenses, including texting, arriving late to school, and farting during class); Russell J. Skiba, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, INDIANA EDUC. POL'Y CNTR. (Report SRS2, 2000) (describing extreme punishments, including expulsion for bringing a homemade rocket made from a potato chip canister); ADVANCEMENT PROJECT, *supra* note 36, at 8-9.

- 64 Donna St. George, *Appeal for Md. 7-year-old Suspended for Nibbling Pastry into Shape of Gun*, WASH. POST (Mar. 14, 2013), https://www.washingtonpost.com/local/education/appeal-for-md-7-year-old-suspended-for-nibbling-pastry-into-shape-of-gun/2013/03/14/2be8bc3a-8cca-11e2-9f54-f3fdd70acad2_story.html. Thankfully, legislators in Florida recognize that not all childish behavior merits severe punishment and therefore exclude as grounds for disciplinary action “brandishing a partially consumed pastry or other food item to simulate a firearm or weapon.” FLA. STAT. ANN. § 1006.07 (2)(g) (West 2016).
- 65 ADVANCEMENT PROJECT & CIVIL RIGHTS PROJECT HARV. UNIV., *OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE* 1-2 (2000) (explaining how schools’ sweeping interpretation of federal laws has resulted in severe penalties for possession of “drugs” like aspirin, Midol, and Certs; “weapons” like paper clips, nail files, and scissors).
- 66 ADVANCEMENT PROJECT, *supra* note 36, at 9.
- 67 Not all exclusions are discipline-related. *See, e.g.*, NEB. REV. STAT. § 79-264 (West 2017) (permitting schools to exclude from school students with dangerous communicable diseases); W. VA. CODE ANN. § 18A-5-1 (West 2017) (allowing teachers to exclude from class students exposed to infectious disease).
- 68 *See, e.g.*, LA. STAT. ANN. § 17:224A (West 2016) (“Unadjustable or incorrigible children, who, through no fault of their parents or tutors or other persons having charge of them, regularly disrupt the orderly processes of the school to which they have been assigned, shall be considered as delinquents and may be reported ... to the juvenile court of the parish, there to be dealt with in the manner prescribed by law.”).
- 69 *See, e.g.*, FLA. STAT. ANN. § 1006.07(2)(d)(2) (West 2016) (applying a “three strikes” suspension rule for violating school dress policy).
- 70 *See, e.g.*, N.J. STAT. ANN. § 18A:37-2 (West 2016) (“Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him ... shall be liable to punishment and to suspension or expulsion from school.”).
- 71 *See, e.g.*, KY. REV. STAT. ANN. § 158.150 (West 2016); § 18A:37-2 (“Any pupil who is guilty ... of the habitual use of profanity or of obscene language ... shall be liable to punishment and to suspension or expulsion from school.”); UTAH CODE ANN. § 53A-11-904(1)(a) (West 2016). For more on the tension between school disciplinary codes and students’ free speech rights, see Catherine J. Ross, “*Bitch, Go Directly to Jail: Student Speech and Entry into the School-to-Prison Pipeline*,” 88 TEMPLE L. REV. 717 (2016).
- 72 *See, e.g.*, N.D. CENT. CODE ANN. § 15.1-19-09(2) (West 2016).
- 73 *See, e.g.*, VT. STAT. ANN. tit. 16, § 1162(b) (West 2016). In Florida, someone who disrupts school but is not a student at that school can be criminally charged for a misdemeanor of the second degree. FLA. STAT. ANN. § 877.13 (West 2016). This applies to students from other schools (*In re D.F.P.*, 345 So.2d 811 (Fla. App. 1977)), as well as parents (*McCall v. State*, 354 So.2d 869 (Fla. 1978)).
- 74 *See, e.g.*, § 18A:37-2 (“Any pupil who ... shall cut, deface or otherwise injure any school property, shall be liable to punishment and to suspension or expulsion from school.”).
- 75 The studies discussed in this Part use a variety of different terms to describe demographic sub-groups (Black, African American, Hispanic, Latino, White, etc.). Because I assume each study uses its terms purposefully, meaning they have a pre-defined definition of each term, my language will change accordingly to reflect whatever demographic term the study uses.
- 76 DANIEL J. LOSEN & RUSSELL J. SKIBA, *SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS* 2-3 (2010). In 2012, only eighteen percent of all preschoolers in the U.S. were black yet they made up forty-eight percent of all preschool students receiving two or more suspensions. Meanwhile, forty-three percent of all preschoolers were white children but they made up only twenty-six percent of preschool students receiving two or more suspensions. Statistics show six

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percent of preschools report suspending students. U.S. DEP'T. OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf>.

- 77 U.S. DEP'T. OF EDUC. OFFICE FOR CIVIL RIGHTS, 2013-2014 CIVIL RIGHTS DATA COLLECTION: A FIRST LOOK 3, 10 (2016), <http://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf> (including figure showing removals where no educational services, such as tutoring or at home instruction, were available).
- 78 U.S. DEP'T. OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 76, at 2.
- 79 Arne Duncan, U.S. Sec'y. Educ., Remarks at the Release of the Joint DOJ-ED School Discipline Guidance Package (Jan. 8, 2014), <https://www.ed.gov/news/speeches/rethinking-school-discipline>; LOSEN & MARTINEZ, *supra* note 33, at 7-9, 20-21 (demonstrating that suspension and expulsion are being used as initial punishments, not measures of last resort).
- 80 Michael P. Krezmien et al., *Juvenile Court Referrals and the Public Schools: Nature and Extent of the Practice in Five States*, 26 J. CONTEMP. CRIM. JUST. 273 (2010) (tracking the general increase in school referrals to police and juvenile courts between 1994 and 2004).
- 81 TONY FABELO ET AL., BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT (2011) (finding that African American students were thirty-one percent more likely to receive discretionary disciplinary action than "otherwise identical white and Hispanic students" *Id.*). Racial disproportions in school discipline has been an observed phenomenon in American schools for a long time. *See, e.g.*, CHILDREN'S DEF. FUND, SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN?, *supra* note 50; Christine Bennett & J. John Harris III, *Suspensions and Expulsions of Male and Black Students: A Study of the Causes of Disproportionality*, 16 URB. EDUC. 399 (1982).
- 82 Am. Psychol. Ass'n Zero Tolerance Task Force, *supra* note 31, at 854-55 (explaining the impact of zero-tolerance policies on students of color and students with disabilities).
- 83 U.S. DEP'T. OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 77. This statistic can be calculated from the U.S. Department of Education's Office of Civil Rights data by dividing the annual suspension numbers for each racial group by the total number of suspensions that year. Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, 99 NEW DIRECTIONS FOR YOUTH DEV. 9, 14 n.4 (2003). A recent study of students in grades 6 through 10 at 17 schools found that black students were 7.6 times as likely to be suspended as white students and Latinos more than twice as likely to be suspended as white students. Edward W. Morris & Brea L. Perry, *The Punishment Gap: School Suspension and Racial Disparities in Achievement*, 63 SOC. PROBS. 68, 76 (2016).
- 84 Russell J. Skiba et al., *Race Is Not Neutral, A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCH. REV. 85, 86-88 (2011) (discussing a number of hypotheses to explain why African Americans have faced greater risks for suspension since the 1970s). Students of color are not only more likely to be picked out from their peers and referred to school administration for tardiness or general disruption, but once students of color reach the administrative level they are also more likely to receive harsher consequences for the same infraction than their white peers. *Id.* at 102.
- 85 FLA. DEP'T OF JUVENILE JUSTICE, DELINQUENCY IN FLORIDA'S SCHOOLS: AN EIGHT-YEAR STUDY (2004-05 through 2011-12) 1 (2013).
- 86 *Id.* at 12.
- 87 *Id.* at 11.
- 88 Charles Fisher et al., *Teaching Behaviors, Academic Learning Time, and Student Achievement: An Overview*, 50 J. CLASSROOM INTERACTION 6, 7 (1981); Charles R. Greenwood et al., *Academic Engagement: Current Perspectives on Research and Practice*, 31 SCH. PSYCH. REV. 328 (2002).

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- 89 CHILDREN'S DEF. FUND, SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN?, *supra* note 50, 55-87. This phenomenon is not new--a 1975 report noted that suspension was an ineffective disciplinary tool that not only failed to respond to students' behavioral issues, but also resulted in long term harm for students and disproportionately affected children of color.
- 90 Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RESEARCHER 59, 60 (2010) (summarizing national and state data showing that frequent suspensions correlate with academic underperformance as well as research findings that school suspension *increases* the risk of antisocial behavior); Emily Arcia, *Achievement and Enrollment Status of Suspended Students: Outcomes in a Large, Multicultural School District*, 38 EDUC. & URB. SOC'Y 359 (2006) (describing a three-year study of middle school students and finding that suspended students' reading skills fell three to five grade levels behind their non-suspended peers).
- 91 Brea L. Perry & Edward W. Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools*, 79 AM. SOC. REV. 68, 81 (2014).
- 92 Suhyun Suh & Jingyo Suh, *Risk Factors and Levels of Risk for High School Dropouts*, 10 PROF'L SCH. COUNSELING 297, 302 (2007) (reporting students who had a history of suspension were seventy-eight percent more likely to drop out); Robert Balfanz et al., *Sent Home and Put Off-Track: The Antecedents, Disproportionalities, and Consequences of Being Suspended in the Ninth Grade*, 5 J. APPLIED RES. ON CHILD.: INFORMING POL'Y FOR CHILD. AT RISK 1, 7, 11 (2014) (summarizing research of ninth graders in Florida that found the odds of drop-out increased and, relatedly, the odds of graduation decreased most sharply after students received their first suspension, and that for 1 in 5 ninth graders, the first suspension was for minor, behavioral incidents).
- 93 ROBERT WM. BLUM & PEGGY MANN RINEHART, *REDUCING THE RISK: CONNECTIONS THAT MAKE A DIFFERENCE IN THE LIVES OF YOUTH 21-24* (1997).
- 94 Suspended students report feelings of alienation and disinterest. Am. Acad. of Pediatrics, *Out-of-School Suspension and Expulsion*, 112 PEDIATRICS 1206 (2003), <http://pediatrics.aappublications.org/content/pediatrics/112/5/1206.full.pdf>.
- 95 Am. Psychol. Ass'n Zero Tolerance Task Force, *supra* note 31.
- 96 Sheryl A. Hemphill et al., *The Effect of School Suspensions and Arrests on Subsequent Adolescent Antisocial Behavior in Australia and the United States*, 39 J. ADOLESCENT HEALTH 736 (2006).
- 97 Virginia Costenbader & Samia Markson, *School Suspension: A Study with Secondary School Students*, 36 J. SCH. PSYCH. 59, 76 (1998) (describing results of a study comparing perspectives of three groups of students, in-school suspended, out-of-school suspended, and no disciplinary action).
- 98 Perry & Morris, *supra* note 91, at 82-83. See RICHARD ARUM, *JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY* (2003) (discussing the relationship between schools' disciplinary practices and student outcomes).
- 99 See Tracey L. Shollenberger, *Racial Disparities in School Suspensions and Subsequent Outcomes: Evidence from the National Longitudinal Survey of Youth*, in *CLOSING THE SCHOOL DISCIPLINE GAP* 32 (Daniel J. Losen ed., 2015).
- 100 See, e.g., FLA. DEPT OF JUVENILE JUSTICE, *supra* note 85, at 1 (noting that in FY 2011-12, school-related arrests accounted for fourteen percent of all delinquency arrests, a drop from nineteen percent in FY 2004-05).
- 101 See, e.g., Anthony Petrosino et al., *'Policing Schools' Strategies: A Review of the Evaluation Evidence*, 8 J. MULTI DISCIPLINARY EVAL. 80 (2012) (surveying a range of school-based interventions by police departments). In 2008, more than 5,000 school safety agents and almost 200 armed police officers were stationed in New York City's public schools. *A Look at School Safety*, N.Y.C.L. UNION, <http://www.nyclu.org/schooltoprison/lookatsafety> (last visited Jan. 20, 2018).
- 102 Jeremy D. Finn & Timothy J. Servoss, *Misbehavior, Suspensions, and Security Measures in High School: Racial/Ethnic and Gender Differences*, 5 J. APPLIED RES. ON CHILD.: INFORMING POL'Y FOR CHILD. AT RISK 1, 7-8, 18-19 (2014)

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(scoring schools according to the number of security measures in place, such as metal detectors and random detector checks, drug testing, random searches and dog sniffing for drugs and contraband, security cameras, and police or security guards on duty during school hours).

- 103 OFFICE OF THE SURGEON GEN., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL (2001), <https://www.ncbi.nlm.nih.gov/books/NBK44295> (identifying commitment to school as protective factor); Steven C. Teske, *A Study of Zero Tolerance Policies in Schools: A Multi-Integrated Systems Approach to Improve Outcomes for Adolescents*, 24 J. CHILD ADOLESCENT PSYCHIATRIC NURSING 88, 89 (2011).
- 104 *Health Risk Behaviors Among Adolescents Who Do and Do Not Attend School--United States*, 1992, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/MMWR/PREVIEW/MMWRHTML/00025174.htm> (last visited Jan. 20, 2018). See, e.g., Greg Botelho, *What Happened the Night Trayvon Martin Died*, CNN (May 23, 2012, 10:48 AM), <http://www.cnn.com/2012/05/18/justice/florida-teen-shooting-details/index.html> (covering the case of Trayvon Martin, the unarmed Black teenager who, while serving a 10-day suspension from his high school and staying temporarily at his father's house in a gated community, was shot and killed by a community watch member).
- 105 Kathryn C. Monahan et al., *From the School Yard to the Squad Car: School Discipline, Truancy, and Arrest*, 43 J. YOUTH ADOLESCENCE 1110, 1116-18 (2014) (reporting findings from month-to-month interviews of 1,354 adolescent juvenile offenders over six years).
- 106 Christine Christle et al., *School Characteristics Related to the Use of Suspension*, 27 EDUC. & TREATMENT CHILD. 509, 521-22 (2004) (noting that "suspension is an expensive practice" for Kentucky schools, which lost an average of \$3.5 million during the 2000-2001 school year); VOICES OF YOUTH IN CHI. EDUC., FAILED POLICIES, BROKEN FUTURES: THE TRUE COST OF ZERO TOLERANCE IN CHICAGO 21-22 (2011) (calculating \$370 million in lost revenue to Chicago Public Schools during the 2009-2010 school year).
- 107 ROMAN ALVAREZ ET AL., TEX. A&M UNIV. THE ABCD'S OF TEXAS EDUCATION: ASSESSING THE BENEFITS AND COSTS OF REDUCING THE DROPOUT RATE viii, 38-57 (2009) (calculating the economic impact of high school dropout rate in Texas).
- 108 Miner P. Marchbanks III et al., *The Economic Effects of Exclusionary Discipline on Grade Retention and High School Dropout*, in CLOSING THE SCHOOL DISCIPLINE GAP 59 (Daniel J. Losen ed., 2015) (studying the disciplinary records of Texas students and extrapolating cohort findings to calculate the statewide costs of exclusionary discipline). Students who received in-school-suspensions in the ninth grade were forty-six percent more likely to repeat that grade, resulting in an increased annual cost to the state of over \$76 million as well as \$14,500 per year in lost earnings for students, \$96 million in lost purchasing power, and \$5.7 million in lost sales tax revenue. *Id.* at 66-67.
- 109 See, e.g., Paula Braveman et al., *The Social Determinants of Health: Coming of Age*, 32 ANN. REV. PUB. HEALTH 381 (2011).
- 110 ALVAREZ ET AL., *supra* note 107, at vi, 38-56 (studying Texas schools and estimating statewide cost savings from reductions in crime and incarceration rates if more students completed high school).
- 111 Skiba & Knesting, *supra* note 31, at 32-33 (2001) (discussing the uncertainty in whether school suspensions and expulsions result in safer schools); Am. Psychol. Ass'n Zero Tolerance Task Force, *supra* note 31, at 854 (explaining that the flawed assumption of removing disruptive students from the classroom makes for safer schools); SIMONE ROBERS ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY: 2012 iii (15th ed. 2013) (aiming to establish reliable indicators of crime and safety in schools).
- 112 See, e.g., LOSEN & SKIBA, SUSPENDED EDUCATION, *supra* note 76 (citing a 2004 study finding only 5% of all out-of-school suspensions used in one state were for serious or dangerous incidents while the remaining 95% were for disruptive behavior or "other"); Skiba & Knesting, *supra* note 31; LOSEN & MARTINEZ, *supra* note 33.

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- 113 As Derek Black points out, if the assumption that zero-tolerance deterred misbehavior were true, then suspensions and expulsions would have had an early surge and then died down as students learned to adjust their behavior. Instead, suspensions and expulsions have steadily increased for decades. BLACK, *supra* note 3, at 14-15.
- 114 See generally Hemphill et al., *supra* note 96 (examining the correlation between suspension and arrest on the later development of anti-social behavior); Costenbader & Markson, *supra* note 97 (studying the impact of suspension on middle school students located in a rural area as well as inner city in New York).
- 115 See, e.g., LOSEN & MARTINEZ, *supra* note 33, at 15-16 (discussing the “high percentages of certain subgroups” subject to suspension in “hotspot” schools--those with suspension rates of twenty-five percent or higher).
- 116 For an expanded discussion of jurisprudential theory behind legal rules and standards, see *infra* Part IV.A.
- 117 VOICES OF YOUTH IN CHI. EDUC., *supra* note 106, at 19, 21 (noting that the Chicago Public Schools provided \$67 million in the 2010-11 school year budget for school-based security officers, metal detectors, and surveillance cameras to the Office of School Safety and Security).
- 118 See, e.g., Nabatchi, *supra* note 27, at 647 (discussing the variation of implementation of Alternative Dispute Resolution).
- 119 *Infra* Part III.C.
- 120 Restorative justice in schools has received a lot of buzz in popular media. See, e.g., Eric Westervelt, *What If Every High School Had A ‘Justice Program’ Instead of a Cop?*, N.P.R. (Oct. 30, 2015, 11:40 AM), <http://www.npr.org/sections/ed/2015/10/30/452910812/what-if-every-high-school-had-a-justice-program-instead-of-a-cop>; Emily Richmond, *When Restorative Justice in Schools Works*, ATLANTIC (Dec. 29, 2015), <http://www.theatlantic.com/education/archive/2015/12/when-restorative-justice-works/422088/>; Susan Dominus, *An Effective but Exhausting Alternative to High-School Suspensions*, N.Y. TIMES MAG. (Sept. 7, 2016), <http://www.nytimes.com/2016/09/11/magazine/an-effective-but-exhausting-alternative-to-high-school-suspensions.html>. Other alternatives include Positive Behavioral Support, Social Emotional Learning, Positive Youth Development, Character Education, and School Development Program. MORGAN ET AL., *supra* note 45, at 29-31.
- 121 Marilyn Armour, *Restorative Practices: Righting the Wrongs of Exclusionary School Discipline*, 50 U. RICH. L. REV. 999, 1002 (2016) (positioning social-based restorative justice “as an antidote to the fallout from exclusionary punitive practices and a mechanism to enhance those school controlled factors that influence school climate.”).
- 122 Mitchell, *supra* note 59, at 317, 320-21 (including restorative justice as a “prescription” for the harsh penalties of zero tolerance).
- 123 See generally Hilary Cremin, *Critical Perspectives on Restorative Justice/Restorative Approaches in Educational Settings*, in *RESTORATIVE APPROACHES TO CONFLICT IN SCHOOLS: INTERDISCIPLINARY PERSPECTIVES ON WHOLE SCHOOL APPROACHES TO MANAGING RELATIONSHIPS* 109 (Edward Sellman et al. eds., 2014) (defining proactive and reactive restorative approaches in the school setting).
- 124 LAYLA SKINNS ET AL., *AN EVALUATION OF BRISTOL RAIS 10-11* (2009), <https://restorativejustice.org.uk/sites/default/files/resources/files/Bristol%20RAIS%20full%20report.pdf> (“Restorative approaches in schools are usually focused on improving pupil behaviour including anti-social acts such as property damage or theft, reducing bullying, improving pupil's educational performance, reducing unauthorized absences and temporary and permanent exclusions, improving pupil and staff well-being.”). See Brenda Morrison, *The School System: Developing its Capacity in the Regulation of a Civil Society*, in *RESTORATIVE JUSTICE AND CIVIL SOCIETY* 195, 203-09 (Heather Strang & John Braithwaite eds., 2001) (describing restorative justice in schools “as a participatory learning framework through which social bonds can be re-constituted and strengthened” and discussing principles of restorative justice in schools and implementation); BELINDA HOPKINS, *JUST SCHOOLS: A WHOLE SCHOOL APPROACH TO RESTORATIVE JUSTICE* (2004); MARGARET

THORSBORNE & PETA BLOOD, IMPLEMENTING RESTORATIVE PRACTICES IN SCHOOLS: A PRACTICAL GUIDE TO TRANSFORMING SCHOOL COMMUNITIES 190 (2013).

- 125 Gordon Bazemore & Mara Schiff, *"No Time to Talk": A Cautiously Optimistic Tale of Restorative Justice and Related Approaches to School Discipline*, in CONTEMPORARY ISSUES IN CRIMINOLOGICAL THEORY AND RESEARCH: THE ROLE OF SOCIAL INSTITUTIONS 77, 77-96 (Richard Rosenfeld et al. eds., 2012) (discussing the need for schools to connect preventative instruction in conflict resolution with discipline); Allison Ann Payne et al., *Schools as Communities: The Relationships Among Communal School Organization, Student Bonding, and School Disorder*, 41 CRIMINOLOGY 749 (2003) (tracking correlations between communal school organizations and rates of teacher victimization, student victimization, and student delinquency).
- 126 The Oakland Unified School District estimates that only twenty percent of a school's restorative practice is reactive while eighty percent is proactive and preventative. OAKLAND UNIFIED SCH. DIST., RESTORATIVE JUSTICE IMPLEMENTATION GUIDE: A WHOLE SCHOOL APPROACH 2, 15, <https://www.ousd.org/cms/lib/CA01001176/Centricity/Domain/134/BTC-OUSD1-IG-08b-web.pdf> (last visited Jan. 20, 2018); see, e.g., *Restorative Overview*, SAN DIEGO UNIFIED SCH. DIST., https://www.sandiegounified.org/sites/default/files_link/district/files/dept/restorative_practices/_restorative-practices.pdf.
- 127 THORSBORNE & BLOOD, *supra* note 124, at 43-45. A whole-school approach to implementing restorative justice requires most of the work to be done on the preventative level, which "is the business of all the adults of the school community--to deliver programmes and curriculum to all learners in order to develop their social and emotional competence, to develop their personal and interpersonal effectiveness, to contribute to a sense of belonging, safety and wellbeing" THORSBORNE & BLOOD, *supra* note 124, at 43.
- 128 Wendy Drewery, *Restorative Practice in New Zealand Schools: Social Development Through Relational Justice*, 48 EDUC. PHIL. THEORY 191, 194-95 (2016). Educational theorists argue that discipline should be educational. Interventions designed only to control students are inappropriate in the education context because they do not further the problem-solving goals of education. P. S. WILSON, INTEREST AND DISCIPLINE IN EDUCATION 77 (1971) (arguing why purely extrinsic control mechanisms are ineffective); ROGER SLEE, CHANGING THEORIES AND PRACTICES OF DISCIPLINE 29 (1995) (explaining how to structure discipline for students to become self-directing).
- 129 COLO. COORDINATING COUNCIL ON RESTORATIVE JUSTICE, COLORADO RESTORATIVE PRACTICES IN SCHOOLS GUIDELINES: PRINCIPLES, PRACTICES, IMPLEMENTATION AND TRAINING (2016), <http://www.rjcolorado.org/restorative-justice/restorative-practices-in-schools> (explaining the five "R"s of restorative justice).
- 130 See, e.g., CAROLYN BOYES-WATSON & KAY PRANIS, CIRCLE FORWARD: BUILDING A RESTORATIVE SCHOOL COMMUNITY (2015) (explaining how restorative circles can be incorporated into the everyday life of a school, from circles for student discussion of difficult topics (gossiping, bullying, feelings about gender, race and privilege), for teacher and staff responsibilities (team building, self-care, teacher assessment, parent-teacher conferences), and for parents and community (IEP programs, feedback to school); Kathy Bickmore, *Peacebuilding Through Circle Dialogue Processes in Primary Classrooms: Locations for Restorative and Educative Work*, in RESTORATIVE APPROACHES TO CONFLICT IN SCHOOLS: INTERDISCIPLINARY PERSPECTIVES ON WHOLE SCHOOL APPROACHES TO MANAGING RELATIONSHIPS 175-88 (Edward Sellman et al. eds., 2014) (using conflict management methods proactively, through dialogue and student self-governance activities in classroom teaching, curricular design, and school structure, rather than responding to conflict reactively with exclusionary discipline and behavioral controls); JAIN ET AL., *supra* note 13, at 7-8 (discussing three tiers of Oakland's Whole School Restorative Justice Model: (1) community and relationship building as proactive means of preventing conflict; (2) restorative discipline to respond to disruptive behavior and harmful incidents; and (3) re-entry or reintegration of students returning to school from incarceration, involuntary transfer, or suspension).
- 131 Kay Pranis, *Restorative Values*, in HANDBOOK OF RESTORATIVE JUSTICE 59, 66 (Gerry Johnstone & Daniel W. Van Ness eds., 2007).

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- 132 HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 27-31 (2015) (contrasting the underlying principles and questions posed by restorative and punitive justice models when confronting “crime” or a harm to relationships in a community).
- 133 JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 14 (1989) (discussing the concept of “reintegrative shaming,” an alternative to stigmatization, and its ability to transform antisocial behavior).
- 134 My groupings are a synthesis of the wide variety of different restorative practices used in countries around the world. Ted Wachtel & Paul McCold, *Restorative Justice in Everyday Life*, in *RESTORATIVE JUSTICE AND CIVIL SOCIETY* 114, 125-26 (Heather Strang & John Braithwaite eds., 2001) (describing a continuum of informal (affective statements and questioning, impromptu conferences) to formal (group circles and conferences) restorative processes); HOPKINS, *supra* note 124, at 34-41 (covering a range of restorative practices, from one-on-one conversation to increasingly complex processes involving more and more people); THORSBORNE & BLOOD, *supra* note 124, at 36-42 (using both a single axis and a pyramidal structure to illustrate which restorative processes to use for different degrees of restorative intervention). Another restorative justice continuum often mentioned in the school context refers to different points along a timeline when restorative practices may be used. For example, restorative practices can first be used to build community and prevent disruptive behavior, then to address disruptive behavior (discipline), and finally to help students re-enter the school community after a period of suspension, expulsion, or incarceration. *See, e.g.*, JAIN ET AL., *supra* note 13, at 7-8; *Restorative Practices in San Diego Unified School District*, NAT’L CONFLICT RESOL. CTR., <http://www.ncrconline.com/mediation-conflict-resolution/restorative-practices/restorative-practices-schools> (last visited Jan. 20, 2018).
- 135 Robert Yazzie, “*Life Comes from It*”: *Navajo Justice Concepts*, 24 N.M. L. REV. 175, 177-178, 180 (1994) (defining “vertical” models of justice as those relying upon hierarchies of power in which a “decision is dictated from on high by the judge” while “horizontal” models of justice are based on “equality and the full participation of disputants in a final decision”).
- 136 *Id.*
- 137 Bickmore, *supra* note 130, at 181. Talking circles in the classroom setting involve all students, not just those directly involved in an incident. Students speak voluntarily but no one can sit-out or watch without being a part of the circle.
- 138 HOPKINS, *supra* note 124, at 72-74; THORSBORNE & BLOOD, *supra* note 124, at 41.
- 139 HOPKINS, *supra* note 124, at 81-84; THORSBORNE & BLOOD, *supra* note 124, at 41-42.
- 140 *See, e.g.*, Cheryl Swanson & Michelle Owen, *Building Bridges: Integrating Restorative Justice with the School Resource Officer Model* 22 (Int’l Police Exec. Symposium, Working Paper No. 1, 2007) (proposing that school resource officer training should include restorative philosophy and training in restorative models of dispute resolution).
- 141 *See, e.g.*, Eric Westervelt, *An Alternative to Suspension and Expulsion: ‘Circle Up!’*, NPR (Dec. 17, 2014), <https://www.npr.org/sections/ed/2014/12/17/347383068/an-alternative-to-suspension-and-expulsion-circle-up>.
- 142 These conferences are sometimes called Family Group Conferences (“FGC”), which have a narrower focus than generic community conferences because they are designed specifically to empower families, not institutional actors, as decision makers. FGC brings together family members and other significant people in a child’s life in order to address unique problems facing that child. Carol Hayden, *Reflections on Researching Restorative Approaches in Schools and Children’s Residential Care*, in *RESTORATIVE APPROACHES TO CONFLICT IN SCHOOLS: INTERDISCIPLINARY PERSPECTIVES ON WHOLE SCHOOL APPROACHES TO MANAGING RELATIONSHIPS* 82-84 (Edward Sellman et al. eds., 2014).
- 143 A school might have a designated restorative justice administrator or a special member of the school community whose job responsibilities include coordinating restorative conferences, contacting all the necessary individuals, and convening the process.

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- 144 In addition to the individuals directly involved (for example, the student who is missing school and her legal guardians), there would also be key support people who could contribute to the problem-solving (for example, guidance counselor or social worker, a coach, the student's advisor) as well as any school administrators.
- 145 BOYES-WATSON & PRANIS, *supra* note 130, at 315-16 (2015). Facilitators must “understand the full scope, history, and impact of problematic behaviors by meeting with: victims and their families; wrongdoers and their families; staff and other students or witnesses” and should use in person, individual pre-meetings to “gain important understandings, discover who might have been affected and therefore also needs to be involved, and learn what some of the underlying issues may be that will need to be addressed.” *Id.*
- 146 HOPKINS, *supra* note 124, at 35. Some facilitators might also ask everyone to propose some guidelines for the discussion so that all participants feel safe and included.
- 147 HOPKINS, *supra* note 124, at 135-36.
- 148 HOPKINS, *supra* note 124, at 37.
- 149 Sometimes restorative conferences are called “community conferences.” *See, e.g., Community Conferencing*, COMMUNITY CONFERENCING CTR., http://www.communityconferencing.org/index.php/programs/schools_youth_programs/#CC.
- 150 Calling the encounter between those harmed and those who caused harm “mediation” is contested. Howard Zehr argues that mediation is not a fitting description for such an encounter because the parties are not on a “level moral playing field” and do not share responsibility for the harm, elements that are usually present in most mediated disputes. ZEHR, *supra* note 132, at 15. Furthermore, the terms “victim” and “offender” tend to be avoided in the school context because the term suggests that responsibility for a harm is one-sided when, more often than not, all of the parties involved contributed in some way to the conflict. HOPKINS, *supra* note 124, at 41-42 (explaining that, in the school setting, individuals often act out in response to perceived provocations and that even individuals who are harmed need to understand how they may have contributed, even if inadvertently, to the situation).
- 151 *See, e.g.,* Lisa Cameron & Margaret Thorsborne, *Restorative Justice and School Discipline: Mutually Exclusive?*, in *RESTORATIVE JUSTICE AND CIVIL SOCIETY* 181-82 (Heather Strang & John Braithwaite eds., 2001) (using community conferencing in schools to address assaults and incidents involving serious victimization, property damage, theft, as well as drugs, verbal abuse, truancy, repeated class disruption, and a bomb threat); COMMUNITY CONFERENCING CTR., *supra* note 149 (listing the different uses for restorative conferencing in the school setting).
- 152 HOPKINS, *supra* note 124, at 74-100, 115. A restorative conference, like the community conferences discussed above, involves all parties who participated in, and were harmed by, destructive behavior, their parents or support people, as well as key school staff.
- 153 TED WACHTEL, INT'L INST. RESTORATIVE PRACTICES, *DEFINING RESTORATIVE* 7 (2016), http://www.iirp.edu/images/pdf/Defining-Restorative_Nov-2016.pdf (describing the questions asked to wrongdoers and wronged in the standard restorative conference script). For each of these questions, the order in which people speak is important, with the “wrongdoer” answering first, followed by the “wronged,” and then additional support people or community stakeholders. Assigned seating is often used to reflect the order in which people speak, with the individuals most closely involved in the incident sitting to either side of the facilitator, with their support people next to them, and the circle completed by other stakeholders affected by the incident. HOPKINS, *supra* note 124, at 116-17.
- 154 HOPKINS, *supra* note 124, at 116-17.
- 155 This is quite different from apologizing.
- 156 *See, e.g.,* Alice Ierley & Carin Ivker, *Restoring School Communities: A Report on the Colorado Restorative Justice in Schools Program*, VOMA CONNECTIONS 3 (2003) (finding behavior changes included things like “[a]gree not to throw snowballs on school property” or “[w]ill not talk behind each other's back” or “[w]ill stop harassment on the bus and stand up for others”;

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including examples of restitution from the offender such as “[w]ill work 20 hours to repay the losses” or “[w]ill go with victim to replace her things” or “[a]greed to meet with the teacher (victim) and work in her classroom”; listing community services like “[r]epaint bathroom wall” or “[m]ake anti-vandalism posters”; and providing examples of pro-social reflection listing “what makes me feel like a good person” or journaling “about what’s been learned through the process” while educational activities or mentoring involved “[i]nterview college dean about impact of cheating at college level” or “[r]ide along with police department”).

157 *Id.* at 2.

158 *Id.*

159 Brenda Morrison, *Restorative Justice in Schools*, in *NEW DIRECTIONS IN RESTORATIVE JUSTICE: ISSUES, PRACTICE, EVALUATION* 29 (Elizabeth Elliott & Robert M. Gordon eds., 2005) (citing Clea A. McNeely, James Nonnemaker & Robert W. Blum, *Promoting School Connectedness: Evidence from the National Longitudinal Study of Adolescent Health*, 72 J. SCH. HEALTH 138 (2002)).

160 Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. EDUC. 281, 303-21, 321-35 (2012) (cataloguing a variety of different restorative discipline programs piloted in schools and school districts in California, Florida, Illinois, Iowa, Oregon, Maryland, Michigan, Minnesota, Missouri, New Mexico, Pennsylvania, Virginia, and also Denver, Colorado); Armour, *supra* note 121, at 1019-23 (summarizing positive reports from schools implementing restorative disciplinary practices); INT’L INST. RESTORATIVE PRACTICES, IMPROVING SCHOOL CLIMATE: FINDINGS FROM SCHOOLS IMPLEMENTING RESTORATIVE PRACTICES 5 (2009) (providing a collection of article excerpts, reports, and disciplinary data from individual schools and school districts). Many of these positive reports come from restorative justice practitioners and service providers.

161 Rigorous empirical studies attempting to understand and establish causality between restorative disciplinary practices and changes to student behavior, teachers, and school environments, have only just begun. Much of the data currently available about the impact of restorative justice on students, teachers, and school climate consist of descriptive before-and-after summaries, usually self-reported, and testimonials, but not empirically rigorous methods, such as, formal evaluation design, comparison groups or other means for statistical control. TREVOR FRONIUS ET AL., *RESTORATIVE JUSTICE IN U.S. SCHOOLS: A RESEARCH REVIEW* (2016) (listing and describing all the studies and reports identified in a restorative justice literature review). The precise elements of restorative justice responsible for changes in students and school communities have not yet been isolated. *See* Samuel Y. Song & Susan M. Swearer, *The Cart Before the Horse: The Challenge and Promise of Restorative Justice Consultation in Schools*, 26 J. EDUC. PSYCHOL. CONSULTATION 313, 316 (2016). However, an empirical study of restorative practices across fourteen schools in Maine, funded by the RAND Corporation and the National Institute of Child Health and Development, is currently underway. Joie D. Acosta et al., *Rethinking Student Discipline and Zero Tolerance*, RAND BLOG (Oct. 14, 2015), <http://www.rand.org/blog/2015/10/rethinking-student-discipline-and-zero-tolerance.html>. For a discussion of methods for implementing a randomized control trial for restorative practices in schools, *see* Joie D. Acosta, *A Cluster-Randomized Trial of Restorative Practices: An Illustration to Spur High-Quality Research and Evaluation*, 26 J. EDUC. & PSYCHOL. CONSULTATION 413 (2016).

