

TRANSFORMING THE SYSTEM



FOSTER AN ENVIRONMENT FOR

Respecting Children's Rights

Children are still developing and may make mistakes as they are growing toward adulthood. There is considerable research that shows that adolescents' decision-making skills are at a much lower as compared to those of adults.³⁵⁶ Children and adolescents should not be treated like adults because they do not have the same mental capacity of adults. Despite this, some courts and prosecutors routinely administer adult consequences³⁵⁷ to children by issuing harsh sentences and requiring incarceration for childhood behaviors. We must adopt policies that ensure that children reach their full potential and are not placed off track for childhood mistakes.

Sadly, these adult penalties have even entered into our schools. Schools should be institutions of learning and safe spaces for children. Instead, they are too often places in which children may be funneled into the criminal justice system. Children of color have suffered the most from this approach, with wide racial disparities in how children are suspended, expelled, and referred to the criminal justice system.³⁵⁸

356 See, e.g., Laurence Steinberg, *The Science of Adolescent Brain Development and Its Implications for Adolescent Rights and Responsibilities* (2014) (describing how neuroscience has confirmed that there are physical differences between the brains of adults and adolescents, which affects decision-making).

357 For example, a 12-year-old was arrested for spraying perfume: Chris McGreal, "The U.S. Schools with their own police," *The Guardian* (Jan. 9, 2012), <http://www.theguardian.com/world/2012/jan/09/texas-police-schools>; a 13-year-old was arrested for burping in class: "Student Arrested for Burping, Lawsuit Says," *CBS News* (Dec. 1, 2011), <http://www.cbsnews.com/news/student-arrested-for-burping-lawsuit-claims/>; and a 12-year-old was arrested for doodling on her desk: Stephanie Chen, "Girl's Arrest for Doodling Raises Concerns about Zero Tolerance," *CNN* (Feb. 18, 2010), <http://www.cnn.com/2010/CRIME/02/18/new.york.doodle.arrest/index.html?hpt=C1>.

358 See generally Russell J. Skiba et al., "Parsing Disciplinary Disproportionality Contributions of Infraction, Student, and School Characteristics to Out-of-School Suspension and Expulsion," *51 Am. Edu. Research J.* 640 (2014).

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Ensuring that children are treated appropriately for their age³⁵⁹

The juvenile justice system has made inroads, leading to a 45 percent reduction in juvenile incarceration since the 1990s.³⁶⁰ However, additional work needs to be done to ensure that young people are not treated as adults in the criminal justice system; alternatives to incarceration are fully developed; facilities are rehabilitative and appropriate for all children, specifically by ensuring that juvenile facilities for girls are examined through a gender-specific lens and developed to accommodate their needs; and young people are not exposed to abusive conditions when incarcerated. In 2012 the U.S. Supreme Court found that mandatory life without parole was unconstitutional as it violated the Eighth Amendment. The ruling in *Miller v. Alabama* required both states and the federal government to consider the particular circumstances of the juvenile defendant in determining an individual's sentence.³⁶¹ The 2016 case *Montgomery v. Alabama* ensured that that decision was applied retroactively.³⁶²

Congress, the DOJ, and state legislatures should:

- ▶ Strengthen the Juvenile Justice and Delinquency Prevention Act,³⁶³ which focuses on the prevention and control of crime conducted by young people and improving the juvenile justice system;
- ▶ Support evidence-supported programs with technical support, incentive grants, and information sharing;³⁶⁴
- ▶ “Expand flexibility in funding, so that local jurisdictions may spend funds now used for housing some of their youths in large state youth lockups on less costly community-based programs supported by research. Effective community-based models include multi-systemic therapy, victim-offender mediation, mentoring, vocational programs, and

359 See generally Terrance Laney & Janaé Bonsu, Black Youth Project, *Agenda to Keep Us Safe* 100 (2016), <http://agendatobuildblackfutures.org/wp-content/uploads/2016/01/BYP100-Agenda-to-Keep-Us-Safe-AKTUS.pdf> (addressing the need for policies that protect youth of color to reverse their overcriminalization).

