

RESTORATIVE JUSTICE FOR YOUNG ADULTS: LESSONS FROM SCHOOL DISCIPLINE

INTRODUCTION

Public policy debates about discipline and punishment often center around a tension between punitive and rehabilitative ideals. Since the 1970s, there has been a trend in criminal justice away from rehabilitation and toward increasingly retributive forms of punishment.¹ Both state and federal governments began to enact “zero-tolerance” laws in an effort to make up for perceived shortcomings in the criminal justice system.² This led to a system where individuals were automatically punished for crimes that previously would have been addressed through more rehabilitative methods.³ The resulting zero-tolerance regime had a particularly disproportionate impact on the young-adult population⁴ being funneled through the criminal justice system.⁵

This same movement has occurred in education. School districts began drafting similar zero-tolerance policies during the “tough-on-crime” era in an effort to make up for similarly perceived shortcomings in educational discipline and achievement.⁶ School-based zero-tolerance policies relied on exclusionary discipline, where students were automatically suspended or expelled for predetermined offenses.⁷ Instead of being a solution, zero-tolerance laws are often part of the problem. An alternative to zero-tolerance policies is an approach known as restorative justice.

Restorative justice theory is based around three core concepts: (1) holding offenders accountable; (2) repairing harm to victims;

1. See Meghan J. Ryan, *Science and the New Rehabilitation*, 3 VA. J. CRIM. L. 261, 277–85 (2015).

2. See *infra* Part I.A.2.a.

3. See *infra* Part I.A.2.a.

4. For the purposes of this Comment, the term “young adult” refers to individuals ranging in age from eighteen to twenty-five.

5. See *infra* Part I.A.2.b.

6. See *infra* Part I.A.1.

7. See *infra* Part I.A.1.a.

and (3) providing support to offenders to encourage their reintegration into the community.⁸ This approach focuses on a process of “repairing harm and rebuilding relationships . . . that involves stakeholders in an active and respective way, while emphasizing the community’s role in problem solving.”⁹ In this way, restorative justice signifies a shift from the traditional view of crime and punishment towards looking at crime as a violation of relationships with the ultimate goal of repairing the harm.¹⁰

Restorative justice practices should be employed for young adults in the criminal justice setting to counter the negative consequences of zero tolerance in both schools and criminal justice. Further, an analysis of the evolution of school-based zero-tolerance policies and their subsequent rejection in favor of restorative justice provides an evidentiary framework from which a system for young adults can be formed. The negative consequences of zero tolerance in school disciplinary settings warn us of the negative consequences of zero-tolerance laws and just how far-reaching those consequences can be.¹¹ However, school disciplinary settings can also serve as a prime example for the success of restorative justice practices in counteracting those consequences.¹²

A study of restorative justice in the school setting demonstrates not only that it works, but that it has the potential to work better than the current system.¹³ Just as schools have successfully stripped away zero-tolerance policies, the criminal justice system can also strip away similar zero-tolerance policies for young-adult offenders. Some states have already started this trend, taking restorative practices from school settings and implementing them in courts.¹⁴

Part I of this Comment will first discuss the emergence of zero-tolerance policies in education and the severe consequences such policies have created for youths. Next, it will overview the emergence and consequences of zero-tolerance laws more generally that

8. See Tyler B. Bugden, Note, *Addressing Utah’s School to Prison Pipeline*, 2017 UTAH L. REV. 1061, 1087 (2017).

9. *Id.* (quoting Tracy Godwin, *The Role of Restorative Justice in Teen Courts. A Preliminary Look*, NAT’L YOUTH CT. CTR. 1 (2001), <http://www.globalyouthjustice.org/uploads/TheRoleofRestorativeJustice.PDF> [<https://perma.cc/R5C6-W6HQ>]).

10. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE, REVISED AND UPDATED* 29–30 (2015).

11. See *infra* Part I.A.1.b.

12. See *infra* Part I.B.

13. See *infra* Parts I.B, II.A.

14. See *infra* Part II.B.2.

occurred almost in concert with such policies in school settings. It will then provide background information and evidence on school-based restorative justice as a successful means to address the “school-to-prison-pipeline.” This Part will ultimately provide a framework for analyzing the use of restorative justice in the criminal justice setting for young-adult offenders.

Part II of this Comment will propose that the success of restorative justice in school discipline serves as evidence for its potential success in the context of young-adult offenders in the criminal justice system. It will then provide some guidance for structuring a restorative justice framework that allows it to achieve its full potential. This Comment will conclude by arguing that a valuable lesson can be learned from the restorative justice measures being implemented in school discipline.

I. SCHOOLS AND CRIMINAL JUSTICE: THE PROBLEM AND A POTENTIAL RESPONSE

Zero-tolerance policies are widespread in both school discipline and the criminal justice system.¹⁵ The rise of such policies can be attributed to the tough-on-crime era during which policymakers started to dispense with rehabilitation in favor of retribution.¹⁶ Zero tolerance, however, has created significant negative consequences for both students and young adults alike.¹⁷ As a result, schools across the country have begun to successfully implement reforms based on restorative justice to counteract the negative consequences that flow from zero-tolerance policies.¹⁸ An analysis of the evolution of school-based zero-tolerance policies and their subsequent rejection in favor of restorative justice provides an evidentiary framework from which a system for young adults can be formed.

A. *The Problem: The Emergence of Zero-Tolerance Policies*

Reflecting on concerns in the 1970s that rehabilitation did not work, school districts began to implement zero-tolerance policies in an effort to create safe school environments.¹⁹ During this time,

15. See *infra* Parts I.A.1.a, I.A.2.a.

16. See Ryan, *supra* note 1, at 284–85.

17. See *infra* Parts I.A.1.b., I.A.2.b.

18. See *infra* Part I.B.2.

19. Bugden, *supra* note 8, at 1064–65.

influential criminologists began theorizing that there would be a “wave of juvenile ‘superpredators’ that would wreak havoc on our communities.”²⁰ The theory predicted that “America would soon be overcome by ‘elementary school youngsters who pack guns instead of lunches’ and who ‘have absolutely no respect for human life.’”²¹ This now-debunked theory fueled a shift in public policy away from rehabilitation in favor of laws designed to heighten public safety and accountability.²² Public panic worsened after the horrific shootings at Columbine High School, thus leading to the emergence of zero-tolerance policies around the country.²³

1. Zero-Tolerance Policies: School Discipline

The federal government spearheaded a vast expansion of zero-tolerance policies in school discipline with the passage of the Gun-Free Schools Act of 1994.²⁴ The Act was limited in its scope, aimed only at keeping weapons out of schools.²⁵ However, school districts soon began to draft similar policies that punished not only the possession of weapons, but also other nonviolent and disruptive behaviors.²⁶ The zero-tolerance policies that followed quickly cropped up across the country.

a. The Emergence of School-Based Zero Tolerance

Such zero-tolerance policies called for mandatory punishment every time a student committed a prohibited behavior, regardless of the severity of the behavior, mitigating circumstances, or the contextual background.²⁷ Under a zero-tolerance regime, schools

20. BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 159 (2014); Julie E. McConnell, *Five Devastating Collateral Consequences of Juvenile Delinquency Adjudications You Should Know Before You Represent a Child*, *VIRGINIA LAWYER*, Dec. 2012, at 34.

21. STEVENSON, *supra* note 20, at 159 (quoting WILLIAM J. BENNETT ET AL., *BODY COUNT* 25 (1996)).

22. McConnell, *supra* note 20, at 34. John Dilulio, who coined the term “superpredator,” later admitted that his predictions turned out to be wrong. *The Superpredator Myth, 20 Years Later*, *EJI* (Apr. 7, 2014), <https://eji.org/news/superpredator-myth-20-years-later> [<https://perma.cc/4JXR-RY5J>].

23. Bugden, *supra* note 8, at 1065.

24. Gun-Free Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3907 (codified at 20 U.S.C. § 7951 (2012)); Bugden, *supra* note 8, at 1065.

25. See S. David Mitchell, *Zero Tolerance Policies: Criminalizing Childhood and Disenfranchising the Next Generation of Citizens*, 92 *WASH. U. L. REV.* 271, 278 (2014).

