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# ZERO TOLERANCE, THREATS OF HARM, AND THE IMAGINARY GUN: “GOOD INTENTIONS RUN AMUCK”<sup>1</sup>

*Todd A. DeMitchell and Elyse Hambacher\**

Students want and need clear boundaries, structure, and consistency. They need to feel safe, cared for, and respected. It is always the right thing to set high expectations for students, not just in academic terms, but for their behavior and conduct.

–Arne Duncan, U.S. Secretary of Education<sup>2</sup>

## I. INTRODUCTION

In 2014, a fifth grader in Massachusetts was suspended for making a threatening gesture by pointing his fingers like an imaginary ray gun and making laser noises.<sup>3</sup> This is not an isolated event in which innocuous or minor matters are met with a disciplinary response that seems disproportionately severe for the infraction. As another example, in Pensacola, Florida, a zero tolerance policy for weapons resulted in a high

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<sup>1</sup> Ratner v. Loudoun Cty. Pub. Schs., 16 F. App'x. 140, 143 (4th Cir. 2001) (Hamilton, J., concurring) (writing, “I write separately to express my compassion for Ratner, his family, and common sense. Each is a victim of good intentions run amuck.”).

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<sup>2</sup> Rethinking School Discipline, Remarks of U.S. Secretary of Education Arne Duncan at the Release of the Joint DOJ-ED School Discipline Guidance Package (Jan. 8, 2014), <http://www.ed.gov/news/speeches/rethinking-school-discipline>.

<sup>3</sup> Bill Shaner, *Milford 5<sup>th</sup>-Grader Suspended for Pointing Imaginary Gun*, THE MILFORD DAILY NEWS (Nov. 18, 2014), <http://www.milforddailynews.com/article/20141118/NEWS/141116372>.

school girl's ten-day suspension for bringing a nail clipper with an attached nail file to school.<sup>4</sup> The principal stated, while threatening expulsion, "Life goes on. You learn from your mistakes."<sup>5</sup>

These two disciplinary decisions were based on zero tolerance policies; which according to Skiba, is a disciplinary approach intended to send the message that certain behaviors (e.g., drugs and weapons on campus) will not be tolerated on school grounds by punishing all offenses, major and minor uniformly and severely.<sup>6</sup> The examples above of suspensions are a far cry from the original intent of zero tolerance policies. Ethel Detch, Director of the Office of Accountability for Tennessee, questioned the utility of zero tolerance policies in 2005, commenting, "despite the policies' widespread prevalence in the United States, zero tolerance may be falling out of favor among some educators and education researchers."<sup>7</sup> Ten years later, zero tolerance policies are still being questioned as good practice across the nation by the media,<sup>8</sup> scholars,<sup>9</sup> and

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<sup>4</sup> RUSSELL SKIBA, ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE 4 (2000) (citing also to a five-year old student who was suspended for wearing a five inch plastic ax as part of firefighters costume to his classroom Halloween party.).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 2.

<sup>7</sup> Quoted in Brian James Schoonover, Zero Tolerance Policies in Florida School Districts 34 (2007) (unpublished doctoral dissertation) (on file with the University of Florida Library).

<sup>8</sup> Editorial Board, *Zero Tolerance, Reconsidered*, N.Y. TIMES, (Jan. 5, 2014), <http://nyti.ms/1cGlepl> (writing, "Schools across the country are rethinking 'zero tolerance' discipline policies under which children have been suspended, even arrested, for minor offenses like cursing, getting into shoving matches and other garden-variety misbehavior that in years past would have been resolved with detention or meetings with a child's parents."); Editorial Board, *The Wrong Approach to Discipline*, N.Y. TIMES, (Mar. 6, 2012), <http://www.nytimes.com/2012/03/07/opinion/the-wrong-approach-to-discipline.html> (discussing two studies on discipline and stating, "Both surveys offer grim evidence that states and local districts must revisit 'zero tolerance' policies, which are increasingly common in schools and often cover too broad a range of misbehaviors.").

<sup>9</sup> See, e.g., AMERICAN PSYCHOLOGICAL ASSOCIATION ZERO TOLERANCE TASK FORCE, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 3 (Aug. 9, 2006), <http://www.apa.org/pubs/info/reports/zero-tolerance-report.pdf> (a report produced by the Zero Tolerance Task Force assessing the reasoning for zero tolerance policies and the effects of zero tolerance policies on child development, particularly concerning "students of color and students with disabilities," and offering recommendations for the improvements of such policies); Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823, 831 (2015) (arguing, "Zero tolerance and harsh discipline policies routinely violate all of the foregoing substantive due process

legislatures.<sup>10</sup> For example, an *Education Week* commentary stated, “[A] movement is building to end the ineffective, expensive, and tragic era of zero tolerance.”<sup>11</sup>

After nearly two decades, there is little evidence that demonstrates zero tolerance policies as an effective approach to making our classrooms, schools, and students safer. How long should we continue on this path of limited success but with documented negative consequences before we stop and ask, ought we continue? It is time to reflect on what we have learned about zero tolerance and reconsider its impact and utility. Is there a better way?

## II. DISCIPLINE THROUGH ZERO TOLERANCE

Disciplinary decisions are among the difficult but necessary decisions that school authorities make on a daily—and in many cases, hourly—basis. “About this there is no controversy”: teaching and learning do not thrive in an environment of chaos and disruption.<sup>12</sup> The schoolhouse gate has long been seen as the marker of a safe haven for students; a place of refuge, a place where the violence of the streets dare not intrude. Unfortunately, this assumption of a safe harbor in a turbulent time and place is sorely tested in too many communities. “Who does not want our schools to be safe places, where learning can take place without the fear that violence outside the schoolhouse gate will intrude inside our classrooms or spill onto our playgrounds?”<sup>13</sup> The key becomes determining what policies and approaches educators should take to make and keep schools as a safe and positive learning environment for

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principles.”); John J. Garman & Ray Walker, *The Zero-Tolerance Discipline Plan and Due Process: Elements of a Model Resolving Conflicts Between Discipline and Fairness*, 1 FAULK. L.R. 289, 319 (2010) (calling for “a common-sense relaxation of the rigorous zero-tolerance approach to school discipline.”).

<sup>10</sup> See Rebecca Morton, *Returning “Decision” to School Discipline Decisions: An Analysis of Recent Anti-Zero Tolerance Legislation*, 91 WASH. U. L. REV. 757 (2014) (reviewing legislative changes to zero tolerance policies in Texas, North Carolina, Colorado, and Massachusetts).

<sup>11</sup> Gara LaMarche, *The Time is Right to End “Zero Tolerance” in Schools*, EDUC. WK, (Apr. 5, 2011), <http://www.edweek.org/ew/articles/2011/04/06/27lamarche.h30.html?qs=the+time+is+right+to+end+%22zero+tolerance%22>.