360 Justice Policy Institute, *Sticker Shock: Calculating the Full Price Tag for Youth Incarceration 2* (2014).

361 132 S. Ct. 2455 (2012).

362 577 U.S. ___ (2016).

363 Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415, 42 U.S.C. § 5601 et seq.

364 Mark Soler et al., “Juvenile Justice: Lessons for a New Era,” 16 *Georgetown J. on Poverty L. & Pol’y* 483, 538-41 (2009).

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group homes modeled after those in Missouri for youths that require a residential setting;³⁶⁵

- ▶ De-incentivize programs that have been proven ineffective at reducing the rate of juvenile offenses, such as “Scared Straight” and boot camps programs;³⁶⁶
- ▶ Eliminate the automatic transfer of young people into adult courts;³⁶⁷
- ▶ Abolish life without parole for offenses committed before the individual was 18 years of age;³⁶⁸
- ▶ “Approve standards recommended by the National Prison Rape Elimination Commission addressing the prevention, detection, and response to sexual misconduct in facilities that incarcerate adults and youth”;³⁶⁹
- ▶ “Collect better data about pregnant girls in the juvenile justice system, and support provisions in the reauthorization of the JJDPA [Juvenile Justice and Delinquency Prevention Act] to improve data collection regarding this population”;³⁷⁰
- ▶ Issue guidelines and trainings on best practices for juvenile justice administration and facilities;
- ▶ “Implement evidence-based practices to increase the effectiveness of juvenile probation and parole, such as graduated sanctions that respond to each violation of the rules of supervision with a swift, sure, and commensurate sanction. Graduated incentives should also be employed to reward exemplary conduct. Research has demonstrated graduated responses are far more effective because they send a clear message at the time of the behavior rather than waiting for relatively minor violations to pile up and then applying the ultimate sanction—revocation to a youth lockup”;³⁷¹
- ▶ Create a national mechanism by which juvenile records are automatically expunged or sealed once the child turns 18;

365 Juvenile Justice, Right on Crime, <http://rightoncrime.com/category/priority-issues/juvenile-justice/> (accessed 7 July 2016).

366 Ibid.

367 Ibid.

368 Ibid. See generally Equal Justice Initiative, *All Children Are Children: Challenging Abusive Punishment of Juveniles* (2012), <http://www.eji.org/allchildrenarechildren>.

369 Soler, *supra* note 364, at 483, 538-41.

370 Ibid.

371 Right on Crime, *supra* note 365.

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- ▶ Require the collection of publicly available data, disaggregated by race, religion, sex, gender, gender identity/expression, age, housing status, sexual orientation, HIV status, ethnicity, sexuality, immigration status, national origin, and religious affiliation, on the juvenile justice system at various points;
- ▶ Adopt protocols for promptly addressing racial, ethnic, gender, and other unwarranted disparities that the disaggregated data reveal.³⁷²

Congress and state legislatures should:

- ▶ Require collaboration between the juvenile justice system and the child welfare systems;³⁷³
- ▶ Develop and fund gender-specific programs that enhance girls' cultural strengths, promote trauma recovery, and provide information on female health and contraception;³⁷⁴
- ▶ Provide mental health services that are sensitive to various genders and gender expressions and sexualities;
- ▶ Fund services for LGBTQ youth and youth who have left their homes and reauthorize the Runaway and Homeless Youth Act programs for \$165 million for financial year 2017;³⁷⁵
- ▶ Develop independent monitoring systems for facilities;³⁷⁶

372 To ensure that the system is fair, it is important that there is routine data collection that is supported by protocols for addressing disparities. For example, Native American youth appear to suffer from unfair application in juvenile justice matters as revealed by their disproportionate treatment and confinement. See Lakota People's Law Project, *supra* note 30, at 7. "The national average for new commitments to adult state prisons by Native American youth is almost twice (1.84 times) that for white youth. In the states with enough Native Americans to facilitate comparisons, Native American youth were committed to adult prison from 1.3 to 18.1 times the rate of white youth."