26. *Id.* at 279.

27. See SARAH E. REDFIELD & JASON P. NANCE, AM. BAR ASS’N, *SCHOOL TO PRISON PIPELINE: PRELIMINARY REPORT* 24 (2016); Am. Psychol. Ass’n Zero Tolerance Task Force,

drafted one-strike policies that “automatically suspended or expelled [students] for behaviors that ‘previously would have been dealt with through’” more rehabilitative methods.²⁸ For example, states have applied zero tolerance to conduct such as fighting, dress-code violations, truancy, and tardiness.²⁹ Some state legislatures have even gone as far as criminalizing truancy and other student behaviors.³⁰

Three main goals of zero tolerance include: deterring misbehavior, incapacitating troublesome and dangerous students, and ensuring consistency in punishment across racial lines.³¹ The legitimacy of these goals should not be dismissed. To provide effective education, schools must maintain order and minimize disruption.³² If students misbehave, punishment has long been accepted as a means to achieve that order. The Supreme Court has at various points recognized that discipline requiring “immediate, effective action” is an essential aspect of proper education.³³ Zero-tolerance policies, however, have not achieved any of these goals.³⁴ On the contrary, data indicates that zero tolerance has the “opposite effect, that is, that schools with higher rates of school suspension and expulsion appear to have less satisfactory ratings of school climate” and “less satisfactory school governance.”³⁵

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.”).

28. Bugden, *supra* note 8, at 1066 (quoting Eric Blumenson & Eva Nilsen, *One Strike and You’re Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L. Q. 65, 75–87 (2003)).

29. Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 933 (2016).

30. Marilyn Armour, *Restorative Practices: Righting the Wrongs of Exclusionary School Discipline*, 50 U. RICH. L. REV. 999, 1002 (2016) (“[U]ntil 2015, Texas prosecuted children for truancy at double the rate of all other forty-nine states combined.”).

31. Blumenson & Nilsen, *supra* note 28, at 75–87.

32. *See Goss v. Lopez*, 419 U.S. 565, 580 (1975) (“[S]uspension is considered not only to be a necessary tool to maintain order but a valuable educational device.”).

33. *See id.*; *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) (“[T]he preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.”).

34. Blumenson & Nilsen, *supra* note 28, at 75–87.

35. REDFIELD & NANCE, *supra* note 27, at 24 (quoting Am. Psychol. Ass’n Zero Tolerance Task Force, *supra* note 27, at 854).

b. Negative Consequences of School-Based Zero Tolerance

A closer look at school discipline in practice sheds light on why zero tolerance fails to achieve its goals. First, studies show that more students have been excluded without actually deterring or improving student behavior.³⁶ Moreover, while incapacitation is a legitimate penological goal, it justifies only a small, if not trivial, number of school removals that occur.³⁷ This becomes clear in light of the fact that “many removals are for behaviors that do not invoke real safety concerns.”³⁸ Research shows that the overwhelming majority of suspensions—“95% of the 3.3 million children suspended from school each year—are for nonviolent offenses such as violating the dress code or ‘disruptive’ behavior.”³⁹

Empirical literature has identified a number of collateral consequences of zero-tolerance discipline. Specifically, zero tolerance has been “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.”⁴⁰ Such negative consequences greatly increase the likelihood of future disciplinary problems.⁴¹

First, zero-tolerance policies seriously interfere with a student’s academic achievement, further exacerbating the student’s negative attitude toward learning.⁴² A national study revealed that students who dropped out of school by the tenth grade were three times more likely to have been suspended than students who stayed in school.⁴³ Additionally, out-of-school suspension is shown

36. *Id.* “There is no evidence that frequent reliance on removing misbehaving students improves school safety or student behavior.” *Id.* (quoting DANIEL J. LOSEN & RUSSELL SKIBA, *SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 2* (2010), http://www.splcenter.org/sites/default/files/downloads/publication/Suspended_Education.pdf [<http://perma.cc/JGT4-EYUJ>]).

37. *Id.*

38. *Id.*

39. *Id.*

40. Lydia Nussbaum, *Realizing Restorative Justice: Legal Rules and Standards for School Discipline Reform*, 69 *HASTINGS L.J.* 583, 598 (2018).

41. See Howard B. Kaplan & Cynthia Robbins, *Testing a General Theory of Deviant Behavior in Longitudinal Perspective*, in *PROSPECTIVE STUDIES OF CRIME AND DELINQUENCY* 117, 138 (Katherine Teilmann Van Dusen & Sarnoff A. Mednick eds., 1983) (“By far the most consistent predictor of subsequent deviant responses . . . was felt rejection by the school.”).

42. See Ruth B. Ekstrom et al., *Who Drops out of High School and Why? Findings from a National Study*, 87 *TCHRS. C. REC.* 356, 360 (1986).

43. *Id.*

to be one of the primary indicators of a student's failure to graduate from high school.⁴⁴

Further, zero-tolerance policies can negatively affect a student's emotional and mental health. Unnecessary harsh punishment "either destroys a child's spirit, has no effect at all, worsens the problem, or makes it more difficult for [school administrators] to work with the child in school—he or she no longer trusts [them]."⁴⁵ School expulsion is more likely to remove students from important avenues of adult supervision and positive social support,⁴⁶ which makes students more likely to engage in antisocial behavior.⁴⁷ Such harsh policies serve "only to perpetuate a cycle of violence."⁴⁸ Cause for more concern, the effects of zero tolerance are felt by the student body as a whole. Evidence shows that suspensions for non-violent behaviors are associated with poor academic achievement among even non-suspended students⁴⁹ as well as poor reports on school climate and safety.⁵⁰

Evidence also reveals that zero-tolerance policies push students out of the classroom and into the criminal justice system at alarming rates—a phenomenon known as the school-to-prison pipeline ("STPP").⁵¹ Zero-tolerance policies utilize direct referrals to police, and schools around the country station police officers inside their schools at all times.⁵² Because school attendance facilitates academic and social achievement, suspended or expelled students are

44. Suhyun Suh & Jingyo Suh, *Risk Factors and Levels of Risk for High School Drop-outs*, 10 PROF. SCH. COUNSELING 297, 299–300, 302 (2007) (reporting that students who had a history of suspension were 78% more likely to drop out).

45. ADVANCEMENT PROJECT & CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 3, 10 (2000) (quoting JAMES P. COMER & ALVIN F. POUSSAINT, RAISING BLACK CHILDREN 198 (1992)).

46. RUSSELL J. SKIBA, ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE 13–14 (2000).

47. Sheryl A. Hemphill et al., *The Effect of School Suspensions and Arrests on Subsequent Adolescent Antisocial Behavior in Australia and the United States*, 39 J. ADOLESCENT HEALTH 736, 741 (2006).

48. Virginia Costenbader & Samia Markson, *School Suspension: A Study with Secondary School Students*, 36 J. SCH. PSYCHOL. 59, 76 (1998).

49. Brea L. Perry & Edward W. Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools*, 79 AM. SOC. REV. 1067, 1082–83 (2014).

50. 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 31, 32 (Daniel J. Losen ed., 2015).

51. Nussbaum, *supra* note 40, at 590–91.

52. See, e.g., Anthony Petrosino et al., *Policing Schools' Strategies: A Review of the Evaluation Evidence*, 8 J. MULTI-DISCIPLINARY EVALUATION 80, 81–82 (2012).

significantly more likely to engage in criminal activity.⁵³ Juveniles who get in trouble at school are also at risk for transfer into the more punitive criminal court's jurisdiction.⁵⁴ Due to the criminalization of youthful behavior, students feel the consequences of zero tolerance far beyond the schoolhouse gates and into their adulthood.

Importantly, the emergence of zero tolerance in school discipline did not happen in a vacuum. The shift toward these harsher policies was reflective of a much larger political and social movement happening in the United States and the criminal justice system overall.

