

Zero Tolerance, Frivolous Juvenile Court Referrals, and the School-to-Prison Pipeline: Using Arbitration as a Screening-Out Method to Help Plug the Pipeline

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I. INTRODUCTION

Alexa Gonzalez was in big trouble. Police handcuffed the girl, paraded her through the hallways of Junior High School 190 in New York City, and escorted her to the local precinct station.¹ There, Gonzalez remained handcuffed to a pole for more than two hours while her mother tried in vain to convince officers to let her see her daughter.² Police issued Gonzalez a court summons.³ She was sentenced to eight hours of community service.⁴ Her crime? Doodling on her desk with a lime green erasable marker.⁵ She was twelve years old at the time.⁶ Zero tolerance.

A thirteen-year-old student in Florida was arrested for repeatedly “passing gas” and turning off his classmates’ computers during class.⁷ A fifteen-year-old student in Wisconsin was hauled out of his high school cafeteria in handcuffs for allegedly stealing chicken nuggets from the lunchline.⁸ The case was dropped after authorities learned the teenager obtained

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¹ Rachel Monahan & Wil Cruz, *Cuffed for Doodling on a Desk*, N.Y. DAILY NEWS, Feb. 5, 2010, at 4.

² Complaint at 52, B.H. v. City of New York, No. CV10-210, slip op. (E.D.N.Y. Jun. 18, 2010).

³ Monahan & Cruz, *supra* note 1.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Student Arrested for “Passing Gas” at Fla. School*, ASSOCIATED PRESS, Nov. 22, 2008.

⁸ *Student Arrested At School Over Chicken Nuggets*, WISN 12 NEWS, July 21, 2010, <http://www.wisn.com/news/24317843/detail.html>.

the nuggets from a friend, who was fasting at the time.⁹ A twelve-year-old boy was charged with a misdemeanor after “being disruptive, raising his voice, ‘and getting agitated and upset towards’” a school administrator.¹⁰ Zero tolerance, indeed.

The aforementioned incidents reveal a disturbing trend in our nation’s public schools: the criminalization of student misbehavior that has accompanied the shift toward “zero tolerance” disciplinary policies over the past two decades.¹¹ This change is one of many factors feeding the “school-to-prison pipeline,” a phrase often used to describe the complex, multidimensional process that funnels large numbers of minority students from the classroom into the adult prison system.¹²

One factor that has strengthened the pipeline’s grip on America’s young is the spike in the number of youth who land in the juvenile justice system for in-school offenses that, in another era, would have been handled by school officials.¹³ This newfound reliance on juvenile court has had a

⁹ *Id.*

¹⁰ Leslie Williams-Hale & Elysa Batista, *Bonita Springs Middle School Student Arrested After Yelling at Administrator*, NAPLES DAILY NEWS, Dec. 1, 2010, available at <http://www.naplesnews.com/news/2010/dec/01/bonita-springs-middle-school-student-arrested-fail>.

¹¹ See Am. Psychological Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AMERICAN PSYCHOLOGIST 852, 856 (2008), available at <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf> (reporting that “[t]he increased reliance on more severe consequences in response to student disruption has ... resulted in an increase of referrals to the juvenile justice system for infractions that were once handled in school.”).

¹² See Johanna Wald & Daniel Losen, The Civil Rights Project at Harvard University, *Defining and Redirecting a School-to-Prison Pipeline*, 99 NEW DIRECTIONS FOR YOUTH DEVELOPMENT 9, 9–15 (2003), available at http://www.justicepolicycenter.org/Articles%20and%20Research/Research/testprisons/SCHOOL_TO_%20PRISON_%20PIPELINE2003.pdf (linking the rise in zero tolerance policies to the near-doubling (from 1.7 million to 3.1 million) of the number of students suspended from school each year since the mid-1970s and discussing the disparate impact harsher disciplinary policies are having on minority students and the relationship between “troubled educational histories and subsequent arrest and incarceration”); see also NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *DISMANTLING THE SCHOOL-TO-PRISON PIPELINE*, 2–3 (2005), available at <http://naacpldf.org/publication/dismantling-school-prison-pipeline> (noting that “[h]istorical inequities, such as segregated education, concentrated poverty, and racial disparities in law enforcement, all feed the pipeline.”).

¹³ See Lisa H. Thurau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 978–81

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disparate impact on minority youth.¹⁴ Despite the suggestion that these practices violate the constitutional rights of students funneled into the pipeline, courts have been reluctant to interfere with school disciplinary policies without proof of discriminatory intent.¹⁵

This report suggests an alternative approach to litigating in search of systemic change. Courts are reluctant to declare school discipline policies unconstitutional¹⁶ and the current political climate has rendered efforts to eradicate zero tolerance policies unsuccessful.¹⁷ This note suggests states adopt prophylactic measures to ensure that public school students' constitutional rights are protected even if current zero tolerance policies remain in place—utilizing the arbitration process to screen out frivolous juvenile court referrals that stem from in-school misbehavior. Such a

(2009–2010) (explaining that the shift towards zero tolerance policies amid public outcry after a series of highly publicized school shootings during the 1990s meant that “behaviors such as schoolyard scuffles, shoving matches, and verbal altercations ... took on potentially sinister tones and came to be seen as requiring law enforcement intervention”); see also Heather Cobb, Note, *Separate and Unequal: The Disparate Impact of School-Based Referrals to Juvenile Court*, 44 HARV. C.R.-C.L. L. REV. 581, 583–84 (2009) (noting that the introduction of police officers in school settings has led to “a spike of school referrals to the juvenile court system for largely childish misbehavior. For example, introduction of police officers to schools in Clayton County, Georgia, led to a 600% increase in referrals to juvenile court over a three-year period. Yet during that time there was no increase in the number of serious safety violations.”).

¹⁴ See Catherine Y. Kim, *Procedures for Public Law Remediation in School-to-Prison Pipeline Litigation: Lessons Learned from Antione v. Winner School District*, 54 N.Y.L. SCH. L. REV. 955, 966–69 (2009–2010) (describing ACLU interviews with more than 60 American Indian community members in Winner and Tripp County, South Dakota, the bulk of whom reported that “American Indian students were suspended and/or arrested for minor misconduct and punished more harshly than similarly situated white students”); see also Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability*, 47 HOW. L.J. 243, 255–56 (2004) (noting that “[b]etween 1972 and 2000, the percentage of white students suspended for more than one-day rose from 3.1% to 6.14%. During the same period, the percentage for black students had risen from 6% to 13.2%.”); AMERICAN CIVIL LIBERTIES UNION, *HARD LESSONS: SCHOOL RESOURCE OFFICER PROGRAMS AND SCHOOL-BASED ARRESTS IN THREE CONNECTICUT TOWNS* 36–44 (2008) (reporting statistics from a suburban Hartford school district that reveal “students of color who commit certain common infractions ... are more likely to be arrested than whites committing the very same offenses”), available at http://www.aclu.org/files/pdfs/racialjustice/hardlessons_november2008.pdf.

¹⁵ Kim, *supra* note 14, at 957.

¹⁶ See *infra* Section III.

¹⁷ See *infra* Section II.

screening-out mechanism would help prevent the racial disparity in punishment that has marred the zero tolerance era and violated the constitutional rights of students who have become trapped in the school-to-prison pipeline.

This note is divided into three parts: Section II introduces the school-to-prison pipeline, its impact on students of color, and current federal legislation meant to solve the pipeline problem; Section III explains that courts have been hostile to the suggestion that various aspects of this phenomenon violate students' Fourth, Fifth, and Fourteenth Amendment rights; and Section IV suggests that states use arbitration as a method to screen out frivolous juvenile court referrals from school-based incidents, establishing disciplinary review boards that would serve as a prophylactic measure to prevent zero tolerance policies from violating students' constitutional rights.

II. ZERO TOLERANCE, THE SCHOOL-TO-PRISON PIPELINE, AND MINORITY YOUTH IN PUBLIC SCHOOLS

It is a tough-sounding term with roots in the federal government's get-tough attitude toward drug enforcement in the 1980s: Zero tolerance.¹⁸ The term has since come to describe this nation's approach to policing discipline in its public schools—a nondiscretionary approach that mandates a set of often-severe, predetermined consequences to student misbehavior that is to be applied without regard to “seriousness of behavior, mitigating circumstances, or situational context.”¹⁹ Policymakers imported this attitude to public schools during the early 1990s in response to the widespread

¹⁸ The phrase “zero tolerance” was first recorded in the LexisNexis national newspaper database in 1983, when the Navy reassigned dozens of submarine crew members on suspicion of drug abuse. The phrase took hold as federal officials fought the “War on Drugs” during the 1980s, and eventually came to describe school programs meant to address drug abuse and gang activity, which were “often broadened to include not only drugs and weapons but also tobacco-related offenses and school disruption.” Russell Skiba & Reece Patterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 THE PHI DELTA KAPPAN 372, 373 (1999).

