

# NOTES

## Tracing the School-to-Prison Pipeline from Zero-Tolerance Policies to Juvenile Justice Dispositions

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#### INTRODUCTION

I liked to fool around in school but I also liked school. But then I fooled around too much and got put in a program for kids who got tutored at this Child Guidance Center . . . . Then when I got back to school, the teachers were like, I hope I learned my lesson. And I did. I learned the slightest thing I did I'd be booted. So I was pissed. I mean really pissed. I didn't think schools could do that, and they didn't think I would be bad again, but I was worse. And look where it got me . . . .

—Twenty-Four-Year-Old Prison Inmate<sup>1</sup>

This young man's story represents a troubling trend in the U.S. education system. In recent years, schools have attempted to combat school violence and other behavioral problems by instituting harsh disciplinary policies and referring students to law enforcement.<sup>2</sup> Civil rights advocates argue that these practices push students, especially students of color, "out of school and into the

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1. Ronnie Casella, *Punishing Dangerousness Through Preventive Detention: Illustrating the Institutional Link Between School and Prison*, NEW DIRECTIONS FOR YOUTH DEV., Fall 2003, at 55, 66.

2. See *infra* Part I.

juvenile and criminal justice systems.”<sup>3</sup> The process has come to be known as the school-to-prison pipeline.<sup>4</sup>

Throughout the literature discussing this phenomenon, authors often reference juvenile justice systems in passing, but few studies have given in-depth attention to the specific practices within juvenile courts that perpetuate the school-to-prison pipeline. Accordingly, this Note takes a closer look at the connection between harsh disciplinary practices in schools and the dispositional processes that occur in juvenile justice systems. Part I examines zero-tolerance policies that push students out of schools in the first place. Part II explores the ways that students then enter juvenile courts. Part III discusses the guidelines and other factors that shape judges’ dispositional decisions, particularly when they handle minor crimes and violations of zero-tolerance policies. Finally, Part IV describes alternatives to punitive sanctions for juvenile offenders. Overall, this Note concludes that zero-tolerance policies and punitive juvenile justice dispositions fail to remedy the problems that they are meant to resolve.

### I. ZERO-TOLERANCE POLICIES

In the 1990s, public discourse began to focus on the prevalence of violence in schools.<sup>5</sup> School administrators became increasingly concerned about drug use and gang activity among students, and dramatic events such as the shooting at Columbine High School further solidified fears about school safety.<sup>6</sup> In response to these problems, many schools began implementing zero-tolerance policies.<sup>7</sup> A zero-tolerance policy “mandates predetermined consequences or punishments for specific offenses.”<sup>8</sup> Such policies are generally based on the assumption that removing students from schools when they behave disruptively will create peaceful learning environments and deter others from engaging in similar patterns of conduct.<sup>9</sup>

The zero-tolerance approach to school discipline was originally developed in the 1980s as a means of discouraging drug use among students.<sup>10</sup> However, the

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3. Lawyers’ Comm. for Civil Rights Under Law, *School Pushout*, BREAKING THE SCHOOL-TO-PRISON PIPELINE, <http://www.breakingthepipeline.org/schoolpushout/> (last visited Feb. 10, 2014).

4. *See id.*

5. *See* Am. Psychological Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 852 (2008); Tona M. Boyd, *Confronting Racial Disparity: Legislative Responses to the School-to-Prison Pipeline*, 44 HARV. C.R.-C.L. L. REV. 571, 573 (2009).

6. Am. Psychological Ass’n Zero Tolerance Task Force, *supra* note 5, at 852; Boyd, *supra* note 5, at 573.

7. Boyd, *supra* note 5, at 573.

8. PHILLIP KAUFMAN ET AL., U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY, 1999 app. A, at 117 (1999).

9. Am. Psychological Ass’n Zero Tolerance Task Force, *supra* note 5, at 852.

10. Russ Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 PHI DELTA KAPPAN 372, 373 (1999); *see also* Am. Psychological Ass’n Zero Tolerance Task Force, *supra* note 5, at 852.

approach spread rapidly after passage of the Gun-Free Schools Act of 1994.<sup>11</sup> Under that Act, states receiving Title I funding must implement laws requiring local educational agencies to “expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to a school.”<sup>12</sup> Furthermore, the Act requires local educational agencies to refer students to the juvenile justice system for bringing firearms or other weapons to school.<sup>13</sup> The law effectively mandated that schools adopt zero-tolerance policies for firearms, and in implementing those policies, many school districts also created zero-tolerance policies for other disciplinary infractions.<sup>14</sup>

By the 1996–1997 school year, zero tolerance had become widespread—94% of public schools reported that they had zero-tolerance policies for firearms, and 91% had zero-tolerance policies for weapons other than firearms.<sup>15</sup> Likewise, 88% of schools had zero-tolerance policies for drugs, 87% for alcohol, and 79% for violence.<sup>16</sup> This Part examines these zero-tolerance policies in greater depth, looking first at justifications for their use and then discussing critiques of the policies. Overall, it seems that zero-tolerance policies contribute to the school-to-prison pipeline by pushing disproportionate numbers of African-American and Latino students out of schools.

#### A. JUSTIFICATIONS FOR ZERO-TOLERANCE POLICIES

##### 1. Taking School Violence Seriously

Arguments in support of zero-tolerance policies are often based on the idea that school violence “is at a crisis level and increasing, thus necessitating forceful, no-nonsense strategies for violence prevention.”<sup>17</sup> One article supporting zero-tolerance policies pointed to several school shootings as evidence of the problem of school violence.<sup>18</sup> The author went on to argue that “even the silliest threats must be taken seriously,” noting that students who make jokes about violence sometimes have real intentions of engaging in violent acts.<sup>19</sup> According to proponents of zero tolerance, these policies are needed to effectively investigate students who may pose real threats to school safety and

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11. Gun-Free Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3907 (1994) (codified as amended at 20 U.S.C. § 7151 (2006)); see also Paul J. Hirschfield, *Preparing for Prison? The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79, 82 (2008).

12. 20 U.S.C. § 7151 (2006).

13. *Id.*

14. Hirschfield, *supra* note 11, at 82.

15. KAUFMAN ET AL., *supra* note 8, at 119 tbl.A1.

16. *Id.*

17. Am. Psychological Ass’n Zero Tolerance Task Force, *supra* note 5, at 853. See generally T. Nikki Eckland, *The Safe Schools Act: Legal and ADR Responses to Violence in Schools*, 31 URB. LAW. 309 (1999).

18. Vito A. Gagliardi, Jr., *In Defense of Zero Tolerance*, 164 N.J. L.J., May 21, 2001, at 1, 3, available at [http://208.112.40.29/data/articles/In\\_Defense\\_of\\_Zero\\_Tolerance-147.pdf](http://208.112.40.29/data/articles/In_Defense_of_Zero_Tolerance-147.pdf); see also Eckland, *supra* note 17, at 309.

19. Gagliardi, *supra* note 18, at 4.

prevent them from engaging in truly dangerous activities.<sup>20</sup> Zero-tolerance policies may also deter bad behavior by unequivocally communicating to students that violence is impermissible and that disciplinary infractions will be punished swiftly and firmly.<sup>21</sup>

## 2. Consistently Punishing Disciplinary Infractions

Another common justification for zero-tolerance policies is based on a desire to treat students fairly and consistently. Proponents of the practice argue that zero tolerance helps school administrators treat like offenses alike.<sup>22</sup> A consulting firm that assists schools in implementing zero-tolerance policies explains that the vast majority of school administrators “strive for firm, fair, and consistent discipline applied with good common sense.”<sup>23</sup> However, if students are not subject to predetermined punishments for misbehavior, they will learn that “there are no consequences for inappropriate—and sometimes illegal—behavior as long as it occurs within the [school] grounds.”<sup>24</sup> Likewise, zero-tolerance policies may help diminish racial disparities in school discipline by dictating sanctions for behavioral infractions in advance and diminishing the potential for racial bias in punishment.<sup>25</sup>

### B. CRITIQUES OF ZERO-TOLERANCE POLICIES

#### 1. School Violence is Declining

Despite arguments that school violence is currently at endemic levels, data suggest that violence in schools has actually declined in recent years.<sup>26</sup> Rates of nonfatal victimizations in schools declined dramatically over the past two decades, from nearly 200 victimizations per 1,000 students in 1992 to fewer than 50 victimizations per 1,000 students in 2011.<sup>27</sup> One might argue that these trends are attributable to zero-tolerance policies. However, rates of nonfatal victimizations away from school fell at similar rates between 1992 and 2011,<sup>28</sup> which may suggest that the declines were not caused by school policies.