162 JAIN ET AL., *supra* note 13, at vii (describing the variety of restorative processes utilized in Oakland schools, including community-building dialogues, healing circles, and re-entry circles). In 2013-14, out of 472 harm circles that took place in eight Oakland middle schools, seventy-six percent successfully healed harms and resolved the conflict, twenty-two percent were still in progress, and two percent remained unresolved or had been referred to school administrators. *See* INT’L INST. FOR RESTORATIVE PRACTICES, IMPROVING SCHOOL CLIMATE: EVIDENCE FROM SCHOOLS IMPLEMENTING RESTORATIVE PRACTICES (2014), <http://www.iirp.edu/pdf/IIRP-Improving-School-Climate.pdf> (describing significant reductions in suspensions, office referrals, serious infractions, and numbers of students with multiple suspensions, as well as improved social skills in three schools in Baltimore, Maryland and Bethlehem, Pennsylvania).

163 Memorandum from Hilary Smith of Colo. Legislative Council Staff to Legislative Task Force to Study School Discipline 4 (Aug. 30, 2011), <http://hermes.cde.state.co.us/drupal/islandora/object/co%3A12242/datastream/OBJ/view> (summarizing the

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results of Denver Public School's Restorative Justice Project sourced by Myriam L. Baker, DPS Restorative Justice Project: Year Three Year End Report 2008-2009, 4 (Sept. 16, 2009)).

- 164 Press Release, Chi. Pub. Sch., CPS Continues Reduction of Suspensions and Expulsions to Keep Students Connected to Schools (Feb. 12, 2016), http://cps.edu/News/Press_releases/Pages/PR1_02_12_2016.aspx; CHI. PUB. SCH., UNDERSTANDING SCHOOL BEHAVIOR DATA (defining what the CPS considers police notifications), <http://cps.edu/Performance/Documents/Datafiles/SuspensionExpulsionFactSheet.pdf> (last visited Jan. 20, 2018).
- 165 JAIN ET AL., *supra* note 13, at vi, 45 (reporting that the percent of student suspensions in schools implementing a whole-school restorative justice program dropped by half, from thirty-four percent to fourteen percent over three years).
- 166 JAIN ET AL., *supra* note 13, at 45. When controlling for school type, socio-economic status, gender, school year, and institutional baseline suspensions, the study of Oakland's restorative justice initiative found that that African American students seem to have benefited more from restorative interventions than their White counterparts.
- 167 Anne Gregory et al., *The Promise of Restorative Practices to Transform Teacher-Student Relationships and Achieve Equity in School Discipline*, 26 J. EDUC. PSYCHOL. CONSULTATION 325, 339-42 (2016).
- 168 INT'L INST. RESTORATIVE PRACTICES, *supra* note 160, at 8, 9-10.
- 169 Paul McCold, *Evaluation of a Restorative Milieu: Restorative Practices in Context*, in 11 SOCIOLOGY OF CRIME, LAW AND DEVIANCE: RESTORATIVE JUSTICE: FROM THEORY TO PRACTICE 99-137 (Holly Ventura Miller ed., 2008).
- 170 EARL R. PERKINS, SCHOOL WIDE POSITIVE BEHAVIOR INTERVENTION & SUPPORT (2016), https://boe.lausd.net/sites/default/files/03-15-16TAB1SchoolWidePositiveBehavior.pptx_.pdf (comparing district-wide total numbers of instructional days lost to suspension to numbers of days lost in twenty-five schools piloting restorative justice programs); Memorandum from Hilary Smith, *supra* note 163, at 2.
- 171 JAIN ET AL., *supra* note 13, at 50. Proficient reading levels, which reflect the percentage of students reading at or above the scholastic reading inventory, increased for Grade 9 from fourteen percent in 2011-12 to thirty-three percent in 2013-14. Additionally, four-year graduation rates increased by sixty percent and drop-out rates decreased by fifty-six percent. *Id.* at 51, 52.
- 172 Memorandum from Hillary Smith, *supra* note 163 at 3.
- 173 Anne Gregory et al., *supra* note 167, at 339-42.
- 174 NAT'L CTR. ON SAFE SUPPORTIVE LEARNING ENV'TS, STEMMING THE SCHOOL-TO-PRISON PIPELINE: APPLYING RESTORATIVE JUSTICE PRINCIPLES TO SCHOOL DISCIPLINE PRACTICES (2013), https://safesupportivelearning.ed.gov/sites/default/files/sssta/20130321_SSDWebinar4RestorativeJusticePresentatio.
- 175 Bazemore & Schiff, *supra* note 125, at 78-80; see Hilary Cremin, *Talking Back to Bazemore and Schiff: A Discussion of Restorative Justice Interventions in Schools*, in CONTEMPORARY ISSUES IN CRIMINOLOGICAL THEORY AND RESEARCH: THE ROLE OF SOCIAL INSTITUTIONS 107-14 (Richard Rosenfeld et al. eds., 2012).
- 176 Most activity has been at the state and local level; however, there have been some proposals at the federal level. *See, e.g.*, Keep Kids in School Act, S. 672, 114th Cong. (2015) (aiming to support the Elementary and Secondary Education Act of 1965 in reducing the number of suspensions and expulsions); Better Educator Support and Training Act, S. 882, 114th Cong. (2015) (elevating the development of educational equity).
- 177 FLA. STAT. ANN. § 1006-13 (3)(a), (b) (West 2016) (limiting zero-tolerance to automatic expulsion for bringing a firearm or dangerous weapon to a school event or on campus or making a threat or false report).
- 178 CAL. EDUC. CODE § 48900 (West 2016) (delineating behaviors that may serve as grounds for suspension or expulsion and eliminating expulsion for willful defiance). The Illinois legislature also expressly forbade school boards from instituting zero-

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tolerance policies that would require school administrators to expel or suspend students for certain offenses (H.B. 5617 99th Gen. Assemb. (Ill. 2016)). Illinois state law also prohibits reliance on out-of-school suspensions, permitting them only after non-exclusionary discipline efforts have been exhausted or in those extreme cases where a child's continued presence at school constitutes a threat to others. *Id.*

- 179 H.R.J. Res. 4828, 2015 Gen. Assemb., 121st Sess. (S.C. 2016) (creating “Schoolhouse to Jail House Study Committee”); *see also* H.B. 5617, 99th Gen. Assemb. (Ill. 2016) (providing matching grants).
- 180 TEX. OCC. CODE ANN. § 1701.262 (West 2016); H.B. 460, 2016 Leg., Gen. Sess. (Utah 2016).
- 181 *See, e.g.*, IND. CODE ANN. § 20-28-3-3.5 (West 2016); LA. REV. STAT. ANN. § 17:252(D)(1) (2016).
- 182 *See infra* Part III.C.
- 183 COLO. REV. STAT. ANN. § 22-32-144 (West 2016). Similar legislation proposed in Florida was not enacted (H.B. 1139, S.B. 490, 2016 Leg., Reg. Sess. (Fla. 2016)).
- 184 COLO. REV. STAT. ANN. § 22-32-109.1(2)(a)(II)(B) (West 2016).
- 185 COLO. REV. STAT. ANN. § 22-32-144 (defining restorative practices as those “that emphasize repairing the harm to the victim and the school community caused by a student's misconduct;” and enumerating possible consequences, such as apologies, community service, restitution, restoration, and counseling).
- 186 Michigan enacted new legislation permitting restorative practices as an alternative, or in addition, to exclusionary discipline (MICH. COMP. LAWS ANN. § 380.1310(c) (2017)) and Tennessee considered a bill (H.B. 1349, 2015 Gen. Assemb. (Tenn. 2015)) incorporating “restorative justice” as an alternative to criminal penalties for truancy.
- 187 *See supra* Part II.A.
- 188 State departments of education also provide nonbinding guidance on restorative practices in schools. *See, e.g.*, *Restorative Practices*, MINN. DEPT. OF EDUC. <http://education.state.mn.us/MDE/dse/safe/clim/prac/> (last visited Jan. 20, 2018).
- 189 603 MASS. CODE REGS. 53.05 (2016). Whether restorative practices in school can be considered “evidence based” is a topic of debate. *See, e.g.*, Song & Swearer, *supra* note 161, at 314 (stating “[f]rom a research perspective, an intervention that is not manualized is not an intervention that can be rigorously evaluated.”).
- 190 MD. CODE REGS. 13A.08.01.11A(1), (2) (West 2016).
- 191 *Id.* at B-C.
- 192 *City Announces School Climate Reforms*, N.Y.C. DEPT OF EDUC. (Feb. 13, 2015), <http://schools.nyc.gov/Offices/mediarelations/NewsandSpeeches/2014-2015/City+Announces+School+Climate+Reforms.htm>.
- 193 S.F. UNIF. SCH. DIST. BOARD EDUC., Res. No. 96-23A1 (Oct. 13, 2009), <http://www.healthiersf.org/RestorativePractices/Resources/documents/RJ%20Board%20Resolution.pdf>.
- 194 U.S. DEPT. JUSTICE & U.S. DEPT. EDUC., DEAR COLLEAGUE LETTER: NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE (Jan. 8, 2014).
- 195 U.S. DEPT. EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE (2014), <http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>.
- 196 U.S. DEPT OF JUSTICE, THE COMPREHENSIVE SCHOOL SAFETY INITIATIVE: AWARDS MADE IN FISCAL YEAR 2015 (2016), <https://www.ncjrs.gov/pdffiles1/nij/249228.pdf>.

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- 197 For more on the significance of institutional or structural reform litigation and judicially monitored Consent Decrees, see Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887 (1984) (discussing implications of consent decrees as unlitigated, and therefore privately negotiated, reforms of public institutions); Owen M. Fiss, *Justice Chicago Style*, 1987 U. CHI. LEGAL F. 1, 2, 4 (1987) (noting that consent decrees are a weird amalgam of private settlement in an ADR context and the “exercise of public power” and arguing that they constitute “an appropriation of public power”).
- 198 Consent Order at 4, *Barnhardt v. Meridian Mun. Separate Sch. Dist.*, No. 4:65-cv-01300 (S.D. Miss. Mar. 22, 2013).
- 199 *Id.* at 3.
- 200 *Id.* at 7.
- 201 *Id.* at 18.
- 202 *Id.* at 17, 23.
- 203 *Id.* at 32. The Order also prohibits officers from responding to “public order offenses committed by students” such as disrupting school activities, loitering, trespass, profanity, dress code violations, and fighting that does not involve physical injury or weapon. *Id.* at 33.
- 204 An additional puzzle also raised by the Consent Decree is how a federal judge is supposed to monitor effective implementation of “restorative justice?” The answer to this question lies outside the scope of this particular Article but will be addressed in future writing.
- 205 Complaint at 5, *Peter P. v. Compton Unified Sch. Dist.*, No. 2:215-cv-03726 (C.D. Cal. May 18, 2015).
- 206 *Id.* at 4.
- 207 The parties have been negotiating a settlement since September 2016 and were recently granted a stay to October 2017 to continue their discussions. Order Granting Joint Stipulation to Stay Litigation Until April 2, 2018, *Peter P. v. Compton Unified Sch. Dist.*, No. 2:15-cv-03726 (C.D. Cal. Jan. 9, 2017).
- 208 Administrative Complaint at 1, *Q.B. v. Jefferson Parish Public School System*, No. 06121151 (U.S. Dep’t of Educ. Jan. 11, 2012).
- 209 Sellman et al., *supra* note 8, at 4 (explaining how restorative justice is a contested concept).
- 210 See Kathleen Daly, *The Limits of Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 135 (Dennis Sullivan & Larry Tifft eds., 2006).
- 211 ZEHR, *supra* note 132, at 17.
- 212 Wachtel & McCold, *supra* note 134, at 126 (“Restorative justice is a philosophy, not a model ...”).
- 213 ZEHR, *supra* note 132, at 7, 28 (“Although the term ‘restorative justice’ encompasses a variety of programs and practices, at its core it is a set of principles and values, a philosophy, an alternate set of guiding questions.”).
- 214 ZEHR, *supra* note 132, at 29 (noting that this worldview of interconnectedness is captured in many cultures: “[i]n the Hebrew scriptures, this is embedded in the concept of *shalom*, the vision of living in a sense of ‘all-rightness’ with each other, with the creator, and with the environment. ... For the Maori, it is communicated by *whakapapa*; for the Navajo, *hozho*; for many Africans, the Bantu word *ubuntu*; for Tibetan Buddhists, *tendrel*.”). Howard Zehr comes from the Christian Mennonite tradition that, like Quakers, includes a ministry of pacifism and peacebuilding. *Id.* at 74.
- 215 *Id.*

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- 216 *Id.*
- 217 JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 11 (2002).
- 218 *Id.*
- 219 See Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. SOC. SCI. 161 (2007) (providing an extensive review of the literature on restorative justice theory and the wide range contexts in which it is practiced).
- 220 Catherine Love, *Family Group Conferencing: Cultural Origins, Sharing, and Appropriation--A Maori Reflection*, in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY CENTERED CHILD & FAMILY PRACTICE 15-30 (Gale Burford & Joe Hudson eds., 2000) (explaining Maori social and ideological systems, which in turn were used as the basis of family group conferences that the New Zealand government began using in the 1980s for child welfare cases).
- 221 Dirk J. Louw, *The African Concept of Ubuntu and Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 161 (Dennis Sullivan & Larry Tifft eds., 2006) (explaining the meaning and political applications of ubuntu, also captured by the phrase *umuntu ngumuntu ngabantu*, meaning “a person is a person through other persons”).
- 222 Yazzie, *supra* note 135, at 180-84.
- 223 Michael L. Hadley, *Spiritual Foundations of Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 174-87 (Dennis Sullivan & Larry Tifft eds., 2006) (discussing the many religious and spiritual traditions that serve as foundations for restorative justice); BRAITHWAITE, *supra* note 217, at 3-8 (discussing restorative paradigms in indigenous cultures around the world: Native American; Aboriginal; First Nation peoples in North America; African; Arab Palestinian; Afghan; Celtic).
- 224 Russ Immarigeon & Kathleen Daly, *Restorative Justice: Origins, Practices, Contexts, and Challenges*, 8 J. COMMUNITY CORRECTIONS 13 (1997).
- 225 *Id.*
- 226 *Id.*; Love, *supra* note 220, at 24-25.
- 227 See, e.g., 2 THE POLITICS OF INFORMAL JUSTICE: COMPARATIVE STUDIES (Richard L. Abel ed., 1982) (discussing political movements to establish informal justice systems in countries around the world).
- 228 Kathleen Daly & Julie Stubbs, *Feminist Theory, Feminist and Anti-Racist Politics, and Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE 149-70 (Gerry Johnstone & Daniel W. Van Ness eds., 2007) (discussing different feminist theories and the (often conflicting) ways in which they have engaged with restorative justice reform).
- 229 Heather Strang, *The Crime Victim Movement as a Force in Civil Society*, in RESTORATIVE JUSTICE AND CIVIL SOCIETY 69, 71-76 (Heather Strang & John Braithwaite eds., 2001) (describing the genesis of victims' rights movement and its divided mission of support for victims and rights of victims).
- 230 It is important to note that while many restorative justice interventions challenge established methods for delivering justice, many of which are punitive, restorative justice is not without its own version of retribution or punishment. Early efforts to distinguish restorative from retributive justice have been rejected (and ultimately retracted). For more on this topic, see Howard Zehr, *Retributive Justice, Restorative Justice*, in A RESTORATIVE JUSTICE READER: TEXTS, SOURCES, CONTEXT 69-82 (Gerry Johnstone ed., 2003).
- 231 Daniel W. Van Ness, *Restorative Justice as World View*, in RESTORATIVE APPROACHES TO CONFLICT IN SCHOOLS: INTERDISCIPLINARY PERSPECTIVES ON WHOLE SCHOOL APPROACHES TO MANAGING RELATIONSHIPS 33 (Edward Sellman et al. eds., 2013).

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- 232 *Id.* at 33.
- 233 *Id.*
- 234 Daly, *supra* note 210, at 135 (explaining different axes of disagreement in the restorative justice literature and providing helpful citations to different points of view).
- 235 The rich “restorative justice” biodiversity in the criminal justice context is probably due to the fact that the criminal justice system has been a target of restorative reforms since the 1970s, longer than any other area.
- 236 See, e.g., Caroline G. Nicholl, *Community Policing, Community Justice, and Restorative Justice*, U.S. DEPT JUSTICE (1999), <https://ric-zai-inc.com/Publications/cops-w0033-pub.pdf>.
- 237 These ADR processes include victim-offender mediation, victim-offender reconciliation, and victim-offender conferencing. Mark S. Umbreit et al., *Victim Offender Mediation: An Evolving Evidence-Based Practice*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 52-62 (Dennis Sullivan & Larry Tift eds., 2006). Victim Offender Reconciliation Programs emphasize forgiveness and reconciliation between victims and offenders. Advocates of Victim-Offender Mediation (and some victims) reject the notion of reconciliation not only for its religious overtones but for the notion that victims should have to reconcile with offenders. And, in turn, advocates of Victim Offender Conferencing reject mediation because of the control that mediators exert over the mediation process and mediation's orientation toward settlement. *Id.* at 53. Even for just one of these processes there may be a range of practices. See, e.g., Christa Pelikan & Thomas Trenczek, *Victim-Offender Mediation and Restorative Justice: The European Landscape*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 63-90 (Dennis Sullivan & Larry Tift eds., 2006) (explaining distinctions between VOM practices in Albania, Austria, the Czech Republic, France, Finland, Germany, Italy, the Netherlands, Norway, Poland, Slovenia, England and Wales).
- 238 See, e.g., M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123 (2016); The Restorative Justice Act, S.M. 2014, c 26 (Can.) (calling alternative sentences like mandatory treatment and counselling for mental illness “restorative justice”); *Community Service Standards*, N.Y. DIV. OF CRIM. JUST. SERVS., <http://www.criminaljustice.ny.gov/opca/communityservicestandards.htm> (explaining that court-ordered community service as a sanction for certain offenders is “consistent with the principles of restorative justice”).
- 239 Mary Achilles & Lorraine Stutzman-Amstutz, *Responding to the Needs of Victims: What Was Promised, What Has Been Delivered*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 211-20 (Dennis Sullivan & Larry Tift eds., 2006) (discussing various components of Crime Victims' Bill of Rights). The role of victim impact statements in criminal sentencing is controversial. For further discussion, see James R. Acker, *Hearing the Victim's Voice Amidst the Cry for Capital Punishment*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 246-60 (Dennis Sullivan & Larry Tift eds., 2006).
- 240 Judith Brink, *The Other Victims: The Families of Those Punished by the State*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 261-68 (Dennis Sullivan & Larry Tift eds., 2006).
- 241 Judith W. Kay, *Murder Victims' Families for Reconciliation: Story-telling for Healing, as Witness, and in Public Policy*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 230-45 (Dennis Sullivan & Larry Tift eds., 2006).
- 242 Daly, *supra* note 210, at 135.
- 243 ZEHR, *supra* note 132, at 8-9 (stating “[o]ur past experience with change efforts in the justice arena warns us that sidetracks and diversions from our visions and models inevitably happen in spite of our best intentions. If advocates for change are unwilling to acknowledge and address these likely diversions, their efforts may end up much different than they intended. In fact, ‘improvements’ can turn out to be worse than the conditions that they were designed to reform or replace.”).

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- 244 For example, alternative forms of in-school punishment, such as community service, perhaps alluding to the alternative sentencing or diversion programs used in the criminal justice context, have been referred to as “restorative justice.” Compare, e.g., DANYA CONTRACTOR & CHERYL STAATS, KIRWAN INST., INTERVENTIONS TO ADDRESS RACIALIZED DISCIPLINE DISPARITIES AND SCHOOL ‘PUSH OUT’ 12 (2014), with JENNI OWEN ET AL., DUKE CTR. FOR CHILD FAM. POL’Y & DUKE L. SCH., INSTEAD OF SUSPENSION: ALTERNATIVE STRATEGIES FOR EFFECTIVE SCHOOL DISCIPLINE 27 (2015), and *Restorative Justice Programs*, RESOLVE, <http://www.resolvecenter.org/pg19.cfm> (last visited Jan. 20, 2018).
- 245 Cremin, *supra* note 123, at 109-22 (explaining how and why restorative justice in the criminal justice sector is different from the school setting).
- 246 Interview with Former Lord Chief Justice Charlie Falconer, London, U.K. (Jan. 13, 2010), <https://www.educ.cam.ac.uk/research/projects/restorativeapproaches/Charlie%20Falconer%C20amended%C20final%C20draft%C2001%C20Feb%202010.pdf>.
- 247 Some of these reports come from American schools and some come from Australia, New Zealand, and the UK, where school-based restorative justice has been tried for longer. See, e.g., GWYNEDD LLOYD & GILLEAN MCCLUSKEY, RESTORATIVE PRACTICE PILOTS AND APPROACHES IN SCOTLAND--FOLLOW UP (2009) (concerning the Scottish Government); JEAN KANE ET AL., RESTORATIVE PRACTICES IN THREE SCOTTISH COUNCILS: FINAL REPORT OF THE EVALUATION OF THE FIRST TWO YEARS OF THE PILOT PROJECTS 2004-2006 (2007) (same); YOUTH JUSTICE BD. ENG. & WALES, NATIONAL EVALUATION OF THE RESTORATIVE JUSTICE IN SCHOOLS PROGRAMME (2004), http://www.creducation.org/resources/National_Eval_RJ_in_Schools_Full.pdf (pertaining to schools in England and Wales); SKINNS ET AL., *supra* note 124, at 1 (discussing implementation in Bristol).
- 248 González, *supra* note 160; Laura Byer, Restorative Practices in the School Setting: A Systematic Review (Master of Social Work Clinical Research Paper No. 564, 2016), http://sophia.stkate.edu/msw_papers/564/.
- 249 See Byer, *supra* note 248, at 29 (noting that some schools reserve restorative practices solely for serious disciplinary infractions that would otherwise warrant expulsion, while others exclude all violent encounters); JESSICA ASHLEY & KIMBERLY BURKE, ILL. CRIMINAL JUSTICE INFO. AUTH., IMPLEMENTING RESTORATIVE JUSTICE: A GUIDE FOR SCHOOLS 13 (2009), <http://www.icjia.state.il.us/publications/implementing-restorative-justice-a-guide-for-schools> (recommending restorative practices for truancy and peer mediation only for interpersonal conflicts between students).
- 250 González, *supra* note 160 at 308, 309, 315-16, 318 (discussing “peer mediation” utilized in Florida, “peer juries” developed in Illinois, “peer panels” used in New Mexico, and “peer mediation” encouraged in Virginia); Telephone Interview with Jonathan Scharrer, Clinical Instructor, University of Wisconsin Law School (July 29, 2017) (discussing restorative “peer jury” and “youth court” programs assisted by the Restorative Justice Project at the University of Wisconsin Law School).
- 251 Byer, *supra* note 248, at 13. Such “restorative” classroom management techniques are labeled “Positive Behavioral Intervention and Support” or “PBIS”. See POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORT, [HTTPS://WWW.PBIS.ORG/](https://www.pbis.org/) (LAST VISITED JAN. 20, 2018) (explaining “[t]he broad purpose of PBIS is to improve the effectiveness, efficiency and equity of schools and other agencies.”); Morrison & Vaandering, *supra* note 10, at 149-150 (noting the differences between restorative justice and positive behavioral supports).
- 252 MARILYN ARMOUR, ED WHITE MIDDLE SCHOOL RESTORATIVE DISCIPLINE EVALUATION: IMPLEMENTATION AND IMPACT, 2014/2015 SIXTH, SEVENTH & EIGHTH GRADES 10 (2016) <http://irjrd.org/files/2016/01/Year-3-FINAL-Ed-White-report.pdf> (noting pronounced differences in the perceptions and attitudes toward restorative discipline among teachers from different grade-levels).

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- 253 This problem played out at one middle school where adults in the school reported a lack of cohesion between teachers and administrators over who should handle students with particularly challenging behavior--was that the teachers' or the administration's responsibility? Teachers also reported not having bought in fully to the restorative approach. *Id.* at 63-64.
- 254 Gillean McCluskey, *Challenges to Education: Restorative Practice as a Radical Demand on Conservative Structures of Schooling*, in *RESTORATIVE APPROACHES TO CONFLICT IN SCHOOLS: INTERDISCIPLINARY PERSPECTIVES ON WHOLE SCHOOL APPROACHES TO MANAGING RELATIONSHIPS* 132, 137-40 (Edward Sellman et al. eds., 2013).
- 255 ARMOUR, *supra* note 252, at 8-9. Only seventy-seven circles occurred for all three grades during the last year the school's restorative justice program was studied--a number far lower than the 350 circles used for sixth grade in the first year and the 213 used for sixth and seventh grades in the second year.
- 256 SKINNS ET AL., *supra* note 124, at 22. One student explained, "You've got the support kind of people, they do like proper conferences but the other ones, they say they're conferences but they're just going to sit you down and shout at you." *Id.* Even more troubling is an account of a restorative conference where the "perpetrators" had neither agreed to participate nor had they taken responsibility for doing anything wrong before the conference took place.
- 257 Press Release, Chi. Pub. Sch., CPS Suspension and Expulsion Rates Reach Record Low (Sept. 22, 2016), http://cps.edu/News/Press_releases/Pages/PR1_09_22_2016.aspx (explaining that the new "emphasis on social and emotional learning, and restorative practices to improve school climates" led to a reduction in student misconduct, decreasing out-of-school suspension by sixty-seven percent and expulsion by seventy-four percent since 2012); Howard Blume, *Big Drop in Number of California Students Who Are Suspended, Expelled*, L.A. TIMES (Jan. 15, 2015, 11:34 AM), <http://www.latimes.com/local/lanow/la-me-ln-california-schools-suspended-expelled-20150114-story.html> (noting that, since the 2011-12 school year, out of school suspensions in L.A. Unified School District dropped by fifty-three percent); Anya Kamenetz, *School Suspensions Have Plunged: We Don't Yet Know If That's Good News*, NPR (Mar. 23, 2017, 6:00 AM), <http://www.npr.org/sections/ed/2017/03/23/521070924/school-suspensions-have-plunged-we-don-t-yet-know-if-that-s-good-news>; Alejandra Matos, *Suspensions and Expulsions in D.C. Schools Decrease, but Racial Disparities Persist*, WASH. POST (Feb. 2, 2017), https://www.washingtonpost.com/local/education/suspensions-and-expulsions-in-dc-schools-decrease-but-racial-disparities-persist/2017/02/02/aa007274-e965-11e6-bf6f-301b6b443624_story.html.
- 258 Interview by Doug McIntyre with Alex Caputo-Pearl, President of United Teachers L.A., in L.A., Cal. (Nov. 10, 2015), <http://www.utla.net/news/alex-caputo-pearl-talks-kabc-790-about-restorative-justice>; Watanabe & Blume, *supra* note 1.
- 259 Peace rooms are "safe spaces" where restorative circles and conferences can be held. FRONIUS ET AL., *supra* note 161, at Appendix B.
- 260 Perez, *supra* note 20.
- 261 MAX EDEN, *SCHOOL DISCIPLINE REFORM AND DISORDER: EVIDENCE FROM NEW YORK CITY PUBLIC SCHOOLS, 2012-16* (2017), <https://www.manhattan-institute.org/sites/default/files/R-ME-0217v2.pdf>. The report also includes reports from teachers all across the country who said that discipline reforms were not working. *Id.* at 10-12. Unfortunately, just as there is limited data on the positive impact of restorative justice, there is similarly limited data on its downsides and implementation challenges. Journalistic reporting does capture some dissenting voices on restorative justice implementation. *See, e.g.*, Paul Sperry, *How Liberal Discipline Policies Are Making Schools Less Safe*, N.Y. POST (Mar. 14, 2015, 8:25 PM), <http://nypost.com/2015/03/14/politicians-are-making-schools-less-safe-and-ruining-education-for-everyone/> (referring to restorative meetings with students as "pow-wows"); Richard Ullman, *Restorative Justice: The Zero-Tolerance-Policy Overcorrection*, EDUC. WK. (Sept. 13, 2016), <http://www.edweek.org/ew/articles/2016/09/14/restorative-justice-the-zero-tolerance-policy-overcorrection.html>.
- 262 Matos, *supra* note 257.
- 263 JAIN ET AL., *supra* note 13, at 7-8, 54.

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- 264 ARMOUR, *supra* note 252, at 8.
- 265 Allison Ann Payne & Kelly Welch, *Restorative Justice in Schools: The Influence of Race on Restorative Discipline*, 47 YOUTH SOC'Y 539, 543-44 (2015). Previous research found that schools with high levels of perceived racial threat (determined by racial composition) were more likely to exert harsh punitive responses to student misbehavior. Other factors--the socioeconomic status of the student body, the incidence of delinquency and drug use--were also predictive of whether certain restorative justice methods were used but the percentage of Black students was the strongest predictor. *Id.* 553-54.
- 266 *Id.* at 547, 549, 554.
- 267 One in-depth study of restorative pilot programs in schools in England and Wales found that school principals exercised considerable discretion in how staff and training resources were deployed, when restorative approaches would be offered, and to whom. Schools with less enthusiastic leadership resulted in less effective restorative programs. YOUTH JUSTICE BD. ENG. & WALES, *supra* note 247, at 49-55.
- 268 See, e.g., MATTHEW P. STEINBERG ET AL., STUDENT AND TEACHER SAFETY IN CHICAGO PUBLIC SCHOOLS: THE ROLES OF COMMUNITY CONTEXT AND SCHOOL SOCIAL ORGANIZATION (2011) (study of Chicago schools found that perceived school safety is most strongly defined by the characteristics of a school's student population (such as, their academic achievement) and the relationships between adults, students, and parents).
- 269 Julius C. Menacker et al., *Legislating School Discipline: The Application of a Systemwide Discipline Code to Schools in a Large Urban District*, 23 URB. EDUC. 12, 21-22 (1988) (detailing the results of a study of whether a newly adopted Uniform Discipline Code for Chicago public schools actually penetrates to the level of individual actors--principals, teachers, and students).
- 270 Shael Herman, *Command Versus Purpose: The Scylla and Charybdis of the Code Drafter*, 52 TUL. L. REV. 115, 119 (1977) (citing the French translation of Rudolf von Jhering's *The Spirit of Roman Law*, R. VON JHERING, L'ESPRIT DU DROIT ROMAIN 51-52 (3d ed. Meulenaere trans., 1969)).
- 271 Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Kennedy's writing on formal realizability pertains to judicial interpretation of private or common law rules; however, I am borrowing the concept here and applying it to public law directives from legislatures, administrative agencies, and courts to public school districts, which must in turn interpret and operationalize restorative justice programs.
- 272 *Id.* at 1687-88.
- 273 *Id.*
- 274 *Id.* ("The extreme of formal realizability is a directive to an official that requires him to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way.").
- 275 *Id.* at 1688.
- 276 Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992).
- 277 Kennedy's discussion is both far-ranging and detailed but, for the purposes of this paper, it is useful to focus on only a handful of the conclusions he draws.
- 278 Kennedy, *supra* note 271, at 1688-89.
- 279 Kennedy, *supra* note 271, at 1688.

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- 280 Kennedy, *supra* note 271, at 1689. “Suppose that the reason for creating a class of persons who lack capacity is the belief that immature people lack the faculty of free will. Setting the age of majority at 21 years will incapacitate many but *not all* of those who lack this faculty. And it will incapacitate some who actually possess it.”
- 281 See, e.g., *Ratner v. Loudoun Cty. Pub. Sch.*, 16 F. App’x 140 (4th Cir. 2001) (involving a middle school student who received a long-term suspension under his school’s zero-tolerance policy after he took from a friend, and placed in his locker, a binder containing a knife after the friend shared that she contemplated killing herself by slitting her wrists).
- 282 See, e.g., ADVANCEMENT PROJECT & CIVIL RIGHTS PROJECT, *supra* note 65, at 4; *Colvin ex rel. Colvin v. Lowndes Cty., Miss. Sch. Dist.*, 114 F. Supp. 2d 504 (N.D. Miss. 1999).
- 283 See, e.g., *Illegal Substances/Non-Prescribed Drugs and Prescribed Drugs*, in 2016-2017 OREGON HIGH SCHOOL STUDENT HANDBOOK 22. For an expanded discussion of how zero-tolerance policies fail to distinguish between dissimilarly situated individuals, see Black, *supra* note 60, at 831, 868-81.
- 284 Whether these hardline rules pushed school administrators to comply with mandatory punishments or whether these rules simply provided administrators with the cover to remove students already deemed problematic, does not really matter since the result was the same.
- 285 VOICES OF YOUTH IN CHI. EDUC., *supra* note 106, at 21.
- 286 Herman, *supra* note 270, at 117 (focusing purely on the “command element” of a statute and not its purpose can lead to unjust outcomes).
- 287 Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 400 (1950).
- 288 See *supra* Part III.A.
- 289 Kennedy, *supra* note 271, at 1705-06.
- 290 Kennedy, *supra* note 271, at 1705-06.
- 291 Consent Order, *supra* note 198, at 7.
- 292 See *supra* Part I.B.
- 293 Kennedy, *supra* note 271, at 1701; see Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (discussing arguments for and against crystalline rules and muddy standards).
- 294 Colorado’s legislation and the Meridian Consent Order are exceptions.
- 295 These points are a place to start. As more research is conducted to determine which core components of restorative practices are the essential “mechanisms of change,” these points may need further refinement. Song & Swearer, *supra* note 161, at 320.
- 296 See *supra* Part II; JAIN ET AL., *supra* note 13; ARMOUR, *supra* note 252; SKINNS ET AL., *supra* note 124.
- 297 See *supra* Part III.C.
- 298 Colorado’s legislation and the Meridian Consent Order come the closest to articulating this standard. See *supra* Part III.A.
- 299 This concept is similar to the “health in all policies” approach used in the public health setting to advance health equity. See, e.g., Dawn Pepin et al., *Collaborating for Health: Health in All Policies and the Law*, 45 J. L. MED. & ETHICS 60 (2017). For an example of a local ordinance requiring government action to comply with health equity principles, see Seattle, Wash., Ordinance 16,948, § 3 (Oct. 11, 2010).

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- 300 This proposal is consistent with the *NACRJ Policy Statement on Restorative Justice in K-12 Education*, NAT'L ASS'N COMMUNITY & RESTORATIVE JUST. (Mar. 31, 2017), http://www.nacrij.org/images/resources/Policy_Statements/NACRJ_-_Restorative_Justice_in_K-12_Education_3-31-17.pdf.
- 301 The Restorative Justice Council's Code of Practice requires its members to complete at least 20 hours of training that includes an introduction to the philosophy of restorative practice, types of informal and formal restorative processes, standards of practice, and hands-on opportunities to practice a restorative intervention. RESTORATIVE JUSTICE COUNCIL, RJC PRACTITIONER CODE OF PRACTICE, <https://www.restorativejustice.org.uk/sites/default/files/resources/files/RJC%20Practitioner%C20Code%C20of%C20Practice.pdf> (last visited Jan. 20, 2018).
- 302 Boyes-Watson & Pranis, *supra* note 29.
- 303 John Braithwaite, *Setting Standards for Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 563, 564-67 (2002) (discussing reasons for setting regulatory standards for restorative justice, including prohibiting degrading or humiliating treatment); Paul McCold, *Paradigm Muddle: The Threat to Restorative Justice Posed by Its Merger with Community Justice*, 7 CONTEMP. JUST. REV. 13, 29 (2004) (defining "pseudo-restorative programs as 'those punitive or rehabilitative programs laying claim to the restorative justice terminology--which meet none of the true needs of victims, offenders or their communities'" (citing Paul McCold, *Toward a Mid-Range Theory of Restorative Criminal Justice: A Reply to the Maximalist Model*, 3 CONTEMP. JUST. REV. 357, 401 (2000))). The debate about whether setting standards for informal processes enhances or undermines their efficacy exists in other dispute resolution contexts, such as those surrounding regulation of mediators through accreditation. See Art Hinshaw, *Regulating Mediators*, 21 HARV. NEGOT. L. REV. 163 (2016).
- 304 Lydia Nussbaum, *Mediation as Regulation: Expanding State Governance over Private Disputes*, 2016 UTAH L. REV. 361, 404 (citing Gunther Teubner, *Juridification--Concepts, Aspects, Limits, Solutions*, in JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST, AND SOCIAL WELFARE LAW 3, 8 (Gunther Teubner ed., 1987)).
- 305 See, e.g., RESTORATIVE JUSTICE COUNCIL, PRINCIPLES OF RESTORATIVE PRACTICE, <https://restorativejustice.org.uk/sites/default/files/resources/files/Principles%C20of%C20restorative%C20practice%20-%20FINAL%2012.11.15.pdf> (identifying six principles of restorative practice and they should be applied); INT'L INST. RESTORATIVE PRACTICES, RESTORATIVE PRACTICES--PRINCIPLES AND PRACTICE STANDARDS, http://www.iirp.edu/pdf/beth06_davey7.pdf (last visited Jan. 20, 2018) (listing five guiding principles for restorative processes, which includes a preference for research-based practice); COLO. COORDINATING COUNCIL ON RESTORATIVE JUSTICE, *supra* note 129 (providing principles and guidelines on best practices for implementing restorative practices in schools); Braithwaite, *supra* note 303, at 565-67 (discussing the principle of non-domination).
- 306 This approach has been used in other ADR contexts. See, e.g., OKLA. STAT. ANN. tit. 12, § 1825 (West 2017) (incorporating Model Standards of Conduct for Mediators into minimum requirements for qualified court mediators); N.M. STAT. ANN. LR5-206 (2016) (requiring state court settlement conferences to be conducted according to recognized ADR standards).
- 307 Texas Educators for Restorative Practices offers certification programs for a whole school approach to restorative justice. TEX. EDUCATORS FOR RESTORATIVE PRACTICES, TEXAS EDUCATORS FOR RESTORATIVE PRACTICES CERTIFICATIONS, <http://texrp.com/wp-content/uploads/2016/07/TEXRPCertification-PDF.pdf> (last visited Jan. 20, 2018). The Restorative Justice Council in the UK provides accreditation to facilitators and assessments for programs under its Quality Mark. *The Restorative Service Quality Mark*, RESTORATIVE JUST. COUNCIL, <https://www.restorativejustice.org.uk/restorative-service-quality-mark> (last visited Jan. 20, 2018).
- 308 COLO. REV. STAT. ANN. § 19-2-213 (West 2017). The Coordinating Council's mission is to "[advance] restorative justice principles and practices throughout Colorado by providing gateways to information, networking, and support." *About Us*, RESTORATIVE JUST. COUNCIL, <http://www.rjcolorado.org/about-us/restorative-justice-council/index.html> (last visited Jan. 20, 2018).