<sup>12</sup> AMERICAN PSYCHOLOGICAL ASSOCIATION ZERO TOLERANCE TASK FORCE, *supra* note 9, at 2.

<sup>13</sup> Kim Fries & Todd A. DeMitchell, *Zero Tolerance and the Paradox of Fairness: Viewpoints from the Classroom*, 37 J. L. & EDUC. 211 (2007).

students. The American Psychological Association argues that, while there are a number of questionable applications of zero tolerance policies, it is the potential disruption of student engagement with instruction in their classroom that is the truest measure of the impact of such policies.<sup>14</sup>

Clarity of rules is in order to create better learning environments and, therefore, clarity of school rules is critical. However, clarity alone is insufficient. If we must carry out disciplinary action, we must also consider disciplinary actions that are proportional, fairly applied, and rationally related to the infraction. Students are constitutionally entitled to fair procedures and fair laws, rules, and regulations before the public school suspends or expels the student.<sup>15</sup> Richard Arum asserts that students respect discipline and order but distrust authority when discipline seems random and too strict, and thus unfair, in their eyes.<sup>16</sup>

Clearly, genuine threats must be taken seriously and responded to quickly, decisively, and fairly using effective means. The connection between rule, infraction, and response is important in establishing a culture in a school in which students and adults believe that they will be treated fairly by those tasked with maintaining a safe, respectful, and productive learning environment. Although zero tolerance policies seem to provide quick, anti-discriminatory responses to dangerous behavior, research has shown that these policies do not provide favorable outcomes.<sup>17</sup>

Zero tolerance policies became prominent in U.S. schools<sup>18</sup> after the passage of the federal Gun-Free School Act of 1994,

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<sup>14</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION ZERO TOLERANCE TASK FORCE, *supra* note 9, at 20.

<sup>15</sup> See *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (reasoning, “Among other things, the State is constrained to recognize a student’s 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.”).

<sup>16</sup> See RICHARD ARUM, *JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY* 34 (2003), cited in Black, *supra* note 8, at 839.

<sup>17</sup> See Steven C. Teske, *A Study of Zero Tolerance Policies in Schools: A Multi-Integrated Systems Approach to Improve Outcomes for Adolescents*, 24 *J. CHILD & ADOLESCENT PSYCHIATRIC NURSING* 88, 89 (2011) (writing, “The studies to date show that zero tolerance strategies have not achieved the goals of a safe and disciplined classroom.”).

<sup>18</sup> AMERICAN PSYCHOLOGICAL ASSOCIATION ZERO TOLERANCE TASK FORCE, *supra* note 9, at 2.

which mandated expulsions for possession of weapons.<sup>19</sup> The term zero tolerance as applied to the federal drug policy of the 1980s, “seemed to fire the public imagination” capturing the attention of educators who were facing what appeared as a rising tide of violence.<sup>20</sup> But what is the underlying rationale for zero tolerance policies, which arose in the 1980s?<sup>21</sup> Ewing, describing zero tolerance policies, states,

[A]pplication of Zero Tolerance appropriately denounces violent student behavior in no uncertain terms and serves as a deterrent to such behavior in the future by sending a clear message that acts which physically harm or endanger others will not be permitted at school under any circumstances.<sup>22</sup>

The National Association of School Psychologists, while questioning the utility of zero tolerance policies, characterizes the policies’ initial purpose as assuring “consistent and firm consequences for dangerous behaviors.”<sup>23</sup> One commentator notes that many praise zero tolerance policies for their ability to deter unacceptable behavior, thus making schools safer for all.<sup>24</sup>

It has been argued that zero tolerance policies offer an efficient way to treat all offenders equally by reinforcing an intolerance of rule breaking,<sup>25</sup> holding wrongdoers responsible

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<sup>19</sup> Law of Oct. 20, 1994, 20 U.S.C. § 8921 (repealed 2002).

<sup>20</sup> SKIBA, *supra* note 4, at 2.

<sup>21</sup> See Morton, *supra* note 10, at 757 (“Initially developed in the 1980s to combat the war on drugs, zero tolerance policies spread to school districts in the wake of congressional legislation addressing concerns for school safety.”). See also Robert C. Cloud, *Due Process and Zero Tolerance: An Uneasy Alliance*, 178 W.’S ED. L. REPORTER 1, 9 (2003) (writing, “The get-tough-on-crime mentality that dominated the criminal justice system during the 1980s and the 1990s was transposed into the public schools after 1994.”).

<sup>22</sup> Charles Patrick Ewing, *Sensible Zero Tolerance Protects Students*, 16 HARV. EDUC. LETTER, no. 1, 2000, <http://www.edletter.org/past/issues/2000-jf/zero.html>.

<sup>23</sup> NATIONAL ASSOCIATION OF SCHOOL PSYCHOLOGISTS, ZERO TOLERANCE AND ALTERNATIVE STRATEGIES: A FACT SHEET FOR EDUCATORS AND POLICYMAKERS (Dec. 2001) [http://www.nasponline.org/resources/factsheets/zt\\_fs.aspx](http://www.nasponline.org/resources/factsheets/zt_fs.aspx) (asserting that zero tolerance policies have resulted in negative outcomes with few if any benefits for students or the school).

<sup>24</sup> Kaitlyn Jones, *Chalk Talk: #Zerotolerance #KeepingupwiththeTimes: How Federal Zero Tolerance Policies Failed to Promote Educational Success, Deter Juvenile Legal Consequences, and Confront New Social Media Concerns in Public Schools*, 42 J. L. & EDUC. 739, 739–42 (2013) (writing, “ZT policies are premised on the philosophy that removing students who engage in dangerous, threatening, or disruptive behaviors will deter other students from misbehavior and create an improved learning environment.”).

<sup>25</sup> See Cherry Henault, *Zero Tolerance in Schools*, 30 J. L. & EDUC. 547, 547

by consistently applying and enforcing the discipline code,<sup>26</sup> and addressing common parental concerns about violence in schools. One commentator noted that supporters of zero tolerance assert that it “concretizes discipline policy for schools where enforcement of discipline has become lax; these are schools made more dangerous and chaotic by school personnel who have given up on trying to control students[.]”<sup>27</sup> It is essentially a no-nonsense, no-discretion, consistently-applied, punitive disciplinary response through mandated punishment that results in a climate more conducive to learning and acts as a deterrent for similar behaviors, or so it is asserted by zero tolerance proponents.<sup>28</sup> For example, the defendant school board in *Seal v. Morgan*, in which a high school student was expelled because a knife was placed in his car without his knowledge, argued that its zero tolerance policy must be applied “ruthlessly” so as to send a consistent message of no tolerance and no excuses to its students.<sup>29</sup> However, the Sixth Circuit Court of Appeals disagreed, writing, “[c]onsistency is not a substitute for rationality.”<sup>30</sup>

Law Professor James M. Peden offers a slightly less-positive definition of zero tolerance policies. He writes,

Zero tolerance is a term that is used to characterize an institution’s response 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.<sup>31</sup>

Zero tolerance policies’ disregard of intent, as discussed later in this article, is one of the dangers of responding to conduct in an overly general manner.

