

ZERO TOLERANCE POLICIES: CRIMINALIZING CHILDHOOD AND DISENFRANCHISING THE NEXT GENERATION OF CITIZENS

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*A juvenile adjudication of guilt has far more drastic consequences than existed just ten years ago . . . Some of these consequences may not be apparent for a number of years, but their possibility should be anticipated, fully considered, and planned for, wherever possible.*¹

I. INTRODUCTION

Columbine High School, Littleton, Colorado.² Heath High School, West Paducah, Kentucky.³ Westside Middle School, Jonesboro, Arkansas.⁴ Zero tolerance policies⁵ were adopted in these schools and around the country in response to tragic school shooting events.⁶ Under zero tolerance, students are suspended, expelled, or referred to juvenile authorities or some combination thereof for specified offenses. Zero tolerance policies punish students harshly regardless of the severity of the infraction, the existence of mitigating circumstances, or the context in which the conduct occurred. School shootings have garnered an extraordinary amount of attention not only because of the violence but also because they happened in schools, places that are supposed to be safe. While tragic, school shootings are unique events considering the number of schools that operate daily without incident. Yet, the policies that have developed in the wake of these acts have been misguided, especially as applied to childhood conduct. Kiera Wilmot is a prime example of this

1. Robert E. Shepherd, Jr., *Pleading Guilty in Delinquency Cases*, CRIM. JUST., Fall 2001, at 46, 55.

2. Jennifer Rosenberg, *Columbine Massacre*, ABOUT EDUCATION (2014), archived at <http://perma.cc/4JG8-Z6EV> (discussing the events at Columbine High School).

3. David Harding et al., *No Exit: Mental Illness, Marginality, and School Violence in West Paducah, Kentucky*, in DEADLY LESSONS: UNDERSTANDING LETHAL SCHOOL VIOLENCE 132, Chapter 5, pp. 132–162 (Mark H. Moore et al., eds., 2003), available at http://www.nap.edu/catalog.php?record_id=10370&utm_expnid=4418042-5.krRTDpXJQISoXLpdo-1Ynw.0 (discussing the events in West Paducah, Kentucky).

4. Cybelle Fox et al., *A Deadly Partnership: Lethal Violence in an Arkansas Middle School*, in DEADLY LESSONS, *supra* note 3, at 101.

5. See *infra* Part II.

6. See *U.S. School Shootings*, CBS NEWS, archived at <http://perma.cc/32F4-7PWJ> (last visited June 3, 2014); *Recent Shootings at U.S. Schools*, USA TODAY (June 19, 2001, 3:41 PM), archived at <http://perma.cc/RV6F-YRCQ>.

misguided application of these policies and the potential for irrevocable harm.

Kiera, a sixteen-year-old African-American high school honor student in Florida, decided to conduct a science experiment that her teacher had not approved.⁷ Mixing household cleaner and aluminum foil in an eight-ounce water bottle, Kiera's experiment caused a popping sound no louder than a firecracker and some smoke.⁸ No one was harmed, and no property was damaged.⁹ Yet, she was expelled under the school's zero tolerance policy. She was charged with possession of or discharging of a firearm and possession of a destructive device, charges that would have required her to be tried as an adult and not a juvenile.¹⁰ This inquisitive, bright student was in jeopardy of being convicted of a felony and subsequently disenfranchised for the childhood crime of curiosity. Kiera would have been denied the right to vote before she reached the age of majority and become a fully enfranchised citizen.

Zero tolerance policies construe all conduct the same regardless of the context. The inquisitive sixteen-year-old who endeavors to conduct a science experiment¹¹ or the eleven-year-old child who is arrested for drawing a violent stick figure¹² are both treated the same. Each of these students faced a harsh school-related disciplinary sanction under zero tolerance—suspension or expulsion—and was referred to the criminal justice system. Not only do the policies fail to distinguish between the severity of offenses, but they have also had a disproportionate impact on students of color and students with disabilities, like the seven-year-old special needs child who was arrested for throwing a tantrum while decorating an Easter egg.¹³ In the short-term, students that are punished under zero tolerance policies are being denied an education,¹⁴ because

7. Andrea Peterson, *Florida Honor Student Arrested for Science Experiment Cleared of Charges, Going to Space Camp*, THINKPROGRESS (May 23, 2013, 5:12 PM), archived at <http://perma.cc/S8YR-UYCG>.

8. *Id.*

9. *Id.*

10. *Id.*

11. *See id.*

12. Judy Molland, *11-Year-Old Arrested, Thrown in Jail, for Drawing Stick Figure*, THE EDUCATION CAUSE, available at <http://www.care2.com/causes/11-year-old-arrested-thrown-in-jail-for-drawing-stick-figure.html> (last visited Nov. 29, 2014).

13. Meredith Kolodner, *Special-Ed Student Joseph Anderson, 7, Handcuffed by Cops at Queens School After Easter Egg Tantrum*, N.Y. DAILY NEWS (Apr. 21, 2011), available at <http://www.nydailynews.com/new-york/education/special-ed-student-joseph-anderson-7-handcuffed-cops-queens-school-easter-egg-tantrum-article-1.113913> (last visited Oct. 15, 2014).

14. *See infra* note 61.

being suspended or expelled requires that students be removed from the school setting thereby causing them to miss out on classroom instruction.¹⁵ But that is not all. Students that are suspended or expelled are also at a “greater risk” of dropping out of school altogether.¹⁶ Moreover, these students have an increased risk for “future incarceration.”¹⁷ In the long term, because “future incarceration” or contact with the juvenile justice system is an increased risk, zero tolerance policies are a contributing factor to the disenfranchisement of these students, and a denial of their full citizenship.

In schools that employ zero tolerance policies, school administrators and teachers are required to refer students to law enforcement. In many instances, law enforcement personnel are present on school grounds so referrals occur immediately.¹⁸ The policies have conflated serious and non-serious behavior resulting in the criminalization of some conduct that can be characterized as “childhood behavior.”¹⁹ Because teachers and

15. Daniel J. Losen & Jonathan Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, THE CIVIL RIGHTS PROJECT AT UCLA, available at <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-summary-2012.pdf> (last visited Oct. 15, 2014) (“Besides the obvious loss of time in the classroom, suspensions matter because they are among the leading indicators of whether a child will drop out of school”); see also Am. Acad. of Pediatrics, Council on School Health, Policy Statement, *Out-of-School Suspension and Expulsion*, PEDIATRICS (Feb. 25, 2013), available at <http://pediatrics.aappublications.org/content/131/3/e1000.full.pdf> (last visited Oct. 15, 2014) (“The student is separated from the educational process, and the school district may not be obligated to provide any further educational or counseling services for the student. Data suggest that students who are involved in the juvenile justice system are likely to have been suspended or expelled. Further, students who experience out-of-school suspension and expulsion are as much as 10 times more likely to ultimately drop out of high school than are those who do not.”).

16. See Losen & Gillespie, *supra* note 15.

17. *Id.* (“[O]ut of-school suspension increases a child’s risk for future incarceration.”).

18.

Data from the Bureau of Justice Statistics show that the number of full-time law enforcement officers employed by local police departments or sheriff’s offices who were assigned to work as SROs increased between 1997 and 2003 before decreasing slightly in 2007 (the most recent year for which data are available). Data show that a greater proportion of high schools, schools in cities, and schools with enrollments of 1,000 or more report having SROs.

NATHAN JAMES & GAIL MCCALLION, CONG. RESEARCH SERV., R43126, SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS, at i (2013), archived at <http://perma.cc/TKS5-A9JS>.

19. Augustina Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 ST. JOHN’S J. LEGAL COMMENT. 73, 78 (2006–2007) (“Overly strict state zero-tolerance policies mandating disciplinary alternative education programs may be ineffective and often mean a transition from school to the prison pipeline. This development has been long in coming, but was never publicly debated or considered. . . . Despite robust and longstanding debates, legislation, and litigation over such issues as school finance, vouchers, and desegregation, the public has never fully

administrators have little to no discretion in creating individualized sanctions, the punishments they impose are met with frustration—students view their punishments as irrational, impersonal, and unjustified. As a result, nondiscretionary zero tolerance policies breed contempt for the rule of law, irreparably harm students’ notions of fairness and justice, and contribute to the creation of the same divisions between students and teachers that exist between adult citizens and law enforcement. While zero tolerance policies penalize students too harshly for insignificant or nonviolent conduct, the policies have had a disproportionate impact on students of color, particularly African-American students, as well as students with disabilities. As a result, these students are at greater risk of being disenfranchised than their white counterparts and students without disabilities.

Social scientists examining discipline in educational settings have found that African-American males were disproportionately sanctioned regardless of whether they were in the numerical minority;²⁰ the type of infraction (e.g. defiance, fighting, truancy, tardiness, or dress code);²¹ or the type of discipline being applied (e.g. suspension or expulsion).²² The existing empirical research also indicates that African-Americans are unduly targeted for a range of behaviors and suffer various education-interrupting consequences. Zero tolerance policies are thus one reason²³

contemplated or acquiesced in this marriage of convenience that has led to the criminalization of school discipline programs and adolescent behavior.”)

20.

Raffaele Mendez and Knoff . . . found that African American children account for 17% of the student population, yet they constitute approximately 33% of all suspensions (see also Education Trust, 1998). Additionally, Gregory and Weinstein . . . observed similar dynamics in a study they completed, reporting that while African Americans made up 58% of students referred to the office for defiance related infractions, they constituted only 30% of the total student enrollment. Contrastingly, their White peers comprised only 5% of defiance referrals and made up roughly 37% of the student body. . . . Wallace et al. . . . concluded from their analysis that African Americans males represented a startling 330% of the number suspensions and expulsions, roughly 3.3 times the rate of their White male peers. Similar investigations into the overrepresentation of African American males also report findings consistent with these above mentioned studies. . . . African American males have the highest reported suspension rates, followed by White males, African American females, and White females, respectively. . . .

Chance W. Lewis, *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. 1, 10 (2010) (internal citations omitted).

21. *Id.* at 12–13.

22. *Id.*

23. Other reasons to partially explain the disparity in discipline are: “(a) racial discrepancies in the dispensation of disciplinary measures that result in more severe consequences for African

for the disparity in discipline between African-American students and their white counterparts, also known as the “discipline gap.”²⁴ Moreover, zero tolerance policies not only contribute to the disparity of school-related discipline for African-American and Latino students but these students are also more likely than their white peers to be referred to the juvenile justice system, regardless of the demographics of the school’s enrollment.²⁵ Furthermore, the socioeconomic status of the students does not account for the existence of these disparities.²⁶ Zero tolerance policies may not be racialized in theory, but the application of the policies has had a profoundly racialized effect. With their removal of students from the educational setting, especially students of color and students with disabilities, zero tolerance policies are depriving students of what has long been viewed as a means of upward mobility, thus contributing to the next generation of disenfranchised citizens.

With automatic suspensions, expulsions, and juvenile justice referrals, educational achievement is at risk because of missed academic time. Moreover, the risk of students not returning at all following suspension or expulsion increases as well. Zero tolerance policies not only deprive students of access to education, but they also interfere with the educational process. This disruption directly undermines the limited citizenship that students experience and jeopardizes the future full citizenship to which they are entitled. No longer do schools serve as pathways to responsible citizenship; rather they have become pipelines to societal exclusion.

Part II discusses the origin and evolution of zero tolerance policies, as well as the various legal challenges to the policies. Part III discusses the concept of a disenfranchised citizen and how students subjected to zero tolerance policies are destined to become the next generation of disenfranchised citizens. Finally, Part IV offers some prescriptions on how to prevent the creation of a new generation of disenfranchised citizens.

American males; (b) the proliferation of zero tolerance policies; (c) interpersonal and cultural misunderstandings; and/or (e) the attitudes of school personnel.” *Id.* at 10 (internal citations omitted).

24. The “[D]iscipline gap [is] a concept coined to draw attention to the disproportionate discipline policies and procedures meted out to certain student groups at rates that supersede (sometimes drastically) this group’s statistical representation in a particular school population.” *Id.*

25. ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 8 (2005), archived at <http://perma.cc/H2NU-ATCF>.

26. *Id.* at 18.

II. ZERO TOLERANCE POLICIES

“Zero tolerance policies” are school discipline policies that create mandatory punishments for specific offenses.²⁷ Under so-called “zero tolerance” policies, schools do not make exceptions or substitute punishments under any circumstances. The result is often severe punishment for any breach of a rule, regardless of how minor or whether there are extenuating circumstances.²⁸ Recently, the disciplinary philosophy underlying of zero tolerance policies has been the subject of the national discourse on school discipline, garnering a great deal of attention as the school-to-prison pipeline has been examined.²⁹ While zero tolerance as a policy appears to have always been associated with school-related discipline, the concept of zero tolerance was originally developed outside of the school context as a law enforcement approach to drug trafficking.³⁰ Zero tolerance became widely adopted in schools and accepted as the preferred means for addressing school conduct and meting out punishment in the early 1990s.

27.

The phrase “zero tolerance” was first recorded in the LexisNexis national newspaper database in 1983, when the Navy reassigned dozens of submarine crewmembers on suspicion of drug abuse. The phrase took hold as federal officials fought the ‘War on Drugs’ during the 1980s, and eventually came to describe school programs meant to address drug abuse and gang activity, which were ‘often broadened to include not only drugs and weapons but also tobacco-related offenses and school disruption.’

Elbert H. Aull IV, *Zero Tolerance, Frivolous Juvenile Court Referrals, and the School-to-Prison Pipeline: Using Arbitration as a Screening-out Method to Help Plug the Pipeline*, 27 OHIO ST. J. ON DISP. RESOL. 179, 182 n.18 (citing 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 Kathy Koch, *Zero Tolerance: The Issues*, 10 CQ RESEARCHER 188 (2000) (While zero tolerance policies are associated almost exclusively with school discipline, the school policies are an adaptation of practices adopted elsewhere in the criminal justice system such as “drug laws . . . mandatory minimum sentences, three strikes . . . laws, civil-asset forfeiture and stop-and-frisk tactics.”).

28. Aull, *supra* note 27, at 180.

29. Sheila Heaviside, Cassandra Rowand, Catrina Williams & Elizabeth Farris, *Violence and Discipline Problems in U.S. Public Schools: 1996–1997*, NCES U.S. DEPT. OF EDUC. 98-030 (Mar. 1998) (“According to the National Center for Education Statistics research, 94% of U.S. schools have zero-tolerance policies for weapons or firearms and 87% for alcohol, while 79% report mandatory suspensions or expulsions for violence or tobacco, accordingly.”) See also LaGina Gause, *Zero Tolerance and Academic Performance: When Fear Dictates School Culture*, APSA 2009 Toronto Meeting Paper (2009) (citing Heaviside et al., *supra*).

30. RUSSELL SKIBA, NAT’L ASS’N OF SCH. PSYCHOLOGISTS, ZERO TOLERANCE AND ALTERNATIVE DISCIPLINE STRATEGIES, S4H35-1 (2006).

A. *The Origin and Evolution of Zero Tolerance Policies*

Congress passed the Gun-Free Schools Act (“the Act”) in 1994,³¹ ushering in the era of zero tolerance.³² Under this new approach, also known as “exclusionary discipline,”³³ school officials were removed of their discretion to punish students for bringing weapons to school.³⁴ Students who were found to possess either a firearm or an explosive device in school were required to be expelled for up to one year. The underlying purpose and goal of the Act was clear: to create safe schools. By removing students who brought a dangerous weapon or device to school, schools would become safe spaces for students to learn and a safe working environment for school personnel once again.³⁵ The Act was limited in its scope, but the zero tolerance policies that evolved from it were not,³⁶ in part because of the funding that was attached to the policies.

To be eligible for federal education funds, the federal government required that schools adopt zero tolerance policies that reflected the goals and purpose of the Gun-Free Schools Act. As a result, states passed a slew of laws to receive federal education funds.³⁷ Zero tolerance policies that

31. The Gun-Free Schools Act (GFSA) of 1994, Pub. L. No. 103-382, 108 Stat. 3907, 3907–08 (2000) (codified at 20 U.S.C. §§ 8921–8923 (2000)), amended by the No Child Left Behind Act Pub. L. No. 107-110, 115 Stat. 1762, 1762–63 (2002) (codified at 20 U.S.C. § 7151 (2006)) (repealing the Gun-Free Schools Act of 1994, but simultaneously enacting another, similar Gun-Free Schools Act as a subpart of the No Child Left Behind Act of 2001); currently Gun-Free Schools Act, 20 U.S.C.A. § 7151 (2004) (current through Pub. L. No. 113-74; approved Jan. 16, 2014).

32. Peter Follenweider, *Zero Tolerance: A Proper Definition*, 44 J. MARSHALL L. REV. 1107, 1109 (2011).

33. Amity L. Noltemeyer & Caven S. McLoughlin, *Changes in Exclusionary Discipline Rates and Disciplinary Disproportionality Over Time*, 25 INT. J. OF SPECIAL EDUC. 59 (2010) (“Exclusionary discipline involves the use of suspensions, expulsions, and other disciplinary action resulting in removal from the typical educational environment; it is frequently used as a consequence for inappropriate student behavior.”).

34. The Gun-Free Schools Act (GFSA) requires that “[e]ach State receiving Federal funds under any subchapter of this chapter shall have in effect a State law 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, or to have possessed a firearm at a school.” 20 U.S.C. § 7151(b)(1) (2004) (emphasis added).

35. Eric Blumenson & Eva S. Nilsen, *One Strike and You’re out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L.Q. 65, 81 (2003).

36. *Id.* at 69–70.

