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More Than Zero: The Cost of Zero Tolerance and the Case for Restorative Justice in Schools

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MORE THAN ZERO: THE COST OF ZERO TOLERANCE AND THE CASE FOR RESTORATIVE JUSTICE IN SCHOOLS

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The author Tracy Kidder documented a year following the life of an extraordinary elementary school teacher and her fifth-grade class at a public school in Holyoke, Massachusetts.[1] During that year, the teacher, Chris Zajac, had a particularly troublesome student named Clarence. For much of the year, he completed little work, was constantly disruptive, frequently started fights, and often hurt other students.[2] Finally, in March of that year, Zajac faced the decision of whether to keep Clarence in the class or send him to a special "Alpha" class for difficult and even violent children.[3] Zajac was torn between the harm that she feared Clarence was likely to suffer by being separated from the mainstream students and the harm that Clarence continued to inflict on those mainstream classmates:

> Was it fair to let one child's problems interfere with the education of nineteen other children, many of them just as needy as Clarence? When she looked back and imagined herself saying, "No! I don't want him taken away," she imagined herself feeling just as guilty as she would have if she'd said, "Yes, by all means, Alpha." In retrospect, sending Clarence to Alpha seemed like a decision to accomplish something that was probably right by doing something that was probably wrong.[4]

This passage characterizes the dilemma posed by disruptive students. For Clarence, it was probably wrong to send him to a class filled with troublesome students. Frequently, such students will benefit most from an orderly, mainstream classroom. However, for the rest of Zajac's students, it was probably right to have Clarence leave. His presence diminished and constantly threatened to destroy the very learning environment from which he was most likely to benefit. Ultimately, the little consolation Zajac took from a committee's decision to assign Clarence to the

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1. *See* Tracy Kidder, Among Schoolchildren (1989).
2. *Id., passim.*
3. *Id.* at 166-67.
4. *Id.* at 167.

Alpha class was that she had tried "everything possible" before sending him away from her class.[5]

INTRODUCTION

There is a trend in public education of treating the dilemma posed by the Clarences of the classroom as a single-sided coin. That is, it fails to recognize the cost of exclusion as a sanction. This trend finds its most explicit expression in so-called "zero tolerance" policies.[6] Zero-tolerance policies are designed to suspend or expel students from public schools for a single occurrence of a proscribed conduct. In their extreme form, the policies mandate permanent expulsion for actions ranging from possession of a weapon on school grounds to conviction of serious crimes.[7] In the fall of this school year, enforcement of a multi-year expulsion against students under such a policy in an Illinois public school gained national attention.[8] Some supported the strict response to the boys' undoubtedly violent and destructive conduct.[9] Others, including the Reverend Jesse Jackson, sided with families of the expelled students who argued that the punishment was excessive and destructive to the boys' education.[10]

This trend can be viewed largely as a response to increased youth violence in light of recent events such as the Columbine High School tragedy.[11] Although, concern about violence existed well before Columbine,[12] it is likely that the numerous recent school shootings have further

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5. *See id.* at 168.

6. *See, e.g.*, Margaret Graham Tebo, *Zero Tolerance, Zero Sense*, ABA JOURNAL, Apr. 2000, at 41.

7. *See, e.g.*, MICH. COMP. LAWS ANN. § 380.1311 (mandating permanent expulsion for students found in possession of a weapon on school grounds and for students found guilty of arson or rape).

8. *See* Clarence Page *'Zero Tolerance,' Zero Thinking*, CHI. TRIB., Nov. 14, 1999, at 21 (describing the replaying of the videotaped brawl on national television). The students were involved in a brawl in the bleachers of a high school football game.

9. *See, e.g.*, Kathleen Parker, *Coddling Not Allowed: Pendulum Swings Back Toward Discipline, Responsibility*, CHI. TRIB., Nov. 24, 1999 at 17 (asserting that Americans are fed up with "victimology" and praising school board's decision to expel the boys).

10 *See, e.g.*, Eric Zorn, *Chance at Change Must Outweigh All Else in Decatur*, CHI. TRIB., Nov. 11, 1999 at 1 (arguing that expelled students should be returned to mainstream classes as soon as possible).

11 *See* Barry C. Feld, *Rehabilitation, Retribution & Restorative Justice: Alternative Conceptions of Juvenile Justice, in* RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 24 (Gordon Bazemore & Lode Walgrave eds., 1999); *see generally* Developments in the Law, *Alternative Punishments: Resistance & Inroads*, 111 HARV. L. REV. 1967, 1968-71 (1998) (discussing punitive trends in criminal law as a whole).

12. The issuance of the Safe School Study Report to Congress in 1978 is often identified as the "formal recognition of a serious national concern with the increasingly crime-ridden, unsafe conditions of American public schools." Julius Menacker & Richard Mertz, *State Legislative Responses to School Crime*, 85 ED. LAW REP. 1 (1993). *See also* Page, *supra* note 8, reporting that at least four out of every five high schools in the United States has been subject to a zero-tolerance policy since at least 1997.

concentrated attention on problems of violence in schools and have hastened the trend toward expulsion as a proactive measure. Indeed, in December of 1999, Governor Owens proposed a zero-tolerance policy for weapons, drugs, and violent behavior in schools.[13] In addition, he urged a "three strikes and you are out" policy for "disruptive" behavior.[14]

In terms of educational policy, this trend can be justified by the implicit or explicit recognition that security must be a fundamental concern for public schools.[15] In other words, schools must be safe places for children to learn. The importance of security to the integrity of public schools cannot be gainsaid or minimized. So-called "zero-tolerance" policies are consistent with trends away from lenity in criminal law and with restrictions on constitutional rights that courts have found appropriate in the public school context.[16] Expulsion is a necessary tool for achieving and maintaining security. However, this article also contends that the growing reliance on zero-tolerance responses to misconduct runs directly counter to a fundamental purpose of public education—the purpose of preparing children to live in a democratic society.[17] It suggests that the decision to exclude or ostracize individuals from an institution specifically designed to prepare them to be productive members of our society is a grave one. As a result, exclusionary policies should be enforced as a last resort rather than as a first response.

