

Restorative Justice in Schools: Learning from Jena High School

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I. INTRODUCTION

Public policy debates about discipline and punishment often include a tension between punitive and rehabilitative ideals. Although policymakers and practitioners often advocate rehabilitative ideals, there is a trend in criminal and juvenile justice away from rehabilitation and toward increasingly punitive forms of discipline.¹ This same movement is occurring in education. Punitive discipline is the dominant model in schools today. Schools rely on exclusion through suspension and expulsion, harsh mandatory punishments, surveillance, and partnership with law enforcement to address behavior problems.²

Instead of being a solution, punitive school discipline is often part of the problem. Disciplinary exclusion through suspension and expulsion deprives misbehaving students of educational opportunities while still generally failing to make schools safer places for other students. Punitive discipline unilaterally imposes punishment on offenders, thereby failing to turn disciplinary violations into learning experiences. This missed opportunity is particularly problematic because of the socializing function played by schools. School communities, comprised of students, teachers, and administrators, have long been viewed as fulfilling important roles in affirming democratic norms and other positive social values.³ If schools do not address disciplinary violations in ways that promote positive norms within the school community, then their disciplinary policies are not meeting the needs of the school environment.

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¹ See generally *Developments in the Law, Alternative Punishments: Resistance and Inroads*, 111 HARV. L. REV. 1967, 1970-71 (1998).

² See *infra* Part II.B (discussing trends in school discipline, including the rise in exclusion, zero tolerance, and referrals to the criminal justice system).

³ See generally JOHN DEWEY, *DEMOCRACY AND EDUCATION* (1916); Robert Dreeben, *The Contribution of Schooling to the Learning of Norms*, 37 HARV. EDUC. REV. 211, 215 (1967); Robert J. Havighurst & Allison Davis, *Child Socialization and the School*, 13 REV. EDUC. RES. 29, 32 (1943); Talcott Parsons, *The School Class as a Social System: Some of Its Functions in American Society*, 29 HARV. EDUC. REV. 297, 298 (1959). These positive social values include democratic participation, cooperation, adherence to community rules, and respect for authority and peers.

An alternative to punitive school discipline is an approach rooted in the values of restorative justice. The dominant goals of restorative justice include repairing the harm caused by an offense and community participation in disciplinary procedures. There are many models of conflict resolution that fall under the rubric of restorative justice. All of these include mechanisms for expressing a community's disapproval of an offender's actions while simultaneously reaffirming the norms of the community and reintegrating the offender back into the community.⁴ Restorative justice practices build support for victims and offenders, providing both with an opportunity to share their perspectives and to work together to reach a reparative solution.⁵ Whereas traditional school discipline cuts off discussion in favor of a swift and punitive response, restorative programs focus on improving the community's capacity to respond positively to adversity and conflict.⁶

This Essay advances the argument that a disciplinary response rooted in restorative justice values is more appropriate for schools than the conventional punitive disciplinary approach. The experiences of the students and administrators at Jena High School in the fall of 2006 provide a vivid illustration of the failures of conventional punitive school discipline. These failures highlight the ways in which restorative justice would provide a more effective response. Part II begins with an overview of school discipline in the United States today, discussing and critiquing conventional punitive approaches. Part III focuses on Jena High School, addressing the shortcomings in the school's response to a series of racial incidents occurring on the school's campus and throughout the community. As a result of these conflicts, six black students, now known as the "Jena Six," were charged with crimes including attempted murder for an assault on a white student at school. Part IV discusses the benefits of restorative justice as a more effective school discipline model. Part V reviews three case studies of school districts that have integrated restorative justice models into their disciplinary responses, and concludes with a discussion of what the restorative justice process might have looked like if it had been used at Jena High School.

II. SCHOOL DISCIPLINE TODAY

A. *The Problem of School Misconduct*

School discipline is an extremely important issue facing schools today and it requires a strong and concerted response by schools and administrators. Disciplinary problems, ranging from minor misbehavior to outright vi-

⁴ JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* 4 (1989).

⁵ See Gordon Bazemore, *After Shaming, Whither Reintegration: Restorative Justice and Relational Rehabilitation*, in *RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME* 155, 163 (Gordon Bazemore & Lode Walgrave eds., 1999).

⁶ David R. Karp & Beau Breslin, *Restorative Justice in School Communities*, 33 *YOUTH & Soc'y* 249, 250 (2001).

olence, inhibit classroom learning and place students at risk. In a 1998 national survey, 40% of public school students reported that the misbehavior of other students interfered with their school performance.⁷ Students at schools with moderate to high levels of school violence see their performance particularly inhibited. They are less likely to graduate from high school or attend a four-year college, even after controlling for a range of student and school characteristics.⁸ The National Center for Education Statistics found that in 2005 approximately 4% of students ages 12-18 reported being victimized at school during the past six months, with 3% reporting being the victim of a theft and 1% reporting violent victimization.⁹ The harmful effects of victimization extend beyond the specific victim, as disciplinary violations create a threatening environment and cause heightened levels of stress for all of a school's students.¹⁰

B. Punitive School Discipline Responses

As concern about school discipline has grown over the last several decades, schools have responded through punitive and authoritarian measures. Schools have adopted heightened security procedures such as controlling access to and from school buildings, using metal detectors to check for weapons, employing random dog sniffs to look for drugs, performing random sweeps for contraband, and using security cameras.¹¹ Schools have also extended their disciplinary reach over incidents that occur off-campus.¹² Congress and state legislatures have supported the growth of punitive discipline policies by increasing criminal penalties associated with offenses committed near schools.¹³ Courts similarly have generally supported schools' discipli-

⁷ R. Matthew Gladden, *Reducing School Violence: Strengthening Student Programs and Addressing the Role of School Organizations*, 26 REV. RES. EDUC. 263, 266 (2002) (citing JENNIFER M. PARK, HORATIO ALGER ASS'N, STATE OF OUR NATION'S YOUTH, 1998-1999, at 45 (1998)).

⁸ *Id.* at 266 (citation omitted).

⁹ RACHEL DINKES, EMILY FORREST CATALDI, WENDY LIN-KELLY & THOMAS D. SNYDER, NAT'L CENTER FOR EDUC. STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2007, at 10 (2007), available at <http://nces.ed.gov/pubs2008/2008021.pdf>.

¹⁰ *Id.*

¹¹ *Id.* at 58-59.

¹² Schools have increasingly been involved in disciplining students for behavior occurring away from school grounds. The legal status of extending discipline beyond the boundaries of the school day or school building is still somewhat unclear. School intervention has been found to be legitimate, for example, where there is a connection between the activity being disciplined and school-related behavior. See, e.g., *Giles v. Brookville Area Sch. Dist.*, 669 A.2d 1079, 1082 (Pa. Commw. Ct. 1995) (holding that although a marijuana sale occurred off-campus, the agreement for the sale was made at school and was therefore subject to the school's drug-prohibition policy). See Christina L. Anderson, *Double Jeopardy: The Modern Dilemma for Juvenile Justice*, 152 U. PA. L. REV. 1181, 1196-97 (2004), for further discussion of the trend toward schools disciplining off-campus behavior in the context of the intermingling of educational and criminal justice institutions.