37. *Zero Tolerance Programs*, LIFTING THE VEIL, archived at <http://perma.cc/K6PQ-8HBN> (last visited Oct. 15, 2014) (“To qualify for federal education funds, states had to enact laws requiring school districts to expel any student who brought a gun to school.”). See also JACOB KANG-BROWN ET AL., VERA INST. FOR JUST., A GENERATION LATER: WHAT WE’VE LEARNED ABOUT ZERO TOLERANCE IN SCHOOLS 2 (2013), archived at <http://perma.cc/YH9J-UK8S> (discussing increased funding for other discipline related programs. “As early as the 1996–97 school year, 79 percent of schools had adopted

were adopted initially reflected the express intent of the Act—the removal of students who brought weapons to school for a specified period of time.³⁸ The strict meaning of the Act was clear and unequivocal. Students who were in possession of a weapon on school grounds were disciplined—quickly and harshly. Without specific legislative guidance, school districts interpreted the Act more broadly: “School districts were left on their own to interpret the law’s application to offenses ranging from bringing illicit drugs or guns to school to more mild transgressions, such as possessing over-the-counter medication.”³⁹ Hence, the policies ignored the express language and the implied intent of the law—to punish only the most severe and dangerous behavior.⁴⁰

Instead of restricting zero tolerance policies to potentially violent and dangerous behaviors as indicated in the legislative directives of the Act, schools proceeded to create policies that far exceeded the intended scope of the Act.⁴¹ Zero tolerance policies that were drafted prohibited not only the possession and use of weapons, but also nonviolent and other disruptive behaviors.⁴²

Schools created zero tolerance policies that covered a range of conduct, some serious and some innocuous. In many cases, the policies were applied to conduct that did not rise to the threat level anticipated under the Act. For instance, in some jurisdictions, schools drafted zero tolerance policies that prohibited behavior such as fighting, drug or alcohol use, gang activity, possession of over-the-counter medication, sexual

zero tolerance policies for violence, going beyond federal mandates. To put some muscle behind these policies, the federal government and states began to increase funding for security guards and other school based law enforcement officers and later to install metal detectors. Between the 1996–97 and 2007–08 school years, the number of public high schools with full-time law enforcement and security guards tripled. This shift in school disciplinary policy and practice mirrored changes in the juvenile justice system to make it more closely resemble the adult system.”).

38. 20 U.S.C. § 7151(b)(1).

39. See Koch, *supra* note 27, at 185, 187; *Wagner v. Fort Wayne Comty. Sch.*, 255 F. Supp. 2d 915 (N.D. Ind. 2003) (granting school district’s summary judgment motion in middle school student’s civil rights challenge under § 1983 to expulsion for bringing caffeine pills to school and distributing them to other students; court found no violation of student’s substantive or procedural due process rights, no impermissible vagueness of rule against improper use of over-the-counter medication, and no violation of student’s equal protection rights where other students were merely suspended for taking the pills).

40. Koch, *supra* note 26, at 187.

41. *Id.*

42. Ann Daniels, *What is Considered Disruptive Behavior in a Classroom?*, LIVESTRONG.COM, archived at <http://perma.cc/GC4W-4L6F> (last updated Jan. 22, 2014) (discussing disruptive behavior such as talking, late arrivals and early departures, noises, and other behaviors).

harassment, threats, and vandalism.⁴³ Others adopted policies that prohibited “oppositional culture”⁴⁴ behavior, such as wearing nontraditionally colored lipstick, dyeing hair a different color, or writing about murder or suicide.⁴⁵ For example, in Columbus, Ohio, “[a] third grader . . . was suspended from school for three days for saying ‘yeah’ instead of ‘yes, Ma’am’ to his teacher.”⁴⁶ In Cincinnati, Ohio “[a] six-year-old girl . . . was proposed for expulsion for bringing her mother’s nail clippers to school.”⁴⁷ And in southwest Ohio, “[a] middle school honors student . . . was expelled from school for eighty days because he mistakenly left his Swiss Army knife in his backpack after returning from a weekend Boy Scout camping trip.”⁴⁸ The broad scope of conduct covered under zero tolerance policies has prompted some critics to refer to the policies as “a national intolerance for childish behavior.”⁴⁹ Under zero tolerance policies violent and nonviolent behavior, once regarded as innocuous childhood behavior, has been characterized anew as criminal conduct.⁵⁰ These policies have effectively stripped educators of the discretion to determine whether conduct that at one time would have been defined as “childhood behavior” and resulted in after school detention should now merit the more serious punishment of separation from the school by suspension or by expulsion.⁵¹ By dispensing the same harsh

43. Koch, *supra* note 27, at 185.

44. Spencer J. Salend & Shawna Sylvestre, *Understanding and Addressing Oppositional and Defiant Classroom Behaviors*, 37 TEACHING EXCEPTIONAL CHILD. 32 (2005). See generally Signithia Fordham and John Ogbu, Black Students’ School Success: Coping with the “Burden of ‘Acting White,’” 18 URBAN REV. 176 (discussing oppositional culture).

45. Koch, *supra* note 27, at 187.

46. *Zero Tolerance and Exclusionary School Discipline Policies Harm Students and Contribute to the Cradle to Prison Pipeline*, CHILD. DEF. FUND-OHIO, 2 (Nov. 2012), archived at <http://perma.cc/U98Y-AL77>.

47. *Id.*

48. *Id.*

49. Koch, *supra* note 27, at 187.

50. Kim Fries & Todd A. DeMitchell, *Zero Tolerance and the Paradox of Fairness: Viewpoints From the Classroom*, 36 J.L. & EDUC. 211, 212–13 ((2007) (citing *Zero Tolerance Policies Policy Updates*, NAT’L ASS’N OF ST. BDS. OF EDUC. 1 (2001), available at http://www.nasbe.org/new_resources_section/policy_updates/PU_Zero_Tolerance_02.01.pdf (“nonviolent and non-drug behavior such as defiance of authority, habitual profanity, defacing school property and gang-related behavior in schools.”); see also Richard R. Verdugo & Beverly C. Glenn, *Race-Ethnicity, Class and Zero Tolerance Policies: A Policy Discussion*, Paper Presented at the Annual Meeting of the American Educational Research Association (New Orleans, LA, Apr. 1–5, 2002), available at <http://eric.ed.gov/?id=ED466678> (last visited Oct. 19, 2014) (“Generally, zero tolerance policies are unfair and unjust because they are blanket policies covering certain behaviors without considering the context in which such behavior occurs.”).

51. Koch, *supra* note 27, at 192 (“One of the rationales for zero tolerance both in schools and law enforcement was to remove discretion from authorities and ensure that everyone would be treated

punishment for all conduct without regard for the nature and seriousness of the offense, there is no appreciation for the nature of justice in these contexts. This lack of appreciation for an unjust system can be analogized to the adult criminal justice system where any and all felonies will trigger a host of collateral consequences resulting in the disenfranchisement of and denial of full citizenship to adults.⁵² Similarly, with no scaling of punishment to fit the conduct, zero tolerance policies fail to distinguish between childish behavior that constitutes a “teachable moment”⁵³ and dangerous behavior that threatens the safety and well-being of other students and school personnel. Consequently, the policies have resulted in a number of absurd cases.⁵⁴

fairly.”). However, with the disproportionate rates of suspensions and expulsions for students of color and students with disabilities indicates that discretion is being utilized to determine which students will be referred for the application of zero tolerance policies.

52. See *infra* Part III. While there is some discrepancy within and across jurisdictions as to the impact of a felony conviction, the denial of the right to vote can be triggered for non-electoral offenses thus resulting in ex-offenders being disenfranchised. See generally MARGARET COLGATE-LOVE, CECILIA KLINGELE & JENNY ROBERTS, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE (2012–2013) (discussing the impact of a criminal conviction on a numerous rights across jurisdictions); ELIZABETH HULL, THE DISENFRANCHISEMENT OF EX-FELONS (Temple Univ. Press, 2006); American Civil Liberties Union, the ACLU of Florida, the Hip Hop Caucus, the Lawyers’ Committee for Civil Rights Under Law, the Leadership Conference on Civil and Human Rights, the National Association for the Advancement of Colored People, the NAACP Legal Defense and Educational Fund, Inc. and The Sentencing Project, *Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Laws in the United States*, CIVILRIGHTS.ORG (Sept. 2013), available at <http://www.civilrights.org/publications/reports/iccpr-shadow-report/democracy-imprisoned.html> (last visited Oct. 19, 2014). In the same way, a student who writes a story about a gun, see THE EDUCATION CAUSE, *supra* note 12, points his or her finger in the shape of a gun, see Bill Bush, *Boy Points Finger like Gun, Gets Suspended*, THE COLUMBUS DISPATCH (Mar. 4, 2014), available at <http://www.dispatch.com/content/stories/local/2014/03/04/boy-who-used-finger-like-gun-suspended.html> (last visited Oct. 19, 2014), or actually brings a gun to school, see Dan Tuohy, *Suspension for Student Bringing Loaded Gun to School: The Cooperative Middle School Student Faces Disciplinary Action for “Bad Choice”*, THE EXETER PATCH (Apr. 30, 2014), available at <http://patch.com/new-hampshire/exeter/suspension-for-student-bringing-loaded-gun-to-school#.VEOx7aMsiwF> (last visited on Oct. 19, 2014), each will face suspension and/or expulsion.

53. RUSSELL SKIBA ET AL., AM. PSYCHOL. ASS’N, ZERO TOLERANCE TASK FORCE, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 2 (2006).

54. See, e.g., *supra* notes 7–12 and accompanying text; Darryl E. Owens, *Zero Tolerance Runs Amok When Finger-Gun Results in Suspension*, ORLANDO SENTINEL, Oct. 6, 2013, archived at <http://perma.cc/B9ZN-5W4E>; Carl Willis, *School Officials ‘Reassess’ Students’ Punishment for Nasal Spray*, WSB-TV (Mar. 26, 2012, 8:06 AM), archived <http://perma.cc/3VL7-9XKH>; Jeri Clausing, *Suit Filed After NM Teen Cuffed for Burp in Class*, SEATTLE TIMES, Dec. 1, 2011, archived at <http://perma.cc/8RUV-6BE3>; *Boy, 12, Busted Over Spilled Milk Incident*, THE SMOKING GUN (Apr. 15, 2011), archived at <http://perma.cc/N645-VRLQ>.

In theory, zero tolerance policies were meant to create learning environments where students would be able to focus on the work of education without fear by removing students in possession of weapons or explosive devices from school grounds that pose a threat to the safety and well-being of others.⁵⁵ This goal was derived directly from the Act. With federal funding tied to the adoption of zero tolerance policies and no specific directive on what those policies should look like, school districts not only targeted school violence, but they also addressed nonviolent disruptive student conduct.⁵⁶ In the opinion of many, the policies have proven to be quite effective.⁵⁷

Students were removed from schools if they were actual or perceived threats to school safety, or if they were non-violent and violated school conduct policies.⁵⁸ The removal of these students who violate zero tolerance policies serves a dual purpose. On the one hand, the policies remove a student who is a disruptive influence. On the other hand, the policies serve as a deterrent because of the severity of the punishment for a wide range of behaviors.⁵⁹ The result is the creation of a climate that is

55. Follenweider, *supra* note 31, at 1134.

56. Ben Boychuk, *Zero Tolerance for Federal Mandates*, THE HEARTLAND INSTITUTE, available at <http://news.heartland.org/editorial/zero-tolerance-federal-mandates> (last visited Oct. 19, 2014) (“[I]n 1994 Congress passed and President Bill Clinton signed the Gun-Free Schools Act in response to a rash of school shootings. The law required every district to establish a zero-tolerance policy for guns or risk losing federal funds. Any student caught with a gun on campus faces a mandatory one-year expulsion and possible prosecution. . . . Over time, zero tolerance expanded to drugs, knives, sexual assault, gang paraphernalia, and explosives—all of which were of course already illegal.”). See also JUSTICE POLICY INSTITUTE, *EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS*, 1 (Nov. 2011), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/education_underarrest_executivesummary.pdf (last visited Dec. 2, 2014) (“Zero tolerance policies created the perceived need to have law enforcement readily available to enforce these policies; the federal government fed this perception by offering funding to expand the presence of law enforcement in schools.”).

57. See, Cherry Henault, *Zero Tolerance in Schools*, 30 J. L. & EDUC. 547 (2001); Kevin Gorman & Patrick Pauken, *The Ethics of Zero Tolerance*, 41 J. EDUC. ADMIN. 24, 26 (2003).

58. Jennifer A. Sughrue, *Zero Tolerance for Children: Two Wrongs Do Not Make a Right*, 39 EDUC. ADMIN. Q. 238, 254 (2003) (“Another argument against zero-tolerance policies centers on concern about the increasingly blurry distinctions between misbehavior and violent acts and the shrinking continuum of responses to rule violations.”). The phenomenon of punishing minor behavior is not a recent one. See Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1054 (2001) (“In 1997, zero tolerance approaches to discipline contributed to the suspensions of over 3.1 million students, mostly for non-violent behavior.”) (citing Kim Brooks et al., *School House Hype: Two Years Later*, POLICY REP. 4 (Justice Pol’y Inst., Washington, D.C. & Children’s Law Cent., Inc., Covington, KY, Apr. 2000).

59. Follenweider, *supra* note 31, at 1125; see also Charles Patrick Ewing, *Sensible Zero Tolerance Protects Students*, HARV. EDUC. LETTER, Jan./Feb. 2000, at 8.

ripe for learning for those students who were neither expelled nor suspended.⁶⁰ And yet, that has not been shown to be fully accurate.

In the aftermath of recent school shootings, zero tolerance policies have continued to dominate the national discourse. The focus on how to make schools safer remains an important topic of the day. For some stakeholders, zero tolerance policies are the appropriate response. For others, zero tolerance policies are a quick fix reaction to high-profile events that have dire consequences for students' rights and disproportionately impact students of color.

B. The Impact of Zero Tolerance Policies

Zero tolerance policies have both short- and long-term consequences for students. In the short term, students who are suspended or expelled are deprived of valuable classroom instruction time.⁶¹ Upon their return, if they have not attended an alternative program or have failed to keep up with the class, these students fall even further behind.⁶² The long-term impact is that students who face the harsh penalties associated with zero tolerance policies are not only more likely to drop out⁶³ but are also at an

60. *Teaching Interrupted: Do Discipline Policies in Today's Public Schools Foster the Common Good?*, PUB. AGENDA (2004), available at <http://www.publicagenda.org/research/>.

61. Daniel J. Losen & Russell J. Skiba, *Suspended Education, Urban Middle Schools in Crisis*, THE SOUTHERN POVERTY LAW CENTER (Sept. 2010), available at <http://www.splcenter.org/get-informed/publications/suspended-education> (last visited on Oct. 20, 2014); Erin Russ, *Zero Tolerance, Zero Benefits: The Discipline Gap in American Public K-12 Education*, NEW VOICES IN PUB. POLICY, Spring 2014, at 8 ("Critics argue . . . [the] exclusionary nature [of zero tolerance policies] eventually leads to a widening of the achievement gap."); Dara Feldman, *Zero Tolerance for Zero Tolerance*, DARAFELDMAN.COM available at <http://www.darafeldman.com/zero-tolerance-for-zero-tolerance/> (last visited on Oct. 20, 2014) ("Each time we send a student out of our classroom for disciplinary purposes, especially to be suspended or expelled . . . they lose valuable academic instruction. When the student comes back into our classroom they are even more difficult to deal with because they are behind in whatever instruction they have missed and therefore we need to work with them to catch them up.")

62. Feldman, *supra* note 61.

63. Jeanne B. Stinchcomb, Gordon Bazemore & Nancy Riestenberg, *Beyond Zero Tolerance: Restoring Justice in Secondary Schools*, 4 YOUTH VIOLENCE AND JUV. JUST. 123, 130 (2006) (citing J. Sheley, *Controlling Violence: What Schools Are Doing*, in 2 PREVENTING SCHOOL VIOLENCE: PLENARY PAPERS OF THE 1999 CONFERENCE ON CRIMINAL JUSTICE RESEARCH AND EVALUATION—ENHANCING POLICY AND PRACTICE THROUGH RESEARCH 37, 49 (S. G. Kellam, R. Prinz & J. F. Sheley eds., Nat'l Inst. of Just. & U.S. Dept. of Educ. 1996)); Office of Juvenile Justice & Delinquency Prevention, Office of Elementary and Secondary Education, *Creating Safe and Drug-Free Schools* (Washington, D.C. 1996). ("[The] long-term benefits of expulsion and suspension are considerably more difficult to identify. When students are expelled—regardless of the reason—they are essentially committed to a lifetime of struggle against the material and intellectual poverty that inevitably shadows those lacking a high school education. Although evidence linking zero tolerance

increased risk for contact with the juvenile justice system.⁶⁴ And with each successive contact with the juvenile justice system, these students are at an increased risk of future contacts with the criminal justice system. As a consequence, the severity of punishment increases with each successive contact. While some students will recover from the educational disruption and will avoid future contacts with the criminal justice system, others will not. These students will face lifetime consequences of a disciplinary system that removes discretion.