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(2001).

<sup>26</sup> See Kevin Gorman & Patrick Paulken, *The Ethics of Zero Tolerance*, 41 J. EDUC. ADMIN. 24, 26 (2003).

<sup>27</sup> *Id.*

<sup>28</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION ZERO TOLERANCE TASK FORCE, *supra* note 9, at 4–5.

<sup>29</sup> *Seal v. Morgan*, 229 F.3d 567, 581 (6th Cir. 2000).

<sup>30</sup> *Id.*

<sup>31</sup> James M. Peden, *Through a Glass Darkly: Educating with Zero Tolerance*, 10 KAN. J. L. & PUB. POL’Y 369, 371 (2001).



Is the implementation of zero tolerance policies—a reflexive, non-discretionary approach to discipline—truly supportive of students? According to the Centers for Disease Control and Prevention, students who feel connected to and supported by the adults in their school are less likely to become involved in risky behaviors, including violence, and are more likely to have better academic achievement.<sup>32</sup> Law Professor Josie Foehrenbach Brown raises the question of whether schools that institute harsh and punitive disciplinary policies, such as zero tolerance policies, “diminish the likelihood that students will view the school as supportive.”<sup>33</sup> Therefore, the impact of zero tolerance policies may not create the supportive environment that was originally envisioned.

Many question the assumptions of zero tolerance policies in schools and argue that these policies simply provide an illusion of order. For example, the American Bar Association featured a 2014 article titled, “Schools Start to Rethink Zero Tolerance Policies.”<sup>34</sup> The author discusses the backlash to zero tolerance in which some schools are replacing the rigidity of zero tolerance with more creative approaches to discipline focusing more on the development of a positive school environment.<sup>35</sup> In a speech before the House of Delegates of the American Bar Association, United States Attorney General Eric Holder discussed the need to confront “zero-tolerance school policies that do not promote safety, and that transform too many educational institutions from doorways of opportunity into gateways to the criminal justice system.”<sup>36</sup>

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<sup>32</sup> See CENTERS FOR DISEASE CONTROL AND PREVENTION, ADOLESCENT AND SCHOOL HEALTH: SCHOOL CONNECTEDNESS (last updated Sept. 1, 2015), <http://www.cdc.gov/healthyyouth/protective/connectedness.htm>.

<sup>33</sup> Josie Foehrenbach Brown, *Developmental Due Process: Waging a Constitutional Campaign to Align School Discipline with Developmental Knowledge*, 82 TEMP. L. REV. 929, 963 (2009).

<sup>34</sup> Stephanie Francis Ward, *Schools Start to Rethink Zero Tolerance Policies*, A.B.A. J., (Aug. 1, 2014), [http://www.abajournal.com/magazine/article/schools\\_start\\_to\\_rethink\\_zero\\_tolerance\\_policies/](http://www.abajournal.com/magazine/article/schools_start_to_rethink_zero_tolerance_policies/).

<sup>35</sup> *Id.*

<sup>36</sup> Eric Holder, Attorney General, Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 13, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

### III. CRITIQUING ZERO TOLERANCE

As noted above, zero tolerance policies were originally enacted to create safe schools and enable children to acquire knowledge and become contributing members of society. Critics of zero tolerance policies argue that they create tunnel vision for teachers and administrators and push students out of the classroom and into the juvenile and criminal justice systems, thus creating the school-to-prison pipeline.<sup>37</sup> Zachary W. Best writes, “[Z]ero tolerance policies that take a punitive and exclusionary approach to school discipline have a significant negative impact on students’ education, including psychological damage and harm to academic achievement.”<sup>38</sup> Similarly, Skiba and Peterson state, “[D]isciplinary exclusion appears to be associated with a host of negative outcomes for both students and the school climate.”<sup>39</sup> When Skiba and Peterson posed the question, “Is disciplinary removal an effective method for teaching students the social behaviors they need to succeed in school?” they found the answer to be a “clear and resounding no.”<sup>40</sup> We agree that the removal of students from school should not be a first response to discipline and should instead be used as a last resort. Too often, the students who experience punitive discipline are the very students who would benefit from additional instructional time.

Cole and Heilig correctly argue that zero tolerance principles and rhetoric have been “punitive and destructive” with a “disparate impact on children of color and children with disabilities.”<sup>41</sup> Not only does disciplinary removal have negative

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<sup>37</sup> See ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 7 (Mar. 2005), [http://b.3cdn.net/advancement/5351180e24cb166d02\\_mlbrqgxlh.pdf](http://b.3cdn.net/advancement/5351180e24cb166d02_mlbrqgxlh.pdf) (discussing “[h]ow zero tolerance, a policy originally designed to address the most serious misconduct, morphed into a ‘take no prisoners’ approach to school discipline issues and created a direct track into the juvenile and criminal justice systems[.]”).

<sup>38</sup> Zachary W. Best, *Derailing the Schoolhouse-to-Jailhouse Track: Title VI and a New Approach to Disparate Impact Analysis in Public Education*, 99 GEO. L. J. 1671, 1680 (2011).

<sup>39</sup> Russell Skiba & Reece Peterson, *Teaching the Social Curriculum: School Discipline as Instruction*, 47 PREVENTING SCH. FAILURE 66, 69 (2003)(quotations omitted).

<sup>40</sup> *Id.*

<sup>41</sup> Heather A. Cole & Julian Vasquez Heilig, *Developing a School-Based Youth Court: A Potential Alternative to the School to Prison Pipeline*, 40 J. L & EDUC. 305, 308 (2011).

consequences on students' learning, but evidence shows that policies like zero tolerance are especially harmful for students of color and those with disabilities. For example, a doctoral dissertation on the impact of Texas's zero tolerance policy found that it has done little to improve the academic success of students and "has 1) increased dropout rates . . . , 2) widened the learning gap between white students and both African American and Latino students . . . , and 3) decreased the learning opportunities of special education students . . . ."<sup>42</sup> Similarly, the VERA Institute for Justice asserts evidence that zero tolerance policies have a disproportionate impact on students of color.<sup>43</sup> On January 8, 2014, the U.S. Department of Justice and the U.S. Department of Education joined the discussion by issuing a joint Dear Colleague Letter (DCL) to assist public schools in meeting their obligations "to administer student discipline without discriminating on the basis of race, color, or national origin."<sup>44</sup> The DCL is based on the Civil Rights Data Collection, which demonstrates that students of certain racial or ethnic groups are disciplined through suspensions and expulsions disproportionately to their white peers.<sup>45</sup> In their article, "Racial Threat and Punitive School Discipline," Welch and Payne found that schools that had a large percentage of African American students were "more likely to use extremely punitive discipline and to implement zero tolerance policies."<sup>46</sup> These several studies evidence the disproportionate overall negative impact these policies have on

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<sup>42</sup> Ana Yanez Correa, A Study of Middle and High School Administrators' Interpretations and Implementation of Discretionary School Discipline Policies at Urban School Districts 6 (May 2011) (unpublished Ph.D. dissertation, University of Texas, Austin) (on file with the authors).