Finally, this article proceeds from the premise that a particular strategy can be a last resort only if there are intermediate responses available to teachers and administrators. One response the author advocates is to apply principles of restorative justice more aggressively to the school setting. In particular, victim-offender mediation offers a response to violence or threats of violence that has proven to be effective in the criminal law context and, for reasons discussed in Part II, has even greater potential in the context of a school community.

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13. *See* Governor Bill Owens, *Announcement of "Putting Children First: A Plan for Safe & Excellent Schools," available at:*
http://www.state.co.us/gov_dir/govnr_dir/ ChildrenFirstRemarks.htm.

14. *See id.*

15. *See, e.g.*, Todd A. DeMitchell, *Security Within the Schoolhouse Gate: An Emerging Fundamental Value in Educational Policy Making*, 120 ED. LAW REP. 379, 382 (1997) (arguing that security now joins equity, efficiency, liberty, and quality as a fundamental educational value).

16. *See* Bill O. Heder, *The Development of Search & Seizure Law in Public Schools*, 1999 B.Y.U. EDUC. & L.J. 71, 114 (discussing restrictions on constitutional rights of school children); Dan Lungren, *Three Cheers for Three Strikes*, POL'Y REV., Nov.-Dec. 1996, at 34 (discussing effectiveness of three strikes law in California).

17. Incidents prompting proposal of such policies are likely to affect not only offenders, but all students in a school community through the narrowing of students' rights, particularly constitutional rights such as those protected by the Fourth Amendment. *See* Heder, *supra* note 16 at 113-14 (predicting that the substantial intrusions on student Fourth Amendment protections found permissible in recent Supreme Court decisions will only accelerate in light of drug and weapons incidents).

Following this Introduction, in Part I, the article considers the increasingly restrictive, punitive trends in both public education and in criminal law and questions whether, while understandable in the face of recent events like the Columbine tragedy, they will diminish the likelihood of subsequent incidents. These policies often fail to address the underlying causes of school violence or, more importantly to give public education an opportunity to fulfill its purpose for those most in need of it.

Part II discusses the principles of restorative justice, which has recently been recognized as a neglected element in our mainstream approach to criminal law.[18] It describes the process of victim-offender mediation as one means of implementing those principles. It suggests that victim-offender mediation offers an intermediate response to violence or threats of violence that is not only more consistent with principles of public education than expulsion but also more likely, in many cases, to reduce violence effectively. This Part also briefly distinguishes victim-offender mediation from more commonly recognized school peer-mediation programs which, while serving a valuable purpose in schools, have limitations that make it inappropriate for the types of conflict for which victim-offender mediation can be most effective. The central purposes of this article are to 1) identify generally accepted restorative justice principles and processes that have such potential for application in the school setting; 2) note the positive effects that restorative justice programs have had in other contexts; and 3) identify particular qualities of the public school environment that make restorative justice programs particularly appropriate and likely to be effective.

I. REPRESSION & RETRIBUTION – THE PREDOMINANT RESPONSES TO YOUTH VIOLENCE

Legislative awareness of and responses to trends of violence in public schools did not originate with the most recent spate of incidents. For at least thirty years, the issue has received legislative recognition. At the federal level, the Comprehensive Drug Abuse Prevention and Control Act of 1970 was an early effort to make public schools safer by making it a federal offense to sell drugs in or near a public or private elementary, secondary, vocational, or post-secondary school.[19] Such sales became subject to double the prison sentence applicable to identical sales in a non-school setting.[20] Subsequently, in 1978, Congress commissioned the

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18. *See, e.g., Developments in the Law*, *supra* note 11 (discussing trends in restorative justice such as alternative sentencing as well as the political resistance to approaches that emphasize rehabilitation over punishment); Katherine L. Joseph, *Victim-Offender Mediation*, 11 OHIO J. DISP. RESOL. 207 (1996); Daniel W. Van Ness, *New Wine & Old Wineskins: Four Challenges of Restorative Justice*, 4 CRIM. L.F. 251 (1993).

19. Comprehensive Drug Abuse Prevention & Control Act of 1970, Pub. L. No. 91-513 § 419 (codified as amended at 21 U.S.C. § 860 (1994)).

20. 21 U.S.C. § 860 (1994).

National Institute of Education's Violent Schools—Safe Schools study.[21] This study indicated that crime and violence represented serious problems in schools during the 1970s, but also expressed optimism that the problem had peaked.[22] In 1986, the Safe and Drug-Free Schools and Communities Act authorized grants to states and to national programs to provide substance abuse and violence prevention activities.[23] In 1999 alone, the Safe and Drug-Free Schools program has disbursed over $100 million in federal aid to schools in an effort to help schools provide a more disciplined, orderly and safe environment for teaching and learning.

The Supreme Court ultimately thwarted one subsequent congressional attempt to reduce school violence. The Gun-Free School Zones Act of 1990 made it a federal crime for any individual knowingly to possess a firearm in a school zone.[24] The "zone" extended to any area within 1000 feet of a public or private school campus.[25] Congress asserted its authority to enact such legislation under its broad Commerce Clause powers, but the Supreme Court in *Lopez* found that the legislation's alleged relationship to interstate commerce was too tenuous or ill-defined to regulate in this realm of traditional local control.[26]

The *Lopez* decision represents a rare judicial limitation on legislative or administrative authority to regulate conduct in or around schools. Typically, courts have been extraordinarily deferential to legislators and, even more so, to school administrators with respect to school policies that have a direct bearing on the educational environment of the school.[27]

A prominent example of this trend can be found in recent search and seizure decisions. The Supreme Court has approved random suspicionless drug testing as a prerequisite to participation in school athletic programs.[28] The Court found, among other things, a diminished privacy interest for student athletes and a substantial government interest in preventing drug use.[29] Not only did the Court make it clear that children have diminished rights in comparison to adults, it also found that children's rights are not the same in the school setting as they would be elsewhere.[30] As one commentator summarized the trend, "courts are

21. NATIONAL INSTITUTE OF EDUCATION, VIOLENT SCHOOLS – SAFE SCHOOLS: THE SAFE SCHOOL STUDY REPORT TO CONGRESS (1978).

22. *Id.* at iii.