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20. *Id.* Similarly, Casella quotes a school guard who stated: “What we in school have to keep in mind is how conflicts between students can go from bad to worse. . . . What starts as innocent can turn dangerous in a split-second, especially when we have students on the verge of potentially explosive situations.” Casella, *supra* note 1, at 60. The guard was justifying the suspension of a student for a dress-code violation. *Id.*

21. Am. Psychological Ass’n Zero Tolerance Task Force, *supra* note 5, at 854; Eckland, *supra* note 17, at 316; see *Zero Tolerance and School Safety*, NAT’L SCH. SAFETY & SEC. SERVS., <http://www.schoolsecurity.org/trends/zero-tolerance> (last visited Oct. 5, 2013).

22. Am. Psychological Ass’n Zero Tolerance Task Force, *supra* note 5, at 853–54; *Zero Tolerance and School Safety*, *supra* note 21.

23. *Zero Tolerance and School Safety*, *supra* note 21.

24. *Id.*

25. See Am. Psychological Ass’n Zero Tolerance Task Force, *supra* note 5, at 854.

26. *Id.* at 853.

27. THOMAS D. SNYDER ET AL., U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY: 2012, at 11 fig.2.1 (2013).

28. *Id.*

Moreover, although proponents of zero tolerance often point to shootings as evidence of violence in schools, the number of youth homicides in schools remained fairly stable between 1992 and 2011, and they constituted less than 2% of all youth homicides during that period.<sup>29</sup>

## 2. Students of Color are Punished Disproportionately

The most common criticism of zero-tolerance policies is that students of color tend to be subjected to harsher punishments under zero-tolerance policies than their white counterparts.<sup>30</sup> Social-science research supports this argument. One study of school-based arrests in Connecticut found that students of color committing common disciplinary infractions were more likely to be arrested than white students committing the same offenses.<sup>31</sup> In one town, African-American and Latino students who were caught with drugs, alcohol, or tobacco were ten times more likely to be arrested than similarly situated white students.<sup>32</sup> Another study of male students in a Midwestern school district found that black students tended to receive harsher punishments than their white peers for similar behavioral infractions.<sup>33</sup>

To better understand these patterns, Professor Russell Skiba and several colleagues examined underlying factors potentially responsible for racial disparities in school discipline by analyzing data from a large, Midwestern school district.<sup>34</sup> As in other studies, these researchers found that black students “were overrepresented on all measures of school discipline,” including referrals to law enforcement, suspensions, and expulsions.<sup>35</sup> Yet they also found that there were no statistically significant racial differences in the proportion of incidents resulting in suspension.<sup>36</sup> Instead, racial disparities in suspension rates appeared to be attributable to “prior disproportionate referral of African American students to the [principal’s] office,” suggesting that teachers played an important role in determining which students would be punished.<sup>37</sup>

It also seemed that white and black students were generally referred to the office for different types of disciplinary infractions. White students were commonly referred to the office for “smoking, leaving without permission, vandal-

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29. *Id.* at 6–7 & fig.1.1.

30. Lawyers’ Comm. for Civil Rights Under Law, *supra* note 3; *Locating the School-to-Prison Pipeline*, AM. CIVIL LIBERTIES UNION, [https://www.aclu.org/sites/default/files/images/asset\\_upload\\_file\\_966\\_35553.pdf](https://www.aclu.org/sites/default/files/images/asset_upload_file_966_35553.pdf) (last visited Oct. 5, 2013).

31. AM. CIVIL LIBERTIES UNION, *HARD LESSONS: SCHOOL RESOURCE OFFICER PROGRAMS AND SCHOOL-BASED ARRESTS IN THREE CONNECTICUT TOWNS* 10 (2008).

32. *Id.*

33. Chance W. Lewis et al., *African American Male Discipline Patterns and School District Responses Resulting Impact on Academic Achievement: Implications for Urban Educators and Policy Makers*, 1 J. AFR. AM. MALES EDUC. 7, 14–15 (2010).

34. Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 326 (2002).

35. *Id.*

36. *Id.* at 328.

37. *Id.* at 330.

ism, and obscene language,” whereas black students tended to be referred for “disrespect, excessive noise, threat, and loitering.”<sup>38</sup> The researchers noted that it was “difficult to judge which of these two sets of behaviors is more ‘serious,’” but they also pointed out that the reasons for referrals of black students to the office tended “to require a good deal more subjective judgment on the part of the referring agent.”<sup>39</sup> Based on this evidence, it seems that zero-tolerance policies remain subject to a great deal of inconsistency. Even with seemingly clear-cut policies in place, teachers still decide which infractions are serious enough to report to the office and thereby determine when students are disciplined.

### 3. Harsh Discipline Pushes Students Out of School

Opponents of zero-tolerance policies also argue that harsh disciplinary policies make schools unwelcoming for students, thereby pushing them “out of school and into the juvenile and criminal justice systems.”<sup>40</sup> Consistent with these claims, research suggests that harsh disciplinary practices can contribute to negative school outcomes. One longitudinal study of a Florida school district found that out-of-school suspensions predicted future suspensions and low academic performance.<sup>41</sup> In this way, removing students from school often leads those students to continue misbehaving, which may result in additional disciplinary actions and poor achievement in school. Moreover, the size of the student cohort decreased significantly over the course of the longitudinal study as many students dropped out of school. The researchers posited that this pattern probably resulted at least in part from suspensions pushing students out of schools.<sup>42</sup>

An ethnographic study of young prison inmates in Connecticut also suggested that harsh disciplinary practices such as zero tolerance lead to negative educational outcomes.<sup>43</sup> Several inmates stated that they were surprised and disillusioned when they learned how their schools responded to disciplinary infractions. For example, a twenty-one-year-old black inmate explained that he was kicked out of school for selling marijuana.<sup>44</sup> He was then relocated to a school that “wasn’t as good” and began “catching little stupid misdemeanors here and little stupid cases there.”<sup>45</sup> But when the young man was wrongly

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38. *Id.* at 332 (emphasis omitted).

39. *Id.* at 334.

40. Lawyers’ Comm. for Civil Rights Under Law, *supra* note 3; *Locating the School-to-Prison Pipeline*, *supra* note 30.

41. Linda M. Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, NEW DIRECTIONS FOR YOUTH DEV., Fall 2003, at 17, 25.

42. *Id.* at 30.

43. Casella, *supra* note 1, at 65–68.

44. *Id.* at 67–68.

45. *Id.* at 67.

accused of a crime he did not commit and removed from school in handcuffs, he decided to drop out.<sup>46</sup>

Based on these studies, it seems that zero-tolerance policies may contribute to high dropout rates among harshly disciplined students. And if students of color are disproportionately subjected to this discipline in the first place,<sup>47</sup> the negative effects of zero tolerance may have a greater impact on students of color. Thus, it appears that these policies may permanently push students of color out of schools and add to the school-to-prison pipeline.

## II. PATHS TO JUVENILE COURT

Though zero-tolerance policies likely push students out of schools, these young people do not always end up in court. This Part studies ways that youth enter the juvenile justice system, particularly after being subjected to zero-tolerance policies. Section II.A examines the role schools play in referring students to law enforcement and juvenile justice systems. Section II.B then discusses the increasing use of school resource officers (SROs). Finally, section II.C explores ways that intake officers and government attorneys process juvenile cases.

### A. SCHOOL REFERRALS TO LAW ENFORCEMENT

A juvenile delinquency case generally begins with a referral either to a government attorney or to a juvenile court's probation or intake department.<sup>48</sup> The most direct way for students to enter the juvenile justice system is through school referrals. A 2000 report noted that forty-three states *required* school officials to report students to law enforcement for committing crimes on school premises.<sup>49</sup> Similarly, the Gun-Free Schools Act mandates that local educational agencies must report students to juvenile or criminal justice systems when they bring firearms or other weapons onto school property.<sup>50</sup> Although schools may not always comply with these policies, the laws certainly encourage administrators to refer students with behavioral problems to police and juvenile courts.<sup>51</sup>

School officials refer students to law enforcement and courts for a range of disciplinary infractions. Sometimes students are referred for more serious offenses such as fighting in school. For example, the chief of security at a

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46. *Id.* at 68.

47. *See supra* section I.B.2.

48. Barry C. Feld, *Justice By Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J. CRIM. L. & CRIMINOLOGY 156, 174 (1991).

49. ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 49 (2000), available at <http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/>.

50. 20 U.S.C. § 7151 (2006).

51. One vice principal at a New York high school summarized school approaches to discipline quite succinctly: "You fight, you get arrested. You misbehave, you get suspended. Everything else, you get expelled." Casella, *supra* note 1, at 60.



Connecticut high school described incidents he handled during a typical week:

We had two girls go at it in a classroom, caused a huge scene, and have breach of peace charges and a possible assault and there is suspicion that one young lady may need a more secure facility. We had a girl and boy go at it over a CD player, which shouldn't even be on school grounds. Breach of peace there. Another boy/girl fight, we had threatening remarks. These were suspensions with pending disciplinary action. We had two students who were about to fight in the cafeteria. A teacher got in between that one, which we don't support. We have, looks like, 10–15 cases for the week. Suspensions, mostly, but expulsions and arrest too.<sup>52</sup>

Based on these cases, it seems that schools often respond to disruptive behavior by referring students to law enforcement. Such referrals may result in juvenile or criminal charges and out-of-home placements in secure detention facilities.