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309 See, e.g., NYC DEPT. OF EDUC., CITYWIDE BEHAVIORAL EXPECTATIONS TO SUPPORT STUDENT LEARNING (2015), <http://schools.nyc.gov/NR/rdonlyres/CD69C859-524C-43E1-AF25-C49543974BBF/0/DiscCodebookletApril2015FINAL.pdf> (providing guidance on restorative approaches, identifying types of interventions to address different student infractions, and also including the Student Bill of Rights and Responsibilities).

310 Morrison & Vaandering, *supra* note 10.

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50 U. Rich. L. Rev. 999

RESTORATIVE PRACTICES: RIGHTING THE WRONGS OF EXCLUSIONARY SCHOOL DISCIPLINE

Marilyn Armour | University of Richmond Law Review (Approx. 34 pages)

School Inequality: Challenges and Solutions
Allen Chair Issue 2016
School Discipline Policies
Marilyn Armour^{a1}

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RESTORATIVE PRACTICES: RIGHTING THE WRONGS OF EXCLUSIONARY SCHOOL DISCIPLINE

INTRODUCTION

Schools are beset with complex challenges in their efforts to educate students. The tough policies created to ensure safe learning environments appear to be increasingly ineffective, generating racial disproportionality in discipline, academic failure, high dropout rates, and a clear school-to-prison pipeline. The drive to meet the standards on state or national tests have generated pressure-cooker classrooms with little time for students who need more attention or for addressing students' emotional or social needs. A growing number of sources suggest that some of these conditions are exacerbated by a lack of teacher preparation in student management,¹ lack of training in culturally competent practices,² and gaps in familiarity between students and teachers that reinforce okay-racial stereotypes.³ Much of this fallout predictably and disproportionately affects economically disadvantaged African American and Hispanic students.

Usually, public policies with legal consequences are the first remedies generated to correct disparities because of the commonly held prospect that the law guarantees greater equity. Such top down and legally mandated measures, however, commonly fall ***1000** short because they do not target the root cause. More often, they produce short-sighted and reactionary results because they fail to provide the kind of transformation necessary to shift the current paradigm, which today privileges punitive and exclusionary responses to student behavior as a way to maintain order and keep up with externally decreed instructional schedules. In contrast, there is increasing evidence that when applied to education, **restorative justice** holds the potential for making a nationwide massive shift to a whole school climate change, which embodies a relational ecology aimed at nurturing the motivational bonds of belonging.⁴ **Restorative justice**, which has been swiftly introduced to school districts as a solution, offers an inclusive community building approach to the classroom and a set of practices that appear to have a significant impact on redirecting the school-to-prison pipeline. However, the clamor for change threatens to upend the processes necessary for successful and sustainable implementation of

Secondary Sources

Personal liability of public school executive or administrative officer in negligence action for personal injury or death of student

35 A.L.R.4th 272 (Originally published in 1985)

...This annotation collects and analyzes the state and federal cases in which the courts have discussed or decided whether, or under what circumstances, a public school executive or administrative officer...

Tort liability of public schools and institutions of higher learning for injuries resulting from lack or insufficiency of supervision

38 A.L.R.3d 830 (Originally published in 1971)

...This annotation discusses cases dealing with tort liability, when not barred by the doctrine of sovereign immunity or by a general immunity statute, of public schools and public institutions of higher ...

Tort liability of public schools and institutions of higher learning for injuries caused by acts of fellow students

36 A.L.R.3d 330 (Originally published in 1971)

...This annotation discusses cases dealing with tort liability, when not barred by the doctrine of governmental immunity or by a general immunity statute, of public entities involved in the operation of p...

[See More Secondary Sources](#)

Briefs

Motion for Leave to File and Amici Curiae Brief of Ohio School Boards Association, National School Boards Association, and Fifteen Other National and State Organizations In Support of Petition for Writ of Certiorari

2015 WL 4911542
Dr. Nancy SCHOTT, Ph.D., Petitioner, v. Peter and Robin WENK, Respondents.
Supreme Court of the United States
Aug. 13, 2015

...The Ohio School Boards Association ("OSBA"), National School Boards Association ("NSBA"), American Association of School Administrators ("AASA"), American Professional Society on Abuse of Children ("AP...

Petition for Writ of Certiorari

1999 WL 33641285
WHEELING COLLEGE, INC., A West Virginia corporation, The Most Reverend Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston, and The Ohio County Board of Education, Petitioners, v. THE CITY OF WHEELING, West Virginia, a municipal corporation, Respondent.
Supreme Court of the United States
Apr. 28, 1999

...The opinion of the Supreme Court of Appeals of West Virginia in City of Clarksburg v. Grandeotto, Inc. is not yet reported in either the West Virginia Reports or West's Southeastern Reporter, Second Se...

Petition for Writ of Certiorari

restorative justice in schools. The rule of law has a unique role to play in ensuring that the roll out of a **restorative justice** approach proceeds slowly, thoughtfully, and scientifically throughout this country.

The past thirty years have seen a paradigm shift in school disciplinary practices and an unparalleled upsurge in the criminalization of youth behaviors. Whereas student misconduct was traditionally viewed as normative, within the bounds of healthy development, and manageable via traditional school-based interventions, current punitive and exclusionary practices are predicated on the belief that school-based misbehavior is evidence of a dangerous and growing trend in out-of-control youth. This movement is best exemplified by events such as the Columbine High School shootings in 1999 that ushered in an era of zero-tolerance school policies in an effort to ensure greater school safety.⁵ Indeed, by 1997, 79% of the nation's schools had adopted zero-tolerance policies toward alcohol, drugs, and violence.⁶ These policies ***1001** continue to hold sway but are taking different directions. For example, the more recent Sandy Hook Elementary School massacre has resulted in the drafting of bills in several states to arm teachers in the classroom with guns for greater protection.⁷

Unfortunately, zero-tolerance policies, which are meant to increase school safety, instead jeopardize the futures of thousands of students because the policies criminalize youthful actions and create a system of exclusion through punishment that literally pushes students out the door with the message that they are not wanted here. In hindsight, it appears that much of the purging of troublesome students has been spurred by the No Child Left Behind Act (“NCLB”), which in 2002 ushered in high stakes testing-- transforming schools into production factories.⁸ Students who acted up are removed so that teachers can focus on the remaining students,⁹ thereby separating out those who will succeed from those who will fail. The U.S. Department of Education projects that 250,000 more students received out-of-school suspension in 2006-07 than received it four years earlier.¹⁰ In Texas alone, out-of-school suspensions increased 43% during that time.¹¹

The purpose of this article is to explain the pressing need for school-based **restorative justice** as a philosophy and mechanism to alter increasingly negative school climates, redress educators' retributive orientation to student behavior, and redirect the school-to-prison pipeline. Part I discusses the manifestations of the current crisis in education. Although zero tolerance was intended to increase school safety, recent studies attest to the severe iatrogenic consequences including high rates of in-school and out-of-school suspensions, ever-increasing racial disparities in the use of punishment, the misuse of harsh disciplinary procedures with traumatized youth, and growing evidence of educator drop out that parallels the failure of students to complete school. Part II provides background on school-based **restorative justice**. Besides defining the concept of **restorative justice**, this part focuses ***1002** on its application to education, the constituents of a whole school approach, and the rapid growth that is occurring throughout the United States. Part III examines the evidence for this approach. Although the use of school-based **restorative justice** is still in its infancy, numerous studies attest to dramatic reductions in suspensions, increased school attendance, improved academic achievement, lower student drop out rates, financial savings, and decreases in racial disproportionality. Part IV explores the rapid and emerging legislative and institutional response to school-based **restorative justice** that threatens to upend a process that requires time and precision in implementing a complex, contextualized, and nuanced shift in how educators approach student behavior. In response, efforts to take school-based **restorative** practices to scale in Texas are described followed by a list of Thirteen Best Practices that provide a values-based guide to whole school implementation. Part V is a call to action that positions social-based **restorative justice** as an

1999 WL 33641290
The Most Reverend Bernard W. SCHMITT,
Bishop of the Roman Catholic Diocese of
Wheeling-Charleston, Petitioner, v. THE CITY
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corporation, Respondent.
Supreme Court of the United States
Apr. 28, 1999

...The opinion of the Supreme Court of
Appeals of West Virginia in City of Clarksburg
v. Grandeotto, Inc. is not yet reported in either
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Trial Court Documents

U.S. v. Arcoren

2010 WL 11469116
UNITED STATES OF AMERICA, v. Eugene
M. ARCOREN, Jr.
United States District Court, D. South Dakota,
Central Division.
July 22, 2010

... pleaded guilty to count(s) II. pleaded nolo
contendere to count(s) which was accepted
by the court. was found guilty on count(s)
after a plea of not guilty. The defendant is
adjudicated guilty of th...

U.S. v. Thunder

2010 WL 11469117
UNITED STATES OF AMERICA, v. George
G. Little THUNDER.
United States District Court, D. South Dakota,
Central Division.
July 22, 2010

... pleaded guilty to count(s) II. pleaded nolo
contendere to count(s) which was accepted
by the court. was found guilty on count(s)
after a plea of not guilty. The defendant is
adjudicated guilty of th...

In re Nebraska Book Co., Inc.

2012 WL 2367443
In re: NEBRASKA BOOK COMPANY, INC., et
al., Debtors. 1. The debtors in these chapter
11 cases, along with the last four digits of
each debtor's federal tax identification
number include: Nebraska Book Company,
Inc. (9819); Campus Authentic LLC (9156);
College Bookstores of America, Inc. (9518);
NBC Acquisition Corp. (3347); NBC Holdings
Corp. (7477); NBC Textbooks LLC (1425);
Net Textstore LLC (6469); and Specialty
Books, Inc. (4807). The location of the
debtors' service address is: 4700 South 19th
Street, Lincoln, Nebraska 68512.
United States Bankruptcy Court, D. Delaware.
June 18, 2012

...FN1. The debtors in these chapter 11
cases, along with the last four digits of each
debtor's federal tax identification number
include: Nebraska Book Company, Inc.
(9819); Campus Authentic LLC (9156); ...

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antidote to the fallout from exclusionary punitive practices and a mechanism to enhance those school controlled factors that influence school climate. This part also highlights the likelihood of backlash if implementation of the **restorative** approach is too rapid or applied without careful consideration to the change process. It concludes with recommendations for how the legal profession can support the successful adoption of school-based **restorative justice**.

I. IMPACTS OF HISTORICAL PRACTICES

A. *Misguided Strategies for School Safety*

Zero-tolerance policies have birthed still more tough-minded approaches, which collectively contribute to repressive environments, seemingly in the name of safety. Some state legislative bodies, for example, passed laws criminalizing student behaviors such as truancy. Indeed, until 2015, Texas prosecuted children for truancy at double the rate of all other forty-nine states combined.¹² Moreover, the presence of law enforcement, commonly referred to as “school resource officers,” on school campuses became normative as police officers today routinely monitor public school ***1003** hallways, lunchrooms, school grounds, and after-school events. Media accounts have described occasions where pepper spray, Tasers, and trained canines have been used to break up fights and **restore** order if youth are seen as misbehaving on school property or at school functions.¹³ Many school districts have hired their own police commissions using sizable portions of their budgets for security-- amounts that eclipse those spent on social work services, curriculum development, or food services.¹⁴ Indeed, it is not surprising that campus policing has become “the largest and fastest growing area of law enforcement in Texas, according to its own professional association.”¹⁵

Accompanying the increase in law enforcement and public safety-centered policy is the response of police to school-related behaviors including “disruption of class, disorderly conduct, disruption of transportation, truancy, and simple assaults related to student fights.”¹⁶ The available data does not support the assumed rise in school violence that justifies a strong police presence and stiff disciplinary practices. Violent criminal behavior is quite low. Non-violent property crimes account for most juvenile criminal behavior, with assaults representing approximately 5% of all reported offenses.¹⁷ Indeed “[p]olls of teachers show very little difference between the rate of assaults on teachers in 1956 and in 2003-04”¹⁸ This is not to decry the country's increased awareness of bullying, the advent of cyber bullying, and escalating adolescent suicides, some of which occur in response to bullying, but criminal arrests show low rates of exceedingly egregious offenses. Moreover, contrary to popular opinion, there is not a direct relationship between bullying and youth suicide, which has steadily declined over the last two decades and is generally associated with the presence of seven risk factors, all of which must operate at the same time to move a youth to attempt suicide.¹⁹ The risk factors include “history of substance abuse, conduct disorder ***1004** or depression, access to such items as firearms or ropes, internal and external protective factors and vulnerabilities, hopelessness, and impulsiveness”²⁰

B. *Fallout from Punitive Strategies*

Unfortunately, these realities have been hidden until recent research and publicity exposed the consequences from the out-of-control system of suspensions and expulsions for low-level disciplinary infractions. A statewide study of Texas students followed nearly one million seventh graders for six years.²¹ Researchers found that “[a]bout 54 percent of students experienced in-school suspension, [and] . . . [t]hirty-one percent of students experienced out-of-school suspension, which averaged two

days per incident.”²² Moreover, only 3% of the disciplinary actions were for behaviors that called for mandatory suspensions and expulsions, meaning 97% were based on the discretion of school officials.²³ Special education students were particularly vulnerable. Approximately three-quarters of students with special emotional and physical needs were suspended or expelled at least once.²⁴ Importantly, these suspensions and expulsions at the 3900 public middle and high schools in Texas did not show a correlation with student risk factors such as economic disadvantage.²⁵ Indeed, “[t]he proportion of campuses within a single [school] district with higher-than-expected disciplinary rates ranged from 7.7 percent to 46.7 percent Similarly, the proportion of campuses within a district with lower-than-expected disciplinary rates was as low as 20 percent and as high as 76.9 percent.”²⁶ This suggests that how student behavior was addressed depended on the officials in a particular school.

Although the Texas “study found that African-American students were no more likely than students of other races [and ethnicities] ***1005** to commit serious offenses that mandate that a student be removed from the campus,”²⁷ “African-American students had a 31 percent higher likelihood of a school discretionary action [than did] otherwise identical white and Hispanic students.”²⁸ Indeed, “[a] much larger percentage of African-American (26.2%) and Hispanic (18%) students were placed in out-of-school suspensions for their first violation than were whites (9.9%).”²⁹

The use and reuse of increasingly punitive avenues had other serious repercussions. Research findings showed that 31% of “students with one or more suspensions or expulsions repeated their grade level at least once.”³⁰ Worse yet, 15% of students with eleven or more suspensions or expulsions dropped out of school compared to a 2% dropout rate for students with no disciplinary actions.³¹ There was also evidence of a negative relationship between suspensions and expulsions and involvement in the juvenile **justice** system. Specifically, “juvenile probation youth with one school disciplinary referral were 10 percent more likely to become chronic offenders than juveniles with no school disciplinary referrals.”³² Indeed, “[e]ach additional referral increased a youth's risk of re-offense by an added 10 percent.”³³ In contrast, “[o]f those students who had no involvement in the school disciplinary system, just 2 percent had contact with the juvenile **justice** system.”³⁴

C. Disproportionate Use of Discipline

Another outcome of the punitively based system is that African American students shouldered and continue to carry much of the disciplinary burden. The differential of five-and-a-half percentage points between elementary school age African American and white students for out-of-school suspension, for example, grows to seventeen percentage points at the secondary level.³⁵ Acceleration ***1006** in the discipline gap is also evident for office referrals. African American students are twice as likely to be referred to the office at the elementary school level and up to four times more likely at the middle school level.³⁶

Besides the disparity in frequency, the severity of punishment also illustrates the lack of equity. A study in Florida found that in addition to suspending 39% of African American students-- compared to 22% of white students and 26% of Hispanics/Latino students--schools also suspended African American students for longer periods of time than other students, even after controlling for poverty.³⁷ Ironically, “[s]urvey data from 8th and 10th grade Black, White, and Hispanic/Latino students indicate that Black males reported similar or lower uses of drugs, alcohol, and weapons at school compared to other students”³⁸ The importance of this glaring racial disparity is reflected in the simple fact that attending a school with more black students, regardless of the school's demographics, increases one's risk of out-of-school-

suspension more than engaging in a fight or battery.³⁹

Moreover, there is alarming evidence that the racial trend in disproportionate use of punishment starts early. The Civil Rights Data Collection (“CRDC”) amassed data on preschool suspensions and expulsions for the first time in 2011-12. Based on over one million students from 99% of schools offering preschool, researchers found that black children represent 18% of preschool enrollment, but 48% of the preschool children who received more than one out-of-school suspension.⁴⁰ In comparison, white students represent 43% of preschool enrollment, but made up just 26% of the *1007 preschool children who received more than one out-of-school suspension.⁴¹

Although African American students are far more likely to be targets of harsh discipline, several other student populations also experience more than their share of suspensions and expulsions. Male students⁴² and LGBT students⁴³ are disciplined at higher rates, as well as students with disabilities who tend to be suspended at over twice the rate of their non-disabled peers.⁴⁴ Of all students, however, those who belong to two or more disadvantaged groups show the highest risk of suspension.⁴⁵

D. Trauma and Punitive Practices

Behind these punitive practices lies glaring histories of trauma, much of it chronic. A study of over 9000 youths found that almost 80% of youths involved in the juvenile justice system had been exposed to traumatic events associated with physical abuse, sexual assault, domestic violence, and community/school violence.⁴⁶ Many youth are themselves victims of this violence. Their exposure is associated with increased risk for delinquent behavior/arrest, learning disorders, academic difficulties, substance use, PTSD, and other mental health problems.⁴⁷ These rates are highest among the same groups that are disproportionately affected by zero-tolerance policies, namely racial/ethnic minorities, LGBT youth, children in foster care, and those who are economically disadvantaged.⁴⁸

Although students may behave in ways that provoke suspension or even arrest, zero-tolerance policies and harsh disciplinary procedures have deleterious effects on these youths as well as on *1008 the safety and learning environment for their peers. Indeed, much of the behavior that has been deemed criminal is increasingly found to be related to brain development and trauma-infused environments--areas that require interventions aimed at increasing self-regulation as well as relational and social skills. Many of these youth who have been victimized by those who are supposed to protect them are suspicious and hostile toward efforts to control their behavior.⁴⁹ After growing up in households marked by anger and hostility, they can be easily triggered to re-experience the sense of danger and dread and respond aggressively to protect themselves.⁵⁰ Unfortunately, the placement of law enforcement to promote safety has resulted in more youth being detained for non-criminal behaviors such as emotional outbursts.⁵¹ The presence of zero-tolerance policies and related practices likely has created a climate over many years that itself is iatrogenic or resulting from the treatment, i.e., zero-tolerance policies, itself. Consequently, positive interventions are needed not only to address school-related misconduct, but also to change the mindset of the system itself, which is criminally oriented.

E. The Impact on Teachers

The negative school climate generated by punitive practices and unequal treatment has also impacted teachers and administrators. The National Commission on Teaching and America's Future reports that 16.8% of teachers turn over annually.⁵² In urban schools the rate has risen to 20%.⁵³ In some urban areas the rate is even higher. In New York City middle schools, 66% of teachers *1009 leave within five years.⁵⁴ A national survey of teachers leaving the profession found that 44% of

teachers left, in part, because of student behavior.⁵⁵ Less recognized is the fact that this trend is also manifest in principal turnover. Among school leadership professionals, 50% of new principals quit during their third year in the role and less than 30% stay beyond their fifth year.⁵⁶

Compared with white teachers, though, African American and Hispanic teachers are more likely to stay and particularly so at schools where the student body has similar racial and socioeconomic backgrounds.⁵⁷ This pattern, however, is undoubtedly influenced by the fact that of 6 million teachers, 84% of teachers are white and 84% are female⁵⁸ while students of color comprise over 50% of students as of 2014.⁵⁹ This demographic chasm likely fuels assumptions and stereotypes about racial and ethnic differences because of the lack of familiarity between minority students and predominantly white female teachers.⁶⁰ Indeed, teachers have been taught erroneously that personal philosophy or instructional virtuosity should suffice for managing the classroom, leaving ***1010** them ignorant and ill-equipped to respond effectively to students.⁶¹

F. Importance of School Controlled Factors

Recent studies on racial disparities in discipline indicate that school-controlled factors are the strongest predictors of both frequency and disproportionate use of suspensions.⁶² These factors include teachers' attitudes and tolerance levels,⁶³ their classroom management skills,⁶⁴ principal attitudes toward discipline,⁶⁵ and positive or negative school climate.⁶⁶ The significance of school-level characteristics override student demographics and behaviors,⁶⁷ suggesting that subtle forms of bias can impact educators' perception of problematic conduct, their subjective responses, and the decisions they make about consequences.

Because the tone for the culture of the school is set by the administration, the principal's attitude toward discipline warrants close scrutiny. Studies have found that students are less likely to receive out-of-school suspensions or expulsions in schools where principals are more oriented toward preventative alternatives.⁶⁸ Moreover, the racial temperature decidedly influences school climate, as does academic pressure, student support, and the conveying of warmth between members of the school community.⁶⁹ Indeed, so-called "indifferent" schools that score the lowest on measures of warmth/support and academic expectations show the ***1011** highest rates of suspension and the largest black-white suspension gaps.⁷⁰

These subtle indices of bias are not necessarily undone by school-wide interventions that are considered effective in improving school discipline or school climate. For example, a nationally representative study of schools who had implemented School Wide Positive Behavioral Support programs found when disaggregating the results that "African American and Latino students were up to five times more likely than white students to receive suspension and expulsion for minor infractions."⁷¹ Reductions in suspensions and expulsions, therefore, do not necessarily indicate that changes have been made in racial disparities and the disproportionate use of punishment.⁷²

Research consistently shows that educators who establish supportive relationships with students are not only aware of the events affecting them at school, but are also able to read and understand their responses to these events. This puts the students' behavior in context (e.g., his father is in Afghanistan and he is frightened) and avoids rigid and global judgments.⁷³

For many educators, knowing the back story about students' lives reduces the gap or lack of familiarity between teacher and student. Maybe high emotional intensity when speaking or use of large physical gestures are norms for self-expression. When such

behavior is misjudged as an expression of defiance, it distances educators and alienates students.⁷⁴ In contrast, authentic efforts to understand nuance and meaning frequently draw students ***1012** closer furthering their connectedness, sense of being wanted, belonging and engagement in the learning process.⁷⁵ This deepening of understanding increases educators' relational skills, including their confidence and having a place in their students' worlds but also encourages problem solving approaches for conflict and discipline rather than fixed rules.⁷⁶ This logic is supported by the results from a recent district-wide study of Chicago schools that found that the quality of teacher-student and teacher-parent relationships was the strongest predictor of a strong sense of safety in the school building.⁷⁷ Moreover, after accounting for the demographic differences in the neighborhoods served, the study showed that low suspension rates correlated with higher safety rates.⁷⁸

G. The Crisis and the Opportunity

The advent of zero-tolerance policies and high stakes testing created a culture that, in the name of safety and academic productivity, allowed the use of punitive and exclusionary practices to manage student behavior. These measures target African American students, among others, who, over time, fall further behind in their classes due to being suspended, are retained at their grade level, and eventually drop out.⁷⁹ This reality has led to allegations of implicit bias and inconsistency in the application of suspension and expulsion that deprives students of the opportunity to learn, thereby establishing the basis for civil rights based litigation.⁸⁰ The negative school climate that accompanies initiatives such as metal detectors, armed police, the public humiliation of being “kicked out,” and high stakes testing affects teachers, many of whom lack cultural familiarity with the students they teach⁸¹ and are unprepared to manage unruly classrooms. ***1013**⁸² They too feel disillusioned and failed. They may seek relief by changing schools but eventually and increasingly drop out too.⁸³ Though foreboding, this crisis has produced an unusual opportunity to impact a major social institution in our society, our schools, and hopefully turn around this dire situation.

State legislatures regulate public education including aspects of student discipline. To date, the most obvious and seemingly far reaching remedy to the crisis is to propose new laws to replace or modify zero-tolerance policies. Indeed, some states recently passed such legislation. California, for example, passed AB 420 that bans the use of “willful defiance” policies, which accounts for 43% of student suspensions.⁸⁴ The law reserves the use of suspensions for serious violations while requiring schools to use alternative measures for nonviolent transgressions.⁸⁵ Similarly, Connecticut passed a bill prohibiting the suspension of young children.⁸⁶ Colorado passed an amendment to the School Finance Act eliminating mandatory expulsions for drugs, weapons, assault, and robbery, and changed the grounds for suspensions and expulsions from “shall” to “may” be grounded.⁸⁷ Texas, in an effort to dismantle the school-to-prison pipeline and keep students in school, decriminalized truancy in 2015.⁸⁸

These efforts at reforming state policy and law are strong indicators that the public is moving away from the harsh discipline ***1014** associated with zero tolerance. Although well intentioned, many of these legally based directives aimed at curbing punitive and exclusionary practices and keeping students in school are, unfortunately, now producing chaos.⁸⁹ In part, this is because teachers and administrators have few, if any, tools to use instead.⁹⁰

II. RESTORATIVE PRACTICES AND CHANGING SCHOOL CLIMATE

A groundbreaking report was released in 2014 by the Council of State Governments **Justice** Center that pulled together consensus-based and field-driven recommendations from over 100 advisors and 600 contributors aimed at “reducing the millions of youth suspended, expelled, and arrested each year while creating safe and supportive schools for all educators and students.”⁹¹ Central in the recommendations is the critical role of positive school climate and the use of **restorative justice** in education as the underpinning for productive learning environments.⁹²

A. Defining Restorative Justice in Schools

Restorative justice is a philosophy and set of principles and practices that bring together stakeholders voluntarily in the aftermath of crime or wrongdoing to directly address harm, make amends, and **restore**, to the extent possible, the normative trust that was broken.⁹³ Derived from indigenous cultures and spiritual traditions, **restorative justice** is embedded in the principles of respect, dignity, and the inherent worth and well-being of all people. ***1015**⁹⁴ Its practices are predicated on the belief that when a violation occurs, it breaks human connections, throwing the entire community into disharmony.⁹⁵ Although **restorative justice** has been used primarily in response to criminal behavior, it is gathering significant momentum in education because of its ability to build safe communities for engaged learning, meet student needs, increase cross-cultural connections, and generate collaborative and inclusive solutions that foster healing and **restoration**.

As a school-based initiative, it serves as an alternative to retributive zero-tolerance policies. It “views violence, community decline, and fear-based responses as indicators of broken relationships.”⁹⁶ Its practices are grounded in the values of showing respect, taking responsibility, and strengthening relationships.⁹⁷ These qualities conform to the mandate from the Denver Public Schools that there must be a shift in school values such that developing relationships and connectedness take precedence over exclusion and separation from the school community.⁹⁸

→ The use of **restorative justice** for school-related discipline goes by a variety of names including Circles, **Restorative** Practices, **Restorative** Processes, **Restorative** Measures, **Restorative** Approaches, and **Restorative** Discipline (hereafter referred to as **restorative** practices). Its parallel emergence throughout the world makes it difficult to accurately trace its historic development. Indeed, even in the United States, it materialized in the late 1990s in Bethlehem, Pennsylvania, Minneapolis and St. Paul, Minnesota, and six school districts in Wisconsin at roughly the same time.⁹⁹ More important, however, has been its steady expansion as concerns about the sanctioning process and its bias against lower socioeconomic status students and minorities have grown coupled with concerns over highly punitive school cultures.

***1016 B. Growth and Scope of Restorative Practices**

Currently, **restorative** practices are emerging throughout the country but are notably recognized in California, Colorado, Georgia, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, Texas, Connecticut, and Pennsylvania.¹⁰⁰ However, implementation is spotty. For example, The International Institute for **Restorative** Practices, a private **restorative justice** center, has implemented **restorative** practices in major urban districts such as New York, Detroit, Philadelphia, Baltimore, and San Francisco.¹⁰¹ The Oakland Unified School District has implemented Circles in over twenty schools.¹⁰² The Denver Public Schools have **restorative justice** coordinators in five middle schools and two high schools.¹⁰³ As this young movement grows, it is amassing convincing evidence that supports its

philosophy and practices as well as understanding and knowledge about what makes for a successful and sustainable implementation.

Part of that knowledge includes a strong warning or caveat about how **restorative** practices must be introduced into schools and the propensity for it to be used as a quick fix. Specifically, schools must not reduce **restorative** practices to a program of behavior intervention¹⁰⁴ that is narrow, reactive, and focused on the “bad” students. Effective implementation requires developing a new currency to motivate change that rests on the power of relational influence.¹⁰⁵ Specifically, **restorative** practices replace fear, uncertainty, and punishment as motivators with belonging, connectedness, ***1017** and the willingness to change because people matter to each other. However, unless this relational approach is threaded as an ethos throughout the school's culture and endorsed by the entire school community, behavior change will be limited and **restorative** practices will have “little impact on the school as a whole, including the reduction of future crises.”¹⁰⁶ A whole school relational approach, therefore, refers not just to serious instances of harm and aggression but also to relationships in the classroom and between school educators, administrator's leadership style, policy decisions, broad community engagement, and a long-term commitment to change. Indeed, school-based **restorative justice** prioritizes building the capacity for school community and positive climate over punitive responses to behaviors in order to embed true safety in schools.¹⁰⁷

Besides defining the philosophical underpinnings for a whole school approach, there is wide-spread agreement that implementation must draw on the public health prevention framework of a three-tiered triangle that places harm-specific incidents requiring repair at the top, problem solving incidents requiring maintenance in the middle, and community building needed for prevention at the bottom.¹⁰⁸ Operationally, the specific practices associated with intensive, targeted, and universal tiers establish a non-authoritarian culture of high expectations with high levels of support that emphasizes doing things “with” someone as opposed to doing things “to” or “for” someone.¹⁰⁹

In the classroom, Tier 1 **restorative** circles are used to build community, problem solve, facilitate student and teacher connectivity, and to provide a respectful space for establishing the values for the class based on human dignity and democratic principles.¹¹⁰ Outside the classroom, Tier 2 and Tier 3 practices such as circles, **restorative** conferencing, or peer juries are used for more ***1018** intensive interventions that include repairing damage, reintegrating back into the school after a student absence, and resolving differences.¹¹¹

Because the focus is on inclusion and community-based problem solving, **restorative justice** in schools not only addresses harm but also uses processes that concurrently create a climate that promotes healthy relationships, develops social-emotional understanding and skills, increases social and human capital, and enhances teaching and learning. At the same time that it serves as an intervention, it also becomes preventative because schools are better equipped to resolve issues early on and outside the framework of a reactionary crisis. Indeed, the methods used ensure sustainability in that students are “much more likely to take responsibility for harm done if they have a voice in repairing the harm,” if the community has to provide the necessary support for its youth, and if positive outcomes result from holding themselves and others accountable.¹¹²

Although **restorative** practices are philosophically geared towards a whole school model, the rapid growth and adoption of **restorative** practices reflect the goodness-of-fit between schools and **restorative justice** philosophy and programs when applied specifically to wrongdoing. In this regard, **restorative** practices build on its base using a relational rather than separatist model that brings people together to

collectively identify the impact from wrongdoing and to determine steps to make things right. Instead of a punitive model that asks (1) what rules or laws were broken, (2) who broke them, and (3) how should they be punished, **restorative** practices asks (1) what is the harm caused and to whom, (2) what are the needs and obligations that have arisen, and (3) who has the obligation to address the needs, to repair the harm, and to **restore** relationships.¹¹³ From a **restorative** perspective, these questions “cannot be adequately answered without the involvement of those who have been most affected.”¹¹⁴ As a realignment of **justice** processes, **restorative** practices provide a mechanism that builds true and meaningful accountability, fosters resilience in youth and their capability to handle their problems, and stimulates reconnections and reempowerment of individuals by holding ***1019** them responsible. When both the preventative and interventive aspects are brought together, **restorative** practices can be defined as follows: “a relational approach to building school climate and addressing student behavior that fosters belonging over exclusion, social engagement over control, and meaningful accountability over punishment.”¹¹⁵

III. OUTCOMES OF **RESTORATIVE PRACTICES**

Evidence of the impact of **restorative** practices on behavioral outcomes, such as suspensions and absenteeism, is growing. Indeed, randomized control trials are being conducted by the Rand Corporation in Pittsburgh, Pennsylvania, on twenty-three public schools,¹¹⁶ and in Maine on fourteen schools.¹¹⁷ These randomized trials build on the wealth of data that indicates large drops in suspensions after **restorative** practices have been introduced. West Philadelphia High School, for example, was on the state's “Persistently Dangerous Schools” list for six years running. The school reduced the frequency of “[v]iolent acts and serious incidents” by 52% in 2007-08 and an additional 40% in 2008-09.¹¹⁸ Suspensions declined 84% and expulsions declined to zero at Cole Middle School in Oakland, California, over a two-year period during the implementation of **restorative justice**.¹¹⁹ In a sample of students (n=331) drawn from a three-year project in five Denver public middle schools and two high schools, 30% of schools reduced their average number of out-of-school suspensions received, and there was a 90% reduction in office referrals and out-of-school suspensions.¹²⁰ District-level impact has been noted in cumulative reductions in out-of-school suspensions of over 40% ***1020** compared with baseline rates.¹²¹ Ed White Middle School in San Antonio, Texas, reduced out-of-school suspensions by 87% and in-school suspensions by 29% in the first year of implementation.¹²² In-school suspensions fell another 52% for the pilot group in the second year.¹²³

Besides these large drops in disciplinary actions, schools reported decreases in related behaviors. In a study of Minnesota schools, referrals for violent behaviors at Lincoln Center Elementary School decreased by more than half.¹²⁴ Additionally, behavior referrals for physical aggression at the same elementary school decreased from 773 to 153 incidents.¹²⁵ Research on Chicago Public Schools showed a 63% decrease in misconduct reports and an 83% decrease in arrests for a high school in just one year.¹²⁶ Another school had a 59% drop in cases of misconduct and a 69% decline in arrests.¹²⁷ In a comparative study of twenty-four middle schools in Oakland, California, absenteeism dropped by 24% for the **restorative justice** schools but rose 62% for the non-**restorative justice** schools.¹²⁸ Students sampled in Denver Public Schools **Restorative Justice** Project showed a 30% improvement in school attendance and timeliness.¹²⁹ Tardies fell 39% at an economically disadvantaged middle school in San Antonio, Texas.¹³⁰

Although not causal, the data suggests that as suspensions fall, physical altercations reduce, and as students show greater engagement in school, evidenced by drops in

absenteeism and tardies, there is also growth in educational achievement. In a comparative study of Oakland schools, reading levels “in grade 9 doubled in [restorative justice] high schools from an average of 14% to 33%, an increase of 128%, compared to 11% in [non-***1021 restorative justice**] high schools.”¹³¹ Moreover, “[f]rom 2010-2013, [restorative justice] high schools experienced a 56% decline in high school dropout rates in comparison to 17% for [non-restorative justice] high schools.”¹³² Graduation rates increased 60% over three years compared to 7% for non-restorative justice high schools.¹³³ In a separate study, standardized test scores at Cole Middle School rose seventy-four points after two years of implementing restorative practices.¹³⁴ A study of Baltimore County School District charter schools found that students functioning at grade level tripled, based on the Maryland State Assessment.¹³⁵ After being designated as a school with “[i]mprovement [r]equired” by the Texas Education Agency, Ed White Middle School achieved stars of distinction for student performance in English, math, and social studies.¹³⁶ It also received a star of distinction and ranked second in the state for improved student progress compared to other middle schools with similar demographics after two years of implementing restorative practices.¹³⁷

Equally important to the hard evidence supporting restorative practices are outcomes specific to students' social functioning and life skills, as well as cost savings. In the Denver Public Schools Restorative Justice Project, nearly half the students showed improvement on their emotional quotient scores and over 50% improved their stress management, suggesting that students perceived improvement in their management of interpersonal conflict.¹³⁸ Students in restorative justice circles in Oakland reported enhanced ability to understand peers, manage emotions, demonstrate greater empathy, resolve conflicts with parents, improve their home environments, and maintain positive relationships with peers.¹³⁹ Though limited, some data exists supporting the impact of restorative practices on teachers. Specifically, Cole Middle School retained all of its teachers in spite of historically ***1022** high turnover.¹⁴⁰ In terms of cost savings, reductions in suspensions and expulsions in the Santa Rosa School District saved more than \$550,000 in average daily attendance money.¹⁴¹

Most important is the emerging evidence that restorative practices may impact racial disproportionality in discipline. A three-year study of restorative practices in a K-8 urban school found that out-of-school suspensions fell from 51% to 14% for African American students, 34% to 6% for Hispanic students, 39% to 6% for multiracial students, and 51% to 9% for white students.¹⁴² Although this study did not measure the relationship between restorative practices and drops in suspensions, the average discipline gap between students of different races and ethnicities decreased from 10% in 2011 to 0% in 2013.¹⁴³ In a study of schools across two states, David Simson found a smaller black-white gap in suspension rates in restorative justice schools compared with a matched set of non-restorative justice schools.¹⁴⁴ In Denver, after six years of using restorative practices, district-wide disparities in discipline among black, white, and Latino students narrowed.¹⁴⁵ Suspension rates for African American students dropped the most from 17.6% to 10.4%.¹⁴⁶ The gap between black and white students narrowed from 11.7% to 8.1%.¹⁴⁷ A correlational study analyzed student surveys from high school classrooms at two urban high schools with a total enrollment of approximately 4500 students.¹⁴⁸ Results showed that classrooms ***1023** where teachers implemented more restorative practices tended to have narrow discipline gaps--that is Latino and African American versus Asian and white students--compared to teachers who implemented less restorative practices.¹⁴⁹ A study of school-based restorative justice in Oakland School District found a 40% decrease in the number of suspensions for African American students.¹⁵⁰ Moreover, the discipline gap between black and white students had closed from 12.6% to 9.2% in the restorative justice schools compared to an

increase in the control schools.¹⁵¹ Finally this study found a significant difference in effects of **restorative** practices on African American students compared to white students in schools where **restorative justice** had been more fully developed.¹⁵² This outcome suggests that the African American students may benefit more from being in **restorative justice** schools than white students.¹⁵³

IV. THE TRAJECTORY FOR IMPLEMENTATION IN THE UNITED STATES

Restorative practices are on a fast track to becoming the favored discipline philosophy in schools throughout the country accompanied by a range of multi-tiered practices. As an antidote to punitive and exclusionary school discipline, it has been highly recommended in the extensive School Discipline Consensus Report.¹⁵⁴ National leaders also support its adoption. In a recent letter, former Secretary of the U.S. Department of Education Arne Duncan wrote, “States are revising discipline laws to enhance local discretion, curtail zero-tolerance requirements, and encourage the development of alternative disciplinary approaches such as **restorative justice**.”¹⁵⁵ President Obama and Hillary ***1024** Clinton have also endorsed the use of **restorative justice** in schools.¹⁵⁶

Research on whole school **restorative** practices approach is in its nascent stages. However, concerns over the unprecedented use of suspensions and expulsions coupled with the dramatic drops in punitive sanctions when **restorative** practices are used create a tempting offer to schools desperate for solutions. Indeed, **restorative** practices portend an encompassing preventative and interventive model that builds community for both students and teachers, improves the quality of the teacher and student relationships, and encompasses fair process, participatory decision making, and student voice. It also treats the harm generated by zero-tolerance policies by reducing suspensions and expulsions, rehumanizing schools, and potentially reducing the enduring racial discipline gap.