Viewed another way, students who are excluded from the school environment either by means of suspension or expulsion are removed from the “society” in which they have membership. In other words, prior to becoming legally enfranchised at the age of eighteen into adult society (i.e. possessing the right to vote), the world that these students occupy and in which they are accorded some status is school. When a student is forced to leave that environment or is denied membership in that society, the student is alienated and marginalized from their peers resulting in feelings of a lack of belonging.⁶⁵ The student who faces this type of exclusion because of conduct, which may be nonviolent or minor, has effectively been banished from the community. And much like adult disenfranchisement,⁶⁶ the student who is still a physical member of the larger community (i.e. school) is denied the rights and privileges provided to the other members of society. The experience of suspension or expulsion parallels adult felon disenfranchisement in that they are stigmatized and denied the rights and privileges of other similarly situated adults. In addition to the parallel between the exclusion that suspended or expelled students and adults disenfranchised because of a felony conviction, the subsequent processes of reentry and reintegration are also similar.

Students who return to school following a suspension or attend an alternative school because of an expulsion bear the stigma and difficulty of re-entering the school environment that is similar to their adult counterparts.⁶⁷ This initial form of “student disenfranchisement” (it is not

policies with high school dropout rates is not unequivocal, recent findings are pointing in the direction of an empirical connection.”).

64. See Losen & Gillespie *supra* note 15.

65. See Feldman, *supra* note 61 (“Each time we send a student out of our classroom for disciplinary purposes, especially to be suspended or expelled, we give the student the sense that they are not wanted, that they are not valued, that we don’t care and/or that we are not capable of handling them.”)

66. See *infra* Part III for a discussion of disenfranchisement.

67. See *infra* Part III for a discussion of reentry and reintegration.

truly disenfranchisement in the voting sense because the students, more often than not, have not reached the age of maturity and are unable to vote) does have profound consequences for their future. Not only are the students being deprived an education or are at risk for increased contacts with the juvenile justice system, students who are suspended or expelled because of zero tolerance policies are marginalized and alienated. The stigma and ostracism that the students encounter is no different than their adult counterparts who face numerous obstacles under the framework of collateral consequences that attach upon a felony conviction.⁶⁸ The adults have to overcome numerous obstacles in order to become law-abiding citizens, as do the students who are punished under zero tolerance policies. Proponents of the policies have a different perspective.

The proponents of zero tolerance policies argue that such policies provide a safe, nondisruptive learning environment, and deter improper conduct.⁶⁹ In general, supporters of these policies make these claims although there is a lack of empirical data to substantiate them.⁷⁰ School administrators are also supportive of the policies because of the deterrent function. And, their support is also similarly based on a lack of empirical data. Relying instead upon anecdotal evidence,⁷¹ school officials credit zero tolerance policies with the reduction in school violence and weapons use.⁷² For many of the supporters of zero tolerance policies, it is not the outcome that is determinative of whether the policies are effective but the ease with which the policies can be and are implemented.⁷³ The policies provide a singular standard⁷⁴ that disruptive conduct will not be tolerated

68. See *infra* Part III for a discussion of the scope of collateral consequences.

69. Cf. Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream's Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 U.C. DAVIS J. JUV. L. & POL'Y 289, 375 (2005).

70. Koch *supra* note 27, at 189 ("Proponents credit zero tolerance policies with recent declines in crime and school weapons cases, even though they acknowledge there is little data to support that claim.").

71. *Id.* at 189–90.

72. *Id.*

73. Russ Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, PI DELTA KAPPAN (1999), available at http://curry.virginia.edu/uploads/resource_library/dark_zero_tolerance.pdf (last visited Oct. 19, 2014) (discussing that a "comprehensive program of prevention" requires more than what most are willing to do (e.g. the adoption of conflict resolution programs, the "screening and early identification of troubled youth," and schools need to have "effective discipline . . . plans and procedures in place to deal with . . . disruptive behaviors There are doubtless those with little patience for the complex and careful planning that such a program demands, those who prefer the quick fix that zero tolerance purports to be.").

74. But see Laura McNeal & Christopher Dunbar, Jr., *In the Eyes of the Beholder: Urban Student Perceptions of Zero Tolerance Policy*, 45 URBAN EDUC. 293, 305 (2010). In one school district,

and that violations of school rules will be met with severe punishment. Opponents disagree on a variety of grounds.

The opponents of zero tolerance policies view the policies as misguided, pointing to the lack of flexibility in their application.⁷⁵ While no one would argue against the fact that students and teachers are entitled to a safe environment, opponents of zero tolerance policies argue that the policies do not create such an environment. Instead of providing a setting where students learn about proportionality with respect to punishment, zero tolerance policies promote a lack of respect for the system. Moreover, opponents contend that zero tolerance policies infringe upon the individual rights of students.⁷⁶ And furthermore, the policies have a disproportionate impact on particular groups—students of color and students with disabilities.⁷⁷ Consequently, opponents argue that zero tolerance policies have been adopted largely based upon anecdotal rather than empirical evidence and should be removed.⁷⁸

interviewers found that students perceived that administrators were discretionary when applying the policies:

School staff as street-level bureaucrats are given considerable discretion in implementing sanctions for student violations of zero tolerance policies (sic). This high level of discretion and autonomy is given to school staff with the understanding that they will apply traditional notions of fair play and substantial justice when evaluating disciplinary issues. Simply meaning, school staffs are expected to enforce zero tolerance policy irrespective of their personal biases or relationships with students. However, the urban high school students participating in this study revealed that they do not perceive their school staff as unbiased in their enforcement of zero tolerance policy. To the contrary, student statements convey a school environment riddled with double standards in applying zero tolerance sanctions based on school staffs' personal relationships with the student.

Id.

75. See, e.g., Hanson, *supra* note 69, at 302 n.35 (citing James M. Peden, *Through a Glass Darkly: Educating with Zero Tolerance*, 10 KAN. J.L. & PUB. POL'Y 369, 371 (2000) ("Zero tolerance is a term that is used to characterize an institution's responses to breaches in the code of conduct which the institution recognizes as being fundamental to its operation. It carries with it a connotation of absolutism and inflexibility which implies that once parameters of conduct have been established for any particular institution, no activity which occurs outside those parameters will be allowed. A code of conduct premised on such a concept does not contemplate an individual's intent.")).

76. See Koch, *supra* note 27, at 192 (citing Nadine Strossen, President of the ACLU) ("[S]tudents' rights to privacy, free speech, and due process are being abridged by zero tolerance rules.").

77. *Id.* at 185 ("[C]ivil rights advocates say the policies are being used to kick out minority, disabled and academically challenged students who might drag down the standardized test scores.").

78. Michael Harris, *New National Data Shows Racial Disparities in School Discipline*, NAT'L CTR. FOR YOUTH LAW (2012), archived at <http://perma.cc/Y5CT-4RQ9>. ("[Zero tolerance policies are a] classic example of policy by anecdote: implementing a policy not based on analysis of data but because a news story is broadly covered and compels some policy response.").

Nonetheless, supporters of zero tolerance policies have praised them as an appropriate response to stem the rising tide of school violence; while detractors of the policies criticize them as infringing on students' rights and disproportionately punishing students of color and students with disabilities. The impact of the policies is more complex than the platitudes and rhetoric from supporters and detractors suggest.

1. *In General*

School disciplinary actions that result in either suspensions or expulsions have a direct and immediate impact on academic achievement.⁷⁹ According to the research, the mere act of removing students from the educational environment (temporarily, with suspensions, or permanently, with expulsions) has negative consequences.⁸⁰ Specifically, students who receive out-of-school suspensions or expulsions fall behind their peers in their academic work “because they are no longer getting classroom instruction.”⁸¹ Consequently, students who are removed from the classroom suffer serious and potentially long-term consequences.⁸² More importantly, the data suggests that the benefits that are supposed to result from removing the student from the school environment are not readily apparent.⁸³ Hence, it is unclear whether the classroom climate improves with the removal of disruptive students.

Anecdotally, one would anticipate that the removal of “disruptive” children or those exhibiting negative behaviors would result in an improved educational environment for the remaining students. Simply put, remove the disruption and the learning environment is now peaceful.

79. Research “indicates a negative relationship between the use of school suspension and expulsion and school-wide academic achievement When students are removed from school, they obviously do not receive these services and instruction [and yet] even in-school suspensions or detention can cause students to miss out on instruction.” SKIBA ET AL., *supra* note 53, at 5.

80. Harris, *supra* note 79.

81. *Id.* (“Research confirms what seems obvious: over the long term, suspended and expelled students do worse academically. A recent comprehensive research study found that students subjected to exclusionary discipline had increased school dropout rates, and were more likely to have later contact with the juvenile justice system, particularly if they were disciplined multiple times.”).

82. *Id.*

83. *Id.* (“[T]here is no evidence to support the presumption that removing disruptive students from the classroom improves the school climate or academic outcomes for the remaining students.”). Rather, it has been the opposite: “Indeed, schools with higher rates of suspension and expulsion have been shown to do worse on a number of school climate indicators. More importantly, they also show a negative relationship with school-wide academic achievement (while controlling for demographics and socioeconomic status).” *Id.*

However, there has been no empirical support indicating that the school climate actually improves when disruptive students are removed.⁸⁴ To the contrary, and “[p]erhaps counter-intuitively, purging the school of misbehaving students does not appear to improve school climate. Schools with higher rates of school suspension have been found to pay significantly less attention to school climate and have lower ratings in academic quality and quality of school governance.”⁸⁵ Hence, the purported benefits of harsh school discipline such as improved school outcomes does not accrue with zero tolerance policies.

The goals of zero tolerance policies may have been noble—the creation of a uniform approach to school discipline, the maintenance of safe schools, and the discouragement of students from engaging in disruptive behavior. The result has often simply been to increase the number and severity of punishments on students,⁸⁶ sometimes under ridiculously petty circumstances.⁸⁷ For instance,

In rural Mississippi, five high school students passed the time on the long ride home by tossing peanuts at each other. When the driver got hit by an errant peanut, she pulled over, called the police and

84. DANIEL J. LOSEN & RUSSEL J. SKIBA, S. POVERTY LAW CTR., *SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS* 10, (2010) (“There are no data showing that out-of-school suspension or expulsion reduce rates of disruption or improve school climate; indeed, the available data suggest that, if anything, disciplinary removal appears to have *negative* effects on student outcomes and the learning climate.”) (internal citations omitted).

85. *Id.* (internal citations omitted).

86. Tamar Lewin, *Black Students Face More Discipline, Data Suggests*, N.Y. TIMES, Mar. 6, 2012, at A11, available at http://www.nytimes.com/2012/03/06/education/black-students-face-more-harsh-discipline-data-shows.html?_r=0 (“A previous study of the federal data from the years before 2006, published in 2010 by the Southern Poverty Law Center, a nonprofit civil rights organization, found that suspension rates in the nation’s public schools, kindergarten through high school, had nearly doubled from the early 1970s through 2006—from 3.7 percent of public school students in 1973 to 6.9 percent in 2006—in part because of the rise of zero-tolerance school discipline policies.”).

87. Several additional examples highlight the absurdity of the policies. “A 9-year-old Ohio boy was suspended after writing, ‘You will die an honorable death’ as a fortune-cookie prediction for a class assignment”, Koch, *supra* note 26, at 187. Lindsey Tanner was a 14-year-old eighth-grade honor student who, in May 2007, was expelled from Houghton Middle School after another student received a Midol [pill] from her. By giving the friend the over-the-counter medication, Lindsey violated a School Board policy forbidding drugs on campus. Lindsey, who had never been a discipline problem, was forced to attend a six-week drug and alcohol awareness program and AA meetings. She also had to attend an alternative school for the remainder of her eighth-grade year and the first nine weeks of her first year in high school. Mary Nash-Wood, *Are School Zero-Tolerance Policies Too Harsh?*, USA TODAY, Dec. 4, 2011, available at <http://usatoday30.usatoday.com/news/nation/story/2011-12-04/zero-tolerance-policy/51632100/1>. And “a 10-year-old girl found a small knife in her lunchbox placed there by the mother for cutting an apple. Although she immediately handed over the knife to her teacher, she was expelled from school for possessing a weapon.” SKIBA ET AL., *supra* note 53, at 16.

had the boys arrested for assault, punishable by five years in prison. The criminal charges were soon dropped, but the teenagers were suspended and lost their bus privileges. Unable to make the 30-mile trip to school, all five dropped out.⁸⁸

While dangerous and annoying, the actions certainly did not demand a criminal justice response. For the students who dropped out, the likelihood that they would be involved in future criminality increased exponentially.⁸⁹

Countless other examples of the absurdity of such policies exist, such as the “6-year-old boy in York, Pa., [who] was suspended for carrying a pair of nail clippers to school,”⁹⁰ or the “second-grader in Columbus, Ohio, who was suspended for drawing a paper gun, cutting it out and pointing it at classmates.”⁹¹ Young children clearly have the capacity to commit criminal acts. Yet, it would appear that suspending children for violating a school rule when there was no injury or damage to school property has allowed common sense to be replaced with dogmatic adherence to policy. For example, the case of the “13-year-old boy in Manassas, Va., who accepted a Certs breath mint from a classmate was suspended and required to attend drug-awareness classes.”⁹² The surreptitious sharing of candy in school was at most a violation of a school rule that would have been regarded as a “teachable moment[.]”⁹³ or

88. RUSSELL SKIBA ET AL., AM. PSYCHOL. ASS'N, ZERO TOLERANCE TASK FORCE, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 2 (2006).

89. John H. Tyler & Magnus Lofstrom, *Finishing High School: Alternative Pathways and Dropout Recovery*, 19 FUTURE OF CHILD. 77, 88 (2009) (“Dropouts are also greatly overrepresented in U.S. prisons. The Bureau of Justice Statistics reports that 68 percent of the nation’s state prison inmates are dropouts. Dropouts constitute 62 percent of white inmates, 69 percent of black inmates, and 78 percent of Hispanic inmates. Although these figures represent strikingly strong relationships between education and crime, the extent of causality is unknown. For example, children who grow up in poor, inner-city neighborhoods are more likely both to drop out of school and to engage in criminal activities during the adolescent and post-adolescent years. It is clearly challenging to estimate the causal effect of education on criminal behavior.”).

90. Koch, *supra* note 26.

91. *Id.*

92. *Id.*

93. Richard R. Verdugo, *Race-Ethnicity, Social Class, and Zero-Tolerance Policies: The Cultural and Structural Wars*, 35 EDUC. AND URB. SOC'Y 50, 70 (2002) (“Zero-tolerance policies must be reasonable. By reasonable, I mean that such policies should consider the long-term effects on students and the right for all children to be educated, and they should fit the behaviors. For example, if a student’s behavior is perceived as threatening, perhaps educators should take the high road by backing off and not escalating the situation. Later, the teacher can have a one-on-one discussion with the student about how his or her behavior is perceived. Teachable moments are important.”). Nan Stein, *Bullying or Sexual Harassment—The Missing Discourse of Rights in an Era of Zero Tolerance*

resulted in detention. These less severe disciplinary responses reduce the detrimental impact of lost academic time unlike the harsh punishments associated with zero tolerance policies. And, no jurisdiction is immune to such policies. For instance, “[a] teen student was expelled for violating school rules by talking to his mother . . . on a cell phone while at school.”⁹⁴ The student was speaking with his mother who had been deployed to Iraq after not having been able to speak to her in a month.⁹⁵ The impact of such policies is made worse when school conduct is criminalized and the juvenile justice authorities become involved.

School conduct which previously may never have been referred to juvenile justice authorities or would have taken considerable time and effort to enter the system does so with increasing frequency. The rapidity with which school conduct becomes criminalized is almost instantaneous because of the presence of law enforcement personnel on school grounds. With the increased presence of law enforcement coupled with broad zero tolerance policies, student behavior has now become transformed from mundane, childish events into juvenile justice referrals. Due to the overwhelming presence of security officers and law enforcement personnel, the criminalization of such behavior is no longer a phone call away but a short walk down the hall.⁹⁶ The result has been not simply to keep unwanted intruders out and protect schools from violent behavior from within but the hypercriminalization of childhood conduct.⁹⁷ Incidents that previously would have remained outside of the juvenile justice system are now more easily brought within its jurisdiction because of the presence

45 ARIZ. L. REV. 783, 792 (2003) (“Zero tolerance is ‘one strike-you are out,’ and it allows for no “teachable moments” or for the interjection of the professional assessment by teachers. In fact, it is an ideology that is insulting to teachers and their professional judgments.”).

94. SKIBA ET AL., *supra* note 53, at 16–17.

95. *Id.*

96. *See* EDUCATION UNDER ARREST, *supra* note 56, at 1 (“Fueled by increasingly punitive approaches to student behavior such as ‘zero tolerance policies,’ the past 20 years have seen an expansion in the presence of law enforcement, including school resource officers (SROs), in schools. According to the U.S. Department of Justice, the number of school resource officers increased 38 percent between 1997 and 2007.”). *See also* Lawrence F. Travis III & Julie Kiernan Coon, *The Role of Law Enforcement in Public School Safety: A National Survey*, NAT’L CRIM. JUST. REFERENCE SERV. (Oct. 2005), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/211676.pdf> (last visited Oct. 19, 2014) (discussing the various law enforcement roles and relationships with students and school personnel).

