

“That’s the Hate They’re Giving Us, Baby, A System Designed Against Us.” The Restorative Justice Solution to the School-to-Prison Pipeline

Amanda Iocono

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“That’s the Hate They’re Giving Us, Baby, A System Designed Against Us.”¹ The Restorative Justice Solution to the School- to-Prison Pipeline

Amanda D. Iocono*

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ABSTRACT

The school-to-prison pipeline is one of the nation’s biggest challenges as students of color, LGBTQIA+ students, and students with disabilities are being funneled into prisons. Thousands of articles have been written on the existence of the school-to-prison pipeline and potential solutions. Federal and state policies have shifted to combat the pipeline, but there is still a large proportion of our nation’s students being criminalized on account of their looks and behaviors. This Note argues that the school-to-prison pipeline is a systemic practice of the American education system, and the education system is functioning exactly as designed. The continued use of zero-tolerance policies and school resource officers are proof that this system exists and continues to evolve. To address the real structural inequities of the school system, it must be met with equally radical practices, such as restorative justice, that address the systemic harm. Restorative justice, when done correctly and with the right resources, can be the solution to the school-to-prison pipeline.

AUTHOR’S NOTE

*B.S., Centre College; J.D. Candidate, 2023, University of Massachusetts School of Law; M.P.P. Candidate, 2024, University of Massachusetts Dartmouth; Alumna, City Year Corps Member (2018-2020). This article is dedicated to my former students. Thank you to Professor Jeremiah Ho and Professor Hillary Farber for your endless encouragement, guidance, and patience. Thank you to my family and friends for your constant support and listening to me rant about the education system for hours. Also, a massive thank you to the *UMass Law Review* staff for your tireless work. I would be remised if I also did not thank my former AmeriCorps teams and staff at my school for everything they taught me. Words are insufficient to express my gratitude and appreciation.

¹ ANGIE THOMAS, THE HATE U GIVE 170 (2017).

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INTRODUCTION

Malcolm X once said, “[e]ducation is the passport for the future, for tomorrow belongs to those who prepare for it today.”² Schools should be setting students up for success, but for many, schools are setting them up for a future in prison.³ This phenomenon is known as the school-to-prison pipeline.⁴ The school-to-prison pipeline is a culmination of national policies and practices targeting and disproportionately impacting students of color, LGBTQIA+ students, and students with disabilities.⁵ These policies, and their trickle down effects, include: 1) zero-tolerance policies that lead to suspensions and expulsions, 2) hostile school climates, and 3) educational trauma leading to a lack of academic success.⁶ This Note argues that the school-to-prison pipeline is not just a development of these factors and policies, but is an expected byproduct of how the education system functions.⁷

As society begins to reemerge from the COVID-19 pandemic, there is a new opportunity to redefine school discipline and end the school-to-prison pipeline.⁸ Schools have faced unprecedented challenges as students have suffered educationally, psychologically, and socially during the pandemic.⁹ The National Association of School Psychologists reported, “[u]nder normal circumstances, we would expect approximately 20% of children to experience some social–emotional and behavioral concern throughout their school trajectory—we now expect these rates to double or triple after COVID.”¹⁰

² Sha Be Allah, *The Source Remembers Malcolm X*, THE SOURCE, (May 19, 2013), <https://thesource.com/2013/05/19/the-source-remembers-malcolm-x/> [<https://perma.cc/W52Y-52CV>].

³ Kalinda Jones et al., *Seen but Not Heard: Personal Narratives of Systematic Failure Within the School-to-Prison Pipeline*, 17 J. CULTURE & EDUC. 49, 50 (2018); Russell J. Skiba et al., *More Than a Metaphor: The Contribution of Exclusionary Discipline to a School-to-Prison Pipeline*, 47 EQUITY & EXCELLENCE EDUC. 546, 558 (2014).

⁴ Skiba et al., *supra* note 3, at 558.

⁵ *Id.*

⁶ Jones et al., *supra* note 3, at 53.

⁷ Skiba et al., *supra* note 3, at 558.

⁸ RICHARD MENDEL, THE SENTENCING PROJECT, BACK-TO-SCHOOL ACTION GUIDE: RE-ENGAGING STUDENTS AND CLOSING THE SCHOOL-TO-PRISON PIPELINE 23 (2021), <https://www.sentencingproject.org/wp-content/uploads/2021/08/Back-to-School-Action-Guide-Re-Engaging-Students-and-Closing-the-School-to-Prison-Pipeline.pdf> [<https://perma.cc/8NU2-9VYJ>].

⁹ *Id.* at 6.

¹⁰ *Providing Effective Social–Emotional and Behavioral Supports After COVID-19 Closures: Universal Screening and Tier 1 Interventions*, NAT’L ASS’N OF SCH. PSYCHS. (2020), <https://www.nasponline.org/resources-and-publications/resources-and-podcasts/covid-19-resource-center/crisis-and-mental-health-resources/providing-effective-social%E2%80%99>

This Note will first review the history of the school-to-prison pipeline and explore how the culmination of zero-tolerance policies have resulted in this systemic practice. In Part II, this Note will argue that this systemic practice is an inherent feature of our education system. The education system is functioning exactly as designed, and students of color are suffering because we are refusing to acknowledge and act on it. Without systemic change, the pipeline will continue. Part II will also argue that restorative justice practices must be implemented in schools to address the harm. Part III of this Note concludes by arguing that the concept of restorative justice practices can serve as a legal and social solution to the education system crisis.

I. THE BACKGROUND: STORIES FROM THE PIPELINE

Christian Ramirez, a child of Mexican immigrants, learned to read at sixteen years old, after being arrested at age fifteen.¹¹ He was expelled from elementary school in fourth grade and subsequently kicked out of three more elementary schools and two middle schools.¹² As Ramirez recalls:

Having a “disruptive” reputation meant that school employees were quick to remove me from school. I acknowledged this and countered with being violent. The middle school suspensions, also known as “the only option to handle Christian,” were the most damaging. They kept me out of school at the time when I needed to catch-up academically. Since I was not in school, I began to be curious about my neighborhood where there was a heavy gang presence.¹³

Ramirez then became involved in a neighborhood gang where he was later arrested on weapons charges and sentenced to twenty-seven years in prison at age seventeen.¹⁴ According to Ramirez, “I attended the public school system, but I was blatantly excluded from education.”¹⁵

Ramirez is one of the many victims of the school-to-prison pipeline, and his story is reflective of how our education system disproportionately funnels students of color, LGBTQIA+ students, and students with disabilities into the criminal justice system and out of

93emotional-and-behavioral-supports-after-covid-19-closures-universal-screening-and-tier-1-interventions [https://perma.cc/XX5V-WQKG].

¹¹ Jones et al., *supra* note 3, at 54.

¹² *Id.*

¹³ *Id.* at 55.

¹⁴ The charges were attempted murder and carrying a concealed weapon. *Id.* at 56.

¹⁵ *Id.* at 57.

schools and society.¹⁶ “Students who experience suspension and expulsion because of harsh disciplinary policies are three times more likely to become involved in the criminal justice system.”¹⁷ The history of the inequities of the school-to-prison pipeline starts with “zero-tolerance policies.”¹⁸

A. The Origin and Impact of Zero-Tolerance Policies

For as long as there has been formal education, students have been punished. School discipline has traditionally been accomplished through corporal punishment (whipping and paddling), teacher-administrated discipline, and administrative proceedings.¹⁹

The logic behind traditional discipline has been deterrence, with corporal punishment taking place in front of the entire class to show the consequences of misconduct.²⁰ As long as the teacher’s punishment of the student was reasonable, meant to promote discipline, and not done maliciously to inflict pain, the punishment was deemed acceptable by the standards set in the Supreme Court’s 1977 corporal punishment case *Ingraham v. Wright*.²¹ While most schools have shifted away from corporal punishment, they have embraced zero-tolerance policies and have started adopting surveillance strategies used in prisons, such as videotaping, searches and seizures of students’ possessions, and metal detectors.²²

¹⁶ Skiba et al., *supra* note 3, at 558.

¹⁷ Jones, *supra* note 3, at 50; *see also* Tracey L. Shollenberger, *Racial Disparities in School Suspension and Subsequent Outcomes*, in CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 31, 31 (David J. Losen ed., 2015).

¹⁸ *See infra* Part IIA.

¹⁹ Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned Into A Nightmare? The American Dream’s Promise of Equal Education Opportunity Grounded in Brown v. Board of Education*, 9 U.C. DAVIS J. JUV. L. & POL’Y 289, 299 (2005).

²⁰ Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1044 (2001).

²¹ 430 U.S. 651 (1977). In *Ingraham*, two students sued their school for incidents of disciplinary paddling, alleging that it was a violation of their Eighth and Fourteenth Amendment rights. *Id.* at 653. The Supreme Court of the United States upheld corporal punishment, reasoning that the Eighth Amendment only protected those who were facing charges in the criminal justice system, not for students in the public sector and that the student’s Fourteenth Amendment rights were satisfied. *Id.* at 661. *See also* Hanson, *supra* note 19, at 299.