<sup>43</sup> See JACOB KANG-BROWN, ET AL., A GENERATION LATER: WHAT WE'VE LEARNED ABOUT ZERO TOLERANCE IN SCHOOLS 3 (2013), <http://www.vera.org/sites/default/files/resources/downloads/zero-tolerance-in-schools-policy-brief.pdf>.

<sup>44</sup> Catherine E. Lhamon & Joceyln Samuels, Dear Colleague Letter: Nondiscriminatory Administration of School Discipline from Catherine E. Lhamon, Assistant Sec'y, Office of Civil Rights & Joceyln Samuels, Acting Assistant Att'y Gen. at 1 (Jan. 8, 2014), <http://www.justice.gov/crt/about/edu/documents/dcl.pdf>.

<sup>45</sup> *Id.* at 3. For a critique of the DCL and its stance on zero tolerance policies see Richard A. Epstein, *Civil Rights Enforcement Gone Haywire*, 14 EDUCATION NEXT 29, 33 (2014) (asserting that "[i]n sum, the [Office for Civil Rights in the Department of Education] and [Department of Justice] action forces school districts to comply with a substantive rule of dubious legal validity and practical soundness. Their 'guidance' represents the worst in federal policy on K-12 education.").

<sup>46</sup> Kelly Welch & Allison Ann Payne, *Racial Threat and Punitive School Discipline*, 57 SOC. PROBLEMS 25, 25 (2010).

students of color.

In another case, the plaintiffs brought an equal protection claim under disparate treatment arguing that the discipline meted out to their African-American son violated his Fourteenth Amendment rights.<sup>47</sup> The boy had worn a multifunction tool to school, which included a small knife on a key chain. The school suspended and then expelled him for violating the district's ban on possessing weapons of any kind at school.<sup>48</sup> The suit alleged—and facts subsequently established—that white students who breached the district's rules “were not punished so severely” as the plaintiffs' son.<sup>49</sup>

While no evidence shows sustained effectiveness of zero tolerance policies in “improv[ing] school climate or school safety,”<sup>50</sup> these policies continue to be prevalent in schools to the detriment of all students, especially black and Latino students who are most likely to suffer from the policies' negative consequences.<sup>51</sup> For example, the National Association of School Psychologists noted the harsher penalties and negative impact that black students and students with disabilities receive, respectively, as a result of the implementation of zero tolerance policies.<sup>52</sup> A National Center for Education Statistics report, using a nationally representative dataset, found that approximately one in five black students are suspended, compared with fewer than one in

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<sup>47</sup> See National School Board Association, *Pennsylvania District Settles Race Discrimination Suit with the Parents of an African-American Student Expelled for Violating District's Weapons Possession Policy*, LEGAL CLIPS (May 14, 2015), [http://legalclips.nsba.org/2015/05/14/pennsylvania-district-settles-race-discrimination-suit-with-the-parents-of-an-african-american-student-expelled-for-violating-districts-weapons-possession-policy/?utm\\_source=NSBA+e—Newsletter+Subscribers&utm\\_campaign=1c7af2437d-Legal+Clips+Newsletter&utm\\_medium=email&utm\\_term=0\\_498fb22860-1c7af2437d-309623925](http://legalclips.nsba.org/2015/05/14/pennsylvania-district-settles-race-discrimination-suit-with-the-parents-of-an-african-american-student-expelled-for-violating-districts-weapons-possession-policy/?utm_source=NSBA+e—Newsletter+Subscribers&utm_campaign=1c7af2437d-Legal+Clips+Newsletter&utm_medium=email&utm_term=0_498fb22860-1c7af2437d-309623925).

<sup>48</sup> See *id.*

<sup>49</sup> *Id.*

<sup>50</sup> AMERICAN PSYCHOLOGICAL ASSOCIATION ZERO TOLERANCE TASK FORCE, *supra* note 9, at 14 (“Ultimately, an examination of the evidence shows that zero tolerance policies as implemented have failed to achieve the goals of an effective system of school discipline.”).

<sup>51</sup> See *School-to-Prison Pipeline [Infographic]*, AMERICAN CIVIL LIBERTIES UNION (Aug. 2012), <https://www.aclu.org/racial-justice/infographic-school-prison-pipeline> (depicting how zero tolerance policies result in harsher punishment for black students than white students in public schools).

<sup>52</sup> National Association of School Psychologists, *Zero Tolerance and Alternative Strategies: A Fact Sheet for Educators and Policymakers*, [http://www.nasponline.org/resources/factsheets/zt\\_fs.aspx](http://www.nasponline.org/resources/factsheets/zt_fs.aspx).

ten white students.<sup>53</sup> The same students are repeatedly punished for zero tolerance violations, suggesting that the policies are ineffective deterrents.<sup>54</sup> If zero tolerance was effective, we would expect that students disciplined under its aegis would not be repeat offenders. Furthermore, African American and Latino students “are also more likely than their white peers to be referred to the juvenile justice system.”<sup>55</sup> Zero tolerance is predicated on blind justice in which the characteristics of the alleged perpetrator do not matter and all students who are called before zero tolerance are treated equally. The reality of zero tolerance is that justice under this approach is anything but blind.

#### IV. INTENT TO CAUSE HARM

Zero tolerance policies do not require knowledge of wrongdoing, nor the intent to cause harm. Garman and Walker assert “[m]any, if not most, of the horror stories spawned by applications of zero tolerance occurs” when knowledge and intent to harm are not present.<sup>56</sup>

Two legal terms, *intent*, and *scienter*, may assist here. According to *Black’s Law Dictionary*, intent is a [d]esign, resolve, or determination with which a person acts. Intent on the part of an individual is a desire to cause a consequence. *Scienter* means knowingly. The term is frequently used to signify the defendant’s guilty knowledge. Both terms arise within substantive due process discussions of zero tolerance.<sup>57</sup>

For example, if I intend to throw a rock from one place to another, that is volitional act with an intent to do some specific thing that may result in an unintended consequence such as hitting another person. In contrast, *scienter* requires that when I threw the rock I intended to cause harm by throwing it at a

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<sup>53</sup> See Angelina Kewal Ramani, Lauren Gilbertson, Mary Ann Fox, & Stephen Provasnik, *Status and Trends in the Education of Racial and Ethnic Minorities*, NCES 2007-039, NAT’L CTR. FOR EDUC. STATS., INST. EDUC. SCIS., Sept. 2007, at 1, 86 tbl. 16, <http://nces.ed.gov/pubs2007/2007039.pdf>.