¹³ See, e.g., 21 U.S.C. § 860(a) (2006) (increasing the sentence for offenders convicted of selling drugs near a public or private school).

nary efforts, for example by upholding random drug testing as a prerequisite to participation in school athletic programs.¹⁴

Punitive school discipline excludes students from school as punishment for a broad range of behavior.¹⁵ Exclusion did not always play such a prominent role in school discipline. Originally, “school discipline” meant corporal punishment. As public opinion about corporal punishment began to change¹⁶ and larger schools made the public spectacle of punishment less effective,¹⁷ schools began looking to other means of ensuring discipline. By the 1960s and 1970s, schools had shifted to exclusion as the primary tool of discipline because exclusion was viewed as an “administratively efficient” manner to handle disruptive youth.¹⁸ However, in *Goss v. Lopez*, the Supreme Court held that because a student has a property interest in a state-provided education, a school may not deprive her of this interest without due process of law.¹⁹ The effect of *Goss* was to require hearings that increased the administrative cost of exclusion, leading to a growth of in-school detention during the late 1970s and 1980s.²⁰

Beginning in the late 1980s, heightened public concern about school safety and the spread of zero tolerance policies caused a swing back toward exclusion as a major school discipline strategy.²¹ As a result, there has been a significant increase in average national student suspension rates, which nearly doubled between 1974 and 1997: from 3.7% to 6.8% per year.²² According to the Department of Education’s National Center for Education Statistics, a 2003 survey showed that 10.8% of students from kindergarten to 12th grade have been suspended at some point in their educational careers, and 2.0% have been expelled.²³

¹⁴ See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

¹⁵ Exclusion is frequently used as a consequence for what are generally viewed as relatively minor offenses. See Cindy Morgan-D’Atrio, John Northup, Lynn LaFleur & Sandi Spera, *Toward Prescriptive Alternatives to Suspensions: A Preliminary Evaluation*, 21 BEHAV. DISORDERS 190, 192 (1996) (discussing a 1993-94 study of middle and high school students finding that fifty-three percent of suspensions were due to inadequate attendance).

¹⁶ Donald E. Greydanus et al., *Corporal Punishment in Schools: Position Paper of the Society for Adolescent Medicine*, 32 J. ADOLESCENT HEALTH 385, 385 (2003), available at http://www.adolescenthealth.org/PositionPaper_Corporal_Punishment_in_Schools.pdf.

¹⁷ A. Troy Adams, *The Status of School Discipline and Violence*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 144 (2000).

¹⁸ *Id.*

¹⁹ 419 U.S. 565, 581 (1975).

²⁰ Adams, *supra* note 17, at 146.

²¹ *Id.*

²² Gladden, *supra* note 7, at 270.

²³ ANGELINA KEWALRAMANI, LAUREN GILBERTSON, MARY ANN FOX & STEPHEN PROVASNIK, NAT’L CTR. FOR EDUC. STATISTICS, STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC MINORITIES 86 (2007), available at <http://nces.ed.gov/pubs2007/2007039.pdf>. The numbers are starker when broken down by race and gender. In 2003, 12.7% of white males had been suspended and 2.2% expelled, whereas 24.2% of black males had been suspended and 6.7% of them had been expelled. *Id.* In the same year, 4.6% of white females had been suspended and 0.6% expelled, whereas 15.2% of black females had been suspended and 3.3% had been expelled. *Id.* The national data shows much less of a disparity between white

One of the characteristics of punitive school discipline is zero tolerance policies. Zero tolerance policies in schools are a relatively recent development. While some schools have used zero tolerance policies since the late 1980s, school boards around the country began widely adopting them beginning in 1993.²⁴ Zero tolerance in schools is an outgrowth of similar policies in the military and in the criminal justice system.²⁵ As in the criminal context, the mandatory punishments are designed to be highly punitive in order to send a strong deterrent message to other would-be offenders.

Under zero tolerance policies, students are suspended or expelled for a single occurrence of certain specified conduct. Zero tolerance in schools began solely for serious offenses like possession of firearms.²⁶ Over the past few years, however, zero tolerance policies have expanded to include a wider range of student behavior including other violence, bullying, threatening, use of profanity, alcohol or tobacco consumption, and other offenses.²⁷

The “school-to-prison pipeline” is another characteristic of contemporary school discipline policy that highlights both its increasingly punitive nature and the infiltration of criminal justice policy into education policy.²⁸ This “pipeline” includes all school and criminal justice policies that speed the removal of students from schools and their entry into the juvenile and criminal justice systems.²⁹ Many referrals to the juvenile justice system stem from offenses that occur at school. This has a disproportionate effect on youth of color, who are more likely to be referred for school disciplinary offenses.³⁰ The overrepresentation of students of color in the disciplinary referral process parallels and is one of the reasons for the overrepresentation of black youth in the juvenile justice system.³¹

students and Hispanic, Asian/Pacific Islander, and American Indian/Alaska Native students. *Id.*

²⁴ Russ Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 PHI DELTA KAPPAN 372, 373 (1999).

²⁵ AUGUSTINA REYES, DISCIPLINE, ACHIEVEMENT, AND RACE: IS ZERO TOLERANCE THE ANSWER? 3 (2006).

²⁶ *See, e.g.*, The Federal Gun-Free Schools Act of 1994, 20 U.S.C. § 8921 (repealed 2002) (conditioning federal funding on compliance with mandatory one-year expulsion for possession of a firearm).

²⁷ Anderson, *supra* note 12, at 1185; *see also* ADVANCEMENT PROJECT & CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE 3, 8 (2000) [hereinafter OPPORTUNITIES SUSPENDED] (describing examples of settings in which zero tolerance policies have been applied in ways that seem overly punitive, such as expulsion for bringing a nail clipper to school).

²⁸ REYES, *supra* note 25, at 21.

²⁹ NAACP LEGAL DEFENSE FUND, INC., DISMANTLING THE SCHOOL TO PRISON PIPELINE 1 (2005), available at http://www.naacpldf.org/content/pdf/pipeline/Dismantling_the_School_to_Prison_Pipeline.pdf.

³⁰ *See generally* KEWALRAMANI ET AL., *supra* note 23; Russell J. Skiba, Robert S. Michael, Abra Carroll Nardo & Reece L. Peterson, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URBAN REV. 317, 319 (2002).

