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“MORE THAN A CHRONOLOGICAL FACT”: *ROPER V. SIMMONS* AS AN  
ARGUMENT FOR MOVING AWAY FROM ZERO-TOLERANCE DISCIPLINE  
AND TOWARD RESTORATIVE JUSTICE

*Elisse Newey*

*“Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.” – Supreme Court in *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)*

INTRODUCTION

Behavioral scientists and psychologists have long been aware of the emotional effects of the criminal justice system. Scholars such as David B. Wexler have pointed out that the current criminal justice system both creates new psychological and emotional trauma through exclusionary and punitive practices, and completely fails to address the emotional and psychological needs of victims.<sup>1</sup> This is especially true in the case of juveniles who are still in the process of growing, learning, and constructing identities for themselves.

In *Roper v. Simons*, the Supreme Court took an unprecedented step by grounding their opinion in social science research on the emotional and psychological development of juveniles.<sup>2</sup> In ruling on the constitutionality of capital punishment for minors, the court held that it was morally misguided to conclude “that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character” and

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1. David B. Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (1990).  
2. *Roper v. Simons*, 543 U.S. 551 (2005).

therefore deserving of the death penalty.<sup>3</sup> Justice Kennedy, writing for the majority, held that the execution of individuals under the age of 18 is unconstitutional under the eighth and fourteenth amendments. He argued that the application of capital punishment to minors is neither moral nor scientifically sound. To make his case, he relied upon three major points from “scientific and sociological studies<sup>4</sup>”: (1) adolescent brains are underdeveloped and often lead to ill-considered decisions; (2) juveniles are more vulnerable and susceptible to negative influences and outside pressures; and (3) the character of juveniles is transitory and more open to reformation.

The Supreme Court’s arguments in this case referred to narrow context of capital punishment, but the logic employed can be broadly applied to all crimes and infractions committed by juveniles. It follows, then, that all forms of punishment that fail to acknowledge the unique developmental needs of adolescents are inappropriate and damaging to young people.

Schools are guilty of just such behavior as that described above when they impose “zero-tolerance” and exclusionary consequences on students. These are rules, policies and procedures that impose the ideologies of the criminal justice system and solve school infractions by removing students from the school community and often, actually passing students off on to the juvenile justice system. Not only have these practices failed to make our schools any safer, they have created a new set of problems for individuals and the community at large.

The Utah State Legislature has been among several states to make considerable efforts in recent years to implement changes to the juvenile justice system to rectify some of these alarming trends.<sup>5</sup> These efforts began with the formation of a working group to examine the state of the juvenile justice

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3. *Id.* at 1195.

4. *Id.* at 568.

5. Jessica Miller, *Two Utah Lawmakers Honored for their Work in Changing Juvenile Justice Laws*, SALT LAKE TRIBUNE (Oct. 26, 2017).

system. The working group was then expanded by the funding of an academic study of the experiences of Utah youths in the juvenile justice system which culminated in the passage of multiple pieces of legislation focused on shifting the responsibility for dealing with minor infractions at the school level from the justice system back to the school system.<sup>6</sup>

In this article, I argue that Utah is on the right track, that schools should be the primary responders to student misbehavior, and that restorative justice approaches are a developmentally and pedagogically appropriate way to address student misbehavior. Although there has been initial push back from school administrators and teachers, the preliminary data indicates that the efforts have largely been successful at diverting students away from the criminal justice system. But more than that, the efforts have pushed schools to look for alternative systems for dealing with school misbehavior. Many schools have adopted restorative justice practices – programs that give students the opportunity to make real amends for their wrong doing and have an authentic voice in the process.

Part I will describe how the current system does more harm than good and undermines the societal and legal goals of educating students by reproducing discrimination and other systemic problems. Students that commit crimes and infractions within the school system are often the most in need of what school can offer. The students most disproportionately impacted by zero-tolerance are those who are socio-economically disadvantaged, racial minorities and students with disabilities.<sup>7</sup> By placing such students outside of the school environment as a form of “punishment,” schools exac-

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6. Utah Juvenile Justice Working Group, *Final Report* (Nov. 2016).

7. See David Osher, Darren Woodruff & Anthony E. Sims, *Schools Make a Difference: The Overrepresentation of African American Youth in Special Education and the Juvenile Justice System*, in *RACIAL INEQUITY IN SPECIAL EDUCATION* 93, 97 (Daniel J. Losen & Gary Orfield eds., 2002); Eric S. Hall & Zorka Karanxha, *School Today, Jail Tomorrow: The Impact of Zero Tolerance on the Over-Representation of Minority Youth in the Juvenile System*, 4(1) *POWER PLAY* 1, 4-5 (2012).

erbate these students' vulnerabilities and place them at greater risk of committing future crimes.