2. Zero-Tolerance Policies: Young-Adult Offenders

The 1980s tough-on-crime movement saw similar changes within the adult criminal system. While zero tolerance as a policy appears to have most prominently been associated with school discipline, the concept of zero tolerance was originally developed outside of the school context as a law enforcement approach to drug trafficking.⁵⁵ At the time, national politics began to focus heavily on the strict adherence to law and order⁵⁶ due to public fear that crime was on the rise.⁵⁷ Combined with that fear, “[t]he language of zero tolerance seemed to fire the public imagination.”⁵⁸ Even before the passage of the Gun-Free Schools Act, the federal and state governments had begun to apply zero-tolerance policies across a broader spectrum of conduct. Although such policies do not specifically mention “zero tolerance,” this Comment will argue that the goals, effects, and collateral consequences of such policies are virtually identical to school-based zero-tolerance policies.

Since the tough-on-crime movement, crime-control policies in the United States have shifted focus from rehabilitation and have

53. Nussbaum, *supra* note 40, at 598–600.

54. See Ryan, *supra* note 1, at 287–88.

55. RUSSELL SKIBA, NAT'L ASS'N OF SCH. PSYCHOLOGISTS, ZERO TOLERANCE AND ALTERNATIVE DISCIPLINE STRATEGIES, at S4H35-1 (2010), https://www.nasponline.org/assets/documents/Resources%20and%20Publications/Handouts/General%20Resources/Zero_Tolerance_35-1_S4-35.pdf [<https://perma.cc/Q9PK-2387>].

56. See Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 726 (2002).

57. See Ryan, *supra* note 1, at 280.

58. Russell J. Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, NEW DIRECTIONS FOR YOUTH DEV., Winter 2001 at 17, 19.

relied heavily on retribution and incapacitation.⁵⁹ “[T]hese policies included the introduction of mandatory minimum sentences, habitual offender legislation, parole release restrictions, truth-in-sentencing laws, and an overall increase in the number and length of custodial sanctions.”⁶⁰ In the forty years since, the incarceration rate has more than tripled, from 220 per every 100,000 residents to 670 per every 100,000 residents.⁶¹ With over 2.1 million people behind bars, the United States incarcerates residents at nearly five times the global average.⁶² This dramatic increase in the prison population cannot be understood by rising crime rates alone.⁶³ Instead, the increase is fueled by predetermined prison sentences, mandatory minimums, a great reduction in discretion afforded to judges, and a strengthening of prosecutorial roles.⁶⁴

a. Tough-on-Crime Legislation

It is worth briefly mentioning the trajectory of federal criminal law since the 1980s. Through the mid-1970s, both federal and state prison sentences were governed by practices referred to as “indeterminate sentencing.”⁶⁵ Under indeterminate sentencing, a judge would specify a sentencing range for an individual, and a parole board would later determine actual time served.⁶⁶ Such a sentencing practice provided for a high degree of discretion and “reflected the belief that sentences should be individualized with the ultimate aim of rehabilitating the offender.”⁶⁷ However, Congress soon abandoned the idea that judges deserved the discretion to punish individuals on a case-by-case basis and replaced indeterminate

59. See *A Brief History of the Drug War*, DRUG POL’Y ALLIANCE, <http://www.drugpolicy.org/facts/new-solutions-drug-policy/brief-history-drug-war-0> [<https://perma.cc/bx74-KLYV>].

60. Ram Subramanian & Alison Shames, *Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States*, 27 FED. SENT. REP. 33, 33 (2014).

61. *Key Statistic: Incarceration Rate*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=kfdetail&iid=493> [<https://perma.cc/6H64-WTKJ>].

62. ROY WALMSLEY, INST. FOR CRIMINAL POL’Y RES., WORLD PRISON POPULATION LIST 2 (12th ed. 2018), http://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1_12.pdf [<https://perma.cc/7EjD-V7F7>].

63. See STEVEN RAPHAEL & MICHAEL A. STOLL, WHY ARE SO MANY AMERICANS IN PRISON? 100 (2013).

64. *Id.*

65. *Id.* at 97; J.C. Oleson, *Blowing out all the Candles: A Few Thoughts on the Twenty-Fifth Birthday of the Sentencing Reform Act of 1984*, 45 U. RICH. L. REV. 693, 700–02 (2011).

66. RAPHAEL & STOLL, *supra* note 63, at 97–98.

67. *Id.* at 98.

sentencing with the Sentencing Reform Act of 1984.⁶⁸ The Act created mandatory sentencing guidelines designed to “eliminate the previous widespread disparity in sentencing across the country due to wholly unguided discretion.”⁶⁹

Shortly thereafter, President Reagan signed into law the Anti-Drug Abuse Act of 1986.⁷⁰ The Act created new mandatory minimum sentences for drug offenses and changed the system of federal supervised release from a rehabilitative system into a punitive system.⁷¹ Mandatory minimum laws require minimum prison sentences for specified offenses or offenses with aggravating circumstances.⁷² Similar to zero-tolerance policies in schools, such laws statutorily define specific instances of conduct that automatically trigger predetermined sentences, thus removing a judge’s discretion to consider the severity of the conduct, mitigating circumstances, or the contextual background.⁷³ In practice, mandatory minimums take away from a judge the traditional authority to account for the circumstances of the crime and the characteristics of the individual defendant when imposing a sentence.⁷⁴ The Act required ten-year mandatory minimum sentences for large-scale drug dealers, even on a first offense.⁷⁵ A mid-level drug dealer received a mandatory minimum sentence of five years.⁷⁶ Congress also applied the five-year minimum to mere possession offenses.⁷⁷ Contrary to the Act’s original intent, the imposition of mandatory minimum sentences for small amounts of drugs has created an incentive for law enforcement agencies to go after easier targets, i.e., low-level dealers.⁷⁸ The Fifth Circuit District Judges Association

68. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. § 3551 et seq. and 28 U.S.C. §§ 991–998).

69. *Mandatory Minimums and Sentencing Reform*, CRIM. JUST. POL’Y FOUND., <https://www.cjpf.org/mandatory-minimums> [<http://perma.cc/84Z8-Y2F6>].

70. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801 et seq.).

71. RAPHAEL & STOLL, *supra* note 63, at 98, 100; *see also* Anti-Drug Abuse Act § 1002 (codified at 21 U.S.C. § 841(b)(1)) (creating mandatory minimums for possession of marijuana).

72. RAPHAEL & STOLL, *supra* note 63, at 103.

73. *See id.* at 100.

74. Shristi Devu, Comment, *Trapped in the Shackles of America’s Criminal Justice System*, 20 SCHOLAR: ST. MARY’S L. REV. & SOC. JUST. 217, 224 (2017).

75. U.S. SENTENCING COMM’N, SPECIAL REPORT, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 9 (August 1991).

76. *Id.*

77. RAPHAEL & STOLL, *supra* note 63, at 110.

78. Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383, 411 (1995).

found that such sentences “often require[d] the imposition of sentences which [were] manifestly unjust.”⁷⁹

The Clinton Administration amped up various laws that contribute to the zero tolerance of young-adult offenders as well. President Clinton spearheaded the infamous “three strikes and you’re out” law in the Violent Crime Control and Law Enforcement Act of 1994.⁸⁰ The law created a “three-strikes” rule, which provided for mandatory life sentences for criminals convicted of a violent felony after two or more prior convictions.⁸¹ President Clinton also unveiled his “one strike and you’re out” strategy to reduce crime in public housing through evictions.⁸² The strategy encouraged housing authorities to implement a “one-strike” rule that any resident who committed a crime would be automatically evicted from public housing.⁸³ In practice, the one-strike rule created serious collateral consequences for innocent public housing residents—housing authorities began to implement automatic eviction policies whenever a child got into trouble at school and was subsequently arrested or even when a guest of a tenant committed a crime.⁸⁴

States across the country followed suit and took a similar trajectory toward zero tolerance. Paralleling the federal system, many states shifted from indeterminate to determinate sentencing.⁸⁵ During that same time period, every state adopted some form of mandatory minimum sentencing law.⁸⁶ Although these zero-toler-

79. U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM app. at G-10 (1991); *see also* Sterling, *supra* note 78, at 411.

80. *See* Gwen Ifill, *White House Offers Version of Three-Strikes Crime Bill*, N.Y. TIMES (Mar. 2, 1994), <https://www.nytimes.com/1994/03/02/us/white-house-offers-version-of-three-strikes-crime-bill.html> [<https://perma.cc/4HWK-85HR>].

81. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 42 U.S.C. ch. 136).