23. Safe & Drug-Free Schools & Communities Act of 1986, Pub. L. No. 99-570 § 4102 et seq., 100 Stat. 3207 (1986).

24. Gun-Free School Zones Act of 1990, Pub. L. 101-647, § 1702, 104 Stat. 4844 (codified as amended at 18 U.S.C. § 922 (1994)).

25. *Id.*

26. *See United States v. Lopez*, 514 U.S. 549, 551 (1994) (holding the Gun-Free School Zones Act of 1990 unconstitutional).

27.

28. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665-66 (1995).

29. *See Vernonia*, 515 U.S. at 665-66.

30. *See id.* at 655-56.

struggling to empower school officials to effectively address rising threats to children."[31]

In general, the principal of judicial deference to school administrators for decisions implicating educational policy seems appropriate for achieving the purposes of public education. Yet, this deferential judicial role heightens the responsibility of educational administrators to consider the social and educational consequences of the policies. Reliance on the legality of a policy to determine its educational efficacy would abdicate educator's responsibility to make educationally sound decisions. The fact that a policy *can* be enforced from a legal perspective begs the question of whether it *ought* to be enforced from an educational standpoint. This question must be answered in light of the school's alternatives. That is, the decision whether or not to implement a restrictive policy or to expel an individual child can be answered only (1) in the context of its demonstrable effectiveness and (2) in relation to available alternatives for responding to violent or potentially violent behavior.

Although efforts to address concerns about school violence have been ongoing, they have undoubtedly become more repressive and punitive in recent years. This trend has been particularly evident at the state and local level. One such effort has been in the area of dress codes.[32] Implementation of public school dress codes is perhaps the most concrete reflection of the notion that lack of discipline and uniformity is one of the causes of declining educational performance in general, and school violence, in particular. Educators who support dress codes often assert that they encourage discipline, enhance self-esteem, and promote unity in the school setting.[33] As a result, some states allow public school districts to mandate school uniforms.[34]

Scholarly analysis of the school uniform concept has devoted substantial attention to whether such policies violate student rights.[35] The central legal question has been whether dress codes infringe unconstitutionally on students' rights of expression.[36] An equal or greater concern for educators, however, is whether such policies are likely to achieve

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31. Heder, *supra* note 16, at 113.

32. *See generally* Amy Mitchell Wilson, *Public School Dress Codes: The Constitutional Debate*, 1998 B.Y.U. EDUC. & L.J. 147; Note, Dena M. Sarke, *Coed Naked Constitutional Law: The Benefits & Harms of Uniform Dress Requirements in American Public Schools*, 78 B.U.L. REV. 153 (1998).

33. *See* Wendy Mahling, *Secondhand Codes: An Analysis of the Constitutionality of Dress Codes in the Public Schools*, 80 MINN. L. REV. 715, 719-20 (1996).

34. *See* Alyson Ray, *A Nation of Robots? The Unconstitutionality of Public School Uniform Codes*, 28 J. MARSHALL L. REV. 645 (1995).

35. *See, e.g.*, Wilson, *supra* note 32, at 169-70 (discussing possible outcomes of constitutional determination based on balancing of students' expressive interest with government's interest in providing safe educational environment); Ray, *supra* note 34, at 645 (arguing that public school uniform codes violate students' First Amendment rights of free expression).

36. *See id.*

their disciplinary and educational goals. Will these restrictions on student expression have a positive effect on the learning environment and the ultimate goals of public education? At the moment, there is little data on which to evaluate the efficacy of school uniforms apart from anecdotal accounts of improved school climate.[37]

School uniforms represent a proactive effort to improve school climate. However, a more common legislative response to concerns about violence has been reactive. Numerous state legislatures have enacted zero-tolerance statutes in recent years.[38] In California, for example, a student must be recommended for expulsion from school for acts including possession of certain dangerous objects, robbery, and sale of any controlled substance.[39] The legislative popularity of such policies mirrors increasingly punitive trends in criminal law characterized by so-called "truth in sentencing" legislation or "three-strikes" laws.[40] Whether one agrees with the efficacy of the laws, such treatment of adults is rational, at least, from a culpability perspective. Our notions of criminal law are based on the premise that adults have the necessary state of mind to be fully accountable for their actions.[41]

For children, however, zero-tolerance policies flatly contradict the traditional premise that children have diminished capacity to develop the requisite intent for criminal conduct.[42] Instead, they assume both an injurious intent and an injurious effect based on a single incident, sometimes of possession alone.[43] As a result, the zero-tolerance mindset has predictably led to cases of rigid, overinclusive punishment of children. One such case involved an eighth grade student in Omaha, Nebraska who

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37. *See* Mahling, *supra* note 33, at 718-20 (reporting that educators who support dress codes have asserted an improved educational environment as a result of enhanced discipline, self-esteem, and classroom unity). One notable exception is the documented experience of the Will Rogers Middle School in Long Beach, California. The school reported a 32% drop in suspensions and a 36% drop in crime as well as a significant jump in its statewide ranking on a standardized algebra test. *See* Wilson, *supra* note 32, at 149.

38. *See, e.g.*, CALIF. EDUC. CODE § 48915, MICH. COMP. LAWS ANN. § 380.1311, and NEB. REV. STAT. § 79-283.

39. *See* CALIF. EDUC. CODE § 48915(a).

40. President Clinton hailed his 1994 crime bill with its three-strikes provision as "one of his lasting achievements." Stephen Glass, *Anatomy of a Policy Fraud*, NEW REPUBLIC, Nov. 17, 1997, at 22. Recent crime reduction in both California and New York City has been attributed, in part, to three-strikes policies in those states. *See* Lungren, *supra* note 16; *but see* Editorial, *Crime is Down All Over*, N.Y. TIMES, Oct. 14, 1997, at A26 (suggesting that crime reduction may be a result of demographic changes).

41. 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 1.5, at 30-40 (1986) (discussing theories of punishment).