¹⁹ Am. Psychological Ass'n Zero Tolerance Task Force, *supra* note 11, at 2; see Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream's Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 U.C. DAVIS J. JUV. L. & POL'Y 289, 300–302 (2005) (explaining that zero tolerance policies have led to the classification of school rule violations as “criminal or delinquent acts,” thereby encouraging “referral to juvenile justice authorities and ... punishment in addition to or bypassing the administrative school disciplinary hearing processes.”).

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perception that juvenile violence was increasing and school officials needed to take desperate measures to address the problem.²⁰ Zero tolerance was one factor that opened the schoolhouse gates to law enforcement officials, who were called upon to help school administrators stem the rising tide of violence.²¹

It turns out the public's fears were misguided—statistics show violent crime among juveniles was in decline just as the zero tolerance movement was picking up steam.²² This data, however, has not weakened public schools' reliance on zero tolerance policies, which persist despite lawsuits and media attention questioning their appropriateness in the public school context.²³ This reliance on zero tolerance policies, coupled with the advent of police patrolling the hallways, has had the unintended consequence of forcing many students into the juvenile justice system for youthful indiscretions that would have once been handled in-house by school officials.²⁴ In turn, students who become involved in the juvenile justice

²⁰ See NAACP, *supra* note 12; see also Hanson, *supra* note 19, at 303–14 (tracing the growth of zero tolerance policies to their origins in the federal Gun Free Schools Act of 1994, which required public schools to expel students caught with firearms at school for a minimum of one year).

²¹ See Thureau & Wald, *supra* note 13, at 978–81 (reporting that the “rapid increase in officers” began with a convergence of factors, including the availability of federal funds for police officers in schools, high-profile school shooting incidents, zero tolerance policies, and the advent of the national policies meant to ferret out crime); see also AMERICAN CIVIL LIBERTIES UNION, WHAT IS THE SCHOOL-TO-PRISON PIPELINE, <http://www.aclu.org/racial-justice/what-school-prison-pipeline> (last visited Jan. 14, 2011).

²² See Howard N. Snyder, *Juvenile Arrests 2003*, OJJDP JUVENILE JUSTICE BULLETIN (August 2005), <http://www.ncjrs.gov/html/ojjdp/209735/page2.html>, (reporting that the juvenile share of murders, forcible rapes, robberies, aggravated assaults, and property crimes were all lower in 2003 than they were in the mid-1990s).

²³ See, e.g., *King v. Beaufort Cty. Bd. of Educ.*, 364 N.C. 368 (N.C. 2010); see also Erik Eckholm, *School Suspensions Lead to Questions and Legal Challenge*, N.Y. TIMES, Mar. 19, 2010, at A14.

²⁴ See *supra* note 13 and accompanying text; see also Am. Psychological Ass'n Zero Tolerance Task Force, *supra* note 11, at 9. One of the unfortunate consequences of this phenomenon is its affect on adolescents, who “display a heightened sensitivity to situations where they believe the punishment may not be warranted,” and tend to develop a deep-seated negative attitude towards “adult authority, justice and fairness” as a result of zero tolerance disciplinary policies. “As a result, many students are further alienated from the educational process, and behavioral problems meant to be remedied are, instead, exacerbated.” ADVANCEMENT PROJECT AND THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO

system—for any reason—face many barriers to re-entering traditional schools and have exceedingly high dropout rates upon re-entry.²⁵ The high dropout rate is ominous for students returning from juvenile incarceration: Statistics show prisons are composed primarily of inmates who did not finish high school.²⁶

The expansion of zero tolerance policies came at an inopportune time. The movement away from in-school, discretionary discipline coalesced with other social factors—from budget shortfalls at inner-city schools to the rise of high-stakes testing that followed the federal No Child Left Behind Act of 2001²⁷—to create a public school system that now appears to be actively working to funnel troublesome and low-performing students out of schools and into the criminal justice system.²⁸

TOLERANCE AND SCHOOL DISCIPLINE POLICIES 10 (2000), available at <http://www.advancementproject.org/sites/default/files/publications/opsusp.pdf>. Another is the extraordinary burden these frivolous referrals are placing on the juvenile justice system. See DAVID RICHARD ET AL., BUILDING BLOCKS FOR YOUTH, UNINTENDED CONSEQUENCES: THE IMPACT OF “ZERO TOLERANCE” AND OTHER EXCLUSIONARY POLICIES ON KENTUCKY 25–26 (2003) (reporting that during public forums, court officials “suggested that these [frivolous] referrals were beginning to overwhelm Kentucky’s juvenile and family courts” as well as the “fragile system of prevention programs” intended to serve at-risk students; further concluding that this trend poses the risk of greatly discouraging and dispiriting students, “who may lose their opportunity to be educated, and who may turn to crime”), available at http://jjpl.org/Publications_JJ_InTheNews/JuvenileJusticeSpecialReports/BBY/kentucky/kentucky.pdf.

²⁵ See Jessica Feierman et al., *The School to Prison Pipeline ... And Back: Obstacles and Remedies for the Re-enrollment of Adjudicated Youth*, 54 N.Y.L. SCH. L. REV. 1115, 1116–18 (2009–2010) (noting that nationally, two-thirds of students who spend time in custody drop out of school, while 90% of Philadelphia students placed in juvenile detention during high school drop out upon their release).

²⁶ Wald & Losen, *supra* note 12, at 4.

²⁷ The act mandates that all schools bring 100% of their students to proficiency in Math and Reading by 2014 and uses a series of standardized tests—administered annually to students in the third through eighth grades, as well as high school students—to measure progress. See Sam Dillion, *Most Public Schools May Miss Targets*, *Education Secretary Says*, N.Y. TIMES, Mar. 10, 2011, at A16. Critics contend that the law places too much emphasis on standardized testing, rather than investing in low-performing school districts. Linda Darling-Hammond, *Evaluating No Child Left Behind*, THE NATION, May 21, 2007, available at <http://www.thenation.com/article/evaluating-no-child-left-behind>.

²⁸ See Wald & Losen, *supra* note 12; see also FAIRTEST, HOW TESTING FEEDS THE SCHOOL-TO-PRISON PIPELINE, <http://www.fairtest.org/how-testing-feeds-schooltoprison-pipeline> (March 2010); NAACP, *supra* note 12, at 1–8.

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The school-to-prison pipeline is perhaps most troubling because the confluence of harsh discipline policies, underfunded schools, and obsession with high-stakes testing is disproportionately affecting minority students.²⁹ Nowhere is this disparate impact more acute than in the area of school discipline. African Americans who violate school rules are more likely to face multi-day suspensions than whites, and both anecdotal and statistical evidence reveal that American Indian and Hispanic children are likewise being targeted.³⁰ Studies show that students of color are faced with this harsher punishment in response to *the same kind of conduct* as their white peers.³¹ Further, research has shown that this discrepancy cuts clearly across racial lines—it is not the result of differences in socioeconomic status.³² The application of zero tolerance policies often results in the unfair punishment of

²⁹ See NAACP, *supra* note 12, at 1–8 (explaining that “[s]everal indicators demonstrate that the racial disparities in the pipeline begin in schools ... African-American students are over-represented in special education categories and under-represented in advanced placement courses and gifted education,” are more likely to be held back a grade level based upon their test performance, and that the overreliance on testing gives schools “perverse incentives” to find ways to push underperforming students out of traditional high schools and into alternative schools or juvenile detention centers using zero tolerance disciplinary policies); FAIRTEST, *supra* note 26; *supra* note 14 and accompanying text.

³⁰ See *supra* note 14 and accompanying text.