In part II, I will examine the legal arguments for developing alternatives to the mainstream criminal justice system. The

Supreme Court has argued that traditional punishment/retribution can be inappropriate for adolescents, due to their stage of development, the increased pressure of their social and family environments and the transitory nature of their character. While the original source for these arguments was a capital punishment case, I argue that they can also be applied to the zero-tolerance policies in schools. A restorative response to juvenile behavior is necessary not because crimes committed by youths are any less harmful than those committed by adults, but because adolescents have "less capacity to control their conduct and to think in long range terms."<sup>8</sup> The Supreme Court has stated that youth crime "represent[s] a failure of family, school, and the social system, which share responsibility for the development of America's Youth."<sup>9</sup> Restorative Justice approaches respond to this failure by requiring that the efforts of the entire community be involved in redressing juvenile wrongdoing.

Finally, Part III will examine the possibility of Restorative Justice as an approach to address these arguments. Despite a growing resistance to zero tolerance policies, many states and school districts struggle to develop an alternative. Restorative Justice (RJ) is the process by which students can own up to and make amends for their mistakes. And while it has been recognized as a potential alternative to traditional criminal justice at all levels, it is especially appropriate for juveniles, for the reasons pointed out by the Supreme Court above. If widely accepted and implemented, RJ holds the potential to reduce

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8. *Supra* note 2 at 568.

9. *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1987). Quoting, 1978 *Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders* 455 U.S.

juvenile court referrals, support students in their growth and development and build stronger school communities.

## I. THE SYSTEM IS FAILING: THE SCHOOL TO PRISON PIPELINE

We are at a crisis point in the juvenile criminal justice system. Fear and collective feelings of vulnerability have led us to a place where we regularly pass off juvenile, low level crime to the criminal justice system.<sup>10</sup> Only a few decades ago, similar “crimes” would have remained within school communities. The irony is that our schools are not any safer for it. Research has found no correlation between the punitive school disciplinary changes and declines in school violence, drug use or crime.<sup>11</sup> However, for those touched by this system, the consequences can be terrible and lifelong.

### 1. How We Got Here

Many scholars assert that schools have always been repressive and punitive institutions – especially for minority groups.<sup>12</sup> But the 1990s ushered in a particularly punitive ideology of youth justice in schools. Several highly publicized incidents of violence and increased focus on the war against drugs evoked a very real fear about the safety of children within the

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10. See e.g. Dana Goldstein, *20 Years After Columbine, Schools have Gotten safer. But Fears have only Grown* Ronald Burns & Charles Crawford, *School Shootings, the Media, and Public Fear: Ingredients for a Moral Panic*, 32 *CRIME, LAW & SOCIAL CHANGE* 2, 147-168 (1999); Sarah Farmer, *Criminality of Black Youth in Inner-City schools: ‘Moral Panic’, Moral Imagination, and Moral Formation*, 13 *RACE ETHNICITY AND EDUCATION* 3, 367-381 (2010).

11. See Jacob Kang-Brown et al., *A Generation Later: What We’ve Learned About Zero Tolerance in Schools*, Vera Institute of Justice Issue Brief (2013); James H. Price & Jagdish Khubchandani, *School Firearm Violence Prevention Practices and Policies: Functional or Folly?*, 6 *VIOLENCE AND GENDER* 3, (2019) (“Hundreds of millions of dollars have been spent to harden schools. None of the currently employed school firearm violence prevention methods have empirical evidence to show that they actually diminish firearm violence in schools.”)

12. See e.g. Kathleen Nolan & Paul Willis, *Police in the Hallways: Discipline in an Urban High School* (2011); Carlos J. Ovando, *Bilingual Education in the United States: Historical Development and Current Issues*, *BILINGUAL R. J.*, 27, 1 (2003).

nation's public schools.<sup>13</sup> Political rhetoric fueled the fire by labeling urban youths as potential "super predators" and encouraged aggressive street policing and school policies to protect potential victims.<sup>14</sup>

Surveys in the early 1990s found that the "safety of the nation's schoolchildren" was the foremost concern facing schools.<sup>15</sup> This hysteria among adults led to greater control over juveniles within schools across the nation. These "tough on crime" policies included a variety of changes to schools' physical spaces. Such changes included: the installment of metal detectors and video cameras; the practice of conducting frequent random searches of student lockers and possessions; the placement of police officers within school buildings; and the formation of specialized school response SWAT teams.<sup>16</sup>

In addition to these changes to physical school spaces, a number of important policy developments changed the landscape of public schooling as well. Behaviors that were once handled on a case-by-case basis began to be lumped together into offense categories that had predetermined matrices of consequences and punishments. To encourage wide-spread adoption of these policies, federal funding became contingent upon school districts adopting these zero tolerance policies in 1994.<sup>17</sup> By 1995, every state was in compliance with the federal act and the zero-tolerance mindset became a national policy.<sup>18</sup>

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13. Russell Skiba & M.K. Rausch, *Zero Tolerance, Suspension, and expulsion: Questions of Equity and Effectiveness*. In *HANDBOOK OF CLASSROOM MANAGEMENT: RESEARCH, PRACTICE, AND CONTEMPORARY ISSUES*, 1063-108 (2006).