373 See Brian Goldstein, *Crossover Youth: The Intersection of Child Welfare & Juvenile Justice*, Juvenile Justice Information Exchange (Nov. 15, 2012); *Improving Outcomes for Multi-System Involved Youth Who Cross Over Between Child Welfare and Juvenile Justice—Webinar Series*, Office of Juvenile Justice and Delinquency Prevention, <https://www.nttac.org/index.cfm?event=trainingCenter.traininginfo&eventID=27&from=training&dtab=1> (accessed 25 July 2016); Katie Ishizuka and Paul D. Ashton, *Fostering Change: How Investing In D.C.'s Child Welfare System Can Keep Kids Out of the Prison Pipeline*, Justice Policy Institute (April 9, 2013), <http://www.justicepolicy.org/research/5165>.

374 See *Understanding Trauma through a Gendered Lens*, NCCD Center for Girls and Young Women; Barbara E. Bloom & Stephanie S. Covington, *Gender-Specific Programming for Female Offenders: What is it and Why is it Important?* The Center for Gender and Justice (Nov. 11, 1998), <http://www.stephaniecovington.com/assets/files/13.pdf>; National Council for Incarcerated and Formerly Incarcerated Women and Girls, <http://thecouncil.us/> (last visited July 25, 2016)

375 *Current Status*, The National Network for Youth, <https://www.nn4youth.org/policy-advocacy/fy2017-appropriations/> (accessed 7 July 2016).

376 Center for Children's Law and Policy, *Independent Monitoring Systems for Juvenile Facilities* (Aug. 6, 2012), <http://www.modelsforchange.net/publications/546>

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- ▶ Develop racial impact strategies to eliminate racial disparities in the juvenile justice system.³⁷⁷

Raising the age of criminal responsibility

We all want safer, more just communities for our children. But the criminal justice system has at times treated children like adults. “Adolescents are children, and prosecuting and placing them in the adult criminal justice system doesn’t work for them and doesn’t work for public safety.”³⁷⁸ We know that adolescents are still developing with limited ability to properly judge their actions. We also know that they are highly amenable to change and rehabilitation. Yet, those who are tried and sentenced as adults, who spend critical years of maturation and personal development in incarcerated, are more likely to recidivate after their sentence and more likely to engage in a lifelong relationship with the criminal justice system.³⁷⁹ According to the federal Centers for Disease Control, young people transferred to the adult criminal justice system have approximately 34 percent more re-arrests for felony crimes than youth retained in the youth justice system.³⁸⁰ Around 80 percent of youth released from adult prisons reoffend, often going on to commit more serious crimes.³⁸¹ What’s more, when given lengthy sentences, youths are more likely to commit suicide.³⁸² Some states routinely try 16- and 17-year-olds as adults. Each year in New York alone, which prosecutes all people over 16 as adults, over 50,000 16- and 17-year-olds face the possibility of prosecution as adults in criminal court—the vast majority for low-level crimes (75.3 percent are misdemeanors).³⁸³ Fourteen states have no minimum age for trying children as adults. Children as young as eight have been prosecuted as adults. Some states set the minimum age at 10, 12, or 13.³⁸⁴

377 Joshua Rovner, *Disproportionate Minority Contact in the Juvenile Justice System*, The Sentencing Project (May 2014), <http://www.sentencingproject.org/wp-content/uploads/2015/11/Disproportionate-Minority-Contact-in-the-Juvenile-Justice-System.pdf>;

378 Raise the Age NY, *Get The Facts*, <http://raisetheage.ny.com/get-the-facts> (accessed 7 July 2016).

379 Child Trends Data Bank, *Young Adults in Jail or Prison* (2012), <http://www.childtrends.org/?indicators=youth-adults-in-jail-or-prison>.

380 Robert Hahn et al., Centers for Disease Control and Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: Report on Recommendations of the Task Force on Community Preventive Services* (Nov. 30, 2007), <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm>.

381 National Campaign to Reform State Juvenile Justice Systems, *The Fourth Wave: Juvenile Justice Reforms for the Twenty-First Century 20* (2013), <http://raisetheage.ny.com/wp-content/uploads/2011/08/The-Fourth-Wave.pdf>.