³¹ RUSSELL J. SKIBA, INDIANA EDUCATION POLICY CENTER, ZERO TOLERANCE, ZERO EVIDENCE 15 (2000) (observing that studies reveal “African-American students appear to be at risk for receiving a range of more severe consequences for less serious behavior” than their white peers), *available at* <http://www.indiana.edu/~safeschl/ztze.pdf>; JOHN M. WALLACE ET AL., NATIONAL INSTITUTES OF HEALTH, RACIAL, ETHNIC, AND GENDER DIFFERENCES IN SCHOOL DISCIPLINE AMONG U.S. HIGH SCHOOL STUDENTS: 1991–2005, 8–9 (2008) (showing that black, Hispanic, and American Indian youth “are consistently more likely than [w]hite youth to receive school discipline” and further showing that “although [b]lack boys’ and girls’ rates of being sent to the office or detained are roughly comparable to those of other racial and ethnic groups ... they are significantly ... more likely than the other racial and ethnic groups to have been suspended or expelled”), *available at* <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2678799/pdf/nihms50094.pdf>.

³² WALLACE ET AL., *supra* note 31, at 8–9 (explaining the results of a study of school discipline adjusted for socioeconomic factors and broken down by race. The study found that controlling “for socio-demographic factors reduces the magnitudes of the racial and ethnic differences” in school discipline “only modestly, and all of the subgroups (blacks, American Indians, and Hispanics) remain significantly different from their [w]hite counterparts”).

students with disabilities, despite federal laws meant to protect disabled students from unfair discipline.³³

This new culture of discipline has added an additional layer of instability to an already fragile learning environment at many schools.³⁴ Far from being a silver bullet that has made schools safer and more conducive to learning, the overbearing police presence and overly punitive disciplinary policies appear to have transformed schools into places where administrators are far more concerned with controlling student behavior than encouraging scholarship and the free flow of ideas.³⁵ Some research suggests zero tolerance policies have the potential to make schools *more* dangerous.³⁶ One may only venture a guess at the long-term implications of these developments, but it seems safe to state that the current environment at many

³³ See ADVANCEMENT PROJECT AND THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, *supra* note 24, at 8 (describing one case in which an autistic child hit a teacher and was both expelled from school and charged with felony battery, and further suggesting that harsh discipline against students with disabilities triggered by zero tolerance policies is in violation of the federal Individuals with Disabilities Education Act [IDEA]). This note does not directly examine the tension between the IDEA and zero tolerance policies, which has generated much controversy. For an examination of one program that has had some success in combating the school-to-prison pipeline for disabled students, see Kristina Menzel, *The School-to-Prison Pipeline: How Schools are Failing to Properly Identify and Service Their Special Education Students and How One Probation Department has Responded to the Crisis*, 15 PUB. INT. L. REP. 198, 203–205 (examining Cook County, Illinois’ Educational Advocacy Program, a division of its Juvenile Probation Department consisting of law enforcement personnel specially trained in both education and special education matters, who advocate on behalf of special needs students at risk of dropping out of school; noting that the officers often face an “uphill battle” due to school officials’ reluctance to provide special education services to children).

³⁴ Am. Psychological Ass’n Zero Tolerance Task Force, *supra* note 11, at 4–5 (discussing that studies show schools with higher rates of suspension and expulsion “have less satisfactory ratings of school climate, less satisfactory school governance structures” and that high rates of discipline are “associated with more negative achievement outcomes”) (emphasis in original); see ADVANCEMENT PROJECT AND THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, *supra* note 24, at 10.

³⁵ *Id.*

³⁶ See Kevin P. Brady, *Zero Tolerance or (In)tolerance Policies? Weaponless School Violence, Due Process and the Law of Student Suspensions and Expulsions: An Examination of Fuller v. Decatur Public School Board of Educational School District*, 2002 B.Y.U. EDUC. & L.J. 159, 163–68 (2002) (citing research from the U.S. Department of Justice and U.S. Department of Education that shows schools using zero tolerance policies were “less safe than those without zero tolerance policies,” even four years after zero tolerance policies took effect).

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public schools is not the type that will make American students more competitive with children abroad, some of whom are outperforming them by wide margins.³⁷

This collection of circumstances has attracted the attention of civil rights activists, journalists, and juvenile justice reformers alike.³⁸ The American

³⁷ See David Barboza, *Shanghai Schools' Approach Pushes Students to Top of Tests*, N.Y. TIMES, Dec. 30, 2010, at A4 (reporting that students from China outperformed students from sixty-five countries on a recent "international standardized test that measured math, science and reading competency," while "American students came in between 15th and 31st place in the three categories"); see also Thomas Friedman, *We're Number 1(1)!*, N.Y. TIMES, Sept. 12, 2010, at WK11 (discussing school reform failures within the broader context of an America in decline).

It should be telling that many think tanks, governmental, and nonprofit organizations that either study or advocate for school reform do not consider strengthening zero tolerance policies or making discipline programs more punitive a key to turning around underperforming school districts. See BRYAN HASSEL ET AL., CENTER ON INNOVATION & IMPROVEMENT, *SCHOOL TURNAROUNDS: A REVIEW OF THE CROSS-SECTOR EVIDENCE ON DRAMATIC ORGANIZATIONAL IMPROVEMENT 9* (2007), available at <http://www.centerii.org/survey/downloads/Turnaround%20Actions%20and%20Results%203%2024%2008%20with%20covers.pdf> (finding that "schools undertaking significant school reform...appear to have a higher chance of success when the district allows as much freedom as possible from regulations regarding scheduling, transportation, discipline, and curriculum") (emphasis added). Instead, many of these organizations advocate a return to the discretionary, flexible, context-based discipline that was discarded in favor of zero tolerance. See UDI OFER ET AL., THE ANNENBERG INSTITUTE FOR SCHOOL REFORM & THE NEW YORK CIVIL LIBERTIES UNION, *SAFETY WITH DIGNITY: ALTERNATIVES TO THE OVER-POLICING OF SCHOOLS 17-19* (2009), available at http://www.nyclu.org/files/publications.nyclu_pub_safety_with_dignity.pdf (discussing the positive impact of replacing zero tolerance policies with traditional (discretionary) school discipline, conflict-resolution, and restorative justice programs in six New York City Schools that serve at-risk student populations, yet experience higher-than-average attendance and graduation rates, as well as lower-than-average rates of crime and school suspensions).

³⁸ See Veronica Flores-Paniagua, *How Did We get to Where a Student is Shot?*, SAN ANTONIO EXPRESS-NEWS, Nov. 16, 2010, at A1 (analyzing a school-related police shooting of an unarmed, 14-year-old through the lens of the school-to-prison pipeline); see also Lewis Pitts & Leon Mozell, *School Systems Irresponsibly Ignoring 'Academic Genocide'*, GREENSBORO NEWS & RECORD, Jun. 20, 2010, at H3 (discussing a state judge's declaration that conditions at certain North Carolina public schools were tantamount to "academic genocide"); Friedman, *supra* note 37; NAACP, *supra* note 12, at 1-8; TEXAS APPLESEED, *TEXAS' SCHOOL-TO-PRISON PIPELINE: DROPOUT TO INCARCERATION, THE IMPACT OF SCHOOL DISCIPLINE AND ZERO TOLERANCE 2-7, 25-61* (2007), available at <http://www.texasappleseed.net/pdf/Pipeline%20Report.pdf> (criticizing the weak educational offerings and lax state oversight of alternative education

Bar Association recently called for the enactment of laws aimed at reducing the criminalization of “truancy, disability-related behavior, and other school-related conduct.”³⁹

The most promising piece of federal legislation intended to address the school-to-prison pipeline would establish a competitive grant program for local organizations working to steer youth away from trouble and toward productive lives.⁴⁰ Supporters hail the Youth PROMISE (Prison Reduction through Opportunities, Mentoring, Intervention, Support, and Education) Act as a rejection of the get-tough approach of zero tolerance in favor of a more preventative, community based approach to addressing the problems of at-risk youth.⁴¹ An important piece of the legislation would establish a Center for Youth-Oriented Policing and provide funding to train law enforcement officers to better serve high-risk youth.⁴² The bill would also provide resources to study the effectiveness of youth crime prevention strategies.⁴³

While passage of the Youth PROMISE Act would certainly be a step in the right direction,⁴⁴ the Act does not call for a direct prohibition of the

programs for students with discipline issues within the context of school dropout and pushout).

³⁹ American Bar Association, Recommendation 118B, adopted August 3–4, 2009 (urging further that schools “be required, prior to removing a student from his/her regular program, to try other preventative and supportive interventions ... in a small-group setting (e.g., social skills training); on an individualized basis (e.g., a behavioral contract or self-management strategies); or for the entire class (e.g., a timeout or differential treatment”).

⁴⁰ H.R. 1064, 111th Cong. (2009).