14. See John Dilulio, *How to Stop the Coming Crime Wave*, Manhattan Institute (1996); John Dilulio, *The Coming of the Super-Predators*, *WEEKLY STANDARD*, 23 (Nov. 27, 2995).

15. L.C. Rose & A.M. Gallup, *The 30<sup>th</sup> Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools*, 80 *PHI DELTA KAPPAN* 1, 41-56 (1998).

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17. Kathleen M. Cerrone, *The Gun-Free Schools Act of 1994: Zero Tolerance Takes Aim at Procedural Due Process*, 20 *PACE L. REV.* 130 (1999). See also, AMERICAN PSYCHOLOGICAL ASSOCIATION ZERO TOLERANCE TASK FORCE, *ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS* (2008), available at <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf>.

18. Russell Skiba, Reece L. Peterson, *School Discipline at a Crossroads: From Zero Toler-*

At the same time, the legal definition of “weapon” was expanded to such a point that any potentially dangerous item such as a pack of skittles.<sup>19</sup> During the 1998-1999 school year alone, 3253 students were expelled for possessing a weapon at school. Students cited for possessing weapons were included anything from a paper clip shot across the room using a rubber band and a tiny can of pepper spray carried by a high school female who walked home in the dark.<sup>20</sup>

Following the implementation of zero tolerance style policies, schools saw sharp increases in suspensions. The U.S. Department of Education projected that almost 250,000 more students were suspended out-of-school in 2006-2007 than during the 2002-2003 school year. Suspensions in Texas increased by 43 percent within only 5 years. And in the 2011-2012 academic year, the New York City School-Justice Partnership Task Force found that the city’s schools had 70,000 suspensions, a forty percent increase over a six year period.<sup>21</sup>

As punitive policies became the norm, some schools, police officers and judges began to interpret existing law broadly in favor of stricter punishment. Statutory offenses such as “interfering with an educational facility,” “willful defiance<sup>22</sup>” and “simple battery” became catch-all charges that allowed students to be criminally charged for misbehavior such as profanity, disrespect toward teachers and throwing small objects.<sup>23</sup>

*ance to Early Response*, 66 EXCEPTIONAL CHILDREN 3, 335-346 (2000); Russell Skiba & R. Peterson, *The Dark Side of Zero Tolerance: Can Punishment lead to Safe Schools?* 80 Phi Delta Kappan 5, 372-382 (1999).

19. Supplement to *Q.B. et al. v. Jefferson Parish Public School System*, Filed with the Office for Civil Rights, January 11, 2012, OCR Reference No. 06121151 .

20. *Supra* note 19.

21. The Editorial Board, *The School-to-Prison Pipeline*, N.Y. TIMES (May 29, 2013), <http://www.nytimes.com/2013/05/30/opinion/new-york-city-school-to-prison-pipeline.html>.

22. Teresa Watanabe, *LAUSD Board Could Ban Suspensions for ‘Willful Defiance,’* L.A. Times (May 12, 2013). Nina Agrawal, *California expands ban on ‘willful defiance’ suspensions in Schools*, L.A. TIMES (Sep. 10, 2019) (California has since banned all suspensions for ‘willful defiance’ for students in middle school and younger).

23. Colleen Shalby, *Report: Disproportionate number of Black Students Being Arrested in One Louisiana School District*, PBS NEWSHOUR (May 12, 2015); New Mexico Center on Law and Poverty, *Suspend, Expel and Exclude: How Zero-Tolerance Discipline Policies Deny New Mexico*



For example, Louisiana schools and police recently arrested a student, who was then charged with simple battery for allegedly throwing a Skittle at another student.<sup>24</sup> Thus, criminal sanctions have become a wholesale replacement for school disciplinary consequences.

In Utah, researchers found that while the state statute forbade detention sentences for infractions and truancy related issues, judges were still able to issue a court order to a youth to attend school.<sup>25</sup> Following the issuance of that order, if the youth failed to attend class one more time, the youth would be found in violation of a court order and could be charged with “contempt of court” – an offense that leads to detention. Therefore, while truancy was *legally* not a detentionable offense, it regularly leads to detention sentences for students. Schools regularly rely on this loop hole to “scare kids” into going to school.<sup>26</sup>

However, this practice has far greater effects than simply scaring kids into attendance. The Pew Research Center found in 2016 that 47% of youths in Utah Detention centers were there on a contempt of court charge – made up mostly of orders to attend school. And of all of the students entering the justice system, 80% of them were assessed to be a low risk to reoffend. That meant that almost half of the youths being detained were there because they were simply failing to show up to school. They were not on a path toward adult criminal behavior – at least not at the time of the original offense – but now had spent multiple nights in prison, away from their families and communities, and with other youths who had actual experience with violent criminal activity.<sup>27</sup>

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*Students Access to an Education* (February 2012).