Anecdotal stories also indicate that schools sometimes refer cases to police when crimes have not even been committed.<sup>53</sup> For example, in 2008, several news sources reported that a thirteen-year-old boy was arrested in school for passing gas and turning off his fellow students' computers—he was charged with disruption of school function.<sup>54</sup> In 2010, a twelve-year-old student was arrested in her school for writing on her desk with a marker.<sup>55</sup> In February 2013, a ten-year-old student was arrested for bringing a toy gun to school.<sup>56</sup> Although a law enforcement spokesperson confirmed that the “gun did not actually shoot or propel anything,” the boy was charged with brandishing a weapon.<sup>57</sup> And in April 2013, a fourteen-year-old student was arrested for wearing an NRA T-shirt to school and refusing to take it off—he was charged with disrupting an educational process and obstructing an officer.<sup>58</sup>

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52. Casella, *supra* note 1, at 61–62.

53. ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT, *supra* note 49, at 49.

54. *Student Arrested for “Passing Gas” at Fla. School*, NBCNEWS.COM (Nov. 24, 2008, 9:47 PM), <http://www.nbcnews.com/id/27898395.Ux0qeV5FrC5>.

55. *12-Year-Old Arrested for Doodling at Desk*, CBSNEWS.COM (Feb. 5, 2010, 9:24 AM), [http://www.cbsnews.com/2100-201\\_162-6177041.html](http://www.cbsnews.com/2100-201_162-6177041.html); *NYC Student, 12, Arrested for Doodling on Desk*, FOXNEWS.COM (Feb. 8, 2010), <http://www.foxnews.com/story/2010/02/08/nyc-student-12-arrested-for-doodling-on-desk/>; Stephanie Chen, *Girl's Arrest for Doodling Raises Concerns About Zero Tolerance*, CNN.COM (Feb. 18, 2010, 10:22 AM), <http://www.cnn.com/2010/CRIME/02/18/new.york.doodle.arrest/index.html>.

56. Allison Klein, *Va. Student Displayed Toy Gun on School Bus, Police Say*, WASH. POST (Feb. 5, 2013), [http://articles.washingtonpost.com/2013-02-05/local/36758640\\_1\\_toy-gun-orange-tip-school-bus](http://articles.washingtonpost.com/2013-02-05/local/36758640_1_toy-gun-orange-tip-school-bus); Derrick Perkins, *10-Year-Old Student Arrested for Possession of a Toy Gun*, ALEXANDRIA TIMES (Feb. 5, 2013, 10:58 AM), <http://alextimes.com/2013/02/10-year-old-student-arrested-for-possession-of-a-toy-gun>.

57. Perkins, *supra* note 56 (internal quotation marks omitted).

58. Kevin Dolak, *W.Va. Teen Arrested After “Almost Inciting Riot” Wearing NRA Shirt to School*, ABCNEWS.COM (Apr. 22, 2013), <http://abcnews.go.com/US/west-virginia-teen-arrested-wearing-nra-shirt-school/story?id=19017896> (“Logan county schools’ dress code, which is posted online, prohibits

Many students also enter the juvenile justice system through school referrals for status offenses—noncriminal misbehaviors such as truancy and alcohol use that are only illegal for young people.<sup>59</sup> In 2004, truancy accounted for 35% of all formally petitioned status-offense cases,<sup>60</sup> and schools referred 72% of the truancy cases that were formally petitioned.<sup>61</sup> Zero-tolerance policies likely played a role in these referrals. Thus, status offenses, and truancy in particular, are increasingly leading students from the supervision of schools into the juvenile justice system.

#### B. SCHOOL RESOURCE OFFICERS

In recent years, the prevalence of police officers (called school resource officers or SROs) in schools has increased in conjunction with the adoption of zero-tolerance policies, allowing law enforcement to more easily intervene in school disciplinary matters.<sup>62</sup> During the early 1990s, SROs were uncommon in many parts of the country.<sup>63</sup> However, in 1999, the U.S. Department of Justice established the COPS in Schools program “to help law enforcement agencies hire new, additional school resource officers . . . to engage in community policing in and around primary and secondary schools.”<sup>64</sup> The program has provided in excess of \$753 million to local law enforcement agencies, allowing those agencies to hire more than 6,500 SROs.<sup>65</sup>

These officers serve as direct conduits between schools and juvenile justice systems, allowing police officers to handle behavioral problems from the start. For example, in Clayton County, Georgia, police were placed on school campuses in 1994.<sup>66</sup> That year, the number of referrals from the school system to law enforcement increased by 1,248%.<sup>67</sup> Approximately 90% of the referrals were based on infractions that were previously addressed by

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clothing and accessories that display profanity, violence, discriminatory messages or sexual language, along with ads for alcohol, tobacco or drugs. There is no mention of the NRA or guns.”); see Pam Ramsey, *Student Charged After Refusing to Remove NRA Shirt*, HUFFINGTON POST (Apr. 21, 2013, 6:19 PM), [http://www.huffingtonpost.com/2013/04/21/student-nra-shirt\\_n\\_3128715.html](http://www.huffingtonpost.com/2013/04/21/student-nra-shirt_n_3128715.html); *Charge Dismissed Against Student Who Refused to Remove NRA Shirt*, FOXNEWS.COM (June 28, 2013), <http://www.foxnews.com/us/2013/06/28/charge-dropped-against-student-who-refused-to-remove-nra-shirt>.

59. Richard E. Behrman et al., *The Juvenile Court: Analysis and Recommendations*, FUTURE CHILD., Winter 1996, at 4, 6.

60. ANNE L. STAHL, U.S. DEP'T OF JUSTICE, PETITIONED STATUS OFFENSE CASES IN JUVENILE COURTS, 2004 (2008), available at <https://www.ncjrs.gov/pdffiles1/ojdp/fs200802.pdf>. This percentage was an increase from 29% of formally petitioned status-offense cases in 1995. *Id.*

61. *Id.*

62. See AM. CIVIL LIBERTIES UNION, *supra* note 31, at 14, 16.

63. See, e.g., *id.*

64. U.S. Dep't of Justice, *COPS in Schools (CIS)*, COMMUNITY ORIENTED POLICING SERVICES, <http://www.cops.usdoj.gov/default.asp?Item=54> (last visited Oct. 5, 2013).

65. *Id.*

66. Steven C. Teske & J. Brian Huff, *When Did Making Adults Mad Become a Crime? The Court's Role in Dismantling the School-to-Prison Pipeline*, JUV. & FAM. JUST. TODAY, Winter 2011, at 14, 16.

67. *Id.*

school administrators.<sup>68</sup> Similar trends have occurred in other parts of the country,<sup>69</sup> suggesting that the presence of SROs in schools “may increase the likelihood that students will be arrested for misconduct that otherwise would be addressed as a discipline issue.”<sup>70</sup>

### C. JUVENILE-COURT PROCESSING

Even if students are referred to the juvenile justice system, their cases may not be formally processed. In most states, processing decisions in juvenile cases are generally made either by intake staff at youth-services agencies or attorneys in juvenile justice systems.<sup>71</sup> “Many referrals are dismissed or disposed of informally by counseling, warning, referral to another agency, or informal probation.”<sup>72</sup> One study of juvenile-court processing in Missouri found that 20.6% of cases were rejected and another 46.8% were processed informally.<sup>73</sup> Predictably, juveniles accused of more serious offenses were more likely to have their cases formally processed.<sup>74</sup> The processing decision is widely seen as the most critical determinant of a case’s final disposition.<sup>75</sup> By deciding whether the case will go to juvenile court, the intake worker has a powerful effect on the sanctions a young person will eventually receive.<sup>76</sup>

Research suggests that race plays a role in the way juvenile-court cases are processed. In the Missouri study discussed above, researchers found that even after controlling for the type of offense, nonwhite juveniles were more likely to have their cases formally processed than white juveniles.<sup>77</sup> Somewhat surprisingly, the researchers also found that nonwhite youths were more likely to have their cases rejected by intake officers.<sup>78</sup> However, based on research showing that people of color are more likely to be arrested on weaker evidence, the study’s authors suggested that the seemingly lenient treatment might actually be a result of intake personnel correcting biases that occurred at the arrest stage.<sup>79</sup>

Another study of juvenile-court processing in Florida showed that “53% of nonwhite youths . . . [were] recommended for referral to court, compared to 42% of white youths.”<sup>80</sup> This study looked more closely at the reasons behind

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68. *Id.*

69. *Id.* (“Jefferson County, Ala., experienced a similar increase. During this time, school suspensions increased while graduation rates decreased . . .”).

70. AM. CIVIL LIBERTIES UNION, *supra* note 31, at 16.

71. *See, e.g.*, Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 396 (1996); Michael O. Maume, Reid C. Toth & Jeffrey W. Spears, *Race in Context: The Impact of Structural Factors on Racial Differences in Juvenile Court Processing*, 32 INT’L REV. MOD. SOC. 53, 61–63 (2006).