97. *See supra* note 55, at 15 (citing Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280–87 (2009)). *See generally* Victor Rios, *Punished: Policing the Lives of Black and Latino Boys*, NYU PRESS (June 2011); *see also* Heather Ann Thompson, *Criminalizing Kids: The Overlooked Reason for Failing Schools*, RE-IMAGINING EDUCATION REFORM, available at <http://www.yale.edu/glc/lme/HAT.pdf> (last visited Oct. 19, 2014).

of those directly involved and connected to the juvenile justice system. For example, in Florida, a “12-year-old . . . boy was handcuffed and jailed after he stomped in a puddle, splashing classmates.”⁹⁸ Also, in Florida, “[a] five-year-old African American girl was arrested and forcibly removed from her St. Petersburg elementary school for having a temper tantrum in class.”⁹⁹ In each case, a juvenile justice officer was present and thus behavior that would have been resolved informally in the principal’s office was now referred to the juvenile justice system for to be formally resolved. Hence, zero tolerance policies have resulted in the treatment of children more as adults and (in ways that resemble the adult criminal justice system) less as students who should be educated. But “[t]he most irrational aspect of zero tolerance [policies] . . . is that they that turn kids into criminals for acts that would rarely constitute a crime when committed by an adult.”¹⁰⁰ The reporting requirements that have been created under the system of zero tolerance has resulted in an increase in student referrals to the juvenile justice system, or the school-to-prison pipeline.¹⁰¹ In theory, zero tolerance policies are supposed to be “neutral.” As applied, the policies have had a disproportionate impact on students of color and students with disabilities.

2. *The Disproportionate Impact*

While zero tolerance policies are purported to be race neutral, nothing could be further from the truth. The implementation of the policies has resulted in a disproportionate number of students of color being suspended, expelled or attending alternative schools.¹⁰² The harm has been so great it has resulted in what has been termed the “School to Prison Pipeline.”¹⁰³ For students of color, and most noticeably African-American

98. John W. Whitehead, *Majoring in Minors: Turning Our Schools into Totalitarian Enclaves*, THE RUTHERFORD INST. (Feb. 4, 2013), archived at <http://perma.cc/U9PC-LK4X>.

99. Rhonda Brownstein, *Pushed Out*, TEACHING TOLERANCE (2009), available at <http://www.tolerance.org/pushed-out>.

100. See *supra* note 25, at 11.

101. Hanson, *supra* note 69, at 305.

102. See, e.g., Ruth Zweifler & Julia De Beers, *The Children Left Behind: How Zero Tolerance Impacts our Most Vulnerable Youth*, 8 MICH. J. RACE & L. 191, 205 (2002).

103. See Deborah N. Archer, *Introduction: Challenging the School-To-Prison Pipeline*, 54 N.Y.L. SCH. L. REV. 867, 868 (2010) (“Despite clear evidence that violence and crime in our schools is decreasing, the often misguided approaches of our criminal justice system, with its focus on punishment rather than rehabilitation, are bleeding into our schools. This has led many school districts to “crack down” on our children, focusing on punishment and criminalization rather than education. Today, children are far more likely to be arrested at school than they were a generation ago. . . . This

students, much has been written about the pre-existing and all too common discipline gap.¹⁰⁴ The empirical research has demonstrated that African-American youth, especially males, are punished disproportionately compared to their white counterparts. In fact, minority students suffer disproportionate punishment in the absence of zero tolerance policies.¹⁰⁵ However, under a zero tolerance regime, the pre-existing disparity in punishment is even further highlighted as the punishment is harsher—i.e., suspensions and expulsions.

Zero tolerance policies have merely heightened and made more serious the consequences associated with behavior that is often viewed differently and labeled as disruptive when conducted by African-American youth. Moreover, in many schools, consequences for disruptive behavior have become more severe because of the presence of law enforcement.¹⁰⁶ For example, in a 2005 study, the Southern Poverty Law Center “found that children are far more likely to be arrested *at* school than they were a

disturbing phenomenon is called the school-to-prison pipeline. The school-to-prison pipeline is the collection of education and public safety policies and practices that push our nation’s schoolchildren out of the classroom and into the streets, the juvenile justice system, or the criminal justice system.”); Chauncey D. Smith, *Deconstructing the Pipeline: Evaluating School-To-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009, 1018–19 (2009) (defining the school-to-prison pipeline).

104. Lewis, *supra* note 20, at 7 (“The intensity of these scholarly investigations have focused on the common phenomenon of the discipline gap’ that often occurs in many K–12 educational environments, particularly in urban school settings” (internal citations omitted)).

105. See, e.g., India Geronimo, *Systemic Failure: The School-to-Prison Pipeline and Discrimination Against Poor Minority Students*, 13 J. L. SOC’Y 281, 286–87 (2011); Tona M. Boyd, Symposium Response, *Confronting Racial Disparity: Legislative Responses to the School-to-Prison Pipeline*, 44 HARV. C.R.-C.L. L. REV. 571, 573–75 (2009); Johanna Wald, *The Failure of Zero Tolerance: A Nationwide Crackdown on Students has Resulted in Outrageous Punishments that Disproportionately Affect Minorities*, SALON, Aug. 29, 2001, archived at <http://perma.cc/99N7-UBGG> (“Less chronicled is the fact that, in many schools, zero tolerance has become a convenient tool for disposing of more and more children of increasingly young ages—disproportionately poor and minority—who may be irritating, problematic or troublesome, but hardly dangerous.”). See also DANIEL K. LOSEN & DANIEL GILLESPIE, CIV. RTS. PROJECT, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 6–7 (2012), archived at <http://perma.cc/NLA3-P4FS>; KIM BROOKS, VINCENT SCHIRALDI & JASON ZIEDENBERG, JUST. POL’Y INSTITUTE/CHILD.’S L. CTR., SCHOOL HOUSE HYPE: TWO YEARS LATER 16–27 (2001), archived at <http://perma.cc/8WSN-K9SC>.

106. Marilyn Elias, *The School to Prison Pipeline*, TEACHING TOLERANCE (2013), available at <http://www.tolerance.org/magazine/number-43-spring-2013/school-to-prison> (“One 2005 study found that children are far more likely to be arrested at school than they were a generation ago. The vast majority of these arrests are for nonviolent offenses. In most cases, the students are simply being disruptive. And a recent U.S. Department of Education study found that more than 70 percent of students arrested in school-related incidents or referred to law enforcement are black or Hispanic. Zero-tolerance policies, which set one-size-fits-all punishments for a variety of behaviors, have fed these trends.”).

generation ago [with t]he vast majority of these arrests . . . for nonviolent offenses.”¹⁰⁷ Furthermore, the racial impact of the policies is readily apparent. For example, “a recent U.S. Department of Education study found that more than 70 percent of students arrested in school-related incidents or referred to law enforcement are black or Hispanic. Zero-tolerance policies, which set one-size-fits-all punishments for a variety of behaviors, have fed these trends.”¹⁰⁸

The increase in referrals of disciplinary issues to the juvenile justice system has had a greater impact on students of color. These students are more likely to be on the schoolhouse-to-jailhouse track than their white peers, thus further increasing the disproportionality that already existed there.¹⁰⁹ And, zero tolerance policies are one factor that has exacerbated this trend.¹¹⁰ According to a previous report of the U.S. Department of Education, “nearly one out of eight African-American students was suspended from the nation’s public schools. By contrast, only one out of 30 white students was suspended.”¹¹¹ While the figures of temporary removals demonstrate a disturbing trend, expulsions were far worse.

According to the U.S. Department of Education, “[n]early 1 million students were expelled that year, [and] one-third of them [were] black.”¹¹² Additionally, in 2009 to 2010, the Civil Rights Data Collection reported that “[a]lthough black students made up only 18 percent of those enrolled in the schools sampled, they accounted for 35 percent of those suspended once, 46 percent of those suspended more than once and 39 percent of all

107. *Id.*

108. *Id.*

109. ADVANCEMENT PROJECT, *supra* note 25 (“Across the board, data shows that black and Latino students are more likely than their white peers to be arrested in school, regardless of the demographics of the school’s enrollment. These disparities cannot be accounted for by socioeconomic status of students, nor is there any evidence that black and Latino students misbehave more than their white peers.”).

110. *See* Lewin *supra* note 86 (“One in five black boys and more than one in 10 black girls received an out-of-school suspension . . . [B]lack students were three and a half times as likely to be suspended or expelled than their white peers . . . expulsions under zero-tolerance policies, Hispanic and black students represent 45 percent of the student body, but 56 percent of those expelled under such policies. . . . In Los Angeles . . . black students made up 9 percent of those enrolled, but 26 percent of those suspended; in Chicago, they made up 45 percent of the students, but 76 percent of the suspensions . . . And while black and Hispanic students made up 44 percent of the students in the survey, they were only 26 percent of the students in gifted and talented programs.”).

111. Earl Ofari Hutchinson, Commentary, *Zero-Tolerance: Fueled by Bad Behavior or Racism?*, LA TIMES, Oct. 24, 2000, available at <http://articles.latimes.com/2000/oct/24/local/me-41008> (last visited Oct. 19, 2014).

112. *Id.*

expulsions.”¹¹³ The consequences of enforcing zero tolerance policies has been disastrous for African-American youth particularly as the range of behaviors that make a student eligible for either suspension or expulsion has been expanded. “[A]s more districts and states have adopted zero-tolerance policies, imposing mandatory suspension for a wide range of behavioral misdeeds, more and more students have been sent away from school for at least a few days, an approach that is often questioned as paving the way for students to fall behind and drop out.”¹¹⁴ And while the act of suspension or expulsion is problematic, the referrals to law enforcement raise the stakes to an even higher level.

When students are suspended or expelled, the disruption in their education is readily apparent and the long-term impact is evident. Students who are removed from the school fall behind in work and have an increased likelihood of dropping out of school,¹¹⁵ and future contacts with the juvenile justice system.¹¹⁶ When coupled with referrals to the juvenile justice system, the outcomes are bleaker. Students that are referred because of minor, noncriminal behavior are more likely to encounter law enforcement in the future.¹¹⁷ Moreover, subsequent sanctions will be

113. See Lewin, *supra* note 86. To give an idea of the scope of the issue, Lewin notes that “[t]hese statistics are from 72,000 schools in 7,000 districts, serving about 85 percent of the nation’s students. The data covered students from kindergarten age through high school.” *Id.*

114. See *id.*; Harris, *supra* note 79.

115. Harris, *supra* note 79 (“Newly released data from the U.S. Department of Education reveals disturbing racial disparities in school discipline. The Civil Rights Data Collection (CRDC) finds youth of color not only face harsher discipline than White students, they are more often referred to law enforcement . . . These new data from 2009 and 2010 confirm that the way in which youth of color, especially Black youth, are disciplined in schools is excessive and counterproductive. These findings have great significance because there are profound collateral consequences for youth who are subjected to forms of discipline, such as suspension and expulsion that exclude them from opportunities to learn.”).

116. Rachel Wilf, *Disparities in School Discipline Move Students of Color Toward Prison*, CTR. FOR AM. PROGRESS (Mar. 13, 2012), archived at <http://perma.cc/9MPH-V4JW> (“For many students of color, suspensions and expulsions are the first step toward time behind bars. Students who were suspended or expelled for even one discretionary violation in Texas were 2.85 times more likely than their peers to be in contact with the juvenile justice system within the following year. Each subsequent violation exponentially increased student’s chances of juvenile justice involvement—nearly half (46 percent) of students with at least 11 disciplinary actions came into contact with the juvenile justice system, compared to only 2.4 percent of students with no disciplinary violations.”).

117. See EDUCATION UNDER ARREST, *supra* note 58, at 13–17 (“With this rapid increase in the presence of law enforcement . . . districts from around the country have found that youth are being referred to the justice system at increased rates and for minor offenses . . . This is causing lasting harm to youth, as arrests and referrals to the juvenile justice system disrupt the educational process and can lead to suspension, expulsion, or other alienation from school. All of these negative effects set youth on a track to drop out of school and put them at greater risk of becoming involved in the justice system.”). Attorney General Eric Holder, *Attorney General Eric Holder Delivers Remarks at the*

harsher because of the pre-existing juvenile justice history.¹¹⁸ And while the impact is detrimental for all students, once again, the referrals for African-Americans reveal a disproportionality along racial lines.¹¹⁹ “Newly released data from the U.S. Department of Education reveals disturbing racial disparities in school discipline. The Civil Rights Data Collection . . . finds youth of color not only face harsher discipline than White students, they are more often referred to law enforcement.”¹²⁰ Zero tolerance policies therefore do more than negatively impact the educational outcomes of students of color. The policies contribute to the criminalization of students of color by conflating behaviors and conduct that in the past would have been handled by schools internally. With such a stark racial disparity, it is apparent that zero tolerance policies disproportionately victimize and criminalize students of color.¹²¹

Civil rights groups have blamed the gaping disparities on racism and have challenged school officials nationally to find better ways to discipline black students instead of shoving them out of the schoolhouse doors.¹²² Education officials however have responded that there are factors other than racism that can explain the racial disparities in suspensions.¹²³ The

Department of Justice and Department of Education School Discipline Guidance Rollout at Frederick Douglass High School, JUSTICE.GOV (Jan. 8, 2014), available at <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-department-justice-and-department-education> (last visited Oct. 19, 2014) (“Too often, so-called ‘zero-tolerance’ policies—however well-intentioned—make students feel unwelcome in their own schools. They disrupt the learning process. And they can have significant and lasting negative effects on the long-term well-being of our young people—increasing their likelihood of future contact with juvenile and criminal justice systems.”).

118. Aaron J. Curtis, Note, *Tracing the School-to-Prison Pipeline from Zero-Tolerance Policies to Juvenile Justice Dispositions*, 102 GEO. L.J. 1251, 1270 (2014) (“Moreover, among juveniles appearing in court for the third or fourth time, 52.9% were removed from home, and 39.9% were confined. 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.”) (citation omitted).

119. Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States: A Look at the Racial Disparities Inherent in Our Nation’s Criminal-Justice System*, AMERICANPROGRESS.ORG (Mar. 13, 2012), available at <http://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states/> (last visited on Oct. 19, 2014).

120. *Id.*

121. Lewin, *supra* note 86 (quoting Secretary of Education Arne Duncan: “Education is the civil rights of our generation. . . . The undeniable truth is that the everyday education experience for too many students of color violates the principle of equity at the heart of the American promise.”).

122. Verdugo, *supra* note 43; Pedro A. Noguera, *Schools, Prisons, and Social Implications of Punishment: Rethinking Disciplinary Practices*, 42 THEORY PRAC. 4 (2003).

123. Hutchinson, *supra* note 98 (“Though they don’t spell out what those factors are, the disturbing implication is that black students are more prone to carry knives and guns, pick more fights, act unruly and engage in illicit conduct than whites at schools. . . . Education officials concede that one

get-tough school policies may be badly tainted with racial stereotypes. The danger is that many school officials reflexively view young blacks as violence-prone, menace-to-society thugs.¹²⁴

Zero tolerance policies that merely dump students into makeshift alternative schools, or out onto the streets demoralizes students and parents, reinforces the notion among blacks that school officials impose a racial double standard in punishing blacks and whites, and increases cynicism and disdain among minorities for public education. This should force school officials to ask themselves whether they use zero tolerance policies to punish bad behavior or to overly punish black and Latino students because of racial fears. Civil rights groups are right to demand that school officials ask and answer that question.¹²⁵

In the instances that zero tolerance policies have been challenged, regardless of race, the Supreme Court has often deferred to the judgment of school officials.¹²⁶

C. Legal Challenges

The challenges to zero tolerance have focused on the infringement of students' constitutionally protected rights to exercise free speech, to privacy and to due process. While students do not enjoy the full panoply of the constitution's protections,¹²⁷ the United States Supreme Court has

reason for the racial blip in suspensions is that poor and minority parents are less likely than white, middle-class parents to challenge school officials' decisions to suspend or expel their children.").

124. *Id.* ("The well-publicized two-year expulsion slapped on black students for fighting at a football game by the mostly white school board in Decatur, Ill., raised huge warning flags that some school officials deal more harshly with black students who misbehave than with whites.").

125. See Earl Ofari Hutchinson, *Zero Tolerance: Racism or Bad Behavior?*, L.A. TIMES, Oct. 24, 2000, available at <http://articles.latimes.com/2000/oct/24/local/me-41008>.

126. Ellen M. Boylan, Esq., *Advocating for Reform of Zero Tolerance Student Discipline Policies: Lessons from the Field*, EDUCATION LAW CENTER, at 38 (2002), available at http://www.edlawcenter.org/assets/files/pdfs/publications/AdvocatingReform_ZeroTolerance.pdf (last visited Oct. 19, 2014) (discussing the deference that courts have given to school boards: "Federal constitutional law and the rational relationship standard are deferential to school boards and do not support a systemic challenge to zero tolerance policies.").

127. *Morse v. Frederick*, 551 U.S. 393 (2007) (narrowing scope of First Amendment noting that the curtailing of students free speech rights at school event is permissible); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1987) (also narrowing scope of the First Amendment by restricting what students can publish in school newspaper); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (narrowing the Fourth Amendment protection for students when it upheld search of a student's purse); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986) (granting school's deference over students' First

stated that students do not check all of their rights at the schoolhouse door.¹²⁸ The Court has maintained that schools are allowed limited exceptions to enable administrators to create a safe and non-disruptive environment.¹²⁹

1. *Free Speech*

Zero tolerance policies were designed to be proactive, even if that proactivity results in infringing upon a student's free speech rights.¹³⁰ The reasoning is that when a student brings a weapon to campus it may be too late at that point to prevent the harm that may occur. Thus, rather than risk the harms, administrators assess childhood behavior differently. For example, in the past, a student who submitted a piece of creative writing or an art project that depicted an act of violence would have been counseled or the teacher would have discussed what the student intended with the work.¹³¹ Under the current system, however, the student is referred to school administrators for violating the zero tolerance policy. With this proactive approach, student speech is viewed with suspicion. Naturally, students and their advocates have challenged the application of zero tolerance policies as an infringement on the students' First Amendment rights to free speech.¹³² An illustrative case of this was a 17-year-old high

Amendment rights when for comments that may be "disruptive of the educational process."); *Vernonia Sch. Dist. No. 47J v. Acton*, 515 U.S. 646 (1995) (permitting student drug testing); *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002). *But cf.* *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364 (2009) (holding that a strip search of a middle school student violated the Fourth Amendment when there was no reasonable suspicion to suspect that the drugs presented a danger or that they were concealed).

128. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their right to freedom of speech or expression at the schoolhouse gate.").

129. For those who study correctional theory and practice, the language and method of zero tolerance utilized in schools to restrict the rights of students and apply punishment for infractions is eerily similar to the language, e.g. maintaining institutional security, and methods, e.g. administrative segregation, utilized in correctional facilities. KENNETH J. PEAK, *JUSTICE ADMINISTRATION: POLICE, COURTS, AND CORRECTIONS MANAGEMENT* 253 (5th ed. 2007) (discussing judicial deference to prison administrators).

130. David L. Hudson Jr., *The Silencing of Student Voices, Preserving Free Speech in America's Schools*, FIRST AMENDMENT CENTER (2003), available at http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/Silencing.intro_.pdf (last visited Oct. 20, 2014).

131. See Koch, *supra* note 26, at 187.

132. See S.G. *ex rel.* A.G. v. Sayreville Bd. of Educ., 333 F.3d 417, 422 (2003) (finding that student free speech was not infringed. "The Supreme Court has recognized that a balance must be struck between the student's rights and the school's role in fostering what the Court in *Fraser* termed 'socially appropriate behavior' . . . Here, where the school officials determined that threats of violence and simulated firearm use were unacceptable, even on the playground, the balance tilts in favor of the school's discretionary decision-making.") (internal citations omitted).

school student who wrote a poem following the tragic school shooting at Sandy Hook Elementary School.¹³³ In her personal notebook, the student wrote a poem reflecting upon the shooter.¹³⁴ A teacher found the poem and gave it to the principal.¹³⁵ The poem was not viewed as “self-expression about the scarier aspects of life.”¹³⁶ It was viewed as a safety threat earning the student a suspension and the possibility of expulsion.¹³⁷ The poem which was meant to serve as a cathartic piece of writing for the student was viewed as an indicator of potential danger.¹³⁸

While some have expressed a concern for the free speech rights of students, proponents of zero tolerance policies note that students do not possess limitless free speech protection and thus infringing upon that right is not relevant.¹³⁹ In fact, the Court has on several occasions curtailed student speech when it has been determined to be disruptive to the learning environment.¹⁴⁰ For example, in *S.G. ex rel. A.G. v. Sayreville Board of Education*,¹⁴¹ a five-year-old kindergarten student and his classmates made statements that referred to the use of weapons and “shooting each other at recess.”¹⁴² The student stated that he and his friends were playing a game of “cops and robbers” when he uttered the phrase “I’m going to shoot you.”¹⁴³ The kindergartener was subsequently suspended for three days.¹⁴⁴ The Superintendent of Schools told the kindergarten student’s parents that “policy was policy” and that he had to stand behind the principal’s decision.¹⁴⁵ In the context of a schoolyard game that children have played in a variety of forms over the years, the

133. Margaret Rose Heftler, *Zero Tolerance for Violating Free Speech*, REPRESENT (May/Jun. 2013), archived at <http://perma.cc/YS8G-R7LF>.

134. *Id.* (“They wanna hold me back/I run but they still attack/My innocence, I won’t get back/I use to smile/They took my kindness for weakness/The silence the world will never get/I understand the killing in Connecticut/I know why he pulled the trigger/the Government is a shame/Society never wants to take the blame/Society puts these thoughts in our head/Misery loves company/If I can’t be loved, no one can.”).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* See also Lynda Hils, “Zero Tolerance” for Free Speech, 30 J.L. & EDUC. 365 (2001).

139. See *Morse v. Frederick*, 551 U.S. 393 (2007).

140. 333 F.3d 417, 422 (2003) (finding that student free speech was not infringed. “[W]here the school officials determined that threats of violence and simulated firearm use were unacceptable, even on the playground, the balance tilts in favor of the school’s discretionary decision-making.”).

141. *Id.*

142. *Id.* at 419.

143. *Id.* at 417.

144. *Id.*

145. *Id.* at 419.

District Court granted the school's motion for summary judgment, deferring to the judgment of the school administrators.¹⁴⁶ And so, while the student raised a First Amendment argument, the appellate court upheld the lower court's decision relying upon the reasoning that a student's right to free speech was not absolute.¹⁴⁷ In these and other cases, the Court has deferred to the schools in determining the best way to create a safe and effective learning environment.¹⁴⁸

In defending zero tolerance policies and the infringement on the free speech rights of students, proponents of the policies emphasize the numerous instances in which the perpetrators of school violence had demonstrated their intent and capacity for violence in their writings and elsewhere, but these warnings had largely gone unnoticed. For proponents, the telltale signs were present long before any violent act was ever committed and the failure was that school personnel failed to take these warning signs seriously. Zero tolerance policies thus require that administrators are proactive and not reactive, waiting for *something* to happen.¹⁴⁹ The reason that schools take a pre-emptive stance is to prevent being held liable for failing to identify students¹⁵⁰ and possible warning signs, and for failing to intervene to prevent a tragedy or an act of violence from occurring. With mandatory referrals, school personnel no longer have the discretion to not refer a student when they lack certainty about a student's intentions. Therefore, rather than err on the side of caution, zero

146. *Id.* ("The Court examined the school's conduct in the context of its announced intention to take seriously speech that refers to guns and violence, and in light of the school's heightened concerns about the problem of guns and violence on school premises. The Court held that Baumann's response "was reasonable and within in [sic] her authority and did not implicate any fundamental constitutional rights that A.G. could assert in that context."); see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (noting that First Amendment protection for students' speech is not unlimited).

147. *Sayreville*, 333 F.3d at 422.

148. See Boylan *supra* note 126. See also Zweifler & De Beers, *supra* note 102, at 212.

149. *But see Koch*, *supra* note 26, at 190–91 (quoting John Mitchell of the American Federation of Teachers) ("[E]ven proponents say that the toughest policies won't totally eradicate violence. . . . 'If a kid is so driven that killing becomes a major thin in their lives, schools can't protect against that with just a zero tolerance policy. . . . Other things have to be in place.'").

150. Am. Psychological Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?, An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST, Vol. 852, 856 (Dec. 2008) ("Zero tolerance policies may also have increased the use of profiling, a method of prospectively identifying students who may be at risk of committing violence or disruption by comparing their profiles to those of others who have engaged in such behavior in the past. Studies by the U.S. Secret Service, the Federal Bureau of Investigation, and researchers in the area of threat assessment have consistently found that profiles constructed to promote school safety are unreliable. Such profiles tend to overidentify students from minority populations as potentially dangerous despite the fact that no minority students were involved in the most prominent late-1990s school shootings.") (internal citations omitted).

tolerance policies now err on the side of acting too quickly. They remove school personnel indecision and discretion.¹⁵¹ In the absence of such discretion, however, all behavior that fits the prohibited criteria is subject to punishment regardless of the actual conduct or the underlying intent. The rationale is clear that while the policies may interfere with students' free speech rights, some infringement is preferable to the possible alternative—an act of violence. In short, it is better to infringe upon a student's constitutional right rather than permit a tragedy from occurring.

2. *Right to Privacy*

Another legal challenge to zero tolerance policies is that they infringe upon the students' right to privacy. Exceeding the original scope of the Act, zero tolerance policies were expanded to include a range of behaviors,¹⁵² most notably the possession of drugs.¹⁵³ Students who are found to be in possession of drugs will be punished swiftly and harshly. Hence, the policies are clear and unequivocal. The problem with the policies, however, is that they fail to make a distinction between harmless over-the-counter items, such as cough drops¹⁵⁴ or ibuprofen,¹⁵⁵ and illicit drugs.

151. *But see* McNeal & Dunbar, Jr., *supra* note 74.

152. "Disruptive behavior" appears to be a catchall phrase that is used when school personnel are unable to label the conduct at issue. *See* Jennifer A. Sughrue, *Zero Tolerance for Children: Two Wrongs Do Not Make a Right*, 39 EDUC. ADMIN. Q. 238, 248 (2003) ("Other conduct that is subject to disciplinary action at the discretion of school authorities includes improper student dress, unexcused absence or tardiness, disruptive conduct, profane or abusive language, and gambling.") Russell Skiba & Jeffrey Sprague, *Safety Without Suspensions*, EDUC. LEADERSHIP, Sept. 2008, at 38, 40 ("We often assume that schools reserve suspension for serious offenses, such as fighting. But schools actually use suspension in response to a wide range of behaviors, including tardiness and truancy, disruptive behavior, noncompliance, and insubordination."); Kevin P. Brady, *Zero Tolerance or (In)Tolerance Policies—Weaponless School Violence, Due Process, and the Law of Student Suspensions and Expulsions*, 2002 BYU EDUC. & L.J. 159.

153. Michael Alison Chandler, *Birth-Control Pill Lands Fairfax Student 2-Week Suspension, Possible Expulsion*, WASH. POST, Apr. 5, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/04/04/AR2009040402591_pf.html ("For two decades, many schools have set zero-tolerance policies on drugs. That means no over-the-counter drugs, no prescription drugs, no pretend drugs in student lockers or pockets.")

154. *9-Year-Old Called Drug Dealer Over Cough Drops*, WORLD NET DAILY (Dec. 19, 2008 at 12:25 AM), <http://www.wnd.com/2008/12/83973/> ("A Florida elementary school accused a 9-year-old student of selling drugs for sharing cough drops with friends . . . The accusation arose one day earlier when the child got into trouble after her father put some Halls Defense Vitamin C cough drops in her school bag when she was recovering from a cold.")

155. *ACLU Files Lawsuit on Behalf of Maine High School Student Expelled for Taking Pain Reliever*, ACLU (Feb. 1, 2001), https://www.aclu.org/racial-justice_drug-law-reform_immigrants-

With zero tolerance policies, the infringement on the right to privacy has been implicated most notably with respect to legally permissible and proscribed medications, such as birth control pills.¹⁵⁶ For instance, a teenage girl was suspended for two weeks and faced the possibility of expulsion for taking her birth control pill,¹⁵⁷ highlighting the failure of such policies to distinguish between legal and illegal drugs.¹⁵⁸ The creators of the policies did not contemplate the range of drugs or medications that were sold over-the-counter and that students could legally possess, thus creating a blanket prohibition on all substances.¹⁵⁹ A parental exception to the policies does exist, if a student received parental consent to possess certain medications and provided notification and documentation to the school.¹⁶⁰ On its face, this solution appears to resolve the potential for invading a student's right to privacy. But it does not. By *requiring* a parental exception, zero tolerance policies run afoul of a student's right to privacy. For example, the parental consent exception therefore denies female students the right to possess contraceptives, such as birth control pills, and control their own reproductive autonomy absent parental knowledge.¹⁶¹ Proponents argue that to prevent illicit drug possession, *all* drugs should be barred or parents should provide consent. The underlying notion is that safety in general should be allowed to trump the individual privacy rights of students.

rights_national-security/aclu-files-lawsuit-behalf-maine-h. *But see* Safford v. Redding Sch. Dist., 557 U.S. 364 (2009) (noting that the strip search violated the Fourth Amendment).

156. See Chandler, *supra* note 153; Elizabeth Frost, *Zero Privacy: Schools Are Violating Students' Fourteenth Amendment Right of Privacy Under the Guise of Enforcing Zero Tolerance Policies*, 81 WASH. L. REV. 391 (2006) (discussing the application of zero tolerance policies to a hypothetical student.).

157. See Chandler, *supra* note 153.

158. See Frost, *supra* note 156 ("These policies [zero tolerance] often ban the possession of prescription and over-the-counter medication, thereby including medical contraceptives such as birth control pills, hormonal patches, and the "morning after" pill.").

159. *Id.*

160. *Id.* ("Many of these policies allow students to bring legally prescribed or over-the-counter medication to school only if the student's parent or guardian first approves the student's possession of the medication.").

161. While abortions for minors require parental consent in most states, the use of birth control does not. *Parental Consent and Notification Laws*, PLANNED PARENTHOOD (2014), <http://www.plannedparenthood.org/health-info/abortion/parental-consent-notification-laws>; *Minors Access to Contraceptive Health Care*, CONTRACEPT.ORG, <http://www.contracept.org/minorsaccess.php> (last updated Sept. 29, 2014) ("In the United States, each state has different laws and policies about whether or not minors—anyone under the age of 18—may get contraceptive prescriptions and counseling from a health care professional. Twenty-one states explicitly allow all minors to consent to contraceptive services without parental permission.").

3. *Due Process*

Another ground upon which zero tolerance policies have been challenged is due process.¹⁶² Students have attacked the constitutionality of such policies, claiming that school administrators often fail to adhere to an established process.¹⁶³ For example, students have asserted that schools have often failed to provide notice of the charges.¹⁶⁴ Considering juveniles have secured a host of due process rights in the formal juvenile justice system,¹⁶⁵ it would seem readily apparent that due process would be adhered to in the school setting, especially given the severity of the consequences that may follow.

In some jurisdictions, zero tolerance policies are viewed as being “vague and overbroad,”¹⁶⁶ thus not providing students with a clear understanding of the substance or procedure associated with the violation to the policies. The Court has not looked favorably upon such challenges, finding them to be constitutionally void.¹⁶⁷ In support of its position, the Court has deferred to the schools’ decisionmakers, thereby thwarting the attempts to challenge the constitutionality of zero tolerance policies on either due process¹⁶⁸ or equal protection grounds.¹⁶⁹ The “substantial

162. *Goss v. Lopez*, 419 U.S. 565 (1975) (discussing that students facing temporary suspension from public school were entitled to protection under the due process clause and that due process required, in connection with suspensions of up to ten days, that such a student be given notice of charges and an opportunity to present his version to authorities preferably prior to removal from school, but there were instances in which prior notice and hearing were not feasible and the immediately removed student should be given necessary notice of hearing as soon as practicable: “[O]n the basis of state law, appellees plainly had legitimate claims of entitlement to a public education. [Sections] 3313.48 and 3313.64 direct local authorities to provide a free education to all residents between five and 21 years of age, and a compulsory-attendance law requires attendance for a school year of not less than 32 weeks. It is true that § 3313.66 of the Code permits school principals to suspend students for up to 10 days; but suspensions may not be imposed without any grounds whatsoever.”) (internal citations omitted).

163. Robert C. Cloud, *Due Process and Zero Tolerance: An Uneasy Alliance*, 178 ED. LAW REP. 1 (2003).

164. *Id.*

165. *In re Gault et al.*, 387 U.S. 1 (1967).

166. Koch *supra* note 26, at 191.

167. *Id.*

168. S.G. *ex rel. A.G. v. Sayreville Bd. of Educ.*, 333 F.3d 417, 424 (2003) (discussing due process: “The requirements of procedural due process for suspension of students were set forth in *Goss v. Lopez* . . . [T]he Supreme Court held that high school students were denied due process of law when they were suspended for misconduct without a hearing. The Court stated that a student has a ‘legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause’ . . . In addition, because the suspensions could damage the students’ standing with other students and their teachers, and interfere with later opportunities for

deference” that the Court has afforded to school administrators¹⁷⁰ is in many ways similar to the deference accorded to correctional institutions in the adult context with a similar outcome.¹⁷¹ Juveniles who face discipline under a zero tolerance framework are punished harshly for infractions ranging from the severe to the trivial. Punishments are handed out for conduct that is dangerous and conduct that is creative. In an effort to increase school safety, zero tolerance policies have forced school personnel to punish students for engaging in what was once simply childhood behavior.

Opponents to zero tolerance policies have raised substantive due process challenges as well, which the Court has similarly denied. The Court has long held that education is not a fundamental right, thus making substantive due process challenges difficult. Since education is not a fundamental right, laws that impact a student’s education are evaluated under a rational basis test.¹⁷² To succeed under this test, a school simply has to show that its zero tolerance policies are “rationally related to a

higher education and employment, the Court believed that the students’ liberty interest in their reputation was also implicated.”) (internal citations omitted).

169. *Id.* at 424–25 (discussing equal protection: “In *Palmer v. Merluzzi* . . . [the Third Circuit] considered whether a suspension from participation in interscholastic sports because of drug use violated a student’s right to equal protection. Applying a rational relationship test, [the court] concluded that the school’s disciplinary action was rationally related to a valid state interest in preserving a drug-free environment in the schools and in discouraging drug use by its students. . . . [T]he school’s disciplinary action of short three day suspensions for threats of violence and similar gun play was rationally related to the valid state interest in controlling student conduct in light of the shootings at other schools nationwide and . . . recent incidents at [the] school involving threats of violence. It was not unreasonable for the principal to seek to avoid conduct which has the capacity to interfere with the orderly conduct of the school and other children’s rights to be secure.”) (internal citations omitted).

170. *See Koch, supra* note 26, at 191–92; *Aull, supra* note 27, at 193 (“Courts are similarly deferential when considering claims that sanctions under zero tolerance policies violate substantive due process, upholding disciplinary action as long as it is not arbitrary, capricious, or conscience shocking, and is rationally related to the legitimate governmental interest of maintaining an atmosphere conducive to learning. Courts have been hesitant to second-guess zero tolerance policies, even when their application produces eye-popping results. This is true even when students unknowingly violate zero tolerance rules.”); *Boylan, supra* note 126, at 38.

171. Mikel-Meredith Weidman, Comment, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505 (2004) (discussing a culture of judicial deference); *see Boylan, supra* note 126.