24. James King, *School District Arrests Kids for Throwing Skittles*, *VOCATIV* (May 12, 2015).

25. Utah Code Ann. 78A-6-1101(2016).

26. Informal interview with Utah Valley school administrator, October 20<sup>th</sup>, 2017. Facts about the amount of students in the system without offenses besides truancy/court order

27. Utah Juvenile Justice Working Group, *FINAL REPORT* (Nov. 2016).

## 2. *The Effects: Intended and Otherwise*

So far, no credible evidence has been found that zero tolerance reduces violence or drug abuse, or makes schools safer.<sup>28</sup> In fact, one study by the American Psychological Association found that such policies can make schools “less safe.”<sup>29</sup>

These policies and practices have had a strikingly disproportionate impact. Black males who have diagnosed disabilities are the group most often suspended.<sup>30</sup> Nationwide, seventy percent of the students arrested for an event arising at school were African American or Latino.<sup>31</sup> African American students represent forty-two percent of referrals to law enforcements, and Latino students represent twenty-nine percent, with White students accounting for only twenty-five percent of referrals.<sup>32</sup>

In Utah, a similar study was conducted and found that Black students are disciplined more than three times more

28. Russell J. Skiba, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, Policy Research Report (Aug. 2000).

29. *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary review and recommendations*, AMERICAN PSYCHOLOGIST, (2008).

30. See DAVID OSHER, DARREN WOODRUFF & ANTHONY E. SIMS, *Schools Make a Difference: The Overrepresentation of African American Youth in Special Education and the Juvenile Justice System*, in RACIAL INEQUITY IN SPECIAL EDUCATION 93, 97 (Daniel J. Losen & Gary Orfield eds., 2002). Nationwide, twelve percent of students have recognized disabilities, and of those students, eighteen percent are African American boys. Department of Education’s Office for Civil Rights, *supra* note 13, at 3.

31. Department of Education’s Office for Civil Rights, CIVIL RIGHTS DATA COLLECTION (March 2012).

32. See e.g. Department of Education’s Office for Civil Rights, CIVIL RIGHTS DATA COLLECTION (March 2012), <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-datasummary.pdf> (last visited Nov. 8, 2013) African American students represent only about 16 % of the population, even though they account for 45 % of juvenile arrests; NAACP Legal Defense and Educational Fund Inc., *Dismantling the School-to-Prison Pipeline*, [http://www.naacpldf.org/files/publications/Dismantling the School to Prison Pipeline.pdf](http://www.naacpldf.org/files/publications/Dismantling%20the%20School%20to%20Prison%20Pipeline.pdf) (last visited Nov. 8, 2013); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 408 (2013) (describing the over-representation of African American youth in particular throughout every stage of juvenile and criminal courts: from 2002-2004, African American youth were 16 % of the overall population and yet 30% of juveniles arrested, 37 % of those detained, 30% of juvenile court referrals, and 35% of those waived to adult court).

than expected given population representations.<sup>33</sup> American Indian students in Utah are three and a half times more likely to receive a disciplinary action than any other racial group.<sup>34</sup>

Further, experts attribute the overly harsh application of exclusionary sanctions to marginalized students to a myriad of causes - unconscious biases, lack of teacher preparation, and inadequate training in culturally competent practices, for example.<sup>35</sup> Research has found that White students were referred for discipline violations that were predominantly objective such as smoking or leaving the school premises without permission.<sup>36</sup> However, Latino and African American students are referred for discipline for more subjective infractions such as excessive noise or general disrespect. Scholars have found that Black and other minority students do not actually misbehave more than White peers, but are referred more often.<sup>37</sup>

Beyond reproducing discriminatory systems within schools, the zero tolerance policies have caused new problems. Suspensions have been associated with increased recidivism, risk of grade retention, dropping out and even suicide ideation and attempt.<sup>38</sup>

In Utah, the most recent data found that once students enter the justice system, their likelihood of committing future crimes increases significantly - 74% of youths charged with low-level misdemeanors are screened as a high risk to re-offend.<sup>39</sup> In addition to being detrimental to individual stu-

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33. ACLU of Utah, *Racial Disparities in Utah's Juvenile Justice System* (2017).

34. *Id.*

35. Eric S. Hall & Zorka Karanxha, *School Today, Jail Tomorrow: The Impact of Zero Tolerance on the Over-Representation of Minority Youth in the Juvenile System*, 4(1) POWER PLAY 1,4-5 (2012).

36. Carolyn Everston and Carol Weinstein. *Handbook Classroom Management: Research, Practice, and Contemporary Issues*. (2006).

37. Tom Rudd, *Racial Disproportionality in School Discipline*. Policy Brief (2014).

38. See, Russell, *Zero Tolerance, Zero Evidence: An Analysis of school Disciplinary Practice*, Policy Research Report. Indianan Education Policy Center, 2000; CDC data. See also, Elaine Wilson, *Guiding Young Children Series: Discipline without Punishments*, OKLA. St. Univ., Okla. Coop. Extension Serv., Div. of Agric. Sci. And Natural Res., T-2329-2329-4.