72. Feld, *supra* note 48, at 174–75.

73. Maume, Toth & Spears, *supra* note 71, at 64.

74. *Id.* at 68.

75. *See id.* at 69.

76. *Id.* at 61.

77. *Id.* at 69.

78. *Id.*

79. *Id.*

80. Bishop & Frazier, *supra* note 71, at 400.

disparities by conducting qualitative interviews with juvenile justice officials.<sup>81</sup> Although some respondents attributed the racial disparities to prejudicial attitudes, others noted that well-intended policies and practices had differential impacts on whites and people of color.<sup>82</sup> For example, one agency policy rendered youth ineligible for diversion programs if their parents or guardians could not be contacted, if parents were unable to be present for an intake interview, or if parents appeared to be uncooperative with intake staff.<sup>83</sup> Policies such as these frequently singled out young people of color for formal processing, leading to a disproportionate number of minority youth in juvenile court.<sup>84</sup>

### III. THE JUVENILE JUSTICE SYSTEM

When a student ends up in juvenile court, a judge must then determine whether the youth has committed the offense and how the youth should be sanctioned. This Part focuses on the laws, guidelines, and other factors that affect judges' dispositional decisions. It first describes the evolution of juvenile-court dispositions over the past century and then discusses ways in which these policies contribute to the school-to-prison pipeline.

#### A. DISPOSITIONS IN THE JUVENILE JUSTICE SYSTEM

##### 1. Early Juvenile Justice Systems and the *Parens Patriae* Doctrine

Juvenile courts originated in the late nineteenth century when reformers began pushing for separate systems focused on the unique needs of youth.<sup>85</sup> The first juvenile court in the United States was founded in Cook County, Illinois, in 1899, and by 1925, all but two states had established separate juvenile justice systems.<sup>86</sup> These courts were created based on the concept of *parens patriae*, which suggests that states have an obligation to intervene in the lives of children who have not received adequate care or supervision.<sup>87</sup>

Under the *parens patriae* approach, the offenses that young people committed were viewed as symptoms of juveniles' real needs, rather than criminal actions for which they were directly blameworthy.<sup>88</sup> Proponents noted that children are dependent on adults in many facets of their lives: they are developing emotionally and cognitively, they are highly impressionable, and they have different understandings of the consequences of their actions.<sup>89</sup> These attributes all contributed to a sense that children were less culpable for their offenses than

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81. *Id.* at 406–07.

82. *Id.*

83. *Id.*

84. *Id.*

85. Daniel P. Mears, *Sentencing Guidelines and the Transformation of Juvenile Justice in the 21st Century*, 18 J. CONTEMP. CRIM. JUST. 6, 8 (2002).

86. *Id.*

87. *Id.*

88. Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 71–72 (1997).

89. Behrman et al., *supra* note 59, at 5–6.

adults. Instead of focusing on punishment, juvenile courts were intended to promote the best interests of court-involved children by providing a rehabilitative alternative to the criminal justice system.<sup>90</sup>

Judges in juvenile justice systems had broad discretion in determining what dispositions to impose.<sup>91</sup> This was based on the idea that the judge needed to craft a disposition that would serve the interests of the “whole child,” not simply incapacitate the offender or punish the symptom of criminal activity.<sup>92</sup> Under this discretionary system, the juvenile-court judge was expected to evaluate a juvenile offender’s resources and needs. The judge could then impose treatments intended to remedy the underlying causes of the juvenile’s delinquency and address various aspects of the young person’s well-being.<sup>93</sup>

Traditional juvenile courts also rejected many of the criminal justice system’s procedural safeguards. “Judges conducted confidential and private hearings, limited public access to court proceedings and court records, employed a euphemistic vocabulary to minimize stigma, and adjudicated youths to be delinquent rather than convicted them of crimes.”<sup>94</sup> Juvenile-court judges often imposed indeterminate and nonproportional dispositions to allow flexibility in juveniles’ treatment and supervision.<sup>95</sup>

## 2. Due Process Under *In re Gault* and *In re Winship*

Beginning in the 1960s and 1970s, however, juvenile courts became increasingly formal in response to two important decisions by the U.S. Supreme Court, *In re Gault*<sup>96</sup> and *In re Winship*.<sup>97</sup> In *Gault*, the Court held that juveniles accused of delinquency must be afforded the same due process rights as adults.<sup>98</sup> A fifteen-year-old boy who made lewd remarks to a neighbor was “taken from the custody of his parents and committed to a state institution pursuant to proceedings in which the Juvenile Court ha[d] virtually unlimited discretion.”<sup>99</sup> Although the statutory penalty for adults was a \$5 to \$50 fine or two months imprisonment, the young man was sentenced to six years in a

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90. Feld, *supra* note 88, at 71–72; Mears, *supra* note 85, at 8.

91. Feld, *supra* note 48, at 160 (“The traditional juvenile court’s emphasis on rehabilitating offenders fostered judicial discretion, procedural informality, and organizational diversity.”); Sandra B. Simkins et al., *The School to Prison Pipeline for Girls: The Role of Physical and Sexual Abuse*, 24 CHILD. LEGAL RTS. J. 56, 57 (2004); see also Roxanne Lieb & Megan E. Brown, *Washington State’s Solo Path: Juvenile Sentencing Guidelines*, 11 FED. SENT’G REP. 273, 273–74 (1999) (“The picture emerged of a juvenile court currently operating with extensive discretion and few checks and balances, where decision-making occurred behind closed doors.”).

92. Feld, *supra* note 88, at 71–72.

93. *Id.*

94. *Id.* at 71; see also Feld, *supra* note 48, at 160.

95. Feld, *supra* note 88, at 71–72.

96. 387 U.S. 1 (1967).

97. 397 U.S. 358 (1970).

98. 387 U.S. at 30–31.

99. *Id.* at 4, 10.

juvenile facility.<sup>100</sup> The Supreme Court held that the informal process that resulted in this lengthy sentence violated the Fourteenth Amendment. Writing for the majority, Justice Fortas explained, “The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. . . . Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.”<sup>101</sup> Accordingly, the juvenile was entitled to notice of the charges against him, counsel, confrontation and cross-examination of witnesses, and privilege against self-incrimination.<sup>102</sup>

A few years later, the Supreme Court applied the standard of proof used in criminal proceedings to the juvenile context.<sup>103</sup> In *Winship*, a twelve-year-old boy was charged with breaking into a locker and stealing \$112 from a woman’s pocketbook.<sup>104</sup> Despite acknowledging that “the proof might not establish guilt beyond a reasonable doubt,” the judge sentenced the boy to eighteen months in a training school.<sup>105</sup> The Supreme Court reversed, noting that “[t]he same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child.”<sup>106</sup> Accordingly, the juvenile court could only impose a sentence if it concluded “beyond a reasonable doubt” that the boy had committed the offenses.<sup>107</sup>

In addition, the *Winship* Court explained that “the observance of the standard of proof beyond a reasonable doubt ‘will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.’”<sup>108</sup> However, despite the Court’s insistence that the decisions would not change the juvenile court’s therapeutic mission, these changes to the operation of juvenile justice procedure made juvenile courts more like adult criminal justice systems. The doctrine of *parens patriae* was no longer the overriding approach. Instead, judicial discretion was circumscribed by the requirements of due process. Professor Barry Feld has stated that *Gault* and *Winship* “shifted the focus of juvenile courts from paternalistic assessments of a youth’s ‘real needs’ to proof of commission of a crime.”<sup>109</sup> He argues that this transition to a more formal approach has caused juvenile courts to increase their focus on punitive justice at the expense of the rehabilitative norm.<sup>110</sup>

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100. *Id.* at 29.

101. *Id.* at 18–19.

102. *Id.* at 31–57.

103. *In re Winship*, 397 U.S. 358, 365 (1970).

104. *Id.* at 360.

105. *Id.*

106. *Id.* at 365.

107. *Id.* at 368.

108. *Id.* at 367 (quoting *In re Gault*, 387 U.S. 1, 21 (1967)).

109. Feld, *supra* note 88, at 73.

110. *Id.* at 73–75.

### 3. Increased Statutory Focus on Punishment

In response to incidents of violence in schools in the 1980s and 1990s, state lawmakers also began to move toward policies for juvenile justice that focused more on punishment, deterrence, and incapacitation.<sup>111</sup> At the same time, many juvenile justice laws maintained elements of earlier approaches based on the best interests of the child.<sup>112</sup> For example, the purposes of Texas's Juvenile Justice Code include "balanc[ing] public protection and rehabilitation while holding juvenile offenders accountable," "permit[ting] flexibility in the decisions," and "consider[ing] the juvenile offender's circumstances."<sup>113</sup> The statute incorporates both the traditional goal of rehabilitation and the more recent goals of protecting the public and holding juveniles accountable.