<sup>54</sup> Tanya M. Suarez, *Creating Safe Environments for Learning in North Carolina’s Public Schools*, N.C. EDUC. POL’Y RES. CTR., (May 1992), <http://files.eric.ed.gov/fulltext/ED373406.pdf>.

<sup>55</sup> S. David Mitchell, *Zero Tolerance Policies: Criminalizing Childhood and Disenfranchising the Next Generation of Citizens*, 92 WASH. U. L REV. 271, 276 (2014).

<sup>56</sup> Garman & Walker, *supra* note 9, at 311.

<sup>57</sup> Fries & DeMitchell, *supra* note 13, at 226.

person. Intent is a purposive act while scienter is a purposive act with the desired result to cause harm.

For example, a New Mexico high school student who borrowed a car to drive to school claimed that he did not know that the car contained his brother's knife, gun, ammunition, and drug paraphernalia.<sup>58</sup> Because the vehicle did not have the required parking permit, the school's security searched the car and saw the "butt end of a knife sticking up from between the passenger seat and the center console."<sup>59</sup> The Tenth Circuit Court of Appeals upheld the one-year suspension, stating that the student "should have known" he was bringing a weapon onto school property.<sup>60</sup> Intent to bring a weapon on school grounds was not required under zero tolerance.

However, consider the Sixth Circuit's response to a similar issue of intent versus scienter. As in our discussion above, Seal intended to drive his car to school, but he did not intend to break the rule of bringing a weapon on to school grounds because he was unaware that the weapon was in the car. In this case,

Seal, a junior in high school, was expelled for possessing a knife at school. The knife was found in Seal's glove compartment during a consensual search of the car for alcohol on school property. Seal did not know that the knife was in the glove compartment. A friend had placed the hunting knife there after taking it from another student who had been riding in Seal's car to a football game. The original owner of the knife was carrying it for protection because of an on-going problem with another student. Seal had no knowledge that the knife had been placed in his glove compartment or that there was even a knife in his car while it was on school property. Once again, Seal was subsequently expelled. The school board found that Seal's knowledge, or in this case, lack of knowledge about the knife, was "irrelevant."<sup>61</sup>

Clearly, Seal did not intend to bring a knife to school. He did not know that the knife was in the car. While there was

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<sup>58</sup> See *Butler v. Rio Rancho Pub. Sch. Bd. of Educ.*, 341 F.3d 1197, 1198–99 (10th Cir. 2003).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1201; see also *Bundick v. Bay City Indep. Sch. Dist.*, 140 F. Supp. 2d 735, 740 (S.D. Tex. 2001) (asserting that "[s]cienter is not a requirement of the school district's policy").

<sup>61</sup> Fries & DeMitchell, *supra* note 13, at 226.

volitional intent, scienter was not present.

The Sixth Circuit disagreed with the school board and the superintendent in their reasons for expelling Seal,<sup>62</sup> stating,

No student can use a weapon to injure another person, to disrupt school operations, or, for that matter, any other purpose if the student is totally unaware of its presence. Indeed, the entire concept of possession—in the sense of possession for which the state can legitimately prescribe and mete out punishment—ordinarily implies knowing or conscious possession.<sup>63</sup>

In some student interactions, misbehavior on the part of a student that was not intentional is treated differently than intentional behavior. In other student interactions, “[t]he foremost factor in assessing student behavior is intent.”<sup>64</sup> For example, a student who hits another student while kicking a ball on the playground may have acted negligently, but may not have intended harm to the other student. Any discipline that would follow would be based on the negligent behavior and not on intentional behavior. Zero tolerance turns this concept of intent to harm or knowledge of contraband on its head. This is particularly true when the consequences for possession without knowledge or intent to use a weapon result in a response “that far exceed the threat.”<sup>65</sup> Zero tolerance policies disregard for scienter contradicts the individualized efforts that many teachers make today to tailor educational and social experiences to the abilities and requirements of each student.

## V. TEACHERS’ PERCEPTIONS OF ZERO TOLERANCE: THE FAILURE OF COMMON SENSE

Teachers are on the frontline of discipline and often act as gatekeepers for the implementation of school-wide discipline, including zero tolerance policies. The classroom demands

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<sup>62</sup> See Seal v. Morgan, 229 F.3d 567, 575 (6th Cir. 2000).

<sup>63</sup> *Id.* at 575–76.

<sup>64</sup> Black, *supra* note 9, at 881. See also Christopher T. Pellicioni, Note, *Is Intent Required? Zero Tolerance, Scienter, and the Substantive Due Process Rights of Students*, 53 CASE W. RES. L. REV. 977, 1007 (2003) (arguing that disregarding the intent of the student under zero tolerance policies is not rationally related to the goal of “providing safe and effective schools” and that such discipline should “shock the conscience of the court.”).

<sup>65</sup> Cole & Heilig, *supra* note 41.

include such intrinsic features of teacher work as multidimensionality, simultaneity, immediacy, unpredictability, publicness, and history.<sup>66</sup> These features create “constant pressures” that impact the classroom environment and the subsequent decisions teachers make each day.<sup>67</sup> The crush of the classroom requires teachers to act and react quickly to these demands, often without the luxury of thoughtful deliberation before acting. Decisions as to when and under what considerations to send a student to the office have consequences. For example, a teacher’s decision to send a ten-year-old student to the principal’s office for possessing a small knife that her mother placed in the student’s lunchbox to cut her apple resulted in her expulsion.<sup>68</sup> As evidenced in this example, when to handle an issue in the classroom and when to escalate a discipline decision can be a daily challenge for teachers.<sup>69</sup>

Two researchers at a public university in New England wanted to understand how teachers make sense of zero tolerance policies. Teachers stand at the intersection of classroom rules and school rules deciding which direction to shunt the resolution. The researchers used a mixed-methods approach of experienced teachers and teaching interns in a focus group study.<sup>70</sup> Participants were given a scenario involving a student who placed a three-inch knife into the backpack of a popular, well-behaved student.<sup>71</sup> The participants discussed whether they would report the student who had the knife in his backpack but who had no knowledge of its presence.<sup>72</sup> The educators grappled with the scenario, at times

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<sup>66</sup> WALTER DOYLE, *Classroom Organization and Management*, in HANDBOOK OF RESEARCH ON TEACHING 394–95 (Merlin C. Wittrock ed., 3rd ed.) (1986).