39. Utah Juvenile Justice Working Group, *Final Report* (2016).

dents' lives, youth detention is costly to the public as well. Over \$21 million per year has been spent on youth detention in Utah.<sup>40</sup>

Throughout the last three decades, legal language within policies throughout the school and criminal justice systems have become increasingly punitive, leading to a greater reliance on law enforcement and a shrinking community infrastructure to deal with potential underlying concerns such as mental health, family relationships and poverty.

## II. ROPER: A CASE FOR OFFENDER DRIVEN POLICIES

In holding that juvenile capital punishment was unconstitutional, the Supreme Court acknowledged that bright line rules and punitive approaches do not fit most juvenile cases. Rather, juveniles are unique in their emotional and psychological development, and should therefore receive a more case-by-case review. Additionally, the opinion hinted at a call for an offender-driven process as an appropriate step, by which the entirety of the offender, victim and situation is taken into consideration.<sup>41 42</sup>

Justice Kennedy, writing for the majority, emphasized this fact by arguing that capital punishment of minors is nei-

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40. *Id.*

41. *Supra* note 2.

42. Proponents of tough school policies typically argue that schools have a responsibility to protecting the victim and maintaining a safe space. They cite liability law and case law that sets schools in a unique space where even constitutional rights are restricted for the benefit of the whole. However, this conversation often neglects the rights and the safety of the accused or worse, blatantly disregards them.

42. The needs of the victim are also disregarded in favor of relying on blanket, zero-tolerance punishments to meet the needs of the state over the actual needs of the victim. And finally, they fail to recognize that the exclusionary practices are creating even greater risks by alienating, labeling and ignoring the needs of students who largely go on to reoffend when they may have otherwise been fine. Case law also establishes a strong argument for protecting the rights and potential of all juveniles, whether accused or victims.

Rather than the dichotomous view that schools can either protect the accused at the expense of the victim or vice versa, schools have a legal, pedagogical, and moral responsibility to both and to create a community that fosters growth and learning for every student.

ther moral or scientifically sound. He went on to explain that while “bright line” rules are often convenient for institutions, they rarely meet the needs of individuals.

He relied upon the following three major points from “scientific and sociological studies<sup>43</sup>” to make his case: (1) adolescent brains are underdeveloped and often make ill-considered decisions; (2) juveniles are more vulnerable and susceptible to negative influences and outside pressures; and (3) the character of juveniles is transitory and more open to reformation.<sup>44</sup>

### *1. Juveniles are still developing*

Justice Kennedy’s first argument involved an acknowledgment of the nature of adolescent brains, and of developmental stages in particular. Justice Kennedy pointed out that “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.<sup>45</sup>”

As mentioned in the opinion, on average, adolescents are far greater risk takers than adults.<sup>46</sup> Adolescents are statistically overrepresented in almost every category of reckless behavior. Behavioral studies indicate that adolescents often undervalue the true consequences of their actions. Instead, adolescents, as a group, often value impulsivity, fun-seeking, and peer approval more than adults do.<sup>47</sup>

This is demonstrated by a steep increase “in antisocial behavior between ages 7 and 17” followed by a steep decrease in “antisocial behavior between ages 17 and 30” as pointed out

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43. *Supra* note 2 at 568.

44. *Supra* note 2.

45. *Johnson* 113 S.Ct. 2658; *See also, Eddings* at 115-116, 102 S.Ct. 869.

46. *Supra* at note 2.

47. *See* Laurence Steinberg, *ADOLESCENCE* 88 (6<sup>th</sup> Ed. 2002).

by the American Psychological Association in their Amicus Curie Brief.<sup>48</sup>

For this reason, laws have been established at every jurisdictional level to protect juveniles from their own reckless behavior by prohibiting certain permanent decisions - almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.<sup>49</sup> However, each of these statutes expire by a designated age, at which point society then holds individuals to a higher standard or reasonable behavior.

"In sum, the same person who engages in risky or even criminal behavior as an adolescent may moderate or desist from these behaviors as an adult. Indeed, most do."<sup>50</sup>

## *2. Juveniles are uniquely susceptible to peer pressure and their environment*

Secondly, Justice Kennedy pointed out that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. "Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."<sup>51</sup>

That vulnerability also extends to their own perception of belonging within the community. A recent report on Juveniles in Utah by the CDC found that a lack of belonging in a school community highly correlated with suicidal ideation and suicide attempts.<sup>52</sup>

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48. *Brief for the American Psychological Association, and the Missouri Psychological Association as Amici Curiae Supporting Respondent* at 6.

49. *Supra* at note 2.

50. *Supra* note 40 at 7.

51. *Supra* note 2 at 1195; *See also Stanford v. Kentucky*, 492 U.S., at 395, 109 S. Ct. 2969 at 395 (1989).