### 4. The Creation of Juvenile Disposition Guidelines

Responding to continuing concerns about undue judicial discretion, many states also began enacting guideline systems for juvenile delinquency dispositions.<sup>114</sup> These guidelines were intended to make juvenile dispositions more consistent and uniform across cases and among different judges.<sup>115</sup> In some states, the guidelines are voluntary, other states provide incentives for using the guidelines, and still others require judges to adhere to the guidelines.<sup>116</sup> Guideline systems are primarily based on the type of offense committed, thus injecting elements of proportionality and punitive justice into juvenile systems.<sup>117</sup>

For example, Texas's Juvenile Justice Code contains seven tiers of sanctioning.<sup>118</sup> For committing "an act that violates a school district's previously communicated written standards of student conduct,"<sup>119</sup> a student will be assigned to sanction level two, which permits a judge to require the student to participate in a community-based intervention program or other social services.<sup>120</sup> However, based on prior delinquent conduct and other factors, a judge may assign the student to a higher level with sanctions that are more severe.<sup>121</sup> Similarly, guidelines in the state of Washington direct judges to first calculate an initial number of points based on the seriousness of the offense (and according to a ten-level grid).<sup>122</sup> The judge then modifies the point total based on the

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111. Behrman et al., *supra* note 59, at 7; Linda F. Giardino, Note, *Statutory Rhetoric: The Reality Behind Juvenile Justice Policies in America*, 5 J.L. & POL'Y 223, 275 (1996).

112. Giardino, *supra* note 111, at 275.

113. TEX. FAM. CODE ANN. § 59.001 (West 2008).

114. Lieb & Brown, *supra* note 91, at 273; Mears, *supra* note 85, at 9.

115. Mears, *supra* note 85, at 10.

116. Feld, *supra* note 48, at 190; Mears, *supra* note 85, at 9, 12.

117. Mears, *supra* note 85, at 12.

118. FAM. § 59.003.

119. *Id.* § 51.03(b)(5).

120. *Id.* §§ 59.003, .005.

121. *Id.* § 59.003(c).

122. STATE OF WASH., CASELOAD FORECAST COUNCIL, 2012 WASHINGTON STATE JUVENILE DISPOSITION GUIDELINES MANUAL 1, 33 (2013).

offender's age and criminal history.<sup>123</sup>

Despite guideline systems' attempts to make dispositions more consistent, however, the practices of individual judges remain profoundly divergent, even within states.<sup>124</sup> One study of juvenile courts in Minnesota found that urban courts generally engaged in more formal, rule-oriented decision making, whereas suburban and rural courts typically decided cases informally, giving more emphasis to the best interests of children.<sup>125</sup> As a result, urban courts tended to sentence similarly charged offenders more severely than suburban and rural courts.<sup>126</sup>

Enduring differences in disposition practices largely stem from guideline systems themselves, which continue to give substantial discretion to judges.<sup>127</sup> For each level in the Texas guidelines, for example, the statute presents a list of potential sanctions that judges "may" impose.<sup>128</sup> The permissive use of "may" gives judges discretion to determine which of the presented options to impose and whether to impose sanctions at all. Discussing the purposes of the guidelines, the Texas Code also states that "departure of a disposition from this model is not necessarily undesirable and in some cases is highly desirable."<sup>129</sup> Thus, the guideline systems maintain elements of *parens patriae* while simultaneously channeling judicial discretion toward proportionality and punitive justice.

## 5. Approaches to Status Offenses

Further adding to geographic inconsistencies, state laws are widely divergent in their treatment of status offenses.<sup>130</sup> Some states require status offenders to receive "intervention and diversion services intended to increase family functioning and avoid court involvement," whereas other states do not provide interven-

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123. *Id.*; Lieb & Brown, *supra* note 91, at 275. Under the Delaware dispositional guidelines, the presumptive level of placement is based on "the instant offense for which the juvenile is adjudicated," "aggravating factors including the juvenile's prior record of delinquency," and "mitigating factors including the juvenile's individual characteristics and needs." Dep't of Servs. for Children, Youth, & Their Families, *Dispositional Guidelines for Juveniles*, STATE DEL., [http://kids.delaware.gov/yrs/yrs\\_dispositional\\_guid.shtml](http://kids.delaware.gov/yrs/yrs_dispositional_guid.shtml) (last updated Mar. 13, 2012).

124. Daniel P. Mears, *The Sociology of Sentencing: Reconceptualizing Decisionmaking Processes and Outcomes*, 32 LAW & SOC'Y REV. 667, 668 (1998); Giardino, *supra* note 111, at 225, 275–76.

125. Feld, *supra* note 48, at 157–58.

126. *Id.*

127. *See, e.g.*, TEX. FAM. CODE ANN. §§ 59.003, .005 (West 2008); Lieb & Brown, *supra* note 91, at 275. Differences in dispositional approaches may also be caused by the availability of resources (or lack thereof) in a geographic area. For example, in the 1990s, then-Governor Christine Todd Whitman of New Jersey explained, "A judge in one county has many options to craft appropriate orders for young offenders. In the next county over, . . . a judge may have very few options between probation and incarceration." RICHARD A. MENDEL, NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 14 (2011).

128. *See, e.g.*, FAM. § 59.005.

129. *Id.* § 59.001.

130. Jessica R. Kendall, *Juvenile Status Offenses: Treatment and Early Intervention*, TECHNICAL ASSISTANCE BULL. NO. 29 (A.B.A. Div. for Pub. Educ., Chicago, Ill.), 2007, at 2, available at <http://www.americanbar.org/content/dam/aba/migrated/publiced/tab29.authcheckdam.pdf>.



tions at all prior to formal adjudication.<sup>131</sup> Some states treat status-offense cases as dependency cases, and others classify them as delinquency cases.<sup>132</sup> Because of differing state approaches to status offenses, dispositional outcomes vary among states and juvenile courts.<sup>133</sup> In addition, remnants of *parens patriae* approaches to juvenile justice allow judges to exercise considerable discretion in disposing of these cases, resulting in widely variable outcomes for juvenile offenders.<sup>134</sup>

In spite of these differences, many juvenile justice systems appear to be approaching status offenses with increasing formality. Between 1985 and 2004, the number of formally petitioned status-offense cases more than doubled, with the largest increases occurring in truancy and curfew cases.<sup>135</sup> The likelihood that a petitioned status-offense case would be adjudicated rose from 50% in 1995 to 63% in 2004.<sup>136</sup> Accordingly, it is becoming increasingly likely that a student who is referred to court for truancy or another status offense in school will have her case formally prosecuted.

Federal law has also played a role in the disposition of status offenses. In 1974, Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDP), which provides financial incentives for states to prohibit juvenile courts from placing status offenders in secure facilities.<sup>137</sup> This prevented many status offenders from being sent to out-of-home placements for truancy and other misbehavior. However, the JJDP was amended in 1980 to permit the detention of status offenders who violated valid court orders, including orders imposing probation.<sup>138</sup> Though many states continue to “restrict the use of harsher penalties if a status offender violates probation,”<sup>139</sup> others “have exercised this detention authority more aggressively.”<sup>140</sup> Moreover, some states have simply chosen to forgo portions of the JJDP funding in order to place status offenders in secure institutions.<sup>141</sup> As a result, “juveniles were securely detained in 7% of petitioned status offense cases” in 2004, with truancy cases making up the largest share of adjudicated status offenses that resulted in out-of-home placement.<sup>142</sup>

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131. *Id.*

132. *Id.*

133. *Id.*

134. Simkins et al., *supra* note 91, at 57.

135. CHARLES PUZZANCHERA, NAT'L CTR. FOR JUVENILE JUSTICE, TRENDS IN THE JUSTICE SYSTEM'S RESPONSE TO STATUS OFFENDING: OJJDP BRIEFING PAPER (2007), available at [http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/adolescent\\_15.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/adolescent_15.authcheckdam.pdf).

136. STAHL, *supra* note 60.

137. Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415, 88 Stat. 1109 (1974) (current version at 42 U.S.C. §§ 5601–5792a (2006)).

138. Juvenile Justice Amendments of 1980, Pub. L. No. 96-509, § 11(a), 94 Stat. 2750 (1980).

139. Kendall, *supra* note 130, at 7.

140. Behrman et al., *supra* note 59, at 14.

141. Kendall, *supra* note 130, at 2.

142. STAHL, *supra* note 60.

## B. JUVENILE DISPOSITIONS AND THE SCHOOL-TO-PRISON PIPELINE

## 1. Judicial Discretion Allows for Punitive Dispositions

The expansive reach of judicial discretion in the juvenile justice system likely contributes to the school-to-prison pipeline. Entrenched principles of *parens patriae* allow juvenile-court judges to address all of a delinquent student's needs, creating real possibilities that students will be sent to out-of-home placements for disciplinary infractions in schools. For example, a student arrested in school on a minor charge may be dealing with complex mental-health issues. In a case like this, a judge will often order mental-health evaluations that can lead the student to be placed in a treatment facility.<sup>143</sup> The student may also have a judge “who wishes to address many problems through various types of services, thereby causing her to remain in a placement for months or even years.”<sup>144</sup>

In one such case, a twelve-year-old boy with emotional problems was arrested and routed into the juvenile justice system in Pennsylvania after he brought a toy pistol to school.<sup>145</sup> The student was then held in a secure detention facility for over two months so that he could be “assessed.”<sup>146</sup> Although the boy's psychiatrist thought it was appropriate for him to be disciplined, she did not agree with the judge's decision to detain him because placement in the secure facility had interfered with the boy's mental-health treatment.<sup>147</sup> This story is just one example of how broad uses of judicial discretion can contribute to the school-to-prison pipeline. The student was pushed out of his school for a relatively minor offense and held in a detention facility, supposedly in service of his best interests. Yet the out-of-home placement was not beneficial to the student—it was actually detrimental to his mental well-being.