³¹ In 2000, African American youth were 17% of the overall youth population, but made up a full 34% of suspensions. NAACP LEGAL DEFENSE FUND, INC., *supra* note 29, at 6 (citing ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 18 (2005), <http://www.advancementproject.org/reports/FINALEOLrep.pdf>). In 2003,

C. Failures of Punitive School Discipline

Punitive discipline, particularly exclusion, is an ineffective response to problems of school misconduct. Exclusion and harsh discipline can have negative effects on the offending student, which increase the likelihood of future disciplinary problems.³² One common consequence of punitive discipline is that it interferes with an offending student's academic achievement, further fueling the student's negative attitudes toward school.³³ Suspended students are three times more likely to drop out by 10th grade than students who have never been suspended.³⁴ This effect is particularly pronounced because exclusion is often used in schools already characterized by low achievement.³⁵

Punitive school discipline can also lead to alienation and can be psychologically harmful to students by interfering with school relationships that promote achievement and positive behavior. Psychologists James Comer and Alvin Poussaint comment that overly harsh punishment "either destroys a child's spirit, has no effect at all, worsens the problem, or makes it more difficult for you to work with the child in school—he or she no longer trusts you."³⁶ Even though the goal of harsh punishment is the offender's conformance with positive social norms, it is equally likely to lead to aggravated non-conformance with these norms.³⁷ The likelihood that exclusion will lead to aggravated delinquent behavior is exacerbated for at-risk youth, as school exclusion is more likely to remove them from important sources of adult supervision and positive social support.³⁸

African American youth were 16% of the overall youth population but constituted 45% of the juvenile arrests. NAACP LEGAL DEFENSE FUND, INC., *supra* note 29, at 6 (citing Howard N. Synder, *Juvenile Arrests 2003*, OJJDP JUV. JUST. BULL. (OJJDP, Wash., D.C.), 2005, at 9, <http://ojjdp.ncjrs.org>).

³² See Howard B. Kaplan & Cynthia Robbins, *Testing a General Theory of Deviant Behavior in Longitudinal Perspective*, in PROSPECTIVE STUDIES OF CRIME AND DELINQUENCY 117, 138 (Katherine Teilmann Van Dusen & Sarnoff A. Mednick eds., 1983), *cited in* Anderson, *supra* note 12, at 1191 n.51 ("By far the most consistent predictor of subsequent deviant responses . . . was felt rejection by the school.").

³³ Gladden, *supra* note 7, at 271; *see also* Pedro N. Noguera, *Preventing & Producing Violence*, 65 HARV. EDUC. REV. 189, 192-207 (1995).

³⁴ Ruth B. Ekstrom, Margaret E. Goertz, Judith M. Pollack & Donald A. Rock, *Who Drops out of High School and Why? A National Study*, 87 TCHRS. C. REC. 357, 360 (1986).

³⁵ Alan McEvoy & Robert Welker, *Antisocial Behavior, Academic Failure, and School Climate: A Critical Review*, 8 J. EMOTIONAL & BEHAV. DISORDERS 130, 137 (2000). This is particularly problematic because the most punitive disciplinary policies are found in predominantly black and Latino school districts. "During the 1996-97 school year, these districts were more likely to have policies addressing violence (85%), firearms (97%), other weapons (94%), and drugs (92%) than white school districts (71%, 92%, 88% and 83%, respectively)." OPPORTUNITIES SUSPENDED, *supra* note 27, at 8.

³⁶ OPPORTUNITIES SUSPENDED, *supra* note 27, at 10.

³⁷ See Anderson, *supra* note 12, at 1190 (citing Ron Van Houten, *Punishment: From the Animal Laboratory to the Applied Setting*, in THE EFFECTS OF PUNISHMENT ON HUMAN BEHAVIOR 13, 19-22 (Saul Axelrod & Jack Apsche eds., 1983)).

³⁸ RUSSELL SKIBA, INDIANA EDUCATION POLICY CENTER, ZERO TOLERANCE, ZERO EVIDENCE 13-14 (2000), available at <http://www.indiana.edu/~safeschl/tztc.pdf> (identifying at-

Another problem with punitive school discipline is its failure to address adequately the needs of the victims of school misconduct or violence. Conventional punitive discipline contains no mechanism to validate victims' concerns or to reassure them that they will not be victimized in the future. Failure to address victims' needs can interfere substantially with their education. Student concerns about school safety can be so strong that some are driven to avoid school entirely. In a 1999 survey, 5% of students reported missing one or more days of school in the prior thirty days because they felt unsafe going to school.³⁹ For school discipline to better address the true harm caused by disciplinary violations, the response must include support for the victims.

A third problem with conventional punitive school discipline is that it does not sufficiently address the systemic problems that lead to school misconduct. The rationale behind harsh punishment is that it will deter future wrongdoing, but harsh punishment does little to reinforce the norms and expectations of the school community. By engaging in punishment that alienates and isolates an offender, punishment can further weaken the offending student's bonds with school officials and classmates. Since those bonds are instrumental in building a positive school community, punitive school discipline may make it less likely for a student to engage in positive behavior.⁴⁰

This failure to affirm positive community values affects the broader school community as well. Strong school community expectations of behavior are essential for an ordered, well-functioning school environment. While harsh punishments alone may deter some individuals from misbehavior, a significant factor in students' decisions to follow institutional rules is that they believe that these rules are just and legitimate.⁴¹ Harsh punishment communicates that the administration views a disciplinary offense as worthy of serious punishment. However, punitive school discipline is imposed on the individual student in private, it does very little to strengthen community norms about misbehavior or to increase the legitimacy of the rules. Punitive school discipline also fails to address the systemic underpinnings of school discipline problems in that it necessarily views the disciplinary violation as a personal wrongdoing that can be fully dealt with by punishing only the individual offender. This allows schools to respond harshly to misconduct without addressing the atmosphere of the school or the context in which the harm occurred.

risk youth as those students who are alienated from teachers and peers, and whose families frequently are unable to provide supervision).

³⁹ Gladden, *supra* note 7, at 266.

⁴⁰ See Bazemore, *supra* note 5, at 165.

⁴¹ See generally TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006).

III. FAILURES OF SCHOOL DISCIPLINE AT JENA HIGH SCHOOL

An analysis of how school administrators at Jena High School handled the series of racially-charged incidents leading up to the assault on Justin Barker provides a particularly vivid example of the failures of conventional punitive school discipline. Much attention has been paid to the problems in the criminal justice system highlighted by the prosecution of the Jena Six. However, relatively little attention has been paid to how administrators at Jena High School addressed the incidents leading up to the assault or to how a different response could have prevented the assault and the involvement of the criminal justice system. The shortcomings in the school's handling of the disciplinary issues stemmed from its failure to include the voices of those who felt victimized or to properly acknowledge the community-wide context of the conflicts and the harm to the broader student body.

The series of racial conflicts in Jena, Louisiana⁴² leading up to the assault that spawned the charges against the Jena Six began on August 31, 2006, the first day of school. At an assembly, a black student asked a school administrator whether he could sit under a tree that was known as a hang-out for white students. The student was told that he could sit wherever he wanted.⁴³ The next morning students arrived at school to find two nooses hanging from the tree.⁴⁴

Jena High School Principal Scott Windham recommended to the expulsion hearing committee that the students who hung the nooses be expelled,⁴⁵ which was the harshest punishment available in Jena High School's Code of Conduct.⁴⁶ While the severity of this punishment indicates that the principal took the offense seriously, the school did not publicly address the racial nature of the incident. Officials did not acknowledge the significance of the noose-hanging at the school nor its relation to the history of violent lynching and threats against blacks in the South.⁴⁷ School officials later said that, "in reality, the nooses had nothing to do with racial bigotry, but rather were an ignorant prank taken from the mini-series, *Lonesome Dove*."⁴⁸ The parish expulsion hearing committee voted to override the principal's recommenda-

⁴² Jena, Louisiana, is a rural town in Western Louisiana with a population of 2,864. The town has a 12.3% black population. U.S. Census Bureau, American Fact-Finder, Jena, Louisiana, <http://www.census.gov> (search "Jena" in population finder, then follow "fact sheet" hyperlink).