172. Lynn S. Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act’s Disparate Restrictions on Attorney’s Fees*, 89 CAL. L. REV. 999, 1016 (2001) (“The rational basis test, however, requires only a rational relationship between the end (the legitimate governmental objective) and the means to that end (the statute whose constitutionality is at issue).”).

legitimate state interest.”¹⁷³ For school discipline cases, a substantive due process claim will succeed only in the “rare case” when there is “no ‘rational relationship between the punishment and the offense.’”¹⁷⁴ Schools can easily demonstrate that zero tolerance policies are rationally related to keeping schools safe. By removing students who exhibit threatening behavior in any form, schools are proactively engaged in keeping the environment safe for students and personnel alike.

To date, the legal challenges to zero tolerance policies on a variety of different grounds have proven to be unsuccessful.¹⁷⁵ And yet, while there does not appear to be a valid constitutional claim, it does not mean that zero tolerance policies do not have a long-term and devastating impact on the individual student’s current and future life outcomes.¹⁷⁶ Moreover, the disruption of the student’s educational attainment will negatively impact the student’s family and community as well. By referring students directly to the juvenile justice system or indirectly causing future contacts, zero tolerance policies are not just creating a pipeline to prison but also a pathway to individual and collective disenfranchisement.

III. THE NEXT GENERATION OF DISENFRANCHISED CITIZENS

Without a process for mitigating the short-term and long-term effects of these policies, juveniles subject to zero tolerance policies will be the next generation of disenfranchised citizens. Prior to examining the relationship between zero tolerance policies and the disenfranchisement of juveniles, it is necessary to explain the concept of disenfranchisement as used in this Article and what it means to be a disenfranchised citizen.

The disenfranchised citizen, an oxymoron to be sure, is a citizen who is denied the right to vote.¹⁷⁷ In fact, “disenfranchised” means: “to deprive of

173. See *Vacco v. Quill*, 521 U.S. 793 (1997) (applying the rational basis standard of review to uphold New York’s statutes outlawing assisted suicide, which neither infringe fundamental rights nor involve suspect classifications).

174. *Rosa R. v. Connelly*, 889 F.2d 435, 439 (2d Cir. 1989) (concluding that substantive due process did not require a student to be credited with “time served” while the student was out of school awaiting expulsion proceedings that were postponed at the student’s request) (quoting *Brewer v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 264 (5th Cir. 1985)); see also *Wood v. Strickland*, 420 U.S. 308, 326 (1975) (“It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.”).

175. See *Boylan*, *supra* note 126, at 32–40 (discussing unsuccessful legal challenges and suggesting possible future challenges to zero tolerance policies).

176. See *Losen*, *supra* note 15.

177. To be clear, disenfranchisement as it pertains to the right to vote is barring an individual from exercising the right—not simply preventing that person from actually casting a ballot—although it

a franchise, of a legal right, or of *some* privilege or immunity.”¹⁷⁸ And while the deprivation of the right to vote is highlighted in the definition, it also suggests much more—the “depriv[ation] of *some* privilege or immunity.”¹⁷⁹ It is this broader, all-encompassing definition of “disenfranchised” that will be used in this Article.¹⁸⁰ Therefore, the disenfranchised citizen is not only deprived of the right to vote but also other privileges and immunities. Under this broad conceptualization there are a number of citizens that are denied rights and privileges and thus are disenfranchised citizens. The disenfranchised citizens that are the focus of this Article are those citizens that are deprived of rights because of their interaction with the criminal justice system and the application of collateral consequences.¹⁸¹

A. *The Making of a Disenfranchised Citizen*

In many instances, the disenfranchised citizen is a convicted felon or ex-offender.¹⁸² For this group of citizens, disenfranchisement attaches

may be one and the same. Alice E. Harvey, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145, 1145 (1994).

178. To disenfranchise is “to deprive of a franchise, of a legal right, or of some privilege or immunity; *especially*: to deprive of the right to vote.” *Disenfranchise*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/disenfranchise> (last visited Mar. 14, 2014) (emphasis added).

179. *Id.*

180. S. David Mitchell, *Undermining Individual and Collective Citizenship: The Impact of Exclusion Laws on the African-American Community*, 34 FORDHAM URB. L.J. 833, 838–44 (2007) (discussing T.H. Marshal’s three elements that comprise citizenship—political, social and civil); LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN* 12–36 (Princeton Univ. Press 2008) (discussing the many different definitions of citizenship).

181. See ABA Collateral Sanctions Standards, Standard 19-1.2 [Unsure on citation form here] (“[collateral sanctions are those penalties that automatically become effective upon conviction even though not included in the court’s judgment or identified on the record.”). See also MARGARET COLGATE-LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* § 1:7 (2013) (“The term ‘collateral consequences’ is of fairly recent origin in the academic literature and case law, and until recently was used interchangeably with terms such as ‘civil disabilities,’ ‘adverse legal consequences,’ and ‘indirect consequences’.”).

182. Some advocates and scholars disfavor the use of the term “ex-offender” asserting that it continues to stigmatize a particular status and prefer the phrase “formerly incarcerated persons.” The latter phrase has its merits as it emphasizes the humanity behind the status and removes the impersonal label. See, e.g., City of Philadelphia, *Mayor Nutter Signs Executive Order; Legislation Introduced to Help “Returning Citizens”*, CITY OF PHILADELPHIA (Oct. 24, 2013), available at <http://cityofphiladelphia.wordpress.com/2013/10/24/mayor-nutter-signs-executive-order-legislation-introduced-to-help-returning-citizens/> (last visited Oct. 21, 2014) (“The City of Philadelphia has already taken steps to ease the transition of returning citizens, including Ban-the-Box legislation for employers operating in the City and expanding services offered at R.I.S.E. But, it is also important that we re-examine how we refer to these people. The commonly used term ‘ex-offender’ carries with it a stigma which may

upon conviction through various collateral consequences,¹⁸³ also known as “civil disabilities.”¹⁸⁴ Collateral consequences refer to the indirect punishment that is triggered when an ex-offender is convicted.¹⁸⁵ They are vast in scope and breadth and impact all facets of an ex-offender’s life. Ex-offenders may lose political rights such as the right to vote¹⁸⁶ or to hold

increase the challenges these citizens face, while the term “returning citizen” more appropriately focuses on their engagement in the process of reintegration. As a government, the City of Philadelphia must do what it can to help their transition.”); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 678–79 (2006). Yet, some individuals may have been convicted (i.e. accepted a plea) without having ever been incarcerated. Lorelei Laird, *Ex-Offenders Face Tens of Thousands of Legal Restrictions, Bias and Limits on Their Rights*, ABA JOURNAL (June 1, 2013), available at http://www.abajournal.com/magazine/article/ex-offenders_face_tens_of_thousands_of_legal_restrictions/ (last visited Oct. 21, 2014). I use the ex-offender label to encompass the broadest category of individuals impacted by collateral consequences.

183. See generally Robert E. Shepherd Jr., *Collateral Consequences of Juvenile Proceedings: Part II*, CRIM. JUST., Fall 2000, at 41; Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153 (1999); Margaret E. Finzen, Note, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. & POL’Y 299 (2005); Taja-Nia Y. Henderson, *New Frontiers in Fair Lending: Confronting Lending Discrimination Against Ex-Offenders*, 80 N.Y.U. L. REV. 1237 (2005); Robert M.A. Johnson, *Collateral Consequences*, CRIM. JUST., Fall 2001, at 32; Marc Mauer, *Introduction: The Collateral Consequences of Imprisonment*, 30 FORDHAM URB. L.J. 1491 (2003); Kathleen M. Olivares et. al, *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10 (1996); JOAN PETERSILIA, NAT’L INST. OF JUST., WHEN PRISONERS RETURN TO THE COMMUNITY, POLITICAL, ECONOMIC, AND SOCIAL CONSEQUENCES (2000), available at <http://www.nij.gov/pubs-sum/184253.htm>.

184. They have also been referred to as “adverse legal consequences,” “collateral sanctions,” “indirect consequences,” “enmeshed consequences,” and “significant entanglements.” See COLGATE-LOVE ET AL., *supra* note 52, § 1:7. But in the words of William Shakespeare, “What’s in a name? That which we call a rose/By any other name would smell as sweet.” WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 2, sc. 2. Regardless of what they are called, an individual who is convicted will encounter some kind of collateral sanction that deprives that offender of certain rights and / or privileges. See generally COLGATE-LOVE ET AL., *supra* note 52.

185. Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1111 (2006) (“In contrast to direct consequences, which are defined as the immediate and automatic effects of criminal convictions, collateral consequences are defined as the indirect sanctions that result from criminal convictions. Some of these consequences, such as ineligibility for public benefits and the denial of voting rights, are imposed automatically upon the conviction. Others, including some employment-related restrictions, are imposed at the discretion of agencies that are independent of the criminal justice system. Regardless of their source, these consequences affect numerous aspects of the individual’s life and, as a result, often outlast the direct consequences.”).

186. See Regina Austin, *“The Shame of it All”: Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173 (2005); Angela Behrens, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231 (2004); Traci Burch, *A Study of Felon and Misdemeanor Voter Participation in North Carolina*, THE SENTENCING PROJECT (Feb. 2007), archived at <http://perma.cc/78CE-JEN7>; Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement*,

public office.¹⁸⁷ Ex-offenders may also lose legal rights such as the right to sit on a jury;¹⁸⁸ to own a firearm;¹⁸⁹ to receive public housing;¹⁹⁰ or social rights, such as the right to obtain occupational licenses.¹⁹¹

Ex-offenders, while stripped of these rights and privileges upon conviction, often have a mechanism for getting these rights restored. In some jurisdictions, the rights restoration process is automatically triggered

and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?, 92 GEO. L.J. 259 (2004); Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159 (2001); Roger Clegg et al., *The Bullet and the Ballot? The Case for Felon Disenfranchisement Statutes*, 14 AM. U. J. GENDER SOC. POL'Y & L. 1 (2006); Marisa J. Demeo & Steven A. Ochoa, *Diminished Voting Power in the Latino Community: The Impact of Felony Disenfranchisement Laws in Ten Targeted States*, MALDEF (2003), <http://www.maldef.org/assets/pdf/FEB18-LatinoVotingRightsReport.pdf>; Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753 (2000); Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727 (1998); ELIZABETH A. HULL, *THE DISENFRANCHISEMENT OF EX-FELONS* (Temple Univ. Press 2006); Afi S. Johnson-Parris, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 VA. L. REV. 109 (2003); JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (Oxford Univ. Press 2006); Debra Parkes, *Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 71 (2003); Brian Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519 (2003); Jason Schall, *The Consistency of Felon Disenfranchisement with Citizenship Theory*, 22 HARV. BLACKLETTER L.J. 53 (2006); Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993).

187. Andrea Steinacker, *The Prisoner's Campaign: Felony Disenfranchisement Laws and the Right to Hold Public Office*, 2003 B.Y.U. L. Rev. 801.

188. James L. Buchwalter, Annotation, *Disqualification or Exemption of Juror for Conviction of, or Prosecution for, Criminal Offense*, 75 A.L.R. 5th 295 (2000); Hiroshi Fukurai et al., *Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection*, 22 J. BLACK STUD. 196 (1991); Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003); Paul J. Komives & Peggy S. Blotner, *Loss and Restoration of Civil Rights Affecting Disqualification for Federal Jury Service*, 70 MICH. B.J. 542 (1991); Amanda L. Kutz, Note, *A Jury of One's Peers: Virginia's Restoration of Rights Process and its Disproportionate Effect on the African American Community*, 46 WM. & MARY L. REV. 2109 (2005)

189. See COLGATE-LOVE ET AL., *supra* note 52 §§ 2:29–2:36 (discussing firearm restrictions for former offenders).

190. See COLGATE-LOVE ET AL., *supra* note 181, § 2:17.

191. Debbie A. Mukamal, *Confronting the Employment Barriers of Criminal Records: Effective Legal and Practical Strategies*, 33 CLEARINGHOUSE REV. 597 (2000); Shawn Bushway et al., *Private Providers of Criminal History Records: Do You Get What You Pay For?*, in *BARRIERS TO REENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA* 174–200 (Shawn Bushway et al. eds., 2007); Harry J. Holzer et al., *The Effect of an Applicant's Criminal History on Employer Hiring Decisions and Screening Practices: Evidence from Los Angeles*, in *BARRIERS TO REENTRY*, *supra*, at 117–50; Becky Pettit & Christopher J. Lyons, *Status and the Stigma of Incarceration: The Labor-Market Effects of Incarceration, by Race, Class, and Criminal Involvement*, in *BARRIERS TO REENTRY*, *supra*, at 203–26; William J. Sabol, *Local Labor-Market Conditions and Post-Prison Employment Experiences of Offenders Released from Ohio State Prisons*, in *BARRIERS TO REENTRY*, *supra*, at 257–303.

upon release from incarceration, or the termination of probation or parole.¹⁹² In others, ex-offenders that are no longer under the supervision of the criminal justice system must wait a predetermined period of time to apply to have their rights restored. Still, other jurisdictions require a gubernatorial pardon as the only means to restore rights.¹⁹³ The process of rights restoration differs not only across jurisdictions but also depends on the type of offense of which an individual was convicted and whether the individual is even eligible to have rights restored.¹⁹⁴ Some rights and privileges, such as the right to serve on a jury, are lost permanently.¹⁹⁵ An ex-offender that is prohibited from exercising any right or from enjoying any privilege for any length of time is denied full citizenship. In other words, the ex-offender who faces either a mandatory or discretionary deprivation of any right or privilege is a disenfranchised citizen. And yet, the ex-offender never relinquished his or her citizenship during the criminal justice process.¹⁹⁶

B. The Adult Disenfranchised Citizen

With the largest incarcerated population in the world,¹⁹⁷ the United States has several million disenfranchised adult citizens.¹⁹⁸ Comparably,

192. Each jurisdiction has different rules detailing the conditions under which the right to vote is not only lost but also when the right to vote is restored. There are two jurisdictions, Maine and Vermont, that permit incarcerated offenders to cast a ballot. See Mitchell, *supra* note 180, at apps. I–III; *National Inventory of Collateral Consequences*, A.B.A. (2013), <http://www.abacollateralconsequences.org/>.

193. See COLGATE-LOVE ET AL., *supra* note 181, § 7:6–7:13 (discussing the various state pardon processes).

194. For example, felons are prohibited from possessing firearms at the state and federal level but may have the right restored upon receiving a gubernatorial and presidential pardon. *Id.* § 2:35.

195. See Kalt, *supra* note 188; Komives & Blotner, *supra* note 188.

196. *Trop v. Dulles*, 356 U.S. 86, 92–93 (1958) (“Citizenship is not a license that expires upon misbehavior. The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation. The citizen who fails to pay his taxes or to abide by the laws safeguarding the integrity of elections deals a dangerous blow to his country. But could a citizen be deprived of his nationality for evading these basic responsibilities of citizenship? . . . [C]itizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen’s conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship . . . [the] fundamental right of citizenship is secure.”)

197. Nicole Flatow, *The United States Has the Largest Prison Population in the World—and It’s Growing*, THINKPROGRESS.ORG, available at <http://thinkprogress.org/justice/2014/09/17/3568232/the-united-states-had-even-more-prisoners-in-2013/> (last visited Oct. 21, 2014) (“Both in raw numbers and by percentage of the population, the United States has the most prisoners of any developed country in the world—and it has the largest total prison population of any nation. That didn’t change in 2013.”)

there are tens of thousands of juveniles in the juvenile justice system, many of whom had their initial contacts as the result of zero tolerance policies. Prior to discussing the disenfranchisement of juveniles, this Article will highlight how the denial of the right to vote or the denial of employment creates a disenfranchised adult citizen.¹⁹⁹

1. *The Disenfranchised Citizen Loses the Right to Vote*

Voting disenfranchisement laws prevent those convicted of a crime, most often a felony, from casting a ballot.²⁰⁰ This right, a fundamental one, is denied to convicted felons in nearly all jurisdictions.²⁰¹ In these jurisdictions, the right to vote could be restored either automatically or after the completion of a rights restoration process.²⁰² The denial of the right to vote is mandatory and is triggered upon conviction in all jurisdictions, with the exceptions of Maine and Vermont.²⁰³ Offenders are stripped of *the* fundamental right²⁰⁴ that is both a practical and symbolic representation of citizenship.

After several years in which the prison population dropped slightly, the raw number of inmates in United States custody went up again in 2013.”).

198. Proponents of collateral consequences, who are often most vocal in the voting context, declare that such consequences are a part of the punishment and that ex-offenders should have to earn their rights back. *Incarceration*, THE SENTENCING PROJECT (2014), <http://www.sentencingproject.org/template/page.cfm?id=107>; see also Clegg, *supra* note 186.

199. In an earlier article, I contend that the deprivation of *any* right or privilege as a result of a criminal conviction results in the loss of full citizenship. See Mitchell, *supra* note 180. I selected the right to vote because it is a fundamental right. See Harvey, *supra* note 177. And, I selected the denial of employment as the other privilege because of its relationship to educational attainment. See Dionissi Aliprantis & Mary Zenker, *Educational Attainment and Employment*, ECON. TRENDS, Mar. 2011 (“Labor market experiences can be highly varied for individuals with different levels of educational attainment. Higher levels of educational attainment tend to be associated with higher wages, and there is evidence that the benefits of a degree have been increasing in recent decades in the United States. For example, the wages of high school dropouts have dropped since the early 1970s, while the wages of college graduates relative to high school graduates have increased.”).