²² Edward Ward, a graduate of Orr Academy on the West Side of Chicago, testified before Congress, “[f]rom the moment we stepped through the doors [of the school] in the morning, we were faced with metal detectors, X-ray machines, and uniformed security.” Melinda D. Anderson, *When School Feels Like Prison*, THE ATLANTIC, (Sep. 12, 2016), <https://www.theatlantic.com/education/archive/2016/09/when-school-feels-like-prison/499556/> [<https://perma.cc/J98L-6JU2>]; *see also* Shollenberger, *supra* note 17, at 31. For

Zero-tolerance policies developed in the late 1980s and early 1990s out of state and federal drug enforcement policies.²³ Across the country, there was a mistaken perception that juvenile violence was rising, especially in urban schools, and this violence was expanding to suburban schools.²⁴ John J. Dilulio’s “superpredator” myth that emerged in the 1990s helped stress this belief.²⁵ According to Dilulio, superpredators were ruthless sociopaths with no moral conscience who saw crime as a rite of passage and were undeterred by any consequences or sanctions.²⁶ Specifically, “Black boys were caught in the midst of this superpredator mythology, constantly represented in the media as an army of thugs that threatened the future of ‘innocent’ citizens pursuing the American dream.”²⁷ Alongside the “superpredator” myth, the “broken windows theory” took off in academia, politics, and media.²⁸

example, before 2013, Texas school officers were able to charge students with Class C misdemeanors, and students were required to show up in court before a judge. If students failed to pay the fines associated with the misdemeanor, then they could be immediately arrested. This law was repealed in 2013, but not before 300,000 students were charged. Jody Serrano, *School Officers Can No Longer Issue On-Campus Misdemeanor Citations*, THE TEX. TRIBUNE, (Aug. 29, 2013, 6:00 AM), <https://www.texastribune.org/2013/08/29/class-disruption-cases-head-principals-office-not-> [<https://perma.cc/L8H7-B96X>].

²³ Hanson, *supra* note 19, at 300.

²⁴ Stephanie Martinez, *A System Gone Berserk: How Are Zero-Tolerance Policies Really Affecting Schools?*, 53 PREVENTING SCH. FAILURE 153, 153 (2009).

²⁵ Judith A.M. Scully, *Examining and Dismantling the School-To-Prison Pipeline: Strategies for a Better Future*, 68 ARK. L. REV. 959, 964-67 (2016). Dilulio would later apologize for the superpredator myth and admit that he was wrong. Carroll Bogert & Lynnell Hancock, *Analysis: How the Media Created A ‘Superpredator’ Myth That Harmed a Generation of Black Youth*, NBC NEWS, (Nov. 20, 2020, 6:00 AM), <https://www.nbcnews.com/news/us-news/analysis-how-media-created-superpredator-myth-harmed-generation-black-youth-n1248101> [<https://perma.cc/F7AH-CNAY>].

²⁶ Scully, *supra* note 25, at 964.

²⁷ *Id.* at 966.

²⁸ Shankar Vedantam et al., *How A Theory of Crime and Policing Was Born, and Went Terribly Wrong*, NPR, (Nov. 1, 2016, 12:00 AM), <https://www.npr.org/2016/11/01/500104506/broken-windows-policing-and-the-origins-of-stop-and-frisk-and-how-it-went-wrong> [<https://perma.cc/S2P6-PTK5>] (discussing the importance of the “broken windows” theory of policing in discussions on scholastic discipline). The broken windows theory, set forth by George L. Kelling and James Q. Wilson, is derived from Phillip Zimbardo’s field study where he placed two cars in two very different locations. *Id.* One car was placed in a poor neighborhood in New York City and the other car was placed in an affluent neighborhood in Palo Alto, California. *Id.* Within ten minutes, the car was vandalized in New York City, but the car in Palo Alto was untouched. *Id.* Then, Zimbardo himself vandalized the car in Palo Alto, and after that, the car was destroyed, just like it was in New York. *Id.* Zimbardo concluded that “something that is clearly neglected can become a target for vandals. *Id.* Kelling and Wilson expanded on this idea and proposed that “a broken window or other visible signs of disorder or decay . . . can send the signal that the neighborhood is uncared for.” *Id.* Kelling and Wilson also proposed that “Instead of channeling most resources into solving major crimes, [the police] should instead try to clean up the streets and maintain order . . .” *Id.*

The superpredator myth and the broken windows theory infiltrated the logic informing discipline in schools. The American public embraced the myth and called for harsher sanctions against children who committed crimes, specifically youths of color.²⁹

One of the most well-known national zero-tolerance policies was the Gun-Free Schools Act passed by the Clinton Administration.³⁰ The Act required that any student who brought a gun to school be expelled for one year and referred to the juvenile justice system.³¹ Schools were forced to comply with the Act or risk losing federal funding.³² However, many states took a tougher stance and adopted stricter zero-tolerance policies for their schools.³³

Zero-tolerance policies were designed to be “administrative rules intended to address specific problems associated with school safety and discipline,” specifically issues involving weapons, drugs, and violence.³⁴ Students received automatic expulsions for bringing in “guns, knives, or items that look[ed] like weapons onto school grounds.”³⁵ Interestingly, these policies were modeled after laws intended to target the heads of drug cartels, further emphasizing the fact that students were meant to be criminalized from the beginning.³⁶ Zero-tolerance policies spread quickly through the education system and continued to expand in both breadth and severity.³⁷ Several school districts implemented policies that expelled students for bullying,

²⁹ *Id.*; see also Naomi E.S. Goldstein et al., *Dismantling the School-to-Prison Pipeline: The Philadelphia Police School Diversion Program*, 101 CHILD. & YOUTH SERVS. REV. 61, 62 (2019). The broken windows theory along with the superpredator myth exacerbated the logic informing disciplines in school, which was that strict punishments were necessary to maintain the required social order in a classroom. *Id.* Outside the schools themselves, communities also became scared that schools were no longer safe for children, and this rising fear was further intensified by the extensive media coverage. Martinez, *supra* note 24, at 153. Zero-tolerance policies were embraced as necessary to protect students from violence, and even state legislatures followed suit to not appear to be “soft on crime.” *Id.*

³⁰ Scully, *supra* note 25, at 969.

³¹ The Gun-Free Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3907 (codified as amended at 20 U.S.C. § 7961).

³² *Id.* § 14601(b)(1).

³³ Scully, *supra* note 25, at 986. For example, a 10-year-old girl found a small knife in her lunchbox placed there by her mother for cutting fruit. Although she immediately gave the knife to her teacher, she was expelled due to the zero-tolerance policies at the school. Am. Psych. Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in Schools?*, 63 AM. PSYCH. 852, 852 (2008).

³⁴ Hanson, *supra* note 19, at 301.

³⁵ *Id.*

³⁶ Martinez, *supra* note 24, at 154.

³⁷ Nora M. Findlay, *Should There Be Zero Tolerance for Zero Tolerance School Discipline Policies?*, 18 EDUC. & L.J. 103, 106 (2008).

fighting, drug use, swearing, or violating the dress code.³⁸ By 1997, “more than 90% of public schools in the United States reported having zero-tolerance policies.”³⁹ This alarming statistic endorses the notion that zero-tolerance policies have become a part of the educational public policy.⁴⁰

Zero-tolerance policies were meant to protect schools. Instead, these policies have resulted in a “near doubling of the number of students suspended annually from schools since 1974 (1.7 million to 3.1 million), an increase in the presence of police in schools, and the enactment of new laws mandating referral of children to law enforcement authorities”⁴¹ The rise in the number of school resource officers (SROs), security cameras, random searches, and zero-tolerance policies have led to higher rates of suspension.⁴² Despite the argument that violence has increased in schools, statistics show that violent crime has actually decreased from 1992 to 2017.⁴³

Today, zero-tolerance has come to refer to school or district-wide policies that mandate predetermined and harsh punishments for several broadly defined school rules.⁴⁴ In implementing zero-tolerance policies in schools, administrators cast a wide net for both minor and major infractions to deter other potential violators.⁴⁵

Despite the general goal of deterrence, many student actions (or non-actions) are now being punished as criminal or delinquent acts under the guise of zero-tolerance policies.⁴⁶ Schools are being treated as

³⁸ Kaeanna Wood, *Restoring Our Children's Future: Ending Disparate School Discipline Through Restorative Justice Practices*, 2 J. DISP. RESOL. 395, 399 (2014).

³⁹ Findlay, *supra* note 37, at 107 (internal citation omitted).

⁴⁰ *Id.*

⁴¹ Johanna Wald & Daniel F. Losen, *Defining and Redirecting a School-To-Prison Pipeline*, 99 NEW DIRECTIONS FOR YOUTH DEV. 9, 10 (2003).

⁴² Edward W. Morris & Brea L. Perry, *The Punishment Gap: School Suspension and Racial Disparities in Achievement*, 63 SOC. PROBLEMS 68, 70 (2016).

⁴³ Nadine Frederique, *What Do the Data Reveal About Violence in Schools?*, NAT'L INST. OF JUST. (November 13, 2020), <https://nij.ojp.gov/topics/articles/what-do-data-reveal-about-violence-schools> [<https://perma.cc/TUG5-MT54>].

⁴⁴ Hanson, *supra* note 19, at 301.

⁴⁵ *Id.* at 300-01.