⁴¹ See Tonya M. Boyd, Note, *Confronting Racial Disparity: Legislative Responses to the School-to-Prison Pipeline*, 44 HARV. C.R.-C.L. L. REV. 571, 578–80 (2009) (noting that the act “could be a catalyst for a new culture of youth discipline, which may ultimately stem the school-to-prison pipeline and its racially disparate effects”); see also Human Rights Watch, Letter of Support for the “Youth PROMISE Act,” H.R. 3846, and Opposition to H.R. 3547, the Gang Prevention, Intervention, and Suppression Act, Apr. 7, 2008, available at http://www.bobbyscott.house.gov/images/pdf/HRW_supportypa_opphr3547.pdf (urging support for the bill, which “[r]ather than creating duplicative penalties and sanctions that would increase federal prosecution and incarceration ... invests resources in local communities to prevent juvenile gang violence, delinquency and crime from occurring in the first place”).

⁴² H.R. 1064, 111th Cong. §§ 401–404 (2009).

⁴³ *Id.* §§ 301–302.

⁴⁴ The bill had not yet been approved by the House or Senate at the time of publication.

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frivolous, school-based referrals to juvenile court that are funneling additional students into the criminal justice system and thereby strengthening the school-to-prison pipeline.⁴⁵ Furthermore, in an era when lawmakers tend to use tough-on-crime stances as campaign platforms, it is important to note the bill—introduced in 2009—has passed neither the House, nor the Senate.⁴⁶

The aforementioned points are not intended to suggest the Act would be unsuccessful. They do, however, suggest that more is necessary. Given the difficulties children have re-entering schools once they are stuck with the lasting stigma of having been involved in the juvenile justice system,⁴⁷ students should not be referred to juvenile court for in-school misbehavior unless it directly threatens to have a lasting, negative impact on the safety or well-being of other students. While they await the enactment of federal legislation meant to address the root causes of the pipeline, states should take proactive steps to ensure that students who are funneled away from schools and onto the prison track are there because of actions that threatened serious harm to the learning environment, not for incidents better handled by assistant principals or deans. Failure to do so arguably violates the constitutional rights of students who are pushed into the pipeline for dubious reasons.⁴⁸

III. COURTS ARE HOSTILE TO CLAIMS THAT SCHOOL DISCIPLINARY POLICIES VIOLATE STUDENTS' CONSTITUTIONAL RIGHTS, FORCING ADVOCATES TO PRESSURE STATES TO TAKE ACTION TO ADDRESS THE PROBLEM

Despite a range of claims that zero tolerance discipline policies violate students' constitutional rights, courts are extremely deferential when it comes to the authority of schools to discipline students.⁴⁹ Attorneys interested in

⁴⁵ See Feierman et al., *supra* note 25, at 1116–18.

⁴⁶ See ADVANCEMENT PROJECT AND THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, *supra* note 24, at 14 (noting that “politicians seeking to woo voters with their ‘tough on crime’ agendas have used [z]ero [t]olerance as a popular sound bite. Similarly, politicians and educators seeking to respond immediately to public outrage over tragic school shootings have adopted the [z]ero [t]olerance [p]hilosophy”).

⁴⁷ See *id.*, at 11–12 (discussing the “downward spiral” often created by zero tolerance policies, with rock bottom being jail or prison).

⁴⁸ See *infra* Section III; see also *infra* note 117 and accompanying text.

⁴⁹ See *infra* Section III.

juvenile justice and education reform face daunting obstacles in challenging the machinations that keep the school-to-prison pipeline well oiled. This section provides an overview of legal challenges to zero tolerance policies on the Fourth, Fifth, and Fourteenth Amendment fronts. The author then recommends that reformers should utilize community advocacy in an effort to convince states to adopt prophylactic measures to protect students' constitutional rights at what is quickly becoming a critical juncture for American public schools.⁵⁰

A. *Due Process and Equal Protection Claims*

The Supreme Court has not held that education is a fundamental constitutional right.⁵¹ Nevertheless, the Court has noted that students do not “shed their constitutional rights ... at the schoolhouse gate.”⁵² At the very least, all public school students subject to suspension or expulsion due to zero tolerance policies are entitled to due process and equal protection under the Fourteenth Amendment.⁵³

Courts, however, have granted great deference to educators where school discipline is concerned.⁵⁴ This trend has continued in the face of mounting

⁵⁰ See *supra* notes 37–38 and accompanying text.

⁵¹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

⁵² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–506 (1969) (holding that a school district's prohibition of black armbands, in absence of any showing that students' display of the protest measure would cause disruption or interference with school activities, violated the First Amendment).

⁵³ *Goss v. Lopez*, 419 U.S. 565, 573–74, 579–80 (1975) (holding that exclusion from school for longer than a trivial period is enough to trigger due process protections). See also Brady, *supra* note 36, at 170 (arguing that courts should be more open to potential substantive due process violations related to zero tolerance policies and statistical analyses of zero tolerance policies in evaluating equal protection claims); Robert C. Cloud, *Due Process and Zero Tolerance: An Uneasy Alliance*, 178 ED. LAW. REP. 1, 18 (Aug. 28, 2003) (suggesting that school officials clearly define, widely disseminate, and frequently update the goals and processes of their zero tolerance policies, further recognizing that “[a]bove all, school officials must realize that due process rights supersede zero tolerance rules”). Courts have held that students in states with compulsory school attendance laws have a protected property interest in their education, which is necessary to sustain a due process claim. *Goss*, 419 U.S. at 574.

⁵⁴ In *Wood v. Strickland*, the Supreme Court noted that while students do have due process rights, it “is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.” 420 U.S. 308, 326 (1975). Even recently, courts have found a wide range of decisions by

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evidence that modern-day zero tolerance policies have imposed punishments that are not appropriate for the offenses committed and had an overwhelmingly disparate impact on minorities.⁵⁵ Courts hold plaintiffs challenging school discipline on due process grounds to a lofty standard, generally upholding long-term suspensions or expulsions so long as they provide a minimum amount of notice and can withstand rational basis review.⁵⁶ Discriminatory purpose, which is required to sustain an equal protection claim,⁵⁷ is likewise difficult to prove when challenging zero tolerance policies.⁵⁸

The Supreme Court has not confronted the issue of what procedural protections are due to students when school officials or school resource officers decide whether to refer an incident to juvenile court or simply punish the rulebreaker using in-house methods, such as detention or suspension. But courts have been generally unreceptive to claims that zero tolerance policies violate students' procedural due process rights when suspension or expulsions are the punishments at issue.

The Supreme Court stated in *Goss* that students facing suspensions of ten days or less must be provided with oral or written notice of the charges they face, and if the students deny them, an explanation of the evidence against them.⁵⁹ Lower courts, however, have held that this required notice does not

school officials constitutionally permissible. *See* Peterson v. Baker, 504 F.3d 1331, 1337 (11th Cir. 2007) (holding that there was no due process violation when a teacher choked a student after he grabbed her hand and pushed it away as she attempted to prevent him from leaving a classroom); *see also* D.D. *ex rel.* Davis v. Chilton Cnty. Bd. of Educ., 701 F.Supp.2d 1236, 1242 (M.D. Ala. 2010) (finding no due process violation when a teacher strapped a four-year-old, learning-disabled student into a chair, facing the wall, after he kicked her and made disruptive comments to the teacher and other students).

⁵⁵ *See supra* note 14 and accompanying text; *see also* Cobb, *supra* note 13, at 583–84.

⁵⁶ Brady, *supra* note 36, at 177.

⁵⁷ Washington v. Davis, 426 U.S. 229, 239–41 (1976) (holding that a law or governmental action, which has a racially disproportionate impact, is not unconstitutional unless it reflects a “racially discriminatory purpose”).

⁵⁸ Brady, *supra* note 36, at 180–81. *See also* Chauncey D. Smith, Note, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORD. URB. L.J. 1009, 1015 (Nov. 2009) (noting that critical race scholars believe Davis has downgraded “the Constitution’s equal protection mandate to an illusory promise because proving the existence of a discriminatory motive in a racist system is an impractical, and thus insurmountable, barrier”).

⁵⁹ *Goss*, 419 U.S. at 581.

have to state with specificity the reasons students are facing suspension.⁶⁰ The standards for pre-disciplinary hearings articulated by the *Goss* court—“an opportunity to explain his version of the story”⁶¹—have also been construed in favor of school officials.⁶² Courts, for example, have held that students do not always have the right to call witnesses of their own during disciplinary proceedings.⁶³ While the *Goss* court left open the possibility that more formal adversarial procedures should be imposed for penalties more severe than a suspension of less than ten days,⁶⁴ lower courts have held that students facing severe punishment do not necessarily have the right to cross-examine their accusers or school officials during disciplinary hearings.⁶⁵

⁶⁰ *Smartt v. Clifton*, No. C-3-96-389, 1997 WL 1774847, at *15 (S.D. Ohio Feb. 10, 1997).