A. Expansion Through Requiring **Restorative Practices**

School districts and campuses are implementing **restorative** practices with lightning speed. The downward cascade in numbers of suspensions have influenced school boards and other policy and rulemaking entities to pass resolutions supporting, even requiring schools to implement **restorative** practices. In 2012, for example, the Massachusetts legislature passed Chapter 222, a school discipline reform law requiring districts to revise their Codes of Conduct by July 2014 to issue suspensions and expulsions only as a last resort.¹⁵⁷ Tom Mela, Senior Project Director with Massachusetts Advocates for Children and member of the Chapter 222 Coalition said, “the law requires alternatives to exclusion, such as **restorative justice** practices, and it requires services for any students excluded from school.”¹⁵⁸ In 2013, the Board of Education for the Los Angeles Unified School District adopted the Board Resolution-2013 School Discipline Policy and School ***1025** Climate Bill of Rights.¹⁵⁹ This resolution mandates schools to develop and implement **restorative justice** practices by 2020 as an alternative to traditional school discipline.¹⁶⁰ Additionally, in 2010, the Board of Education of the Oakland Unified School District passed Resolution No. 0910-0120, launching “a District-wide three-year **Restorative Justice** Initiative to include professional development of administrators and school site staff, redesign of District discipline structures and practices, and promote alternatives to suspension at every school. . . .”¹⁶¹

California has been particularly noteworthy in passing similar resolutions in other parts of the state. Besides activity by Fresno Unified School District, San Francisco Unified School District, and Berkeley Unified School District, the California

Democratic Party adopted Resolution 14-07.06 in support of the implementation of **restorative justice** policies for all California school districts.¹⁶² Although **restorative** practices are not specifically mentioned in the legislation, California led the nation in passing Assembly Bill 420, which limits the use of “willful defiance” as a reason to expel students.¹⁶³ In the 2012-13 school year, “willful defiance” was responsible for over half of the suspensions in the state and has been used disproportionately throughout the country to discipline African Americans and, in some districts, Latino students.¹⁶⁴ The passage of this significant legislation is the direct result of positive outcomes from California school districts that have reduced or eliminated expulsions and suspensions while concomitantly implementing **restorative** practices.

****1026 B. Expansion Through Codes of Conduct***

Besides resolutions, districts across the country have made numerous revisions to their codes of conduct to include **restorative** practices. Dayton, Ohio, for example, introduced **restorative justice** to a number of schools in 2012.¹⁶⁵ It expanded to eight schools for the 2014-15 year and plans for it to be adopted district-wide by 2017, pending funding.¹⁶⁶ Dayton Public Schools also added **restorative** practices in 2014 to its Student Code of Conduct.¹⁶⁷ After Massachusetts passed its school discipline reform law, Boston took the lead to become, ahead of schedule, the first district in the state to align its Code of Conduct with the new legislation.¹⁶⁸ Other districts have followed, including Fall River, Massachusetts, which based its code on the one adopted by the Boston Public School District.¹⁶⁹

Schools in Syracuse, New York, have moved to **restorative** discipline with their new Code of Conduct with assistance from Engaging Schools, a non-profit that assists educators in middle and high schools.¹⁷⁰ Larry Dieringer, executive director of Engaging Schools, says “[t]he Syracuse Code of Conduct, Character and Support goes far beyond establishing a set of policies, procedures, rules, and consequences. It lays the foundation for establishing a **restorative** and supportive culture in Syracuse.”¹⁷¹ This movement likely was propelled, in part, because the district was under investigation by the New York State Attorney General's Office for inequitable disciplinary practices.¹⁷²

Chicago Public Schools have been using **restorative** practices for many years. However, in 2015, the district changed its Code of Conduct. As part of its statement of purpose, the code states, “Chicago Public Schools is committed to an instructive, corrective, ***1027** and **restorative** approach to behavior.”¹⁷³ The Bridgeport, Connecticut, School District also changed its Code of Conduct in 2013-14 to include **restorative** practices.¹⁷⁴ Although not a part of changes in codes of conduct, in 2014, the National Education Agency partnered with the Advancement Project, the Opportunity to Learn Campaign, and the American Federation of Teachers to release a **restorative** practices toolkit as part of encouraging schools to adopt **restorative** measures.¹⁷⁵

Some states and districts have received large grants or allocated significant funds to implement these changes. Besides the grant given to Pittsburgh Public Schools and the state of Maine, New York appropriated \$2.4 million of the 2016 City Budget for implementation of **restorative justice** practices in schools as part of the New York City Council's commitment to progressive school discipline reform.¹⁷⁶

C. Problems with Rapid Expansion

Restorative practices provide educators, students, and parents with a forward-looking, whole school, positive climate and disciplinary system for school reform that infuses hope. As a social corrective, it treats rule-breaking as harm done to a relationship, humanizing key players and offering students a way back. Although the

literature counsels that implementation is at least a three- to five-year process,¹⁷⁷ the swiftness with which **restorative** practices are being adopted is concerning and threatens to cause a predictable backlash. Indeed, articles have already appeared in the *New York Post*¹⁷⁸ and the *Los Angeles Times*.¹⁷⁹ The *New York *1028 Post* article claims that teachers are struggling with lawless classrooms, the lack of consequences for serious infractions, serious threats and physical attacks against teachers, the worsening of student behavior including student fights, roaming the halls and mouthing off to teachers, and an inordinate amount of time away from academic instruction.¹⁸⁰ Without consequences, the classrooms are controlled by bullies. The article warns that under such conditions students and teachers will transfer to safer private or charter schools.¹⁸¹ The *Los Angeles Times* article reports similar problems but recognizes that these are likely the result of inadequate resources and training.¹⁸² Indeed, Los Angeles has the second largest school district in the country.¹⁸³ The district tried to implement **restorative** practices in five years but had only given training to 307 of the district's 900 schools and had employed only five **restorative justice** counselors in its first year.¹⁸⁴ After recognizing its inadequate planning, the district increased the number of counselors to twenty-five amid community pressure and added twenty more counselors in its second year of implementation for a total added cost of \$7.2 million.¹⁸⁵

Restorative practices are a young initiative. There is no agreement on a standard for implementation, on the training of teachers, the need for **restorative** coordinators or how to use them, or on the differences in implementation by grade level, e.g., elementary, middle, and high school. Many schools likely try to execute the approach by focusing on the more intensive or challenging students first without having fully prepared teachers or understood that the priority must be on changing the school culture through Tier 1 or community building practices. If school districts are directed to remove traditional disciplinary practices all at once and implement **restorative** practices broadly and without slow, careful, and strategic planning, it is predictable that the use of **restorative** practices will falter. Unfortunately, the blame will be placed on **restorative** practices rather than on inadequate implementation.

***1029 D. Expansion in Texas**

Unfortunately, most districts in the country are putting **restorative** practices into place in too many schools at once and too quickly. Although **restorative** practices are seemingly a good fit for today's schools, there is little to no recognition of the thorough and detailed planning that must accompany implementation and the need for ongoing adjustment based on the response of a school over time to new ideas and changing traditional mindsets. In contrast to the rest of the country, Texas, which houses almost 10% of the nation's students,¹⁸⁶ is introducing **restorative** practices to its 1266 school districts but is using a different structure to convey information. The state is divided into twenty regional education service centers that provide assistance to educators throughout the state, including curriculum support, technology hosting, and bringing districts together in accordance with the Texas Education Agency's ("TEA") focus on increasing student achievement.¹⁸⁷ TEA, in partnership with the Institute for **Restorative Justice** and **Restorative** Dialogue ("IRJRD") housed in the School of Social Work at the University of Texas at Austin, is using the twenty regional education service centers to provide two types of training throughout the state aimed at educating the critical constituencies for successfully implementing sustainable **restorative** practices in schools.¹⁸⁸

A two-day Administrator Readiness Training is offered to administrative teams to equip them with a long-term overview of what is involved in executing a whole school approach so their planning is realistic, contextualized, and grounded in **restorative** principles. A five-day **Restorative** Coordinator Training is offered to persons who are

or will be guiding their districts or schools in the process of whole school implementation over time. Besides the specific multi-tiered practices, participants are equipped to work with and strategically plan with administrative teams, train and ***1030** mentor teachers, involve the community, and activate student leadership. Both trainings emphasize a diffusion model of conveying information through networking and narratives that foster a positive contagion effect and gradual buy. This process mirrors the **restorative justice** principle of voluntariness, promotes self-agency and ownership, and diminishes reactivity and resistance. Both trainings underscore voluntariness of participation, changing attitudes about discipline, a whole school approach focused on managing complexity, slow implementation, careful planning tailored to the culture of each school, deep commitment from school administrators, and the presence of a **restorative** coordinator to help guide the school through the change process. IRJRD is conducting research on school and district implementation post the trainings.

E. *Best Practices*

IRJRD has developed a set of thirteen Best Practices in support of the Texas model of implementation hereafter referred to as **Restorative** Discipline.¹⁸⁹

1. **Restorative** Discipline is a philosophy and system-wide intervention that places relationships at the heart of the educational experience.

Restorative Discipline utilizes a relational ecology that finds its strength through nurturing motivational bonds of belonging that support individual development and social responsibility. This paradigm gives the harm or conflict “back” to the parties most involved. 2. *The goal of **Restorative** Discipline is to change the school climate rather than merely respond to student behavior.*

While utilizing a multi-tiered model of influence and intervention, the energy of **Restorative** Discipline begins at Tier 1 with a focus on changing school climate. **Restorative** practices are utilized for community building, teaching course content, decision ***1031** making, values clarification, problem-solving, and acknowledging new, returning, and departing members of the community, as well as resolving conflict. **Restorative** practices are utilized by all members of the school community: administrators, teachers, students, support staff, volunteers, parents, and community stakeholders.

3. **Restorative** Discipline requires a top-down commitment from school board members and administrators.

School board and administrator buy-in, as well as communication and modeling of that buy-in, prevent **Restorative** Discipline from becoming another initiative around which there's a flurry of excitement with no follow up, support, or accountability. A committed administrator who can “voice the vision” can instill in others the optimism, critical thinking, and strategic planning necessary for successful and fruitful implementation. An enthusiastic and knowledgeable administrator leads the way for teacher buy-in, demonstrates community building by applying **Restorative** Discipline practices in teacher and administrator interactions such as staff meetings, oversees the creation and use of the leadership response team, provides leadership in the midst of change and challenge, and promotes data collection and analysis to undergird **restorative** work. Finally, administrative support and commitment assures the necessary long-range planning and resources to support the expected three-to-five-year rollout. 4. **Restorative** Discipline uses a whole school approach. All administrators, teachers, all staff, and students should be exposed to and/or trained in **restorative** processes with periodic boosters.

Restorative Discipline is a **restorative justice**-based, whole school disciplinary response that focuses on changing school climate through the building of community at the classroom and campus levels. It is more than a tool or technique that gets applied to a specific incident, individual student, or exclusive classroom. **Restorative** Discipline's core concept--relational trust--is developed and practiced by all community members who must be trained initially and then supported through additional training, support activities, reinforcement, and period boosters.

1032 5. **Restorative Discipline engages parents/caregivers as integral members of **restorative** conferences and circles.*

Restorative Discipline practitioners are expected to become proficient in community engaged **restorative** circles and family-group conferencing, which typically include parents and caregivers as participants. 6. **Restorative** Discipline uses an internal leadership response team to spearhead the implementation and help support necessary dialogue.

An active leadership response team serves as a planning and implementation body, facilitates circles involving more complicated or serious incidents or those in which family members and caregivers participate, and coordinates needed trainings and boosters. Team members are often school administrators, the on-site **Restorative** Discipline coordinator, counselors, family service coordinators, school resource officers, and committed teachers and parents. 7. **Restorative** Discipline calls for an outside **restorative justice** coordinator to serve onsite.

Implementation fidelity requires a **Restorative** Discipline Coordinator who is “of the community” more than representative of campus employees and who may be employed at the District level or from an external agency. Whether full or part-time, the **Restorative** Discipline Coordinator's only role is to assist the campus and surrounding community in the **Restorative** Discipline application and implementation. The Coordinator must be able to move freely among administrators, teachers, students, staff, parents, and community members in order to model, assist, and as needed, challenge and critique. 8. **Restorative** Discipline has a data system to analyze trends and inform early interventions.

A data collection system is necessary both to measure outcomes and to identify implementation gaps and challenges. This practice **1033* mirrors the Positive Behavioral Intervention and Support expectation that teams “systematically collect, summarize, and analyze, data to drive the decision-making process and identify priorities.” ¹⁹⁰

9. **Restorative** Discipline focuses on the harms, needs, and causes of student behavior, not just the breaking of rules and dispensing of punishment.

A fully **restorative** campus uses circles and other **restorative** interventions at Tier 2 and Tier 3 levels and applies **Restorative** Discipline principles in every conflict and issue of harm in order to give stakeholders a voice and to create a contextual response to the matter under consideration. To the degree possible within district guidelines, the parties involved determine the parameters and nature of how the wrongdoer will be held accountable and the form amends-making will take. ¹⁹¹ Circle facilitators are carefully selected and trained to be able to create “safe spaces” where the work of **Restorative** Discipline can take place. ¹⁹²

10. **Restorative** Discipline places a fundamental attention on harm and the subsequent needs of the victim.

Restorative Discipline reflects a problem-solving and relational approach that focuses on **restoring**, to the degree possible, the victim to wholeness and the

person(s) responsible for the harm back to the community.¹⁹³ Repairing the harm both literally and relationally is central to responses to negative behavior.

11. **Restorative** *Discipline places an emphasis on meaningful accountability in matters involving harm and conflict.*

Responses to conflict and issues of harm focus energy on accountability plans that are meaningful, specifically in regards to ***1034** the harm that occurred, the needs and concerns of the victim and the community, the development of empathy, and the needs and deficits of the person(s) responsible for the harm as evidenced by the nature of the conflict or issue of harm.¹⁹⁴ Furthermore, accountability plans are recorded and monitored for successful completion with a subsequent plan should the plan not be completed or in the event of further problems.¹⁹⁵

12. **Restorative** *Discipline takes time. It is dialogue driven and rests on the steady establishing and deepening of relationships.*

Research and experience suggest that three to five years of intentional and concentrated work is needed to make a campus fully **restorative**.¹⁹⁶

13. **Restorative** *Discipline calls for collaboration with community-based **restorative justice** programs, local businesses, and agencies that serve youth, including community and faith-based programs, law enforcement, and public health and mental health entities.*

Restorative Discipline maintains that schools belong to and are part of a wider community.¹⁹⁷ Partnering with local programs and agencies illustrates this principle, provides a way for the community to invest in the school and its students, and broadens the range of people who can be influential or serve as a positive influence on a student's life.

CONCLUSION

There is no question that policies and procedures meant to ensure safe learning environments have had severe unintended consequences that jeopardize the futures of children, create prison-like conditions in schools, profoundly discourage teachers from continuing in their chosen profession, and contribute decidedly to ***1035** lower student achievement. Research on this national crisis, earmarked by gross racial disproportionality in discipline, suggests that school controlled factors override student characteristics and demographics as predictors of both frequency and disproportionate use of punishment. As noted earlier, school controlled factors include teachers' attitudes and tolerance levels, their skill in managing the classroom, principal attitudes toward discipline, and a positive or negative school climate.¹⁹⁸ These factors are the exact targets of a whole school **restorative** practices approach.¹⁹⁹

Restorative justice calls on those responsible for the harm done to others to make amends and **restore** the normative trust that was broken by wrongdoing. Although this fundamental **restorative** principle usually applies to individual wrongdoers and discrete acts, it is also congruent with the harm done through societally endorsed exclusionary practices to students, school personnel, and the learning environment over many years. That is, **restorative** practices not only provide schools with the opportunity to embed a different paradigm for current issues, but also to make amends for the past by committing deeply and unfailingly to a relational healing philosophy that is inclusive in nature. Indeed, the current crisis opens the door to relationally oriented solutions that usually would be scoffed at as “soft.” These solutions have been pushed to the forefront because arguably few other comprehensive options exist. Actually, the use of **restorative justice** in education is

still young. There is little scientific knowledge about how to implement it well. As a society conditioned to efficiency, immediate gratification, and fast fixes, there is undue pressure on schools to implement an otherwise slow, thoughtful, and relationally oriented process too rapidly. These social norms could easily create a backlash such that a failed implementation would provide justification for returning to a modified and disguised form of punitive practices.

The rule of law has a critical role to play in nurturing the solution provided through **restorative** practices. In light of its potential, through legislative action to mandate change, it must be careful not to feed the potential backlash. Specifically, the prohibition ***1036** on punitive practices exercised by some states is likely to exacerbate failure because other alternatives, such as **restorative** practices, are still in experimental stages, unknown or have limited capacity to help schools successfully put new practices into place because so few persons have been trained or have experience with **restorative** practices in schools. Likewise, legal mandates to implement **restorative** practices may overwhelm systems ill prepared for what is required for sustainable implementation. Moreover, legal mandates undo the voluntariness that philosophically accompanies **restorative** practices and insert instead unrealistic time lines coupled with inadequate resources for implementation.

Law, therefore, must be innovative in constructing avenues to support **restorative** practices that truly assist districts and campuses in their adoption of profound reforms. It might be productive, for example, for legislatures to generate policy that “philosophically” supports **restorative** practices in schools, financially incentivizes schools to use **restorative** coordinators to guide the implementation over three to five years, or establishes review committees to approve thoughtful implementation plans based on best practices. Legislatures might also support “philosophically” the education and training of future teachers in Colleges of Education so they are better equipped to bring **restorative** practices into their classrooms. Likewise, school resource officers need training mandated by legislatures. Just as the government offers subsidies for alternative energy sources such as solar or wind energy or tax credits for hybrid cars using electrical power, school districts could be similarly incentivized, through relieving some of their tax burden, to pilot diverse options including **restorative** practices.

The concept of **restorative** practices does not come pre-packaged. Rather it requires thinking outside the box to generate novel supports for far reaching sustainability and success. This historic period presents a golden opportunity to make right the wrongs of prior times and to generate a different base for the future. In the words of Savannah, a fifteen-year-old student, “[i] nstead of learning from our behavior, schools just force us out without real conversations and interventions. Suspensions don't ***1037** work, summonses don't work, arrests don't work. Keep us in the classroom, keep us accountable, and build relationships. That works.”²⁰⁰

Footnotes

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Fordham Urban Law Journal

December, 2017

Juvenile (In)Justice
Article

Josh Gupta-Kagan ^{a1}

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THE SCHOOL-TO-PRISON PIPELINE'S LEGAL ARCHITECTURE: LESSONS FROM THE SPRING VALLEY INCIDENT AND ITS AFTERMATH

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***84 INTRODUCTION**

In October 2015, a Black teenager at Spring Valley High School in Columbia, South Carolina had her cell phone out in her math class.¹ Her teacher told her repeatedly to put it away. Repeatedly she refused. The teacher then called a school

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administrator, who similarly instructed her to put away her phone. The student continued to refuse. The administrator then called the school resource officer (“SRO”), the uniformed, armed deputy sheriff assigned to the school.² The SRO came and informed the student that she had to put away her cell phone.³ When the student again refused, the officer arrested her for the crime of “disturbing schools.”⁴ Other students in the classroom recorded the arrest on their cell phones.⁵ The video footage captured the SRO pulling the teenager *85 out of her desk and appearing to throw her across the classroom floor. The officer also arrested a second student who encouraged her classmates to record the arrest and vocally objected to it. Students posted their videos, which soon went viral. The incident quickly joined a long list of other incidents involving questionable use of force by SROs. It also contributed to the larger debate about policing tactics, especially those tactics directed at Black individuals and communities.

The incident initially garnered national attention due to the SRO's use of excessive force. But the Spring Valley High School incident also illustrates how specific incidents of relatively minor school misbehavior lead to arrest and prosecution rather than school-based intervention.⁶ This incident was a product of a series of choices: by educators who asked an SRO to become involved in a classroom management situation, and by the SRO who agreed to do so and who chose to make two arrests. These kinds of decisions are replicated in a range of cases which have been dubbed the school-to-prison pipeline.⁷ The result--children charged with criminal or delinquent acts for school misbehavior--is strongly criticized for imposing an overly punitive and harmful law enforcement response on situations that would be better handled through school discipline.⁸

The decisions that lead to school-based arrests, like those at the center of the Spring Valley incident, do not happen in a vacuum. This Article will use that incident and South Carolina's broader experience to analyze the laws, policies, and legal practices that create the legal architecture of the school-to-prison pipeline--and also identify promising, but incomplete reforms that have taken root in South Carolina. Reforming individual elements of that architecture will help limit this problem, but the problem can only be completely *86 solved by reforming all elements. The legal architecture involves several interlocking legal elements that together cause school discipline issues to become law enforcement issues.

First, the Spring Valley incident illustrates how criminal law broadly encompasses many incidents at schools that would be better handled as school discipline matters than as juvenile delinquency matters. It is a crime in South Carolina to disturb a school “in any way.”⁹ This statute was used to charge both girls in the Spring Valley incident--and more than 1300 other South Carolina children that same year, making it the second most frequent delinquency charge in the state that year.¹⁰ The racial disparities for this charge are tremendous, even when compared to the already large disparities in the juvenile justice system as a whole.¹¹ Although South Carolina's criminal law is particularly broad--perhaps the broadest in the nation--other states are not far behind.¹²

Second, the Spring Valley incident reveals how legal instruments direct SROs' involvement in situations that school officials should handle on their own. SROs are usually uniformed, armed officers employed by local police departments and assigned to schools.¹³ There has been a significant national focus on encouraging school districts to enter into memoranda of agreement with law enforcement agencies to establish shared understandings between schools and law enforcement agencies regarding SROs' roles, and to limit those roles.¹⁴ The Spring Valley school district had a memorandum of agreement with the local sheriff's department that both placed SROs at middle and high schools in the district and required school officials to refer any criminal action to those SROs.¹⁵ Consistent with the memorandum of agreement, the Spring Valley High School administrator called in an SRO to assist with a disobedient but nonviolent

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student. The Spring Valley experience thus demonstrates the importance of creating such memoranda of agreement with provisions to prevent school discipline matters from becoming matters for law enforcement.

***87** The Spring Valley experience also demonstrates the need for statutory reform. In addition to the requirements under the memorandum of agreement, a South Carolina statute requires schools to refer certain other behavior--such as some schoolyard fights--to law enforcement.¹⁶ That state statute requiring reporting was enacted at the height of tough-on-crime reforms of a generation ago.¹⁷ This statute serves to transform school disciplinary incidents into law enforcement incidents unnecessarily. Like other legislation of that era, it is now ripe for reform.

Third, South Carolina illustrates a problem with the structure of diversion programs.¹⁸ Diversion programs are often excellent alternatives to prosecuting children, but they are too often operated by law enforcement, thus requiring law enforcement involvement.¹⁹ Moreover, frequently used programs require a child to first be charged so that law enforcement or prosecutors can admit them to the program.²⁰ In contrast, many schools do not operate their own diversion programs.²¹ This can lead school officials and police officers to charge children criminally with a goal of directing them to a law enforcement-operated diversion program.²² Such actions can sometimes lead to prosecution and conviction contrary to the intent of the school officials or police officers initiating that process.²³ More broadly, locating diversion programs within law enforcement agencies rather than schools requires law enforcement involvement in incidents that school officials could handle on their own. Thus, accessing those programs requires transforming school discipline matters into law enforcement matters. Developing more diversion programs operated by schools would avoid this unnecessary involvement with law enforcement.

***88** Fourth, the Spring Valley incident reveals concerns about the exercise of prosecutorial discretion in deciding whether to prosecute, dismiss, or divert school-based charges. In our juvenile justice system, such decisions should consider both the state's ability to prove a child guilty of a crime *and* whether prosecuting a child for that crime is necessary to protect the public or to rehabilitate the child.²⁴ Contrary to the latter principle, the local elected prosecutor in the Spring Valley incident left charges pending against the two girls for months before dismissing them.²⁵ The prosecutor wrote that he did not believe the publicity around the event would permit him to have a fair trial.²⁶ The elected prosecutor did not state any consideration of whether prosecution would serve the juvenile justice system's rehabilitative purposes,²⁷ illustrating a more widespread problem of how authorities exercise prosecutorial discretion without adequately considering whether rehabilitating a particular child requires prosecuting him or her.²⁸

This Article will also address post-Spring Valley reform efforts in South Carolina. These reform efforts are significant, but incomplete. There are both local and statewide reforms that seek to limit arrests and charges for school misbehavior, and these reforms have had some success. In Richland County (where the Spring Valley incident occurred), reforms have reduced arrests by sheriff's department ***89** SROs by more than fifty percent, and statewide, changes in practice have cut disturbing schools charges in half.²⁹

The South Carolina Senate has passed a bill dramatically narrowing the scope of the disturbing schools offense.³⁰ The bill's fate will depend on South Carolina House of Representatives action when it reconvenes in 2018. Passing this bill would represent significant progress, but only partial reform. An original analysis of South Carolina data shows that limiting disturbing schools prosecutions has historically led to authorities using other charges instead.³¹ If the pending bill is enacted, it will likely screen out some of the more extreme fact patterns, but will not stop the larger flow of children

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through the school-to-prison pipeline. Recent declines in disturbing schools charges have occurred without any enacted disturbing schools statutory reforms--showing that powerful levers of change exist beyond such legislation.

This Article will also analyze efforts to improve the legal limits on SROs' activities in schools. The county in which the Spring Valley incident took place has made some significant progress, especially through a voluntary agreement between the county sheriff's department and the U.S. Department of Justice ("DOJ").³² This agreement identifies a range of minor crimes as school discipline matters in which SROs should not be involved.³³ Less promising efforts to revise the memoranda of agreement between the sheriff's department and local school districts show an ongoing need for stronger provisions to distinguish law enforcement from school discipline.³⁴ The revised memoranda encourage but do not require officers to decline to charge children for minor incidents.³⁵ Yet, the revised memoranda continue to require school officials to report to SROs any incident that amounts to a crime.³⁶ This is in tension with the provisions of the voluntary agreement, and leaves SROs with the discretion of what to do next. Thus, the revised memoranda seek to change the culture of SRO involvement in school discipline, but fail to change the legal elements that permit it.

***90** One statewide reform has made significant progress on limiting the role of SROs. A 2017 South Carolina Department of Education regulation limits when school officials can refer minor incidents to law enforcement.³⁷ Such referrals are only lawful when an incident poses an immediate safety risk or the student has engaged in at least three such incidents in that school year.³⁸ It also requires that districts and law enforcement agencies incorporate such limits in their memoranda of agreement.³⁹ This regulatory change holds the greatest promise for statewide reforms for limiting the pipeline. But the regulation alone is not enough because it leaves important implementation questions to local school districts.

Reforms to other pillars of the school-to-prison pipeline's legal architecture remain relatively untouched. The South Carolina statute requiring schools to report many incidents to law enforcement has not been changed. Public schools have not developed a wide set of diversion programs. No formal steps have been taken to affect the exercise of delinquency charging discretion.

This Article does not address several key issues related to the school-to-prison pipeline, including points that other scholars have already established. First, it does not rehash the description of the school-to-prison pipeline or trace its history.⁴⁰ Second, this Article takes as a given that there is a significant difference between law enforcement and school discipline; common school misbehavior like disobedience and fights should not trigger arrests or juvenile delinquency charges absent relatively severe factors like serious injuries, weapon possession, or drug distribution. Third, United States schools, family courts, and juvenile justice systems have too often failed to prevent school misbehavior from forming the basis of juvenile delinquency charges. The school-to-prison pipeline contributes to this failure and it requires reform. Other scholars have established these points in detail.⁴¹ Fourth, this Article does not ***91** address non-legal reforms described by other scholars, which can establish "more pedagogically sound methods to address school violence" than arresting students.⁴² These include improved training and supervision of SROs, classroom management training of teachers, school innovations to improve school-wide discipline, and the development of a variety of school-based diversion programs--crucially important topics, but beyond the scope of this Article. Fifth, this Article does not address searches and surveillance of students at school and how such actions (and related Fourth Amendment doctrines) may further the school-to-prison pipeline.⁴³ Finally, this Article does not address how punitive school discipline and academic challenges at school can lead to delinquency and adult crime--an important component of the school-to-prison pipeline. Rather, this Article focuses on incidents at school that lead directly to arrests or charges, and the purely legal reforms necessary to dismantle that portion of the school-to-prison pipeline's architecture.

Part I will describe the Spring Valley incident in detail, including its immediate aftermath and legal reform efforts it inspired. In so doing, Part I will explain why this incident and South Carolina's broader experience is worth focusing on. Part II identifies the elements of the pipeline's legal architecture illustrated by the Spring Valley incident and South Carolina more broadly. Part III explores reform efforts in South Carolina and notes some significant but incomplete progress that has occurred. Part III argues that discrete reforms, while positive, will not be enough to stem the flow of cases through the pipeline or to keep recent progress from eroding; more comprehensive reform is required.

I. CASE STUDY: THE SPRING VALLEY INCIDENT AND THE SCHOOL-TO-PRISON PIPELINE IN SOUTH CAROLINA

This Part will describe the Spring Valley incident itself--both its well-publicized facts and other details that are equally important to drawing lessons from the incident. This Part will also explain why this incident, and South Carolina's experience more generally, deserve particular attention.

***92 A. The October 26, 2015 Spring Valley High School Incident**

The facts of what happened at Spring Valley High School on October 26, 2015 are well established.⁴⁴ A teenager, whose name is sealed, had her mobile phone out in her third period algebra I class.⁴⁵ Her teacher told her to put away her phone, and she did.⁴⁶ The teacher then assigned the class to do class work on a website.⁴⁷ He used a separate program to monitor what students were doing on their individual computers.⁴⁸ Through that program, he saw that the student had opened her email.⁴⁹ He used his remote access to close her email. She re-opened it and he re-closed it remotely three or four more times.⁵⁰

The teacher walked up to the student and “noticed that she had her cell phone in her lap. He asked the student to give him her cell phone, at which point she refused and told [him] to ‘get out of her face.’”⁵¹ He then wrote a discipline referral and asked the student to leave the class and she refused.⁵² He repeated the instruction to leave and she repeatedly refused.⁵³ At this point, there was no suggestion that she was interfering with any other student's work.⁵⁴

The teacher contacted a high school administrator--the equivalent of an assistant principal in many schools. The administrator came to the classroom and asked the student several times to leave the classroom with him. “The student sat quietly and refused to comply *93 with [the administrator's] directives or respond to him in any way.”⁵⁵ The administrator then called the SRO Benjamin Fields and explained the situation to that officer when he arrived.⁵⁶ The administrator gave the student a final warning, noting the “deputy is here” and asked her to leave a final time; she refused.⁵⁷

The SRO asked the student to come with him several times and she continued to refuse. As the elected solicitor (the South Carolina term for elected local prosecutor,⁵⁸ equivalent to the district attorney in other jurisdictions) later summarized: “Fields subsequently informed the student that she was under arrest for disturbing schools and attempted to place her under arrest. While Fields was attempting to effectuate a lawful arrest, an altercation between himself and the student occurred.”⁵⁹ That “altercation” began when Fields used physical force to pull the non-compliant student out of her desk. One video showed the student resisting by “striking Deputy Fields in the face with her fist when his hand makes

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the initial contact with her arm.”⁶⁰ The video reveals only this single strike, which was not forceful enough to stop or delay the deputy's actions or cause any reported injury. The deputy successfully pulled the student out of her desk, which tipped over and fell to the floor, leaving the student on the floor. He then “threw”⁶¹ the student (as the local sheriff later put it) several feet away from the desk. In recordings widely publicized, one can hear the officer then say, “[p]ut your hands behind your back” as he completed the arrest of the student as classmates looked on.⁶²

After the arrest, authorities took the student to a hospital. Doctors noted several injuries, including “a minor nondisplaced fracture at the distal radial physis [a wrist bone].”⁶³

When the SRO first entered the class, another student, Niya Kenny,⁶⁴ encouraged students to record the incident and objected to ***94** how the SRO handled the situation. Several other students recorded the “altercation” on their mobile phones and circulated the recordings, which soon reached media outlets.⁶⁵ After the SRO arrested the first student, Kenny said, “[h]e turned around and he was like, ‘Oh, you have so much to say, you're coming, too.’”⁶⁶ The SRO initially arrested Kenny for disorderly conduct but later submitted paperwork to charge her with disturbing schools.⁶⁷

The SRO charged both the first student and Kenny with disturbing schools.⁶⁸

B. The Incident's Aftermath

Thanks to the students who recorded the incident and posted those recordings on social media, the incident--or at least the final moments captured on video--quickly became well known.