⁴⁶ *Id.* at 301-02.

Most frequently, zero-tolerance policies address drugs, weapons, violent incidents, smoking, and school disruptions The evolution of seemingly simple policies with which most reasonable persons would agree and respect has led to unintended and often absurd consequences, a path from which reasonable persons have not yet found any measurable retreat.

Id. at 302.

extensions of the prison system through the hiring of SROs.⁴⁷ “Nationally, the Federal Government has invested more than \$1 billion to subsidize the placement of police officers in schools, resulting in more than 46,000 SROs patrolling school hallways.”⁴⁸ Schools with a majority of Black and/or Latinx students are also more likely to have a police officer stationed at their school as compared to schools with majority White students.⁴⁹

Research has shown that there is a direct correlation between the presence of SROs and increases in arrests, often for low-level offenses.⁵⁰ Even when accounting for poverty, a study showed that “schools with a SRO had nearly five times the rate of arrests for disorderly conduct than a school without a SRO.”⁵¹ In reviewing the literature on the placement of SROs on middle and high school campuses starting in the mid-1990s, “the number of referrals to the juvenile court system increased approximately 1,248% by 2004.”⁵² Again, most of these referrals were for minor offenses and against students who were not considered high risk to re-offend or a public

⁴⁷ Kendrick Washington & Tori Hazelton, *School Resource Officers: When the Cure is Worse than the Disease*, ACLU (May 24, 2021), <https://www.aclu-wa.org/story/school-resource-officers-when-cure-worse-disease> [https://perma.cc/3UE9-VLQE].

⁴⁸ *Id.* In 2014, 43% of all public schools had security staff at school at least once a week, affecting over 70% of students across the country. ANLAN ZHANG ET AL., NAT’L CTR. FOR EDUC. STAT., NCES 2016-079/NCJ 249758, INDICATORS OF SCHOOL CRIME AND SAFETY: 2015, at 106 (2016), <https://bjs.ojp.gov/content/pub/pdf/iscs15.pdf> [https://perma.cc/F2EP-M3A5]. In the 2017-18 school year, “about 45% of schools had an SRO in place at least once a week,” and about 13% of schools reported hosting police officers who were not officially SROs in their building. Stephen Sawchuk, *School Resource Officers (SROs), Explained*, EDUC. WEEK (Nov. 16, 2021), <https://www.edweek.org/leadership/school-resource-officer-sro-duties-effectiveness> [https://perma.cc/8ZFW-CZRW]. Some states, such as Maryland and Florida, now require schools to hire school resource officers. *Id.* In Florida, all schools are required to hire a school resource officer or an “armed guardian,” who is a layperson who participates in a state training program. *Id.* To further highlight the amount of resources devoted to SROs, “the New York Police Department’s School Safety Division is larger than the entire police force of the District of Columbia, Detroit, Boston, and Las Vegas.” Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 288 (2012) [hereinafter *Keeping Kids in Schools*].

⁴⁹ Dana Goldstein, *Do Police Officers Make Schools Safer or More Dangerous?*, N.Y. TIMES (Oct. 28, 2021), <https://www.nytimes.com/2020/06/12/us/schools-police-resource-officers.html> [https://perma.cc/D9VZ-B9RD].

⁵⁰ MENDEL, *supra* note 8, at 13.

⁵¹ Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280 (2009); *see also* Libby Nelson & Dara Lind, *The School-to-Prison Pipeline, Explained*, VOX (Oct. 27, 2015, 11:05 AM), <https://www.vox.com/2015/2/24/8101289/school-discipline-race> [https://perma.cc/C85E-846T].

⁵² 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, 93 (2011).

safety risk.⁵³ Between 2003 and 2011, after implementing alternative discipline programs, Clayton County, Georgia, saw a 67.4% decrease in juvenile court referrals from schools overall, with a 43% reduction for youth of color.⁵⁴ In 2012, Steven Teske, Chief Judge of the Clayton County Juvenile Court, testified to Congress that “[b]y 2004, the referrals [from SROs] increased over 1,000 percent to 1,400 referrals, of which 92% were misdemeanors mostly involving school fights, disorderly conduct, and disrupting public school.”⁵⁵ Teske further described his frustration with his “court system being inundated with low risk cases that consumed the court docket and pushed kids toward probation—kids who made adults mad versus those that scare us.”⁵⁶

Many students have been referred to law enforcement, yet the majority of these students have committed offenses that are not dangerous or serious.⁵⁷ Most referrals to SROs were for minor, non-violent offenses such as tardiness, bad grades, and disorderly conduct; none of these are actions that significantly impact the classroom or school.⁵⁸ SROs, operating under zero-tolerance policies, control both

⁵³ *Id.* For example, in Pennsylvania, school arrests plummeted 84% from 2013-14 to 2018-19 after police agreed to stop arresting students for routine misbehaviors and instead refer the misbehaving youths to community development agencies. Goldstein et al., *supra* note 29, at 62. “One such program in Philly helped to reduce student arrest rates by more than 50% in its first year and by 84% after its fifth year.” Kiley Koscinski, *ACLU finds Allegheny County Students are Arrested More Often Than Anywhere Else in Pennsylvania*, 90.5 WESA (Jan. 24, 2022, 5:56 PM), <https://www.wesa.fm/education/2022-01-24/aclu-finds-allegheny-county-students-are-arrested-more-often-than-anywhere-else-in-pennsylvania> [<https://perma.cc/4UP8-33Q7>].

⁵⁴ Teske, *supra* note 52, at 93.

⁵⁵ Steven C. Teske, Testimony before Senate Subcommittee on the Constitution, Civil Rights, and Human Rights (Dec. 12, 2012), <https://www.judiciary.senate.gov/imo/media/doc/12-12-12TeskeTestimony.pdf> [<https://perma.cc/W4FR-P774>].

⁵⁶ *Id.*

⁵⁷ NCAAP LEGAL DEF. & EDUC. FUND, DISMANTLING THE SCHOOL-TO-PRISON PIPELINE, (Jul. 27, 2018), https://www.naacpldf.org/wp-content/uploads/Dismantling_the_School_to_Prison_Pipeline_Criminal-Justice_.pdf [<https://perma.cc/3RRC-C39E>]. According to the U.S. Department of Education’s Civil Rights Data Collection (CRDC), approximately 260,000 students were referred to law enforcement during the 2011-2012 school year, and approximately 92,000 students were arrested on school property during the school day or at a school sponsored event. U.S. DEP’T OF EDUC. OFF. FOR C.R., CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE 6 (Mar. 21, 2014), <https://ocrdata.ed.gov/assets/downloads/CRDC-School-Discipline-Snapshot.pdf> [<https://perma.cc/ZY9Y-3UL7>] [hereinafter *Civil Rights Snapshot*]. In the 2015-16 school year, at least 230,000 students were referred to law enforcement, mostly students of color.” MENDEL, *supra* note 8, at 8.

⁵⁸ Washington & Hazelton, *supra* note 47. “Specifically, many of the youth subject to the harshest forms of punishment also come from communities traumatized by poverty, violence, underemployment, inadequate nutrition, health care and education, resulting in youth that are defensive, offensive and ill-equipped to deal with the structured, and often

the children who have a lapse in judgement and the children whose acts are “obviously dangerous and arguably criminal.”⁵⁹

These behavioral infractions trigger automatic expulsions and calls to the police, even when no actual threat exists.⁶⁰ Clearly, this discipline is not unbiased.⁶¹ Black students are targeted more “for inherently subjective conduct such as ‘loitering, disrespect, threats, excessive noise,’” and “conduct interference” compared to White students who are more frequently cited for alcohol or drugs.⁶² In 2016, the American Civil Liberties Union (ACLU) filed suit against South Carolina for its “disorderly conduct law,” which prohibited students from conducting themselves in a “disorderly or boisterous manner.”⁶³ The ACLU reported that Black children were four times more likely to be charged under this law than their White counterparts.⁶⁴

This characterization of non-violent student actions as “criminal” encourages the bypassing of student administration proceedings (which are protected by the Supreme Court in *Goss v. Lopez*) and directs them to the juvenile and criminal justice system instead.⁶⁵ This expansion of zero-tolerance laws, policies, practices, and conditions “have led schools to over-discipline many students, sending them on a path that eventually ends with too many of them becoming incarcerated and disenfranchised.”⁶⁶

stressful, environment of public school.” Mara Schiff, *Can Restorative Justice Disrupt the “School-to-Prison Pipeline?”*, 21 CONTEMP. JUST. REV. 121, 122 (2018).

⁵⁹ Hanson, *supra* note 19, at 316.

⁶⁰ Lydia Nussbaum, *Realizing Restorative Justice: Legal Rules and Standards for School Discipline Reform*, HASTINGS L.J. 583, 585 (2018). Such infractions include “insubordination,” “willful defiance,” disrupting class, violating school dress codes, or bringing contraband to campus, like alcohol, controlled substances, or a potential weapon. *Id.*

⁶¹ See Wood, *supra* note 38, at 400.