⁶¹ *Goss*, 419 U.S. at 582.

⁶² *Smartt*, 1997 WL 1774874 at *16 (declining to “construe the Due Process clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incidents”). Courts have noted that this “opportunity” to argue a student’s case does not have to come before an impartial tribunal. *Schomburg v. Johnson*, No. 08-11361-GAO, 2009 WL 799466, at *4 (D. Mass. Mar. 25, 2009) (observing that “neither *Goss* nor any other applicable precedent requires the hearing to be before a totally neutral or impartial decision-maker. In the real world, the school official who hears the student’s explanation may often be the official who has proposed the punishment”). Nor do schools have to provide students with an opportunity to consult with their parents prior to an informal suspension hearing. *S.G. ex rel. A.G. v. Sayreville Bd. of Educ.*, 333 F.3d 417, 425 (3d Cir. 2003) (upholding suspension of kindergartener who told friends he was “going to shoot” them during a game of cops and robbers on the school playground).

⁶³ See *Smartt*, 1997 WL 1774874 at *17–18.

⁶⁴ *Goss*, 419 U.S. at 584. Lower courts have followed *Goss*’ direction by finding due process violations when school boards effectively rubber-stamp recommendations for expulsion based on zero tolerance policies, without considering the individual facts of the case. *Colvin ex rel. Colvin v. Lowndes Cnty., Miss. Sch. Dist.*, 114 F.Supp. 2d 504, 512 (N.D. Miss. 1999) (noting that school boards must “fully consider the circumstances surrounding the misdeed as well as the penalty to be prescribed in an effort to provide students with full due process”).

⁶⁵ *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 924–26 (6th Cir. 1988) (holding that the burden of requiring cross-examination of school officials during disciplinary hearings outweighs the benefits that would be derived from the practice in a case in which the student was pegged as a drug dealer by a pair of student “informants” and subsequently expelled); *Bogel-Assegai v. Bloomfield Bd. of Educ.*, 467 F.Supp. 2d 236, 243 (D. Conn. 2006) (finding “no authority ... which would require that such an opportunity be provided by the defendant Board of Education”); *Caston v. Benton Pub. Sch.*, No. 3:00CV00215WКУ, 2002 WL 562638, at *4 (E.D. Ark. April 11, 2002)

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Courts are similarly deferential when considering claims that sanctions under zero tolerance policies violate substantive due process, upholding disciplinary action as long as it is not arbitrary, capricious, or conscience-shocking, and is rationally related to the legitimate governmental interest of maintaining an atmosphere conducive to learning.⁶⁶ Courts have been hesitant to second-guess zero tolerance policies, even when their application produces eye-popping results.⁶⁷ This is true even when students unknowingly violate zero tolerance rules.⁶⁸

Federal courts have also stated that students do not have a protected property or liberty interest in a *traditional* education, and therefore cannot challenge disciplinary placements in alternative schools on due process grounds.⁶⁹ In *Nevaras v. San Marcos Consolidated Independent School District*, a student charged with aggravated assault stemming from an out-of-

(observing that when analyzing whether the burden on the school district of providing additional procedural safeguards to students facing expulsion outweighs the benefit to the student, “the balance generally tips in favor of the educational institution”).

⁶⁶ *Jefferson v. Ysleta I.S.D.*, 817 F.2d 303, 305–306 (5th Cir. 1987) (holding that tying a student to her chair for extended periods as an “instructional technique” was arbitrary and not rationally related to the goal of maintaining an atmosphere conducive to learning); *Brady*, *supra* note 36, at 177.

⁶⁷ *See Ratner v. Loudoun Cnty. Pub. Sch.*, 16 F.App’x 140, 142 (4th Cir. 2001) (observing that “federal courts are not properly called upon to judge the wisdom of a zero tolerance policy” even when it produces “harsh” results as in the case at bar, in which a student was suspended from school after he took a knife from a girl who admitted she was contemplating slitting her wrists and put the knife in his locker so she would not have access to it); *see also Vann ex rel. Vann v. Stewart*, 445 F.Supp. 2d 882, 889–90 (E.D. Tenn. 2006) (dismissing challenge to one-year suspension of student who possessed a pocket knife on school grounds, yet did not open or brandish the knife and willfully surrendered it to a school official who asked if he was in possession of any contraband while questioning the student about another matter).

⁶⁸ Lower courts are split on whether zero tolerance policies carry with them a scienter requirement. *See Bundick v. Bay City Ind. Sch. Dist.*, 140 F.Supp. 2d 735, 740–41 (S.D. Tex. 2001) (holding that no such requirement exists in case in which student forgot he had a machete in a toolbox in his truck and was later expelled for bringing a weapon on campus; further noting that “scienter is not a requirement of the school district’s policy, and that policy is entitled to deference”). *But see Seal v. Morgan*, 229 F.3d 567, 575 (6th Cir. 2000) (finding due process violation when school officials expelled student after finding a knife in his car; student’s friend had placed the weapon in the glove compartment unbeknownst to the student and court found that “suspending or expelling a student for weapons possession, even if the student did not knowingly possess any weapon, would not be rationally related to any legitimate state interest.”).

⁶⁹ *Nevaras v. San Marco Consol. Ind. Sch. Dist.*, 111 F.3d 25, 26–27 (5th Cir. 1997).

school incident sued after he was transferred to an alternative school.⁷⁰ The U.S. Court of Appeals for the Fifth Circuit held the student lacked standing to challenge the transfer, explaining that so long as the state provided students who had violated disciplinary standards with some sort of alternative education, it has not denied them access to a public education.⁷¹ The *Nevarres* holding is problematic because it denies students who have been transferred to alternative high schools after contact with the juvenile justice system standing to challenge the transfers in court. Thus, students referred to alternative education programs for violations of school rules that would have traditionally been handled with suspensions or detentions would not have grounds for a due process claim—troubling, given that alternative high schools have been roundly criticized for their lack of educational quality.⁷²

Students face an equally daunting task challenging punishment on equal protection grounds. To establish discriminatory motive—a necessary component in an equal protection claim⁷³—students must show that similarly situated individuals of another race could have been punished for the same type of act for which the plaintiff was punished, but were not.⁷⁴ In *Fuller*, for

⁷⁰ *Nevarres*, 111 F.3d at 26. The charge was still pending when school officials removed the student from the traditional high school he attended at the time. *Id.*

⁷¹ *Id.* at 26–27.

⁷² See TEXAS APPLESEED, *supra* note 38, at 25–61. Indeed, some students who are transferred to alternative schools in conjunction with excessive zero tolerance penalties decide to seek GEDs, or simply drop out of school, instead of attending the nontraditional program. *Id.* These students have found that they cannot sustain due process claims against school boards. For example, in *Langley v. Monroe County School District*, a high school honor roll student was ordered to spend 30 days at an alternative school after she violated the school's zero tolerance policy on alcohol. *Langley v. Monroe County School District*, 264 F. App'x 366, 232 Ed. Law. Rep. 112 (5th Cir. 2008). The girl was severely punished despite the highly unusual factual circumstances of her case: Her mother had left a half-empty can of beer in her car after a picnic the day before, and when the student's car would not start and she instead drove her mother's vehicle, she did not notice the open container of alcohol. *Id.* at 367. The car did not have a school parking decal, and school officials located the alcohol while looking into the vehicle in an attempt to discern its owner. *Id.*

⁷³ *Washington*, 426 U.S. at 239.

⁷⁴ *Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 78 F.Supp. 2d 812, 825 (C.D. Ill. 2000) (citing *United States v. Armstrong*, 517 U.S. 456 (1996)). For criticism of this standard as applied to zero tolerance policies in the educational setting and a suggested alternative approach, see Smith, *supra* note 58, at 1020–49 (recommending

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example, a group of black students were expelled from school for two years each after a fight in the stands during a football game.⁷⁵ School records revealed that 82% of students expelled from the beginning of the 1996–97 school year until December 1999 were black, although blacks comprised approximately 46–48% of the district’s student population.⁷⁶ Although the court noted “the statistics . . . could lead a reasonable person to speculate that the School Board’s expulsion action was based upon the race of the students,”⁷⁷ the group could not show that similarly situated white students had avoided similar punishment.⁷⁸ This was largely because a school official described the fight as the worst he had seen in his twenty-seven years in education, and therefore, the court concluded the group could not have found any similarly situated white students in order to draw a comparison.⁷⁹ It is not difficult to imagine why this standard effectively insulates schools facing equal protection claims based on zero tolerance related punishments from unfavorable judgments, as it is easy for school officials to distinguish individual instances of misbehavior from one another.