82. Renai S. Rodney, Comment, *Am I My Mother’s Keeper? The Case Against the Use of Juvenile Arrest Records in One-Strike Public Housing Evictions*, 98 NW. U. L. REV. 739, 743–44 (2004).

83. *Id.*

84. *See id.* at 745–53. Public Housing Authorities have had the authority to evict tenants on this basis since the passage of the Anti-Drug Abuse Act of 1988. Pub. L. No. 100-690, 102 Stat. 4181, 4300 (1988). President Clinton revamped this provision in the mid-1990s by advising PHAs to implement the “one strike and you’re out” rule. President Clinton’s Memorandum on the “One Strike and You’re Out” Guidelines, 1996 PUB. PAPERS 521 (Mar. 28, 1996); Pub. L. No. 104–20, 110 Stat. 834 (1996).

85. RAPHAEL & STOLL, *supra* note 63, at 101.

86. *Id.* at 103.

ance laws do not target any age group, young adults are disproportionately impacted by the harsh sentences and the collateral consequences that result.⁸⁷

b. Negative Consequences of Zero Tolerance for Young Adults

A closer look at the practical effects of zero tolerance sheds light on why such policies fail to achieve their goals and ultimately fail the young-adult population overall. Illegal drugs, for example, continue to be as available today as when the mandatory minimum sentencing laws were first enacted.⁸⁸ However, the number of incarcerated drug offenders rose from 50,000 to 500,000.⁸⁹ This disparity is not surprising when viewed in light of the fact that 54% of all offenders sentenced to a mandatory minimum punishment had no prior record.⁹⁰ And, among offenders with mandatory minimums imposed, the proportion of younger offenders increased, “a trend not found among the federal offender population in general.”⁹¹

As reflected in the school disciplinary setting, research tends to find that increased criminal sanctions do not reduce recidivism.⁹² This is especially true for young-adult offenders, who comprise 10% of the entire United States population but make up 21% of individuals admitted to prison every year.⁹³ Of that percentage, black men in this age group are significantly overrepresented—they are “7 to 9 times more likely to end up in prison compared to their white peers.”⁹⁴ In fact, social scientists argue that “were social control over minorities not a primary concern, the same amount of money

87. See Vincent Schiraldi et al., *Community-Based Responses to Justice-Involved Young Adults*, NEW THINKING IN COMMUNITY CORRECTIONS, Sept. 2015, at 1, 6–8.

88. John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. TIMES (Dec. 11, 2012), <http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html> [<https://perma.cc/E69Q-ZRZC>].

89. *Id.*

90. BARBARA S. MEIERHOEFER, THE GENERAL EFFECT OF MANDATORY MINIMUM PRISON TERMS 14–29 (1992).

91. *Id.* at 17 (“A past tendency for younger offenders to be treated slightly less severely has disappeared”).

92. See, e.g., David Huizinga & Kimberly L. Henry, *The Effect of Arrest and Justice System Sanctions on Subsequent Behavior: Findings from Longitudinal and Other Studies*, in THE LONG VIEW OF CRIME: A SYNTHESIS OF LONGITUDINAL RESEARCH 220, 250 (Akiva M. Liberman ed., 2008).

93. Alex Frank, *Why Reimagining Prison for Young Adults Matters*, VERA INST. OF JUST. (Feb. 28, 2017), <https://www.vera.org/blog/why-reimagining-prison-for-young-adults-matters> [<https://perma.cc/BN73-MRSP>].

94. *Id.*

could be funneled into education, employment, and self-sufficiency initiatives with markedly greater results.”⁹⁵

Moreover, young-adult offenders have the highest recidivism rates of any age group.⁹⁶ Zero-tolerance laws do not reduce recidivism—research of serious young offenders aged fourteen to eighteen revealed no difference in recidivism rates among comparable offenders from imprisonment instead of probation, or from longer imprisonment terms.⁹⁷ In stark contrast, varying a young-adult offender’s social environment⁹⁸ and community-based services following release was strongly correlated with a reduction in recidivism.⁹⁹

Due to a host of serious collateral consequences ex-offenders are subject to, it becomes almost impossible for an ex-offender to become a productive member of society, thus driving the high recidivism rates.¹⁰⁰ Convicted offenders are routinely precluded from public housing under the one-strike rule, meaningful education and employment opportunities, food stamps, and even the right to vote.¹⁰¹ These collateral consequences are only amplified for young adults—studies show that for young adults, incarceration “creat[es] additional barriers to educational attainment, stable employment, housing, health care and relationships.”¹⁰² More importantly, young adults who spend their “transition to adulthood” in jail “miss out on key opportunities to take on adult social roles or prepare for the future through educational and employment experience.”¹⁰³ Incarceration—as it now stands—of young adults during such a critical time in their development has long-lasting consequences for future offensive behavior and for successful

95. Mark R. Fondacaro et al., *The Rebirth of Rehabilitation in Juvenile and Criminal Justice: New Wine in New Bottles*, 41 OHIO N.U. L. REV. 697, 711 (2015) (citing Bruce Western & Becky Pettit, *Incarceration and Social Inequality*, 139 DAEDALUS 8, 18 (2010)).

96. A study by the Bureau of Justice Statistics found that 76% of people under age twenty-five when released were rearrested within three years. See MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, at 12 tbl. 14 (2014).

97. THOMAS A. LOUGHRAN ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STUDYING DETERRENCE AMONG HIGH-RISK ADOLESCENTS 6 (2015).

98. Gary Sweeten et al., *Age and the Explanation of Crime, Revisited*, 42 J. YOUTH & ADOLESCENTS 921, 931 (2013).

99. CAROL A. SCHUBERT & EDWARD P. MULVEY, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, BEHAVIORAL HEALTH PROBLEMS, TREATMENT, AND OUTCOMES IN SERIOUS YOUTHFUL OFFENDERS 10 (2014).

100. Devu, *supra* note 74, at 241.

101. *Id.* at 226, 241.

102. Schiraldi et al., *supra* note 87, at 8.

103. *Id.*

rehabilitation. The high recidivism rates associated with zero-tolerance criminal laws show that such punishments do not successfully deter crime, nor are they justified in light of individual circumstances.

The personal costs of zero-tolerance laws for young adults are similar to those of students. Offenders suffer from extended periods of separation from society and the inability to foster and maintain positive relationships.¹⁰⁴ Many offenders are faced with years of incarceration, during which time they are not given the tools to make basic life decisions for themselves upon release.¹⁰⁵ These costs are felt more by the young-adult offender. Young adults have not even begun or have only just started to pave their way in the world. The zero-tolerance laws swiftly and automatically remove them from positive relationships, give them the stigma of a conviction without an opportunity for meaningful review, and deprive them of educational training and job opportunities.¹⁰⁶ Therefore, the criminal justice system should treat young-adult offenders through a restorative justice lens, a trend that has already become widespread in school discipline across the country.

B. *The Response: Restorative Justice in School Discipline*

Since zero-tolerance policies took effect, a large body of research has developed documenting not only the serious collateral consequences of zero tolerance and punitive discipline, but also highlighting its serious flaws in both school discipline and the justice system as it pertains to young-adult offenders.¹⁰⁷ In the face of demands for change, schools have quickly begun to shift toward experimenting with new strategies for school discipline. In 2014, the Council of State Governments Justice Center released a report with recommendations aimed at “reducing the millions of youth suspended, expelled, and arrested each year while creating safe

104. *Id.*; see also Creasie Finney Hairston, *Prisoners and Their Families: Parenting Issues During Incarceration*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 259, 270–71 (Jeremy Travis & Michelle Waul eds., 2003).

105. See Schiraldi et al., *supra* note 87, at 8.

106. See CURT T. GRIFFITHS ET AL., INT’L CTR. FOR CRIM. L. REFORM & CRIM. JUST. POL’Y, THE SOCIAL REINTEGRATION OF OFFENDERS AND CRIME PREVENTION 4 (2007), <https://pdfs.semanticscholar.org/4b72/c0cac0ed2fc50bb24894dc245826e2bc537d.pdf> [<https://perma.cc/E5LQ-FQC9>].