⁶² *Id.*

⁶³ *Kenny v. Wilson*, ACLU (Mar. 8, 2021), <https://www.aclu.org/cases/kenny-v-wilson> [<https://perma.cc/UTV3-RWAT>] [hereinafter ACLU]. The named plaintiff, Niya Kenny, watched her classmate forcefully pulled from her desk, dragged out on the floor, and subsequently handcuffed. Kenny tried to document the incident but was also arrested pursuant to the statute. Complaint at 18, *Kenny v. Wilson*, No. 2:16-cv-2794-CWH (D. S.C. 2016), 2017 WL 436016.

⁶⁴ ACLU, *supra* note 63.

⁶⁵ Hanson, *supra* note 19, at 301-02. In *Goss*, the Supreme Court held that Ohio students suspended from public school had a right to education given to them by the state constitution and were owed more procedure before being suspended. See generally *Goss v. Lopez*, 419 U.S. 565 (1975).

⁶⁶ Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 330-331 (2016).

This rate of suspension and expulsion continues to increase “[b]ecause it is familiar, cheap, and convenient.”⁶⁷ Administrators can push out “problem” students that are being disruptive, thereby helping teachers handle their full classrooms.⁶⁸ This was seen with the added pressure of the No Child Left Behind Act, which “required schools to have students perform at certain levels” or face punishment, including loss of funding for schools and loss of teachers’ jobs.⁶⁹ Under the Act, teachers were stripped of their professional judgment in teaching and were instead required to “teach to the test” in order to meet the high standards.⁷⁰ For teachers, it became easier to eliminate the students who were not performing to certain standards to protect their performance evaluations rather than actually teach the students.⁷¹ As a consequence, more students were suspended or encouraged to attend alternative schools.⁷²

“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 year and more than 130,000 students were expelled during the 2011-2012 school year.”⁷³ The overwhelming majority (95%) of suspensions were issued for non-violent offenses or minor violations including dress code violations and cursing.⁷⁴

These suspensions are overrepresented by students of color and students with disabilities.⁷⁵ “Black and Hispanic students are 3.6 times

⁶⁷ Brian Palmer, *Why Do We Suspend Misbehaving Students?*, SLATE (Mar. 15, 2013, 5:51 PM), <https://slate.com/human-interest/2013/03/why-do-we-suspend-children-from-school.html> [<https://perma.cc/Z4VB-TVDW>].

⁶⁸ Linda Raffaele Mendez et al., *School Demographic Variables and Out-Of-School Suspension Rates: A Quantitative and Qualitative Analysis of a Large, Ethnically Diverse School District*, 39 PSYCH. SCHOOLS 259, 260 (2002).

⁶⁹ The No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425; Scully, *supra* note 25, at 961-62. Although this Act is now repealed, teachers (and students) are still feeling the impact. See generally *The Difference Between the Every Student Succeeds Act and No Child Left Behind*, UNDERSTOOD, <https://www.understood.org/articles/en/the-difference-between-the-every-student-succeeds-act-and-no-child-left-behind> [<https://perma.cc/D3ZA-H9SL>].

⁷⁰ James E. Schul, *Unintended Consequences: Fundamental Flaws That Plague the No Child Left Behind Act*, J. EDUC. POL’Y (2011), <https://in.nau.edu/wp-content/uploads/sites/135/2018/08/Unintended-Consequences-ek.pdf> [<https://perma.cc/XTE7-2AM8>].

⁷¹ Scully, *supra* note 25, at 962.

⁷² *Id.* at 962.

⁷³ *Civil Rights Snapshot*, *supra* note 57; see also Nussbaum, *supra* note 60, at 597.

⁷⁴ Nussbaum, *supra* note 60, at 597.

⁷⁵ Areto A. Imoukhuede, *The Right to Public Education and the School to Prison Pipeline*, 12 ALB. GOV’T L. REV. 52, 81 (2018).

more likely to be punished—and they are punished more severely—than their white counterparts.”⁷⁶ A National Longitudinal Survey of Youth study revealed that “Black boys were at the highest risk of suspension, with fully two in three (67%) suspended at some point during K-12.”⁷⁷ In 2012, the UCLA Civil Rights Project found that White students have a one-in-twenty chance of being suspended at least once, while Latinx students face a one-in-fourteen chance, Indigenous students face a one-in-thirteen chance, and Black students face a one-in-six chance.⁷⁸ Even within the same school, a study by Morris and Perry showed Black and Latinx students were disproportionately susceptible to suspension compared to White and Asian students.⁷⁹ Various studies have also shown that Black students are punished not only at higher rates, but “are also more likely to experience severe punishment, such as court action or notification to the police.”⁸⁰ A landmark study of Texas schools found 97% of suspensions were at the discretion of school administrators.⁸¹ Only the remaining 3% were in response to an offense that required suspension, such as bringing a weapon to school.⁸² These studies reiterate that Black and Latinx students are treated more harshly than their White peers, and that zero-tolerance policies do not apply equally to every student.⁸³ Instead, teachers and schools appear to administer discipline based on race.⁸⁴ A 2014 report from Padres and Jovenes Unidos points out:

True “zero tolerance” was largely reserved for Black and Brown youth from low-income families, and males in particular. Middle and upper-middle class White students almost never encountered zero tolerance For them, there continued to be seemingly

⁷⁶ Nussbaum, *supra* note 60, at 597-98.

⁷⁷ Shollenberger, *supra* note 17, at 34.

⁷⁸ See, e.g., DANIEL J. LOSEN & JONATHAN GILLESPIE, C.R. PROJECT, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 6 (2012), available at <https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-crr-research/losen-gillespie-opportunity-suspended-2012.pdf> [<https://perma.cc/J422-4QFD>].

⁷⁹ Morris & Perry, *supra* note 42, at 82.

⁸⁰ *Id.* at 70.

⁸¹ Donna St. George, *Study Shows Wide Varieties in Discipline Methods Among Very Similar Schools*, WASH. POST (July 19, 2011), https://www.washingtonpost.com/local/education/study-exposes-some-some-myths-about-school-discipline/2011/07/18/gIQAV0sZMI_story.html [<https://perma.cc/4SKS-EM25>].

⁸² *Id.*

⁸³ Morris & Perry, *supra* note 42, at 82.

⁸⁴ See Scully, *supra* note 25, at 974.

boundless tolerance for their misbehavior, usually chalked up to “youthful mistakes.”⁸⁵

Over the years, zero-tolerance policies have been criticized for their harmful impact on students for loss of valuable learning time in the classroom, disaffection, alienation, and increased likelihood of dropping out of school or being diverted into the criminal justice system.⁸⁶ For instance, in Massachusetts, the average number of days of instruction missed due to school discipline is sixteen days per one hundred enrolled students.⁸⁷ For Black students, that number is thirty-four days, more than triple the amount missed by White students.⁸⁸ Research from the National Longitudinal Survey of Youth shows that nearly half of suspended Black boys (46%) and more than two in five (42%) Latinx boys in the study never obtained their high school diplomas by their late twenties.⁸⁹ To place this in context, one out of every four people who are incarcerated has a high school diploma, and the states with the highest dropout rates have the highest per-capita prison populations.⁹⁰

With these alarming statistics, zero-tolerance policies are not worth preserving.⁹¹ Research has shown that zero-tolerance policies do not work; they have a negligible impact on increasing punishment consistency and improving academic achievement, and an insignificant impact on whether removing students makes the school feel safer.⁹² Furthermore, suspended students are more likely to be repeat offenders as well.⁹³ Being in school is a protective factor against delinquent and

⁸⁵ PADRES AND JÓVENES UNIDOS & ADVANCEMENT PROJECT, LESSONS IN RACIAL JUSTICE & MOVEMENT BUILDING: DISMANTLING THE SCHOOL-TO-PRISON PIPELINE IN COLORADO AND NATIONALLY 7 (2014), <https://cdpsdocs.state.co.us/safeschools/Resources/PJU%20Padres%20Jovenes%20Unidos/PJU%20Lessons%20in%20Racial%20Justice%20School%20to%20Prison%20Pipeline.pdf?msclkid=653787cbb80111eca1b9c81295701c99> [https://perma.cc/8QCW-AY5G].

⁸⁶ Nussbaum, *supra* note 60, at 585.

⁸⁷ *The School-to-Prison Pipeline*, CITIZENS FOR JUV. JUST., <https://www.cfjj.org/school-to-prison-pipeline> [https://perma.cc/HWZ4-JD2E].

⁸⁸ *Id.*

⁸⁹ Shollenberger, *supra* note 17, at 36.

⁹⁰ Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 559 (1992).

⁹¹ Rocío Rodríguez Ruiz, Comment, *School-To-Prison Pipeline: An Evaluation of Zero Tolerance Policies and Their Alternatives*, 54 HOUS. L. REV. 803, 815 (2017).

⁹² See SARAH E. REDFIELD & JASON P. NANCE, THE AMERICAN BAR ASSOCIATION JOINT TASK FORCE ON REVERSING THE SCHOOL-TO-PRISON PIPELINE PRELIMINARY REPORT 28 (2016), available at <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1765&context=facultypub> [https://perma.cc/36S9-VQR8].