There are certainly cases in which judicial discretion is used to combat the school-to-prison pipeline. For example, some judges reject referrals of emotionally disturbed children “who behave precisely as they are expected to behave.”<sup>148</sup> In one case, a Pennsylvania judge reprimanded a school district “for referring a fourteen-year-old girl with serious emotional problems to juvenile court for making threats to a teacher.”<sup>149</sup> The case was dismissed, and the judge noted that the disciplinary problem could have been handled more effectively through the student's Individualized Education Program.<sup>150</sup> In this way, the

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143. Simkins et al., *supra* note 91, at 57.

144. *Id.*

145. Robert Schwartz & Len Rieser, *Zero Tolerance as Mandatory Sentencing*, in *ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS* 126, 133 (William Ayers, Bernardine Dohrn & Rick Ayers eds., 2001).

146. *Id.*

147. *Id.*

148. *Id.* at 132.

149. *Id.*

150. *Id.*

judge used discretionary power to prevent the young woman from being placed in a facility that might interfere with her mental health. Still, judicial discretion remains dangerous because it allows for the opposite result.<sup>151</sup> The judge easily could have taken a punitive approach and placed this student in a treatment facility.

Moreover, it seems that judges often feel pressure to detain students who are referred to the juvenile justice system for disciplinary infractions. In an online survey of juvenile-court judges, 40% of respondents felt that school officials encouraged the use of detention in status-offense cases, and 51% of respondents stated that law enforcement encouraged them to use detention.<sup>152</sup> Furthermore, most states fully cover the costs of incarcerating juveniles in state facilities, but probation systems commonly operate at the local level and receive little if any state funding.<sup>153</sup> This gives juvenile justice systems strong financial incentives to send students to out-of-home placements instead of providing community-based programs.<sup>154</sup> Judges may also believe that school administrators are likely to deal with minor infractions internally and that they only refer cases to juvenile courts when a serious infraction has occurred. As a result, judges may view the disciplinary cases that come before them as serious and impose penalties accordingly. Though it is difficult to generalize about judges' thought processes as they approach these cases, judges have the discretionary power to make these types of decisions.

## 2. Prior Records and Probation Violations Result in Tougher Sanctions

When students are first arrested for violating zero-tolerance policies, they frequently receive fairly minor punishments from juvenile courts, but they also begin to develop criminal records.<sup>155</sup> If a student later returns to juvenile court on another charge, the prior offense will typically increase the sanction the student receives in the second instance.<sup>156</sup> This pattern largely results from the design of juvenile sentencing guidelines, which typically place significant emphasis on prior offenses.<sup>157</sup> For example, in Texas, a "child's subsequent commis-

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151. As the Supreme Court noted in *In re Gault*, "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." 387 U.S. 1, 18 (1967).

152. NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, JUDICIAL PERSPECTIVES ON THE DEINSTITUTIONALIZATION OF STATUS OFFENDERS IN THE UNITED STATES WITH RECOMMENDATIONS FOR POLICY AND PRACTICE 2 (2012), available at [http://www.ncjfcj.org/sites/default/files/DSO\\_Issues\\_Bulletin\\_2012\\_FINAL\\_CORRECTED.pdf](http://www.ncjfcj.org/sites/default/files/DSO_Issues_Bulletin_2012_FINAL_CORRECTED.pdf).

153. MENDEL, *supra* note 127, at 14.

154. *Id.*

155. CHILDREN'S DEF. FUND, AMERICA'S CRADLE TO PRISON PIPELINE 127 (2007), available at <http://www.childrensdefense.org/child-research-data-publications/data/cradle-prison-pipeline-report-2007-full-highres.html>.

156. *Id.*

157. See, e.g., STATE OF WASH., CASELOAD FORECAST COUNCIL, *supra* note 122, at 1, 33; UTAH SENTENCING COMM'N, JUVENILE SENTENCING GUIDELINES 1 (2004), available at <http://www.sentencing.state.ut.us/Guidelines/Juvenile/JuvenileManual2004.pdf>; Dep't of Servs. for Children, Youth, & Their Families, *supra* note 123.

sion of delinquent conduct or conduct indicating a need for supervision” makes it permissible for a judge to assign a student to one sanction level higher than the level the student would originally be assigned.<sup>158</sup> Over time, this can lead to sanctions that are significantly more severe, even for offenses that are relatively minor on their own.

Empirical evidence confirms this trend toward increasingly punitive dispositions. A study of Minnesota juvenile courts found that after controlling for the type of offense, juveniles with longer prior records tended to receive more severe dispositions.<sup>159</sup> The largest increase in the severity of disposition occurred “between those juveniles with one or two prior referrals and those with three or four.”<sup>160</sup> Moreover, among juveniles appearing in court for the third or fourth time, 52.9% were removed from home, and 39.9% were confined.<sup>161</sup> Thus, initial school referrals to the juvenile justice system can have detrimental effects for students because judges are likely to impose harsher penalties if students are arrested again for committing additional offenses.

Furthermore, even when judges do not initially send students to out-of-home placements, dispositions that impose probation often lead students to juvenile detention. Many courts give students probation for school disciplinary infractions such as truancy or fighting.<sup>162</sup> If a student then violates any probationary terms, the judge may use her discretionary power to put the student in an out-of-home placement.<sup>163</sup>

A significant number of young people end up in detention for violating probationary terms. In 2010, for example, 22% of detained juveniles were held for violating probation or parole, and 14% of committed juvenile offenders were incarcerated for probation or parole violations.<sup>164</sup> It seems probable that at least some of those young people (if not a substantial number of them) were detained for violating probationary terms imposed for zero-tolerance infractions in schools.

In cases where probationary terms have been violated, judicial discretion has the potential to produce positive outcomes for court-involved youth and obstruct the school-to-prison pipeline. A technical violation of probationary terms should signal to the judge that sanctions previously imposed were not adequately serving the needs of the individual youth. Instead of focusing on retributive justice and imposing an out-of-home placement, the judge should use

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158. TEX. FAM. CODE ANN. § 59.003(c) (West 2008).

159. Feld, *supra* note 48, at 193.

160. *Id.*

161. *Id.*

162. STAHL, *supra* note 60 (noting that courts ordered probation in 61% of adjudicated truancy cases in 2004); see SARAH LIVSEY, U.S. DEP’T OF JUSTICE, JUVENILE DELINQUENCY PROBATION CASELOAD, 2009 (2012), available at [http://www.ncjj.org/pdf/Livsey\\_JuvDelinquencyProbation09.pdf](http://www.ncjj.org/pdf/Livsey_JuvDelinquencyProbation09.pdf) (noting that courts ordered probation for 61% of adjudicated person offenses and 53% of public order offenses).

163. Simkins et al., *supra* note 91, at 57; *Locating the School-to-Prison Pipeline*, *supra* note 30.

164. SARAH HOCKENBERRY, U.S. DEP’T OF JUSTICE, JUVENILES IN RESIDENTIAL PLACEMENT, 2010, at 9–10 (2013), available at <http://www.ojjdp.gov/pubs/241060.pdf>.

her discretion to craft new remedies that will better serve the young person's needs. This is the rehabilitative model that lies at the core of *parens patriae*.<sup>165</sup>

Moreover, the benefits of the rehabilitative approach are clear. Research shows that out-of-home placements are generally ineffective in rehabilitating youth and often lead to high rates of recidivism.<sup>166</sup> Imposing detention may lead students to become involved in continued patterns of misbehavior, engage in increasingly serious offenses, and even end up in prison. In most cases, a student would be better served by a community-based intervention program that focuses on reducing recidivism and rehabilitating the offender.<sup>167</sup> Yet judges often send youth to out-of-home placements for violating probation, rather than attempting to remedy the real problems that the young people face. The advantages of the rehabilitative model have been obfuscated in recent years by statutory changes and guideline systems that emphasize formality, incapacitation, and punishment.<sup>168</sup>

### 3. Youth of Color Are Disproportionately Detained

Evidence also suggests that racial disparities persist at the disposition phases of juvenile delinquency cases, making students of color even more prone to the negative effects of zero-tolerance policies and the school-to-prison pipeline. In the Florida study discussed above,<sup>169</sup> 31% of nonwhite youths were incarcerated or transferred at judicial disposition, compared to only 18% of white youths.<sup>170</sup> Because of the cumulative effects of higher rates of formal processing, young people of color comprised 44% of those who were incarcerated or transferred, despite making up only 21% of the population initially processed.<sup>171</sup> If this trend is combined with the disproportionate rates at which students of color are referred to juvenile justice systems through zero-tolerance policies, it seems that the proportions are likely even more stark. Moreover, it appears that the disproportionate incarceration of young people of color has increased in recent years. In 2001, youth of color made up 60.3% of youth in confinement nationwide, but they made up 67.6% of youth in confinement in 2010.<sup>172</sup>

These patterns likely stem from juvenile justice systems embracing stereotypes about the capabilities of minority families and communities. Qualitative interviews have demonstrated that “black family systems generally tend to be

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165. See *supra* section III.A.1.