B. *Fourth and Fifth Amendment Claims*

The presence of police officers in schools and the uptick of school-based juvenile court referrals have raised a number of concerns about evidence obtained by teachers, school administrators, and law enforcement officers through searches, seizures, and custodial interrogation.⁸⁰ Courts currently

that courts analyze zero tolerance equal protection claims through a structural racism framework).

⁷⁵ *Fuller*, 78 F.Supp. 2d at 814–15.

⁷⁶ *Id.* at 824.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 825.

⁸⁰ See Paul Holland, *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39 (Spring 2006) (suggesting that a modification of the Miranda analysis for school-based searches and interrogations would be better-suited for the modern school context); see also Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067 (Winter 2003) (suggesting that the current reasonable suspicion standard for searches in public schools should be raised to probable cause when law enforcement and public school officials work closely together).

evaluate both searches and interrogations using the framework laid out in *New Jersey v. T.L.O.*⁸¹

In *T.L.O.*, school officials caught a student smoking in the bathroom and subsequently searched her purse after she denied having participated in the activity.⁸² The search produced evidence of marijuana distribution, and the school principal forwarded the evidence to police, who subsequently obtained a confession and brought delinquency charges.⁸³ The student challenged the constitutionality of the search, and the Supreme Court found the search reasonable.⁸⁴ The Court held that in order to conduct such a search, school officials must have reasonable suspicion to suspect it will produce evidence that the student has violated either the law or school rules.⁸⁵ The Court noted that the scope of such searches must be reasonably related to their purpose and not “excessively intrusive in light of the age and sex of the student and the nature of the infraction.”⁸⁶

The *T.L.O.* court, however, did not articulate a standard for cases in which school officials act in concert with—or at the behest of—law enforcement officers. It did not really need to come up with such a standard at the time, as *T.L.O.* was decided in 1985—nearly a decade before zero tolerance discipline policies and on-campus policing became the norm at public schools.⁸⁷ The Supreme Court has not set the standard for searches conducted by school officials who now work closely with law enforcement agents.

Lower courts have thus been left to adapt to the changing times, and have articulated a variety of standards in an effort to bring *T.L.O.* into the zero tolerance era. The most perplexing issue for the courts has been determining whether police officers whose primary duty is working at schools must have probable cause (the standard for police conducting Fourth Amendment

⁸¹ *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985). See also Holland, *supra* note 80, at 41 (noting that many courts have “simplistically combined *T.L.O.* and *Miranda* and assumed that *Miranda* does not apply to questioning by school officials unless those officials are acting as agents of law enforcement”).

⁸² *T.L.O.*, 469 U.S. at 328.

⁸³ *Id.* at 328–29.

⁸⁴ *Id.* at 343.

⁸⁵ *Id.* at 342.

⁸⁶ *Id.*

⁸⁷ Zero tolerance policies took root with the Federal Gun Free Schools Act of 1994. See Hanson, *supra* note 19, at 303–14.

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searches of citizens) or reasonable suspicion (the standard for school officials conducting Fourth Amendment searches of students) to search students.⁸⁸

Courts commonly hold that if an officer not assigned to work at the school district initiates the search of a student based on suspicion of criminal activity, and not at the urging of school officials, the officer must have probable cause.⁸⁹ Courts have upheld *T.L.O.*'s reasonable suspicion standard when school officials search students' belongings with police present, or request that school resource officers search students' belongings for them.⁹⁰ Some courts have justified use of the reasonable suspicion standard in this context on the grounds that holding school officials to a higher standard would discourage them from seeking the assistance of police officers, which could put students in danger.⁹¹ Courts have also held that police who are assigned to patrol school hallways as school resource officers may search students on their own initiative without probable cause when such a search is "in furtherance of the school's attempt to maintain a proper educational environment."⁹²

⁸⁸ Pinard, *supra* note 80, at 1082–83 (“[C]ourts only require the more stringent probable cause standard in fairly narrow circumstances. Both because of the tensions inherent in these relevant factors, as well as the inconsistent manner in which courts weigh these factors, the case law does not establish clear parameters to guide school officials and law enforcement authorities.”).

⁸⁹ *Id.* at 1082 n.68; Jacqueline A. Stepkovich & Judith A. Miller, *Law Enforcement Officers in Public Schools: Student Citizens in Safe Havens?*, 1999 B.Y.U. EDUC. & L.J. 25, 65 (Winter 1999) (noting that “if police initiate a search of students in public schools and if that search is for evidence of a criminal offense rather than a violation of a school rule, then the probable cause standard clearly applies”).

⁹⁰ *State v. Burdette*, 225 P.3d 736, 741 (Kansas Ct. App. 2010) (holding that reasonable suspicion was the applicable standard when a principal ordered a student to empty his pockets, despite the presence of two deputy sheriffs in the principal's office at the time of the search); *In re D.D.*, 554 S.E.2d 346, 351–52 (N.C. Ct. App. 2001) (applying reasonable suspicion to a case in which a school principal and multiple law enforcement agents approached a group of students, and upon suspicion that they were there to engage in a fight, an officer searched a girl's purse and the principal subsequently had the group empty their pockets); *In re Josue T.*, 989 P.2d 431, 438 (N.M. Ct. App. 1999) (applying reasonable suspicion in a case in which a school resource officer searched a student at the behest of a school official after the official became suspicious that the student was carrying contraband in his pocket).

⁹¹ *In re Angelia D.B.*, 564 N.W.2d 682, 690 (Wis. 1997) (holding that reasonable suspicion was the proper standard to justify an officer's search of a student's waistband at the behest of a school official).

⁹² *People v. Dilworth*, 661 N.E. 2d 310, 317 (Ill. 1996) (applying reasonable suspicion when a school resource officer initially searched a student for drugs, found

There is a growing body of scholarly work that suggests the current framework is either being misapplied or has become outdated in the context of modern public schools.⁹³ Police presence at schools is now nearly ubiquitous, thus school officials and law enforcement officials are working more closely than ever before.⁹⁴ Law enforcement officers in modern schools are increasingly using evidence collected there in juvenile court proceedings, rather than the in-school disciplinary hearings common in the era in which *T.L.O.* was decided.⁹⁵ Police and school officials therefore have an improper advantage against students who end up in front of juvenile court judges based on evidence seized during in-school searches.

Police and school officials also enjoy an advantage against students who make confessions during custodial interrogations on school grounds. In *Miranda v. Arizona*,⁹⁶ the Supreme Court held that prosecutors may not use statements obtained during custodial interrogation unless they can demonstrate that law enforcement agents informed defendants of their Fifth Amendment right against self-incrimination before those statements are made.⁹⁷ The Supreme Court has not determined how *Miranda* should be applied when school officials question students in public schools.⁹⁸

nothing, and then searched the student again when the student acted suspicious); see *T.S. v. State*, 863 N.E.2d 362, 369–71 (Ind. Ct. App. 2007) (holding that a police officer assigned to a school acted to further educationally related goals and, therefore, needed only reasonable suspicion when he searched a student based on an anonymous telephone tip that the student had marijuana); see also *In re William V.*, 4 Cal.Rptr.3d 695, 699–700 (Cal. Dist. Ct. App. 2003) (rejecting the argument that a distinction should be drawn between school resource officers, who are paid by the city, and security guards, who are hired by schools, for purposes of Fourth Amendment analysis).

⁹³ See Holland, *supra* note 80, at 58–72. See also Bryan C. Hathorn, *Constitutional Protections for Students in Public Schools*, 76 TENN. L. REV. 211, 230–33 (Fall 2008) (suggesting that *T.L.O.*'s standard of reasonableness in the modern school context allows police agencies to circumvent probable cause requirements by having school resource officers search suspects while in school and seize evidence for use in juvenile court proceedings); Pinard, *supra* note 80, at 1108.

⁹⁴ See Thureau & Wald, *supra* note 13, at 978–81.

⁹⁵ Hathorn, *supra* note 93, at 231.

⁹⁶ *Miranda*, 384 U.S. 436 (1966).

⁹⁷ *Id.* at 444.