107. See, e.g., Armour, *supra* note 30, at 1001–03.

and supportive schools for all educators and students.”¹⁰⁸ The report considered recommendations from over 100 advisors and 600 contributors.¹⁰⁹ Central to the report is the critical role restorative justice should play in creating a positive school environment.¹¹⁰ Both the underlying principles behind restorative justice in schools and the evidence of its success reveal that restorative justice practices have proven to be a more successful response to student misbehavior.

1. Restorative Justice Principles

Restorative practices first developed in the juvenile justice and criminal justice systems.¹¹¹ Subsequently, restorative justice as a school-based policy began to crop up as an alternative to the more retributive zero-tolerance policies in school discipline and since then, its application and success have grown exponentially.¹¹²

When focused on improving school safety and the educational environment, restorative justice theory is based on three core principles: (1) “repairing harm;” (2) involving all interested parties; and (3) “transforming community relationships.”¹¹³ In other words, the broad aim of restorative justice in educational policy and practice is to prioritize the needs and concerns of the school community over exclusionary responses to student behavior.¹¹⁴ Restorative practices function by encouraging “youth who have misbehaved to take responsibility by repairing harm and restoring relationships with the parties affected by the wrongdoing” while allowing adults to “learn to employ a continuum of preventive restorative practices.”¹¹⁵ Restorative practices in schools have “evolved from victim-offender mediation, family and group conferencing, and circle conferencing.”¹¹⁶ The community conferencing involves parents,

108. *School Discipline Consensus Report*, COUNCIL ST. GOV'TS JUST. CTR., <https://csgjusticecenter.org/youth/school-discipline-consensus-report/> [<https://perma.cc/QPB7-5KUE>].

109. COUNCIL OF ST. GOV'TS JUST. CTR., *SCHOOL DISCIPLINE CONSENSUS REPORT: STRATEGIES FROM THE FIELD TO KEEP STUDENTS ENGAGED IN SCHOOL AND OUT OF THE JUVENILE JUSTICE SYSTEM* x (2014) https://csgjusticecenter.org/wp-content/uploads/2014/06/The_School_Discipline_Consensus_Report.pdf [<https://perma.cc/2WHP-VPFL>].

110. *Id.* at 31.

111. Thalia Gonzalez, *Restorative Justice from the Margins to the Center: The Emergence of a New Norm in School Discipline*, 60 *HOW. L.J.* 267, 270 (2016).

112. *Id.* at 269–71.

113. *Id.* at 270–71.

114. *Id.*

115. COUNCIL OF STATE GOV'TS JUSTICE CTR., *supra* note 109, at 31.

116. Gonzalez, *supra* note 111, at 277.

students, and teachers in a practice where victims share with offenders by whom they have been harmed, and offenders are given the opportunity to apologize and begin to repair that harm.¹¹⁷ Schools utilize this continuum of approaches in order to prevent the negative consequences of zero-tolerance policies.

2. Evidence of Success

The movement of restorative justice from an untested concept to a more widely accepted philosophy and practice is visible at both the state and national levels.¹¹⁸ Schools across the country are implementing restorative justice in order to repair the harms caused by zero-tolerance policies. Some of the most well-known states implementing restorative justice in schools are: California, Colorado, Illinois, Pennsylvania, and Utah.¹¹⁹ Due to the implementation of restorative justice, schools report reductions in suspension and expulsion rates as well as police referrals.¹²⁰ Schools also report additional benefits such as higher academic achievement and emotional well-being of community members, students, and teachers alike.¹²¹

Data also indicates a decline in the racial disparities that existed under a zero-tolerance regime in schools previously.¹²² In California, Oakland Unified School District has successfully decreased the suspension gap between African American and white students through restorative justice.¹²³ After implementing restorative practices, some schools report less misbehavior and fewer violent incidents, especially among repeat offenders.¹²⁴ For example, West

117. U.S. DEP'T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE 10 n.25 (2014), <http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf> [<https://perma.cc/W6X4-RG5J>].

118. Gonzalez, *supra* note 111, at 268, 271–72; *see also Resources on Positive Discipline*, AM. FED'N TCHR., <http://www.aft.org/ae/winter2015-2016/resources> [<https://perma.cc/W3QN-BU6G>]; *School Climate and Discipline*, U.S. DEP'T EDUC., <https://www2.ed.gov/policy/gen/guid/school-discipline/index.html> [<https://perma.cc/PXY5-6LFE>].

119. Bugden, *supra* note 8, at 1063–64, 1077–78; Gonzalez, *supra* note 111, at 285–86, 288–90, 292–95.

120. Nussbaum, *supra* note 40, at 612–13; *see, e.g.,* SONIA JAIN ET AL., RESTORATIVE JUSTICE IN OAKLAND SCHOOLS: IMPLEMENTATION AND IMPACTS v–vi (2014), <https://www.ousd.org/cms/lib/CA01001176/Centricity/Domain/134/OSD-RJ%20Report%20revised%20Final.pdf> [<https://perma.cc/V5C9-62QA>].

121. Gonzalez, *supra* note 111, at 289–90.

122. *Id.* at 277, 289.

123. SONIA JAIN ET AL., *supra* note 120, at 45–46. Additionally, the number of African American students suspended in one year decreased by 29%. *Id.* at 45.

124. Nussbaum, *supra* note 40, at 613.

Philadelphia High School—once known as one of the state’s most dangerous schools—saw a decrease in violent offenses by 52% after one year of implementing restorative practices.¹²⁵ After the second year, violent offenses decreased by an additional 40%.¹²⁶ Additionally, restorative justice practices in schools have “reduced eighty-four percent of out of school discipline, as well as dropped tardiness by thirty-nine percent.”¹²⁷ Overall, “shifting the focus to building relationships, rather than punishing students,” has begun to “halt the school to prison pipeline.”¹²⁸ The criminal justice system, as it pertains to young-adult offenders, can take valuable lessons from such school-based restorative practices.

II. RESTORATIVE JUSTICE FOR YOUNG ADULTS: A LESSON FROM SCHOOL DISCIPLINE

Restorative justice practices can and should be employed in the criminal justice setting for young adults, as evidenced by the success of such practices in school discipline. Recent research suggests that young adults are more similar to juveniles in terms of brain development, thus opening up avenues for increased rehabilitation.¹²⁹ Moreover, the goals of school discipline policies, and their underlying history, parallel those found in the criminal justice system for young-adult offenders.¹³⁰ The negative consequences of zero tolerance combined with a renewed acceptance of the rehabilitative goal have led to an expansion of restorative theories in schools across the country. This effort to combat zero-tolerance law and policy has the potential to create much better outcomes for young-adult offenders if also utilized in the criminal justice system.¹³¹

A. *Why Learn from School Discipline?*

Advances in school discipline serve as a prime example for the criminal justice system because the policies, history, and scientific

125. SHARON LEWIS, IMPROVING SCHOOL CLIMATE: FINDINGS FROM SCHOOLS IMPLEMENTING RESTORATIVE PRACTICES 6–7 (2009), <https://www.iirp.edu/pdf/IIRP-Improving-School-Climate-2009.pdf> [<https://perma.cc/XX84-3N4L>].

126. *Id.* at 7.

127. REDFIELD & NANCE, *supra* note 27, at 70.

128. *Id.*

129. *See infra* Part II.A.1.

130. *See infra* Part II.A.2.

131. *See infra* Part II.B.2.

backdrop that have developed over time are virtually the same in both settings. The same political climate which brought zero tolerance to the forefront of school discipline also had serious impacts on young-adult offenders. Many young adults are representative of a class of people who are trapped in a never-ending cycle of overly harsh punishment, beginning in school discipline and spiraling into the adult criminal context. Moreover, the same policy goals that are currently being addressed in schools are not being adequately addressed in the criminal justice system, where it is most needed.