166. Kendall, *supra* note 130, at 7–8.

167. Behrman et al., *supra* note 59, at 11.

168. See *supra* sections III.A.3–4.

169. See *supra* notes 80–84 and accompanying text.

170. Bishop & Frazier, *supra* note 71, at 400.

171. *Id.*

172. JUSTICE POLICY INST., COMMON GROUND: LESSONS LEARNED FROM FIVE STATES THAT REDUCED JUVENILE CONFINEMENT BY MORE THAN HALF 10 (2013), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/commonground\\_online.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/commonground_online.pdf).

*perceived* in a more negative light, that pre-disposition reports give disproportionate attention to assessments of family situations, and that judges rely heavily on pre-disposition reports in reaching dispositional decisions.”<sup>173</sup> Accordingly, if a black student is referred to the juvenile justice system for violating a zero-tolerance policy, there is a good chance that the intake officer will view the student’s family as unable to help the student rehabilitate. The intake officer is then likely to recommend harsher sanctions for that student in the pre-disposition report, and the judge is likely to give significant weight to that recommendation. In these ways, it seems that negative (and potentially inaccurate) perceptions of black families play an active role in moving students of color toward juvenile detention and long-term involvement with the juvenile and criminal justice systems.

#### IV. ALTERNATIVES TO PUNITIVE SANCTIONS

Despite the troubling patterns of the school-to-prison pipeline, programs throughout the nation are seeking to make juvenile courts a last resort for young people.<sup>174</sup> This Part explores some of those alternatives to harsh disciplinary policies and punitive dispositions. It examines positive approaches to behavior within schools, programs for diverting students away from the juvenile justice system, community-based alternatives to detention, and ways of focusing judicial discretion on rehabilitation. Schools and juvenile justice systems should use a combination of these approaches and others like them to keep students in their communities and out of detention.

##### A. CHANGING SCHOOLS’ RESPONSES TO BEHAVIOR

In recent years, new behavioral approaches have sought to change the cultures of schools, shifting away from zero-tolerance policies and focusing instead on establishing positive and supportive climates. One such methodology is called Positive Behavioral Interventions and Supports (PBIS). Under this approach, teachers and administrators focus on rewarding and positively reinforcing students’ *good* behavior rather than imposing harsh and exclusionary punishments for misbehavior.<sup>175</sup> The technique also involves students, teachers, administrators, and parents in the process of establishing productive behavioral expectations.<sup>176</sup>

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173. Bishop & Frazier, *supra* note 71, at 409.

174. See generally Sara Mogulescu & Gaspar Caro, *Making Court the Last Resort: A New Focus for Supporting Families in Crisis*, 24 FED. SENT’G REP. 30 (2011).

175. NICHOLAS READ & STEPHANIE LAMPRON, SUPPORTING STUDENT ACHIEVEMENT THROUGH SOUND BEHAVIOR MANAGEMENT PRACTICES IN SCHOOLS AND JUVENILE JUSTICE FACILITIES: A SPOTLIGHT ON POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS (PBIS) 5 (2012), available at <http://www.neglected-delinquent.org/sites/default/files/docs/SupportingStudentAchievement.pdf>; *Positive Behavior Intervention and Support*, CHARLOTTE-MECKLENBURG SCHOOLS, <http://www.cms.k12.nc.us/cmsdepartments/pbis/Pages/default.aspx> (last visited Oct. 5, 2013).

176. READ & LAMPRON, *supra* note 175, at 5.

PBIS has been shown to produce positive disciplinary outcomes in schools. After a school district in South Los Angeles instituted PBIS, the district experienced “a 13.3% decrease in suspensions, a 55.6% decrease in expulsions, and a 31.7% decrease in opportunity transfers.”<sup>177</sup> Likewise, a study of an urban high school found that the average number of daily referrals to the office decreased by 20% over the course of a year in which PBIS was implemented.<sup>178</sup> These findings suggest that PBIS may reduce student misbehavior and resolve conflicts within schools without relying on harsh disciplinary practices such as zero tolerance.<sup>179</sup> Moreover, these methodologies can create nurturing learning environments where students feel valued, thereby resulting in improved educational outcomes and higher graduation rates.<sup>180</sup> Local school boards and school administrators should work to replace punitive disciplinary policies with PBIS and other similar approaches.

#### B. DIVERTING STUDENTS FROM THE JUVENILE JUSTICE SYSTEM

Governments are also developing programs that divert students away from juvenile justice systems for disciplinary infractions. For example, in Orange County, New York, a young person who engages in a status offense such as truancy is no longer routed into the juvenile justice system.<sup>181</sup> Instead, a case manager works with the student and her family to develop a service plan that will connect them to useful social services. If the initial plan does not resolve the behavioral problems, the family “may be referred to longer-term therapeutic programs in the community.”<sup>182</sup> This program has been incredibly successful in improving outcomes for young people. From March 2003 to March 2008, 98% of the children served by the program avoided out-of-home placements.<sup>183</sup> Other local governments should look for similar solutions that will keep students in school and out of the juvenile justice system.

In addition, many communities have developed youth courts (or peer courts) to handle delinquent behavior in schools and divert students away from juvenile justice systems.<sup>184</sup> In these programs, youth volunteers (under adult super-

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177. CMTY. ASSET DEV. RE-DEFINING EDUC. ET AL., REDEFINING DIGNITY IN OUR SCHOOLS: A SHADOW REPORT ON SCHOOL-WIDE POSITIVE BEHAVIOR SUPPORT IMPLEMENTATION IN SOUTH LOS ANGELES, 2007–2010, at 8 (2010), available at [http://www.cadre-la.org/core/wp-content/uploads/2011/03/4488\\_RedefDignityFullLengthReport\\_FINAL.pdf](http://www.cadre-la.org/core/wp-content/uploads/2011/03/4488_RedefDignityFullLengthReport_FINAL.pdf).

178. Hank Bohanon et al., *Schoolwide Application of Positive Behavior Support in an Urban High School: A Case Study*, 8 J. POSITIVE BEHAV. INTERVENTIONS 131, 140 (2006).

179. Other positive approaches to student behavior in schools have yielded similar outcomes. SHARON MIHALIC ET AL., U.S. DEP’T OF JUSTICE, BLUEPRINTS FOR VIOLENCE PREVENTION 29–40 (2004), available at <http://www.ncjrs.gov/pdffiles1/ojdp/204274.pdf>. (discussing various programs that focus on reinforcing positive behaviors and that have been shown to reduce delinquency in schools).

180. See *supra* section I.B.3.

181. Mogulescu & Caro, *supra* note 174, at 31.

182. *Id.*

183. *Id.*

184. Thomas Poch, *What’s New in Alternative Sentencing Programs for Teenagers*, 74 CLEARING HOUSE 60, 61 (2000).

vision) serve as prosecutors, defenders, clerks, juries, and sometimes judges.<sup>185</sup> The courts generally give sentences that focus on rehabilitation, including “essays, apologies to victims, workshops, or community service.”<sup>186</sup> Youth courts also allow students to collaborate with one another to solve behavioral problems in their schools instead of meting out punitive and counterproductive sanctions.<sup>187</sup> These programs have become fairly widespread in recent years—over 116,000 cases were referred to youth courts in 2007.<sup>188</sup>

Empirical studies suggest that youth courts can be effective in changing student behavior. One study of youth in Missouri found that only 9% percent of young people who participated in the youth court reoffended within six months, compared to 28% of similar youth handled by the local family court.<sup>189</sup> Likewise, a study of youth courts in Lane County, Oregon, showed that 19.3% of young people who participated in youth courts reoffended within two years, whereas 29.3% of young people who received only a warning letter from Youth Services reoffended during that period.<sup>190</sup> These studies suggest that youth courts may be effective in reducing recidivism among youth who engage in disciplinary infractions and other delinquency.