382 They are also more likely to be raped and assaulted in adult prisons and exhibit the aggression that accompanies victimization. Vincent Shiraldi & Jason Zeidenberg, *The Risks Juveniles Face When They Are Incarcerated With Adults*, Justice Policy Institute (1997), http://www.justicepolicy.org/images/upload/97-02_rep_riskjuvenilesface_jj.pdf.

383 Raise the Age NY, *supra* note 378.

384 *Children in Prison*, Equal Justice Initiative, <http://www.eji.org/childrenprison> (accessed 7 July 2016).

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Extensive research has shown that the relevant parts of the brain that govern “impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable” do not reach maturity until the early or mid-twenties. Contrary to the arbitrary designation of 18 as the age of maturity, experts place the “biological” age of maturity between 22 and 25 years of age.³⁸⁵

To remedy this situation, **Congress and state legislatures** should:

- ▶ Raise the age of criminal responsibility in adult court to at least 18 years of age in every jurisdiction in the country including instituting a minimum age for processing in adult criminal court where none exists,³⁸⁶
- ▶ Progressively raise the age of juvenile court jurisdiction to at least 21 years old with additional, gradually diminishing protections for young adults up to age 24 or 25.³⁸⁷

Eliminating unfair sex-related registries for youth

Everyone deserves a chance to grow and change over time. Yet young people who have been convicted of a sex crime while children may find themselves paying for the consequences of their conduct for the rest of their lives through mandatory registration on sex-related registries. Due to laws written to consider the age of the victim but not the age of the person who committed the act, youth are often disproportionately punished for normal or experimental sexual behavior. Child registrants include kids who played games of “doctor” with other children, high school streakers and flashers, and teens who had consensual sex with near-age peers. Children can be placed on registries for sex-related acts they commit when they are as young as 8, 10, and 12 years old.

385 Tony Cox, *Brain Maturity Extends Well Beyond Teen Years*, NPR (Oct. 11, 2011), <http://www.npr.org/templates/story/story.php?storyId=141164708>.

386 Vincent Schiraldi et al., U.S. Department of Justice, National Institute of Justice, *Community-Based Responses to Justice-Involved Young Adults* (2015), <https://www.ncjrs.gov/pdffiles1/nij/248900.pdf>.

387 Ibid.

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Young people who commit sex-related offenses need support to understand the impacts of their actions, and interventions to address the root causes. Registration and notification do not rehabilitate or reduce recidivism, and instead destroy children, families, and communities. These registries often require continuous registration and may have onerous restrictions that prevent these young people from moving on with their lives. There are currently 39 states that place children on registries. The U.S. Supreme Court has recently highlighted the importance of eliminating life sentences for children.³⁸⁸ These registries are essentially life sentences for children.³⁸⁹ Our former Communications Institute Fellow Nicole Pittman has committed herself to getting children off registries for sex-related offenses in the United States.

To eliminate unfair registries, **Congress and state legislatures** should:³⁹⁰

- ▶ “Explicitly exempt all persons who were below the age of 18 at the time of their offense from all sex offender registration, community notification, and residency restriction laws”;³⁹¹
- ▶ Amend legislation so that youth adjudicated delinquents in juvenile court are no longer required to register for sex-related offenses under any circumstances;³⁹²
- ▶ Immediately relieve young people currently required to of the duty to register;³⁹³
- ▶ Expunge all records relating to the registration status of young people;³⁹⁴
- ▶ Terminate all ongoing registration and notification requirements and restrictions upon the act’s effective date;³⁹⁵

388 See *Montgomery v. Louisiana*, 577 U.S. ___ (2016) (holding that all young people sentenced to mandatory life without parole sentences are entitled to challenge the constitutionality of their sentences).

389 Sarah Stillman, “The List,” *The New Yorker* (Mar. 14, 2016), <http://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes>

390 These requirements were devised following consultation with the Center for the Youth Registration.

391 Nicole Pittman, Human Rights Watch, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US* (2013), <https://www.opensocietyfoundations.org/reports/raised-registry-irreparable-harm-placing-children-sex-offender-registries-us>; Justice Policy Institute, *Registering Harm: How sex offense registries fail youth and communities* (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/walsh_act.pdf.