⁴³ Bill Sumrall, *Jena High Noose Incident Triggers Parental Protests*, TOWN TALK (Alexandria, La.), Sept. 6, 2006, at 6A.

⁴⁴ *Id.*

⁴⁵ Billy Gunn, *3 Jena Students Face Possible Expulsion*, TOWN TALK (Alexandria, La.), Sept. 8, 2006, at 1A.

⁴⁶ *Id.*; JENA HIGH SCHOOL, STUDENT CODE OF CONDUCT (2006), available at <http://jhs.lasallepsb.com/Information/Student%20Code%20of%20Conduct.htm>.

⁴⁷ See generally PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA (2002) (discussing lynching threats against southern blacks).

⁴⁸ *Incident More Hype than Reality*, JENA TIMES, Sept. 13, 2006, at 1A.

tion. The committee chose instead to suspend the three students⁴⁹ on the basis that the noose hanging was not racially motivated.⁵⁰ After the suspension hearing, La Salle Parish School Superintendent Roy Breithaupt said that there were no plans to address the matter again before the school board, since he felt that the issue had been dealt with sufficiently.⁵¹

Neither the school nor the school district provided any opportunity for input from those who perceived themselves as victims of the noose-hanging or from the broader community. The parents and students who felt harmed by the noose-hanging were never given an opportunity to have their concerns formally acknowledged or legitimized. Parents of Jena High School students began to meet as early as September 5 to discuss how they should respond to the noose-hanging incident.⁵² Many community members felt that the school board had failed to understand the seriousness of the offense, because of the board's reduction in the punishment for the white perpetrators and its refusal to address the racial implications of the noose-hanging. Many parents and community members were as concerned with the response to the noose-hanging as they were with the incident itself.⁵³ The parents organized to express their concern that the punishment for the students was insufficient.⁵⁴ However, the real problem was not the punishment itself, but rather the board's refusal to acknowledge the seriousness of the incident and the harm to the students and community.

In the days following the noose-hanging incident, there was a series of fights between black and white students,⁵⁵ causing parents and students to feel that Jena High School was not a safe place. The school dealt with each of the fights as separate violations of the school disciplinary policy, thereby failing to address the escalating situation as a problem facing the school community as a whole. The racial tension led to such a strong sense of a lack of discipline that Superintendent Roy Breithaupt addressed parents by radio broadcast, assuring them that Jena High School was safe and that it was unnecessary to keep their children home from school.⁵⁶

⁴⁹ *Jena Students Suspended, Not Expelled, over Incident*, TOWN TALK (Alexandria, La.), Sept. 9, 2006, at 1A [hereinafter *Jena Students Suspended*].

⁵⁰ *Chronological Order of Events Concerning the Jena 6*, JENA TIMES, Sept. 20, 2007, available at <http://www.freerepublic.com/focus/f-news/1899967/posts>.

⁵¹ *Jena Students Suspended*, *supra* note 49.

⁵² Sumrall, *supra* note 43.

⁵³ One Jena resident addressed a crowd of black parents, saying that while the incident itself concerned her, she was "more concerned about the way the school officials handled the incident." *Id.*

⁵⁴ Mandy Goodnight, *LaSalle Board Skips over Noose Incident*, TOWN TALK (Alexandria, La.), Sept. 12, 2006, at 4A.

⁵⁵ *Chronological Order of Events Concerning the Jena 6*, *supra* note 50.

⁵⁶ *Id.*

School officials did make one attempt to address the racial conflict: they invited law enforcement to Jena High School.⁵⁷ During the week following the noose-hanging, local law enforcement and the Jena High School principal invited District Attorney Reed Walters to speak at a school-wide assembly. District Attorney Walters warned students to behave or they would suffer the consequences. He allegedly told the students, “I can be your best friend or your worst enemy. I could take your lives away with the stroke of my pen.”⁵⁸ When this warning did not de-escalate the tension at Jena High School, police were sent to the school the following two days “as a precaution,” according to the LaSalle Parish Sheriff.⁵⁹ The school was placed on a “lockdown” after reports that a student might have brought a gun to school.⁶⁰ Unsurprisingly, the increased police intervention at the school did not comfort the students. On this day, 150 students stayed home from Jena High School and 160 more students were pulled out of school by their parents or left on their own later in the day.⁶¹

Later in the semester there was another series of racially motivated conflicts, this time off-campus. These conflicts included at least some involvement by both white and black Jena High School students. These conflicts began when a group of black students was denied admission to a mostly-white student party and was assaulted by a white party guest and taunted by a group of white guests.⁶² The next day there was another confrontation, this time at a convenience store, between black students and a white Jena resident.⁶³

On the following Monday afternoon, December 4, a white Jena High School student named Justin Barker was assaulted and knocked unconscious by multiple students in the school gymnasium. Accounts vary as to what sparked the assault and who the attackers were, with some saying it was motivated by racially charged comments Barker made about the weekend’s fights, and others saying it was unprovoked.⁶⁴ Barker was taken to the hos-

⁵⁷ This response highlights another shortcoming of conventional punitive school discipline: namely, its reliance on outsourcing discipline to law enforcement and the criminal justice system instead of dealing with disciplinary issues internally.

⁵⁸ Darran Simon, *Thousands March on Jena*, TIMES-PICAYUNE (New Orleans, La.), Sept. 21, 2007, at 1.

⁵⁹ *Jena Students Suspended*, *supra* note 49.

⁶⁰ *Chronological Order of Events Concerning the Jena 6*, *supra* note 55.

⁶¹ *Id.*

⁶² Abbey Brown, *Official Sought to Clear up ‘Jena Six’ ‘Misinformation’*, TOWN TALK (Alexandria, La.), July 31, 2007, at 1A.

⁶³ *More Arrests Made in Jena High Fight*, TOWN TALK (Alexandria, La.), Dec. 7, 2006, at 4A.

⁶⁴ A pleading filed by Mychal Bell’s family in response to a civil suit filed by Justin Barker’s family alleges that a few days before the battery, Justin drove his pick-up truck by Mychal and a passenger in the truck pointed a shot-gun out the window at Mychal and pumped it once. Mychal claims that Justin called him a “stupid ass nigger” before lunch, and that Justin allegedly insulted him again after lunch. It was after this insult that Mychal admits hitting Justin once. See Amended and Supplemental Answer, Reconventional Demand, and Cross-Claim at App. C, *Barker v. LaSalle Parish School Bd.*, No. 35,918 (La. Dist. Ct. Feb. 29,

pital and was released after three hours. He drove himself to a high school ring ceremony that evening.⁶⁵ The school referred the assault to the police, and six black Jena High students were charged with the assault. These charges were soon increased to attempted murder and conspiracy to commit second degree murder.⁶⁶ Local law enforcement denied connections between the Barker assault and the racial tension that had been building up since the noose-hanging, although local detectives said that they suspected that the fight at the party on Friday led to the attack.⁶⁷ After the assault, the police and district attorney stepped in to fill the disciplinary role that the school had failed to fill. Had the school better addressed these ongoing conflicts, beginning with the noose-hanging incident, it is possible that the conflicts would not have escalated as they did and that law enforcement would not have become involved.