⁹³ *Id.*

antisocial behavior.⁹⁴ Removing a student from school for normal adolescent behavior is counterproductive and invites additional delinquent conduct once they return to school.⁹⁵

Ultimately, zero-tolerance policies result in under-educated and unskilled students of color who are still expected to live productive, law-abiding lives.⁹⁶ Unfortunately, many of them may turn to a life of crime, resulting in society losing productive citizens and communities paying the price of incarceration.⁹⁷ Even more tragically, as schools move away from zero-tolerance policies, their legacy is still felt within them. In Philadelphia, zero-tolerance policies officially ended in 2012, but their decades of implementation continue to impact school culture and disciplinary practices; this led to approximately 1,600 school-based arrests of students in the 2013-14 school year.⁹⁸

B. Zero-Tolerance Policies Lead Directly to the School-to-Prison Pipeline

Suspension is the leading predictor of whether children will drop out of school, resulting in a greater likelihood of unemployment and imprisonment.⁹⁹ When children are expelled and/or suspended and not enrolled in any alternative educational setting provided by the state, they have limited options outside of crime.¹⁰⁰ Christian Ramirez is the perfect example of a student who was shunted into the criminal justice system because he was pushed out of school.¹⁰¹ Ramirez found a community and employment in his local gang because education did not provide it for him.¹⁰²

It is a horrible cycle.¹⁰³ Maguin and Loeber, in their meta-analysis of studies involving juvenile delinquency, found the use of frequent disciplinary actions that remove students from schools contributed to delinquency and perpetuated a cycle of failure.¹⁰⁴ Schools push out students, and students don't want to return to an unwelcoming and

⁹⁴ Teske, *supra* note 52, at 89.

⁹⁵ *Id.*

⁹⁶ Hanson, *supra* note 19, at 331.

⁹⁷ *Id.*

⁹⁸ Goldstein et al., *supra* note 29, at 62.

⁹⁹ Mary Ellen Flannery, *The School-to-Prison Pipeline: Time to Shut it Down*, NAT'L EDUC. ASS'N (Jan. 5, 2015), <https://www.nea.org/advocating-for-change/new-from-nea/school-prison-pipeline-time-shut-it-down> [<https://perma.cc/YNX9-GLWU>].

¹⁰⁰ Hanson, *supra* note 19, at 331.

¹⁰¹ Jones et al., *supra* note 3, at 54-56.

¹⁰² *Id.*

¹⁰³ Mendez et al., *supra* note 68, at 260.

¹⁰⁴ Eugene Maguin & Rolf Loeber, *Academic Performance and Delinquency*, 20 CRIME & JUST. 145, 145 (1996).

hostile environment where they are perceived as nothing more than a problem student.¹⁰⁵ When students begin to sense that the educational process will not help them—that it is unlikely that they will meet grade level expectations, graduate, attend college, or obtain a well-paying job—they have fewer reasons to behave, take school seriously, learn the material, and stay in school.¹⁰⁶ “Instead, they disrupt classroom activities, push back against mandatory attendance policies, look for alternative (often illegitimate) ways to establish their self-worth, identity, and status among peers, or drop out of school altogether.”¹⁰⁷ With continued misbehavior, students continue to be suspended until they drop out or are expelled, which significantly increases the probability of becoming involved in the juvenile justice system.¹⁰⁸

In 2010, a report conducted by the Advancement Project concluded that punitive discipline policies led to a tripling of the national prison population from 1987 to 2007.¹⁰⁹ In another study done by the Texas A&M Public Policy Institute, 23% of students who had been suspended at least once had contact with the criminal justice system.¹¹⁰ In comparison, only 2% of students with zero suspensions had contact with the criminal justice system.¹¹¹ In 2021, a ground-breaking study by Bacher-Hicks, Billings, and Deming confirmed a correlation between suspensions and later involvement in the criminal justice system.¹¹² In their study, they evaluated Charlotte-Mecklenburg Schools where a large and sudden change in school enrollment boundary lines resulted in half of all students changing schools in a single year.¹¹³ They compared school discipline data from different years, and evaluated

¹⁰⁵ Jones et al., *supra* note 3, at 54.

¹⁰⁶ Nance, *supra* note 66, at 324-25.

¹⁰⁷ *Id.*; see REDFIELD & NANCE, *supra* note 92, at 10 (explaining that the school-to-prison pipeline “arises from low expectations and engagement, poor or lacking school relationships, and overly harsh discipline, including suspension, expulsion, referral to law enforcement, arrest, and treatment in the juvenile justice system”).

¹⁰⁸ Nance, *supra* 66, at 318.

¹⁰⁹ ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW “ZERO TOLERANCE” AND HIGH-STATES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 9 (2010), <https://www.justice4all.org/wp-content/uploads/2016/04/Test-Punish-Push-Out.pdf> [<http://perma.cc/6RRJ-YGS6>] [hereinafter ADVANCEMENT PROJECT]; see also *Keeping Kids in School*, *supra* note 48.

¹¹⁰ St. George, *supra* note 81.

¹¹¹ *Id.*

¹¹² Andrew Bacher-Hicks et al., *Proving the School-to-Prison Pipeline*, 21 EDUC. NEXT (2021) (finding that students assigned to stricter middle schools were 3.2% more likely to have been arrested and 2.5% more likely to be incarcerated as adults. They are also 1.7% more likely to drop out of high school and 2.4% less likely to attend college. These disparities are more prominent for Black and Hispanic male students).

¹¹³ *Id.*

how strict school discipline impacted students in the long-term.¹¹⁴ “Our analysis shows that young adolescents who attend schools with high suspension rates are substantially more likely to be arrested and jailed as adults. These long-term, negative impacts in adulthood apply across a school’s population, not just to students who are suspended during their school years.”¹¹⁵ Furthermore, the study shows these negative impacts are largest for minority students and male students, furthering already existing educational gaps.¹¹⁶ These studies and statistics show what people have known for years; harsh discipline targets students of color, and the impact is long-lasting.¹¹⁷

II. “THAT’S THE HATE THEY’RE GIVING US, BABY, A SYSTEM DESIGNED AGAINST US.”¹¹⁸

The school-to-prison pipeline is the natural byproduct of the deep structural inequality and systemic racism in our school system.¹¹⁹ Systemic racism refers to the systems and practices that create and maintain racial inequality.¹²⁰ The school-to-prison pipeline is a systemic practice that is designed to impose sanctions disproportionately against students of color and ultimately lead them to prison in order to maintain social order.¹²¹ As discussed, *supra*, the school-to-prison pipeline is the culmination of policies that set up students of color to fail in traditional school environments because of national zero-tolerance policies, bias, and structural inequity.¹²²

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ THOMAS, *supra* note 1, at 170.

¹¹⁹ See Kenneth J. Fasching-Varner et al., *Beyond the School-to-Prison Pipeline and Toward an Educational and Penal Realism*, 47 EQUITY & EXCELLENCE EDUC. 410, 411 (2014) (“our fundamental premise is that there is no crisis because each institution—the educational system and the criminal justice system—is functioning per their design and the demands of the society”); see also Frank W. Munger & Carroll Seron, *Race, Law, and Inequality, 50 Years After the Civil Rights Era*, 13 ANN. REV. L. & SOC. SCI. 331 (2017).

¹²⁰ *Systematic Racism in the US*, SKIMM (Apr. 19, 2021), <https://www.theskimm.com/news/systemic-racism-us-2f9M0RP13VEuCAA5pSoZNR> [<https://perma.cc/CBG6-255X>].

¹²¹ Fasching-Varner et al., *supra* note 119, at 420-21.

¹²² *Id.*

A. Since We Have Set Up Our Schools to Be Prisons, We Should Expect Prisons.¹²³ The School- to- Prison Pipeline as a Systemic Practice.

The school-to-prison pipeline is not a new phenomenon and has drawn the attention of several organizations, including the federal government.¹²⁴ Although the U.S. Department of Education cannot dictate local disciplinary policies, it released a “Dear Colleague Letter” encouraging schools to rely less on exclusionary forms of discipline and reminded them that racial discrimination has no place in schools.¹²⁵ While the Trump Administration has rescinded the guidelines, citing that it caused more harm than good, the Biden Administration is now taking measures to fight against the school-to-prison pipeline through executive actions, policy guidelines, and research studies.¹²⁶ Even the American Bar Association has released several guidelines, seminars, and articles on how to challenge the practices that lead to the school-to-prison pipeline.¹²⁷ However, these guidelines and recommendations are nothing without concrete action; the pipeline will continue until we acknowledge the tangled historical roots and structure of our education system.¹²⁸

In the latest Department of Education Civil Rights Data Collection for the 2017-18 school year, Black students made up 15.1% of students

¹²³ ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 38-39 (2003).

¹²⁴ Morris & Perry, *supra* note 42, at 71.

¹²⁵ *Id.* at 71; *see also* Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline from Catherine E. Lhamon, Assistant Sec. for C.R., U.S. Dep’t of Educ. & Jocelyn Samuels, Acting Assistant Att’y Gen., U.S. Dep’t of Just. (Jan. 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html?msclkid=c720d6a8b80911ec83f73a46f6395055> [<https://perma.cc/838M-S9XJ>].