392 Ibid.

393 Ibid.

394 Ibid.

395 Ibid.

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- ▶ Provide an avenue for individuals who believe that he or she should have been removed from the duty to register under the new law, but are still being required to register, to petition the court for relief of the duty to register.³⁹⁶

Alternatively, they should:

- ▶ Eliminate the practice of placing youth adjudicated of sex-related offenses in juvenile court on registries for sex-related offenses;
- ▶ Remove youth under 18 convicted in adult court of sex-related offenses from registries, unless an evidence-based assessment indicates they are a high risk of committing sexual harm in the future; and
- ▶ Use a public health response to sex-related offenses that recognizes that treatment and prevention are more appropriate responses for persons accused of sex-related offenses,³⁹⁷ including comprehensive sexuality education.³⁹⁸

Until youth registration is fully eliminated in all 50 states:

Judges, defense attorneys, and prosecutors should ensure that there is proper consideration concerning the possibility, requirements, and term of registration.

Police should eliminate the use of flyers or any form of publicized information about people on the registry in order to protect people on the registry for sex-related offenses from undue harassment.

Preventing the "school to prison pipeline"

The tendency for overcriminalization has entered into schools.³⁹⁹ Many schoolchildren have been funneled into the criminal justice system due to overly punitive school disciplinary

³⁹⁶ Ibid.

³⁹⁷ Ibid.

³⁹⁸ Ibid.

³⁹⁹ Catherine Y. Kim et al., *The School-to-Prison Pipeline: Structuring Legal Reform* (2010).

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approaches and zero tolerance policies.⁴⁰⁰ There has been a trend of criminalizing schoolchildren for ridiculously minor acts of misconduct.⁴⁰¹ For example, a Florida 5-year-old was handcuffed and charged with battery on a police officer in 2012,⁴⁰² while a San Mateo 7-year-old special education student was sprayed with pepper spray for climbing on furniture while at school in 2011.⁴⁰³ New York City, Houston, and Miami all employ more school police officers than they do school counselors.⁴⁰⁴

There should be a concerted effort to replace these policies, which inappropriately channel large numbers of young people into the criminal justice system. The substantial investment in school policing should be replaced by culture and discipline strategies, such as restorative justice, that have been proven effective at keeping young people in school and keeping schools safe, as well as an increase in social services, school counselors, and school activities that enrich the environment in our nation's schools.

The **Department of Justice** should:

- ▶ Eliminate the funding of police officers in schools⁴⁰⁵ and invest in school-wide restorative justice program to improve school safety;⁴⁰⁶
- ▶ Require that police officers deployed in schools enter a memorandum of understanding with the school district outlining the nature of school policing;⁴⁰⁷

400 Ibid.; see also Tanya E. Coke, National Association of Criminal Defense Attorneys, *Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparities in the Criminal Justice System* 30 (2013), http://www.ushrnetwork.org/sites/ushrnetwork.org/files/2013_racial_disparity_report.pdf.

401 See, e.g., Chris McGreal, "The US Schools with Their Own Police," *The Guardian* (Jan. 12, 2012), <https://www.theguardian.com/world/2012/jan/09/texas-police-schools> (describing an incident where a 12-year-old was arrested for spraying perfume on herself); "Student Arrested For 'Passing Gas' at Fla. School," *NBC News* (Nov. 24, 2008), http://www.nbcnews.com/id/27898395/ns/us_news-weird_news/t/student-arrested-passing-gas-fla-school/#.V2ro3OsrKUK (recounting incident where a 13-year-old was arrested for passing gas).

402 Dav Manoucheri, "5-Year-Old Handcuffed, Charged with Battery On Officer," *NBC: KRCA 3* (Feb. 9, 2012), <http://www.kcra.com/5-Year-Old-Handcuffed-Charged-With-Battery-On-Officer/12648852>.