<sup>67</sup> *Id.* at 393.

<sup>68</sup> AMERICAN PSYCHOLOGICAL ASSOCIATION ZERO TOLERANCE TASK FORCE, *supra* note 9, at 16.

<sup>69</sup> See HAIM G. GINOTT, *TEACHER & CHILD* 15-16 (1972) (writing about the power of the teacher:

I have come to a frightening conclusion. I am the decisive element in the classroom. It is my personal approach that creates the climate. It is my daily mood that makes the weather. As a teacher I possess tremendous power to make a child’s life miserable or joyous. I can be a tool of torture or an instrument of inspiration. I can humiliate or humor, hurt or heal. In all situations it is my response that decides whether a crisis will be escalated or de-escalated, and a child humanized or de-humanized.)

<sup>70</sup> See Fries & DeMitchell, *supra* note 13, at 219.

<sup>71</sup> See *id.* at 220.

<sup>72</sup> See *id.* at 220–22.



disagreeing with each other's assessment. As the researchers looked under the veil of zero tolerance by exploring the scenario, they found many teachers' responses focused on the context of the situation, the intent of the student, the history of the student, and the importance of exercising professional judgment.<sup>73</sup>

The teachers' responses captured the conflict between the teacher-identified important variables of context, intent, and history, and the policy requirements of automatic consequences. One teacher elaborated on the dilemma, stating, "You want to give 'so-and-so' the benefit of the doubt, but if you do and three days later the same student does something that injures somebody, then you are taking that burden or responsibility on your shoulder. It is a scary position to be in."<sup>74</sup> Another participant stated, "Zero tolerance throws common sense out the window and that's its defect. We all know in education, one size never fits all[.]"<sup>75</sup> Hence, context and knowledge of students' backgrounds matter, especially when making decisions regarding student behavior. Teachers do not simply instruct a class; they work with individual students. Therefore, teachers must understand what works with one student may not work with another student.

The teachers in this study struggled to reconcile the legal requirements of zero tolerance policies with their professional demands. They faced the paradox of fairness: automatically referring every student to the principal may unfairly escalate a discipline situation and result in an overly harsh punishment that they believe does not fit the situation.<sup>76</sup> The research found that these teachers did not want an automatic response to weighty issues such as student discipline and fairness. Teachers prefer that they be responsible for considering the variables of context, intent, and history when assessing what course of action is best for the student, the classroom, and the school.<sup>77</sup>

In other words, teachers advocated for a "student first" approach rather than a "discipline first" approach. The

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<sup>73</sup> See *id.* at 222.

<sup>74</sup> *Id.* at 229.

<sup>75</sup> *Id.* at 225.

<sup>76</sup> See *id.* at 229.

<sup>77</sup> See *id.*

researchers found that the ruthless consistency of zero tolerance is a poor substitute for a teacher's professional judgment.<sup>78</sup> Judge Hamilton, in a zero tolerance case, agrees that a teacher's professional judgment is important, stating,

The panic over school violence and the intent to stop it has caused school officials to jettison the common sense idea that a person's punishment should fit [the] crime in favor of a single harsh punishment, namely, mandatory school suspension. Such a policy has stripped away judgment and discretion on the part of those administering it; refuting the well established precept that judgment is the better part of wisdom.<sup>79</sup>

The hallmark of professionalism is the application of teachers' decisions informed by the tenets, literature, and ethics of the profession. All too often, zero tolerance strips away those professional attributes.

Professionals accept that making difficult decisions is their responsibility. Correa writes in her study, "Not only have zero tolerance and other discipline policies failed to accomplish their desired outcomes, they have increased the number of ethical dilemmas already facing those responsible for implementing the policies."<sup>80</sup> The teachers in the Fries and DeMitchell study discussed above, along with Judge Hamilton, conclude that zero tolerance eliminates teachers' professional judgment. This creates the problem that "with no scaling of punishment to fit the conduct, zero tolerance policies fail to distinguish between childish behavior that constitutes a 'teachable moment' and dangerous behavior that threatens the safety and well-being of other students and school personnel."<sup>81</sup> Judgment based on the deep understanding of the interactions that occur in classrooms and knowledge of school culture are necessary conditions for the critical decisions of what is considered a serious breach and what is a minor breach of expectations. Educators must be allowed to exercise this discretion.

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<sup>78</sup> See *id.* at 222 (teachers believed it was imperative to consider context, intent, history, and allow for teacher judgment).

<sup>79</sup> *Ratner v. Loudoun Cty. Pub. Schs.*, 16 F. App'x. 140, 143 (4th Cir. 2001), *cert. denied*, 534 U.S. 1114 (2002) (Hamilton, J., concurring).

<sup>80</sup> Correa, *supra* note 42, at 28.

<sup>81</sup> Mitchell, *supra* note 55, at 281.

## VI. MOVING FORWARD

Where do we go from here? If zero tolerance was established as a “good” policy intended to protect students from violence and drugs while at school, but currently fails in practice, what might stakeholders do? It is uncontested that our schools must be safe places for learning. The Secret Service and the United States Department of Education assert that a climate that “creates relationships of respect and connection between adults and students is integral in developing and sustaining a safe school.”<sup>82</sup> Do zero tolerance policies foster this climate of respect and connection?

Perhaps a beginning point for educators to create this climate is a discussion of discipline and zero tolerance policies and what constitutes a common sense approach to securing a safe environment. Is an imaginary ray gun a real and imminent threat, or is an imaginary gun just an imaginary threat with no true substance? Is a nail clipper really a weapon and should it have resulted in a ten-day suspension? How could teachers and administrators have handled the situations differently? What constitutes real threat with the means and intent that require immediate action to protect students from harm? These are questions that educators need to discuss in order to change the policy.

Another option is for school districts to review their zero tolerance policies, searching for an alternative approach that focuses on common sense and posits that discipline is an integral aspect of learning.<sup>83</sup> However, searching for an alternative approach to implement is not a simple undertaking. Richard L. Curwin and Allen N. Mendler, over fifteen years ago, asserted that eliminating zero tolerance could be difficult because the concept of zero tolerance is “simple to understand, sounds tough, and gives the impression of high standards for behavior.”<sup>84</sup> However, a “discipline first” approach like zero

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<sup>82</sup> ROBERT A. FEIN, ET AL., U.S. SECRET SERVICE & U.S. DEP’T OF EDUC., THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATE SAFE SCHOOL CLIMATES 72 (2002).

<sup>83</sup> Matt Zalaznick, *Closing the School-to-Prison Pipeline*, DISTRICT ADMIN., (Oct. 2014), <http://www.districtadministration.com/article/closing-school-prison-pipeline>.