This guidance will help public elementary and secondary schools administer student discipline in a manner that does not discriminate on the basis of race The Civil Rights Data Collection (CRDC), conducted by OCR, has demonstrated that students of certain racial or ethnic groups tend to be disciplined more than their peers. For example, African- American students without disabilities are more than three times as likely as their white peers without disabilities to be expelled or suspended.

Id. (internal citations omitted). *See generally* REDFIELD & NANCE, *supra* note 92.

¹²⁶ Dear Colleague Letter from Kenneth L. Marcus, Assistant Sec. for C.R., U.S. Dep’t of Educ. & Eric S. Dreiband, Assistant Attn’y Gen., U.S. Dep’t of Just. (Dec. 21, 2018), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf?msclkid=91bef618b80d11ec87c81bd6ea6633be> [<https://perma.cc/2MBJ-YPL4>]; *see also* Executive Order No. 14050, 86 Fed. Reg. 58551 (Oct. 19, 2021) (creating a White House Initiative to further education goals for Black Americans).

¹²⁷ *See, e.g.*, REDFIELD & NANCE, *supra* note 92.

¹²⁸ *See also* Skiba et al., *supra* note 3, at 558-59.

in the United States.¹²⁹ Starting as early as preschool, Black pre-school students were expelled at rates that were more than twice their share (38.2%) of total preschool enrollment (18.2%).¹³⁰ Beyond pre-school, Black students were expelled at rates twice as much as total enrollment (15.1% v. 38.8%).¹³¹ It is the same with suspensions. In the 2017-18 school year, Black students received one or more in-school suspensions (31.4%) and one or more out-of-school suspensions (38.2%) at rates that were more than twice their share of total student enrollment (15.1%).¹³² On top of suspensions, there was a 12% increase in referrals to law enforcement, a 7% increase in expulsions with educational services, and a 5% increase in school-related arrests compared to the 2016-17 school year.¹³³

The common argument is that Black students act out more compared to their White peers, but the data does not support this.¹³⁴ Research has consistently shown that Black students do not have higher rates of misconduct than other students.¹³⁵ “Rather, Black students are disproportionately disciplined for more subjective offenses, such as disrespecting a teacher or being perceived as a threat, than their White counterparts. These disparities result from and perpetuate stereotypes about Black students, specifically the stereotype that they are aggressive and dangerous.”¹³⁶

These stereotypes lead administrators and other authority figures to see Black students as “beyond help” and thus, they may rationalize that it is okay to “dispose of” Black children through suspensions and expulsions.¹³⁷ The rationale is simple: keep the problematic child out of the classroom to ensure that everyone else is safe and learning. It is very

¹²⁹ U.S. DEP’T OF EDUC., AN OVERVIEW OF EXCLUSIONARY DISCIPLINE PRACTICES IN PUBLIC SCHOOLS FOR THE 2017-18 SCHOOL YEAR (June 2021), available at <https://ocrdata.ed.gov/assets/downloads/crdc-exclusionary-school-discipline.pdf> [<https://perma.cc/N87J-VT7F>].

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* This is not a new trend. Comparing the 2011-12 school year data, the Department of Education Civil Rights Data Collection showed that Black students represented 16% of the total student population but represented 32-42% of students who were suspended or were expelled. See *Civil Rights Snapshot*, *supra* note 57.

¹³⁴ AJMEL QUERESHI & JASON OKONOFUA, THURGOOD MARSHALL INST., LOCKED OUT OF THE CLASSROOM: HOW IMPLICIT BIAS CONTRIBUTES TO DISPARITIES IN SCHOOL DISCIPLINE 1 (Oct. 20, 2018), https://www.naacpldf.org/wp-content/uploads/LDF_Bias_Report_WEB-2.pdf [<https://perma.cc/WB2R-6EKD>].

¹³⁵ *Id.*

¹³⁶ *Id.*; see Scully, *supra* note 25, at 964 (relating to the superpredator myth discussed *supra*, societal stereotypes about Black boys have infiltrated our collective subconscious).

¹³⁷ Scully, *supra* note 25, at 975.

easy to place blame solely on certain teachers or schools, but the school-to-prison pipeline is the result of *all* school and national policies, such as zero-tolerance.¹³⁸ Rather than a rigid zero-policy standard, schools must consider additional factors, such as the source of the misbehavior and what solutions will most effectively meet that child's needs.¹³⁹ Schools must adopt restorative justice principles by having a student-centered approach that integrates the school community rather than casting students aside.

III. RESTORATIVE JUSTICE

A. What is Restorative Justice?

A potential solution to this systemic problem is found within the restorative justice movement. Restorative justice is a social justice movement and “a transformative force that addresses healing and accountability at personal and structural levels of society.”¹⁴⁰ The modern restorative justice movement stems from a variety of practices developed in a variety of cultures, nations, and contexts.¹⁴¹ Because of this, there is no authoritative theory or one definition of restorative justice.¹⁴² Restorative justice is a philosophy rooted in the transformative power of relationships and is rooted in cultural heritage and community values.¹⁴³

Overall, restorative justice operates on the principle that “because crime hurts, justice should heal.”¹⁴⁴ Restorative justice practices

¹³⁸ See Martinez, *supra* note 24.

¹³⁹ Some students are now showing symptoms of Post-Traumatic Stress Disorder (PTSD). Schiff, *supra* note 58, at 122. “Specifically, many of the youth subject to the harshest forms of punishment also come from communities traumatized by poverty, violence, underemployment, inadequate nutrition, health care and education, resulting in youth that are defensive, offensive and ill-equipped to deal with the structured, and often stressful, environment of public school.” *Id.*

¹⁴⁰ Carl Stauffer & Sonya Shah, Restorative Justice: Taking the Pulse of a Movement 18 (2019) (unpublished manuscript), <http://zehr-institute.org/publications/docs/introduction.pdf> [https://perma.cc/T42Z-XL6Q].

¹⁴¹ See Carolyn Boyes-Watson, *Looking at the Past of Restorative Justice*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF RESTORATIVE JUSTICE 1, 2 (Theo Gavrielides ed., 2019) (discussing the development of the modern restorative justice movement and its indigenous roots).

¹⁴² Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFF. L. REV. 635, 640-41 (2021).

¹⁴³ Artika R. Tyner, *The Tangled Web of Mass Incarceration: Addressing the School-To-Prison Pipeline Through a Restorative Justice Approach*, 17 U. ST. THOMAS L.J. 59, 69 (2020).

¹⁴⁴ Renee Warden, *Where is the Empathy? Understanding Offenders' Experience of Empathy and Its Impact on Restorative Justice*, 87 UMKC L. REV. 953, 953 (2019) (quoting John Braithwaite, *Restorative Justice and De-Professionalization*, 13 GOOD SOC'Y 28, 28 (2004)).

share the view that the proper response to an offense should focus not on punishment, but on meeting the needs of the victim, holding the offender accountable for the harm caused, taking steps to repair the harm suffered by the victim and the community, and addressing the offender's needs to prevent reoffending and promote reintegration.¹⁴⁵

Some restorative justice practices call for an extension of “transformative justice” by seeking community involvement to address the structural inequalities that lead to the harm.¹⁴⁶

B. Restorative Justice in Schools

In schools, restorative justice aims to foster school climates and utilize relationships to address challenging behavior.¹⁴⁷ Instead of waiting for misbehavior to occur, practitioners proactively implement lessons that cover relational, emotional, academic, cognitive, and physical needs.¹⁴⁸ Restorative justice directly addresses the three factors that lead to the school-to-prison pipeline.¹⁴⁹ Instead of pushing students out, restorative justice, (1) keeps the student in the classroom, (2) helps foster relationships within the school, and (3) addresses educational trauma.¹⁵⁰

The most comprehensive form of school-based restorative justice “combines a proactive, conflict prevention pedagogy” with systems to address conflict between students.¹⁵¹ Guided by a set of values and principles, restorative justice practices respond to broken relationships and systems with dignity, respect, accountability, and fairness through nurturing healthy relationships, resolving conflict, and promoting justice and equity.¹⁵² “Restorative justice allows the impacted parties to talk about what happened, how they are feeling about it now, the impact it had on everyone, and ultimately what can be done to make it as right

¹⁴⁵ Lanni, *supra* note 142, at 640.

¹⁴⁶ *Id.* at 640-41.

¹⁴⁷ ANNE GREGORY & KATHERINE R. EVANS, NAT’L EDUC. POL’Y CTR., THE STARTS AND STUMBLING OF RESTORATIVE JUSTICE IN EDUCATION: WHERE DO WE GO FROM HERE? 7 (2020), <https://nepc.colorado.edu/publication/restorative-justice> [<https://perma.cc/XUJ5-RM87>].

¹⁴⁸ *Id.*

¹⁴⁹ Jones et al., *supra* note 3, at 53 (listing the three factors as “(1) zero tolerance policies that lead to suspension and expulsion . . . (2) hostile school climates . . . [and] (3) educational trauma . . .”).

¹⁵⁰ See GREGORY & EVANS, *supra* note 147, at 7.

¹⁵¹ Nussbaum, *supra* note 60, at 586.