42. *See, e.g.*, Owens, *supra* note 13 (asserting that "[e]veryone knows you do not bring a weapon anywhere near an airport. . . . Children must know without any doubt that the same rules apply to everyone."

43. *See, e.g.*, *See* CALIF. EDUC. CODE § 48915(a)(2), MICH. COMP. LAWS ANN. § 380.1311(2), NEB. REV. STAT. § 79-283(3), (4).

carried a pocketknife on a school bus.[44] He showed the knife to another boy, poked a hole in the seatback in front of him, and poked a hole in his own shirtsleeve.[45] The Nebraska legislature had previously given school districts the authority to expel students for two semesters for possession of a dangerous weapon at school.[46] Pursuant to this legislation, the Omaha Public Schools had designated all knives as dangerous weapons and mandated a two-semester expulsion as the automatic penalty for violation of the rule.[47] In *Kolesnick*, the Nebraska Supreme Court upheld the boy's year-long expulsion, finding that it did not violate his federal substantive due process rights.[48]

Regardless of the limits on the child's due process rights, the zero-tolerance response was overinclusive from an educational standpoint because it ostracized a child who had no intent to injure anyone and who caused little disruption of the school environment. His crime was slight property damage to a school bus seat—damage of an extent that one suspects most children cause to school property at one point or another in their educational lives. Yet, the consequence was his expulsion from the educational community for a year. One must question how the educational aims of a public school have been achieved by denying education to a child on such grounds.

Another example of overly rigid disciplinary policy, this one in the context of harassment, received prominent popular attention a few years ago when a North Carolina school suspended a six-year-old boy from school after he kissed a classmate.[49] Public schools must treat harassment concerns seriously, and respond promptly to incidents of alleged harassment in order to develop responsible and educationally sound policies and practices and maintain legal standards.[50] Lines of accountability must exist, even for children who may not be old enough to understand the full implications of their actions; however, in the North Carolina case a chasm existed between intent and accountability, injury and punishment.

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44. *See Shaw ex rel. Kolesnick v. Omaha Pub. Sch. Dist.*, 558 N.W.2d 807 (Neb. 1997); *see also Minooka Boy's Knife Tests School, After-Hours Quarrel May Bring Expulsion*, CHI. TRIB., Nov. 17, 1999 (reporting eighth-grade boy's possible one-year expulsion for carrying a pocket knife on school grounds).

45. *See Kolesnick*, 558 N.W.2d at 811.

46. *See* 1994 Neb. Laws 1274, 1281-82 (codified at NEB. REV. STAT. § 79-283).

47. *See Kolesnick*, 558 N.W.2d at 811.

48. *See id.* at 813-14.

49. *See* George F. Will, *Six-Year-Old Harassers?*, NEWSWEEK, Jun. 7, 1999, at 88.

50. *See id.* (mentioning that public school liability for sexual harassment has received significant attention from the Supreme Court in recent years). A jury awarded a former public school student in Alexandria, VA, more than $1,000,000 for his sexual abuse by a teacher. *See* Patricia Davis & Ann O'Hanlon, *Alexandria Schools Liable for Sex Abuse; Jury Awards $1 Million To Victim Of Teacher*, Washington Post, Mar. 11, 2000, at A01. The jury found that the school principal and other school officials had ignored reports of previous abuse by the teacher and signs that he might have been abusing the particular student. *See id. See also* Tamar Lewin, *Kissing Cases Highlight Schools' Fears of Liability for Sexual Harassment*, N.Y. TIMES, Oct. 6, 1996, at 22-23.

Although the retributive net might occasionally be cast too broadly, such extraordinary occasions, taken alone, should not be the basis for evaluating a general policy. Uniform draconian responses to misconduct in schools might be justified if such policies demonstrably achieved their ultimate goals with limited concomitant costs. The efficacy is doubtful, however, and the costs are numerous and varied, including the potential economic costs of providing alternative education for expelled students.[51] Moreover, the long-term costs, both to the child and to society, of denying an individual the benefit of a traditional education, may be great.[52] The purpose of public education, traditionally, has been to prepare children to live as productive members of a republican society.[53] Such purpose can hardly be achieved by refusing to educate those who have the most difficulty understanding or accepting the expectations of such a society.

The assumption that punitive responses to juvenile offenders will deter antisocial and potentially violent conduct runs counter to democratic, inclusionary principles of public education. Furthermore, it conflicts with goals and incentives for future conduct. Alienation and isolation from the community are potential sources for violent conduct, as evidenced in the backgrounds of Dylan Klebold and Eric Harris following the Columbine tragedy.[54] Punitive responses to juvenile offenders serve to weaken bonds with the school community and make reintegration less likely.[55] This pattern of response is problematic in light of our understanding that a sense of isolation from community is one of the *causes* of juvenile offenses.[56] Expulsion from the community for a single

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51. *See* Lisa Petrillo, *Zero Tolerance At Schools: One Strike & They Were Out: Was the Punishment Fair? You be the Judge . . .*, SAN DIEGO UNION-TRIB., Nov. 24, 1995, at B1 (reporting that California's mandatory expulsion rule had resulted in punishment of children for carrying nail clippers, Swiss Army knives, and bottle openers, and that the state estimated the cost of expulsion at $20 million).

52. The negative effects of repressive policies tend to extend beyond the individual child and to the school community as a whole. *See infra* note 56 and accompanying text. *See also Chicago's Alternative Schools Run Out of Room: Night Classes Slated to Keep Overflow Students in System*, CHI. TRIB., Dec. 23, 1999 (reporting that it would be nearly impossible for Chicago Public Schools to offer any additional troubled students a second chance to complete their education).

53. *See, e.g.*, LAWRENCE A. CREMIN, THE AMERICAN COMMON SCHOOL: AN HISTORIC CONCEPTION 70-71 (1951) ("'It may be an easy thing to make a Republic, . . . but it is a very laborious thing to make Republicans.'" (quoting HORACE MANN, TWELFTH ANNUAL REPORT OF THE BOARD OF EDUCATION, TOGETHER WITH THE TWELFTH ANNUAL REPORT OF THE SECRETARY OF THE BOARD (Dutton & Wentworth, Boston, eds., 1849)); *see id.* at 59 ("'[T]he spirit of common schools – schools where the rich and the poor meet together on equal terms, where high and low are taught in the same house, the same class, and out of the same book, and by the same teacher – is a republican spirit. And this is a republican education.'") (quoting J. Orville Taylor, *Common School Assistant*, Vol. II (1837)).

