

Realizing Restorative Justice: Legal Rules and Standards for School Discipline Reform

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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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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

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).

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.

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 Tift eds., 2006). Peruse the table of contents and note the diverse origins of restorative justice and its varied applications around the world.

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 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

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.

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=4231>

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

o&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'.

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.

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).

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);

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

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).

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

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

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

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/do5cb2181a4545db07_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%93once-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.nsb.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. DEP’T. JUSTICE & U.S. DEP’T. 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>.

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 debate.⁴⁷ However, what makes today's debate about punitive discipline

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

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

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*

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

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 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.

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

DEP'T 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).

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 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.

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.”).

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

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 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).

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

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:*

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 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

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).

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

“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

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. Perty & 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. DEP’T 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. MULTIDISCIPLINARY 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) (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*

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

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).

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

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

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.

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.

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.

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.

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.

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

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-ut-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%20rep%20ort.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).

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

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-o8b-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).

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

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).

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).

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

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.

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

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.

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.

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

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).

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

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 Ivker & 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”; 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

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

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

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,

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 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

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 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

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.

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

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_SSDWebinar4RestorativeJusticePresentation.pdf.

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.

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).

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

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-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).

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 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

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.

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

188. State departments of education also provide nonbinding guidance on restorative practices in schools. *See, e.g., Restorative Practices*, MINN. DEP'T. 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).

“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. 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.

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. DEP’T. JUSTICE & U.S. DEP’T. EDUC., DEAR COLLEAGUE LETTER: NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE (Jan. 8, 2014).

195. U.S. DEP’T. 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. DEP’T OF JUSTICE, THE COMPREHENSIVE SCHOOL SAFETY INITIATIVE: AWARDS MADE IN FISCAL YEAR 2015 (2016), <https://www.ncjrs.gov/pdffiles1/nij/249228.pdf>.

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 school should aspire to be. In the Order, parties agreed that

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.

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

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.

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.

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).

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

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 Tift 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.*

216. *Id.*

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”

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 Tift 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 Tift 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).

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 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,

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).

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

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).

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. DEP’T 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 Tifft 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 Tifft 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*

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

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.”).

distinct from, but gets confused with,²⁴⁴ restorative justice in the criminal justice or transitional justice settings.²⁴⁵ As Judge Charlie 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.

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%20amended%20final%20draft%2001%20Feb%202010.pdf>.

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

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).

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 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

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).

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.

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

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/>

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 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.

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.

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

263. JAIN ET AL., *supra* note 13, at 7–8, 54.

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.

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

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.

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).

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

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.

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

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.

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

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.

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 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*

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.

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

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.

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 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

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.

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.

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).

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.nacrj.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%20Code%20of%20Practice.pdf> (last visited Jan. 20, 2018).

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 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

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)).

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

305. See, e.g., RESTORATIVE JUSTICE COUNCIL, PRINCIPLES OF RESTORATIVE PRACTICE, <https://restorativejustice.org.uk/sites/default/files/resources/files/Principles%20of%20restorative%20practice%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/TEXRP-Certification-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).

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.

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

309. See, e.g., NYC DEP'T. OF EDUC., CITYWIDE BEHAVIORAL EXPECTATIONS TO SUPPORT STUDENT LEARNING (2015), <http://schools.nyc.gov/NR/rdonlyres/CD69C859-524C-43E1-AF25-C49543974BBF/o/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).

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

310. Morrison & Vaandering, *supra* note 10.

“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.