52. Francis Annor, Amanda Wilkinson & Marissa Zwald, Utah Dept. of Health, *Final Report - Undetermined Risk Factors for Suicide among Youth Aged 10-17 years - Utah* (2017).

The results of not belonging to a school community can be real and devastating. Researchers have repeatedly found that a student's sense of belonging, and other closely associated constructs of school community, have been shown to correlate to a wide variety of Academic, academic, health and psychological factors.<sup>53</sup> For all students, a lack of school belonging has been found to be associated with loneliness, emotional distress, psychosocial disturbance, suicide, mental illness, and depression.<sup>54</sup> School connectedness and belonging has been found to be second only to family connection in protecting children and adolescents against emotional distress, eating disorders, and suicide.<sup>55</sup> Finally, it has been suggested by researchers that connectedness to school community is the strongest protective factor in decreasing many of the unwanted behaviors that zero tolerance originally attempted to curb such as substance abuse, school absenteeism, early sexual involvement, and violence for secondary students.<sup>56</sup>

### 3. *Juveniles' Character and Identity is Transitory*

One of the core ideas behind punishment is that by excluding perpetrators, we can protect others from potential future behavior from an offender. We incarcerate individuals and place harsh punishments on offenders with the assumption

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53. See Kelly A. Allen & Terence Bowles, *Belonging as a Guiding Principle in the Education of Adolescents*, 12 AUSTRALIAN JOURNAL OF EDUCATIONAL & DEVELOPMENTAL PSYCHOLOGY 108-119 (2012); Lynley H. Anderman, *Academic and Social Perceptions as Predictors of Change in Middle School Students' Sense of School Belonging*, 72 THE JOURNAL OF EXPERIMENTAL EDUCATION 1, 5-22 (2003); Angus J. MacNeil, Doris L. Prater & Steve Busch, *The Effects of School Culture and Climate on Student Achievement*, 12 INTERNATIONAL JOURNAL OF LEADERSHIP IN EDUCATION 1 (2009).

54. Kelly A. Allen & Terence Bowles, *Belonging as a Guiding Principle in the Education of Adolescents*, 12 AUSTRALIAN JOURNAL OF EDUCATIONAL & DEVELOPMENTAL PSYCHOLOGY 108-119 (2012).

55. Center for Disease Control, *School Connectedness: Strategies for Increasing Protective Factors Among Youth*, (2009).

56. *Id.*; See also Michael D. Resnick, Peter S. Bearman, Robert Blume et al., *Protecting Adolescents from Harm: Findings from the National Longitudinal Study on Adolescent Health*, 278 JAMA 10, 823-832 (1997).

that without intervention they will offend again. An assumption of future danger underlies theories of both retributive and deterrent punishment.<sup>57</sup> As such, judging future dangerousness has become an increasingly large part of the justice system.

However, this assumption is not valid for adolescents. Justice Kennedy addressed this in his third argument by pointing out that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.<sup>58</sup> “The reality that juveniles still struggle to define their identity means. . . it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.<sup>59</sup>” Even professionals avoid making predictions about the enduring nature of an adolescents as the error rate has been found to be so high.<sup>60</sup>

Justice Kennedy argues that our criminal justice system should allow for consideration of the transitory nature of youths’ character but our systems should do more than just take it into account. Our institutions that deal directly with adolescents should be active in the process of building character and positive identity. And schools are poised to accomplish this unlike any other institution.

The current system of exclusionary punishment actively imposes labels and stereotypes on youths who are in a particularly vulnerable state of building an identity. Students are acutely in tune to how they are labeled and stereotyped. Researchers have found that when a student is suspended, expelled or referred to law enforcement, that student must grapple with how that exclusionary action either threatens or

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57. David Garland, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY (2012).

58. *Supra* note 2 at 1195.

59. *Id.*

60. *Supra* note 40 at 22; rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others.



conforms to a self-image that already existed.<sup>61</sup> This grappling usually results in a youth taking on a label of trouble-maker, delinquent, etc. and then conforming their behavior to the new label.<sup>62</sup>

Once a youth has been categorized as a delinquent, a self-fulfilling prophecy is often set in motion. Unable to break free of the stigma, he may begin to structure his identity around this label. The effect is frequently future criminal behavior, diminished employment and educational opportunities, and the receipt of a new label- “one of society’s ‘undesirables.’”<sup>63</sup>

### III. RESTORATIVE JUSTICE IN SCHOOLS

As states and jurisdictions do away with the bright line rules of zero tolerance and its corollaries many are questioning whether there is a better replacement.<sup>64</sup> Schools are still under state mandates to require regular attendance and to keep campus safe from violence, drugs and bullying. So how do schools implement an “offender-driven” system to respond to offenses? One option is restorative justice.