200. In some instances, individuals with misdemeanor convictions are denied the right to vote provided that they are incarcerated during the electoral process. See COLGATE-LOVE ET AL., *supra* note 181, 42 § 2:3 (“In some states, some categories of misdemeanants are also disenfranchised. In most of these states, misdemeanor offenders lose the right to vote only while confined to jail . . .”).

201. *Id.* § 2:3

202. See, e.g., *Virginia’s Rights Restoration Process*, COMMONWEALTH OF VA., available at <https://commonwealth.virginia.gov/judicial-system/restoration-of-rights/> (last visited Oct. 21, 2014).

203. COLGATE-LOVE ET AL., *supra* note 52, at apps. A-29, A-184, A-56, A-320.

204. MANZA & UGGEN, *supra* note 186 (“The right to vote is a[] precious constitutional right that, if denied, silences a group already on society’s margins. Denying prisoners and ex-convicts the vote serves no legitimate penal purpose, impedes rehabilitation and denies all of us the views of those who have experienced prison from the inside.”).

By denying an ex-offender the right to vote, the individual is denied the opportunity to participate directly in the democratic process. The impact, however, extends beyond the individual and silences entire communities because of the concentration of ex-offenders in certain communities.²⁰⁵ The disenfranchisement of entire communities, specifically African-American communities, is a direct result of the mass incarceration policies that have existed for quite some time.²⁰⁶

While it is easy to see the connection between the loss of the right to vote and the disenfranchised citizen, there are other rights and privileges that ex-offenders are deprived of and that have a greater impact on an ex-offender's daily life.

2. *The Disenfranchised Citizen Denied Employment*

After having been convicted of an offense, it is difficult for ex-offenders to find gainful employment in either the public or the private sector.²⁰⁷ Unlike the denial of the right to vote, the denial of employment is often not automatic but up to the discretion of the potential employer.

An ex-offender may be denied employment because of the type of offense that was committed. For instance, an ex-offender who committed a violent crime may be denied the opportunity to work in a setting where there are sharp and dangerous objects even though the circumstances of the offense did not involve dangerous objects or violence.²⁰⁸ Hence, there often is not a rational relationship between the offense and the employment denial. From a policy perspective, there may be a legitimate reason to bar a violent ex-offender from working in such a setting. But such restrictions are not individualized, thereby failing to account for the nature of the offense, the length of time that has passed since the offense,

205. *Reentry Mapping Network*, URBAN INSTITUTE (2014), available at http://www.urban.org/reentry_mapping/.

206. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010).

207. See Harry J. Holzer et al., *The Effect of an Applicant's Criminal History on Employer Hiring Decisions and Screening Practices: Evidence from Los Angeles*, in *BARRIERS TO REENTRY*, supra note 191, at 174–200 (Shawn Bushway et al. eds., 2007); Becky Pettit & Christopher J. Lyons, *Status and the Stigma of Incarceration: The Labor-Market Effects of Incarceration, by Race, Class, and Criminal Involvement*, in *BARRIERS TO REENTRY*, supra note 191, at 203–26; William J. Sabol, *Local Labor-Market Conditions and Post-Prison Employment Experiences of Offenders Released from Ohio State Prisons*, in *BARRIERS TO REENTRY*, supra note 191, at 257–303.

208. *Chandler v. Allen*, 108 S.W.3d 756 (Mo. Ct. App. 2003) (sex offender properly dismissed from job in deli on public safety grounds).

and other relevant factors that may indicate an ex-offender's propensity to re-offend.

Another way in which ex-offenders are impacted in the employment context is through the denial of an occupational license.²⁰⁹ For many occupations, an occupational license is required.²¹⁰ Ex-offenders are often prevented from obtaining such licenses because the governing associations find that ex-offenders lack moral turpitude. Thus, an individual is deemed unemployable solely because of membership in the ex-offender status group.²¹¹ Several things have been promoted to remove the stigma associated with a criminal conviction. For example, government agencies permit a person's status as an ex-offender to be a consideration but it is impermissible to be the *sole* factor for employment decisions.²¹² Additionally, there has been a growing movement for jurisdictions to remove the question of whether an individual has been convicted of a felony from job applications; this movement is known as "ban the box."²¹³ Municipalities, cities and states have removed the felony conviction question from public employment applications²¹⁴ and require contractors with the public entity to do the same.²¹⁵ Some jurisdictions have gone as far as requiring private employers to do the same.²¹⁶ While there are numerous efforts to reduce the stigma associated with a criminal conviction, an ex-offender often cannot outrun the past. The same holds true for juveniles.

209. See COLGATE-LOVE ET AL, *supra* note 52, § 1:12.

210. *Id.* §§ 2:8–2:10 (detailing the numerous occupations that require a license at the state and federal level).

211. Max Weber, *Class, Status and Party*, in CLASS, STATUS AND POWER: SOCIAL STRATIFICATION IN COMPARATIVE PERSPECTIVE 24 (Reinhard Bendix & Seymour Martin Lipset eds., 2d ed. 1966).

212. U.S. E.E.O.C., 915.002, EEOC ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2014), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

213. "Ban the box" is a national movement that encourages employers to remove the question: "Have you ever been convicted of a felony?" from employment applications. Proponents seek to have employers delay the criminal background check to later in the hiring process to increase the likelihood that an ex-offender will be judged as an individual and not a past conviction. Opponents contend that this forces employers to incur additional costs and unnecessarily delays the hiring process. *Ban the Box*, NATIONAL EMPLOYMENT LAW PROJECT (2014), archived at <http://perma.cc/7NDK-JSB3>.

214. *Id.*

215. *Id.*

216. *Id.*

C. *The Next Generation of Disenfranchised Citizens*

Zero tolerance policies contribute to the next generation of disenfranchised citizens.²¹⁷ Understanding the disenfranchised juvenile citizen is a far more complex process than it is to understand adult offenders. Due to the structure of the juvenile justice system, it is necessary to consider the following factors when evaluating the scope and breadth of juvenile disenfranchisement: (1) juveniles convicted in adult criminal court; (2) juveniles adjudicated delinquent; and (3) juveniles suspended or expelled from school and in the juvenile justice system. While many juveniles will gain the right to vote upon reaching the age of majority, juveniles whose offenses are severe enough will be tried as adults and face adult consequences. Some juveniles may be disenfranchised before ever having been enfranchised.²¹⁸ Juveniles facing the extreme and unyielding disciplinary responses that exist because of zero tolerance policies will more likely than not become disenfranchised citizens.²¹⁹

1. *Juveniles Convicted in Adult Criminal Court*

The number of juveniles arrested annually is staggering.²²⁰ In 2008, there were approximately two million juveniles arrested.²²¹ While not all of these arrests result in charges being filed or an official disposition, approximately 250,000 are processed in adult court.²²² Regardless of how

217. Jenny E. Carroll, Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings: Apprendi, Adult Punishment, and Adult Process, 61 HASTINGS L.J., 175 (2009).

218. David M. Altschuler & Rachel Brash, *Adolescent and Teenage Offenders Confronting the Challenges and Opportunities of Reentry*, 2 YOUTH VIOLENCE & JUV. JUST. 72 (2004); Carroll, *supra* note 217; Daniel P. Mears & Jeremy Travis, *Youth Development and Reentry*, 2 YOUTH VIOLENCE & JUV. JUST. 3 (2004); Joseph B. Sanborn Jr., *Striking Out on the First Pitch in Criminal Court*, 1 BARRY L. REV. 7 (2000).

219. See Stinchcomb, *supra* note 63, at 130 (“When students are expelled—regardless of the reason—they are essentially committed to a lifetime of struggle against the material and intellectual poverty that inevitably shadows those lacking a high school education . . . [G]un free school zones represent a zero tolerance policy that mandates a 1-year expulsion. Especially for those who were already borderline students or who were contemplating leaving school voluntarily, a 1-year expulsion can become the catalyst for permanent withdrawal.”).

220. CHARLES PUZZANCHERA, OFF. OF JUV. JUST. & DELINQUENCY PREVENTION, JUVENILE ARRESTS 2008 (2009).

221. *Id.*

222. NEELUM ARYA, CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2005 TO 2010: REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM (2011). For those who are unaware of the interaction between juveniles and the adult criminal justice system, juveniles find themselves in the adult criminal justice system either because of a transfer to adult court

the case arrived in adult criminal court, a juvenile in adult criminal court is considered an adult for the purposes of the criminal justice system.²²³ As a result, the prospect of rehabilitation is not at the forefront of the court's mind.²²⁴ Thus, unlike in the juvenile justice system where the emphasis is on rehabilitation and juveniles are adjudicated delinquent, a juvenile tried as an adult is considered to be an adult.²²⁵ Therefore, a juvenile tried as an adult suffers the collateral consequences that attach upon conviction for an adult,²²⁶ e.g., losing the right to vote. In the case of the juvenile, however, disenfranchisement comes before the juvenile was ever enfranchised. Moreover, this same juvenile can be barred from receiving an occupational license before ever having received the necessary training to be employed in any occupation. In short, juveniles who are convicted as adults are stripped of their full citizenship rights before those rights were ever granted to them.²²⁷ And yet, ironically, juveniles convicted in adult criminal court have to navigate the byzantine restoration process to have their rights and privileges restored, even though the juveniles never actually possessed or exercised the rights before being deprived of them.

Juveniles that are tried as adults will unequivocally be among the next generation of disenfranchised citizens. It is an unavoidable certainty. For juveniles that have adult collateral consequences attach upon conviction,

or because a prosecutor filed a case directly in adult criminal court. Cases that are filed directly in adult criminal court are often tried there because of either criminal statutes that require the cases to be filed there or because a prosecutor feels that the heinous nature of the conduct demands the case to be filed in adult criminal court.

223. Edward P. Mulvey & Carol A. Schubert, *Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court*, JUV. JUST. BULL., Dec. 2012, at 2 (discussing the effects of transferring youths to adult criminal court).

224. Malcolm C. Young & Jenni Gainsborough, *Prosecuting Juveniles in Adult Court: An Assessment of Trends and Consequences*, THE SENTENCING PROJECT, at 2 (Jan. 2000), <http://www.prisonpolicy.org/scans/sp/juvenile.pdf> (“Fear of out-of-control juvenile crime and a coming generation of “super-predators,” compellingly if erroneously described publicly and to Congress in 1996, has undermined the traditional practice of treating young offenders as different from adult criminals—less culpable because of their age and more amenable to rehabilitation. In recent years, the focus has turned to punishment and in particular to the transfer of increasing numbers of youthful offenders from juvenile to criminal courts.”).

225. *Id.* at 4 (discussing the various processes by which juveniles come under the jurisdiction of adult criminal court).

226. Ashley Nellis, *Addressing the Collateral Consequences of Convictions for Young Offenders*, THE CHAMPION, July–Aug. 2011, at 20, 21, available at <http://sentencingproject.org/doc/publications/Collateral%20Consequences%20NACDL%202011.pdf> (“The philosophical beginnings of the juvenile justice system rested on the notion that young people who become delinquent were amenable to reform and the system should respond by providing ample rehabilitation services. It was also emphasized that youth should be spared from the stigma of involvement with the adult criminal justice system and not be branded as ‘criminals.’”).

227. See Young & Gainsborough, *supra* note 224, at 7.

their reentry and pathway to successful reintegration²²⁸ is far more difficult than the adults in the criminal justice system.²²⁹ Unlike adult offenders that may have had opportunities available to them prior to conviction and incarceration, juveniles who have been convicted in adult criminal court have had their education forcibly interrupted.²³⁰ Thus, educational or other opportunities are not available to them.²³¹

Another consequence of zero tolerance policies is that mental health counseling and referrals have been replaced with law enforcement referrals.²³² Thus, undiagnosed mental health issues remain undiagnosed as students are subjected to the criminal justice system instead of the mental health system. School transgressions have not only prompted students' expulsion (or suspension) but have also merited a referral to law enforcement, preventing the school's opportunity to provide a necessary

228. Reentry and reintegration are the processes by which ex-offenders discard the burden of a conviction upon releases from actual incarceration or conditional supervision. The process varies from one jurisdiction to the next. In some jurisdictions, ex-offenders have their rights restored automatically upon release. In others, they must apply to have their rights restored. In the majority, however, full restoration of rights is almost impossible because some rights are denied unless the ex-offender receives either a gubernatorial or a presidential pardon and pardons are difficult to receive. *See generally*, COLGATE-LOVE ET AL., *supra* note 52, § 7:1 et. seq. *See also* JEREMY TRAVIS, BUT THEY ALL COME BACK, THE URBAN INSTITUTE PRESS, Ch. 5 (2005) (discussing prisoner reentry and public safety).

229. Nellis, *supra* note 226, at 20 ("Juveniles and young adults who become delinquent are handled by the system during a key developmental phase of adolescence. Often lacking the necessary skills to cope with adult responsibilities when they are released, many youth face unemployment, school reenrollment challenges, and homelessness. Plans are rarely in place to support youth as they attempt to move past their convictions.").

230. *See* Young & Gainsborough, *supra* note 224, at 6.

231. Nellis, *supra* note 226, at 21 ("Youth who have been transferred to the adult system face additional problems. Juveniles incarcerated in adult facilities are 30 percent more likely to be rearrested than those retained in the juvenile justice system, both sooner and for more serious offenses.⁶ Incarcerated juveniles receive significantly less access to age appropriate rehabilitative, educational, or vocational services than they would in the juvenile justice system. This sets them up for failure upon release. Additionally, programs offered in the adult system are not structured for juveniles, and correctional officers are often not aware of developmental differences between adults and youth, who require specialized handling and treatment. As a result, youth housed in adult facilities and released as young adults exhibit more negative outcomes than if they had been held in a juvenile facility.").

232. *See* Skiba & Peterson, *supra* note 73 (citing the National Institutes of Mental Health, *Priorities for Prevention Research at NIMH: A Report by the National Advisory Mental Health Council Workshop on Mental Disorders Prevention Research*, NIH (Washington, D.C. 1998) ("[A] recent task force on prevention research, commissioned by the National Institutes of Mental Health, found wide gaps in our knowledge, noting that 'virtually no preventive services research of any kind was found under NIMH sponsorship.'"); *Cradle to Prison Pipeline*, *supra* note 46, at 10 ("Schools have seen success in reducing suspensions when they implement programs designed to address students' mental health and other needs and train staff to recognize and respond to those needs, rather than punish them.").

medical intervention, and instead requiring a punitive one. And the problem lies in the range of conduct that goes unexplored but is simply referred to law enforcement. For example, “[the] 13-year-old [that] was arrested . . . in Oklahoma City, [who] accused of violating a little-known city ordinance that prohibits possession of a permanent marker in some circumstances,”²³³ or the student who was arrested for spilling milk and then refusing to clean it up.²³⁴ No longer is juvenile conduct or misbehavior viewed as a symptom of a problem to be solved through education and counseling. Schools now substitute incarceration for instruction, all in the name of safety.²³⁵

2. *Juveniles Adjudicated Delinquent*

Collateral consequences for juveniles that are adjudicated delinquent are different than those of juveniles who have been convicted in adult criminal court. In the long term, however, the collateral consequences that they face are similar. For juveniles that are adjudicated delinquent, their housing options may be negatively impacted²³⁶ or their employment options severely reduced.²³⁷ In the end, a juvenile need not be tried in adult criminal court to be disenfranchised and stripped of full citizenship. With zero tolerance policies referring students to law enforcement without

233. Megan Rolland, *Using Marker at School Leads to Oklahoma Teen’s Arrest*, NEWSOK, available at <http://newsok.com/using-marker-at-school-leads-to-oklahoma-teens-arrest/article/3525768> (last visited Oct. 22, 2014).

234. *Busted Over Spilled Milk*, *supra* note 54.

235. Beverly Ford, “Zero Tolerance” Policies Lead to Thousands of Lost School Days for Massachusetts Students, THE REPUBLICAN NEWSROOM (Jan. 29, 2012), available at http://www.masslive.com/news/index.ssf/2012/01/zero_tolerance_policies_lead_t.html (last visited Oct. 22, 2014) (discussing the case of “a Somali boy who was expelled from high school . . . after he poked another student with a pencil. Despite no prior disciplinary record, the 16-year-old was cited for using the pencil as a weapon, a charge which mandated immediate expulsion under the school’s code of conduct . . . that incident remains a troubling reflection on what is happening in classrooms throughout the Bay State, where school administrators are tossing misbehaving youngsters out of class in the name of school safety.”).

236. *See* Pinard, *supra* note 185, at 1114 (“For instance, as with adults, juveniles could be disqualified from residing in public housing because of their adjudications. Professor Kristin Henning has illustrated that some housing authorities, in addition to conducting background checks for adult applicants, can investigate whether any member of the family unit, including a juvenile member, has been convicted of specific disqualifying offenses.”).

237. *Id.* at 1115 (“Juvenile adjudications may also limit future employment opportunities. For example, adjudications could impact an individual’s eligibility to serve in the military. As a result, adjudications can directly affect juveniles’ future economic mobility.”).

institutional discretion, juveniles are subject to being denied future opportunities like countless adult ex-felons.²³⁸

While juvenile criminal activity can trigger expulsion under zero tolerance policies,²³⁹ the argument asserted here is that childhood acts have been elevated under zero tolerance policies to invite participation of the juvenile justice system to an unprecedented and unnecessary level. Zero tolerance policies have removed the discretion which would have allowed educators to disentangle the serious breaches of conduct from childish acts that are rebellious or that evince oppositional culture. As a result, more juveniles have more frequent contacts with the juvenile system, and with each additional contact, citizen disenfranchisement becomes more of a reality.