IV. RESTORATIVE JUSTICE AS A MORE EFFECTIVE SCHOOL DISCIPLINE MODEL

School discipline problems are school-wide problems. As the situation at Jena High School illustrates, school discipline problems can escalate if they are not properly addressed. Schools need to respond to discipline problems seriously and effectively. Focusing on punishing only the offender is insufficient. Schools must instead tailor their disciplinary responses with an eye towards addressing the community-wide impact of disciplinary violations and supporting the offender in positive behavior change. Rather than focusing solely on punishing the offender, the restorative justice movement provides a framework for a school discipline model that can focus on repairing harm by identifying community dynamics and victim and offender needs.

A. *Restorative Justice as an Alternative*

Restorative justice is a method of bringing together the parties who identify as stake-holders in a communal, non-hierarchical dialogue about the consequences of a harm, providing them an opportunity to discuss what is to be done to repair the situation.⁶⁸ Its main objectives are for the community to hold offenders accountable, repair harm to the victims, and provide sup-

2008), *cited in* Motion to Recuse the Hon. J.P. Mauffray, Jr. at 4, State in the Interest of Jesse Ray Beard, No. J-3868 (La. Juv. Ct. Apr. 15, 2008), *available at* <http://www.elecville.com/files/EV-Blog/Jena6-RecuseMotion-Judge.pdf>.

⁶⁵ Abbey Brown, *What Happened that Day in Jena?*, TOWN TALK (Alexandria, La.), June 11, 2007, at 1A.

⁶⁶ Mandy Goodnight, *Jena High Fight Counts Upgraded to Attempted Murder Charges*, TOWN TALK (Alexandria, La.), Dec. 8, 2006, at 1A.

⁶⁷ *Id.*

⁶⁸ See JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 12 (2002).

port and assistance to offenders to encourage their reintegration into the community.⁶⁹ Parties to a restorative justice conflict resolution will often include the victim, offender, families and supporters of both, and community members.⁷⁰ The goal of restorative justice is to “replace our existing highly professionalized systems of punitive justice and control . . . with community-based reparative justice and moralizing social control.”⁷¹

The contemporary restorative justice movement is a global social movement that, although viewed as having deep historical roots,⁷² has achieved widespread prominence only recently with a significant growth in public attention in the 1990s. Restorative justice was originally used primarily in the juvenile justice context, but has since been adapted to a wide range of other institutional settings.⁷³

There are many implementation models that reflect restorative justice’s focus on holding an offender accountable, repairing the harm to the victim, and reintegrating the offender into her community.⁷⁴ All models are voluntary, and the restorative justice process only begins after the offender admits guilt or is determined to be responsible for the behavior at issue. The models vary in their level of community involvement and the balance of their focus between the victimized and offending parties. Effective restorative justice models use the tool of “reintegrative shaming.”⁷⁵ The premise of reintegrative shaming is that an offender, when confronted with the full extent of the harm caused by her actions and the disapproval of her supporters and community members, will feel shamed by the harm she has caused and her violation of the community’s rules. The offender receives an opportunity to express shame and remorse. The community can accept the remorse as an affirmation of the legitimacy of social norms while also accepting the offender back into the community.⁷⁶

The model generally referred to as “family group conferencing” would be an effective model for schools responding to disciplinary violations. It combines a high level of community involvement and support for offenders and victims with a focus on educating offenders about the harm caused by their behavior.⁷⁷ In a family group conference, a trained facilitator brings together the offender, victim, and their supporters. The facilitator allows all

⁶⁹ Sandra O’Brien & Gordon Bazemore, *Introduction to the Symposium: Communities, Organizations, and Restorative Justice Reform*, 5 PUB. ORG. REV. 279, 281 (2005).

⁷⁰ Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Conferencing Models*, JUV. JUST. BULL., Feb. 2001, at 1, 5, available at <http://www.ncjrs.org/pdffiles1/ojjdp/184738.pdf>.

⁷¹ Gerry Johnstone & Daniel W. Van Ness, *The Meaning of Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE 5, 5 (Gerry Johnstone & Daniel W. Van Ness eds., 2007).

⁷² BRAITHWAITE, *supra* note 68, at 3.

⁷³ O’Brien & Bazemore, *supra* note 69, at 281-84.

⁷⁴ See generally Bazemore & Umbreit, *supra* note 70.

⁷⁵ BRAITHWAITE, *supra* note 4, at 84-98 (discussing the social conditions that promote reintegrative shaming).

⁷⁶ *Id.*

⁷⁷ Bazemore & Umbreit, *supra* note 70, at 5.

participants to share their perspectives, and all similarly contribute to the discussion and determination of how to repair the harm caused and the appropriate consequences for the offender.⁷⁸ Other forms of restorative justice may be more victim-focused or even less formal. Restorative justice also includes alternate forms of conflict resolution that embody the goals of harm-repairing and community involvement. For example, these may include a peer reparative board,⁷⁹ in which an offender is sentenced by students instead of administrators, or a victim impact panel.⁸⁰

B. Benefits of Restorative Justice

i. Broader Understanding of Harm

A restorative justice philosophy in schools views misconduct as a harm to community members and relationships, not as an offense against the institution itself.⁸¹ This understanding of harm brings with it collateral benefits. As members of the school community, students are more likely to understand this idea of harm. Emphasizing the harm caused by violation of a school rule or policy will help students see the rules as more legitimate and will also help students view the disciplinary consequences as more fair.⁸² This idea of harm also creates an opportunity for the disciplinary process to address the perspectives and needs of the victims, whether discrete community members who have been individually wronged or a broader segment of the school community.

Traditional approaches to school violence fail to assess the full extent of harm that violence can cause to students within a school. This includes the psychological and emotional harms that arise from being in a community where misconduct or even violence occurs, as well as more concrete harms

⁷⁸ *Id.*

⁷⁹ This would be similar to a “community reparative board,” but held with student community members instead of community members at large. Community-based boards or panels responding to youth crime have been used at times in the United States since the 1920s, *id.* at 3, and their modern counterparts focusing on repairing harm have been used primarily in Vermont since the 1990s. *Id.* A community reparative board is composed of community members who are specifically trained for their function and who conduct public meetings with offenders. The boards develop sanction agreements in partnership with the offender after discussing the nature of the offense and its negative consequences. Board members then monitor compliance with the offender. *Id.* at 3-4. While this model could play a role in school discipline, the family conference model provides more support for the offender, which would make it preferable in situations where supporting the offender and affirming relationships are of greater importance.

⁸⁰ These panels may also include victims of similar misconduct. Karp & Breslin, *supra* note 6, at 260.

⁸¹ Lisa Cameron & Margaret Thorsborne, *Restorative Justice and School Discipline: Mutually Exclusive?*, in *RESTORATIVE JUSTICE AND CIVIL SOCIETY* 180, 183 (J. Braithwaite & H. Strang eds., 2001).