54. *See Colorado Comes Together*, DENV. POST, Aug. 15 1999, at F4.

55. *See* Roger J.R. Levesque, *The Right to Education in the United States: Beyond the Limits of the Lore & Lure of Law*, 4 ANN. SURV. INT'L & COMP. L. 205, 248 (1997).

56. *See id.* (citing Florence M. Stone & Kathleen B. Boundy, *School Violence: The Need for a Meaningful Response*, 28 CLEARINGHOUSE REV. 453, 454, 456 (1994)). *See also* Gordon Bazemore, *After Shaming, Whither Reintegration: Restorative Justice & Relational Rehabilitation, in*

offense in the name of zero tolerance is merely the most obvious example. Its effect might be to make the community appear safer in a superficial sense; yet, expulsion provides little hope that those in positions of authority will recognize or attempt to mitigate the community isolationism that seemingly encourages criminal acts.[57] In general, repressive policies damage the educational environment and fail to reduce the problems they are designed to remedy.[58] Some commentators suggest that such policies make schools more effective at creating delinquent students than at controlling or reforming them.[59]

II. RESTORATIVE JUSTICE – A MISSING LINK

A. *Defining Restorative Justice*

Retributive responses often repress and isolate, not only the offender, but also the victim and the surrounding community. In contrast, restorative justice principles hold offenders strictly accountable for their conduct while seeking to repair and restore the integrity of the school community after an offense has occurred. Restorative justice, as a model, requires a distinct shift away from the current emphasis on punishing the offender.

The current political climate, stressing retribution at the expense of rehabilitation, magnifies the degree to which criminal justice must be reconceived.[60] Core principles of restorative justice demand a focus on restoration of the community. That is, the primary goal in responding to

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RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 165 (Gordon Bazemore & Lode Walgrave eds., 1999) (stating that "[s]anctions that degrade and isolate the offender . . . weaken bonds that foster reintegration and ultimately heighten risks to public safety."); Pedro N. Noguera, Preventing & Producing Violence, 65 Harv. Educ. Rev. 189, 192-207 (1995) (arguing that "get tough" approaches fail to create safe environments because coercive strategies disrupt learning, increase mistrust, and encourage resistance to learning).

57. *See* Levesque, *supra* note 55, at 248 (citing ROBERT M. REGOLI & JOHN D. HEWITT, DELINQUENCY IN SOCIETY 313-23 (3d ed. 1997)).

58. *See id.* (citing David C. Broterton, *The Contradictions of Suppression*, 28 URBAN REV. 95, 99-113 (1996) (concluding from a two-year study of gangs in inner-city high schools that typical suppressive responses were futile and had unintended negative consequences for goals of democratic education)).

59. *See id.* (citing ROBERT M. REGOLI & JOHN D. HEWITT, DELINQUENCY IN SOCIETY 313-23 (3d ed. 1997) (arguing that tracking systems and conduct codes, among other repressive policies, contribute to delinquency)).

60. *See generally Developments in the Law*, *supra* note 11, at 1967-70 (discussing punitive trends in criminal justice); Feld, *supra* note 11, at 24-25 (discussing punitive trend specifically with respect to juvenile justice system as reflected in trying juvenile criminals as adults); Gordon Bazemore & Lode Walgrave, *Restorative Juvenile Justice: In Search of Fundamentals & an Outline for Systemic Reform in* RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 59 (Gordon Bazemore & Lode Walgrave eds., 1999); Van Ness, *supra* note 18, at 257 (attributing trend to societal emphasis on maintaining security and public order); *cf.* LAFAVE, *supra* note 41, at 30-40 (1986) (identifying six theories of punishment: prevention, restraint, education, deterrence, retribution, and rehabilitation).

reparation for the injuries the offense has caused.[61] This perspective requires that the justice process devote as much attention to those injured by crime—both individual victims and the community—as to the offender.[62]

The "justice" to be achieved following a crime is to "make things right."[63] In other words, justice requires solutions that hold the offender strictly accountable, not for the purpose of punishment, but in order to reconcile, repair, and reassure those violated by the offender's actions.[64] Thus, justice mandates a response at three levels: to the offender, to the victim and to the community.[65] The process has been summarized as "the effort to heal the three parties that may be injured by crime."[66] Although this article emphasizes potential benefits with respect to offenders, the restorative paradigm for justice is oriented to the victim and to the community as well. Recent support for restorative justice derives largely from the disservice to *victims'* interests and needs, characteristic of current retributive criminal processes:

> We may invoke [victims'] names to do all sorts of things to the offender, regardless of what victims actually want. The reality is that we do almost nothing directly for the victim, in spite of the rhetoric. We do not listen to what they have suffered and what they need. We do not seek to give them back some of what they have lost. We do not let them help to decide how the situation should be resolved. We do not help them to recover.[67]

Restorative justice has followed a variety of paths into contemporary society with programs developing out of sources as diverse as community policing groups and indigenous or tribal dispute resolution processes.[68] Its roots are historically deep, and its origins are as varied as the historic legal codes of the Middle East, the Roman Empire, and European polities.[69] Furthermore, its current applications are culturally diverse.[70]

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61. *See* Bazemore & Walgrave, *supra* note 60, at 48.

62. See *id.* at 49, 164; HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME & JUSTICE 181 (1990); Van Ness, supra note 18, at 259.

63. *See* Zehr, *supra* note 62, at 181.

64. *See id*

65. *See id.* at 188; Van Ness, *supra* note 18, at 259.

66. Bazemore & Walgrave, *supra* note 60, at 55.

67. Zehr, *supra* note 62, at 32 (concluding that "[t]his, then, is the ultimate irony, the ultimate tragedy). Those who have most directly suffered are not to be part of the resolution of the offense [because] . . . victims are not even part of [society's] . . . understanding of the problem." *Id.*

68. *See* Bazemore & Walgrave, *supra* note 60, at 45.