3. *Juveniles in the Pipeline—Suspended or Expelled*

The zero tolerance policies and felon disenfranchisement laws reflect ideas about social control that are cut from the same cloth. With respect to juveniles, the zeal to protect and create safe and secure schools has removed discretion and categorized every violation identically. The same is true for adult felon disenfranchisement. Yet, not all childhood behavior rises to the level of being criminal.

When individuals are denied fundamental rights and punished more severely than is necessary to address the offense, it breeds contempt and disrespect for the law. Minor schoolyard infractions are being transformed into criminal cases under zero tolerance policies. No longer is punishment a note home, detention, extra homework, cleaning the blackboard; it is now contact with the juvenile justice system and being placed in a juvenile facility with other adolescents who may have committed more serious crimes. By punishing conduct without regard for circumstance or context, zero tolerance policies are another means with which to warehouse the most expendable, and vulnerable among us.

Disciplining adolescents through exclusion, i.e. suspension or expulsion from school or placement in a juvenile facility, is not qualitatively different than disenfranchising adults. Excluding minors is

238. See *supra* Part III.B for a discussion of the disenfranchisement of adult citizens.

239. Pinard *supra* note 185, at 1115 (“Lastly, juveniles can face consequences that are unique to their status as juveniles. Specifically, juvenile adjudications can impact immediate educational opportunities. For example, public schools, acting pursuant to zero tolerance policies, often expel students who have been adjudicated in juvenile court. . . . As a result, juveniles can lose both short and long-term opportunities because of their involvement with the juvenile justice system.”).

the first step in the alienation and marginalization of a new population of students. When we criminalize childhood, we are creating the next generation of disenfranchised citizens. Reentry and reintegration for adults is already a difficult proposition; when we have to assist with the reentry and reintegration of adolescents who have been disenfranchised for so long, we have an even longer path to travel.

IV. PRESCRIPTION FOR RE-ENFRANCHISING A GENERATION

For the disenfranchised juvenile, the prospect of successfully reentering society is made more difficult with educational interruptions. To mitigate the negative impact associated with suspensions, expulsions, and referrals to the juvenile justice system, a different approach is necessary. The failure to ameliorate the harsh penalties associated with zero tolerance policies will not only result in a generation of disenfranchised citizens but will also result in a generation that is unprepared. The lack of preparation will result in a reliance on the underground economy²⁴⁰ and hence additional criminal justice costs. The following are a few prescriptions on halting the expansion of the next generation of disenfranchised citizens.

A. *Remove Zero Tolerance Policies*

Zero tolerance policies are complex and complicated. The intent behind the policies is to create a safe environment for students to learn and for school personnel to work. The policies were designed to target weapons possession, but were expanded to include a range of behavior beyond the possession of weapons. In practice, in some jurisdictions, zero tolerance policies removed the discretion that school personnel once had to address childhood conduct. In an effort to appear unbiased and curtail all negative behavior, the policies required a one-size-fits-all approach. In an effort to make schools safe and escape liability, schools have instituted draconian

240. David Dante Troutt, *Ghettoes Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427, 474–76 (2000) (“Related to disparate services and the institutionalized deficiencies of the ghetto’s formal economic structures is the web of informal economic arrangements that prevail in these areas . . . The informal economy of the inner city is an expression of its resistance to chronic marginalization, and it does more than provide goods and services; it also represents a will, a way, and a heritage of survival for inner-city residents . . . [I]t is only important to note that such informal economic activity can only become normal in an antimarket, unwatched by, and excluded from, the social and economic dynamics beyond its borders.”).

policies that categorize all students the same without regard for individual circumstances.²⁴¹ The easiest—albeit least politically palatable—solution would be to do away with such policies altogether.

By removing zero tolerance policies and the language of zero tolerance from the lexicon and practice of educational discipline, the absurd results of suspending or expelling students for nonthreatening and childish behavior would be gone. It would allow instructors to exercise discretion and utilize a student's misconduct as a teachable moment would be present again. While doing away with such policies would remove the absurd results that have occurred under its application, it would not do away with a problem that students contend still exists and is evident with any disciplinary approach—inappropriately applied discretion.²⁴²

Zero tolerance policies are supposed to remove discretion and treat all students equally. When educators have adhered to the blackletter of the policies, it has produced absurd cases of students being suspended or expelled for creative writing,²⁴³ drawing pictures,²⁴⁴ or playground games and activities.²⁴⁵ According to some students, school personnel have not applied the policies without such discretion²⁴⁶ and one can only hazard a guess that it is because school personnel disagree with policies.²⁴⁷ To

241. *But see* McNeal and Dunbar *supra* note 74 (indicating that the application of non-discretionary policies were actually applied with discretion).

242. *See id.*; *see also*, Brownstein, *supra* note 99 (“Even in the age of zero tolerance, many school districts have disciplinary codes that allow for a great deal of discretion by teachers and school-level administrators. In some cases, school personnel have options beyond suspension, expulsion or arrest, but are simply unfamiliar with effective alternatives to these measures.”).

243. Steve Watson, “School Kid Suspended And ARRESTED For Imagining Shooting A Dinosaur,” *available at* <http://www.infowars.com/school-kid-suspended-and-arrested-for-imagining-shooting-a-dinosaur/> (last visited on Dec. 6, 2014) (“In another case of school officials adhering to ridiculous zero tolerance policies, a student from South Carolina was suspended and arrested by police recently after writing an imaginative story about using a gun to shoot a dinosaur.”). *See generally* Brain Dead, *available at* <http://www.suspensionstories.com/brain-dead/> Suspension Stories for an archive of stories about the impact of zero tolerance policies (last visited on Dec. 6, 2014).

244. *See Stop Tolerating Zero Tolerance*, EDUC. WORLD, *available at* http://www.educationworld.com/a_issues/issues303.shtml (“In Jefferson County, Missouri, a fifth-grader was suspended for drawing a picture of a burning World Trade Center and smiling as he showed the picture to classmates. A school district representative called the child’s behavior ‘threatening.’”).

245. *See* Stinchcomb, Bazemore & Riestenberg *supra* note 63, at 127.

246. *See* McNeal & Dunbar, *supra* note 74.

247. Ellen M. Boylan & Jennifer Weiser, *Survey of Key Education Stakeholders on Zero Tolerance Student Discipline Policies*, EDUC. LAW CTR. 4, *available at* http://www.edlawcenter.org/assets/files/pdfs/publications/Survey_ZeroTolerance.pdf (last visited on Dec. 6, 2014) (“Of the four organizations that can be said to actively support zero tolerance (American Federation of Teachers (AFT), National Education Association (NEA), National Association of Elementary School Principals (NAESP) and National Association of Secondary School Principals (NASSP), the general consensus is that there are significant problems in the way such policies are written and implemented. Zero

remove the bias disproportionate impact of the policies are and to restore students' faith in how educational discipline is meted out, it is necessary to remove zero tolerance policies altogether.²⁴⁸ Given that the policies have such strong support, especially from teachers,²⁴⁹ a better option may be to limit the scope of the policies.

B. Limit the Scope of Zero Policies

Assuming that consensus on the first suggestion is not possible, another recommendation would be to limit the scope of zero tolerance policies. The guidelines for limiting such policies is based upon the intended scope of the Gun-Free Schools Act—the prevention of weapons and explosive devices. Initially, when zero tolerance policies were introduced, the purpose was to improve school safety through keeping weapons and other dangerous devices out of schools.²⁵⁰ In an effort to obtain federal funding, schools drafted policies that unnecessarily went far beyond the legislative scope.²⁵¹ The easy fix is to narrow the focus of zero tolerance policies to serious conduct that merits such a drastic response.

The difficulty associated with limiting zero tolerance policies is determining what constitutes “serious conduct.” One would think that banning the possession of all weapons would be best and easiest place to begin a discussion of limiting such policies; and, yet that has even proven to cause problems. For example, the student who went duck hunting before school was suspended for having a gun in his vehicle parked on a

tolerance policies are thought by those organizations to be appropriate only for serious offenses, such as lethal weapons, illegal drugs, or violent assaults, but their support for zero tolerance is not dependent on the nature of the offense.”).

248. Cheryl W. McCune, *Schools' Zero Tolerance Policies: Effective Deterrent or Draconian Overreaction?*, NEW FOUNDATIONS, available at <http://www.newfoundations.com/PracEthics/McCune.html> (last visited on Dec. 6, 2014) (advocating for getting rid of zero tolerance policies).

249. See Boylan & Weiser *supra* note 247, at 5 (“Teachers appear to be the strongest supporters of zero tolerance . . . discipline policies that send a strong message that certain behaviors will not be tolerated by imposing predetermined punishment for specific offenses . . . AFT’s position is that students who bring lethal weapons or illegal drugs to school, or who commit violent assaults against others, should be suspended or expelled . . . AFT acknowledges that zero tolerance policies are often poorly written and administered, it does not feel that those problems significantly undermine the value of zero tolerance policies.”).

250. See *supra* Part II.A for a discussion of the evolution of zero tolerance policies in the wake of the passage of the Gun Free Schools Act.

251. *Id.*

street near campus.²⁵² While the outright restriction of weapons possession and protecting the immediate vicinity makes sense, the difficulty lies in what may be an innocent mistake, such as the duck-hunting, teen and averting a major tragedy. Any type of limiting policy will indeed have its critics. The idea is that such policy will officially reinstate discretion into the conversation and rather than simply suspending or expelling a student, schools can engage in problem solving with the student.

A limited zero tolerance policy would at a minimum narrow the scope and type of conduct that is eligible for suspension and expulsion to those acts that are egregious. Conduct that is an imminent threat would merit a drastic response. And yet, this response calls for school personnel to exercise discretion and common sense.

C. Restorative Justice

The limitation on the scope of conduct that is covered under zero tolerance policies is insufficient without a restorative justice approach. The restorative justice framework permits school administrators to engage in teachable moments and address behavior that falls outside the scope of what the Gun Free Schools Act intended. It will allow schools to handle physical or assaultive behavior in a way that addresses the root causes and not the symptoms. Restorative justice is defined as “a way of dealing with victims and offenders by focusing on the settlement of conflicts . . . and resolving the underlying problems which cause it. . . . Central to [restorative justice] is the recognition of the community, rather than criminal justice agencies, as the prime site of crime control.”²⁵³ Under a restorative justice approach, students learn from their mistakes and how their actions may have harmed the community, caused fear in classmates and school personnel, and allow for the re-introduction of forgiveness as a part of the process.

Restorative justice allows for a community rather than a purely criminal justice response to conduct and goes beyond the conduct to the causes. An illustrative case of a student in Oakland, California shows the

252. Aileen Yoo, *Duck-Hunting Teen Leaves Unloaded Guns in Truck, Gets Expelled*, SFGATE (Jan. 21, 2010) available at <http://blog.sfgate.com/scavenger/2010/01/12/duck-hunting-teen-leaves-unloaded-guns-in-truck-gets-expelled/>.

253. See *Working Definitions of Restorative Justice*, Nat'l Inst. Just., available at <http://www.nij.gov/topics/courts/restorative-justice/pages/definitions1.aspx> (last visited on Dec. 6, 2014).

value. A fourteen-year-old boy had his head down on his desk in class.²⁵⁴ His teacher asked him to sit up and he cursed her.²⁵⁵ When the principal was called because the student began cursing and screaming louder, he took a swing at the principal who told the young man that his mother would have to be called.²⁵⁶ He replied that he didn't care about her and it was at this moment that the causes of the conduct were revealed.²⁵⁷ The principal walked the young man to the restorative justice room and on that walk found out that this fourteen-year-old's mother had relapsed into drug addiction and that he was going home every day to care for his younger siblings.²⁵⁸ Under a strict zero tolerance policy without discretion or the opportunity for restorative justice, this young man would have found himself suspended for sure, possibly expelled and potentially facing criminal charges for assault. With restorative justice, students can engage with those whom they may have hurt and resolve the issue. This method is being used by more teachers²⁵⁹ and provides an effective alternative to the harsh consequences of zero tolerance policies. While limiting the scope of zero tolerance and instituting a restorative justice approach, students have been and are still being saddled with long-term stigma associated with conduct committed as adolescents. In order to remove them from this future of non-citizenship, it is necessary to expand expungement laws.

254. Fania Davis, *Discipline with Dignity: Oakland Classrooms Try Healing Instead of Punishment*, YES! MAG., (Feb 19, 2014), <http://www.yesmagazine.org/issues/education-uprising/where-dignity-is-part-of-the-school-day>.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* ("They [the principal and the student] walked together to the restorative justice room. Slowly, the boy began to open up and share what was weighing on him. His mom, who had been successfully doing drug rehabilitation, had relapsed. She'd been out for three days. The 14-year-old was going home every night to a motherless household and two younger siblings. He had been holding it together as best he could, even getting his brother and sister breakfast and getting them off to school. He had his head down on the desk in class that day because he was exhausted from sleepless nights and worry.").

259. Luke Towler, *More Teachers Adopting Restorative Discipline Policies*, NEA TODAY (Sept. 8, 2014), <http://neatoday.org/2014/09/08/more-teachers-adopting-restorative-discipline-practices/> (discussing the use of restorative justice principles and not just the punitive punishment of zero tolerance) (last visited on Dec. 6, 2014); see also MICHAEL D. SUMNER, CAROL J. SILVERMAN, & MARY LOUISE FRAMPTON, SCHOOL-BASED RESTORATIVE JUSTICE AS AN ALTERNATIVE TO ZERO-TOLERANCE POLICIES: LESSONS FROM WEST OAKLAND, available at http://www.law.berkeley.edu/files/11-2010_School-based_Restorative_Justice_As_an_Alternative_to_Zero-Tolerance_Policies.pdf (discussing restorative justice instead of zero tolerance in a low-income community of color).

D. Expungement

Finally, provided that there is no consensus or a willingness to remove zero tolerance policies, to limit the scope of such policies, or to use restorative justice methods, the final suggestion is to expand the range of offenses eligible for expungement. The idea behind the expungement suggestion is to remove the long-term disabilities with which juveniles are saddled²⁶⁰ after committing acts which may not be criminal but has been classified as such under existing zero tolerance policies.

With the broad range of conduct that is deemed impermissible under zero tolerance policies that can include simply disruptive behaviors,²⁶¹ students may be subject to long-term stigma based on inappropriate behavior and not threatening or dangerous conduct. By expunging conduct that may have caused a student to be referred to the juvenile justice system, adolescents can escape from the stigma of past conduct. Even when disenfranchised juveniles regain the right to vote, many are still fundamentally disenfranchised because of the consequences that attach to juvenile adjudications. Expungement will permit the disenfranchised juvenile to shed the scarlet letter that attached during youth and successfully reenter society. The ability to leave the past behind will enable the disenfranchised juvenile the opportunity to become a law-abiding citizen and no longer be disenfranchised.

V. CONCLUSION

Although the United States Supreme Court has stated that education is not a fundamental right,²⁶² it has also noted that “the total exclusion from the educational process for more than a trivial period . . . is a serious event

260. Nic Puechner, *No Clean Slates: Unpacking the Complications of Juvenile Expungements in the Wake of In Re Welfare of J.J.P.*, 40 WM. MITCHELL L. REV. 1158, 1159–62 (2014) (discussing that expungement provisions are intended to remove the disabilities that may attach following juvenile adjudications); Rebecca Ballard DiLoreto, *Shared Responsibility: The Young Adult Offender*, 41 N. KY. L. REV. 253, 269 (2014) (same). *But see*, T. Markus Funk, *Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REFORM 885 (1996) (discussing whether expungement is a good policy especially when repeat or violent conduct is being considered).

261. *See* Skiba and Petersen, *supra* note 73.

262. For a due process analysis, the United States Supreme Court has said that attending school is not a fundamental right. *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33–37, (1973); *see also* *Smith ex rel. Smith v. Severn*, 129 F.3d 419, 429 (7th Cir. 1997) (rejecting due process and equal protection challenges to a school suspension, noting that “[t]he question of whether a public education is a fundamental right is not a novel one.”).

in the life of the suspended child.”²⁶³ When students are suspended regularly, for long periods of time, or expelled, they are likely to fall further behind academically and are at increased risk of never returning to school at all and/or falling into criminal activity in the community. If zero tolerance were only imposed for serious misbehaviors, this outcome would not be as serious and might even seem to be a natural outgrowth of the student’s in-school behavior. Apart from the distrust of authority and notions of justice being undermined, there are other harms that emanate from these policies. In general, zero tolerance policies have been found to have a negative effect on the outcomes for all students.

The Fourteenth Amendment requires proof of intent to discriminate. Thus, lawsuits challenging the disproportionate effect of zero tolerance on minorities are difficult to win. With every additional suspension and expulsion, the likelihood that an adolescent will have a negative contact with the juvenile justice system increases. With these increased contacts as juveniles, the likelihood of contact with the adult criminal justice system increases. By removing students from schools or separating them away from the majority through suspensions, zero tolerance policies are creating a juvenile disenfranchised population. While this population may be legally different from the adult felon disenfranchised population, it is qualitatively the same and may one day have overlapping membership. If we unduly punish our juveniles, putting them on a path to incarceration and disenfranchisement, then they will become spectators and not be active participants in society. Ascension to the presidency has become a realistic possibility for a child of any color, but zero tolerance policies continue to make it an impossibility for far too many.

263. *See Goss v. Lopez*, 419 U.S. 565, 576 (1975) (“[E]ducation is perhaps the most important function of state and local governments, and the total exclusion from the educational process for more than a trivial period . . . is a serious event in the life of the suspended child.”).