⁸² For a study including findings that people obey rules based on the rules’ perceived legitimacy, see generally TYLER, *supra* note 41.

such as decreased instructional time due to a teacher's need to address disciplinary issues. Traditional discipline similarly does not take into account the harm to an offender and victim resulting from the school's own disciplinary policies or practices. We can view the disciplinary actions of the school as another form of "systemic violence." This concept draws on education theorist Paulo Freire's concept of liberation pedagogy⁸³ and feminist and critical race theory.⁸⁴ "Systemic violence" understands the disciplinary actions of the school as another form of violence: violating the student victims whose concerns are not met and violating the offenders who are prevented from learning due to alienation from school or physical exclusion. One broad definition of "systemic violence" is:

any institutional practice or procedure that adversely impacts . . . disadvantaged individuals or groups It includes practices and procedures that prevent students from learning This may take the form of conventional policies and practices that foster a climate of violence, or policies and practices that . . . result in discriminatory effects.⁸⁵

This expanded notion of systemic violence and victimization includes a wide range of school practices. It identifies conventional school discipline as a form of violence and an additional source of victimization.⁸⁶ Under this model, excluding a student from school is a form of violence against that student that school officials must take into account when they devise a disciplinary approach.

ii. Appreciation of the Context for Disciplinary Violations

Restorative justice also allows the response to address the context in which an offense occurs. Whereas conventional punitive school discipline is narrow in that it typically punishes an offender for specific misconduct, restorative justice recognizes that context is often important and that the roles of the students involved are rarely clearly defined. Because misbehavior is best understood as deriving from an interaction between people's personalities and their environment,⁸⁷ schools using solely traditional offender-fo-

⁸³ PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 73 (Myra Bergman Ramos trans., 1970) (arguing that any institutional structure that prevents students from learning is a form of violence).

⁸⁴ See generally SYSTEMIC VIOLENCE IN EDUCATION: PROMISES BROKEN (Juanita Ross Epps & Alisa M. Watkinson eds., 1997).

⁸⁵ Juanita Ross Epps, *Schools, Complicity and Sources of Violence*, in SYSTEMATIC VIOLENCE IN EDUCATION: PROMISES BROKEN, *supra* note 84, at 1, 1, cited in Adams, *supra* note 17, at 142.

⁸⁶ Adams, *supra* note 17, at 142.

⁸⁷ Gladden, *supra* note 7, at 275.

cused punishment fail to understand how school environment inhibits or exacerbates the likelihood of violence.⁸⁸

Understanding the context of an offense requires a nuanced understanding of victimization. A student identified as an offender in one sense is also likely a victim in another. We see a clear example of this in what happened at Jena High School. At least some of the Jena Six, who were identified as the offenders in the attack on Barker, were the same students who were victims at the Friday night party and over the weekend.⁸⁹ Often, schools' failures to create a safe environment are a root cause of violence in schools, as fear of victimization can produce more violence.⁹⁰ For example, many fights at school are reactions to perceived needs by students to preserve social status. Even for more serious offenses, like weapons possession, studies show that the majority of youth who carry a gun into school do so for protection, not intimidation.⁹¹ Because the perpetrators of violence are also often in many ways victims,⁹² schools must look beyond the isolated incident leading to the disciplinary referral and must instead take a broader view of the context and school environment.

Particularly in school settings with racial tensions, failures of school administrators to address the broader context of racial conflict negatively affect the broader student community. High school students who believe that their peers are prejudiced report higher levels of emotional distress,⁹³ and high levels of racial tension create hostile school environments.⁹⁴ One can fairly assume that, at Jena High, the noose-hanging incident and fights throughout the semester had a negative impact on the entire student body. The underlying racial dynamic and context could have been better addressed by a restorative justice approach. This would have included acknowledging the harm to the whole school community and providing an opportunity for resolving or de-escalating some of the tensions in the community through reflection and participation in the disciplinary process.

iii. Repairing Community Relations and Creating Learning Opportunities

Building school community can be justified as an important goal in its own right,⁹⁵ and strengthening school community is particularly important

⁸⁸ *Id.* at 275 (citation omitted).

⁸⁹ See *supra* notes 66 and 67 and accompanying text.

⁹⁰ Gladden, *supra* note 7, at 266; see also Adams, *supra* note 17, at 143.

⁹¹ Gladden, *supra* note 7, at 266 (citation omitted).

⁹² *Id.* at 267.

⁹³ *Id.* at 265 (citation omitted).

⁹⁴ See *id.* at 266.

⁹⁵ See generally THOMAS SERGIOVANNI, BUILDING COMMUNITY IN SCHOOLS (1999) (arguing that building community in schools is an important end in its own right, regardless of its impact on achievement, because of the essential role that schools play in moral education and in helping youth develop connections with other students and adults).

for addressing disciplinary issues. This is because institutionally strong communities are best able to prevent misconduct and respond to it when it happens.⁹⁶ Restorative justice helps promote these strong community relationships through its ability to engage in a process of “relational rehabilitation.”⁹⁷ Restorative justice views the problems of violence and anti-social behavior as stemming from a breakdown in social relationships, and it uses the process of identifying harm and imposing a consequence as an opportunity to reaffirm and strengthen those relationships.⁹⁸ The focus is not on punishment. Rather, it is on what both the offender and the community must do to reintegrate the offender and repair the bonds between youth, their school, and their broader communities.⁹⁹

By creating a role for the offender and the victim, restorative justice is able to serve as a learning experience and can help develop positive social norms.¹⁰⁰ This is contrasted with conventional punitive school discipline, in which the student offender passively experiences punishment. Because students accused of disciplinary violations are rarely given the opportunity to explain their version of events and are instead forced into a passive role, students often resent and feel alienated from both the school’s authority figures and the institution they represent. Such a student may experience the process as so unjust that she views herself as the victim,¹⁰¹ a phenomenon we see clearly with the Jena Six in response to the disproportionate criminal charges they faced. With conventional punitive school discipline, the community witnesses only the initial punishment. In contrast, with a restorative justice approach, the community is able to participate in the process of learning about the offense and the harm, witness the offender’s acknowledgement of responsibility, and support her reintegration.

V. IMPLEMENTATION OF RESTORATIVE JUSTICE MODELS IN SCHOOLS

Having identified many benefits that a restorative justice framework can offer school communities, we now move on to examining how restorative justice can be implemented in schools.

⁹⁶ See Karp & Breslin, *supra* note 6, at 249-50; see also Pedro Noguera, *Finding Safety Where We Least Expect It: The Role of Social Capital in Preventing School Violence*, in *ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT* (William Ayers, Bernardine Dohrn & Rick Ayers, eds., 2001).

⁹⁷ Karp & Breslin, *supra* note 6, at 251-52 (citing Bazemore, *supra* note 5, at 155).

⁹⁸ See Bazemore, *supra* note 5, at 155.

⁹⁹ *Id.* at 163.

¹⁰⁰ Karp & Breslin, *supra* note 6, at 253.

¹⁰¹ *Id.* at 264 (citing Ted Wachtel, *Safer Saner Schools: Restoring Community in a Disconnected World* (2001), <http://www.iirp.org/pdf/SSSRestoringCommunity.pdf>).