⁹⁸ The Court in *J.D.B. v. North Carolina* held that a child's age is relevant when determining whether he or she was in custody for *Miranda* purposes when being questioned by police. *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2399 (2011). Whether lower courts extend this holding to questioning by school officials remains to be seen. Also uncertain is whether the holding in *J.D.B.* will have the unintended consequence of

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After *T.L.O.*—a Fourth Amendment case that dealt with searches, not a *Miranda* case concerned with custodial interrogation—courts began applying *T.L.O.*'s reasoning in Fifth Amendment cases, holding that *Miranda* does not apply when students are questioned by school officials unless those officials are “acting as agents of law enforcement.”⁹⁹ Lower federal and state courts have subsequently held that school officials are not acting as law enforcement agents even when school resource officers are present during or just before interrogations, thus *Miranda* warnings are not required.¹⁰⁰ Courts have rejected the notion that school officials act at the behest of law enforcement when they obtain written confessions that are later used by the state in delinquency hearings.¹⁰¹

In *S.E. v. Grant County Board of Education*, the U.S. Court of Appeals for the Sixth Circuit confronted a dilemma that illustrates the complexity of the *Miranda* analysis in the zero tolerance era.¹⁰² The case involved a student who gave a classmate Adderall from a bottle of prescription pills.¹⁰³ When school officials learned of the incident, which occurred on the final day of the student's seventh grade year, they contacted her parents and told them that a deputy sheriff would stop by during the summer to question their

having school resource officers urge more school officials to conduct interrogations for them.

⁹⁹ Holland, *supra* note 80, at 41.

¹⁰⁰ *In re Tateana R.*, 883 N.Y.S.2d 476, 477–78 (App. Div. 2009) (holding that a student was not entitled to *Miranda* warnings when she was questioned by a school official with two police officers present and, during the questioning, a police officer advised the student that she could be arrested for theft after she refused repeated requests from the school official to return an iPod she had taken from another student); *J.D. v. Commonwealth of Virginia*, 591 S.E.2d 721, 725 (Va. Ct. App. 2004) (holding that a student was not entitled to *Miranda* warnings despite being questioned by a school official in the presence of a school resource officer, because the officer did not offer “advice about how to conduct the questioning or what to do with the information” the principal obtained from the student); *In re V.P.*, 55 S.W.3d 25, 33 (Tex. Ct. App. 2001) (finding that no *Miranda* warning was required after a school resource officer pulled a student out of class, told the student he suspected him of bringing “something illegal” to campus, and then took the student to a school official's office, where the boy later confessed to bringing a gun to school; the officer was not present when the student confessed).

¹⁰¹ See *S.E. v. Grant Cty. Bd. of Educ.*, 544 F.3d 633, 641 (6th Cir. 2008).

¹⁰² *Id.* at 635–41.

¹⁰³ *Id.* at 635. The student, who took the drug to combat Attention Deficit Hyperactivity Disorder (ADHD), was in possession of the bottle because it was the last day of school and the school nurse (who normally administered the drug) had given the student the remainder of her medication to take home for the summer. *Id.*

daughter about the incident.¹⁰⁴ The deputy sheriff never came.¹⁰⁵ When school resumed after summer break, the assistant principal called the student into his office and—without giving a *Miranda* warning—obtained a written statement from her.¹⁰⁶ The school official forwarded the statement to law enforcement officers and never bothered to place it in the girl's student file.¹⁰⁷ The student was suspended from school for a day and referred to juvenile court, where she would be placed on six months of probation.¹⁰⁸

The Sixth Circuit held the student was not entitled to a *Miranda* warning.¹⁰⁹ The court reasoned the school official was not acting at the behest of law enforcement when he obtained the written statement, despite having already reported the incident to the sheriff's department and immediately forwarding the statement to law enforcement after it was made.¹¹⁰ The court based its holding on the fact that the deputy sheriff assigned to the school did not consult with the school official prior to his meeting with the student, nor was the deputy present at the time the meeting occurred.¹¹¹ The court rejected the argument that the assistant principal's action was an "end-run" around the student's constitutional rights, one that hinged upon a deputy sheriff's acknowledgement during depositions that school officials "collect [written statements from students] for their school things, and then I take the copies of the statement and do the criminal end."¹¹²

Scholars have argued that the act of applying *T.L.O.*'s Fourth Amendment school-search standards to in-school interrogations is improper in the zero tolerance era, one in which symbiotic relationships between school and police officials such as the one described above have become the norm.¹¹³ One has suggested that instead of focusing so heavily on who asks the questions during an in-school interrogation, courts should instead

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* The court explained that the officer "had been sick and not performed the task" of contacting the student over summer break. *Id.* at 641.

¹⁰⁶ *S.E.*, 544 F.3d at 635.

¹⁰⁷ *Id.* at 635–36.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 641.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 640–41.

¹¹² *S.E.*, 544 F.3d at 640.

¹¹³ Holland, *supra* note 80, at 41 (suggesting that "modern school-policing practices have undermined *T.L.O.*'s continued vitality").

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consider whether it would be “reasonable for a person in the circumstances of the student-suspect to believe that she was the subject of law-enforcement activity.”¹¹⁴ While this advocated approach is based upon a state court holding, that case was one in which juveniles were detained and interrogated wholly outside of the school context.¹¹⁵ Lower federal and state courts have only found *Miranda* violations when school resource officers show a substantial level of participation in student interrogations.¹¹⁶ This is particularly disturbing because more and more acts of student misconduct that were once handled by school officials are being referred to juvenile courts, students have even more reason to believe they are “in custody” for *Miranda* purposes when they are questioned by school officials with police officers present—even if those officers do not utter a word.¹¹⁷

IV. JUVENILE COURTS SHOULD UTILIZE MANDATORY ARBITRATION TO SCREEN OUT FRIVOLOUS JUVENILE COURT REFERRALS

The lack of legal remedies for students trapped in the school-to-prison pipeline means juvenile justice reform advocates must shift gears. Judges are loath to Monday-morning quarterback school officials. But, what if a tribunal composed of independent arbitrators, such as students and community members, could conduct this second-guessing of school discipline? This section suggests states create arbitral tribunals to serve as a check on school-

¹¹⁴ *Id.* at 72. Courts using this standard would take into account the normal practices of the school, including how police and school officials interact, in determining whether the “totality of the circumstances reflect the influence of law enforcement authority.” *Id.*

¹¹⁵ *State v. Heritage*, 95 P.3d 345, 347 (Wash. 2004) (noting that a reasonable person in the position of the defendant juveniles would view the city park security guards in this case as state agents for *Miranda* purposes).

¹¹⁶ *See, e.g., In re T.A.G.*, 663 S.E.2d 392, 395 (Ga. Ct. App. 2008) (finding *Miranda* warnings necessary when school officials repeatedly conferred with police before and during a student interview, and the police officer interjected during the interview to advise the school officials of what type of criminal charges might be brought against the student; the court noted that school officials decided to conduct the interview because they knew “different rules would apply if the police became involved”).

¹¹⁷ To be in custody for *Miranda* purposes, and therefore be entitled to a *Miranda* warning, one must show that a reasonable person would believe he is subject to restraints comparable to those associated with formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). The key question is whether a reasonable person would perceive himself as being free to leave if he were in the suspect’s shoes. *Oregon v. Mathiason*, 429 U.S. 492, 494–95 (1977).

based referrals to the juvenile court system.¹¹⁸ The tribunals would screen out unwarranted juvenile court referrals—blocking such actions from proceeding to courts and mandating that school officials impose in-house discipline instead. They would also give an added layer of legitimacy to referrals that actually warrant intervention by the criminal justice system.

A. *The Disciplinary Review Boards: An Overview*

Before describing the composition and activities of the review boards, it is important to describe what these tribunals should not become. These tribunals should not be vehicles for outside observers to review every disciplinary action school officials take. The review boards are meant to be limited in scope, reviewing only a select group of questionable juvenile court referrals. The tribunals should not act according to a standardized set of decisionmaking guidelines—such thinking helped create the problem these boards are meant to address in the first place. Instead, they should be flexible; their decisions guided by the individual facts of each controversy.

Local communities would begin the process of setting up the tribunals by first establishing the scope of controversies the review boards would consider. One way of accomplishing this task would be to have local school boards, juvenile judges, and juvenile justice advocates launch a commission to study current and past disciplinary practices. The commission should separate juvenile court referrals into two categories. The first category is

¹¹⁸ If the preceding sections of the article do not convince the reader of the need for this type of limit on school officials' discretion, consider the following assessment from Miriam Rokeach, an educational consultant who served on her local school board and participated in many disciplinary hearings:

[Rokeach] consistently felt that the board, and the administrators advising them, were in over their heads....It was important to appear tough and in control of the schools. When the offense was serious, there was little patience with a board member who wondered about a student's underlying motivations for acting out or suggested strategies short of expulsion intended to help the student and improve the bad behavior. During deliberations, respected theories of adolescent development or proven practices of effective punishment were never discussed.