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61. See Claude M. Steele, WHISTLING VIVALDI AND OTHER CLUES TO HOW STEREOTYPES AFFECT US (2010); Mark McKown & Rhona S. Weinstein, *The Development and Consequences of Stereotype Consciousness in Middle Childhood*, 74 CHILD DEV. 498, 498 (2003). Claude M. Steele, *A Threat in the Air. How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 680, 680-81 (1998)

62. This phenomenon was first identified by psychologist Claude Steele and is known as “stereotype threat.” It is now well documented across a wide variety of groups, stereotype threat describes the anxiety students experience because of societal stereotypes (girls aren’t good at math), even where students do not believe the stereotype. For example, Girls’ performance lessens as they worry about confirming the stereotypes about their group: I am a girl, girls are not expected to be good at math, and this is a difficult math test. Like other aspects of disengagement, stereotype threat demonstrably lowers student achievement, and may reduce student interest in a particular domain of study. See FREDERICK L. SMYTH ET AL., IMPLICIT GENDER-SCIENCE STEREOTYPE OUTPERFORMS MATH SCHOLASTIC APTITUDE IN IDENTIFYING SCIENCE MAJORS 1, 10 (2009), <http://projectimplicit.net/nosek/papers/SGN2010gensci.pdf>.

63. Carol S. Taylor, *Growing Up Behind Bars; Confinements, Youth Developments, and Crime*, 3 OCJRC 1, 10 (1996).

64.

### 1. A Brief Overview of Restorative Justice

While grounded in religious and indigenous traditions, the term “restorative justice” was first coined by Albert Eglash in a 1977 article, “Beyond Restitution: Creative Restitution,” in which he identified three types of justice: retributive, distributive, and restorative.<sup>65</sup> The introduction of the idea coincided with general dissatisfaction with the criminal justice system and alongside racial and feminist critiques of what was seen as a patriarchal and white supremacist forms of justice.<sup>66</sup>

The traditional criminal justice system views crime as primarily an individual offense against the state and against the larger ideals of law and order.<sup>67</sup> Punishment is central to the system, and has been used largely as a means of deterring for potential future offenders.<sup>68</sup> A punishment-centered system cannot consider or provide reparations to the victim or to the community at large how have been effected by the wrong doing. By ignoring the needs of the individuals involved, our criminal justice system does very little to heal the wounds created by the offense and even less to build up the community in the wake of the events.<sup>69</sup>

Unlike the adversarial and punitive model upon which the U.S. criminal justice system is based,<sup>70</sup> proponents

65. Albert Eglash, *Beyond Restitution: Creative Restitution* in *RESTITUTION IN CRIMINAL JUSTICE*, Joe Hudson and Burt Galaway (eds.) 9 (1977).

66. See Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 *NEW ENG. L. REV.* 967, 969 (1998) (“Forgiveness and reconciliation are central aspirations. Also elevated are the goals of healing individuals, human relationships, and even entire societies.”).

67. See David Garland, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* (2012).

68. White, *Restorative Justice Programing* in *HANDBOOK OF JUVENILE JUSTICE: THEORY AND PRACTICE*, Barbara Sims and Pamela Preston (eds.) 509-519, 510 (2006).

69. Frank D. Hill *Restorative Justice: Sketching a New Legal Discourse*, *CONTEMPORARY READINGS IN LAW AND SOCIAL JUSTICE*, vol. 1, no. 1, (2015).

70. For example, CAL. PEN. CODE § 1170(a)(1) (West 2009) (“The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of

of restorative justice view crime and wrongdoing as harm that must be repaired through a holistic process involving the entire community. By placing relationships and the school community at the center of system, restorative justice can address the natural tensions that spring up between the rights, needs, and interests of offender, victims, and peripheral community members using programs and policies that work to restore communities harmed by crime.<sup>71</sup> Restorative justice, places healing at the center of the justice process, and holds particular potential for use in schools where learning, and by extension, building community are the central goals of the educational process.

2. *RJ processes can meet the unique legal and developmental demands of educating and rehabilitating youths*

A central focus of the RJ process is “the humanity of both offender and victim, and repair of the social connection and peace as more important than retribution.<sup>72</sup>” Shifting the focus from punishment to connection and repair gives schools the opportunity to expand their efforts and examine and address the broader implications of the harm and all of the conditions that motivated that parties’ behavior.<sup>73</sup>

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uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.”).

71. See Howard Zehr, *THE LITTLE BOOK OF RESTORATIVE JUSTICE*, (2003) 186-87, 198 99, 209-10 (“[p]erhaps punishment cannot be eliminated entirely from a restorative approach **False** If there is room for punishment in a restorative approach, its place would not be central. It would need to be applied under conditions which controlled and reduced the level of pain and in a context where restoration and healing are the goals.”).

72. Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 *NEW ENG. L. REV.* 967, 969 (1998) (“Forgiveness and reconciliation are central aspirations. Also elevated are the goals of healing individuals, human relationships, and even entire societies.”).