Within two days, the Richland County sheriff fired Deputy Fields.⁶⁹ In doing so, the sheriff did not question whether the student with the mobile phone had committed a crime or whether Fields should have arrested her. Rather, he focused on the force used during the arrest, especially “the throwing of the student across the floor.”⁷⁰ The sheriff also requested an FBI investigation into the incident.⁷¹

Firing Fields did not have any immediate effect on the charges Fields filed against either child; both continued to face disturbing schools charges. By December, advocates delivered a petition to the office of the Richland County solicitor demanding that he drop the charges.⁷² The solicitor responded with a public statement saying that ***95** he would decide whether to prosecute the charges “based only on evidence and in accordance with the law” and that he would await results of the FBI investigation before making a final decision.⁷³ The solicitor's statement made no reference as to whether prosecuting the girl who refused to put away cell phone⁷⁴ (or delaying a decision pending the FBI investigation) was in her best interest or served the juvenile court's rehabilitative mission.

When the FBI concluded its investigation,⁷⁵ the solicitor announced that he would dismiss the charges against the two girls.⁷⁶ The solicitor wrote that he believed the first student “did disturb the school,” but the termination of the officer and “administrative action ... taken against school personnel” made winning a conviction difficult.⁷⁷ The solicitor again engaged in no analysis of whether prosecuting the child served any rehabilitative purpose.⁷⁸ The solicitor concluded that he could not prove that Kenny was guilty of disturbing schools.⁷⁹

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Dismissing the charges was certainly a positive development for the two girls (as it would be for any defendant), and research, including studies of South Carolina juvenile cases, suggests that this dismissal may have reduced the likelihood of either girl engaging in any future crime.⁸⁰ Nonetheless, the dismissal could not erase harms caused by *96 the arrests and charges. Multiple studies have identified that arrests and charges--even when ultimately dismissed--increase the odds that children will drop out of high school.⁸¹ For instance, Gary Sweeten found that a "first-time arrest during high school nearly doubles the odds of high school dropout."⁸² Niya Kenny's story illustrates this harm. After her arrest at school, Kenny did not return to Spring Valley, and instead enrolled in a GED program.⁸³ Later litigation brought on her behalf asserted that "due to the humiliation and anxiety she experienced, Ms. Kenny did not feel that she could return to Spring Valley High School."⁸⁴ By her own account, the arrest triggered "the worst anxiety," when police officers, or others who reminded her of the incident, came into the fast food restaurant where she worked.⁸⁵ Soon after the event, she stated: "I used to kind of, you know, just start crying. There were times my mom had to come pick me up from work because I just, I couldn't deal with it."⁸⁶ Because the first student was charged in family court and has not publicly spoken about the incident, the effect of the incident on her and the charges against her are not publicly known.

***97 C. Why Focus on Spring Valley and South Carolina?**

The incident at Spring Valley High School could have occurred in any part of the country and, indeed, similar incidents have occurred elsewhere.⁸⁷ The Spring Valley incident "catalyzed a national conversation about the involvement of police officers in the administration of school discipline."⁸⁸ The incident is worthy of analysis for that reason alone. Two additional reasons explain why this incident, and South Carolina more broadly, are worthy of a particular focus: the incident effectively illustrates the legal architecture of the school-to-prison pipeline; and reform efforts that followed the incident both illustrate the possibility of effective changes and allow for analysis of which reform efforts are most impactful.

1. Spring Valley and South Carolina Illustrate the Pipeline's Legal Architecture

Multiple legal rules overlap to form the school-to-prison-pipeline's legal architecture. As Part II will explain in more detail, South Carolina cases and data illustrate the role of statutory, judicial, regulatory, and contract law in shaping incidents like the arrests at Spring Valley. A focus on statewide trends will capture how the pipeline operates in the aggregate, beyond any single incident.

Relatedly, multiple factors have rendered the school-to-prison pipeline particularly active in South Carolina. According to an *Education Week* analysis of 2013-2014 data, South Carolina ranks second in the nation in the percentage of schools with an assigned SRO, and eighth in the nation for percentage of students arrested.⁸⁹ Prior research indicates that this result should cause no surprise. For *98 example, Jason Nance empirically studied strict security measures including the presence of police officers at schools.⁹⁰ He concluded that the percentage of minority students enrolled at a school predicts the use of such security measures, even when controlling for other variables such as school and neighborhood crime rates.⁹¹ In addition, larger schools, urban schools, and southern schools all are more likely to have stricter security measures.⁹² Spring Valley High School fits part of the profile for schools where one might expect strict security measures and resulting arrests. Spring Valley's student population is 52% Black.⁹³ It is a large school--enrolling more than 2000 students⁹⁴--and is located at the edge of Columbia,⁹⁵ South Carolina's capital city. By contract between the Richland

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County School District Two and the Richland County Sheriff's Department, two sheriff deputies were assigned to Spring Valley as SROs.⁹⁶

Still, Spring Valley is far from alone, and far from the top of the list for school arrests. Spring Valley's arrest rate of 0.531% is higher than the national average, but it still ranks below 127 other South Carolina *99 high schools (there are 1225 total), whose arrest rates range up to 29.310%.⁹⁷ Spring Valley also does not fit other stereotypes; it is a relatively high-achieving school⁹⁸ with a diverse student body.⁹⁹ The incident thus demonstrates that the school-to-prison pipeline can exist even at a relatively high-achieving school.

2. Intensive Advocacy in South Carolina for Reform

South Carolina is also worthy of a case study because of intensive advocacy efforts underway within the state, which illustrate both the promise and the difficulty of the work required to prevent the juvenile justice system from being used to handle school discipline matters.

Reform efforts were beginning even before the Spring Valley High School incident. In the school district in which Spring Valley is located, a group of parents formed the Richland Two Black Parents' Association in 2014 and focused on the number of Black students, especially Black boys, subject to suspension and expulsion.¹⁰⁰ The DOJ Office of Justice Programs, Office for Civil Rights began reviewing the Richland County SRO program prior to the Spring Valley incident.¹⁰¹ This review resulted from "data collected by the DOJ and other federal agencies on the county's juvenile population and arrest rates; information on school-based arrests, referrals to law enforcement and exclusionary discipline in the county; and concerns about the SRO program voiced by Richland County community members."¹⁰²

*100 Reform efforts accelerated after the Spring Valley incident. The General Assembly considered a bill (sponsored by a legislator whose district includes Spring Valley High School) to dramatically narrow the disturbing schools statute.¹⁰³ The American Civil Liberties Union ("ACLU") filed a lawsuit seeking to enjoin enforcement of the disturbing schools and disorderly conduct statutes against students attending their schools.¹⁰⁴ The South Carolina Department of Education convened a Safe Schools Task Force with a goal of reviewing policies and regulations that may have contributed to the incident or to other less well-publicized problems.¹⁰⁵ The Richland County Sheriff's Department entered a voluntary resolution agreement with DOJ requiring reforms to its SRO program.¹⁰⁶ The sheriff's department and local school districts renegotiated their memoranda of agreement to include more provisions to discourage arresting and charging students.¹⁰⁷

These reform efforts have made some important progress. The number of disturbing schools charges have dropped by half, and particularly strong reductions have occurred in Richland County.¹⁰⁸ A bill to narrow the disturbing school statute passed one house of the South Carolina General Assembly.¹⁰⁹ The South Carolina Department of Education promulgated regulations limiting when schools can refer routine school discipline matters to SROs.¹¹⁰ But South Carolina's historical and recent reform efforts also illustrate a final point--the need to reform multiple pieces of law. Because multiple pieces of law form the school-to-prison pipeline's legal architecture, reforming only one or two will leave others contributing to the pipeline.

***101 II. SPRING VALLEY INCIDENT REVEALS THE PIPELINE'S LEGAL ARCHITECTURE**

The Spring Valley incident, and the broader practice of charging children for misbehavior at school, results from at least four legal elements, which form the school-to-prison pipeline's legal architecture.

The first element is the broad criminal law.¹¹¹ The charge of disturbing schools permits law enforcement authorities to treat a wide swath of student behavior as crime.¹¹² This section will analyze the disturbing schools statute and its operation in South Carolina, and how it illustrates problems with similar statutes in nearly half of all states, as well as other broad misdemeanor statutes elsewhere.

The second element is how SROs' prominent role in school discipline incidents can transform those incidents into criminal or delinquency charges.¹¹³ Multiple years of research have not established whether SROs improve school safety, but they have clearly shown that SROs' presence significantly increases the likelihood that students will be arrested and charged with relatively minor offenses.¹¹⁴

It is less clear if the law can effectively cabin SROs' role. This section will explore the laws and legal instruments governing the SRO's involvement in the Spring Valley incident, and explain how those laws permitted, if not encouraged, transforming a school disciplinary incident into a criminal justice matter. At a minimum, the Spring Valley incident illustrates the necessity of more effectively distinguishing the SRO's law enforcement role from school discipline, and thus keeping SROs out of school discipline matters.

Third, while many youth-focused diversion programs exist, they are largely operated through law enforcement agencies or prosecution offices, leading authorities to involve SROs in discipline matters or to charge children as a means of accessing such programs.¹¹⁵ The intent to use such programs is commendable, but placing them outside of schools leads to the unnecessary involvement of law enforcement in school discipline matters.

***102** Fourth, prosecutorial discretion too often deemphasizes the essential determination of whether prosecuting children is necessary to protect the public or to rehabilitate children.¹¹⁶ Such a consideration was notably absent from the elected prosecutor's public statements about the Spring Valley incident. Restoring that consideration would help limit charges and prosecutions of incidents that schools can handle better than courts.

A. Wide Criminal Law: Disturbing Schools Statutes and Their Disparate Impact

1. Statutory Terms Criminalizing Ordinary School Misbehavior

The breadth of South Carolina's criminal law was an essential legal piece that transformed a student's non-violent non-compliance with a teacher into two criminal charges. The SRO arrested the two girls for the crime of disturbing schools. Specifically, in South Carolina, it is a crime “for any person willfully or unnecessarily (a) to interfere with or to disturb in any way or in any place the students or teachers of any school or college in this State, (b) to loiter about such school or college premises or (c) to act in an obnoxious manner thereon.”¹¹⁷ The law is incredibly broad--disturbing a school “in any way” is a crime,¹¹⁸ so it is easy to see how school officials or the officer concluded that the child who refused to put away her cell phone or leave the classroom at her teacher's instruction had committed a crime. Following a detailed investigation, the local elected prosecutor concluded that the first student did disturb the school.¹¹⁹ But even the prosecutor concluded that Niya Kenny's conduct--objecting to the officer's conduct--did not rise to a crime.¹²⁰

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Authorities have used this charge with great frequency--1324 disturbing schools charges were sent to South Carolina family courts in 2015-2016, making it the second most frequent delinquency charge.¹²¹ Several hundred more individuals ages seventeen and older were charged with disturbing schools as adults.¹²²

***103** South Carolina's statute is one of many. At least twenty other states have some kind of statute criminalizing misbehavior at school,¹²³ many of which prosecute similarly large numbers of children under their statutes.¹²⁴ *The Atlantic* concluded that more than 10,000 disturbing schools charges are filed nationally each year.¹²⁵ Beyond state statutes, many municipalities also outlaw disturbing schools.¹²⁶

Many jurisdictions with disturbing schools statutes have had officers arrest students under disturbing schools statutes for nonviolent conduct that would be more appropriately treated as school discipline than as delinquency matters. In New Mexico, for instance, a seventh grade student was arrested for "interfere [nce] with the educational process" for a series of burps.¹²⁷ As the U.S. Court of Appeals for the Tenth Circuit later summarized the alleged crime, the child "had generated several fake burps" in gym class, "which made ***104** the other students laugh and hampered class proceedings."¹²⁸ The teacher then told the child to sit in the hallway, but "he leaned into the classroom entranceway and continued to burp and laugh."¹²⁹ The teacher called the SRO, who arrested the child.¹³⁰ In another New Mexico case, an SRO arrested a fourteen-year-old for texting in class and refusing to turn over her cell phone.¹³¹ In Texas, children were arrested for using perfume and throwing a paper airplane in school.¹³² In New York, children have been arrested for writing on their desks with markers.¹³³ In Connecticut, a student was arrested for allegedly stealing a beef patty from the cafeteria.¹³⁴ The student's brother was arrested when he asked officers why they were arresting (and using a Taser against) his brother.¹³⁵

States need not have a disturbing schools statute on the books to charge children for petty misbehavior. When the DOJ investigated the Ferguson, Missouri Police Department, it interviewed an SRO who reported arresting students, mostly for "minor offenses--Disorderly Conduct, Peace Disturbance, and Failure to Comply with instructions."¹³⁶ Other cases around the country involving a variety of charges for relatively minor misbehavior at school have been ***105** catalogued,¹³⁷ including charges against young children with autism and other disabilities.¹³⁸

South Carolina is notable for having one of the broadest, if not the broadest, disturbing schools statutes in the nation. South Carolina is the only state that criminalizes behavior which disturbs a school "in any way"--a phrase absent from other states' otherwise similar statutes.¹³⁹ Moreover, South Carolina's broad language contrasts with limiting language in several other states' statutes.¹⁴⁰ For example, Arizona limits "interference with or disruption of an educational institution" to behavior involving threats of physical injury or threats of damage to any educational institution.¹⁴¹ Nevada's statute requires any disturbance to be created "maliciously."¹⁴² New Hampshire limits its statute's scope to "[a]ny person not a pupil," thus excluding students who misbehave at their own school.¹⁴³ Colorado only criminalizes disturbances "through the use of restraint, abduction, coercion, or intimidation or when force and violence are present or threatened."¹⁴⁴

Importantly, South Carolina courts have declined to narrow the scope of the disturbing schools statute, in contrast with other state courts which have done so. Westlaw reports only six South Carolina cases in which children appealed their convictions for disturbing schools, and every decision that ruled on the meaning of the statute affirmed the

convictions.¹⁴⁵ In the leading case, *In re Amir X.S.*, the *106 South Carolina Supreme Court rejected an argument that the statute was overbroad.¹⁴⁶ It relied on the state's strong interest "in maintaining the integrity of its education system."¹⁴⁷ The court stated that "[b]ecause the school environment is fragile by its nature, ... [a]ny conduct in this context that interferes with the State's legitimate objectives may be prohibited."¹⁴⁸ The Court conceded that a "fertile legal imagination can dream up conceivable ways" in which the disturbing schools statute might be applied to violate First Amendment rights, but such examples were not "substantial" enough to support a conclusion that the statute was overbroad.¹⁴⁹ While a future case could challenge the statute on other grounds,¹⁵⁰ the South Carolina Supreme Court's rejection of the overbreadth challenge in *Amir X.S.* permits the disturbing schools statute to criminalize *any* behavior which disturbs a school, even slightly.

In contrast to South Carolina, several other state courts have limited the scope of their disturbing schools statutes, specifically requiring a disturbance to be significant to qualify as a crime. For example, Maryland courts have noted that various "[d]isruptions of one kind or another" are inevitable any time large groups of children come together.¹⁵¹ "[T]here is a level of disturbance that is simply part of the school activity, that is intended to be dealt with in the context of school administration, and that is necessarily outside the ambit of" the disturbing schools statute.¹⁵² For a school disturbance to amount to a crime in Maryland, it "must be one that *significantly* interferes with the orderly activities, administration, or classes at the school."¹⁵³ Similarly, a New Mexico court interpreted a predecessor to its disturbing schools statute as requiring a "more substantial, more *107 physical invasion" of a school environment.¹⁵⁴ Florida courts have interpreted its disturbing school statute to only apply to behavior "specifically and intentionally designed to stop or temporarily impede" a "normal school function" and that the disruption must be "material []."¹⁵⁵ The North Carolina Supreme Court has defined criminal school disturbance to require a "substantial interference" even though the term "substantial" does not appear in the statute.¹⁵⁶

2. Disparities by Race, Sex, and Disability

The Spring Valley incident, involving a White officer and two Black girls, immediately touched a nerve about disparities in policing generally and school-based arrests specifically. Both state and federal prosecutors declined to charge the officer with any criminal offense, including any civil rights offense.¹⁵⁷ Beyond that individual case, the large disparities in aggregate school arrests and charging decisions both in South Carolina and nationally present a strong case that race, sex, and disabilities have an impact on arrest decisions.

South Carolina's experience with its disturbing schools statute and other school-based arrests illustrates the particularly strong concerns about racial disparities that are present in school discipline, law enforcement referrals, and arrests across the country. Black children make up 33% of all South Carolina children,¹⁵⁸ and were defendants in 56% of all delinquency cases referred to South Carolina family *108 courts in 2015-2016.¹⁵⁹ The disparities are even greater in disturbing schools cases, in which Black children account for more than three quarters of all defendants.¹⁶⁰ The South Carolina Department of Juvenile Justice published data from the 2008-2009 school year that showed that Black boys were charged with disturbing schools at 4.9 times the rate of White boys, and Black girls were charged at 6.2 times the rate of White girls.¹⁶¹ A more recent study of all school-based arrests showed smaller, but still significant disproportionality in arrest rates of boys and girls--Black boys were arrested 2.68 times as frequently as White boys, and Black girls were arrested 2.95 times as frequently as White girls.¹⁶²

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Similar disparities are evident nationally. The U.S. Department of Education has reported that, nationally, Black children account for 16% of all students, but 27% of students referred to law enforcement and 31% of school-related arrests.¹⁶³ Earlier research has made clear that different rates of misbehavior cannot explain these disparities.¹⁶⁴

National measures suggest that, as in South Carolina,¹⁶⁵ racial disparities among girls are larger than among boys. Across the country, Black boys were suspended out of school 3.33 times more frequently than White boys,¹⁶⁶ while Black girls were suspended out of school 6 times more frequently than White girls.¹⁶⁷ Advocates have argued that “[g]ender and race intersect to create categories of girls who are especially vulnerable to certain system policies and practices,”¹⁶⁸ leading Black girls to account for 43% of all girls subject to a school-related arrest.¹⁶⁹ Advocates allege that these disparities “are often tied to racial and cultural biases or subjective expectations of what makes a ‘good’ girl,”¹⁷⁰ and perceptions by both school and law enforcement officials that Black girls are less innocent and deserve harsher punishment than other girls exhibiting similar behavior.¹⁷¹ As a result, Black girls who engaged in behavior perceived as particularly loud or angry could be subject to unnecessarily harsh consequences.¹⁷² Commentators have used the arrests of the two girls in the Spring Valley High School incident to illustrate the phenomenon.¹⁷³ Advocates recommend attacking this problem by “decriminaliz[ing] minor school-based offenses commonly charged to girls, such as verbally disruptive behavior.”¹⁷⁴

The intersection of race and disability is another essential factor. Nationally, children with a disability account for 12% of all students, but 25% of all children referred to law enforcement and 25% of all school-related arrests.¹⁷⁵ Similar disproportionalities exist within South Carolina.¹⁷⁶ Black children with disabilities encounter even ***110** more severe disparities: The UCLA Civil Rights Project calculated, for instance, that Black students on average are about 12% more likely to face suspension than White students, while Black students with disabilities are 15% more likely to be suspended than White students with disabilities.¹⁷⁷ Using an earlier data set, the Civil Rights Project calculated that South Carolina's school suspension rate for Black, White, and Hispanic children with disabilities all exceeded national averages, as did the gap between Black and White children with disabilities.¹⁷⁸

Perhaps the most powerful explanation for these wide disparities relates to implicit bias. Research has shown that different behavior by different groups of students does not explain the disparities.¹⁷⁹ Sarah Redfield and Jason Nance have argued that implicit biases explain many of the large racial disparities in the school-to-prison pipeline.¹⁸⁰

Implicit biases are a particularly large concern in the application of broad criminal laws like disturbing schools. An implicit bias “is an association or preference that is unconscious and experienced without awareness” and often (if not usually) conflicts with an individual's beliefs.¹⁸¹ Forced to make a quick decision with limited information, an implicit bias may lead school officials or police officers to view the behavior of Black children (or Black girls or Black children with disabilities) as more disruptive or threatening than similar behavior by White children, and thus take more punitive actions against Black children.¹⁸² As the DOJ wrote in a statement of interest in *Kenny v. *111 Wilson*, such broad statutes may “fail to provide sufficient guidance to police,” and “officers who lack clear guidelines regarding what conduct is criminal and when enforcement is appropriate may not apply the law equitably, whether or not the differences in enforcement are intentional.”¹⁸³ Accordingly, it is recommended that the American Bar Association enacts “legislation eliminating criminalizing student misbehavior that does not endanger others.”¹⁸⁴

B. Legal Instruments' Failure to Prevent Law Enforcement Involvement in School Discipline

The Spring Valley incident also occurred because of other legal structures that put the SRO in a position to enforce the broad criminal law. The SRO was not only stationed at the school, but he became a key feature of school discipline. His role was not limited to protecting students from assailants with weapons, or even responding to situations which might reasonably be considered security risks, such as the suspected presence of illegal drugs. Rather, the SRO was the person called by the school administrator to enforce the teacher's and the administrator's direction that the student leave the classroom.¹⁸⁵ His role in the Spring Valley incident illustrates Catherine Kim's conclusion that "schools increasingly rely on law enforcement to maintain order," to the detriment of overall student outcomes.¹⁸⁶

Various authorities have argued for a much more limited role for SROs. Noting the harms to students from school-based arrests and the racial disparities among such arrests, the U.S. Department of Education in 2014¹⁸⁷ recommended that SROs' role "focus[] on protecting the physical safety of the school or preventing the criminal conduct of persons other than students, while reducing inappropriate student referrals to law enforcement."¹⁸⁸ SROs, according to the U.S. *112 Department of Education, should be responsible for "addressing and preventing serious, real, and immediate threats to the physical safety of the school and its community," but not have any involvement with "routine discipline matters."¹⁸⁹

One leading recommendation for keeping SROs out of regular school discipline has been for school districts and law enforcement entities to enter into memoranda of agreement that clearly delineate what SROs will and will not do.¹⁹⁰ This recommendation was followed by the local authorities at the time of the Spring Valley incident--a memorandum of agreement ("MOA") was in place between the local school district and the sheriff's department.¹⁹¹ But the MOA failed to stop the SRO from becoming involved in a school disciplinary matter and arresting and charging the two girls for disturbing schools, in part because it required school officials to inform SROs of any criminal conduct at school.¹⁹² The MOA's failure illustrates an essential point: if districts are to permit SROs in their schools, it is important both that MOAs exist, and that their terms effectively keep SROs out of regular school discipline.

The MOA in effect during the Spring Valley incident represents a middle spot between proposed memoranda, which do not provide much meaningful guidance, and those that significantly limit when schools can turn students over to SROs and when SROs can arrest or charge students. Spring Valley High School's MOA was based on a template designed by the DOJ program which funded many SROs around the country.¹⁹³ The DOJ summarized a model memorandum in 2013 and recommended that memoranda of agreement list some examples of what SROs would do, but did not recommend any terms which would limit SROs' role.¹⁹⁴ The National Association of School *113 Resource Officers ("NASRO") recommended sample memoranda which more actively blur the line between SRO duties and school discipline. One such model states that SROs should "be an extension of the principal's office" and should be involved in *both* "law enforcement matters and school code violations."¹⁹⁵ NASRO suggests a difference between law enforcement and school discipline, stating that SROs should bring students to the principal's office for punishment for school discipline code violations.¹⁹⁶ But involvement in school disciplinary incidents--even if theoretically limited to escorting students to the principal's office--risks transforming school discipline matters into arrests or charges. Such a concern is consistent with the empirical record, which shows that SRO presence at schools increases the likelihood of arrests, "even for low-level violations of school behavioral codes."¹⁹⁷ And the Association's proposed memoranda impose no limits on when school officials can refer situations to SROs or when SROs may arrest or charge children for minor offenses.¹⁹⁸

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In contrast, the Advancement Project (a civil rights advocacy organization) proposed a sample memorandum of understanding (“MOU”) that would only permit school officials to refer students to SROs if an incident created a risk of “imminent harm.”¹⁹⁹ When SROs do get involved, the Advancement Project's proposed MOU would prevent arrests or charges for minor offenses. Fights, for instance, could only trigger arrests or charges if they caused “serious bodily harm” or “necessitate[d] medical treatment.”²⁰⁰

The Richland County MOA²⁰¹ attempted, but largely failed, to limit SROs' role--thus making it more like the federal and NASRO models than the model pushed by advocates like the Advancement Project. The Richland County MOA's failure thus illustrates weakness in the federal and NASRO models. The MOA includes language reflecting the understanding that a line exists between law enforcement and school discipline. “First and foremost the SROs will perform law enforcement duties in the school such as handling assaults, theft, burglary, bomb threats, weapons, and drug incidents.”²⁰² Moreover, the Richland County MOA states that an “SRO shall not act as a school disciplinarian, as disciplining students is a school responsibility.”²⁰³ Despite those efforts to distinguish law enforcement from school discipline, the MOA's very next sentence turns school disciplinary incidents into matters for law enforcement: “However, if the incident is a violation of the law, the principal shall contact the SRO or their supervisor in a timely manner and the SRO shall then determine whether law enforcement action is appropriate.”²⁰⁴ Thus, by contract, any time a student violates broad criminal laws--like disturbing schools, disorderly conduct, or breach of peace--school administrators must notify police.²⁰⁵ Any fight or petty theft--a student taking another's cell phone, for instance--would trigger law enforcement involvement, with no consideration of whether the school could or should properly handle such actions without law enforcement.²⁰⁶

The Richland County MOA language was particularly important because no other source of law limited SROs' role. One statute defined SROs and clarified that they are empowered to arrest any individual for “crimes in connection with a school activity or school-sponsored event” anywhere in the state.²⁰⁷ But this statute offered no limitation for when SROs should exercise such authority.²⁰⁸ No law or regulation existed requiring a district to have an MOA, let alone governing what might be included in such an MOA. Similarly, school district discipline policies did not limit the role of SROs, and, in fact, read as if law enforcement should provide disciplinary back-up to teachers. The Richland County School District Two 2016-2017 handbook noted that teachers can handle most discipline problems.²⁰⁹ But “in cases where the student's behavior affects the safety or learning opportunities of other students,” further action is authorized, including action in conjunction with local law enforcement agencies.²¹⁰ Notably, behavior which might affect other students' “learning opportunities” would involve a much wider range of conduct than criminal activity, let alone criminal activity that creates safety risks.

One South Carolina statute even encouraged schools to report some incidents to law enforcement. A statute enacted in 1994 requires schools to:

[C]ontact law enforcement authorities immediately upon notice that a person is engaging or has engaged in activities on school property or at a school-sanctioned or -sponsored activity which may result or results in injury or serious threat of injury to the person or to another person or his property as defined in local board policy.²¹¹

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The statute's timing is notable. It was enacted in an era when juvenile crime rates peaked, and when states widely enacted a range *116 of “tough-on-crime” juvenile justice reforms.²¹² This statute was not triggered by the student's refusal to put away her cell phone in the Spring Valley incident--that behavior did not threaten, let alone cause, any injury. But it would apply to a range of other common behavior, such as schoolyard fights or threats, which a school district could consider to fall under the statute.²¹³

As with South Carolina's disturbing schools statute,²¹⁴ the state's statute requiring schools to report certain behaviors to law enforcement is among the broadest in the nation.²¹⁵ The DOJ even held it up as a model of a strong reporting statute in 2002 (though the DOJ did not evaluate concerns that too much reporting might call law enforcement attention to situations that did not require it).²¹⁶

But South Carolina is not alone--other states have reporting laws, but their breadth varies, as Jason Nance has catalogued.²¹⁷ Some require schools to inform police of any “violent, disruptive incidents”²¹⁸ or any assault at school, even if it does not cause any injury.²¹⁹ Other states require reporting, but in narrower circumstances, such as in cases of criminal bullying,²²⁰ “intimidation,”²²¹ or possession of controlled substances or weapons.²²²

***117 C. Diversion Programs Available Through Law Enforcement, Not School**

Authorities do not prosecute every child who an officer arrests or charges, and officers sometimes do not intend for children they arrest or charge to be prosecuted. A large number are diverted. That is, the child-defendant is offered the opportunity for charges against him or her to be dropped if he or she participates in a program designed to help the child understand his or her error, take steps to avoid repeating that error, and/or make amends with the victim.²²³

One problem, however, is created when law enforcement agencies operate diversion programs and when there are insufficient school-based diversion programs. That scenario furthers the school-to-prison pipeline by inducing officers to arrest and charge children who they do not wish to prosecute, and school officials to involve officers in disciplinary matters as a means of accessing diversion programs. Law enforcement diversion programs are good alternatives to prosecution, but not to school discipline.

A challenge exists in the structure of such programs when, as in South Carolina, accessing them most easily occurs through police departments or prosecutors' offices, rather than purely through schools.²²⁴ This practice furthers the school-to-prison pipeline both through the arrest or charge itself--which can label the child delinquent--and because sometimes such cases inadvertently lead to prosecutions. The Spring Valley incident does not illustrate this issue--there is no public record suggesting that the SRO wanted either child he arrested to be diverted or that the solicitor considered it. But the practice certainly exists in South Carolina.

The practice is illustrated through a case handled by the author's juvenile defense clinic which arose from a different high school in Columbia, South Carolina.²²⁵ A sixteen-year-old was accused of petit larceny for stealing cash from a guidance counselor's desk.²²⁶ The boy was caught on video, confessed, and apologized to the guidance *118 counselor. He was also punished by the school with a long-term suspension requiring him to attend an alternative school for the remainder of the school year. The guidance counselor and SRO agreed that the boy did not need to be charged or convicted. They did want him to agree to pay back the money that was stolen, and knew that a diversion program operated by the sheriff's department would require restitution payments. So they charged him, and included with his charging documents a form

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recommending that he be permitted to participate in that program. But that program refused to accept the child because he had previously completed (successfully) a diversion program for an earlier minor offense. So the solicitor proceeded to prosecute the case. After students working in the juvenile defense clinic got involved, the child offered to pay back the money and the guidance counselor wrote a statement asking the prosecutor to drop the charges, which she did.

This case reveals the harms that can come from depending on law enforcement referrals for diversion programs. Simply facing these charges, which included court appearances, increased this child's likelihood of dropping out of high school fourfold.²²⁷ In addition, one wonders what would have happened to this child had his student attorneys not explored each avenue for a dismissal, and how many other children who lack such representation are prosecuted and convicted.²²⁸

This process shows how the existing legal structure funneled a boy, who authorities did not even want to charge, into the legal system. All the victim of this crime wanted was restitution. As the child's guidance counselor, he determined that a diversion program, which would require restitution, was the most effective way to both hold the child accountable and help prevent him from committing other crimes. Yet this teacher had no school-based diversion program to *119 turn to. The only perceived option was turning the child's mistake into a law enforcement matter.

This example shows that access to such diversion programs is structured inadequately because it requires school officials and SROs to arrest and charge individuals.²²⁹ One of the most frequently used diversion programs in South Carolina--and the program in the case study above that the guidance counselor and SRO recommended--is an "arbitration" program, a form of victim-offender mediation informed by restorative justice principles.²³⁰ The program is designed "[to] bring[] together the juvenile offender, victim, and community directly or indirectly under the guidance of a trained volunteer to determine what actions the offender must take to restore and enhance justice."²³¹ This program is similar to a large number of restorative justice programs that exist around the country.²³² In South Carolina, this program is operated by local prosecutors' and sheriffs' offices through a contract with the Department of Juvenile Justice ("DJJ").²³³ DJJ guidelines define who is eligible and exclude any child who has a prior offense.²³⁴ That provision excluded the child in the case study. These guidelines contain rather strict criteria, especially when compared to leading efforts in other jurisdictions to limit the school-to-prison pipeline by preventing charges for a list of misdemeanors unless it is the third offense in a single school year.²³⁵

The South Carolina status quo also stands in contrast to a leading diversion structure in place in Clayton County, Georgia, outside Atlanta. In place of arrests or charges (even those expected to lead to diversion programs), schools refer children directly to school-based programs.²³⁶ Similarly, the U.S. Department of Education in 2016 *120 urged schools to develop more "corrective, non-punitive interventions, including restorative justice programs and mental health supports."²³⁷ Such programs should "eliminate overreliance on SROs in schools."²³⁸ In Denver, for instance, restorative justice programs have helped reduce school-based law enforcement referrals significantly.²³⁹ But such structures were not available or considered during the Spring Valley incident. In South Carolina, an easy path to similar programs is through law enforcement referrals.

D. Prosecutorial Discretion

When SROs decide to charge children, the charges are funneled to juvenile court authorities, who must determine whether to prosecute, divert, or dismiss each case. These intake decisions are important in their own right and may also affect school and SRO decisions whether to arrest or charge children in the first instance.²⁴⁰ These decisions are especially

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important when the criminal law has a particularly wide scope, giving authorities tremendous discretion to determine which school misbehavior will be prosecuted.²⁴¹

Juvenile court intake decisions have long been essential features of our juvenile justice system, and have distinguished that system from the criminal justice system for adults.²⁴² A central principle is that juvenile court authorities should consider two factors when deciding *121 whether to prosecute a child: first, whether they can prove a child has committed a crime and, second, whether prosecuting a child for such a crime is necessary to protect the public or to serve the juvenile justice system's rehabilitative ends.²⁴³ As a result, juvenile courts should practice "judicious nonintervention."²⁴⁴ The second factor, in practice, ought to screen out many school-to-prison pipeline cases from juvenile court dockets.

Here too, the Spring Valley incident is instructive because of the unusually public statements about whether to press the disturbing schools charges, and the concerning absence of any consideration of that essential second factor in those statements. The Richland County solicitor issued two public statements regarding the disturbing schools charges filed by the SRO against the two girls.²⁴⁵ Both statements emphasized whether evidence could prove the girls guilty of the crime.²⁴⁶ Neither statement discussed whether prosecuting the charges would help rehabilitate them or protect the public, or even noted such questions as an element of prosecutorial discretion.²⁴⁷

One earlier South Carolina disturbing schools case illustrates a similar concern. The case involved a ten-year-old elementary school student who hit a teacher's aide.²⁴⁸ By his own admission, he then "proceeded to scream as loud as he could for one hour."²⁴⁹ Then, while sitting in an administrative office, he said he tried to kill himself when a police officer walked in.²⁵⁰ The appellate record does not reveal why this child was prosecuted. The bare facts reported on appeal make one wonder whether mental health interventions might have served this young child's, and the public's, interest more effectively than the juvenile justice system. There is no provision in South Carolina law explicitly designed to ensure that authorities fully consider whether prosecution serves the purpose of the juvenile justice system. Other scholarship proposes legal reforms to do so.²⁵¹

***122 III. REFORM EFFORTS AFTER SPRING VALLEY AND WHY COMPREHENSIVE REFORM IS NEEDED**

Intensive reform efforts have been underway in South Carolina since the Spring Valley High incident.²⁵² Legislators and litigators have targeted the disturbing schools statute.²⁵³ School districts and law enforcement agencies in Richland County have renegotiated memoranda of agreement regarding SROs.²⁵⁴ The South Carolina Department of Education has promulgated regulations which might limit the role of SROs to school discipline.²⁵⁵

This Part will explore those reform efforts. These efforts are positive²⁵⁶ and have the potential to limit school-to-prison pipeline arrests, charges, and prosecutions in South Carolina. However, these efforts are also limited. Efforts to narrow the disturbing schools statute are welcome--but may not stop authorities from charging children with other offenses, and levers other than legislative changes can lead to significant reductions in disturbing schools charges.²⁵⁷ Efforts to renegotiate memoranda of agreement have yielded some improved memoranda, but still direct schools to refer all cases involving suspected crimes (no matter how minor) to law enforcement.²⁵⁸ State regulatory efforts are perhaps most promising in that they limit SRO involvement in school discipline incidents unless it is a more serious crime, creates an immediate safety risk, or represents the third such crime or more during a school year.²⁵⁹ Yet *123 even these

regulations leave much discretion with school officials and SROs.²⁶⁰ And no significant efforts are underway to expand school-based diversion programs or to ensure that charging decisions consider whether prosecuting children for school-based offenses serves the juvenile justice system's rehabilitative mission.²⁶¹

A. Narrowing Criminal Law

This section will analyze legislative and litigation efforts seeking to narrow significantly the scope of the disturbing schools statute. It will also explain how South Carolina's experience beyond the Spring Valley incident demonstrates that such efforts, while positive, will not fully address the problem of legal practices transforming school misbehavior into juvenile delinquency issues.