<sup>84</sup> Richard L. Curwin & Allen N. Mendler, *Zero Tolerance for Zero Tolerance*, 81 PHI DELTA KAPPAN 119, 120 (October 1999) (among the questions they asked in their study were, “Do you know anyone who was raised by a zero tolerant parent and how did that approach affect his or her childhood?” and, “[D]o we want children to have zero

tolerance does not appropriately teach alternative behaviors. Schools must resist the lure of ease that results in implementing zero tolerance policies.<sup>85</sup>

Reviewing disciplinary records to look for patterns, especially ones involving disproportionality based on race, ethnicity, and special education status is another promising step. However, this review must be followed by a frank discussion about the kind of culture that a school hopes to cultivate. This data can guide educators in achieving a culture where respect, care, and equity are at the core of school decision making.<sup>86</sup> Education stakeholders must balance security, respect, and fairness for all students.<sup>87</sup>

Many urban school districts have adopted restorative practices as a means to reduce racial and other disproportionalities in school discipline.<sup>88</sup> Ted Watchel asks, if zero tolerance isn't the answer to safer school, what is?<sup>89</sup> Watchel advocates for restorative practices, which asks questions that "cause students to reflect on how their behavior has affected others and how they are going to 'make things right.'"<sup>90</sup> By using restorative practices, students must grapple with and address their actions that have caused harm and seek to resolve the issues before returning to their classroom.<sup>91</sup> Relying on restorative justice acts as a response to the problem without resorting to the criminal justice system and creates a safe and supportive learning environment.<sup>92</sup>

Restorative justice works to foster equality in schools because students join together to play an active role in addressing the harm and restoring the community when a rule has been violated. Restorative practices are focused on fixing

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tolerance for others, particularly when they are angry?").

<sup>85</sup> *Id.*

<sup>86</sup> See Rethinking School Discipline, *supra* note 2.

<sup>87</sup> See *id.*

<sup>88</sup> Anita Wadhwa, Restorative Justice in Urban Schools: Disrupting the School-to-Prison Pipeline (2016).

<sup>89</sup> Ted Watchel, *A Shift Away from Zero Tolerance Will Improve School Discipline*, CHRISTIAN SCIENCE MONITOR (Sept. 27, 2012), <http://www.csmonitor.com/Commentary/Opinion/2012/0927/A-shift-away-from-zero-tolerance-will-improve-school-discipline-video>.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> See David R. Karp & Beau Breslin, *Restorative Justice in School Communities*, 33 YOUTH & SOC. 249, 250 (2001).

problems *with* people rather than doing things *to* them.<sup>93</sup> This model “deemphasizes punishment, although it does not preclude punishment.”<sup>94</sup> Restorative justice allows for school community response rather than a criminal justice response in most situations. Furthermore, William Haft argues that using restorative justice in schools “comport[s] with the aims of public education: both strive to prepare children to become capable and productive members of a republican society,”<sup>95</sup> while the reliance on zero tolerance “runs directly counter to . . . the purpose of preparing children to live in a democratic society.”<sup>96</sup> Restorative practices may be successful because they focus on repairing wrongdoing and building relationships rather than merely punishing offenders.<sup>97</sup> Through building social skills and conflict resolution strategies, restorative practices also provide meaningful opportunities for students to take responsibility “for helping to make their school a safe and nurturing place.”<sup>98</sup>

Another approach that has underpinnings in restorative justice is the use of Youth Courts.<sup>99</sup> A goal of this model is to “attempt to prevent the criminalization of students by directing them away from the formal intake of the juvenile justice system.”<sup>100</sup> Youth Courts provide alternative sanctions for first-time offenders using a peer-driven mechanism aimed at enabling young people to take responsibility and to be held accountable for their actions through restitution and peer pressure.<sup>101</sup> The American Psychological Association has

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<sup>93</sup> See Jennifer Larson Sawin & Howard Zehr, *The Ideas of Engagement and Empowerment*, in GERRY JOHNSTONE & DANIEL W. VAN NESS (eds.), *HANDBOOK OF RESTORATIVE JUSTICE* 46 (2007).

<sup>94</sup> Garman & Walker, *supra* note 9, at 320.

<sup>95</sup> William Haft, *More than Zero: The Cost of Zero Tolerance and the Case for Restorative Justice in Schools*, 77 *DENV. U. L. REV.* 795, 808 (2000).

<sup>96</sup> *Id.* at 797.

<sup>97</sup> See, e.g., Jeanne B. Stinchcomb, et al., Riestenberg, *Beyond Zero Tolerance: Restoring Justice in Secondary Schools*, 4 *YOUTH VIOLENCE & JUV. JUST.* 123 (2006) (a qualitative case study analysis on the implementation of a restorative justice initiative in an urban high school).

<sup>98</sup> Emily Morgan, Nina Salomon, Plotkin, Martha, & Rebecca Cohen, *The School Discipline Report: Strategies for the Field to Keep Students Engaged in School and Out of the Juvenile Justice System*, THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER 31 (2014) [https://csgjusticecenter.org/wpcontent/uploads/2014/06/The\\_School\\_Discipline\\_Consensus\\_Report.pdf](https://csgjusticecenter.org/wpcontent/uploads/2014/06/The_School_Discipline_Consensus_Report.pdf).

<sup>99</sup> See Cole & Heilig, *supra* note 41, at 305.

<sup>100</sup> *Id.* at 311.

<sup>101</sup> National Association of Youth Courts, *Significance of Youth Courts*, (2015)

recommended—in addition to programs on bullying, threat assessment, and restorative justice—that schools explore comprehensive approaches to discipline.<sup>102</sup>

Schools that enforce zero tolerance policies have sacrificed measured and proportional disciplinary responses for mechanical and non-discretionary decision-making. These seemingly simple policies offer consistent and clear response to weapons and drugs on our public school grounds that seem reasonable to most persons, but have “led to unintended and often absurd consequences, a path from which reasonable persons have not yet found any measureable retreat.”<sup>103</sup> Too many students are being suspended and expelled under zero tolerance policies for offenses that require a measured, not a Draconian response without regard for common sense and intent. Guns, weapons, and drugs must not be tolerated in our classrooms and hallways, but surely we can work diligently to distinguish true threats and harm from an imaginary ray gun and a commonplace nail file. Given the negative consequences for far too many students, it is necessary to rethink a zero tolerance approach in favor of something that proactively teaches students appropriate behavior.

Zero tolerance policies are also harmful to students because, too often, harsh punishment is not intended to change behavior but to assert or reassert the power of authority.<sup>104</sup> Consequences must be associated with the true seriousness of the infraction. Students have a finely-tuned sense of right and wrong; they are often more productive when they are being treated fairly.<sup>105</sup> Teachers, with their perceptions of their

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[http://www.youthcourt.net/?page\\_id=559](http://www.youthcourt.net/?page_id=559).