403 Henry K. Lee, "San Mateo Pays Family of Boy Pepper-Sprayed by Cop," *SFGate* (Dec. 8, 2011), <http://www.sfgate.com/bayarea/article/San-Mateo-pays-family-of-boy-pepper-sprayed-by-cop-2384518.php>.

404 Matt Barnum, *Exclusive—Data Shows 3 of the 5 Biggest School Districts Hire More Security Officers than Counselors*, 74 (Mar. 27, 2016), <https://www.the74million.org/article/exclusive-data-shows-3-of-the-5-biggest-school-districts-hire-more-security-officers-than-counselors>.

405 Catherine Y. Kim & India Geronimo, American Civil Liberties Union, *Policing in Schools: Developing a Governance Document for School Resource Officers in K-12 Schools* (Aug. 2009), <https://www.aclu.org/other/policing-schools-developing-governance-document-school-resource-officers-k-12-schools>.

406 See e.g., National Inst. for Justice, DOJ, *Restorative Justice* (2007); Office of Special Education Programs, U.S. Dep't of Education, *Positive Behavioral Supports and Interventions, Is School-Wide Positive Behavior Support an Evidence-Based Practice?* (2009).

407 For model Memorandum of Understanding language, please see Ibid.

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- ▶ Require that school-based law enforcement officers, including school police and school resource officers, who deployed pursuant to federal funding be trained to respect students' constitutional and other rights.⁴⁰⁸

Local government and school administrations should require the following:

- ▶ Adoption of policies that prioritize education over penalization, facilitating the repeal of overly punitive school discipline policies that push schoolchildren into the criminal justice system;⁴⁰⁹
- ▶ Elimination of “zero tolerance” policies, which reflect “a philosophy or policy that mandates the application of predetermined consequences, most often severe and punitive in nature, that are intended to be applied regardless of the gravity of behavior, mitigating circumstances, or situational context in schools”;⁴¹⁰
- ▶ That referrals to law enforcement should be viewed as a last resort and used only when needed to ensure public safety;⁴¹¹
- ▶ Maintenance by schools of publicly available data on student disciplinary measures and referrals to law enforcement agencies, disaggregated by students' race, gender, sexuality, nationality, and eligibility for free or reduced lunch;⁴¹²
- ▶ Implementation of restorative justice practices by school districts to eliminate harsh disciplinary procedures and avoid criminalization in the classroom.⁴¹³

408 Kim & Geronimo, *supra* note 405.

409 Ibid.

410 American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations* (2008), <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf> (finding that “zero tolerance” are largely ineffective at promoting school safety).

411 Ibid.

412 Ibid.

413 Ibid.

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For more information on respecting the rights of children in the criminal justice system, check out:

The **Justice Policy Institute (JPI)**, a think tank dedicated to reducing society's reliance on incarceration with a particular focus on reforming the juvenile justice system.

Equal Justice Initiative (EJI), which provides legal representation to indigent defendants and incarcerated individuals denied fair treatment by the criminal justice system with a focus area on ensuring the rights of children involved in the justice system.

Raise the Age NY, a campaign designed to increase public awareness of the need to implement a "comprehensive approach to raise the age of criminal responsibility in NYS so that the legal process responds to all children as children."

Vincent Schiraldi, Bruce Western, and Kendra Bradner, who advocate for appropriate, community-based responses to justice-involved young adults in their 2015 report, *Community-Based Responses to Justice-Involved Young Adults*,⁴¹⁴

Our 2014 Communications Institute Fellow Nicole Pittman of Impact Justice, who discusses the harms of placing children on registries for sex-related offenses in her 2013 report, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US*.

Dignity in Schools Campaign (DSC), which "challenges the systemic problem of pushout in our nation's schools and works to dismantle the school-to-prison pipeline" through advocacy, organizing, and leadership development.

Restorative Justice Training Institute, which provides training and resources to schools and youth-focused organizations.

414 Vincent Schiraldi et al., U.S. Department of Justice, National Institute of Justice, *Community-Based Responses to Justice-Involved Young Adults* (2015), <https://www.ncjrs.gov/pdffiles1/nij/248900.pdf>.