69. *See* Van Ness, *supra* note 18, at 253-55; *see also* Zehr, *supra* note 62, at 139-142 (discussing the Biblical notion of justice as one of making things right and moving toward "shalom").

70. *See* Van Ness, *supra* note 18, at 255-56 (noting restorative grounding of Japanese justice system and discussing the shift away from restorative justice in the British system).

Introduction of restorative justice into contemporary society from different sources inevitably creates different practical definitions, images, and iterations of restorative justice. In fact, some experts in the field would question whether one can fairly discuss "restorative justice" as a unified concept.[71] Nevertheless, the phrase connotes common forms and elements that have strong potential for application in the educational setting.

B. *The Process of Restoring Justice*

Restorative justice has been defined as "a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future. Victim-offender mediation is one of the "clearest" processes employed in the name of achieving restorative justice.[72] As the name implies, the core component is mediation between the crime victim and the criminal offender.[73] Typically, the process also includes members of the victimized community who can speak to the impact of the offender's actions on the community and who can help construct appropriate restoration or restitution.[74] The model process involves face-to-face, non-adversarial, informal and voluntary meetings in a safe environment.[75] The voluntary nature of the process is particularly important.[76] To establish voluntariness the mediator often meets with parties individually in preparation for the face-to-face meeting.[77]

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71. *See* Bazemore & Walgrave, *supra* note 60, at 47-48 (discussing range of definitions and understandings).

72. Mediation workshops and programs are already familiar concepts in school communities nationwide. *See, e.g.*, Glenda L. Cottam, *Mediation & Young People*, 29 CREIGHTON L. REV. 1517, 1522-24 (1996) (discussing various schools that employ mediation workshops and programs); Kelly Rozmus, *Peer Mediation Programs in Schools*, 26 J.L. & EDUC. 69, 81-83 (1997) (discussing evaluations of existing programs); William S. Haft & Elaine R. Weiss, *Peer Mediation in Schools*, 3 HARV. NEGOTIATION L. REV. 213, 213 (1998) (reporting estimates ranging from 5,000 to 8,500 for number of existing peer mediation programs in the United States). There are substantial differences between the restorative justice mediation process discussed in this article and the peer mediation process already common in schools. The most important distinctions relate to the seriousness of the offenses addressed through the process and the commensurate demands on mediator skill and training. These distinctions make peer mediation programs a generally inappropriate forum for addressing the potential range and seriousness of offenses for which victim-offender mediation is designed. *See infra* notes 88-91 and accompanying text; *See* MARK S. UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE & MEDIATION 5 (1994).

73. *See* UMBREIT, *supra* note 72, at 5.

74. *See* Bazemore & Walgrave, *supra* note 60, at 49 (defining "victim" to include the "victimized community").

75. *See* Bazemore & Walgrave, *supra* note 60, at 51-52.

76. *See* John Braithwaite & Christine Parker, *Restorative Justice is Republican Justice, in* RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 115-16 (Gordon Bazemore & Lode Walgrave eds., 1999) (stating that, in the criminal justice context, "victims and offenders should always have a right to walk out of a conference and go to court").

77. *See* UMBREIT, *supra* note 72, at 7-8. In addition to ensuring that the parties are willing participants, these meetings give the parties an opportunity to become familiar with the process and

When the parties do meet, the initial focus is on the offense.[78] Victims have an opportunity to express directly to the offender their feelings about the offense and its impact.[79] In addition, they are often eager to ask the offender questions in order to understand why and how the events occurred.[80] The victim frequently describes the offense's impact on his or her life.[81] Both parties can express feelings, elaborate on facts, discuss consequences, and pursue a resolution, including discussing specific restitution to be made by the offender in order to repair the harm. [82] The resolution itself is often memorialized as a formal a written agreement.[83]

The restorative justice process has three important substantive elements: 1) identifying needs of the parties involved; 2) informing and empowering the parties; and 3) establishing accountability for past conduct and future intentions.[84] These elements combine to promote repair, reconciliation, and reassurance.[85] Each of these elements comports with the goals that a responsible educational system should have for all of its students, particularly those whose isolation is becoming destructive; namely, instilling accountability, instilling a sense of the concrete effect actions have on others in the particular community, and demanding constructive participation in such community. These goals become particularly important with respect to those whose isolation threatens to become destructive.[86]

C. *Positive Effects of Victim-Offender Mediation*

Data evaluating victim-offender programs are limited; however, available research, primarily in the context of juvenile justice programs, indicates that victim-offender programs have had positive results. One study of four U.S. juvenile justice victim-offender programs reported

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to understand their roles and responsibilities. *See id.* They also give the mediator(s) an opportunity to establish rapport and to become familiar with the issues that the mediation will need to address. *See id.*

78. *See id.* at 8.

79. *See id.*

80. *See id.* In court-annexed restorative justice processes, it is usually a prerequisite for referral that the offender acknowledge responsibility for having committed the offense. *See id.* at 7 ("Many programs accept referrals after a formal admission of guilt has been entered with the court.").

81. *See* Harry Mika, *The Practice & Prospect of Victim-Offender Programs*, 46 SMU L. REV. 2191, 2197-98 (1993).

82. *See id.*

83. *See id.* at 2198; see, e.g., UMBREIT, supra note 72, at 61-71 (characterizing restitution agreements from mediations in four U.S. victim-offender programs according to categories of financial restitution, personal service, and community service).

84. *See* ZEHR, *supra* note 62, at 191-204.

85. *See id.* at 181.