¹⁵² GREGORY & EVANS, *supra* note 147, at 3.

as possible.”¹⁵³ The ultimate goal of restorative justice is to repair the harm caused by the incident, while balancing the needs and roles of the victim, offender, and community.¹⁵⁴

“Circles” are one such practice that allow students to connect with each other and learn valuable skills such as patience, empathy, active listening, and impulse control.¹⁵⁵ “Schools use restorative justice circles to address school disciplinary issues.”¹⁵⁶ When a harmful action occurs, participants address the harm and work together to make things right.¹⁵⁷ In an Iowa City school, “talking circles” are led by a teacher-facilitator who challenges students to develop conflict resolution skills and allows students to reflect on their actions that may have caused harm to their community.¹⁵⁸ “Other restorative justice practices may include: peer mediation/jury, victim-offender mediation, and community and family group conferencing.”¹⁵⁹

Many restorative justice programs “also aim to strengthen social and emotional competencies, reduce gender and racial disparities in discipline, and increase access to equitable and supportive environments for students from marginalized groups.”¹⁶⁰ In response to concerns about racial disparities and federal guidelines, several school districts have turned to restorative justice instead of zero-tolerance policies.¹⁶¹ Restorative justice is being practiced in several school districts such as those in, Los Angeles, San Francisco, Chicago, Denver, Portland, and Iowa City.¹⁶²

¹⁵³ David Yusem, *Restorative Justice in Schools: SEL in Action*, MINDFUL SCHOOLS (May 31, 2019), <https://www.mindfulschools.org/inspiration/restorative-justice-in-schools-sel-in-action> [https://perma.cc/2WP6-PAKY].

¹⁵⁴ Sandra Pavelka, *Restorative Justice in the States: An Analysis of the Statutory Legislation and Policy*, 2 JUST. POL’Y J. 1, 2 (2016).

¹⁵⁵ Circles are a traditional Indigenous practice. Yusem, *supra* note 153. See also Laura Mirsky, *Restorative Justice Practices of Native American, First Nation and Other Indigenous People of North America: Part One*, INT’L INST. FOR RESTORATIVE PRACTS. (Apr. 27, 2004), <https://www.iirp.edu/news/restorative-justice-practices-of-native-american-first-nation-and-other-indigenous-people-of-north-america-part-one> [https://perma.cc/JD5B-3FEX] (discussing “peacemaking” in the Navajo community).

¹⁵⁶ Tyner, *supra* note 143, at 72.

¹⁵⁷ *Id.*

¹⁵⁸ Grace King, *Restorative Justice Program Aims to Change Discipline in Iowa City Schools*, THE GAZETTE (Nov. 11, 2021, 7:58 PM), <https://www.thegazette.com/k/restorative-justice-program-aims-to-change-discipline-in-iowa-city-schools/> [https://perma.cc/73NW-Y4XF].

¹⁵⁹ Tyner, *supra* note 143, at 72.

¹⁶⁰ GREGORY & EVANS, *supra* note 147, at 3.

¹⁶¹ Wood, *supra* note 38, at 404.

¹⁶² *Id.*; King, *supra* note 158.

In Maryland, schools are also incorporating restorative justice practices in their school discipline.¹⁶³ The Court of Special Appeals of Maryland in *Gambrill v. Board of Education* addressed the restorative justice approach in Maryland public schools.¹⁶⁴ The Court held that student discipline is an essential component of educational policy and criticized the former suspension model that was used in Maryland because it contributed to the school-to-prison pipeline.¹⁶⁵ The Court reasoned that school discipline is a part of education and is an additional learning opportunity for students, going beyond what is found in textbooks.¹⁶⁶

IV. RESTORATIVE JUSTICE AND THE SCHOOL-TO-PRISON PIPELINE

To truly dismantle the school-to-prison pipeline, the treatment of students of color as criminals and schools as prisons needs to end.¹⁶⁷ What we need instead is “a change of philosophy recognizing that children make mistakes and ‘getting tough’ on them is counterproductive to their growth.”¹⁶⁸ By changing the sources and practices that lead to the school-to-prison pipeline, fewer students will be sent to prison for normal, or trauma response, behaviors.¹⁶⁹

A recent report by the National Association of School Psychologists determined that an underlying factor leading to student misconduct is a lack of relationships with the school.¹⁷⁰ By implementing restorative justice discipline models, schools can create environments for learning that foster meaningful relationships and promote confidence, emotional

¹⁶³ Maryland’s state code describes the restorative justice approach as:

a student discipline model that . . . is preventative and proactive . . . [e]mphasizes building strong relationships and setting clear behavioral expectations that contribute to the well-being of the school community . . . focuses on accountability for any harm done by problem behavior; and . . . [a]ddresses ways to repair the relationships affected by the problem behavior with the voluntary participation of an individual who was harmed.

MD. CODE ANN., EDUC. § 7-306(a)(1) (West 2019).

¹⁶⁴ See generally *Gambrill v. Bd. of Educ.*, 259 A.3d 144 (Md. Ct. Spec. App. 2019). Parents of a student brought due process and negligence claims against the school, alleging that their daughter was robbed of the state constitutional right to education, and the teachers were negligent in preventing harm to their daughter. *Id.* at 148. The daughter was involved in several altercations over several weeks with other students and was later diagnosed with two concussions. *Id.* at 146. The Court of Appeals upheld the summary judgment of the District Court and held that the school officials were immune under state law. *Id.* at 155.

¹⁶⁵ *Id.* at 154-55.

¹⁶⁶ See *id.* at 155.

¹⁶⁷ Scully, *supra* note 25, at 995.

¹⁶⁸ *Id.*

¹⁶⁹ See generally Wood, *supra* note 38.

¹⁷⁰ *Id.* at 407.

health, and responsible citizenship.¹⁷¹ Dr. Shelia Wilson, a fifth grade teacher in Virginia, believes that restorative justice practices “draw their strength in their ability to empower students to learn from unacceptable choices, to understand their impact, and to grow personally in their ability to make more sound decisions and resolve problems.”¹⁷² By addressing underlying trauma and other problems at the source of misconduct, schools can address the harm without removing students from the classroom.¹⁷³ Learning from the harm and the problems not only increases the growth of the individual student, but also strengthens the whole community.¹⁷⁴

With a reduction in suspensions and expulsions, students are in the classroom, learning both the required curriculum and skills to be contributing members of society.¹⁷⁵ This is because restorative justice models reintegrate students into the school community rather than remove them, thereby increasing the potential for separation, resentment, and recidivism.¹⁷⁶ A restorative justice approach addresses the trauma resulting from the student’s behavior while embracing opportunities for growth.¹⁷⁷ “Negative behavior does not define the student as a deviant, outcast, or incorrigible but [instead] creates an invaluable opportunity to reflect, learn, and grow.”¹⁷⁸ This growth is evidenced by increases in “vital life skills such as: reflective listening, empathy, conflict resolution, social interactions, communication, and self-regulation.”¹⁷⁹

Restorative justice programs have helped reduce exclusionary discipline and narrow the glaring racial disparities in how discipline is meted out in schools.¹⁸⁰ A variety of studies by Darren Aitchison show that restorative justice measures, when implemented with the right training and resources, have resulted in a massive reduction in the

¹⁷¹ *Id.*

¹⁷² Larry Ferlazzo, *Ways to Implement Restorative Practices in the Classroom*, EDUC. WEEK (Jan. 9, 2020), <https://www.edweek.org/teaching-learning/opinion-ways-to-implement-restorative-practices-in-the-classroom/2020/01> [<https://perma.cc/4N4K-T99J>].

¹⁷³ Teske, *supra* note 52, at 93.

¹⁷⁴ Tyner, *supra* note 143, at 72.

¹⁷⁵ *Id.* at 71.

¹⁷⁶ *Keeping Kids in School*, *supra* note 48, at 285.

¹⁷⁷ Tyner, *supra* note 143, at 71.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See e.g., Darren Aitchison, *Restorative Practices with Mindfulness: Discipline That Restores Online*, MUNDO PATO, <https://www.mundopato.com/dtr#what> [<https://perma.cc/R5LZ-7QJS>].

number of disciplinary referrals (60-70%), documented incidents of violence (70-80%), and expulsions (95%).¹⁸¹

Aitchison's team works with schools to develop restorative justice programs unique to their specific challenges.¹⁸² Even without a specialized team, these trends are possible. In 2020, fifteen Baltimore City public schools were evaluated after restorative justice was implemented in 2018.¹⁸³ Suspensions fell 44% the first year, and the school climate improved by 72%, mutual respect among students rose to 69%, and student respect for staff rose 64%.¹⁸⁴ In Oakland, California, restorative justice was implemented at a failing middle school resulting in an 87% decrease in suspensions and a corresponding decrease in violence.¹⁸⁵ In a study done by Umbreit, Coates, and Vos, recidivism rates for offenders who participated in a restorative justice program dropped by 20-40%.¹⁸⁶ In Pittsburgh, Pennsylvania, implementation of restorative justice improved the overall school climate (rated by teachers) and reduced the suspension rate.¹⁸⁷

A. Restorative Justice Receives an “F” From Some Critics, But Schools Haven’t Put in the Work.

Restorative justice is slowly gaining traction as an alternative to zero-tolerance policies.¹⁸⁸ Restorative justice requires (and fosters) rethinking of community relationships “built upon a comprehensive conceptual justice framework” instead of the traditional retributive criminal justice model focused on punishment.¹⁸⁹ As described *supra*, there are many ways to implement restorative justice, and that is part of the problem.¹⁹⁰ There is no “plug and play model” for restorative justice; it greatly depends on the school environment, staff, and

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ MENDEL, *supra* note 8, at 15.