<sup>102</sup> AMERICAN PSYCHOLOGICAL ASSOCIATION ZERO TOLERANCE TASK FORCE, *supra* note 9, at 97.

<sup>103</sup> Avarita L. Hansen, *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, 302 (2005).

<sup>104</sup> Pedro A. Noguera, *Preventing and Producing Violence: A Critical Analysis of Responses to School Violence*, 65 HARV. EDUC. REV. 189, 198 (1995).

<sup>105</sup> See Christopher Boccanfuso & Megan Kuhfeld, *Multiple Responses, Promising Results: Evidence-Based, Nonpunitive Alternatives to Zero Tolerance*, in RESEARCH-TO-RESULTS BRIEF 2 (2011) [http://www.childtrends.org/wp-content/uploads/2011/03/Child\\_Trends-2011\\_03\\_01\\_RB\\_AltToZeroTolerance.pdf](http://www.childtrends.org/wp-content/uploads/2011/03/Child_Trends-2011_03_01_RB_AltToZeroTolerance.pdf) (writing,

Students who trust their teachers, and feel that their teachers are respectful, fair, and attentive, are more likely to form bonds with and perform well in school. By restricting the ability of school staff to put student actions into context in some cases, zero tolerance policies can inhibit the formation of school bonds.).

students gained through their daily work with them, tend to be effective enforcers of rules they see as fair to their students. As such, we should not minimize or disregard students' explanations of their intent and motive, nor the ability of the teacher to properly weigh those explanations. Rather, considering the context for the questioned behavior should be essential in a fair process aimed at the education of students. Law Professor S. David Mitchell writes, "By removing students from schools or separating them away from the majority through suspensions, zero tolerance policies are creating a juvenile disenfranchised population."<sup>106</sup> These students typically do not learn the lessons that zero tolerance policies seek to instill, and too often learn the lessons that they do not matter.

Fairness is always a balancing act of competing interests. To place a thumb on the scale on the side of expediency and assertions of considerations of treating all students the same despite differences in context sacrifices the equity of the law for the rigid enforcement of the law. Justice is not a formulaic statement of facts applied in a per se manner; X was done, therefore Y results. It is also an understanding and weighing of those factors that influence the facts.

"School discipline entails more than punishment."<sup>107</sup> Maintaining a safe and orderly learning environment is a major outcome of discipline. However, schools are also learning communities that foster cognitive and life skills, as well as promoting student social and emotional growth, of which self-discipline is a part. Both are important goals of discipline,<sup>108</sup> and both are necessary.<sup>109</sup> Unfortunately, zero tolerance policies seek the first and, as has been discussed above, too often harm the second goal.

Considering the capacity for harm of the questioned instrument against the intent to harm and the history of the

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<sup>106</sup> Mitchell, *supra* note 55, at 323.

<sup>107</sup> David Osher, George G. Bear, Jeffrey R. Sprague, & Walter Doyle, *How Can We Improve School Discipline?* 39 EDUC. RESEARCHER 48, 48 (2010) [https://www.district287.org/uploaded/A\\_Better\\_Way/HowCanWeImproveSchoolDiscipline.pdf](https://www.district287.org/uploaded/A_Better_Way/HowCanWeImproveSchoolDiscipline.pdf).

<sup>108</sup> *Id.* at 49–52.

<sup>109</sup> *Id.* at 53 (writing, "Effective schools establish shared values regarding mission and purpose; promote prosocial behavior and connection to school traditions; and provide a caring, nurturing climate involving collegial relationships among adults and students.").

student is a critical consideration before suspending and expelling a student for possession of a real weapon. What lessons are taught when the rules that are used to punish are perceived as unfair and unreasonable? Reflexive, automatic responses unconnected to the true capacity for harm of the “weapon,” the student’s intent to harm, or the history of behavior of the student must cease. The discretion of the educator to balance the critical factors of student discipline with thoughtful and reasonable decision-making must be restored.<sup>110</sup>

As discussed above, educators will take swift and appropriate action to protect students from real harm. For example, the educator’s response to protect their students in the face of the unfolding massacre at Sandy Hook Elementary School demonstrates this value and predisposition to act. However, educators also wish to balance this willingness to act with common sense. A teacher in the Fries and DeMitchell study responded to the struggle over zero tolerance stating, “[T]he thing that I like about zero tolerance is that it gives you the clout to be able to act with some backing. The part that is frustrating is that it takes away the common sense aspect of life.”<sup>111</sup>

No matter how well intentioned zero tolerance may have been at its inception, its use in our schools is failing our students, pushing too many of them into the school-to-prison pipeline. While it appears facially neutral in its application, it has a disparate impact on minority students and students with disabilities.<sup>112</sup> It is time to reconsider zero tolerance policies. Our laws, rules, policies, and regulations must embrace, rather

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<sup>110</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION ZERO TOLERANCE TASK FORCE, *supra* note 9, at 98 (recommending that zero tolerance policies be applied with greater flexibility taking into account school context and teacher expertise).

<sup>111</sup> Fries & DeMitchell, *supra* note 13, at 223. See also, Hansen, *supra* note 103, at 316 (writing, in addition to zero tolerance sweeping up students whose acts are dangerous and illegal, it also, in the same sweep of the broom catches and severely punishes “basically good children who may have made an error in judgment or exercised the judgment of a child or adolescent, in many cases without regard to the consequences of their actions. That is perhaps, what is most troubling about zero tolerance.”).

<sup>112</sup> Boccanfuso & Kuhfeld, *supra* note 105, at 3 (writing,

[R]esearch has consistently indicated that disproportionate percentages of African American, Latino (to a lesser extent), disabled, and poor students are suspended and expelled in schools with zero tolerance policies. More sophisticated analyses have indicated that this disproportion is not due to higher rates of disruption or violence among these groups.).



than eschew, common sense. One-size-fits-all discipline is ill-fitting.<sup>113</sup> There are options for alternative approaches. Intermediary steps, such as those used in restorative justice approaches, to discipline should be explored. In addition, the context, intent, and likelihood of real harm are important factors when considering zero tolerance. Our zero tolerance policies must, as a beginning point, be fair and reasonable and not be allowed to continue to “run amuck.”<sup>114</sup>

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<sup>113</sup> See, e.g., Brandi Melvin, *Zero Tolerance Policies and Terroristic Threatening in Schools*, 40 J. L. & EDUC. 719, 719 (2011) (writing, “Therefore, these policies, often do not treat violators fairly. Unlike other disciplinary policies, zero tolerance policies do not distinguish between children in any manner.”).

<sup>114</sup> *Ratner v. Loudoun Cty. Pub. Schs.*, 16 F. App’x. 140, 143 (4th Cir. 2001) (Hamilton, J., concurring).