86. *See supra* note 56 and accompanying text.

high levels of victim satisfaction with the fairness of the process.[87] Substantively, victims are more likely to receive promised restitution if the obligation arose through victim-offender mediation.[88] In other words, offenders who commit to some form of restitution through the mediation process are more likely to follow through on their commitment than if they are ordered to pay restitution as part of more traditional adjudication.[89] Regarding recidivism, the data are particularly limited, but there is some evidence both that recidivism rates are lower for juveniles whose offenses are addressed through victim-offender mediation than through the traditional juvenile justice system.[90] The benefits to victims are equally important. In a study of Indiana programs, victims who met with their offenders could get answers to their questions about the offender, the crime, and their victimization.[91] In addition, the victims typically valued the opportunity to describe the offense's effects directly to the offender; furthermore, victims were more likely to value the offender's apology, and less likely to remain upset about the offense or to fear revictimization by the offender.[92] Effects on the community are more difficult to quantify and, to the author's knowledge, have not been meaningfully assessed to date.

D. *Applying the Process to the School Setting*

Whatever benefits have accrued from existing programs within existing legal systems should be magnified in the school setting. This hypothesis should hold true for two reasons. First, programs within the existing legal frameworks work at odds with contemporary retributive notions of justice.[93] By contrast, the goals of restorative justice comport with the aims of public education: both strive to prepare children to become capable and productive members of a republican society.[94] Restorative justice models, in general, and mediation, in particular, contribute to these goals by emphasizing accountability, restitution, and restora-

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87. *See* UMBREIT, *supra* note 72, at 83 (finding that 83% of victims in study reported that their case was handled fairly as compared with 62% for victims whose cases were not referred to mediation).

88. *See id.* at 109-111.

89. *See* Mara F. Schiff, *The Impact of Restorative Interventions on Juvenile Offenders, in* RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 331 (Gordon Bazemore & Lode Walgrave eds., 1999).

90. *See id.* at 333; UMBREIT, *supra* note 72, at 115.

91. *See* UMBREIT, *supra* note 72, at 17.

92. *See id.* at 22.

93. *See* JOHN J. DIIULIO, JR., NO ESCAPE: THE FUTURE OF AMERICAN CORRECTIONS 66-67 (1991). (suggesting that deeply rooted incarcerative sentiments of the American public will make it difficult for alternative programs to gain support).

94. *See supra* note 53 and accompanying text.

tion of the community, including the offender.[95] In other words, a primary function of the process is to reintegrate the offender as a productive member of the school community, rather than further exiling the student and thereby increasing the potential for separation, resentment, and repeated offenses.

Second, the school provides a setting in which injury to the community can be defined and appropriate restitution formulated. This injury to community is often difficult to define or measure in the context of the legal system, because it is not often clear how the community, separate from the individual victim(s), should be defined or compensated. Restitution commonly takes the form of "community service."[96] But in the broader, ill-defined community the service required can become easily attenuated from the effects of the specific offense and, as a result, from a victim's sense of accountability or duty to remedy a particular problem.[97]

By contrast, the school context makes it easier to identify members from that community who can play a positive role in the restorative justice process.[98] In addition, a harm that occurs within the school community has impacts within defined community boundaries, providing established community norms by which conduct can be evaluated and parameters by which parties can define appropriate restitution.[99] Furthermore, school communities are not subject to an important criticism of victim-offender programs established in the context of the legal system: that a one-time intervention of several hours is unlikely "to have a dra-

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95. *See generally* Braithwaite & Parker, supra note 76 at 103-22 (arguing that goals of restorative justice, including justice through face-to-face action, are consonant with fundamental republican principles of non-domination).

96. *See, e.g.*, Susan Guarino-Ghezzi & Andrew Klein, *Protecting Community: The Public Safety Role in a Restorative Juvenile Justice, in* RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 204-05 (Gordon Bazemore & Lode Walgrave eds., 1999) (discussing community service component of restorative justice program in Allegheny County, Pennsylvania).

97. *See* Bazemore, *supra* note 56, at 174 (stating that "[u]nlike conventional adults, most youths lack this sense of 'connectedness.' They do not hold positions of responsibility in work, community or family groups that allow them to make meaningful contributions.").

98. *See id.* at 168-69 (reporting that "sanctioning processes are more likely to enhance rehabilitation/reintegration when they involve family, victims and key members of the offender's community directly in the process"). Bazemore also notes that students' primary "connectedness" occurs through their identity as students in the school environment; accordingly, "this reality puts a great deal of pressure on educational institutions to forge a link between the 'moratorium' experience of adolescence and productive adult life in order 'to allow youths to identify with new roles of competency and invention.'" *Id.* at 174 (quoting ERIK ERICKSON, IDENTITY, YOUTH, & CRISIS 138 (1968)).

99. *Cf.* Feld, *supra* note 11, at 37 (posing the question: "If restorative justice envisions informal enforcement of 'community' norms, who defines the 'community' or the 'norms'?"). The Decatur, Illinois incident, discussed supra notes 8-10 and accompanying text, provides a concrete example of where a defined injury to the community might have been addressed through restorative justice. As part of the fallout from the fights, classes were cancelled for a week; the students lost a week of their educational lives but the offenders' expulsion provided no remedy for this injury. *See* Bob Greene, *Who'll Say 'I'm Sorry' to the Other Decatur Students?* CHI. TRIB., Nov. 22, 1999, at 1 (noting that most of the students were guilty of nothing but they too were kept out of school).

matic effect on altering criminal and delinquent behavior" in which other ongoing factors are present.[100] Schools most likely have more complete information regarding background factors relevant to a specific incident. They also have inherent capacities for ongoing supervision and intervention that traditional justice systems seldom can provide following resolution of a particular offense.[101]

In sum, victim-offender mediation within the school setting facilitates identification of relevant and influential community members; it provides definite boundaries for determining appropriate, relevant restitution; and, it has a supporting framework of continuous contact between the offender and the community to make it an effective component of ongoing intervention.

E. *Limitations of the Process in the School Setting*

Although it is beyond the scope of this article to discuss the detailed means by which a restorative justice program can or should be implemented in a particular school, it is important to identify at least three essential components without which such a program is less likely to succeed. Each of these components draws important distinctions between victim-offender mediation and peer mediation programs that have become common components of dispute resolution processes in schools.[102]

The first limitation relates to the mediators themselves, a critical component of any type of mediation. It is, after all, the mediator who manages the dynamic between the parties and shepherds the process. The mediator's effectiveness is often crucial to whether the participants consider the process to be effective or the outcome to be one that serves justice.[103] The mediator's role in the victim-offender context is more challenging than traditional peer mediation programs, partly because offenses, by definition, may constitute serious criminal acts.[104] Victim-

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100. *See* UMBREIT, *supra* note 72, at 117.