Miriam Rokeach & John Denvir, *Front-Loading Due Process: A Dignity-Based Approach to School Discipline*, 67 OHIO ST. L.J. 277, 279 (2006) (suggesting, among other changes, that schools allow students themselves be involved in determining what types of behavior are forbidden and the severity of punishment for breaking the rules, and that school officials discard blanket zero tolerance rules that serve no rational educational purpose).

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those serious offenses that would have led to a juvenile court referral even before zero tolerance policies brought a heavy police presence into the schools—for example, brandishing firearms in school. The second category of juvenile court referrals would consist of infractions that were historically addressed with in-house disciplinary measures, such as detention, in-school suspension, and out-of-school suspension. The tribunals should review only those referrals that fall into the second category—the boards should not intervene to judge the merits of referrals made for serious crimes committed behind school doors.

The tribunals should not be composed of school officials, but instead a small group of independent arbitrators. The review boards should comprise concerned members of the community at-large with an understanding of children—for example, Parent-Teacher Association representatives, local youth sports coaches, and local religious leaders—as well as students themselves.¹¹⁹ The school board should not appoint the tribunals. They should be elected by local citizens or appointed by City Hall. This will help ensure the tribunals are a truly independent check on school officials' juvenile court referrals.

The tribunals would operate in the following manner: After a student allegedly violates school rules, and an administrator or school resource officer determines the student should be referred to juvenile court for the infraction, the student would appear before a review board of impartial arbitrators who will evaluate whether the referral is warranted or whether school officials should instead impose in-house punishment.¹²⁰ The review boards would give students full procedural due process protections, ensuring the students have notice of the charges and evidence against them and a chance to present their side of the story by calling witnesses and cross-examining school officials. This would not be an excessive burden on school officials because the boards themselves would utilize the same information collected by school officials during their investigations into students' alleged wrongdoing. The only difference under this approach would be that school officials would be required to flesh out and explain the rationale for their

¹¹⁹ Having students on the review board would be one way to help invest them in the disciplinary process, further legitimizing the outcomes in their eyes. *See* Rokeach & Denvir, *supra* note 118, at 289 (suggesting that students should play a larger role in the disciplinary process to provide school officials with needed feedback on what constitutes “fair” punishment, and “come to have an investment in the rules that they are required to obey rather than viewing themselves as objects of bureaucratic whim.”).

¹²⁰ The review board would not decide what sanctions to impose. Their sole purpose would be to screen out unwarranted juvenile court referrals.

decisions during cross-examination. To the extent these hearings are considered a burden on school officials' time, one should remember that every frivolous juvenile court referral constitutes at least an equal burden upon the criminal justice system, one with the potential for lasting effects on the lives of students introduced to the criminal justice system at an early age.¹²¹

The review boards would vote on whether to accept the referral and forward it to the juvenile court system, or reject the referral and send it back to school officials for final action. The tribunals' decisions should be final, as allowing an appeal to the school board or courts would render the fairness the tribunals bring to the student disciplinary process illusory.¹²² The tribunals' work would be confidential—members' notes would not be accessible, and the hearings would be closed to the public in order to protect students' privacy. Public accountability for their decisions should come in the form of non-specific status updates that would provide statistical and anecdotal information about the review boards' work—including the racial breakdown of the number of cases accepted and rejected—but would omit information that would identify students.

B. *The Disciplinary Review Boards: The Benefits*

The review boards would provide an added layer of procedural due process protections to students facing juvenile court referral for in-school infractions. It could be argued that currently, these procedural protections run afoul of *Goss* to the extent that school officials rely on the same informal hearings they rely upon to make minor suspension decisions.¹²³ An

¹²¹ The cost to society of steering students away from education and toward the criminal justice system have been calculated to be in the millions—per student. See Hanson, *supra* note 19, at 338 (detailing a 1998 Vanderbilt University study that pegged the “cost to taxpayers of a young person who drops out of high school and enters a life of crime and drugs ... [at] between \$1.7 million and \$2.3 million.”).

¹²² Both the court system and school boards seem to unfairly favor deference to the disciplinary decisions and recommendations of school officials. See *supra* Section III; see also Rokeach & Denvir, *supra* note 118, at 278–79.

¹²³ It could be argued that the act of referring a student to juvenile court itself is the type of serious penalty or unusual situation that the *Goss* court noted may require some sort of formal hearing process. *Goss*, 419 U.S. at 584 (“Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although

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opportunity for students to present their side of the story to impartial arbitrators would help boost confidence in school systems by providing an added layer of parental and community involvement in the disciplinary process.

The hearings would also help address racial bias in school discipline. The review boards would be required to report their actions to the public—save any information that might indentify a student—in a way that would allow the public at large to assess whether there are variations in school discipline that cut along racial lines. Ideally, the public would hold both the school and review board accountable if such a disparity developed.

The additional community involvement would also serve a deterrence function. It is conceivable that school officials would be less likely to make frivolous juvenile court referrals if they had to explain their reasoning—possibly facing outright rejection of their choices from members of the community at large. It is conceivable that school officials would view the review boards with disdain and opt to abandon juvenile court referrals in all but the most obvious circumstances in order to avoid second-guessing by concerned citizens. This would effectively usher in a return to traditional disciplinary standards—a positive, given the role that excessive juvenile court referrals are currently playing in the school-to-prison pipeline. While it is also possible the review boards would become a rubber stamp for juvenile court referrals, having positions on the boards elected by the general public, or appointed by a body with purview outside the school system, would both help forestall the chances of such a negative development and allow for a recalibration if the tribunal were to develop too deferential a stance toward school officials.

More community involvement in student discipline would also serve as a deterrent to potential student rulebreakers. Students whose in-school actions would normally not be detailed to anyone save a select group of school officials, police, and juvenile justice employees—those in the regular system of discipline—would now risk condemnation from members of their community and their peers. It is not far-fetched to imagine that impressionable, yet rebellious youngsters would not give a second thought about angering a school official, but would care deeply about the opinion of a trusted basketball coach, respected religious mentor, or popular classmate. Thus, the review board process would provide a two-way deterrent effect that would have a positive impact on student behavior.

involving only a short suspension, something more than the rudimentary procedures will be required.”).

V. CONCLUSION

The trend toward zero tolerance disciplinary policies in public schools was a mistake with fallout that will have an adverse affect on an entire generation of students. The shift helped create a school-to-prison pipeline that is funneling students of color from substandard classrooms to shiny new prison cells.¹²⁴ Zero tolerance has been an abject failure that has arguably made schools more dangerous and has certainly resulted in discrimination against students of color. These policies must be replaced.

Now is not the time, however, for a quick fix. Zero tolerance was sold as a quick fix. The current situation calls for a pragmatic solution, one that will gradually plug the school-to-prison pipeline while education officials try out new approaches that will ensure student safety without harsh, discriminatory discipline—accepting those that prove successful over time.

The first step toward deconstructing the pipeline is steering away from the juvenile justice system those who would not historically, and should not now, end up there in the first place. States should establish tribunals for students referred to juvenile court for any in-school incidents, and those commissions should ensure that only serious offenders end up before a juvenile judge. This prophylactic measure will help ensure that schools with zero tolerance policies are not disciplining students in violation of their constitutional rights.

¹²⁴ See *supra* Section II. The for-profit prison model has already proven problematic for children in the juvenile justice system. Craig R. McCoy, *Trial Ready to Begin in 'Kids for Cash' Case*, PHILADELPHIA INQUIRER, Feb. 6, 2011, at A1 (describing the “kids for cash” scandal in northeastern Pennsylvania, in which a juvenile judge was found to have received kickbacks from a for-profit detention center in exchange for closing a county-run detention facility and imposing harsh sentences on youth offenders that would keep the centers full; one girl was jailed for creating a parody MySpace page “that made fun of an assistant principal” at her school). The prison construction industry boomed in the latter part of the last decade, as states facing major overcrowding issues began shipping inmates to new facilities built and managed by private companies. Solomon Moore, *States Export Their Inmates as Prisons Fill*, N.Y. TIMES, July 31, 2007, at A1.