73. See Howard Zehr, *THE LITTLE BOOK OF RESTORATIVE JUSTICE*, at 200 (2003). ; Michael S. King, *Restorative Justice Therapeutic Justice and the Rise of the Emotionally Intelligent Justice*, 32 *MELB. U. L. REV.* 1096, 1103 (2008) (“Although restorative justice sees assisting victims as a priority, many proponents also value offender and community restoration.”).

*a. RJ supports the developmental stage of adolescents*

Current juvenile justice practices frame misbehavior and harmful behavior as a wrong against the state rather than as a wrong against another person or a community of people. Deterrence and punishment outweigh the principle of restoration and therefore fails to teach wrong-doers that their actions affect other people – a central lesson for developing empathy and important social-emotional skills.

Conversely, learning and building social-emotional skills are at the heart of restorative justice. While individual styles and specific practices vary, all restorative justice programs include some component in which the victim and the offender come to terms with one another and hear from these varying perspectives. These conversations can occur in a community circle, mediation or in a more casual environment. However it happens, students are asked to communicate their feelings, listen to other points of view, and accept responsibility.

In the case of violent or sexual crimes, this kind of conversation may never happen face-to-face. Rather, it may occur in the form of a letter or through the help of a mediator who relays information back and forth between the parties. But nevertheless, hearing and communicating these stories is vital to the process. Parties are not expected to agree with other perspectives, but they are expected to come out of the conversation with a better understanding and acknowledgement of another human being.

By expecting parties to hear one another, the process seeks to invoke authenticity and empathy not just from the offender but also in the victim and in the larger community affected by the harm.<sup>74</sup>

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74. Michael S. King, *Restorative Justice, Therapeutic Justice and the Rise of the Emotionally Intelligent Justice*, 32 MELB. U. L. REV. 1096, 1103 (2008) (“Although restorative justice seeks assisting victims as a priority, many proponents also value offender and community restoration.”)

*b. RJ addresses peer pressure by strengthening belonging and community*

In the Utah CDC report on youth suicide, the researchers found that some of the strongest predictors of suicidal ideation were related to young people not feeling a sense of belonging in the school community. The report cited factors such as students being bullied, feeling unsafe, and being suspended as being strongly correlative with suicidal thoughts. On the other hand, feeling connected to teachers and peers, feeling heard by teachers and administrators, and getting a chance to be a part of problem solving and rule making were strongly protective factors against suicidal thoughts.

These findings are especially important in light of current discipline practices in public schools. The current system tends to exacerbate the risk factors by pulling kids out of school, excluding them from meaningful participation and failing to address the underlying relational issues that lead to misbehavior.

Restorative Justice, however, supports building up the protective factors by creating safe spaces for students to connect with peers and adults they may have previously had conflict with and to be active in the consequence process. This fosters, rather than breaks down, relationships at the school level. It also requires that schools build meaningful relationships with community organizations that can help to address many the underlying causes of misbehavior – trauma, mental health, hunger, community violence, etc.

One of the core tools of restorative justice is the “restorative circle” which is described as a “nonjudgmental space for everyone who was affected by the incident to express themselves and come to a resolution.”<sup>75</sup> In the context of a school,

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75. See Howard Zehr, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* (2003) at 186-87, 198-99, 209-10.

that can include student bystanders, parents and teachers – anyone meaningfully affected by the behavior.

At the end of a circle, participants come up with an agreement to repair the harm. They might decide someone needs to post an apology on Facebook, or a resolution could be as simple as a promise to say hello to each other in the hallway. Through this process, parties come to see one another as human beings and individuals with needs, fears and emotions. Even if the circles do not end in friendships (which is to be expected), victims tend to come out of restorative circles feeling heard and validated, and offenders tend to come out feeling seen and understood. This recognition can go a long way in creating a sense of belonging within the school community.

*c. RJ actively builds character and positive identity development*

Rather than alienating the victim and setting them apart from the community, the RJ process is meant to recognize the humanity of all of the parties involved. Preserving the dignity of everyone, including even the offender, facilitates reentry into the larger community and avoids the labeling that occurs as part of the traditional criminal justice system. Students engaged in the process have an opportunity to have their story be heard and validated and their needs addressed. When that occurs, the student is actively engaged in crafting their identity rather than merely responding to a narrative told about them through the punitive justice system. Allowing for positive identity building is consistent with both adolescent development research and research on juvenile delinquency.<sup>76</sup>

## CONCLUSION

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76. American Psychological Association, *Are Zero Tolerance Policies Effective in the Schools? An evidentiary review and recommendations*, *AMERICAN PSYCHOLOGIST* (2008).

As pointed out by the Supreme Court, “Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.<sup>77</sup>”

Given the vulnerability of youth and the potential for damage, schools should be on the front lines of dealing with misbehavior. Unlike the traditional justice system, with a focus on punishment and exclusion schools have the opportunity to build relationships and foster the community investment necessary to truly support students and correct student behavior problems with developmentally and pedagogically appropriate responses.

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77. *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).