¹⁸⁴ *Id.*

¹⁸⁵ WeAreTeachers Staff, *What Teachers Need to Know About Restorative Justice*, WE ARE TEACHERS (Jul. 27, 2021), <https://www.weareteachers.com/restorative-justice/> [<https://perma.cc/69JS-ZR9F>]. In fact, Oakland's restorative justice program was so successful that they are expanding it after ten years of practice. Nelson & Lind, *supra* note 51.

¹⁸⁶ MARK S. UMBREIT, ROBERT B. COATES & BETTY VOS, *THE IMPACT OF RESTORATIVE JUSTICE CONFERENCING: A REVIEW OF 63 EMPIRICAL STUDIES IN 5 COUNTRIES*, CTR. FOR RESTORATIVE JUST. & PEACEMAKING (May 1, 2002).

¹⁸⁷ CATHERINE H. AUGUSTINE ET AL., *CAN RESTORATIVE JUSTICE PRACTICES IMPROVE SCHOOL CLIMATE AND CURB SUSPENSIONS? AN EVALUATION OF THE IMPACT OF RESTORATIVE PRACTICES IN A MID-SIZED URBAN SCHOOL DISTRICT 70-71* (2018).

¹⁸⁸ *See, e.g.*, King, *supra* note 158.

¹⁸⁹ Pavelka, *supra* note 154, at 2 (internal citations omitted).

¹⁹⁰ Yusem, *supra* note 153.

administrators.¹⁹¹ It requires assessments, training, willingness to put in the work, and patience to implement and observe tangible results.¹⁹² Gregory and Evans reported in a National Education Policy Center brief that restorative justice works in schools, but only when schools avoid the common pitfalls of faulty design and implementation.¹⁹³ In reviewing the literature, Gregory and Evans concluded that the most successful restorative justice programs: (1) use principle-based restorative justice that focuses on the entire school, not just students; and (2) implement restorative justice practices with “contextually sensitive,” “strategic,” and “long-term” plans and practices.”¹⁹⁴

Legislation, regulations, and court orders mandating schools use “restorative justice” leaves undue discretion to schools without proper guidance or resources.¹⁹⁵ Restorative justice has been interpreted differently when applied in various school districts.¹⁹⁶ For many teachers, restorative justice is overwhelming and can be hard to implement, especially with increased violence in schools.¹⁹⁷ Therefore, simply requiring schools to use restorative justice will not work.¹⁹⁸ Most restorative justice programs and initiatives take three to five years to make progress.¹⁹⁹ The time and energy required is indicative of the difficulty of restorative justice; it attempts to dismantle an inequitable system designed to keep students of color in this pipeline to prison.²⁰⁰

B. Moving from Criminalization to Restoration

Schools are looking more and more like prisons instead of places of learning.²⁰¹ Public school students are, “outside of prison and jail

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ GREGORY & EVANS, *supra* note 147, at 14.

¹⁹⁴ *Id.* at 14-16. Gregory and Evans suggest three to five years at a minimum as an appropriate standard for measuring the efficacy of restorative justice programming in schools. *Id.*

¹⁹⁵ Nussbaum, *supra* note 60, at 587.

¹⁹⁶ *Id.* at 614-15.

¹⁹⁷ Tim Walker, *Restorative Practices in Schools Work . . . But They Can Work Better*, NAT’L EDUC. ASS’N (Jan. 30, 2020), <https://www.nea.org/advocating-for-change/new-from-nea/restorative-practices-schools-work-they-can-work-better> [https://perma.cc/TCP2-TUQU].

¹⁹⁸ Nussbaum, *supra* note 60, at 586-87.

¹⁹⁹ *See, e.g.*, NAACP LEGAL DEF. AND EDUC. FUND, INC., *DISMANTLING THE SCHOOL-TO-PRISON PIPELINE* 11-15 (Jul. 27, 2018), https://www.naacpldf.org/wp-content/uploads/Dismantling_the_School_to_Prison_Pipeline_Criminal-Justice_.pdf [https://perma.cc/DRG9-4J9U]. *See also* GREGORY & EVANS, *supra* note 147, at 14.

²⁰⁰ Skiba et al., *supra* note 3, at 558.

²⁰¹ *See generally* Michael Snyder, *18 Signs that U.S. Public Schools are Now Equivalent to U.S. Prisons*, BUS. INSIDER (June 2, 2011, 6:59 PM), <https://www.businessinsider.com/public-schools-are-now-comparable-to-us-prisons-2011-6> [https://perma.cc/3BET-UHCC].

inmates[,] perhaps the most policed group in the country right now.”²⁰² Our current punitive criminal justice system’s reliance on retributive justice “recognizes crime as ‘a violation of the state, defined by lawbreaking and guilt. Justice determines blame and administers pain in a contest between the offender and the state directed by systemic rules.’”²⁰³ The criminal justice system is what is being imposed on our public schools.

However, in contrast to the criminal justice system, restorative justice requires a radically different look at harm.²⁰⁴ Schools have a unique context in which any injury can be defined because of distinct relationships, and restitution can be formulated.²⁰⁵ Teachers have the special opportunity to develop relationships with their students and to use restorative justice as a tool to help foster relationships, prevent harm, and restore those relationships when harm occurs.²⁰⁶ “For example, the language of ‘victim’ and ‘offender’ does not adequately capture nuanced student relationships where harm often occurs among ‘friends’ and Wednesday’s offender is often Tuesday’s victim In these settings, conflict is addressed as part of an overall strategy to build, maintain and repair relationships.”²⁰⁷ Moreover, unlike the legal system, schools have the capacity and knowledge to implement proactive strategies that can be long-term and sustainable.²⁰⁸ The criminal justice system, instead, focuses on procedure and punishment after the harm has already occurred.²⁰⁹ “This distinction between passively accepting punishment and actively assuming responsibility for behavior is at the heart of what distinguishes restorative accountability from retributive punishment.”²¹⁰ As restorative justice models continue to be implemented in schools, it is clear that they contribute to the original

²⁰² *Keeping Kids in Schools*, *supra* note 48, at 288; ADVANCEMENT PROJECT, *supra* note 109 at 3.

²⁰³ HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 181 (3d ed. 2005). *See also* Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 2019 UTAH L. REV. 1027, 1029 (2019).

²⁰⁴ González, *supra* note 203, at 1035.

²⁰⁵ *Keeping Kids in Schools*, *supra* note 48, at 286.

²⁰⁶ “[T]he focus is on healing . . . [i]n the education system, restorative justice requires ‘a philosophical and practical shift away from punitive and retributive control mechanisms . . . to prioritize individual and community growth to support safe and healthy school culture.’” Thalia González, *Restorative Justice from the Margins to the Center: The Emergence of a New Norm in School Discipline*, 60 HOW. L.J. 267, 274 (2016)); *see also* Ferlazzo, *supra* note 172.

²⁰⁷ Schiff, *supra* note 58, at 122.

²⁰⁸ *Keeping Kids in Schools*, *supra* note 48, at 286.

²⁰⁹ *Id.*

²¹⁰ Schiff, *supra* note 58, at 126.

goals of education by “emphasizing accountability, restitution, and restoration of a community.”²¹¹

A restorative justice program that simply focuses on reducing suspensions and expulsions will fall short in capturing prevention-oriented and systemic reform of restorative justice.²¹² However, when done right, not only will schools see a reduction in the number of suspensions, but “improved social and emotional learning, accountability, and school connectedness” resulting in a better future not only for students, but all of society.²¹³ If schools dedicate the time and resources to restorative justice, schools will improve and the pipeline will end.²¹⁴

CONCLUSION

“When children attend schools that place a greater value on discipline and security than on knowledge and intellectual development, they are attending prep schools for prison.”²¹⁵ Our schools continue to morph into miniature prisons from the continued use of zero-tolerance policies. Instead of preparing students to wear business casual work attire, schools are prepping them to wear orange jumpsuits. To end the pipeline, restorative justice, a philosophy that addresses this systemic practice, needs to be implemented for a brighter future for all students.

²¹¹ *Keeping Kids in Schools*, *supra* note 48, at 285. Dr. Martin Luther King, Jr. said:

The function of education . . . is to teach one to think intensively and to think critically. But education which stops with efficiency may prove the greatest menace to society. The most dangerous criminal may be the man gifted with reason, but with no morals. . . . We must remember that intelligence is not enough. Intelligence plus character—that is the goal of true education.

Dr. Martin Luther King, Jr., *The Purpose of Education*, STAN. UNIV. (Jan. 1, 1947), <https://kinginstitute.stanford.edu/king-papers/documents/purpose-education> [<https://perma.cc/3K3T-D4MA>].

²¹² Flannery, *supra* note 99.

²¹³ Nussbaum, *supra* note 60, at 587.

²¹⁴ GREGORY & EVANS, *supra* note 147, at 14-16.

²¹⁵ DAVIS, *supra* note 123, at 38-39.