101. *See* Van Ness, *supra* note 18, at 271 (arguing that restorative justice requires greater cooperation between communities and civil government in order to be successful). *See also* Guarino-Ghezzi & Klein, *supra* note 96, at 195-96 (discussing ways in which traditional justice systems create rifts between law enforcement officials and the communities that they are seeking to protect); Russ Immarigeon, *Restorative Justice, Juvenile Offenders & Crime Victims: A Review of the Literature, in* RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 313-14 (Gordon Bazemore & Lode Walgrave eds., 1999) (stating that particular models of restorative justice, such as "family group conferences" have shown particular promise).

102. *See supra* note 72 and accompanying text.

103. *See* UMBREIT, *supra* note 72, at 77 (observing that, in at least one program reviewed, "frequently the victim's satisfaction was directly related to the mediator"); *see also* Cottam, *supra* note 72, at 1538 (discussing how the mediator should give a victim special attention); Stephanie A. Beauregard, Note & Comment, *Court-Connected Juvenile Victim-Offender Mediation: An Appealing Alternative for Ohio's Juvenile Delinquents*, 13 OHIO ST. J. ON DISP. RESOL. 1005, 1020 (1998) (noting importance of high-quality mediators to the success of court-annexed programs).

104. *See* Haft & Weiss, *supra* note 72, at 237 (peer mediation typically responds to disputes that would not implicate anything beyond petty criminal offenses and are characterized as "he said,

offender mediation has been used effectively to address serious crime ranging from burglary, to sexual assault, to vehicular homicide[105] and attempted murder.[106] Students should not be expected to have the experience or perspective needed to work with such serious subject matter, and they generally should not serve as victim-offender mediators.

In addition, the nature of mediations between a defined "victim" and a defined "offender" creates significant power balance concerns. One obvious component of this problem is with regard to the victim. For a victim to face the offender requires great courage. One who demonstrates such courage and is willing to confront the inherent risk must not be subject to the process having the effect of victimizing him or her a second time.[107]

Conversely, a second power-imbalance concern must be for the student-offender, particularly in mediations that include representatives of the community. The traditional justice system has numerous procedural and substantive safeguards to protect offenders' rights.[108] Victim-offender mediation diminishes the formal safeguards inherent in such a system, including rights to representation, rules of evidence, statutory limits on punishment, and judicial review. Community pressure might easily dominate the voluntariness of an offender's participation. The risk is not only violation of legal rights, but also coercion into agreements that violate principles of voluntariness and diminish the sense of responsibility and accountability that is crucial to a successful result. Thus, a mediator must be attuned to, and adept at, recognizing subjective assessments of culpability and acceptance of blame in a manner that may not be either voluntary or substantively just.[109] These concerns are significant for any mediator, and school administrators should not assume that students will ordinarily be capable of taking on such responsibility with their peers.

Another limitation that distinguishes victim-offender from peer mediation programs again relates to mediator competence. It is the need for mediators and school administrators to be aware of the legal implications

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she said" gossip-based conflicts). *But see id.* at 238 (noting that in at least one instance, more sophisticated programs have evolved to address violent conflicts, arising from racial tensions).

105. *20/20* (ABC television broadcast, Apr. 26, 1999) (describing mediation between drunk driver and victim's family).

106. *Attempted Murder: Confrontation* (HBO television broadcast, Feb. 4, 1991) (describing mediation between convicted attempted murderer, Tommy Brown, and the victim, Gary Smith).

107. *See* Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1275-79 (1994) (arguing that the inherent structure of the mediation process forces victims to de-emphasize their own emotions caused by the offense and instead pressure victims toward forgiving the offender). One dissatisfied participant of a victim-offender mediation characterized the additional burden as "like being hit by a car and having to get out and help the other driver when all you were doing was minding your own business." ROBERT B. COATES & JOHN GEHM, VICTIM MEETS OFFENDER: AN EVALUATION OF VICTIM-OFFENDER RECONCILIATION PROGRAMS 9 (1985).

108. *See* Brown, *supra* note 107, at 1288.

109. *See id.*

of an offender's actions. This concern is relevant to the power imbalance issues discussed above, but it also requires distinct consideration. Awareness is necessary both from the standpoint of possible criminal consequences for an offender's actions and from the standpoint of protecting an offender's procedural rights.

Finally, a third qualification was recognized at the outset of this article. Not all conflicts should be mediated and not all offenders should receive an opportunity to remedy their actions through mediation. Phrased one way, "[t]here will, of course, always be a need for a different relational response to more chronic and violent offenders."[110] Phrased more concretely, there will always be "Clarences" for whom everything short of exclusion has been tried and nothing has succeeded.[111] For these types of offenders, expulsion and alternative schools may be the only viable recourse from the standpoint of both the school and the student.

CONCLUSION

Because "zero-tolerance" policies, by definition, exclude students as a first response, they are likely to undermine the ultimate goals of public education. Still, an exclusionary policy can be reserved for a last resort only if intermediate responses are available. If a school is to attempt "everything possible" before sending away its "Clarences," then it must have other available strategies and processes. One such process should be victim-offender mediation. Victim-offender mediation and the overarching principles of restorative justice are more commensurate with the values of public education and more likely than zero tolerance to help schools instill those values in the children who most need to develop them. It is true that, as Governor Owens has decried with respect to disruptive students, at some point there must be a third strike.[112] Nevertheless, we should make certain that, before the third strike is called, a school can assure itself and the larger community that it has provided a student all available resources for reaching base safely. Such assurance can be forthcoming only where, before ostracizing an offender, the school endeavors to achieve justice through the offender's acknowledgement of, accountability for, and reparation to redress the injury caused to individual victims and the community.

110. *See* Bazemore, *supra* note 56, at 181.
111. *See supra* notes 1-5 and accompanying text.
112. *See* Owens, *supra* note 13.