1. *Disturbing Schools Legislation and Kenny v. Wilson*

In 2017, the South Carolina Senate passed a bill which would dramatically narrow the scope of South Carolina's disturbing schools statute.²⁶² The South Carolina House of Representatives did not act on the bill before recessing for 2017, but may consider the bill when it reconvenes in 2018.²⁶³ The bill would mostly exempt students permitted to be at their school from the scope of the law.²⁶⁴ The only way a student could be guilty of disturbing his or her own school is if they threatened "to take the life of or to inflict bodily harm upon another."²⁶⁵

Advocacy for the 2017 bill includes one detail rich in historical irony. The current version of the disturbing schools law was enacted *124 in 1968 in response to civil rights protests in South Carolina.²⁶⁶ The law's sponsor told the press, "I'm interested in keeping outside agitators off campus."²⁶⁷ The sponsor of the 2017 bill to narrow the disturbing schools statute has used that historically resonant phrase to advocate for her bill.²⁶⁸ She has argued that her bill would "take our 'disturbing schools' law back to its original intent, which is to protect our (in-school) students from outside agitators."²⁶⁹ A phrase used in the 1960s to describe civil rights activists derisively is now used to support reforming the school-to-prison pipeline, a central goal of the contemporary civil rights movement.

Where the pending bill seeks to stop charging students with disturbing schools, pending federal litigation seeks to enjoin enforcement of the statute against students. The ACLU has sued the state of South Carolina claiming to represent a class of all South Carolina school children, with Niya Kenny as a named plaintiff, seeking an injunction against enforcement of both the disturbing schools and disorderly conduct statutes against them.²⁷⁰ The core *125 issue is the same one litigated unsuccessfully on behalf of individual clients discussed in Section II.A--whether the disturbing schools statute is unconstitutionally vague.²⁷¹ *Kenny v. Wilson* remains unresolved.²⁷²

Notably, the ACLU litigation seeks relief that is broader than the pending bill--an injunction against enforcing both disturbing schools and disorderly conduct against students.²⁷³ This goal implies an important concern: stopping enforcement of the disturbing schools statute might prevent some of the more extreme examples of charges, but will not limit the school-to-prison pipeline as broadly as advocates hope. The ACLU's complaint notes how different charges can be interchangeable.²⁷⁴ For example, Kenny's police report states that she was arrested for disorderly conduct, but she was charged with disturbing schools.²⁷⁵ Such a concern is entirely appropriate, as discussed below.

2. South Carolina Experience Demonstrates that Narrowing the Criminal Law Is an Important but Insufficient Reform

The proposed bill to limit the scope of the disturbing schools statute would likely prevent the most egregious prosecutions for which no other criminal law is applicable--such as those at issue in the Spring Valley High School incident. But past experiences elsewhere in South Carolina demonstrate that authorities have used other charges in a large number of cases and thus perpetuated the school-to-prison pipeline.²⁷⁶ Those experiences contrast with the experience of Texas where broader reforms, including narrowing the criminal law, led to significant declines in school-based arrests.²⁷⁷ At a minimum, this contrast shows that the effect of narrowing the *126 criminal law may vary significantly by jurisdiction. At a maximum, it suggests that reforming disturbing school statutes or otherwise narrowing one portion of the criminal law without broader reforms will only have a modest impact. Moreover, recent South Carolina data reveal a dramatic drop in disturbing schools charges without any statutory change--suggesting that factors other than the statute itself are particularly impactful.²⁷⁸

The historic experience of Lexington County, South Carolina--a large suburban and rural county on the west side of the Congaree River across from Columbia-- is particularly instructive. In 2010, more than five years before the Spring Valley High School incident, the elected solicitor decided to limit disturbing schools prosecutions.²⁷⁹ In a letter to the local school superintendent, the solicitor noted his office's "very long" dockets and schools' ability to serve kids with behavior problems outside of the justice system.²⁸⁰ He said his office "will no longer prosecute a juvenile's first two offenses of [d]isturbing [s]chools (DS) or [d]isorderly [c]onduct (DC)." ²⁸¹

The solicitor's announcement had the intended effect on disturbing schools charges--they plummeted.²⁸² In four of the five preceding *127 years, disturbing schools had been the single most frequent charge for children referred to the Lexington County Family Court, accounting for 98 to 161 cases in each of those preceding five years.²⁸³ After the letter was sent, the charge dropped out of the top five most frequent charges²⁸⁴ and has remained out of the top five ever since.²⁸⁵ Even if the charge was a close sixth place, it would account for no more than 24 to 54 charges, depending on the year.²⁸⁶

But Lexington County statistics suggest that this change had, at most, a small effect on the number of overall charges. While disturbing schools charges declined, simple assault and battery²⁸⁷ charges spiked.²⁸⁸ This suggests that authorities charged disturbing schools cases as something else. Where there had been 88, 61, and 89 simple assault charges in the three years preceding the solicitor's announcement, there were 189, 126, and 140 charges in the three subsequent years.²⁸⁹ The three-year average increased by 91.2%.²⁹⁰ That dramatic rise would be notable under any circumstances, and is particularly notable given the simultaneous decline in overall charges, and the shift away from using the disturbing schools charge.

*128 The overall number of charges in the county did drop after the solicitor's 2010 letter.²⁹¹ However, that decline was part of a county-and state-wide trend of fewer family court referrals (which most likely largely follows reducing juvenile crime rates). The average total referrals in Lexington County for the three years before the 2010 letter were 19.7% higher than the average total referrals for the subsequent three years.²⁹² But statewide, the total number of charges dropped even more--22.7%²⁹³ -- raising doubt that the Lexington County solicitor's policy towards disturbing schools had much of an impact on the overall decline.

Statewide trends also suggest that authorities have historically replaced disturbing schools with simple assault and battery charges. *129 After the South Carolina Department of Juvenile Justice studied disturbing schools charges (and the racial disparities within them) in the 2008-2009 fiscal year,²⁹⁴ the number of disturbing schools charges declined--from 2339 in 2008-2009 to 1780 in the following year and 1067 in 2010-2011.²⁹⁵ As in Lexington County, when disturbing schools charges declined, simple assault and battery charges picked up much of the slack. They spiked by nearly 900 in 2010-2011, and subsequently disturbing schools charges have crept back up while simple assault and battery charges have crept down in tandem.²⁹⁶ Notably, as Figure 1 illustrates, the trend line for each charge appears to be a mirror image of the trend line for the other.

Figure 1. The relationship between disturbing schools and simple assault and battery charges in South Carolina Family Courts.²⁹⁷

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

The most likely explanation of these data is that when authorities charged children for disturbing schools less frequently, they started charging them for simple assault (and likely other charges) that could be applied to schoolyard fights and other misbehavior. Fewer disturbing schools charges is still a good thing. It would be difficult to frame the Spring Valley High School student's refusal to put away her *130 cell phone as simple assault, and thus similar conduct would not likely be charged if the disturbing schools statute is amended. But the close relationship between disturbing schools and simple assault and battery charges should give some caution to advocates for narrowing the criminal law. That step without others will probably reduce the number of children arrested and charged for misbehavior at school somewhat, but is unlikely to cause more dramatic change.

South Carolina appears to be in the process of breaking this pattern--but the bottom line is that advocates should look beyond the scope of the criminal law. The most recent year's data reveals a 50% decline in the number of disturbing schools charges--from 1324 in 2015-2016 to 652 in 2016-2017.²⁹⁸ It appears that some disturbing schools cases are, consistent with prior practice, simply being charged as other crimes. While overall charges decreased 12% and nonviolent charges decreased 14%,²⁹⁹ public disorderly conduct charges actually increased slightly--suggesting that some disturbing schools cases are being charged as disorderly conduct.³⁰⁰ Even so, the dramatic drop in disturbing schools charges significantly outweighs any such shift. Notably, this dramatic decline happened without any statutory changes, as efforts to reform the disturbing schools statute remain pending. Some other legal reforms or practice changes must therefore explain the reduction in disturbing schools charges. This conclusion should not discourage efforts to reform the disturbing schools statute--it remains an overly broad and frequently used criminal law. This conclusion should, however, focus efforts on other reforms beyond disturbing schools legislation as even more powerful means to limit the school-to-prison pipeline.

Texas has an instructive and optimistic experience. In 2013, Texas narrowed its version of disturbing schools--misdemeanor offenses of "disruption of class" and "disruption of [school] transportation"--so they do not apply to children attending their own school.³⁰¹ A *131 significant change promptly followed. Citations issued to students fell by about fifty percent immediately, and reduced school-based arrests by one-third.³⁰² But it is hard to attribute this decline entirely to that statutory change, because the legislature enacted other reforms at the same time--prohibiting officers from ticketing children at school and requiring them to complete complaints, including sworn statements by school officials about any disabilities the child may have and what "graduated sanctions" the school attempted.³⁰³ And even in Texas there was still a substitution effect, showing that the Texas reforms did not stop authorities from using arrests as a form of school discipline. A 2016 review of Texas data found a greater reliance on disorderly conduct

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charges after the 2013 legislative change, “suggesting that Disorderly Conduct has replaced Disruption of Class and Transportation as a general catch-all offense.”³⁰⁴ Schoolyard fights, disorderly conduct, and similar charges continue to account for more than half of all school-based incidents which lead to court action.³⁰⁵

Skepticism that narrowing the criminal law alone will dramatically reduce school-based arrests and charges is consistent with the experience of other states discussed in Section II.A.1. Even when other states did not have disturbing schools statutes, authorities charged children for petty school misbehavior by labeling it something else--disorderly conduct or “failure to comply.”³⁰⁶ Relabeling relatively less severe offenses has occurred in other juvenile justice contexts, and we should expect no different here.³⁰⁷

***132** This analysis should not dissuade advocates from working to repeal or narrow disturbing schools statutes, but rather, puts such efforts into context. Compared with the status quo disturbing schools statute, it would be preferable to have no disturbing schools statute applicable at all or at least to have such a statute narrowed by statutory language or court decision, as several states have done.³⁰⁸ But if either of these preferences were followed absent other changes, one should expect only a modest limitation on the school-to-prison pipeline, and for authorities to rely more frequently on charges other than disturbing schools. How many school-based arrests and charges will occur will vary from state to state. But even when large reductions are possible, narrowing the criminal law will leave plenty of incidents best handled at school within the boundaries of the criminal law. Thus, narrowing efforts are helpful, but will not solve the entire school-to-prison pipeline problem.

B. Governing the Role of SROs

Nationally, some of the most prominent efforts to reform the school-to-prison pipeline have focused on the role of SROs. Ferguson, Missouri, represents a leading illustration.³⁰⁹ The DOJ's 2015 investigation of the Ferguson Police Department (triggered by protests surrounded the police shooting death of Michael Brown in 2014) included findings criticizing Ferguson SROs for “treat[ing] routine discipline issues as criminal matters,” including frequently charging children with “[f]ailure to [c]omply, [r]esisting [a]rrest, and [p]eace [d]isturbance.”³¹⁰ By the spring of 2016, the DOJ and Ferguson had entered into a consent decree which called for limiting SROs' role.³¹¹ The consent decree requires “SRO Non-Involvement in School Discipline” and specifically directs school officials, rather than SROs, to handle “minor offenses committed by students, including, but not limited to, disorderly conduct, peace disturbance, loitering, trespass, profanity, dress code violations, and fighting not involving a weapon and not resulting in physical injury.”³¹² This provision recognizes that many incidents which fall within the ***133** boundaries of the criminal law are best framed as school disciplinary matters rather than law enforcement matters.

But wider federal reform efforts have not adequately addressed the role of SROs.³¹³ The federal involvement in Ferguson made it a unique case. The DOJ and the U.S. Department of Education's most recent guidance³¹⁴ offers much more modest reforms. As discussed above,³¹⁵ model memoranda of agreements from the government and NASRO at the time of the Spring Valley incident did not impose limits on when schools could refer children to SROs or what SROs could do in those situations. In September 2016, the Departments offered guidance calling for some improvements in managing SROs' activities, but which would not fundamentally limit their role. The Departments published a “Safe School-based Enforcement through Collaboration, Understanding, and Respect (“SECURE”) State and Local Policy Rubric.”³¹⁶ The SECURE rubric called on districts and local law enforcement agencies to enter into memoranda of understanding, and to “involve [] ... community stakeholders in the development of [memoranda of understanding],”

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citing state statutes and regulations requiring such involvement.³¹⁷ Notably, neither the SECURE rubric nor the state laws it cited recommend or require memoranda of understanding to contain express limits on the actions of SROs such as those in the Ferguson consent decree. To the extent the SECURE rubric says anything about SROs' roles at school, it suggests that SROs should *remain* involved in petty criminal matters, such as disturbing schools, minor fights, and the like. It encourages *134 memoranda of understanding to “[e]liminate the involvement of SROs in *non*-criminal matters,”³¹⁸ suggesting ongoing involvement in criminal matters.

The SECURE rubric also suggests that memoranda of understanding should “[e]ncourage officers to minimize arrests for minor school-based offenses.”³¹⁹ This “encouragement” is welcome, but the verb choice illustrates the guidance's weakness; minimizing arrests is encouraged, but fundamentally optional. To its credit, the rubric does cite several sample memoranda of understanding with more specific limits.³²⁰ For example, it cited a Broward County, Florida agreement providing that “[i]n any school year, the first instance of student misbehavior that rises to the level of a non-violent misdemeanor ... should not result in arrest nor the filing of a criminal complaint.”³²¹ Even this MOU, however, ensures that SROs have the discretion to arrest any child for any crime.³²² Thus, model federal memoranda continue to eschew the recommendation of advocates like the Advancement Project, which propose memoranda that would limit when schools can refer children to SROs and when SROs can arrest or charge children.³²³

The federal guidance also urges memoranda of understanding to require school districts and law enforcement agencies to “collect[,], analyz[e], and report[.]” data regarding SROs--how often they arrest or charge children, and the demographics (including race) of those children.³²⁴

This section will describe efforts in South Carolina to limit the role of SROs--and, in particular, to keep SROs away from school discipline matters-- both locally in the county where the Spring Valley incident occurred and statewide. Locally, these efforts include a voluntary agreement with DOJ, which mandates limits on SROs' roles and revising memoranda of agreement regarding SROs subsequent to the Spring Valley incident. Statewide efforts include a 2017 South Carolina Department of Education regulation limiting when schools may involve SROs. The voluntary agreement with DOJ and the state regulations are the most promising reforms, and limit when schools can involve SROs more dramatically, while leaving *135 much discretion with individual school districts. The revised memoranda of agreement largely track the most recent federal guidance--they include some useful improvements but do not impose binding limits on SRO involvement.

1. Local SRO Reforms in Richland County

The most dramatic change in practice in South Carolina since the Spring Valley incident is evident in Richland County, where that incident occurred. The Richland County Sheriff's Department--the department that employed, and fired, the SRO involved in that incident--reports that it dramatically reduced arrests of children by SROs in the school year after the incident.³²⁵ In the 2015-2016 school year, it reported 268 such arrests, compared with only 123 in the 2016-2017 school year, a 54% decrease,³²⁶ with drug and weapon possession charges accounting for a majority of the remaining arrests.³²⁷ Richland County reforms led to particularly dramatic changes compared with statewide trends. From 2015-2016 to 2016-2017, overall juvenile court referrals declined 11.9% statewide, and 22% in Richland County.³²⁸ Disturbing schools charges fell particularly precipitously in Richland County--from 97 in 2014-2015³²⁹ to 62 in 2015-2016,³³⁰ to so few that the state does not report county specific numbers in 2016-2017.³³¹

What legal reforms caused that decline? Following the Spring Valley incident and the DOJ's investigation of the Richland County Sheriff's Department, the sheriff's department took several steps to prevent SROs from becoming involved in regular school discipline. In particular, they agreed to several limits on SROs' roles via a voluntary agreement with the DOJ--entered into between the two school years noted above--and negotiated new memoranda of agreement with all of its local school districts to take effect in the *136 2017-2018 school year.³³² Just as the consent decree in Ferguson, Missouri contains stronger terms than national guidelines for memoranda of agreement, the Richland County voluntary agreement contains stronger provisions than the revised memoranda and is the clearest legal cause of the decline in arrests. That agreement, however, comes with a 2019 expiration date,³³³ thus underscoring the ongoing need for stronger terms in memoranda of agreement.

a. Voluntary Agreement with the DOJ

In August 2016, the Richland County Sheriff's Department entered into a voluntary agreement with the DOJ, in which the DOJ ended its investigation into the sheriff's department early and the department agreed to a range of steps to improve its performance.³³⁴ The voluntary agreement provides that SROs should not engage "in classroom management or school discipline matters that should be appropriately handled by school staff."³³⁵ But, where the revised memoranda continue to require schools to report incidents to SROs, the voluntary agreement includes provisions to keep SROs out of such incidents. The agreement, for instance, lists a range of offenses which "should typically be considered school discipline issues, and should be addressed by school personnel rather than SROs."³³⁶ That list reads more like the Ferguson, Missouri consent decree than the DOJ-recommended memoranda of agreement. It includes disorderly conduct, loitering, trespass, "fighting that does not involve a weapon or a physical injury that is more than de minimis," and disturbing schools, unless there is a "serious, real, and immediate threat to the safety of the school and its community."³³⁷

Consistent with that agreement, the department has changed many of its internal practices with the explicit goal of learning from the Spring Valley incident. In addition to significant training focused on *137 alternatives to arrests and charges, and how traumas and mental health conditions affect children's behavior, the captain who supervises all SROs employed by the department meets with each SRO after an arrest to discuss whether an arrest was necessary in that situation.³³⁸

The agreement is only legally binding for three years,³³⁹ making ongoing legal instruments, like memoranda of agreement between the department and school districts, of particular importance.

b. Renegotiated Memoranda of Agreement

Local authorities also renegotiated memoranda of agreement between the Richland County Sheriff's Department and local school districts. These renegotiated memoranda of agreement expand the SRO program. In the 2017-2018 school year, the Richland County School District Two will spend \$230,000 more for SROs than it did at the time of the Spring Valley incident.³⁴⁰ The sheriff's department will assign four additional SROs to the school district.³⁴¹ Other provisions largely follow the 2016 federal guidance--they are a step forward from prior memoranda of agreement and discourage arrests of students, but continue to require school administrators to report any crime to SROs and leave individual SROs with the authority to determine whether to arrest any individual student.

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The revised Richland County memoranda have several elements that track the 2016 federal guidance. They include several paragraphs that “strongly encourage” SROs to use alternatives to arrest for offenses such as disorderly conduct, trespassing, and loitering.³⁴² And they require the sheriff's department and SROs to track and make publicly available data regarding how frequently children are arrested or charged and the race (and other details) of children arrested or charged by SROs.³⁴³ The latter step was explicitly required in the sheriff's department's agreement with the DOJ following the DOJ's investigation into its SROs.³⁴⁴

Despite those additions, the key legal points in these new memoranda of agreement remain unchanged from the memoranda in place at the time of the Spring Valley incident, and thus are less ***138** legally effective than the voluntary agreement in separating law enforcement from school discipline. Where the voluntary agreement includes provisions to keep SROs out of incidents better handled by school staff, the revised memoranda continue to require schools to report incidents to SROs.³⁴⁵ The new memoranda emphasize in bold font the pre-existing language stating that SROs are not school disciplinarians but follow that language with the same troublesome provision requiring schools to report any criminal activity to the SRO.³⁴⁶ That provision threatens to turn SROs into disciplinarians, whether in bold text or not. That risk is especially strong so long as disturbing schools remains a criminal charge in its current form. One might argue that if the disturbing schools bill is enacted and that law can no longer apply to children properly at their own school, then this provision in the memoranda will result in fewer cases referred to SROs. But the wide range of other charges which could substitute--and have substituted--for disturbing schools suggest that this MOA provision will still require a wide range of behavior to be referred to SROs. Moreover, this MOA language exceeds what the South Carolina reporting statute requires. Under that law, schools must only report conduct that results in injury or a serious threat of injury, and gives school boards authority to define those terms,³⁴⁷ while the memoranda require the reporting of *any* crime. Consistent with the memoranda of agreement maintaining troublesome language requiring schools to refer crimes to SROs, the relevant school district policy continues to permit law enforcement involvement not only when crime occurs, but in pure school discipline situations, when one child's behavior affects another's “learning opportunities.”³⁴⁸

***139** The memoranda ensure that SROs have discretion whether to arrest or charge children for such incidents.³⁴⁹ This discretion illustrates a concern raised by Barbara Fedders--that even improved agreements can preserve police authority to determine when to arrest children, thus limiting the effect of reforms.³⁵⁰ That concern is particularly apt with the new memoranda because they are weaker than the model memoranda of agreement identified in the 2016 federal guidance--while the latter make clear that a first time nonviolent misdemeanor should not lead to an arrest or charges,³⁵¹ no such limitation exists in the Richland County memoranda.

Jason Nance recommended that memoranda of agreement “specify that SROs will not become involved in routine disciplinary matters.”³⁵² The MOA in effect for the Spring Valley incident and the subsequently revised memoranda indicate that it does not suffice to simply state that SROs should not engage in school discipline. Memoranda of agreement should clearly prohibit schools from referring children to SROs absent imminent safety risks,³⁵³ and prohibit SROs from arresting children for minor non-violent offenses unless the behavior is repeated and the school has tried other interventions.

The revised memoranda's continued requirement that schools report all crime to SROs creates a tension with the voluntary agreement. Under the memoranda, school officials are contractually obligated to report misbehavior that amounts to minor crimes to SROs.³⁵⁴ But under the voluntary agreement, SROs should consider such behavior to be school discipline rather than law enforcement matters, and not get involved.³⁵⁵ An important reform would be to

incorporate more of the voluntary agreement's provisions into memoranda of agreement, especially once the voluntary agreement with the DOJ expires in 2019.

***140 2. South Carolina Department of Education Regulations**

The South Carolina Department of Education promulgated regulations which more effectively distinguish law enforcement from school discipline by limiting when schools may refer behavior to SROs.³⁵⁶ The regulations explicitly exempt certain conduct from the list of crimes that must trigger automatic law enforcement referrals--disturbing schools, breach of peace, disorderly conduct, affray, and assault and battery which does not pose "a serious threat of injury or result[] in physical harm."³⁵⁷ Schools may refer such less severe offenses to SROs "only when the conduct rises to a level of criminality, and the conduct presents an immediate safety risk to one or more people or it is the third or subsequent act which rises to a level of criminality in that school year."³⁵⁸ This language is based on the Ferguson consent decree, which keeps SROs out of routine school disciplinary incidents,³⁵⁹ and a leading interagency agreement, which prevents arrests or prosecutions for a similar list of minor charges unless a student has committed at least three offenses in the school year at issue.³⁶⁰ Further regulatory limits on law enforcement referrals are not likely possible in South Carolina

so long as the statute requires referrals whenever an action "may result or results in injury or serious threat of injury."³⁶¹

The regulation requires law enforcement agencies and school districts to enter memoranda of agreement before placing SROs in schools, and those memoranda must include the regulatory limitations on SROs' roles.³⁶² This provision should require a re-evaluation of the terms criticized in Section III.B.1 that continue to require schools to refer all incidents that amount to a crime to SROs.

These regulations are the furthest reaching statewide reform since the Spring Valley incident. They explicitly prevent referrals to law enforcement for misdemeanor offenses--and do so more strongly than the revised Richland County memoranda of agreement.³⁶³ By limiting the number of cases that schools can refer to SROs, it avoids the concern that authorities can simply re-label disturbing schools as another offense.³⁶⁴ Quite simply, if law enforcement is not involved in a school discipline situation, then law enforcement cannot arrest or charge children in that situation.

Nonetheless, even these revised regulations would still permit schools to inform SROs of any incident involving a petty crime that the school interprets to pose a safety threat of any kind. The regulation leaves it to schools to define what conduct "presents an immediate safety risk" and to determine which such conduct they will refer to SROs. The regulation also permits schools to determine when a simple assault "poses a serious threat of injury or results in physical harm" (and thus triggers an automatic law enforcement referral).³⁶⁵ Reporting a child to law enforcement for refusing to put a cell phone away, as in the Spring Valley incident, would likely have been prohibited. But in common situations of school fights, any fight could be reasonably feared to pose a threat of injury to others and thus involve SROs. The effect of this promising new regulation, therefore, will depend on how schools implement it.

***142 C. Other Pillars of the Pipeline**

While Sections III.A and III.B summarize some impressive legal reform efforts, those efforts only address a portion of the laws that structure the school-to-prison pipeline. Several key pieces of the pipeline's legal architecture remain untouched by reform efforts.

1. Reporting Statutes

First, there has been no effort to narrow the statute requiring schools to report to law enforcement incidents posing a “serious threat of injury” to a person or property.³⁶⁶ Juvenile justice law is now evolving towards a less punitive and more rehabilitative model, which includes questioning tough-on-crime era reforms such as this reporting statute.³⁶⁷ But no bill challenging the reporting requirement has been introduced in the South Carolina legislature. Until that happens, many fights at school must, by law, be reported to law enforcement, even when a school-based disciplinary intervention is more appropriate. The statute includes language permitting schools to define what level of injury or threat triggers this requirement. At most, however, that language allows some school districts to narrow their reporting obligations under this statute. Naturally, only school districts that wish to narrow their obligations will do so. As under the new state regulations, districts remain free to report a broad range of incidents to law enforcement.

2. Absence of School-Based Diversion Programs

Second, diversion programs have expanded--but they largely continue to operate through law enforcement rather than through schools. In Richland County, law enforcement-based programs are growing pursuant to the Richland County Sheriff's Department's voluntary resolution agreement with the DOJ. That agreement requires SROs to use the “least coercive measures” possible in response to students, including “restorative justice approaches.”³⁶⁸ In addition, the agreement requires that the sheriff's department train *143 SROs in any school-based restorative justice or other diversion programs,³⁶⁹ and to maximize use of all available programs.³⁷⁰ On a statewide level, the revised state disciplinary regulations list restorative justice and other interventions as alternatives to more punitive interventions for student misconduct.³⁷¹

But neither the voluntary agreement nor the new state regulations actually create (or require districts to create) diversion programs operated through school systems.³⁷² Such programs have grown slightly, but remain sparse. The revised Richland County memoranda of agreement encourage SROs to access diversion programs, but note that they are operated through the Richland County Sheriff's Department Youth Services Division.³⁷³ Small school-based restorative justice programs exist in a small number of local school districts in the state. The Richland One School District has a pilot restorative justice program run with law student volunteers, but the program was so small as to not be included on the district's website as of this writing.³⁷⁴ The Charleston School District announced plans to start restorative justice programs in three schools in the 2017-2018 school year.³⁷⁵ These are hopeful but small steps and there has been no concerted effort as yet to develop such programs statewide. Law enforcement involvement thus remains essential to accessing diversion programs.

3. Prosecutorial Discretion

Third, there has been no legal reform effort to reconsider how authorities determine which charges to prosecute and which to divert *144 or dismiss. Consider what could happen even if reformers succeed in narrowing disturbing schools statutes and in limiting rules for when schools may refer incidents to SROs. SROs will still be present in schools, and will still have the potential to arrest and charge students for misbehavior better dealt with at school. SROs could encounter fights in the hallway, or school officials could report incidents to SROs (even in violation of the statute). The school could even skip the SRO and file charges directly.³⁷⁶ How would individual children fight resulting charges? Indeed, even if school officials reported the incident to an SRO in violation of the new state regulations, nothing in those revised

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regulations or existing MOAs provides individual children with a direct legal remedy. Absent such a remedy, it is not difficult to imagine school districts violating the spirit, if not the letter of the regulation, and continuing to involve law enforcement in a range of student misbehavior. And it is similarly easy to imagine law enforcement encountering incidents at school and arresting or filing charges against children.

In such cases, the question then becomes whether authorities prosecute such charges and, if they do, how the child might fight them. Limited data in South Carolina's record suggests that agencies are more likely to consider whether prosecuting a particular child serves the system's rehabilitative goals and thus dismiss a case.³⁷⁷ The ACLU's examination of South Carolina data found that in twenty percent of cases in which the agency recommended diverting children accused of minor school-based offenses, elected prosecutors overruled those recommendations and prosecuted the children.³⁷⁸ An *145 agency model would lend itself to judicial review of decisions to prosecute cases, especially when the agency failed to seriously consider whether such prosecution served the child's or the public's interest.³⁷⁹ However, there has been no movement towards such a model, nor has there been any movement to change how prosecutors determine which charges to prosecute.

CONCLUSION

The Spring Valley incident of 2015 and South Carolina's broader experience illustrate much about the school-to-prison pipeline's legal architecture--both how the law permits the pipeline to operate and how legal reforms can address it. The incident did not result from a single law or legal practice, but from several--the presence of broad criminal laws, the wide presence of SROs in schools, absence of effective limits on those officers' roles, and prosecutorial discretion that does not adequately consider whether specific incidents warrant juvenile prosecutions.³⁸⁰ Even when the widely recommended step of establishing memoranda of agreements governing SROs is taken, it is insufficient when those memoranda do not impose meaningful limits on when schools can refer students to SROs or when SROs can arrest students.³⁸¹ Finally, concentrating diversion programs in law enforcement and prosecution agencies helps lead cases to those agencies, including cases that could be better handled through programs operated at schools without the involvement of law enforcement.³⁸²

Post-Spring Valley efforts to reform the law to limit the school-to-prison pipeline have been heartening in multiple respects. First, the existence of meaningful (however incomplete) reforms in a jurisdiction with a particularly active pipeline demonstrates that reform can happen anywhere.³⁸³ The dramatic statewide decline in disturbing schools charges should be celebrated. Second, the transition of local officials involved in this incident--the sheriff and administrators of the affected school district--into advocates for legal reform is notable, and provided advocates with prominent support of *146 certain reform efforts.³⁸⁴ The decline in arrests by Richland County SROs is particularly dramatic,³⁸⁵ and suggests that the voluntary agreement terms which led to that decline should be incorporated through memoranda of agreement and elsewhere across the state.

Those reforms, however, remain incomplete, and they illustrate several lessons for advocates in South Carolina and elsewhere. First, while incremental reform may be necessary, advocates must be clear that success on one or two elements does not render the job complete. In particular, this Article has demonstrated how narrowing criminal statutes--while positive and important-- will not stop authorities from arresting and charging children for relatively minor offenses at school in some states.³⁸⁶ Legislatures should narrow such statutes, but that is a first, not a last step.

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Second, statewide rules limiting schools' ability to make law enforcement referrals are possible. The most dramatic statewide reform in South Carolina thus far has been the state Department of Education's new regulations limiting when schools can refer children to law enforcement.³⁸⁷ Prohibiting such referrals for minor offenses, absent repeat offenses or an imminent safety risk, is a dramatic development which could serve as a model for other state regulations or statutes.³⁸⁸ States, including South Carolina, should repeal statutes requiring schools to report broad sets of crimes to law enforcement, and states should consider enacting statutes or regulations like South Carolina's prohibiting the reporting of minor crimes absent immediate safety risks or repeat offenses.³⁸⁹

Third, stronger memoranda of agreement between schools and law enforcement agencies are essential. An MOA simply stating that SROs do not engage in school discipline did not prevent the Spring Valley incident, especially when the MOA required schools to report all crimes to SROs.³⁹⁰ It is unlikely that more clearly encouraging SROs to avoid arrests will have a dramatic effect, especially when the MOA continues to require schools to report all crimes to SROs.³⁹¹ School districts and law enforcement agencies should reconsider such *147 terms, and include more explicit limitations on SROs' roles such as those included in South Carolina's new regulation and in the Richland County Sheriff's Department's voluntary agreement with DOJ.³⁹²

Fourth, reformers should consider all the different authorities that may be able to influence relevant points of law. Individual school districts develop discipline codes, establish (or do not establish) diversion programs within their schools, and negotiate memoranda of agreement with law enforcement agencies.³⁹³ Advocacy with those local entities, in addition to the statewide advocacy that has already occurred, is an important piece of the puzzle.³⁹⁴

These steps, coupled with advocacy for reforms that are beyond the scope of this Article (such as improving teacher and SRO training, and developing positive school culture that does not depend on law enforcement), have great promise for preventing future Spring Valley incidents and for significantly narrowing the school-to-prison pipeline.

Footnotes

a1 Assistant Professor, University of South Carolina School of Law. The author would like to thank Heather Goergen for excellent research assistance.

1 The incident described here is set forth in detail in Section I.A, *infra*.

2 A federal statute defines an SRO as a "career law enforcement officer ... assigned by the employing police department or agency to work in collaboration with schools and community-based organizations" 34 U.S.C. § 10389(4) (2015). By a memorandum of agreement between the local school district and county sheriff's department, the latter assigned deputy sheriffs to Spring Valley High School. *See infra* note 96.

3 *See infra* notes 45-57 and accompanying text (describing the events at Spring Valley High School in greater detail).

4 S.C. CODE ANN. § 16-17-420 (2010).

5 Several news stations published articles reporting on the incident that included footage of these recordings. *See* Sarah Aarthun & Holly Yan, *South Carolina Student's Violent Arrest Caught on Video; Officer Under Investigation*, CNN (Oct. 27, 2015, 12:50 AM), <http://www.cnn.com/2015/10/26/us/south-carolina-spring-valley-high-school-student-video/index.html> [<https://perma.cc/9VS7-2PGC>]; Erik Ortiz & Craig Melvin, *South Carolina Deputy Ben Fields Fired After Body Slamming*

Student: Sheriff, NBC NEWS (Oct. 28, 2015, 12:34 PM), <https://www.nbcnews.com/news/us-news/sheriff-announce-south-carolina-deputy-ben-fields-be-fired-sources-n452881> [<https://perma.cc/UW3F-ZRB8>].

6 The focus of this Article is on direct examples of the school-to-prison pipeline--incidents at school that trigger arrests and/or charges. Indirect examples, in which some combination of severe school discipline, poor education, and excluding children from regular schools creates criminogenic circumstances, are outside the scope of this Article.

7 For a history and critique of the school-to-prison pipeline metaphor, see generally Ken McGrew, *The Dangers of Pipeline Thinking: How the School-to-Prison Pipeline Metaphor Squeezes Out Complexity*, 66 EDUC. THEORY 341 (2016).

8 *E.g.*, *infra* notes 40-42.

9 S.C. CODE ANN. § 16-17-420(A)(1)(a) (2010).

10 *See infra* note 121 and accompanying text.

11 *See infra* notes 158-62 and accompanying text.

12 *See infra* Section II.A.1.

13 A federal statute defines an SRO as a “career law enforcement officer ... assigned by the employing police department or agency to work in collaboration with schools and community-based organizations” 34 U.S.C. § 10389(4) (2015).

14 *See infra* note 190 and accompanying text.

15 *See infra* notes 204-06 and accompanying text.

16 S.C. CODE ANN. § 59-24-60 (1994).

17 1994 S.C. Acts 299.

18 *See infra* Section II.C. A diversion program is designed to help the child understand his or her error, to prevent its recurrence, and to prevent a prosecution of that child--that is, to divert the child from the juvenile justice system. Some diversion decisions are made after a charge is referred to juvenile courts, and others (typically involving programs operated outside of law enforcement) are made before any charge, thus eliminating the need for a charge.

19 *See infra* Section II.C.

20 *See* GEORGE W. APPENZELLER ET AL., AN EVALUATION OF THE SOUTH CAROLINA JUVENILE ARBITRATION PROGRAM 12 (2011), http://www.swsolutionsinc.com/Library/Reports/2011_SCDJJ_ArbitrationProgram.pdf [<https://perma.cc/ZN4X-5PPT>] (describing a commonly used diversion program in South Carolina as one for children “charged with committing” certain offenses).

21 *See infra* Section II.C.

22 *See id.*

23 *See id.*

24 This historic rehabilitative purpose has been stated for decades. *See, e.g.*, Wallace Waalkes, *Juvenile Court Intake--A Unique and Valuable Tool*, 10 CRIME & DELINQ. 117 (1964) (quoted in WILLIAM SHERIDAN, U.S. DEPT' OF HEALTH, EDUC. & WELFARE, CHILDREN'S BUREAU, STANDARDS FOR JUVENILE AND FAMILY COURTS 53 (1966)).

25 *See infra* notes 72-79 and accompanying text.