A. Case Studies of Restorative Justice in Schools

The largest study of restorative practices in schools took place in Queensland, Australia. Queensland was the site of the first documented school restorative justice conference, which took place in 1994 in response to a serious assault at a high school.¹⁰² The Queensland schools continued to conference future disciplinary violations. The majority of these conferences dealt with assaults and serious victimization.¹⁰³ Eighty-nine conferences were conducted during the course of two studies, and conferencing continues today.¹⁰⁴ The Queensland model is an adaptation of the family conference model.¹⁰⁵ The conferences are conducted by a trained facilitator who brings together the offender and her victims along with their families, supporters, and appropriate school personnel. The facilitator poses a number of scripted questions to the offender, who explains in her words what she has done. The facilitator then directs questions to the victim, then to the victim's supporters, and finally to the offender's supporters.¹⁰⁶ All parties are given a chance to tell their version of events and their account of the harm done to them. The entire group then goes on to decide what should be done to repair the harm and how to minimize the likelihood that it will happen again. The group reaches an agreement that reflects the victim's wishes but which is negotiated until all parties are satisfied that it is fair and reflects the value of reparation instead of retribution.¹⁰⁷ Agreements can also provide for future support for the offender or victim.¹⁰⁸

Findings from the conferences were very positive. There was a high compliance rate by the offenders with the terms of the agreement.¹⁰⁹ After conferencing, a majority of offenders said they felt more accepted by other conference participants,¹¹⁰ and a majority of victims felt safer and more able to manage similar situations.¹¹¹ All school administrators questioned in relation to the conferences felt that conferencing reinforced school values. Nearly all schools reported that they had changed their thinking from a punitive to a more restorative approach.¹¹² Despite these positive findings, however, there were also a significant number of incidents that these same

¹⁰² Cameron & Thorsborne, *supra* note 81, at 180.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 181.

¹⁰⁵ See *supra* note 78 and accompanying text.

¹⁰⁶ Margaret Thorsborne, School Violence and Community Conferencing: The Benefits of Restorative Justice 3, http://www.thorsborne.com.au/conference_papers/School_violence_and_RJ.pdf (last visited Apr. 3, 2009).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 2.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 3.

schools chose not to conference, but instead dealt with in a traditional punitive manner that included suspensions and expulsions.¹¹³

This tension between a desire to use restorative methods and a desire to return to the more traditional punitive methods is seen in all attempts to introduce restorative justice into schools. In the United States, both Minnesota and Denver, Colorado schools have attempted to implement restorative justice practices throughout their districts.¹¹⁴ The strategy used in Minnesota was similar to the conference model in Queensland in that it included the same parties and provided an opportunity for participants to discuss strategies for repairing the harm, reintegrating the offender, and building community.¹¹⁵ The mediators in Minnesota were members of the school and general community, including teachers, administrators, corrections officers, and others who were trained in restorative conferencing techniques.¹¹⁶ In Minnesota, the restorative justice approach was treated as one possible approach among many legitimate disciplinary approaches, and conventional punitive discipline continued to play an important role as well. The Minnesota Department of Children, Families and Learning, described it as “another tool to use with children and youth to repair harm and teach problem solving skills.”¹¹⁷

The implementation of restorative practices in Denver included a wider scope of practices, ranging from “informal classroom meetings where the teacher calls an impromptu circle to address a student’s misbehavior to the more formal victim impact panels, where student offenders learn about the effects of their type of offense from victims of similar offenses.”¹¹⁸ The schools tended to use victim impact panels and formal conferencing when the case involved a higher degree of severity, and informal methods when the offense was less severe.¹¹⁹ The results for the offenses that were conferenced in both locations were overwhelmingly positive, with sharp drops in exclusionary discipline practices.¹²⁰ This corresponded to decreases in violent acts and other disruptive behavior¹²¹ and also reflected the way in which restorative justice provides an alternative means of disciplining students.

¹¹³ *Id.* at 7.

¹¹⁴ See Karp & Breslin, *supra* note 6, at 255-62.

¹¹⁵ *Id.* at 256.

¹¹⁶ *Id.*

¹¹⁷ Minnesota Department of Children, Families and Learning, RESPECTING EVERYONE’S ABILITY TO RESOLVE PROBLEMS: RESTORATIVE MEASURES 3 (1996), *quoted in* Karp & Breslin, *supra* note 6, at 256.

¹¹⁸ Karp & Breslin, *supra* note 6, at 260.

¹¹⁹ *Id.*

¹²⁰ See *id.* at 255-62 (detailing the successes of these programs in reducing the use of suspensions and expulsions, as well as the reported collateral benefits of restorative practices).

¹²¹ A Minneapolis school found that there was a 27% decrease in the number of suspensions and expulsions during the first year of implementing restorative justice techniques. While data on decreases in actual violent acts is more difficult to collect, a number of Minnesota schools have found sharp decreases in referrals for violent behavior as well, with a 50% decrease in referrals for violence in one school and an approximately 70% decrease in reports

However, in both programs the schools found that the restorative model was in tension with the broader institutional policies grounded in retributive justice both within the schools and in the criminal justice system.¹²² Denver, like Minnesota, used “a loose combination of restorative justice and traditional punitive responses when dealing with the more severe criminal offenses.”¹²³ For example, if a student was caught selling drugs, the student would still typically be suspended, but the school would engage in restorative practices upon the student’s return to school, at which point the focus would be less on making amends and more on building relationships.¹²⁴ Because of the background norm of retributive justice in schools and the retributive practices of the criminal justice system, schools had to either develop standards for determining which offenses should get the benefit of restorative treatment, or require students to go through both a restorative and retributive process either concurrently or consecutively.

*B. Limitations of Restorative Justice against the
Backdrop of Punitive Discipline*

Drawing on the experiences of Denver and Minnesota,¹²⁵ we can identify the backdrop of the punitive criminal justice system as a serious impediment to implementing restorative justice in schools. Because the benefits of restorative justice can only be accessed through a process in which the offender acknowledges the harm that she has caused, restorative justice is unlikely to work when the stakes for the offender are too high. For example, if acknowledging culpability in a restorative conference can have serious implications for a pending criminal charge against a student, it would be against the student’s interest to participate in a restorative process. While Denver addressed this problem by instituting a restorative process subsequent to a criminal referral, this approach is unlikely to work if the student feels that the criminal consequences were already harsh. For this reason, it is nearly impossible to imagine incorporating restorative justice in parallel or subsequent processes to the serious criminal charges faced by the Jena Six. This suggests that schools can only truly perform their socializing role if the school is able to address disciplinary issues without the involvement of the criminal justice system.

Some proponents of restorative discipline view restorative justice as one possible response in a pyramid of responses of escalating severity.¹²⁶

of violence in another. Notably, this was at a time when the district also implemented new mandatory reporting guidelines. Karp & Breslin, *supra* note 6, at 257.

¹²² *Id.* at 269.

¹²³ *Id.* at 261.

¹²⁴ *Id.*

¹²⁵ See *id.* at 255-62 (discussing the restorative justice programs in Denver and Minnesota schools).