Zero-tolerance laws and policies are a nationwide problem. The goals, effects, and consequences of school-based zero-tolerance policies not only parallel, but also contribute to those found in the adult criminal context. The criminalization of vulnerable youths is contributing to the makeup of the young-adult population being funneled through the criminal justice system.¹³² As discussed earlier, students subject to zero tolerance in schools are much more likely to drop out of high school—in fact, studies have shown that the “risk of imprisonment is *especially high* for prime-age black men who dropped out of high school.”¹³³ This demonstrates that “the current system is not effectively reducing future criminality among this age group.”¹³⁴ And, the government has a substantial interest in providing the tools for its citizens to become productive members of society.¹³⁵ This interest has great force in an educational context, but it does not stop there—an individual does not stop developing when he or she turns eighteen. Therefore, a punishment response rooted in restorative justice values is more appropriate for the young-adult population than the current zero-tolerance approach.

1. Brain Development in Young Adults and Criminal Statistics

Why is the current system failing the young-adult population? The answer to this question can partly be found in advanced research on brain development in juveniles and young adults. Our jurisprudence fully accepts that juveniles are entitled to a separate

132. See Schiraldi et al., *supra* note 87, at 4–8.

133. *Id.* at 7 (emphasis added). In fact, 68% of black male high school dropouts are imprisoned by the time they reach thirty-five years old. *Id.* at 8.

134. *Id.* at 6.

135. See *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.”).

system of justice with more individualized treatment and more accessibility to rehabilitative programming.¹³⁶ This stems from an acceptance that juveniles are less culpable and more responsive to rehabilitation than adult offenders.¹³⁷ This recognition by the Supreme Court and many states around the country is laudable. However, an individual does not stop developing when he or she turns eighteen. In fact, the brain development that distinguishes juveniles from adults continues well into an individual's mid-twenties, "meaning that young adults have more psychosocial similarities to children than to older adults."¹³⁸ Research suggests that people's brains are not fully mature until at least the age of twenty-five.¹³⁹ Therefore, the criminal justice system would benefit from a restorative justice approach similar to that in schools—one that can account for evidence showing that young adults are more developmentally similar to juveniles.

Moreover, criminal offense statistics reinforce the need for a new response to young-adult offending. These statistics line up with the brain development timeline and show that "[a]rrest rates peak in the late teens and early twenties, declining steadily thereafter for all types of crime."¹⁴⁰ Because most young adults age out of crime, our justice system should focus on rehabilitating young adults instead of exposing them to the effects of long-term incarceration and the collateral consequences that come with it. And, due to these

136. See *Graham v. Florida*, 560 U.S. 48, 74 (2010). "For juvenile offenders, who are most in need of and receptive to rehabilitation . . . the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident." *Id.* (internal citation omitted).

137. See *id.*; *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (prohibiting the death penalty for defendants under eighteen because "their irresponsible conduct is not as morally reprehensible as that of an adult" (quoting *Thompson v. Oklahoma*, 487 U.S. 815 (1988))).

138. Karol V. Mason, *Foreword* to Vincent Schiraldi et al., *Community-Based Responses to Justice-Involved Young Adults*, NEW THINKING IN COMMUNITY CORRECTIONS 1, Sept. 2015, at 1, 1.

139. See, e.g., Barbara L. Atwell, *Rethinking the Childhood-Adult Divide: Meeting the Mental Health Needs of Emerging Adults*, 25 ALB. L.J. SCI. & TECH. 1, 20 (2015) (stating that a way to help young adults is to recognize that their development is not complete until age twenty-five); Nico U. F. Dosenbach et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCI. 1358, 1359 fig.1 (2010) (finding that functional brain maturity levels out at twenty-five years old); Robin Marantz Henig, *What Is It About 20-Somethings?*, N.Y. TIMES (Aug. 18, 2010), <https://www.nytimes.com/2010/08/22/magazine/22Adulthood-t.html> [<https://perma.cc/2W3G-94PC>] (stating that the scientists at the National Institute of Health found, after a study of nearly 5000 children aged three to sixteen, that "the children's brains were not fully mature until at least 25").

140. Alex A. Stamm, Note, *Young Adults Are Different, Too: Why and How We Can Create a Better Justice System for Young People Age 18 to 25*, 95 TEX. L. REV. 72, 75 (2017).

new discoveries in behavioral science, the political climate has become more apt to take advantage of the rehabilitative goal of justice beyond the school setting.

2. The Re-Emergence of the Rehabilitative Goal

As recent history suggests, there are similarities between school disciplinary goals and criminal justice goals for young adults. Due to a re-emergence of the rehabilitative goal, the criminal justice system would greatly benefit from implementing a similar restorative justice response found in school discipline.

Within the past 150 years, United States criminal justice policy has had three significant and distinct shifts, from a focus on rehabilitation, to retribution, and now to an enlightened return to rehabilitation. During the late eighteenth century, the goal of rehabilitation began to prevail over the more retributive methods of punishment that came before.¹⁴¹ Reformers became convinced that offenders could be saved and transformed into productive members of society.¹⁴² Scholars have attributed the rise of rehabilitation to the rise of the welfare state, as well as advances in science, which seemed to provide means by which the rehabilitative goal could be achieved.¹⁴³ Nonetheless, the country soon opted for a more punitive approach. By the mid-1970s, policymakers started to dispense with rehabilitation in favor of retribution.¹⁴⁴ This policy evolution led to the emergence of zero-tolerance policies in not only the laws undergirding the criminal justice system, but also the discipline found in the school setting.

a. A Zero-Tolerance Comparison

Similarities can be found in the goals and flaws of zero tolerance in school discipline and the criminal justice system. Because of these similarities, school disciplinary settings can serve as a prime example for the success of restorative justice in counteracting the negative consequences of zero-tolerance laws. The three main goals of school-based zero tolerance are deterring misbehavior, in-

141. FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 4 (1981); Ryan, *supra* note 1, at 272.

142. Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1039 (1991).

143. Ryan, *supra* note 1, at 274.

144. *Id.* at 284–85.

capacitating dangerous students, and ensuring consistency in punishment across racial lines.¹⁴⁵ These goals are directly reflected in the zero-tolerance laws that were enacted for the criminal justice system in the late 1900s. Zero-tolerance policy—including determinate sentencing, mandatory minimums, and strict collateral consequences—is aimed at deterrence, incapacitation, and consistency along racial lines.¹⁴⁶ This alignment is no coincidence. Zero tolerance as an ideal was sparked by the fear that rehabilitation as a punishment goal did not work, thus sparking the tough-on-crime movement.¹⁴⁷ This movement created a retributivist revolution across the country, and its effects were felt in both school discipline and the criminal justice system.

After roughly forty years of zero tolerance, a substantial body of research has amassed that reveals the inherent flaws in the structure of such rules. Zero tolerance in school discipline is decried for being too harsh, stripping away school officials' discretion, exacerbating racial disparities, and contributing to the school-to-prison pipeline.¹⁴⁸ If it isn't clear yet, the criminal justice system is criticized for the same reasons, especially with respect to young adults: the sentencing guidelines are criticized as unnecessarily harsh and rigid;¹⁴⁹ scholars and lawmakers alike argue for a return to greater judicial discretion;¹⁵⁰ rates of criminal justice system involvement are much higher for racial minorities;¹⁵¹ and the recidivism rates are significantly higher for young adults than for any other age group.¹⁵²

As the failures of the zero-tolerance regime in the school setting demonstrates, harsher policies can lead to lower academic achievement, severe emotional and mental health issues, and an upsurge in a student's involvement with the criminal justice system.¹⁵³ Moreover, zero-tolerance policies exclude more students from school without actually deterring or improving student conduct.¹⁵⁴

145. Blumenson & Nilsen, *supra* note 28, at 75–87.

146. See D. A. Andrews & James Bonta, *Rehabilitating Criminal Justice Policy and Practice*, 16 *PSYCHOL. PUB. POL'Y & L.* 39, 40 (2010); Ryan, *supra* note 1, at 279–84.

147. Fondacaro et al., *supra* note 95, at 703–04.

148. See *supra* Part I.A.1.

149. KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING* 2–4 (1998).

150. *Id.* at 3–5. Federal judges have also joined in this criticism. FED. CTS. STUDY COMMITTEE, *REPORT OF THE FEDERAL COURTS STUDY COMMITTEE* 133–43 (1990).

151. Schiraldi et al., *supra* note 87, at 7.

152. *Id.* at 6.