26 Letter from Dan Johnson, Solicitor, Fifth Judicial Circuit to Captain John Bishop, South Carolina Law Enforcement Division (Sept. 2, 2016), regarding South Carolina Law Enforcement Division Investigative File No. 32-15-0130, at

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11 [hereinafter Solicitor Investigation Summary], <http://www.scsolicitor5.org/Portals/2/SLED%20Investigative%C20Flie%C20No%20%2032-15-0130%20-%20Spring%20Valley%20Matter.pdf> [https://perma.cc/9NLJ-9HEX].

27 See, e.g., U.S. DEPT OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE JUSTICE SYSTEM STRUCTURE & PROCESS: ORGANIZATION AND ADMINISTRATION OF DELINQUENCY SERVICES (2013), http://www.ojjdp.gov/ojstatbb/structure_process/qa04205.asp?qaDate=2012 [https://perma.cc/F28C-JVSG] (analyzing juvenile justice purposes clauses in state statutes and finding the vast majority of states endorse rehabilitative goals). South Carolina's statute endorses rehabilitative goals. S.C. CODE ANN. § 63-19-350(7) (2008).

28 Josh Gupta-Kagan, *Rethinking Family Court Prosecutors: Elected and Agency Prosecutors and Prosecutorial Discretion in Juvenile Delinquency and Child Protection Cases*, 85 U. CHI. L. REV. (forthcoming 2018).

29 See *infra* notes 298, and 325-26 and accompanying text.

30 See *infra* note 262 and accompanying text.

31 See *infra* Section III.A.2.

32 See *infra* Section III.B.1.a.

33 See *infra* notes 336-37 and accompanying text.

34 See *infra* Section III.B.1.b.

35 See *infra* note 342 and accompanying text.

36 See *infra* note 345 and accompanying text.

37 See *infra* note 356.

38 See *infra* note 357-58.

39 See *infra* note 362.

40 For an illustrative summary of the pipeline and its history and growth, see Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 929-45 (2016) [hereinafter Nance, *Students, Police, and the School-to-Prison Pipeline*]; Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 324-31 (2016) [hereinafter Nance, *Tools for Change*].

41 E.g., Nance, *Students, Police, and the School-to-Prison Pipeline*, *supra* note 40, at 929-45; Nance, *Tools for Change*, *supra* note 40, at 324-31; Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 864 (2012). See generally Barbara Fedders, *The Anti-Pipeline Collaborative*, 51 WAKE FOREST L. REV. 565 (2016).

42 Nance, *Students, Police, and the School-to-Prison Pipeline*, *supra* note 40, at 978.

43 See generally, e.g., Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765 (2017); Josh Kagan, *Reappraising T.L.O.'s 'Special Needs' Doctrine in an Era of School-Law Enforcement Entanglement*, 33 J.L. & EDUC. 291 (2004); Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067 (2003).

44 The South Carolina State Law Enforcement Division and the FBI both investigated the incident, which was also the subject of significant media attention. Except as noted, the summary of facts relies on the official investigations as summarized by the elected solicitor based on law enforcement investigations. See Solicitor Investigation Summary, *supra* note 26. Other accounts abound. E.g., ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* 72-73 (2017); Alan Blinder, *Ben Fields, South Carolina Deputy, Fired Over Student Arrest*, N.Y. TIMES (Oct. 28, 2015), <https://www.nytimes.com/2015/10/29/us/south-carolina-deputy-ben-fields->

fired.html [https://nyti.ms/2iPRC9e]; Amanda Ripley, *How America Outlawed Adolescence*, ATLANTIC MONTHLY (Nov. 2016), <https://www.theatlantic.com/magazine/archive/2016/11/how-america-outlawed-adolescence/501149/> [https://perma.cc/PQX3-Y7WK].

45 Solicitor Investigation Summary, *supra* note 26, at 1.

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *See id.*

55 *Id.* at 2.

56 *Id.*

57 *Id.*

58 *See* S.C. CONST. art. V, § 24.

59 Solicitor Investigation Summary, *supra* note 26, at 2.

60 Staff Reports, *Richland Co. Sheriff Leon Lott's Statement on Firing of Deputy Ben Fields*, THE STATE (Oct. 28, 2015, 4:20 PM), <http://www.thestate.com/news/local/crime/article41712405.html> [https://perma.cc/3B42-CWE5].

61 *Id.* (“The one [action] that concerns me the most was the throwing of the student across the floor.”).

62 *See* Aarthun & Yan, *supra* note 5.

63 Solicitor Investigation Summary, *supra* note 26, at 9.

64 Kenny's name was made public because she was charged as an adult. She also has spoken frequently about the incident to the media and is the lead plaintiff in the class action challenging the use of the disturbing schools charge. *See* Complaint at 4, *Kenny v. Wilson*, No. 16 Civ. 2794 (D.S.C. filed Aug. 11, 2016) [hereinafter *Kenny v. Wilson* Complaint], https://www.aclu.org/sites/default/files/field_document/kenny_v_wilson_complaint.pdf [https://perma.cc/PU7K-WL3X].

65 *See, e.g.*, WIS Staff, *FBI to Lead Investigation of Violent Incident at Spring Valley High School*, WISTV.COM (Nov. 19, 2015, 3:41 PM), <http://www.wistv.com/story/30353999/video-shows-confrontation-between-spring-valley-student-and-school-resource-officer> [https://perma.cc/9EE4-9753] (posting three videos of the arrest).

66 Evie Blad, *She Recorded Her Classmate's Arrest, Then Got Arrested, Too: Q&A with Former Student Niya Kenny*, EDUC. WK. (Jan. 24, 2017), <http://www.edweek.org/ew/articles/2017/01/25/sherecorded-her-classmates-arrest-then-got.html?print=1> [https://perma.cc/TL76-DENU].

67 *See* *Kenny v. Wilson* Complaint, *supra* note 64, ¶ 86.

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- 68 *Id.*
- 69 *See* Staff Reports, *supra* note 60.
- 70 *Id.*
- 71 *See id.*
- 72 *See* WIS Staff, *Solicitor: No Involvement in Charges Against Spring Valley HS Teens Until FBI Investigation Over*, WISTV.COM (Dec. 16, 2015, 7:34 AM), <http://www.wistv.com/story/30763259/black-parents-association-wants-charges-against-teens-dropped> [<https://perma.cc/GVB2-9CYB>].
- 73 Statement of Dan Johnson, Fifth Judicial Circuit Solicitor (Dec. 16, 2015), <http://www.wistv.com/story/30773582/read-solicitor-johnsons-statement> [<https://perma.cc/U8YT-DYSW>]; *see also* WIS Staff, *supra* note 72 (describing advocates' efforts and the solicitor's response).
- 74 Kenny was seventeen years old at the time of the incident and, following South Carolina law limiting family court jurisdiction to children under seventeen, was charged as an adult. *See* S.C. CODE ANN. § 63-19-20(1) (2008).
- 75 Federal authorities announced they would not charge Deputy Fields with any civil rights violations. Cynthia Roldán, *Former School Officer Will Not Be Charged, Sues Sheriff, School District*, THE STATE (Jan. 13, 2016), <http://www.thestate.com/news/local/crime/article126379009.html> [<https://perma.cc/ULD4-W9M9>].
- 76 Solicitor Investigation Summary, *supra* note 26, at 11.
- 77 *Id.*
- 78 *See id.*
- 79 *Id.*
- 80 Prosecuting rather than dismissing first-time charges was found to increase the likelihood of recidivism, with particularly strong results for misdemeanor offenses like disturbing schools. The only exceptions found were for youth “who have [] been diagnosed with an aggression-related mental disorder,” who had similar levels of re-offending following a misdemeanor regardless of whether they were prosecuted. David E. Barrett & Antonis Katsiyannis, *The Clemson Juvenile Delinquency Project: Major Findings from a Multi-Agency Study*, 26 J. CHILD & FAM. STUD. 2050, 2051-52 (2017).
- 81 Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 462, 463 (2006) (noting earlier research reaching this conclusion). Other studies reach similar conclusions. *See generally, e.g.*, Paul Hirschfield, *Another Way Out: The Impact of Juvenile Arrests on High School Dropout*, 82 SOC. EDUC. 368 (2009); Randi Hjalmarsson, *Criminal Justice Involvement and High School Completion*, 63 J. URB. ECON. 613 (2008); David S. Kirk & Robert J. Sampson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood*, 86 SOC. EDUC. 36 (2010).
- 82 Sweeten, *supra* note 81, at 473. Sweeten found that cases requiring court appearances (as must occur when charges are not diverted or dismissed) “nearly quadruples the odds of dropout.” *Id.*
- 83 Scholars and education leaders have argued that “people with GEDs are, in fact, no better off than dropouts when it comes to their chances of getting a good job.” Claudio Sanchez, *In Today's Economy, How Far Can a GED Take You?*, NPR (Feb. 18, 2012, 5:30 AM), <http://www.npr.org/2012/02/18/147015513/in-today-seconomy-how-far-can-a-ged-take-you> [<https://perma.cc/6Z8T-BXSL>]; *see, e.g.*, James J. Heckman, John Eric Humphries & Nicholas S. Mader, *The GED* 423, 425 (Nat'l Bureau of Econ. Research, Working Paper No. 16064, 2010) (summarizing a body of research as showing that “GEDs are *not* equivalent to ordinary high school graduates” and that “[c]ontrolling for their greater scholastic ability, GEDs are equivalent to uncredentialed dropouts in terms of their labor market outcomes and their general performance in society.”).

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- 84 Kenny v. Wilson Complaint, *supra* note 64, at 17.
- 85 Blad, *supra* note 66.
- 86 *Id.*
- 87 See DEREK W. BLACK, ENDING ZERO TOLERANCE: THE CRISIS OF ABSOLUTE SCHOOL DISCIPLINE 94 (2016) (noting “numerous” stories of “school resource officers and officials choking, handcuffing, restraining, and locking up in isolation rooms elementary and middle school students, including those with special needs”); Evie Blad & Alex Harwin, *Black Students More Likely to Be Arrested at School*, EDUC. WK. (Jan. 24, 2017), <http://www.edweek.org/ew/articles/2017/01/25/black-students-more-likely-to-be-arrested.html> [https://perma.cc/C874-7X3Z] (listing examples in Virginia, Missouri, and Alabama); Jason P. Nance, *Rethinking Law Enforcement Officers in Schools*, 84 GEO. WASH. L. REV. ARGUENDO 151, 151 (2016) [hereinafter Nance, *Rethinking Law Enforcement Officers in Schools*] (“Indeed, evidence of law enforcement officers mishandling student disciplinary problems abound.”).
- 88 Fedders, *supra* note 41, at 565.
- 89 *Policing America's Schools: An Education Week Analysis: Which Students Are Arrested the Most?*, EDUC. WK. (Jan. 24, 2017), <https://www.edweek.org/medias/ew/19policing/index.html#/overview> [https://perma.cc/PP2K-WF2G].
- 90 See generally Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1 (2013) [hereinafter Nance, *Students, Security, and Race*]. Nance defined “strict security measures” this way: “Strict security measures include using metal detectors, conducting random sweeps for contraband, hiring law enforcement officers or guards, controlling access to school grounds, and installing security cameras. These measures, particularly when used in combination, can create an intense, prison-like environment that deteriorates the learning climate.” *Id.* at 5.
- 91 *Id.* at 41; see also Evie Blad & Alex Harwin, *Black Students More Likely to Be Arrested at School*, EDUC. WK., (Jan. 24, 2017), <http://www.edweek.org/ew/articles/2017/01/25/black-students-more-likely-to-be-arrested.html?print=1> [https://perma.cc/YE8L-T735] (reporting that Education Week analysis of federal data shows “that black students are more likely than students in any other racial or ethnic group to attend schools with police”).
- 92 Nance, *Students, Security, and Race*, *supra* note 90, at 41-42.
- 93 SPRING VALLEY HIGH SCHOOL, 2016-2017 SIC ANNUAL REPORT (2017) [hereinafter SPRING VALLEY ANNUAL REPORT], <https://www.richland2.org/RichlandDistrict/media/Richland-District/Documents/2017%20School%20Annual%20Report/High/Spring-Valley-SIC-Brochure-2017.pdf> [https://perma.cc/V53Y-JQS8].
- 94 SPRING VALLEY HIGH SCHOOL, 2015 SOUTH CAROLINA STATE REPORT CARD (2016) [hereinafter SPRING VALLEY REPORT CARD], <http://ed.sc.gov/assets/reportCards/2015/high/c/h4002069.pdf> [https://perma.cc/YG4Q-FSZ3]. Other sources list a lower enrollment of 1885 students. See *Policing America's Schools: An Education Week Analysis: South Carolina School Data*, EDUC. WK. (Jan. 24, 2017) [hereinafter *South Carolina School Data*], <https://www.edweek.org/medias/ew/19policing/index.html#/state/SC> [https://perma.cc/U2AZ-N85U].
- 95 Spring Valley High School is located between U.S. Route 1 and Interstate 20, north of Fort Jackson and a 20-25 minute drive from the South Carolina State House in downtown Columbia.
- 96 Memorandum of Agreement between Richland County School District Two and the Richland County Sheriff's Department for the 2015-2016 School Year (Mar. 1, 2015) (on file with author) [hereinafter Richland 2--RCSD 2015-16 MOA].
- 97 *South Carolina School Data*, *supra* note 94 (providing data by percentage of arrest and allowing the author of this Article to sort and count the number of schools listed above Spring Valley).
- 98 SPRING VALLEY REPORT CARD, *supra* note 94, at 3 (listing graduation rates and end of course test scores which compare favorably to state averages).

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- 99 Rather than a segregated school, Spring Valley is a picture of diversity. SPRING VALLEY ANNUAL REPORT, *supra* note 93, at 2 (noting the demographics of students and staff as “52% African American, 28% White, 10% Hispanic, 6% Asian, 4% Other”).
- 100 Carolyn Click, *New Richland 2 Parent Group Wants to Discuss Race*, THE STATE (Mar. 31, 2014), <http://www.thestate.com/news/local/article13845191.html> [<https://perma.cc/K888-MRVE>].
- 101 *See* U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE FOR CIVIL RIGHTS, 15-OCR-67, LETTER RE: COMPLIANCE REVIEW OF THE RICHLAND COUNTY SHERIFF’S DEPARTMENT 3 (2016) [hereinafter DOJ COMPLIANCE REVIEW LETTER], <https://ojp.gov/about/ocr/pdfs/RCSD-SRO-ComplianceReview-08102016.pdf> [<https://perma.cc/AJK7-XBPZ>]. The DOJ letter refers to actions taken before the October 2015 incident at Spring Valley High School. *See id.* (noting site visit by DOJ Office of Civil Rights staff in September 2015).
- 102 *Id.*
- 103 S. 131, 122nd Gen. Assemb., Reg. Sess. (S.C. 2017), http://www.scstatehouse.gov/sess122_2017-2018/bills/131.htm [<https://perma.cc/RP9D-T94M>].
- 104 *Kenny v. Wilson* Complaint, *supra* note 64. District Court granted defendants’ motion to dismiss, and the plaintiffs have appealed. *Id.* The case is currently pending before the U.S. Court of Appeals for the Fourth Circuit. *See also infra* notes 270-75 and accompanying text. In addition, Niya Kenny filed a tort suit against the Richland County Sheriff’s Department and the Richland County School District 2 seeking damages for false imprisonment, defamation, negligence, and negligent hiring and supervision. *Kenny v. Richland County Sheriff’s Dept.*, 2017-CP-40-05034 (filed Aug. 22, 2017), <https://www.scribd.com/document/357039190/Niya-Kenny-Lawsuit#download> [<https://perma.cc/3YE9-65BN>].
- 105 *See infra* note 356.
- 106 DOJ COMPLIANCE REVIEW LETTER, *supra* note 101, at 1.
- 107 *See* discussion *infra* Section III.B.1.
- 108 *Infra* notes 298-99 and 324-30 and accompanying text.
- 109 *See infra* Section III.A.1.
- 110 *See infra* Section III.B.2.
- 111 *See infra* Section II.A.
- 112 *See* S.C. CODE ANN. § 16-17-420 (2010).
- 113 *See infra* Section II.B.
- 114 Fedders, *supra* note 41, at 571; Nance, *Students, Police, and the School-to-Prison Pipeline*, *supra* note 40, at 948-54.
- 115 *See infra* Section II.C.
- 116 *See infra* Section II.D.
- 117 S.C. CODE ANN. § 16-17-420 (2010).
- 118 *Id.*
- 119 Solicitor Investigation Summary, *supra* note 26, at 11.
- 120 *Id.*

- 121 S.C. DEPT OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2015-2016, at 13 (2016) [hereinafter S.C. REPORT 2015-2016], <http://www.state.sc.us/djj/pdfs/2015-16%20Annual%20Statistical%20Report%20Final.pdf> [<https://perma.cc/NT3J-DWZW>].
- 122 Under current law, juvenile court jurisdiction ends at seventeen, which is set to change to eighteen in 2019. S.C. CODE ANN. § 63-19-20(1) (2008) (defining child under current law as under seventeen); 2016 S.C. Acts 1751 (redefining child as under eighteen). Statistics for seventeen-year-olds (and older individuals) charged with disturbing schools are difficult to find because those charges are filed in local summary courts and no statewide data is tracked. When the South Carolina Revenue and Fiscal Affairs Office estimated the impact of a bill to narrow the disturbing schools statute (discussed in Section III.A.1), it reported 132 convictions for disturbing schools in 2015-2016. S.C. REVENUE & FISCAL AFFAIRS OFFICE, STATEMENT OF ESTIMATED FISCAL IMPACT S. 0131, at 2 (2017), <http://rfa.sc.gov/files/impact/S0131%202017-01-10%20Introduced.pdf> [<https://perma.cc/B2W6-JEYS>]. That figure only includes results from twenty-seven percent of magistrate's courts, and only includes prosecutions, excluding cases that were dismissed or diverted. *Id.* The total number of disturbing schools charges filed against those seventeen and older is, therefore, likely to be several hundred.
- 123 See ARIZ. REV. STAT. ANN. § 13-2911 (2016); ARK. CODE ANN. § 6-21-606 (West 2005); CAL. EDUC. CODE § 32210 (West 1983); COLO. REV. STAT. ANN. § 18-9-109 (West 2005); DEL. CODE ANN. tit. 14, § 4110 (West 2017); FLA. STAT. ANN. § 871.01 (West 2006); ME. REV. STAT. ANN. tit. 20-A, § 6804 (2001); MD. CODE ANN., EDUC. § 26-101 (West 1978); MISS. CODE ANN. § 37-11-23 (West 1970); MONT. CODE ANN. § 20-1-206 (West 1947); NEV. ADMIN. CODE §§ 392.180 & 392.910(2) (2016); N.H. REV. STAT. ANN. § 193:11 (2017); N.M. STAT. ANN. § 30-20-13 (West 1970); N.C. GEN. STAT. ANN. § 14-288.4(a)(6) (West 2013); N.D. CENT. CODE ANN. § 15.1-06-16 (West 1999); 11 R.I. GEN. LAWS ANN. § 11-11-1 (West 2007); S.D. CODIFIED LAWS § 13-32-6 (2017); WASH REV. CODE ANN. § 28A.635.030 (West 2017); W. VA. CODE ANN. § 61-6-14 (West 2017).
- 124 Ripley, *supra* note 44 (reporting similarly large numbers in Maryland, Florida, Kentucky, and North Carolina).
- 125 *Id.*
- 126 *E.g.*, SELMA ALA., CODE ORDINANCES § 17-33 (2017).
- 127 A.M. v. Holmes, 830 F.3d 1123, 1139 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 2151 (2017). This case upheld dismissal of the lawsuit for unlawful arrest against the officer, and is notable in part because it featured a stinging dissent by then-Judge Neil Gorsuch. See *id.* at 1169-70 (Gorsuch, J., dissenting).
- 128 *Id.* at 1129.
- 129 *Id.* at 1129-30.
- 130 *Id.* at 1130.
- 131 G.M. *ex rel.* B.M. v. Casaldue, 982 F. Supp. 2d 1235, 1240 (D.N.M. 2013).
- 132 Chris McGreal, *The US Schools with Their Own Police*, THE GUARDIAN (Jan. 9, 2012), <https://www.theguardian.com/world/2012/jan/09/texas-police-schools> [<https://perma.cc/5SAT-JDD8>]. Texas effectively repealed its disturbing schools statute in 2013. See *infra* notes 301-02 and accompanying text.
- 133 Stephanie Chen, *Girl's Arrest for Doodling Raises Concerns About Zero Tolerance*, CNN (Feb. 18, 2010), <http://www.cnn.com/2010/CRIME/02/18/new.york.doodle.arrest/index.html?hpt=C1> [<https://perma.cc/XP4K-R6SY>].
- 134 Claire Michalewicz, *Mom of Boy Tasered in High School Cafeteria Files Lawsuit*, MIDDLETOWN PRESS (June 14, 2011), <http://www.middletownpress.com/general-news/20110614/mom-of-boy-tasered-in-high-school-cafeteria-files-lawsuit-documents?viewmode=fullstory> [<https://perma.cc/QJ2N-7EHK>].
- 135 *Id.*

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- 136 U.S. DEPT OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 37 (2015) [hereinafter INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT], <https://www.courts.mo.gov/file.jsp?id=95274> [<https://perma.cc/YQ4X-XARP>].
- 137 *E.g.*, Gary Fields & John R. Emshwiller, *For More Teens, Arrests by Police Replace School Discipline*, WALL ST. J. (Oct. 20, 2014), <https://www.wsj.com/articles/for-more-teens-arrests-by-police-replace-school-discipline-1413858602> [<https://perma.cc/YN2R-QNE6>].
- 138 *See, e.g.*, Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 147-48 (2015) (describing three such cases).
- 139 *Compare* S.C. CODE ANN. § 16-17-420 (2010), with statutes cited *supra* note 123.
- 140 *E.g.*, FLA. STAT. ANN. § 871.01 (West 2006) (“Whoever willfully interrupts or disturbs any school ... commits a misdemeanor”); CAL. PENAL CODE § 32210 (West 2014) (willful disturbance); N.C. GEN. STAT. ANN. § 14-288.4(a) (6) (West 2013) (“[d]isrupts, disturbs or interferes with the teaching of students”).
- 141 ARIZ. REV. STAT. ANN. § 13-2911(A)(1) (2016).
- 142 NEV. REV. STAT. ANN. § 392.910(3) (West 2015).
- 143 N.H. REV. STAT. ANN. § 193:11 (2017).
- 144 COLO. REV. STAT. ANN. § 18-9-109(2) (West 2017); *see* *People ex rel. J.P.L.*, 49 P.3d 1209, 1211-12 (Colo. App. 2002).
- 145 *See generally* *In re Michael E.*, No. 2006-MO-043, 2006 WL 7353470 (S.C. 2006); *In re Mathew M.*, No. 2006-MO-044, 2006 WL 7353471 (S.C. 2006); *In re Amir X.S.*, 371 S.C. 380 (2006); *In re Joelle T.*, No. 2010-UP-547, 2010 WL 10088227 (S.C. Ct. App. 2010); *In re John Doe*, 318 S.C. 527, 535 (Ct. App. 1995). The only case to reverse a conviction did so on procedural grounds. *See In re Johnny Lee W.*, 371 S.C. 217, 221 (2006), (reversing a conviction based on a conditional guilty plea because South Carolina law forbids such pleas).
- 146 *In re Amir X.S.*, 371 S.C. at 384, 389 (2006).
- 147 *Id.* at 390.
- 148 *Id.* (quotation and citation omitted).
- 149 *Id.* at 391.
- 150 *In re Amir X.S.* also involved a challenge to the statute as void for vagueness. The Court held that the child lacked standing to facially challenge the statute on this ground because “[t]here can be no doubt that Appellant’s conduct falls within the most narrow application of § 16-17-420.” *Id.* at 391. A future case involving different conduct could challenge the statute as void for vagueness. A federal lawsuit seeking to enjoin enforcement of the disturbing schools statute on students alleges that the statute is unconstitutionally vague. *Kenny v. Wilson Complaint*, *supra* note 64, ¶ 106.
- 151 *In re Jason W.*, 837 A.2d 168, 174 (Md. 2003).
- 152 *Id.*
- 153 *Id.* at 175 (emphasis added).
- 154 *State v. Silva*, 525 P.2d 903, 907 (N.M. Ct. App. 1974). How far this decision reaches was contested in *A.M. v. Holmes*, 830 F.3d 1123, 1143-50 (10th Cir. 2016) (Gorsuch, J., dissenting), the burping case discussed, *supra* notes 126-29 and accompanying text. The child arrested for his disruptive burping and then-Judge Gorsuch argued that *Silva* provided clearly established law that the child’s conduct was not severe enough to justify the arrest. The officer and school defendants argued, and the two-

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judge majority agreed, that *Silva* did not clearly apply to the newer disturbing schools statute nor clearly exclude the middle school burper's conduct from the scope of the criminal law. *See id.*

- 155 J.J. v. State, 944 So. 2d 518, 519 (Fla. Dist. Ct. App. 2006) (quotations and citations omitted).
- 156 *In re Eller*, 417 S.E.2d 479, 482 (N.C. 1992) (quotation and citation omitted).
- 157 *See* Solicitor Investigation Summary, *supra* note 26, at 11; Press Release, U.S. Att'y Office, Dist. of S.C., Federal Officials Close Investigation into Use of Force by School Resource Officer at Spring Valley, South Carolina, High School (Jan. 13, 2017), <https://www.justice.gov/usao-sc/pr/federal-officials-close-investigation-use-force-school-resource-officer-spring-valley> [<https://perma.cc/YR6L-EVJW>].
- 158 *Children Under 18 Years of Age by Race/Ethnicity*, ANNIE E. CASEY FOUND., KIDS COUNT DATA CTR. (2017), <http://datacenter.kidscount.org/data/tables/6132-children-under-18-years-of-age-by-race-ethnicity?loc=42&loct=2#detailed/2/any/true/868,867,133,38,35/66,67,4262,3/12804,15653> [<https://perma.cc/EU98-C7CG>].
- 159 S.C. REPORT 2015-2016, *supra* note 121, at 11.
- 160 S.C. DEPT OF JUVENILE JUSTICE, DISTURBING SCHOOLS DATA FY 2008-2009, slide 3 [hereinafter DISTURBING SCHOOLS DATA FY 2008-2009], http://www.state.sc.us/djj/2010%20disturbing%20schools%20presentation_files/frame.htm [<https://perma.cc/WN7G-76HW>]. The ACLU alleged similar figures continue in more recent years, with Black students “nearly 4 times as likely as their white classmates to be charged with Disturbing Schools.” *Kenny v. Wilson* Complaint, *supra* note 64, ¶ 76.
- 161 The S.C. DJJ reported that 14.2 of every 1000 Black boys were charged with disturbing schools, compared with 2.9 for White boys. DISTURBING SCHOOLS DATA FY 2008-2009, *supra* note 160, slide 5. The rates were 9.3 for Black girls and 1.5 for White girls. *Id.*
- 162 HOLLY GROOVER, S.C. STAT. ANALYSIS CTR., STATISTICS FOR YEARS 2011-2013 REGARDING DISPROPORTIONALITY AND DISPROPORTIONATE MINORITY CONTACT (DMC) IN SOUTH CAROLINA JUVENILE ARRESTS FOR OFFENSES AT SCHOOL USING DATA FROM THE SOUTH CAROLINAA INCIDENT-BASED REPORTING SYSTEM (SCIBRS), at 1, 12 (2016), http://www.scdps.gov/ohsjp/stats/Juveniles/Juvenile_DMC_in_Schools_Report.pdf [<https://perma.cc/R4DD-WFLW>].
- 163 U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE 6 (2014) [hereinafter OCR DATA SNAPSHOT], <https://ocrdata.ed.gov/downloads/crdc-school-discipline-snapshot.pdf> [<https://perma.cc/65H6-ZZR4>].
- 164 *See, e.g.*, Am. Psychological Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOL. 852, 854 (2008).
- 165 *See supra* notes 161-62 and accompanying text.
- 166 OCR DATA SNAPSHOT, *supra* note 163, at 12.
- 167 *Id.* at 14.
- 168 FRANCINE T. SHERMAN & ANNIE BALCK, GENDER INJUSTICE: SYSTEM-LEVEL JUVENILE JUSTICE REFORMS FOR GIRLS 22 (2015), http://www.nationalcrittenton.org/wp-content/uploads/2015/09/Gender_Injustice_Report.pdf [<https://perma.cc/562W-BT67>].
- 169 NAACP LEGAL DEFENSE & EDUC. FUND, INC. & NAT'L WOMEN'S LAW CTR., UNLOCKING OPPORTUNITY FOR AFRICAN-AMERICAN GIRLS: A CALL TO ACTION FOR EDUCATIONAL EQUITY

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16 (2014), http://www.naacpldf.org/files/publications/Unlocking%20Opportunity%20for%20African%20American%20Girls_0.pdf [https://perma.cc/S8LR-BRA8].

170 SHERMAN & BALCK, *supra* note 168, at 23.

171 Rebecca Epstein et al., *Girlhood Interrupted: the Erasure of Black Girls' Childhood*, GEO. U. L. CTR., CTR. ON POVERTY & INEQ. 1 (2017), <http://www.law.georgetown.edu/academics/centers-institutes/poverty-inequality/upload/girlhood-interrupted.pdf> [https://perma.cc/Y6FW-UW3K]. Research also supports similar arguments regarding Black boys. *Id.* at 2.

172 *Id.* at 1.

173 *E.g.*, RITCHIE, *supra* note 44, at 73.

174 SHERMAN & BALCK, *supra* note 168, at 39.

175 *Id.* at 7. Children with a disability include, for purposes of this data point, children who have been deemed to have a disability under the Individuals with Disability Education Act, 20 U.S.C. §§ 1400-1401 (2012).

176 JOINT CITIZENS & LEGISLATIVE COMM. ON CHILDREN, 2017 ANNUAL REPORT 27 (2017), http://www.sc.edu/jclcc/doc/2017_JCCLC_Annual_Report.pdf [https://perma.cc/UZA8-V6KS].

177 Daniel J. Losen et al., *Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline*, UCLA C.R. PROJECT 1, 8 (2013), <https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/state-reports/disturbing-inequities-exploring-the-relationship-between-racial-disparities-in-special-education-identification-and-discipline> [https://perma.cc/EH98-98YK].

178 Daniel J. Losen, *Discipline Policies, Successful Schools, and Racial Justice*, UCLA C.R. PROJECT 1, 5 (2011), https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/discipline-policies-successful-schools-and-racial-justice/NEPC-SchoolDiscipline-Losen-1-PB_FINAL.pdf [https://perma.cc/965R-UN8W].

179 *See* SARAH E. REDFIELD & JASON P. NANCE, AM. BAR ASS'N, SCHOOL-TO-PRISON PIPELINE PRELIMINARY REPORTT 1, 15-20 (2016), https://www.americanbar.org/content/dam/aba/administrative/diversity_pipeline/stp_preliminary_report_final.authcheckdam.pdf [https://perma.cc/57JC-K9GV].

180 *Id.* at 54-56. Redfield and Nance have collected various studies which demonstrate how implicit biases affect a range of educational decisions and outcomes. *Id.* at 61-62.

181 *Id.* at 55.

182 *See id.* 61-62; *see also id.* at 58 ("Implicit bias is at play in discretionary situations and influences disciplinary and other youth related decisions.").

183 *Kenny v. Wilson* Complaint, *supra* note 64, at 12-13. DOJ argued that other broad and vague criminal statutes had similar problems. *Id.* at 14-17.

184 REDFIELD & NANCE, *supra* note 179, at 13.

185 *See supra* notes 51-57 and accompanying text (describing how the SRO was a step in a chain of progressive discipline).

186 Kim, *supra* note 41, at 864.

- 187 The date of this guidance may prove important. It was issued during the Obama Administration, like other federal guidance noted in this Article. Although it seems unlikely that the Trump Administration will similarly push for limits on SROs, it is less clear if it will seek to undo Obama-era guidance.
- 188 U.S. DEPT OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE 9 (2014), <https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf> [<https://perma.cc/TW6M-PLY5>].
- 189 *Id.* at 10.
- 190 *See id.* at 3, 10 (encouraging schools to “provide clear definitions of the officers' roles and responsibilities on campus” and “document those expectations in a written agreement or memorandum of understanding”); *see also* NAT'L ASS'N OF SCH. RES. OFFICERS, NASRO POSITION STATEMENT ON POLICE INVOLVEMENT IN STUDENT DISCIPLINE (2015), <https://nasro.org/news/nasro-updates/nasro-position-statement-police-involvement-student-discipline/> [<https://perma.cc/77LD-HGGS>] (“A Clear and Concise Memorandum of Understanding is Essential.”); Nance, *Students, Police, and the School-to-Prison Pipeline*, *supra* note 40, at 982.
- 191 *See* Richland 2--RCSD 2015-16 MOA, *supra* note 96.
- 192 *See infra* notes 204-206 and accompanying text.
- 193 S.C. DEPT OF EDUC., SOUTH CAROLINA SAFE SCHOOLS TASKFORCE REPORT 5 (2016), <http://scsba.org/wp-content/uploads/2016/08/2016-school-law-presentation-taksforce-richardson.pdf> [<https://perma.cc/JQ6L-ZMF2>].
- 194 U.S. DEPT OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., FACT SHEET: MEMORANDUM OF UNDERSTANDING FOR FY2013 SCHOOL-BASED PARTNERSHIPS 2 (2013), https://cops.usdoj.gov/pdf/2013_MOU-FactSheet_v2_091613.pdf [<https://perma.cc/WT5X-N8EK>].
- 195 NAT'L ASS'N OF SCH. RES. OFFICERS, SCHOOL RESOURCE OFFICER AGREEMENT 2 (2012), <https://nasro.org/cms/wp-content/uploads/2014/04/MOUsampleA2012.pdf> [<https://perma.cc/CY7L-8F3E>].
- 196 *Id.* at 2-3. The Association offers two other sample memoranda. Although their language varies, the bottom line policies are consistent. NAT'L ASS'N OF SCH. RES. OFFICERS, AGREEMENT BETWEEN THE ___ POLICE DEPARTMENT AND THE ___ SCHOOL DISTRICT FOR THE SCHOOL RESOURCE OFFICER PROGRAM (2012), <https://nasro.org/cms/wp-content/uploads/2014/04/MOUsampleC2012.pdf> [<https://perma.cc/AWC3-9XGZ>] (template memorandum of agreement); NAT'L ASS'N OF SCH. RES. OFFICERS, MEMORANDUM OF UNDERSTANDING SCHOOL RESOURCE OFFICER PROGRAM AT ___ SCHOOLS (2012), <https://nasro.org/cms/wp-content/uploads/2014/04/MOUsampleB2012.pdf> [<https://perma.cc/SJ2H-WXDP>] (template memorandum of understanding).
- 197 REDFIELD & NANCE, *supra* note 179, at 53.
- 198 *See generally* sample memoranda cited *supra* note 196.
- 199 ADVANCEMENT PROJECT, PROPOSED MEMORANDUM OF UNDERSTANDING BETWEEN THE SCHOOL DISTRICT AND POLICE DEPARTMENT 1 (2013), http://b.3cdn.net/advancement/cf357b9f96d8c55ff8_rdm6ib9js.pdf [<https://perma.cc/6Q35-UJ4B>]; Fedders, *supra* note 41, at 571.
- 200 *Id.*
- 201 The MOA is also notable for the financial cost imposed on the district. In the year of the Spring Valley incident, the Richland County School District Two paid the Richland County Sheriff's Department \$690,992 for nineteen sheriff deputies to serve as SROs at fourteen separate schools (two each were assigned to high schools, including Spring Valley). Richland 2--RCSD 2015-16 MOA, *supra* note 96, at 1. The cost of SROs has been criticized for “tak [ing] away needed resources that could

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otherwise be used to hire more counselors, mental resources specialists, and implement the alternative programs” to arrests and school exclusions. Nance, *Tools for Change*, *supra* note 40, at 339.

Richland 2--RCSD 2015-16 MOA, *supra* note 96, at 2.

Id. at 3.

Id.

Id.

See id.

S.C. CODE ANN. § 5-7-12 (2013).

Id. South Carolina statutes include only one limitation on the role of SROs--SROs are exempted from a statute requiring police officers to investigate whether certain individuals are present lawfully in the country. S.C. CODE ANN. § 17-13-170(B) (6) (2011). A federal court enjoined enforcement of the statute, so this limitation is moot. *United States v. South Carolina*, 906 F. Supp. 2d 463 (D.S.C. 2012) (enjoining enforcement), *affirmed* 720 F.3d 518 (4th Cir. 2013).