Despite these promising statistics, however, one shortcoming of youth courts is that they are often reserved for first-time offenders. In a 1998 national study of youth courts, 39% of the surveyed programs accepted only first-time offenders, and another 48% “reported that they ‘rarely’ accepted youth with prior arrest records.”<sup>191</sup> Moreover, 91% of programs “indicated that they ‘never’ or ‘rarely’ accepted youth who previously had been referred to a juvenile court.”<sup>192</sup> These practices are troubling considering that youth with prior records tend to receive harsher sanctions in the juvenile justice system.<sup>193</sup> Youth courts that exclude students with prior court involvement fail to provide a diversion option to those students who face the greatest risk of harsh sanctions. Yet this problem can be solved by including a wider range of students among those who are eligible to participate in youth-court programs. Local governments should

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185. HAMILTON FISH INST. ON SCH. & CMTY. VIOLENCE, *YOUTH COURTS: AN EMPIRICAL UPDATE AND ANALYSIS OF FUTURE ORGANIZATIONAL AND RESEARCH NEEDS* 9 (2008), available at <http://www.youthcourt.net/wp-content/uploads/2010/05/NAYC-GWU-Evaluation-Study-2008.pdf>.

186. *Id.*

187. Poch, *supra* note 184, at 61.

188. HAMILTON FISH INST. ON SCH. & CMTY. VIOLENCE, *supra* note 185, at 29.

189. JEFFREY A. BUTTS ET AL., *THE IMPACT OF TEEN COURT ON YOUNG OFFENDERS* 27 (2002), available at <http://www.urban.org/UploadedPDF/410457.pdf>.

190. LANE CNTY. DEP’T OF YOUTH SERVS., *YOUTH COURTS PROGRAM EVALUATION* 23 (2004), available at <http://www.lanecounty.org/Departments/HHS/YS/Documents/TeenCourtEval.pdf>.

191. JEFFREY A. BUTTS & JANEEN BUCK, U.S. DEP’T OF JUSTICE, *TEEN COURTS: A FOCUS ON RESEARCH* 3 (2000), available at <http://www.youthcourt.net/wp-content/uploads/2010/05/183472.pdf>. The eligibility requirements of youth-court programs may have changed since these data were collected, but the author has been unable to find more recent statistics.

192. *Id.* at 3–4.

193. *See supra* section III.B.2.



take these steps and continue to establish effective and inclusive youth-court programs.

#### C. COMMUNITY-BASED ALTERNATIVES TO JUVENILE DETENTION

When students do end up in juvenile court for violating zero-tolerance policies, judges in many jurisdictions have the option of referring these young people to community-based programs. “The most successful programs are those that emphasize family interactions, probably because they focus on providing skills to the adults who are in the best position to supervise and train the child. More traditional interventions that punish or attempt to frighten the youths are the least successful.”<sup>194</sup>

One cost-effective approach that has proven to be particularly successful in rehabilitating court-involved youth, including students with disciplinary problems, is Functional Family Therapy (FFT).<sup>195</sup> In the first phase of FFT, a therapist helps the student and his family overcome intense negative feelings that prevent change (such as hopelessness and anger).<sup>196</sup> In the second phase, the therapist assists the student and his family members in implementing immediate and long-term behavioral changes “that are culturally appropriate, context sensitive, and tailored to the unique characteristics of each family member.”<sup>197</sup> Finally, the student and his family generalize these behaviors to other problems in order to maintain change and prevent relapse.<sup>198</sup>

Many studies over the past three decades have shown that FFT results in “significant and long-term reductions in youth re-offending.”<sup>199</sup> For example, one study found that only 8.7% of subjects who participated in FFT committed a criminal offense within five years of completing the program, whereas 40.9% of those who received only probation services committed a criminal offense during that period.<sup>200</sup> Thus, community-based programs such as FFT can be effective tools for directing students away from out-of-home placements. Juvenile courts should use these programs to keep students in their communities and slow the school-to-prison pipeline.

#### D. REFOCUSING JUDICIAL DISCRETION ON REHABILITATION

Although these types of programs are likely to be effective alternatives to zero tolerance and detention, juvenile-court personnel and judges will continue to exercise considerable discretion over the dispositions students receive. Accord-

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194. Peter Greenwood, *Prevention and Intervention Programs for Juvenile Offenders*, 18 FUTURE CHILD. 185, 198 (2008).

195. MIHALIC ET AL., *supra* note 179, at 26–27; Greenwood, *supra* note 194, at 198.

196. MIHALIC ET AL., *supra* note 179, at 26–27.

197. *Id.*

198. *Id.*

199. *Id.* at 27.

200. Donald A. Gordon, Karen Graves & Jack Arbuthnot, *The Effect of Functional Family Therapy for Delinquents on Adult Criminal Behavior*, 22 CRIM. JUST. & BEHAV. 60, 67 (1995).

ingly, judges and intake personnel should work to channel discretion toward imposing less severe sanctions that focus on rehabilitating youth. In its juvenile delinquency guidelines, the National Council of Juvenile and Family Court Judges states that “[j]uvenile delinquency court judges should ensure their systems divert cases to alternative systems whenever possible and appropriate.”<sup>201</sup> To that end, a juvenile court “must manage its intake and divert less serious cases to community resources.”<sup>202</sup> Judges and juvenile-court staff should also “visit the services and facilities they use” and review “outcome data and research that shows the services the juvenile delinquency court judge orders produce positive behavior change in delinquent youth and reduce recidivism.”<sup>203</sup> These steps will better inform court officials’ decisions and help them design informal and formal dispositions that focus on rehabilitating youth.

Legislatures can also slow the effects of zero-tolerance policies by limiting judges’ abilities to impose harsh sanctions in cases of minor disciplinary infractions. In April 2013, the Maryland legislature passed a bill prohibiting out-of-home placements for minor offenses that are likely to occur in schools, including marijuana possession, disorderly conduct, and trespass.<sup>204</sup> The law only permits out-of-home placement for a minor offense if the court “makes a written finding, including the specific facts supporting the finding, that an out-of-home placement is necessary for the welfare of the child or in the interest of public safety.”<sup>205</sup> In protecting this discretionary power of juvenile-court judges, the bill continues to allow students to be confined for minor disciplinary infractions in schools. Despite some shortcomings, however, this law seems like a promising step toward ensuring that students will not be funneled into juvenile detention for minor disciplinary infractions.<sup>206</sup>

The Maryland law provides a rough model of how states can encourage juvenile courts to find rehabilitative solutions for students who are charged with disciplinary infractions. By requiring judges to make reasoned decisions and support their decisions with written findings of fact, the law is likely to discourage judges from utilizing out-of-home placements when youth have committed only minor offenses. Hopefully, this will help juvenile courts refocus their discretionary power on rehabilitating court-involved youth rather than

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201. NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, JUVENILE JUSTICE MODEL COURTS (2010), available at [http://www.ncjfcj.org/sites/default/files/Juvenile Justice Model Courts Brochure.pdf](http://www.ncjfcj.org/sites/default/files/Juvenile%20Justice%20Model%20Courts%20Brochure.pdf).

202. NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 134 (2005), available at [http://www.ncjfcj.org/sites/default/files/juveniledelinquencyguidelinescompressed\[1\].pdf](http://www.ncjfcj.org/sites/default/files/juveniledelinquencyguidelinescompressed[1].pdf).

203. *Id.* at 136.

204. 2013 Md. Legis. Serv. 651 (West).

205. *Id.*

206. The ACLU of Maryland applauded the passage of this bill as a “step closer to ensuring we can rehabilitate all youth in our juvenile justice system and ending the harmful practice of warehousing teens in the adult criminal justice system.” Press Release, ACLU of Maryland, ACLU Hails Passage of Bill to Reduce Youth Incarceration (Apr. 9, 2013), available at [http://www.aclu-md.org/press\\_room/127](http://www.aclu-md.org/press_room/127).

incarcerating them. Other states should enact similar laws restraining judges' discretion to send students to out-of-home placements for minor offenses that are likely to occur in schools. Such action will help minimize the effects of the school-to-prison pipeline.

#### CONCLUSION

Educators, juvenile justice officials, judges, and policymakers certainly face challenging decisions in determining how to provide safe learning environments for young people. There are no easy ways to prevent students from engaging in violent and disruptive activities. But zero-tolerance policies, referrals to law enforcement, and punitive judicial dispositions do little to prevent or deter violence in schools. These practices have disproportionately adverse effects on students of color, and they contribute to high rates of recidivism and high-school dropouts. Ultimately, zero tolerance and overuse of the juvenile justice system perpetuate the school-to-prison pipeline rather than create peaceful and safe places of learning.

Instead of relying on punitive discipline, school officials, lawmakers, and judges should look for innovative approaches for rehabilitating and supporting youth who misbehave. Schools have successfully implemented programs that promote positive student behavior. Governments have worked to divert juvenile offenders away from the justice system through social services and youth courts. And judges have used their discretionary power to place youth in community-based intervention programs. Violence in schools requires innovative strategies such as these, and more importantly, it requires that adults take meaningful steps to help rehabilitate students instead of simply punishing them.