153. See *supra* Part I.A.1.

154. See *id.*

The vast overbreadth and over-application of such policies lead to significant disparities and the criminalization of youthful conduct at alarming rates.¹⁵⁵

Young-adult offenders suffer similar consequences from harsh zero-tolerance laws. First, zero-tolerance policies for young adults lead to a lack of critical education and employment, cause emotional harm due to a lack of positive relationships, and lead to higher rates of recidivism due to severe collateral consequences relating to conviction.¹⁵⁶ Also, mirroring trends in school discipline, zero-tolerance sentencing practices incarcerate more offenders while failing to reduce crime and recidivism rates.¹⁵⁷ Yet another similarity, zero-tolerance laws create significant sentencing disparities and cause the over-criminalization of young-adult offenders at alarming rates.¹⁵⁸

b. Steps Toward Achieving Rehabilitation

Due to the negative consequences of the zero-tolerance era, there is increasing societal evidence that restorative theories are already being accepted across the United States. In the juvenile context, the Supreme Court has placed a new emphasis on rehabilitation as a sentencing goal.¹⁵⁹ The Supreme Court has also ruled that the Federal Sentencing Guidelines for adults must be interpreted as only advisory in nature.¹⁶⁰ By so ruling, the Court “arguably empowered judges to give greater consideration to offenders’ individual characteristics and circumstances, as well as the rehabilitative ideal.”¹⁶¹ As shown above, schools across the country have taken such aspirations to the next step and are currently implementing successful restorative justice practices.¹⁶²

In the criminal context, states and the federal government have taken small steps toward achieving this same rehabilitative goal.

155. *See id.*

156. *See generally* Devu, *supra* note 74, at 225–42.

157. Fondacaro et al., *supra* note 95, at 709. A study of 150,000 convicted adults found that community-corrections lessened recidivism rates, whereas incarceration had criminogenic effects, leading to above-average recidivism rates. William D. Bales & Alex R. Piquero, *Assessing the Impact of Imprisonment on Recidivism*, 8 J. EXPERIMENTAL CRIMINOLOGY 71, 97 (2012).

158. *See* Devu, *supra* note 74, at 223.

159. *See* *Graham v. Florida*, 560 U.S. 48, 74 (2010).

160. *United States v. Booker*, 543 U.S. 220 (2005).

161. Ryan, *supra* note 1, at 304.

162. *See supra* Part I.B.

State legislatures have attempted to address recidivism through rehabilitative treatment.¹⁶³ Congress also recently passed the FIRST STEP Act, which aims to reduce recidivism by expanding rehabilitative programming and earned-time credit opportunities, as well as reducing mandatory minimums.¹⁶⁴ The Trump Administration's endorsement of the Act "dramatically opened up political breathing room for bolder and more substantive changes."¹⁶⁵ As the Act's name implies, it is only a small step in the direction of reform. Nonetheless, a new focus on rehabilitation at both the federal and state levels signifies an opportunity for restorative justice to play a prominent role in the criminal justice system.

B. *Restorative Justice Proposal for Young Adults in the Criminal Justice System*

Restorative justice practices should be employed for young adults in the criminal justice setting to combat the consequences that occur with zero tolerance in both schools and criminal justice. The success of such practices in school discipline serves as a prime example of how to combat the negative consequences of zero tolerance and further the emerging goal of rehabilitation. Because restorative justice puts greater emphasis on restoring offenders and encouraging their reintegration into the community, a model aimed at young adults aged eighteen to twenty-five would have the most success in the current political and social climate. States already acknowledge the fine line between juveniles and young adults and have established special criminal justice policies within the current system for young adults.¹⁶⁶

163. ADRIENNE AUSTIN, CRIMINAL JUSTICE TRENDS: KEY LEGISLATIVE CHANGES IN SENTENCING POLICY, 2001–2010 8 (2010), <http://www.vera.org/sites/default/files/resources/downloads/Sentencing-policy-trends-v1alt-v4.pdf> [<https://perma.cc/YW3F-9FPY>].

164. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (to be codified at 18 U.S.C. §§ 3631–3635); see Emily Greene, *What is the First Step Act?*, PRISON FELLOWSHIP, https://www.prisonfellowship.org/2019/01/what-is-the-first-step-act/?mwm_id=328811498826&sc=PGNWAAG190104012&gclid=Cj0KCQiA5NPjBRDDARIsAM9X1GL8ciW3duWQXtNIQsLUKcVV2rbf8OQmNvzHlh_LQjJ1xOTexAqYGgaAloJEALw_wcB [<https://perma.cc/RMT6-728A>].

165. Van Jones & Jessica Jackson, *Why We're Celebrating a Three-Month-Old Law*, CNN (Apr. 21, 2019, 3:34 PM), <https://www.cnn.com/2019/04/02/opinions/first-step-act-so-far-opinion-jones-jackson/index.html> [<https://perma.cc/T7X3-ZCYS>].

166. See Nat'l Ctr. for Juv. Just., *Jurisdictional Boundaries*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC. & STAT., <http://www.jjgps.org/jurisdictional-boundaries> [<https://perma.cc/2TFB-T2R7>]. Thirty-six states allow juvenile courts to continue to exercise jurisdiction over adjudicated youth until they reach twenty-one, six states set the limit between twenty-two and twenty-five, and three states set no age limit at all. *Id.* At least

1. What Does Restorative Justice Look Like in Criminal Justice?

Restorative justice shifts the traditional view of crime and punishment toward looking at crime as a violation of people and of interpersonal relationships.¹⁶⁷ In practice, it highlights the accountability of the offender, involves real people affected by the offense (to the extent possible), and shifts the objective of the system from punishment and incarceration to repairing the harm.¹⁶⁸ Howard Zehr, known as the “grandfather of restorative justice,” provides a helpful description of what he called the “restorative justice lens.”¹⁶⁹ The restorative justice lens is the view that “[c]rime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions that promote repair, reconciliation, and reassurance.”¹⁷⁰

In a legal framework, there is always an impulse to create a bright-line rule for any given scenario. However, this exact impulse is what led to the strict zero-tolerance policies of the last four decades. A proper restorative justice model recognizes that “unbridled discretion . . . is . . . a poor substitute for principle and procedure”¹⁷¹ but also that justice without discretion can be “an intolerable engine of tyranny.”¹⁷² In order to be effective, restorative justice must take place in a legalized context.¹⁷³ Therefore, a restorative justice court for young adults would provide a successful framework to assess and account for the individual circumstances of young-adult offenders without imposing unnecessarily harsh punishment.

twenty-five states have established special criminal justice policies for young adults, “such as reduced sentencing options, young adult courts, separate prison facilities, or expunction provisions.” Stamm, *supra* note 140, at 73, 80–99.

167. ZEHR, *supra* note 10, at 28.

168. See JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* 10–12 (2002).

169. HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 180–81 (3d ed. 2005); ZEHR INSTITUTE FOR RESTORATIVE JUSTICE, <http://Zehr-institute.org/> [<https://perma.cc/98M9-QS7J>].

170. ZEHR, *supra* note 169, at 180–81.

171. *In re Gault*, 387 U.S. 1, 17–18 (1967).

172. NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 155 (1982).

173. Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 *DRAKE L. REV.* 667, 668–69 (2005).

2. Restorative Justice Courts

Because there are a host of collateral consequences for adults that are so entrenched in the institutions of our country, the best way forward is to address the needs of young adults proactively. With a young-adult court, states could counteract the impact of zero-tolerance laws by taking a special interest in “protecting offenders from receiving sentences that run contrary to our history of sentencing, trends in psychological data, and our current notions of justice informed by the social climate.”¹⁷⁴ A restorative justice court could utilize victim-offender mediation, family group conferencing, reparative boards, and sentencing circles in order to repair all parties affected by the crime.¹⁷⁵

New Zealand, for example, implemented a three-year pilot program in District Courts where judges could adjourn court for the holding of a restorative conference.¹⁷⁶ Evaluations of the program showed high rates of victim satisfaction and a 9% reduction in reoffending after two years.¹⁷⁷ The success of this program led first to increased funding for restorative justice practices, followed by the incorporation of restorative principles into New Zealand’s sentencing laws.¹⁷⁸ In 2014, New Zealand further revised the sentencing act to require courts to consider restorative justice under certain defined circumstances.¹⁷⁹ The act requires the consideration of restorative justice processes if the offender appears before a judge prior to any sentencing; after the offender enters a guilty plea; where there are one or more victims of the offense; no restorative justice process has previously been attempted for that offense; and the appropriate services can be provided.¹⁸⁰ Since 2014, there have been over 12,000 cases referred for restorative justice conferencing in New Zealand, and data shows that re-offense rates

174. Elijah D. Jenkins, Comment, *Adjudicating the Young Adult: Could Specialized Courts Provide Superior Treatment to This Emerging Classification?*, 61 HOW. L.J. 455, 475–76 (2018).