RICHLAND SCH. DIST. TWO, 2016-2017 BACK-2-SCHOOL HANDBOOK, at 14 (2016), <https://www.richland2.org/RichlandDistrict/media/Richland-District/Advanced/Standard%202/2.1/2-1-2016-2017-Richland-Two-Employee-Handbook.pdf> [<https://perma.cc/FM9X-YTWS>].

Id.; *see also* RICHLAND SCH. DIST. TWO, STUDENT DISCIPLINE (2017), <https://www.richland2.org/Departments/Administrative-Services/Student-Services/Student-Discipline> [<https://perma.cc/YT4T-K2Z5>] (providing that when “the student’s behavior affects the safety or learning opportunities of other students, additional disciplinary action must be taken”).

S.C. CODE ANN. § 59-24-60 (1994).

See, e.g., PATRICIA TORBET ET AL., NAT’L CTR. FOR JUVENILE JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 1, 59 (1996), <http://www.ncjj.org/pdf/statresp.pdf> [<https://perma.cc/7Y3U-AASP>] (describing wide-ranging, tough-on-crime reforms); Barry Feld, *The Transformation of the Juvenile Court--Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327, 327-28 (1999) (arguing that increasing juvenile crime rates, racialized fear of crime, and decreasing faith in rehabilitation triggered “tough-on-crime” reforms).

See 2010 WL 2678697, at *2 (S.C.A.G. 2010) (offering attorney general’s opinion that “a school district is required to report all suspected crimes to law enforcement”).

S.C. CODE ANN. § 16-17-420 (2010).

See supra note 139 and accompanying text.

U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE FOR VICTIMS OF CRIME, REPORTING SCHOOL VIOLENCE 2-3, 5 (2002), https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin2/welcome.html [<https://perma.cc/6F5F-XKY9>].

Nance, *Students, Police, and the School-to-Prison Pipeline*, *supra* note 40, at 934-36.

ALA. CODE § 16-1-24(b) (2014).

See VA. CODE ANN. § 22.1-279-3:1(A) (West 2014).

CONN. GEN. STAT. § 10-222d(b)(15) (2014).

105 ILL. COMP. STAT. 5/34-84a.1 (2014).

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- 222 See CAL. EDUC. CODE § 48902(c) (West 2013).
- 223 S.C. REPORT 2015-2016, *supra* note 121, at 5. (The South Carolina Department of Juvenile Justice, for instance, reports that thirty-five percent of all referrals to family court are diverted. Forty-five percent are prosecuted and the remainder are dismissed.).
- 224 See, e.g., APPENZELLER ET AL., *supra* note 20, at 12 (describing South Carolina's "Youth Arbitration Program" as involving youth charged with crimes).
- 225 References to cases handled by the Author are protected by confidentiality laws. For more information, see Redacted Petition (on file with the author).
- 226 In South Carolina, petit larceny covers theft of money or goods up to \$2000. S.C. CODE ANN. § 16-13-30(A) (2012). In the case described, the child was accused of stealing less than \$400.
- 227 Sweeten, *supra* note 81, at 463.
- 228 Advocating for diversion options is an element of strong juvenile defense counsel. See ROBIN WALKER-STERLING ET AL., NAT'L JUVENILE DEFENDER CTR., ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT 22 (2009), https://www.americanbar.org/content/dam/aba/images/youth_at_risk/SUPP2-NJDC-ROC.pdf [<https://perma.cc/U33F-4L7K>]. One assessment of juvenile defense in South Carolina noted that juvenile defenders could advocate to the solicitor to refer children to diversion programs, but that the majority of defenders surveyed did not do so. See MARY ANN SCALI ET AL., NAT'L JUVENILE DEFENDER CTR., SOUTH CAROLINA JUVENILE INDIGENT DEFENSE: A REPORT ON ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 30 (2010), <http://childlaw.sc.edu/frmPublications/SC%20Juvenile%20Defense%20Assessment.pdf> [<https://perma.cc/64NA-7LQA>].
- 229 As noted in the Introduction, a full exploration of various diversion programs that could be appropriate for minor school-based offenses which currently lead to delinquency charges is beyond the scope of this Article.
- 230 APPENZELLER ET AL., *supra* note 20, at 1.
- 231 *Id.* at 1, 11-13 (describing the program and similar programs nationally).
- 232 *Id.* at 11 (noting "many" similar programs).
- 233 *Id.* at 12.
- 234 *Id.* at 13 (noting eligibility is limited to first time offenders).
- 235 See, e.g., CLAYTON COUNTY SCHOOL PROTOCOL AGREEMENT 5, [http://www.ncjfcj.org/sites/default/files/Clayton%20Co.%20School%20Protocol%20Agreement%20\(2\).pdf](http://www.ncjfcj.org/sites/default/files/Clayton%20Co.%20School%20Protocol%20Agreement%20(2).pdf) [<https://perma.cc/ZH3A-YPVS>] ("Misdemeanor type delinquent acts involving offenses against public order ... shall not result in the filing of a complaint alleging delinquency unless the student has committed his or her third or subsequent similar offense during the school year").
- 236 Even a second offense in the same school year leads to a school-based diversion program. See *id.* at 6. A third or subsequent offense in the same school year could lead to a court complaint. *Id.* at 5-6; see also Evie Blad, *Atlanta Schools Start Over with Police*, EDUC. WK. (Feb. 7, 2017), <https://www.edweek.org/ew/articles/2017/02/08/atlanta-schools-start-over-with-police.html> [<https://perma.cc/DTM2-M93E>] (describing how an Atlanta program modeled after the Clayton County program encourages school officials "to channel misdemeanor offenses and delinquent acts through a tiered system of interventions rather than immediately filing court complaints").
- 237 John B. King, Jr., *Key Policy Letters Signed by the Education Secretary or Deputy Secretary*, U.S. DEPT EDUC. (Sept. 8, 2016) [hereinafter *Dear Colleagues Letter*], <https://www2.ed.gov/policy/elsec/guid/secletter/160907.html> [<https://perma.cc/64NA-7LQA>].

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perma.cc/96U7-798L]; *see also* Nance, *Students, Police, and the School-to-Prison Pipeline*, *supra* note 40, at 981 (recommending school-based restorative justice programs).

238 *Dear Colleagues Letter*, *supra* note 237.

239 *E.g.*, Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 334 (2012).

240 *See* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 430 (2013) (“By declining to prosecute categories of adolescent behavior, prosecutors set the standard for juvenile court intake and over time may significantly influence patterns of arrest and referral.”).

241 *See* Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 191-92 (2017) (describing wide prosecutorial discretion in juvenile courts and how that can lead to overcriminalization); *see also supra* Section II.A.1-2 (describing how broad criminal laws create significant discretion which permits implicit biases to operate).

242 *See* Gupta-Kagan, *supra* note 28.

243 *See* discussion *supra* Introduction.

244 THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE ON JUVENILE DELINQUENCY, JUVENILE DELINQUENCY AND YOUTH CRIME: REPORT ON JUVENILE JUSTICE AND CONSULTANTS' PAPERS 96 (1967).

245 *Supra* notes 73-78 and accompanying text.

246 *Supra* notes 73-78 and accompanying text.

247 *Supra* notes 73-78 and accompanying text.

248 *See In re John Doe*, 318 S.C. 527, 535 (Ct. App. 1995).

249 *See id.* at 529, 558.

250 *Id.*

251 *E.g.*, Gupta-Kagan, *supra* note 28.

252 *See supra* Section I.C.2.

253 *See infra* Section III.A.1.

254 *See infra* Section III.B.1.b.

255 *See infra* Section III.B.2.

256 In full disclosure, I have had a small role in advocating for some of these reforms. I have written and testified in favor of the bill to narrow the scope of the disturbing schools statute. Cynthia Roldán, *Senate Proposal Limiting SC's "Disturbing Schools" Law Hits a Snag*, THE STATE (Feb. 15, 2017), <http://www.thestate.com/news/local/crime/article132992254.html> [<https://perma.cc/8WAW-H5YP>] (noting my testimony in favor of the bill); Josh Gupta-Kagan, *Let School Officials Handle Discipline, Police Handle Threats*, THE STATE (Nov. 2, 2015), <http://www.thestate.com/opinion/op-ed/article41960976.html> [<https://perma.cc/N3V7-C9R5>] (urging the legislature to narrow the disturbing schools statute and school districts and law enforcement agencies to “establish clear boundaries for school resource officers.”). I have commented on proposed regulations, encouraging the Department of Education to revise such regulations to more effectively limit SROs actions to law enforcement

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and leave school discipline to school staff. Letter from Josh Gupta-Kagan to Dr. Sabrina Moore (Aug. 11, 2016) (on file with author) (regarding proposed Regulations 43-279 and 43-210).

257 *See infra* Section III.A.2.

258 *See infra* notes 345-46 and accompanying text.

259 *See infra* Section III.B.2.

260 *See id.*

261 *See infra* Section III.C.2.

262 S. 131, 122nd Gen. Assemb., Reg. Sess. (S.C. 2017), http://www.scstatehouse.gov/sess122_2017-2018/bills/131.htm [<https://perma.cc/RP9D-T94M>].

263 The South Carolina General Assembly recessed for 2017 on May 11, 2017. The Joint Citizens and Legislative Committee on Children, which includes both legislators and relevant executive agency directors, also endorsed this bill. JOINT CITIZENS & LEGISLATIVE COMM. ON CHILDREN, *supra* note 176, at 28.

264 The bill would amend the disturbing schools law so that its main section would only apply to a “person who is not a student,” defined as someone “who is not enrolled in, or who is suspended or expelled from” the school at which any incident occurs. S. 131 § 1(B), 122nd Gen. Assemb., Reg. Sess. (S.C. 2017), http://www.scstatehouse.gov/sess122_2017-2018/bills/131.htm [<https://perma.cc/RP9D-T94M>].

265 *Id.* § 2.

266 S.C. Act 943, an Act to Amend Section 16-551, Code of Laws of South Carolina, 1962, Relating to Disturbances at Schools Attended by Women or Girls, so as to Include All Schools Within the Provisions of the Section, 1968 S.C. Stat. 2308. The original version of the bill, enacted in 1919, only applied to schools “attended by women or girls.” 1919 S.C. Acts 156, § 1, 1919 S.C. Stat. 239. The 1968 amendment struck the language regarding women and girls, thus rendering the statute applicable to all students. The Legislature gave final approval to the expansion on March 2, 1968. 1968 S.C. Acts 943. That approval came less than one month after the Orangeburg Massacre, in which South Carolina state troopers killed three unarmed black men protesting ongoing segregation in Orangeburg, South Carolina. Caitlin Byrd, *To the Archives! Remembering the Orangeburg Massacre and Its Place in Civil Rights History*, POST & COURIER (Feb. 9, 2017), http://www.postandcourier.com/news/to-the-archives-remembering-the-orangeburg-massacre-and-its-place/article_a89cb158-ef06-11e6-849c-03ed94e98f57.html [<https://perma.cc/HSP3-HNNU>]. In yet another historical connection, Bakari Sellers, son of Cleveland Sellers, who helped lead to civil rights protests in Orangeburg in February 1968, now represents Niya Kenny in one of her civil suits. *See id.* (discussing Cleveland Sellers' role and Bakari Sellers' perspective on it); *see also* sources cited *supra* note 104.

267 Ripley, *supra* note 44, at 6.

268 *See* Mia McLeod, *Why I'm Running*, MIA MCLEOD FOR SENATE, <http://miaforsenate.com/blog/why-im-running/> [<https://perma.cc/KG4W-V8UF>].

269 *Id.* Local media has picked up the description as well, describing the bill as “aim[ing] to return the disturbing schools law to its original intent of protecting students and school staffers from ‘outside agitators.’” Cynthia Roldán, *Legislators Debating Where ‘Obnoxious Adolescent Behavior’ Ends, Criminal Behavior Begins at SC Schools*, THE STATE (Mar. 9, 2017), <http://www.thestate.com/news/local/crime/article137592723.html> [<https://perma.cc/4WEQ-LPQL>].

270 The named plaintiffs include Niya Kenny--the second girl arrested for disturbing schools in the Spring Valley incident--and several other individuals and organizations. *See* Kenny v. Wilson Complaint, *supra* note 64.

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- 271 See *Kenny v. Wilson* Complaint, *supra* note 64, at 1, 3; Motion For Preliminary Injunction and Memorandum of Law in Support at 17, 26, *Kenny v. Wilson*, No. 16 Civ. 2794 (D.S.C. filed Aug. 11, 2016) (arguing that both § 16-17-420 and § 16-17-530 are vague).
- 272 The United States District Court for the District of South Carolina dismissed the case, finding that plaintiffs' fear of arrest or charges under the disturbing schools statute was insufficiently imminent to grant them standing to seek an injunction against its enforcement and making no ruling on the plaintiffs' substantive legal claims. *Id.*, Docket Number 90, Order, at 16-21. The plaintiffs have appealed that ruling and the matter is pending before the United States Court of Appeals for the Fourth Circuit. *Id.*, Docket No. 95, Notice of Appeal.
- 273 *Kenny v. Wilson* Complaint, *supra* note 64, at 27.
- 274 See *id.* ¶ 17.
- 275 *Id.*
- 276 *Infra* notes 287-300 and accompanying text.
- 277 *Infra* notes 301-05 and accompanying text.
- 278 *Infra* notes 298-300 and accompanying text.
- 279 Letter from Donald V. Myers, Solicitor, to Dr. Karen Woodward, Superintendent (June 3, 2010) (on file with author) [hereinafter Myers Letter].
- 280 *Id.*
- 281 *Id.*
- 282 See S.C. DEPT OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET 2015-2016 (2016) [hereinafter S.C. COUNTY 2015-2016], <http://www.state.sc.us/djj/pdfs/2015-2016%20County%20Datasheets.pdf> [https://perma.cc/8YZS-3YKN]; S.C. DEPT OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET 2014-2015 (2015) [hereinafter S.C. COUNTY 2014-2015], <http://www.state.sc.us/djj/pdfs/2015-County-Datasheets.pdf> [https://perma.cc/DX3W-T6P8]; S.C. DEPT OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET 2013-2014 (2014) [hereinafter S.C. COUNTY 2013-2014], <http://www.state.sc.us/djj/pdfs/2014%20County%20Datasheets.pdf> [https://perma.cc/LR5F-U9XC]; S.C. DEPT OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET 2012-2013 (2013) [hereinafter S.C. COUNTY 2012-2013], <http://www.state.sc.us/djj/pdfs/2012-13%20county%20datasheets.pdf> [https://perma.cc/Q5TQ-7RZR]; S.C. DEPT OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET 2011-2012 (2012) [hereinafter S.C. COUNTY 2011-2012], <http://www.state.sc.us/djj/pdfs/2011%20county%20datasheets.pdf> [https://perma.cc/T4EG-N2JH]; S.C. DEPT OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET 2010-2011 (2011) [hereinafter S.C. COUNTY 2010-2011], <http://www.state.sc.us/djj/pdfs/10-11%20County%20Datasheets.pdf> [https://perma.cc/KLP3-DJY9]; S.C. DEPT OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET 2009-2010 (2010) [hereinafter S.C. COUNTY 2009-2010], <http://www.state.sc.us/djj/pdfs/2010%20county%20datasheets.pdf> [https://perma.cc/Q6E2-GQM7]; S.C. DEPT OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET 2008-2009 (2009) [hereinafter S.C. COUNTY 2008-2009], <http://www.state.sc.us/djj/pdfs/2008-2009-County-Datasheets.pdf> [https://perma.cc/5SKJ-N28T]; S.C. DEPT OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET 2007-2008 (2008) [hereinafter S.C. COUNTY 2007-2008], <http://www.state.sc.us/djj/pdfs/2008%20County%20Datasheets.pdf> [https://perma.cc/29PX-M4M5] In Lexington County, there were 132 disturbing schools charges in 2005-06, 161 in 2006-07, 115 in 2007-08, 98 in 2008-09, and 117 in 2009-10. See sources cited *supra*. Disturbing schools was the most frequent charge in Lexington County in each of those years except 2008-09, when it was the second most frequent charge. See sources cited *supra*. The solicitor announced his policy change in June 2010. See Myers Letter, *supra* note 279. That is fortunate timing for statistical purposes because the fiscal year ends in June, so the new policy coincides with the change from the 2009-10 reporting year to the 2010-11 reporting year. For every year from 2010-11 through 2014-15, disturbing schools is not on the

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list of top five most frequent referrals, and the fifth most frequent charge accounted for 32, 55, 47, 25, and 52 cases in each of those years, respectively. *See* S.C. COUNTY 2014-2015, *supra*; S.C. COUNTY 2013-2014, *supra*; S.C. COUNTY 2012-2013, *supra*; S.C. COUNTY 2011-2012, *supra*; S.C. COUNTY 2010-2011, *supra* (noting collectively that only the top five charges are publicly reported).

283 *See* sources cited *supra* note 282.

284 *See* sources cited *supra* note 282.

285 *See* sources cited *supra* note 282.

286 *See* sources cited *supra* note 282.

287 The Department of Juvenile Justice reports the number of “simple assault and battery” charges per county. *See* sources cited *supra* note 282. This charge is statutorily known as assault and battery in the third degree, a misdemeanor and the least severe form of criminal assault. S.C. CODE ANN. § 16-3-600(E) (2015).

288 *See* sources cited *supra* note 282.

289 *See* sources cited *supra* note 282.

290 The average in the three years before the police change was 79 simple assault charges per year, compared with 152 in the three years which followed. *See* sources cited *supra* note 282.

291 *See* sources cited *supra* note 282.

292 The S.C. county data sheets report 1011 charges in 2007-08, 1043 in 2008-09, and 1078 in 2009-10, for an average of 1044 per year. *See* sources cited *supra* note 282 (showing those figures had been declining from figures above 1100 in 2005-06 and 2006-07). There were 888 charges in 2010-11, 821 in 2011-12, and 805 in 2012-13, for an average of 838 charges per year--a figure of 19.7% less than 1044. *See* sources cited *supra* note 282.

293 For statewide totals, see S.C. REPORT 2015-2016, *supra* note 121; S.C. DEPT OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2014-2015 (2015) [hereinafter S.C. REPORT 2014-2015], <http://www.state.sc.us/djj/pdfs/2015-Annual-Statistical-Report.pdf> [https://perma.cc/4CVN-WCPG]; S.C. DEPT OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2013-2014 (2014) [hereinafter S.C. REPORT 2013-2014], <http://www.state.sc.us/djj/pdfs/2014%20Annual%20Statistical%20Report.pdf> [https://perma.cc/56X9-QNEM]; S.C. DEPT OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2012-2013 (2013) [hereinafter S.C. REPORT 2012-2013], <http://www.state.sc.us/djj/pdfs/2012-13%20Annual%20Statistical%20Report.pdf> [https://perma.cc/G2TF-6UTS]; S.C. DEPT OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2011-2012 (2012) [hereinafter S.C. REPORT 2011-2012], <http://www.state.sc.us/djj/pdfs/2011-12%20Annual%20Statistical%20Report.pdf> [https://perma.cc/KCA9-L876]; S.C. DEPT OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2010-2011 (2011) [hereinafter S.C. REPORT 2010-2011], <http://www.state.sc.us/djj/pdfs/2010-11%20Annual%20Statistical%20Report.pdf> [https://perma.cc/L8YW-Y959]; S.C. DEPT OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2009-2010 (2010) [hereinafter S.C. REPORT 2009-2010], <http://www.state.sc.us/djj/pdfs/2010%20Annual%20Statistical%20Report.pdf> [https://perma.cc/MJ9W-UWSS]; S.C. DEPT OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2008-2009 (2009) [hereinafter S.C. REPORT 2008-2009], <http://www.state.sc.us/djj/pdfs/2008-09-Annual-Statistical-Report.pdf> [https://perma.cc/8HV3-3L8Q]; S.C. DEPT OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2007-2008 (2008) [hereinafter S.C. REPORT 2007-2008], <http://www.state.sc.us/djj/pdfs/2008-Statistical-Report.pdf> [https://perma.cc/6UGX-WF9A]. There were 23,826 statewide charges in 2007-08, 23,111 in 2008-09, and 20,394 in 2009-10, for an average of 22,444. *See* sources cited *supra*. In the next three years, there were 18,114 in 2010-11, 17,180 in 2011-12, and 16,754 in 2012-13, for a three-year average of 17,349. *See* sources cited *supra*. That reflects a 22.7% decline. *See* sources cited *supra*.

294 DISTURBING SCHOOLS DATA FY 2008-2009, *supra* note 160, at slide 5.

- 295 *Id.*
- 296 *See infra* Figure 1 and note 297.
- 297 For the source of the collected data presented in Figure 1, see S.C. REPORT 2015-2016, *supra* note 121; S.C. REPORT 2014-2015, *supra* note 293; S.C. REPORT 2013-2014, *supra* note 293; S.C. REPORT 2012-2013, *supra* note 293; S.C. REPORT 2011-2012, *supra* note 293; S.C. REPORT 2010-2011, *supra* note 293; S.C. REPORT 2009-2010, *supra* note 293; S.C. REPORT 2008-2009, *supra* note 293.
- 298 S.C. DEPT OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2016-2017, at 13 (2017) [hereinafter S.C. REPORT 2016-2017], <http://www.state.sc.us/djj/pdfs/2016-17%20Annual%C20Statistical%20Report.pdf> [https://perma.cc/TA2E-FK28].
- 299 *Id.* at 11. Total referrals decreased from 15,429 in 2015-2016 to 13,591 in 2016-2017, or 11.9%. *Id.* Nonviolent referrals decreased from 14,172 in 2015-2016 to 12,194 in 2016-2017, a 14.0% decrease. *Id.*
- 300 Compare S.C. REPORT 2016-2017, *supra* note 298, at 13, with S.C. REPORT 2015-2016, *supra* note 121, at 13. That some disturbing schools cases could now be charged as disorderly conduct cases should not come as a surprise since the deputy in the Spring Valley incident initially charged Niya Kenny with disorderly conduct. *See supra* text accompanying note 67.
- 301 Act of Sept. 1, 2013, Tex. S.B. No. 1114, §§ 6-7 (2013), <http://www.capitol.state.tx.us/tlodocs/83R/billtext/pdf/SB01114F.pdf#navpanes=0> [https://perma.cc/AL6C-NE3B] (providing for the prosecution of certain misdemeanor offenses committed by children and to school district law enforcement) (amending TEX. EDUC. CODE ANN. §§ 37.124 & 27.126).
- 302 TEX. APPLESEED & TEX. CARE FOR CHILDREN, DANGEROUS DISCIPLINE: HOW TEXAS SCHOOLS ARE RELYING ON LAW ENFORCEMENT, COURTS, AND JUVENILE PROBATION TO DISCIPLINE STUDENTS 11 (2016) [hereinafter TEXAS APPLESEED], <http://stories.texasappleseed.org/dangerous-discipline> [https://perma.cc/XWZ8-TKAQ].
- 303 Act of May 20, 2013, Tex. S.B. No. 393 § 12 <http://www.capitol.state.tx.us/tlodocs/83R/billtext/pdf/SB00393F.pdf#navpanes=0> [https://perma.cc/FZE3-DGN8] (regarding the criminal procedures related to children who commit certain Class C misdemeanors) (codified at TEX. EDUC. CODE ANN. § 37.146).
- 304 TEXAS APPLESEED, *supra* note 302, at 11.
- 305 *Id.* at 5.
- 306 S.C. DEPT OF EDUC., *supra* note 193, at 9.
- 307 *See* Barry C. Feld, *Violent Girls or Relabeled Status Offenders? An Alternative Interpretation of the Data*, 55 CRIME & DELINQ. 241, 242 (2009) (arguing that increasing arrests of girls for simple assaults, especially domestic assaults, were relabeled status offenses after statutes limited states' ability to incarcerate status offenders).
- 308 *Supra* notes 151-56 and accompanying text.
- 309 *Cf.* INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 136 and accompanying text (discussing charges filed by SROs).
- 310 INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 136, at 37.
- 311 Consent Decree, *United States v. City of Ferguson*, 4:16-cv-00180-CDP, 48-52 (2016).
- 312 *Id.* at 50.

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- 313 It is worth noting that some advocates have called for more dramatic reform “ending the regular presence of law enforcement in schools.” DIGNITY IN SCH., COUNSELORS NOT COPS: ENDING THE REGULAR PRESENCE OF LAW ENFORCEMENT IN SCHOOLS 2 (2016), http://www.dignityinschools.org/sites/default/files/DSC_Counselors_Not_Cops_Recommendations.pdf [<https://perma.cc/9JWL-U9C2>]. While much can be said for such a call, I do not focus on it because it has not garnered much political traction nationally nor has it played a role in post-Spring Valley reform efforts in South Carolina. For purposes of this Article, I focus on efforts to exclude SROs' involvement from school disciplinary matters, and thus reduce the number of arrests and charges arising from such matters.
- 314 As noted, *supra* note 187, it remains to be seen whether the Trump Administration will revise this guidance.
- 315 *Supra* notes 199-205 and accompanying text.
- 316 U.S. DEPT OF JUSTICE & U.S. DEPT OF EDUC., SAFE SCHOOL-BASED ENFORCEMENT THROUGH COLLABORATION, UNDERSTANDING, AND RESPECT (SECURE) STATE AND LOCAL POLICY RUBRIC [hereinafter SECURE RUBRIC], <https://www2.ed.gov/documents/press-releases/secure-policy.pdf> [<https://perma.cc/9QXN-PUK5>].
- 317 *Id.* at 2-4 (citing MO. REV. STAT. § 162.215 (2016); 22 PA. CODE § 10.11 (2012); N.J. ADMIN. CODE § 6A:16-6.2 (2014)).
- 318 *Id.* at 9 (emphasis added).
- 319 *Id.*
- 320 *Id.* at 9-13.
- 321 *Id.* at 10.
- 322 *Id.* at 11-12.
- 323 *Supra* notes 199-200 and accompanying text.
- 324 SECURE RUBRIC, *supra* note 316, at 6.
- 325 Deputy Chief Chris Cowan, The Richland County Sheriff's Departments SRO Program: Innovation and Excitement for the 21st Century, slide 19 (2017) (on file with author).
- 326 *Id.*
- 327 Telephone Interview with Captain John Ewing, Richland County Sheriff's Dep't (June 26, 2017).
- 328 S.C. DEPT OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET 2016-2017, at 40 (2017) [hereinafter S.C. COUNTY 2016-2017], <http://www.state.sc.us/djj/pdfs/2016-2017%20County%20Datasheets.pdf> [<https://perma.cc/8KFF-HPR3>].
- 329 S.C. COUNTY 2014-2015, *supra* note 282, at 40.
- 330 S.C. COUNTY 2015-2016, *supra* note 282, at 40.
- 331 The state reports the five most frequent charges in each county. Disturbing schools fell out of the top five in 2016-2017 for Richland County, meaning it was at least below 27 cases. S.C. COUNTY 2016-2017, *supra* note 328, at 40.
- 332 2017-18 Memoranda of Agreement with the Richland School District Two, Richland School District One and the Lexington-Richland School District Five [hereinafter 2017-18 Memoranda of Agreement] (on file with author). The agreements are identical with the exception of the specific schools to which they apply and the amount of money each district pays the sheriff's

department in exchange for SRO services. The sheriff's department agreement with DOJ required it to review its memoranda of understanding with local school districts. DOJ COMPLIANCE REVIEW LETTER, *supra* note 101.

Reforms related to the selection, training, and supervision of SROs are beyond the scope of this Article.

DOJ COMPLIANCE REVIEW LETTER, *supra* note 101, ¶ 8, ¶¶ 74-75.

Id. ¶ 4.

Id. ¶ 55.

Id. ¶ 55.

Telephone Interview with Captain John Ewing, *supra* note 327.

DOJ COMPLIANCE REVIEW LETTER, *supra* note 101, ¶ 11.

2017-18 Memoranda of Agreement, *supra* note 332, at 1.

Id.

Id. at 3 (emphasis in original).

See id. at 2.

DOJ COMPLIANCE REVIEW LETTER, *supra* note 101, ¶ 28, ¶ 45.

2017-18 Memoranda of Agreement, *supra* note 332, at 3, ¶ 1.

The renegotiated MOA reads:

The SRO shall not act as a school disciplinarian, as disciplining students is a school responsibility. However, if the incident is a violation of the law, the Principal shall contact the SRO or their supervisor in a timely manner and the SRO shall then determine whether law enforcement action is appropriate.

Id. at 1, ¶ 1 (emphasis in original). This is the same precise language as was included in the prior MOA. *See supra* notes 202-03. The only difference is that the new MOA places this language in a more prominent location and has bolded the first phrase. *See also* 2017-18 Memoranda of Agreement, *supra* note 332, at 6, ¶ 30.

S.C. CODE ANN. § 59-24-60 (1994).

Supra note 209 and accompanying text.

2017-18 Memoranda of Agreement, *supra* note 332, at 3 (“[T]he SRO shall then determine whether law enforcement action is appropriate The discretion of filing formal charges is left solely up to the SRO.”).

Fedders, *supra* note 41, at 585.

Supra note 325, at slide 16.

Nance, *Rethinking Law Enforcement Officers in Schools*, *supra* note 87, at 158.

Id.

2017-18 Memoranda of Agreement, *supra* note 332, at 3, ¶ 1.

See 2017-18 Memoranda of Agreement, *supra* note 323, at 3.

- 356 See 41(5) S.C. Reg. 57-65 (May 26, 2017), http://www.scstatehouse.gov/state_register.php [<https://perma.cc/WZK3-D7JY>] (codified at S.C. Reg. 43-279 & 43-210). Although an examination of the drafting history of these regulations is beyond the scope of this Article, it is worth noting how various advocates' efforts improved these regulations. Shortly after the Spring Valley incident, the South Carolina Department of Education convened a Safe Schools Task Force, which recommended new regulation regarding SROs, and revisions to an existing regulation regarding school discipline codes. See S.C. DEPT EDUC., SOUTH CAROLINA SAFE SCHOOLS TASKFORCE REPORT 5 (2016), <http://ed.sc.gov/newsroom/public-information-resources/south-carolina-safe-schools-taskforce-report/> [<https://perma.cc/ZZ8G-XDSQ>]. Those proposed regulations would not have prevented the Spring Valley incident. The SRO regulation would have required memoranda of agreement but did not require any specific limitations on the role of SROs. *Id.* at 17-18. And the discipline regulation (like the MOA in effect for the Spring Valley incident) would have required schools to report any criminal conduct, no matter how minor, to law enforcement. *Id.* at 12 (proposed S.C. Reg. 43-279(IV)(B)(3)(d)). Following critical comments from multiple advocates (including, in full disclosure, myself), the South Carolina Senate Education Committee returned the regulations to the Department, insisting that it revise them. Regulation Document Numbers 4657 & 4659 (reporting that "Committee Requested Withdrawal" and that the regulations were "Withdrawn and Resubmitted"), <http://www.scstatehouse.gov/regnsrch.php> [<https://perma.cc/5KSK-M74S>]. The revisions included the limits on SRO contacts and law enforcement referrals discussed in this section.
- 357 S.C. CODE ANN. REGS. 43-279(IV)(C)(2)(a) & (3) (2017). Exempting this list of offenses echoes provisions of the Richland County Sheriff's Department's voluntary agreement with the DOJ. See DOJ COMPLIANCE REVIEW LETTER, *supra* note 101, at 12-13, ¶ 55.
- 358 S.C. CODE ANN. REGS 43-279(IV)(B)(3)(d) & 43-210(IV)(A) (2017).
- 359 See *supra* notes 311-12 and accompanying text.
- 360 See *supra* note 235.
- 361 S.C. CODE ANN. § 59-24-60 (1994).
- 362 S.C. CODE ANN. REGS. 43-210(V) (2017).
- 363 See *supra* Section III.B.1.b.
- 364 See *supra* Section III.A.
- 365 S.C. CODE ANN. REGS 43-279(IV)(B)(3)(d) & (C)(2)(a) (2017).
- 366 S.C. CODE ANN. § 59-24-60 (1994).
- 367 See Sayali Himanshu Bapat & Barbara Bennett Woodhouse, *Is There Justice for Juveniles in the United States, India, and Italy?: Towards a Framework for Transnational Comparisons*, in THE FUTURE OF JUVENILE JUSTICE: PROCEDURE AND PRACTICE FROM A COMPARATIVE PERSPECTIVE 37, 45-46 (Tamar R. Birckhead & Solange Mouthaan eds., 2016).
- 368 DOJ COMPLIANCE REVIEW LETTER, *supra* note 101, at 12-13, ¶ 55(d); see also *id.* at 13, ¶ 58 (listing restorative justice practices as possible means to address student misbehavior).
- 369 See *id.* at 14, ¶ 59(d) & 17, ¶ 66(e).
- 370 See *id.* at 9, ¶ 38.
- 371 41(5) S.C. Reg. 60 (May 26, 2017), http://www.scstatehouse.gov/state_register.php [<https://perma.cc/UL67-XRN6>] (codified at S.C. CODE ANN. REGS. 43-279(IV)(B)(3)(c) (2017)).
- 372 For the voluntary agreement, see DOJ COMPLIANCE REVIEW LETTER, *supra* note 101. For the regulations, see S.C. CODE ANN. § 59-24-60 (1994).

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- 373 See DOJ COMPLIANCE REVIEW LETTER, *supra* note 101, at 3.
- 374 See Email from Brittney Alls, Richland One School District Ombudsman, to author (Jan. 25, 2017) (on file with author).
- 375 See Email from Jennifer Coker to Heather Goergen, Juris Doctor Candidate, University of South Carolina School of Law (June 13, 2017, 7:38 AM EDT) (on file with author) (“We are just beginning our Restorative Practices initiative in 2017-2018 with 3 schools”). This effort follows a revision to the Charleston school district's discipline code, which explicitly identified a category of less serious misbehavior as incidents that should be “Teacher Managed.” Email from Jennifer Coker to Heather Goergen, Juris Doctor Candidate, University of South Carolina School of Law (July 14, 2017, 3:30 PM EDT) (on file with author).
- 376 In South Carolina, anyone can file delinquency charges. See S.C. CODE ANN. 63-19-1020 (2008). Although uncommon, several other statutes permit anyone to file delinquency cases. *E.g.*, ALA. CODE § 12-15-121(A) (2017); DEL. CODE ANN. 10, § 1003 (West 1994); MINN. STAT. ANN. §§ 260B.141(subd. 1) (West 1999) & 260C.141(subd. 1) (2012); N.H. REV. STAT. ANN. §§ 169-B:6 (2014) & 169-C:7 (2017); OHIO REV. CODE ANN. § 2151.27(A)(1) (West 2017); 23 PA. CONS. STAT. § 6334(a) (2014); 14 R.I. GEN. LAWS § 14-1-11(b) (2015); TENN. CODE ANN. § 37-1-119 (1970). I have called for states to remove this authority, which is a relic of the early family court, in favor of juvenile justice authorities screening all such referrals to determine the strength of the evidence of a crime and whether prosecution is necessary to rehabilitate a child, an analysis that should include whether the incident is better handled at school. Gupta-Kagan, *supra* note 28.
- 377 Cf. *supra* notes 246-49 and accompanying text.
- 378 Kenny v. Wilson Complaint, *supra* note 64, ¶ 78 (“In about twenty percent of cases in which DJJ [Department of Juvenile Justice] recommended diversion, solicitor's offices moved forward with prosecution.”). An academic empirical study of this hypothesis is currently underway in South Carolina. Several colleagues and I are surveying county practices to determine in which counties prosecutors make decisions without consulting the Department of Juvenile Justice and in which counties DJJ recommends whether to prosecute or not specific cases to prosecutors, and whether varying procedures correlate with different outcomes.
- 379 Gupta-Kagan, *supra* note 28.
- 380 See *supra* Section I.A.
- 381 See *supra* Section III.B.
- 382 See *supra* Section II.C.
- 383 See *supra* Section II.D.
- 384 Both the Richland County sheriff and Richland County School District Two superintendent advocated narrowing the disturbing schools' statute. See Roldán, *supra* note 255.
- 385 See *supra* Section III.B.1.
- 386 See *supra* Section III.A.
- 387 See *supra* Section III.B.2.
- 388 See *supra* Section III.B.2.
- 389 See *supra* Section III.B.2.
- 390 See *supra* Section III.B.
- 391 See *supra* Section III.B.

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392 *See supra* Section III.B.

393 *See generally supra* Part II.

394 *See generally supra* Section I.C.2.

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