¹²⁶ See Valerie Braithwaite, *Values and Restorative Justice in Schools*, in RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 114, 124-30 (H. Strang & J. Braithwaite eds., 2000), *avail-*

Under this pyramid model, restorative justice would be used as an initial response, with more harsh responses such as exclusion or referral to the criminal justice system as options to be used further up the pyramid if a restorative approach should fail.¹²⁷ Yet today's school discipline culture interferes with the development of a restorative model because most schools' first response is to exclude a student from school or to refer an offense to the criminal justice system. While some schools attempt to include a restorative element at a later point, it is difficult for restorative justice to play a role after the severity of the response has already been escalated.

C. *Imagining a Restorative Response at Jena High School*

As discussed above, it is difficult to pursue restorative justice after there has been a harsh disciplinary consequence, or once an issue has been referred to the criminal justice system. Therefore, the assault that led to the charging of the Jena Six likely would have been inappropriate for restorative conferencing due to the serious criminal charges that were pending. The most appropriate situation to implement restorative justice practices is one where the offender has significantly harmed members of the community, but where the incident is not subject to the retributive justice of the criminal or juvenile justice systems. The noose-hanging at Jena High is just such an incident and would have been an ideal candidate for a restorative justice approach.

A restorative justice response has the ability to educate offenders and communities about a violation. This would have been particularly warranted in response to the noose-hangings because the students who perpetrated the noose-hangings claimed that they did not understand the hateful racist implications of their actions.¹²⁸ Restorative justice can complement a school's educational mission, as the communal process of identifying the harm caused by violations requires conversation and dialogue in an effort to learn about other members of the community.¹²⁹ One of the significant problems with Jena High School's response to the noose-hanging is that it did not recognize and address the way in which the action harmed the community. With a restorative approach the school could have dealt with this by taking an expanded view of victimization that would have focused on how the relationships within the school community were affected by the incident. In contrast to shrouding the disciplinary process in secrecy, shutting off community participation, and suspending the student offenders, a restorative justice approach would have been open and educational. Requiring the offenders to face the community and discuss the impact of their actions

able at http://demgov.anu.edu.au/ozvalues/braithwaite_2000.pdf (discussing the concept of a pyramid of responses in the context of responding to school bullying).

¹²⁷ *Id.*

¹²⁸ See *supra* note 47 and accompanying text.

¹²⁹ Karp & Breslin, *supra* note 6, at 260.

would likely have been uncomfortable for the offenders. However, the restorative resolution would not have required the students' exclusion from school through suspension. With sufficient support from the school, a restorative approach ultimately could have helped them reintegrate back into the school community in a positive way.

What might a restorative response to the noose-hanging at Jena High have looked like? After identifying the offenders, the next step would have been to identify the victims of the offense. The school might have provided restorative options at different levels of the community as a way of acknowledging how this act caused harm to the victim and the broader community. For example, at the most intimate level, three family group conferences could have been held. Each would have included one of the three offenders, a few members of the student body who felt they were harmed by the noose hanging, family and supporters of the offender and victims, as well as appropriate school administrators or teachers. The school could have arranged a victim impact panel to include more community members who were not able to participate in the conference, opening up the conversation to those outside the student body who also felt harmed by the incident. It might have been appropriate to include victims of other racist acts in order to connect the noose-hanging to the deeper history of racism in this country and particularly in Jena. A school-wide conference would also have been appropriate, one which included both black and white students, to validate that the harm caused was to the entire community, not only to the black students and their families.

By providing an opportunity for community members to express the extent of the harm caused, the restorative approach would have turned the offense into an educational experience for the offenders and for the entire school community. Regardless of whether the noose-hanging incident was spurred by thoughtless or malicious racism, or whether the incident was, as the students claimed, an unknowing prank, the process of humanizing and personalizing the harm the incident caused to individuals and the community could have provided an opportunity for reintegrative shaming.¹³⁰ Under this model, the offenders' apology would have been public, instead of hidden by the school board, and the community and offenders could have prescribed appropriate reparations to repair the harm they caused. This process also could have opened up a channel of communication to address the underlying racial tensions in the community, which could have de-escalated the situation and prevented the violent incidents that occurred throughout the semester.

A restorative approach need not have been restricted to the noose-hanging. A restorative response would also have been appropriate for the fights between black and white students that occurred the following week, as this would have allowed the school to connect the individual fights with the

¹³⁰ BRAITHWAITE, *supra* note 4, at 84-98.

broader disciplinary problems facing the school instead of addressing them as individual incidents. This would have allowed the school to respond to disciplinary violations beyond the school grounds that still impacted school dynamics and behavior, such as the fights that occurred during the weekend leading up to the assault. Whereas schools' increasing tendency to punish students for offenses occurring off-campus¹³¹ is often viewed as problematic when school exclusion is layered on top of other criminal charges,¹³² it may be appropriate when using a restorative justice method. This might also decrease the likelihood of subsequent incidents leading to arrest and entry into the juvenile criminal system.

Although a restorative justice approach to the assault on Barker would likely have been inappropriate due to the serious criminal charges filed by the district attorney, restorative justice should not be taken off the table for future serious assaults such as this one. Restorative justice approaches have been successful in schools in addressing assaults and other serious crimes. If an assault is not addressed against the backdrop of criminal charges, even such a serious incident could be addressed effectively within the school itself, if both victim and offender are willing to voluntarily engage in a restorative justice process.

VI. CONCLUSION

School discipline is an extremely important issue facing the education community today. However, the conventional punitive disciplinary responses fail to address the causes or contexts that shape the disciplinary violations. In fact, negative collateral effects of punitive school discipline can further isolate students from the school community and the relationships that support positive behavior. The example of Jena High School in the fall of 2006 highlights a number of failures of the conventional punitive approach to school discipline. A restorative model of school discipline is an appealing alternative to punitive school discipline. It allows schools to address disciplinary infractions in a serious manner that is appropriate for the disruptive and sometimes dangerous nature of these infractions, but without the collateral negative consequences of a punitive disciplinary policy.

Despite its many benefits, restorative justice in schools remains largely an abstract idea, while punitive discipline remains the norm.¹³³ One obstacle to wider implementation of a restorative justice disciplinary model in schools is the cost of developing such a model. In Minnesota, the State Legislature authorized a \$300,000 grant for four districts to develop alternative disciplinary measures.¹³⁴ In Denver, a non-profit organization supported

¹³¹ See *supra* note 12.

¹³² See, e.g., Anderson, *supra* note 12, at 1195-99.

¹³³ Karp & Breslin, *supra* note 6, at 252.

¹³⁴ *Id.* at 256.

the schools implementing restorative justice models.¹³⁵ Without supplemental sources of funding, it is unlikely that schools will have the financial resources to develop their restorative justice programs, given the existing pressure on schools' budgets and personnel resources.

The benefits of a restorative justice model of discipline nevertheless far outweigh its costs. Evidence suggests that restorative justice would in fact lower the multiple costs of maintaining the current punitive system of addressing misconduct in schools. By taking into account the costs of harm to the broader school community, restorative justice provides an opportunity to address victims' needs and to reinforce strong positive social values. At the same time, restorative justice strengthens the bonds between the offender and the school community, reducing alienation and withdrawal from the school environment. As the example of Jena High School illustrates, disciplinary incidents can be pivotal moments in the life of a school community. Restorative justice provides a promising way to help school communities learn from these difficult moments and, ultimately, emerge from them strengthened.

¹³⁵ *Id.* at 259.