175. Reimund, *supra* note 173, at 672.

176. Fred W.M. McElrea, *Twenty Years of Restorative Justice in New Zealand*, TIKKUN, (Jan. 10, 2012) <https://www.tikkun.org/nextgen/twenty-years-of-restorative-justice-in-new-zealand> [<https://perma.cc/8R22-5EZ3>]. See generally SUE TRIGGS & CRIME AND JUSTICE RESEARCH CTR., *EVALUATION OF THE COURT-REFERRED RESTORATIVE JUSTICE PILOT: TECHNICAL REPORT* (2005).

177. McElrea, *supra* note 176.

178. *Id.*

179. Sentencing Amendment Act 2014, s 24A (N.Z.).

180. Sentencing Act 2002, s 24A(1) (N.Z.).

for those who participated were 15% lower than re-offense rates of comparable offenders who did not participate.¹⁸¹

A new court in Chicago, Illinois, similarly took on restorative justice as a primary goal. Backed by a Department of Justice grant, the Restorative Justice Community Court offers select young adults—aged eighteen to twenty-six—charged with non-violent felonies or misdemeanors an alternative way to repair harm.¹⁸² The court aims to use restorative justice practices to reduce the number of young adults going to jail.¹⁸³ The court utilizes peacemaking circles, where parties discuss crimes committed and aim to achieve a potential solution.¹⁸⁴ The offender ultimately signs a “Repair of Harm” agreement, which dictates the next steps in the process of repairing harm.¹⁸⁵ Once the offender completes all of the agreement’s requirements, the case is dismissed.¹⁸⁶ There is not enough data yet to show its success, but courts in Colorado and New York have already begun to implement these practices.¹⁸⁷ If these suggestions are put into practice, a restorative justice court for young adults could lower the number of inappropriate sentences given to young-adult offenders and hopefully create meaningful reductions in recidivism for future generations.

The potential for an expansion of restorative justice courts is increasing due to changing societal attitudes towards offender rehabilitation. Some states have already begun designing and implementing special sentencing arrangements for young adults.¹⁸⁸ Still, progress is slow, and most states’ current approaches to young adults in the criminal justice system are not making meaningful

181. Amy Adams, *Restorative Justice Lowering Reoffending Rate*, N.Z. GOV’T (Apr. 15, 2016), <https://www.beehive.govt.nz/release/restorative-justice-lowering-reoffending-rate> [<https://perma.cc/X3KV-M4RU>].

182. Yana Kunichoff, *Should Communities Have a Say in How Residents are Punished for Crime?*, THE ATLANTIC (May 2, 2017), <https://www.theatlantic.com/politics/archive/2017/05/chicago-restorative-justice-court/524238/> [<https://perma.cc/ZR25-HDM3>].

183. *Id.*

184. Hon. Timothy C. Evans & Hon. Colleen F. Sheehan, *Restorative Justice Community Court: A Restorative Approach to Crime and Conflict*, CIR. CT. COOK COUNTY, <http://www.njcn.org/uploads/digital-library/07.2017-RJCC%20Brochure%20FINAL%20copy.pdf> [<https://perma.cc/UASQ-PHZ4>].

185. *Id.*; see also Christopher D. Lee, *They All Laughed at Christopher Columbus When He Said the World Was Round: The Not-So-Radical and Reasonable Need for a Restorative Justice Model Statute*, 30 ST. LOUIS U. PUB. L. REV. 523, 556–57 (2011).

186. Evans & Sheehan, *supra* note 184.

187. Kunichoff, *supra* note 182.

188. Alexandra O. Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMP. L. REV. 769, 770–71 (2016).

progress.¹⁸⁹ Restorative justice practices are having such success in the school setting because they look less toward controlling students and more toward educating, repairing relationships, and bringing the community together.¹⁹⁰ Therefore, restorative justice for young-adult offenders would help focus state and local resources toward repairing harm and allowing offenders the chance to become contributing members of society.

3. Anticipating Counter-Arguments

Critics might argue that a line must be drawn distinguishing the treatment of juvenile and adult offenders, and that age eighteen is the most appropriate age for such a line.¹⁹¹ However, the cut off at age eighteen of the juvenile court's jurisdiction is relatively arbitrary, based more on customs and traditions rather than advanced scientific analysis.¹⁹² As discussed earlier, there is now scientific confirmation that the brains of eighteen to twenty-five year-olds are more similar to those of juveniles.¹⁹³ Based on these scientific advances, the Supreme Court has recognized that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18."¹⁹⁴ If there is a line to be drawn, it should not be drawn based on an arbitrary assumption that individuals have always been seen as adults at age eighteen. Instead, our new understanding of the developmental processes that continue through young adulthood should inform such line-drawing.

Additionally, some might argue that restorative practices may not be realistic or safe depending on the nature of the crime, the effect on the victim, or the drug-related activity leading to an offender's involvement in the criminal justice system. In certain situations, the categorical rules that the criminal justice system currently employs may be the most successful means for ensuring public safety and accountability.¹⁹⁵ However, categorical rules do

189. Stamm, *supra* note 140, at 73.

190. See *supra* Part I.B.

191. See *Roper v. Simmons*, 543 U.S. 551, 574 (2005) ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood.")

192. See Schiraldi et al., *supra* note 87, at 2; see also *Roper*, 543 U.S. at 569 (stating that "almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent").

193. See *supra* Part II.A.1.

194. *Roper*, 543 U.S. at 574.

195. See *id.* at 572–73, 578 (holding that a categorical line must be drawn at age 18 for the imposition of the death penalty).

not provide any breathing room for judges or members of the community to take mitigating factors of youth into account when imposing punishment. Moreover, restorative justice should not replace the conventional justice system, but should instead be incorporated into the system for young-adult offenders.¹⁹⁶ Structuring a restorative justice court as proposed above would also provide a screening process sufficient to account for community and safety concerns. Overall, restorative justice as a supplement to the current system will ensure that punishments are appropriately tailored to each young-adult offender, without jeopardizing public safety.

CONCLUSION

A restorative justice court, as proposed above, would provide young-adult offenders with not only better outcomes, but also with the tools to become more productive members of society. This is evidenced by the immense improvement in student outcomes through the use of restorative justice in the school setting. Even though school discipline is a separate institution from the criminal justice system, the criminalization of youth conduct in schools contributes a great deal to the landscape of the criminal justice system, especially for young adults. As detailed above, the same goals, and their underlying history, are found in both school discipline and criminal justice for young adults—from the vast expansion of zero-tolerance to a new movement toward rehabilitation and restoration.¹⁹⁷

The same political climate which brought zero tolerance to the forefront of school discipline also had serious implications for young-adult offenders in the criminal justice system.¹⁹⁸ However, a substantial body of research reveals the flaws inherent in the structure of zero-tolerance rules and the negative consequences that result for both students and young adults.¹⁹⁹ Advancements in scientific research also show that young adults are more developmentally similar to juveniles, therefore opening the door to successful rehabilitation.²⁰⁰ As a result, restorative theories are already being implemented both in the school setting and, to a lesser

196. Lee, *supra* note 185, at 558.

197. *See supra* Part II.A.2.

198. *See supra* Part I.A.

199. *See supra* Parts II.A.2, I.A.1.b, I.A.2.b.

200. *See supra* Part II.A.1.

extent, in the criminal justice setting, particularly through the use of restorative justice courts.²⁰¹ These efforts to integrate restorative justice into the criminal justice system should be expanded to create greater outcomes for our young-adult population, who have more to offer the world in the long lives they have ahead of them.

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201. *See supra* Parts I.B.2, II.B.2.

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