

# GIVING VULNERABLE STUDENTS THEIR DUE: IMPLEMENTING DUE PROCESS PROTECTIONS FOR STUDENTS REFERRED FROM SCHOOLS TO THE JUSTICE SYSTEM

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## ABSTRACT

*There are two primary ways that schools can funnel children into the “school-to-prison pipeline.” The first is by simply removing children from school via expulsions and suspensions, which increase students’ chances of dropping out and getting in trouble with the law. The Supreme Court, recognizing the serious consequences of being forced out of school, has held that expulsions and long-term suspensions constitute deprivations of students’ property interest in their educations and liberty interest in their reputations. Thus, schools seeking to expel or suspend students must provide them with basic due process protections. But schools can also refer students directly to the justice system by having police officers arrest students or issue citations at school. Under current law, these students are not entitled to any due process protections at the point of arrest or referral.*

*This Note argues that the absence of due process protections for students who are arrested or referred to the justice system at school is incompatible with the Supreme Court’s procedural due process jurisprudence in general and its decision in *Goss v. Lopez* in particular. The same property and liberty interests that the Court identified as worthy of protection in *Goss* are implicated by in-school arrests and referrals. Therefore, school administrators who intend to have a child arrested or referred to the justice system should be required to provide students with oral notice of the accusation against them and an opportunity to respond. After an arrest or referral, the school should provide students and their parents with written notice of the arrest or referral and the rationale for the action. These measures will not unduly*

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*burden administrators or schools, but they will provide meaningful protections for students.*

## INTRODUCTION

It is a truism that, in the United States, education is the gateway to prosperity.<sup>1</sup> Education provides—or is supposed to provide—America’s young people with access to colleges and middle-class jobs, as well as exposure to the skills and knowledge necessary to establish their adult lives. But for a significant subset of students, that truism is not true. Education is their gateway not to the middle class, but to the criminal justice system. For these students, education provides exposure to law enforcement officials, interrogation, arrest, and even incarceration.

In the last twenty-five years a confluence of factors has pushed many students out of schools and into the justice system. A perceived spike in school violence in the 1990s<sup>2</sup> led to the creation of “zero-tolerance” policies, which mandated suspension or expulsion for any offense involving drugs or weapons, even if the drug was ibuprofen<sup>3</sup> or the weapon was a Cub Scout camping utensil.<sup>4</sup> Worries about violence also prompted administrators to invite the police into schools. Thousands of “school resource officers” (SROs) are now present in public schools,<sup>5</sup> and even in schools that do not have dedicated SROs, police officers can arrest students. As a result, misbehavior that was

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1. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (describing education as “perhaps the most important function of state and local governments” because it is a “principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment” and “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education”); Barack Obama, U.S. Sen., *What’s Possible for Our Children*, Speech at Mapleton Expeditionary School of the Arts (May 28, 2008), in *DENV. POST* (May 28, 2008), [http://www.denverpost.com/ci\\_9405199](http://www.denverpost.com/ci_9405199) [<https://perma.cc/MG2V-J5MJ>] (“Education is the currency of the Information Age, no longer just a pathway to opportunity and success but a prerequisite.”).

2. For a discussion of this phenomenon, see *infra* note 29 and accompanying text.

3. Robb Hays, *School Board Upholds Girl’s Expulsion for Possessing “Advil” at School*, *KSLA NEWS* (Dec. 4, 2003), <http://www.ksla.com/story/1551977/school-board-upholds-girls-expulsion-for-possessing-advil-at-school> [<https://perma.cc/XJ6G-4479>].

4. Ian Urbina, *It’s a Fork, It’s a Spoon, It’s a . . . Weapon?*, *N.Y. TIMES* (Oct. 11, 2009), <http://www.nytimes.com/2009/10/12/education/12discipline.html> [<https://perma.cc/VL6P-5N2E>] (describing a six-year-old boy who was suspended for forty-five days for bringing “a camping utensil that can serve as a knife, fork and spoon to school” to use at lunch).

5. Melinda D. Anderson, *When Schooling Meets Policing*, *ATLANTIC* (Sept. 21, 2015), <http://www.theatlantic.com/education/archive/2015/09/when-schooling-meets-policing/406348> [<https://perma.cc/3RCM-VU6B>].

once handled by teachers and principals is often addressed by the police,<sup>6</sup> who have arrested students for infractions including cursing,<sup>7</sup> defiance,<sup>8</sup> and pouring milk on a classmate's head.<sup>9</sup>

This amalgam of policies and procedures has received the unfortunately apt appellation “the school-to-prison pipeline,” because it results in students’ in-school behavior being addressed by law enforcement. The students who find themselves caught up in the school-to-prison pipeline are disproportionately poor and black,<sup>10</sup> leading some to question whether education, rather than acting as the “great equalizer,”<sup>11</sup> is actually perpetuating systemic racial inequality.<sup>12</sup>

Suspensions and expulsions are two of the ways schools push students from the education system to the justice system. Schools increasingly suspend and expel students for infractions that might once have merited detention, such as speaking disrespectfully to a teacher<sup>13</sup> or failing to comply with the school uniform.<sup>14</sup> Older students who are

6. Lisa H. Thureau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 978 (2010) (observing that “behaviors such as schoolyard scuffles, shoving matches, and verbal altercations,” which were “once considered exclusively the domain of school disciplinarians,” have taken on “potentially sinister tones and [have come] to be seen as requiring law enforcement intervention”).

7. ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 13 (2005), [http://b.3cdn.net/advancement/bc0b28419416b35bc6\\_mlbrqglxw.pdf](http://b.3cdn.net/advancement/bc0b28419416b35bc6_mlbrqglxw.pdf) [<https://perma.cc/P242-6P26>].

8. Thureau & Wald, *supra* note 6, at 1001 (describing a ten-year-old boy who was arrested “for opening the front door to the school after he had been told repeatedly not to do so”).

9. ADVANCEMENT PROJECT, *supra* note 7 (citing Will Greenlee, *Chocolate Milk Used as Weapon in Middle School Battery Case*, STUART NEWS-PORT ST. LUCIE NEWS, Mar. 1, 2005, at B3).

10. *See infra* Part I.C.2.

11. David Rhode, Kristina Cooke & Himanshu-Ojha, *The Decline of the ‘Great Equalizer,’* ATLANTIC (Dec. 19, 2012), <http://www.theatlantic.com/business/archive/2012/12/the-decline-of-the-great-equalizer/266455> [<https://perma.cc/5WDE-AWCJ>].

12. *See* India Geronimo, *Systemic Failure: The School-to-Prison Pipeline and Discrimination Against Poor Minority Students*, 13 J.L. SOC’Y 281, 282–83 (2011) (arguing that “policies that promote a tough-on-crime approach to education” are part of a network of policies that contribute to the “systemic marginalization of poor and minority students”).

13. Letter from Better Education Support Team, Anna Lellelid & William P. Quigley to Federal, State & Local Authorities (Apr. 15, 2014), [http://media.nola.com/education\\_impact/other/4.15.2014%20Carver%20Complaint%20For%20Release.pdf](http://media.nola.com/education_impact/other/4.15.2014%20Carver%20Complaint%20For%20Release.pdf) [<https://perma.cc/RF7P-MQLL>] [hereinafter Letter from Better Education Support Team].

14. Greg Adomaitis, *N.J. Student, 8, Suspended for Wearing Wrong Shade of Green Uniform*, S. JERSEY TIMES (Sept. 24, 2015), [http://www.nj.com/camden/index.ssf/2015/09/nj\\_student\\_8\\_suspended\\_for\\_wearing\\_wrong\\_shade\\_of.html](http://www.nj.com/camden/index.ssf/2015/09/nj_student_8_suspended_for_wearing_wrong_shade_of.html) [<https://perma.cc/NT65-3PK2>].

suspended or expelled often spend their days unsupervised<sup>15</sup> and as a result are more likely to encounter law enforcement officers than young people who are in school. Even if a student does not run into trouble with the law during a suspension or expulsion, she is virtually guaranteed to fall behind academically as she misses class.<sup>16</sup> Perhaps for this reason, students who are suspended or expelled are far more likely than their peers who have never been suspended to eventually drop out of school entirely.<sup>17</sup> In addition to forcing students to miss class, suspensions can damage their relationships with teachers and administrators and increase the amount of time they spend with other suspended students, thus reinforcing suspended students' negative behaviors even as they fall further behind academically.<sup>18</sup>

The Supreme Court, recognizing the serious consequences of being forced out of class, has held that long-term suspensions and expulsions constitute a deprivation of both property interests and liberty interests, and schools seeking to impose them must provide students with minimal due process protections.<sup>19</sup> These procedures are not as robust as those afforded to criminal defendants,<sup>20</sup> but they do provide some level of protection to students facing the kind of disciplinary action that can put them behind academically and increase their chances of coming into contact with law enforcement.

However, suspensions and expulsions are not the only way that schools funnel students from the education system to the justice

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15. See, e.g., Letter from Better Education Support Team, *supra* note 13, at 6 (noting that high school students removed from school for minor infractions usually did not go home, but spent the remainder of the school day in the public library or a nearby park).

16. See David Simson, Comment, *Exclusion, Punishment, Racism and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. REV. 506, 516 (2014) (noting that “the amount of instructional time a student receives is an important predictor of achievement outcomes”).

17. See, e.g., Emily Bloomenthal, *Inadequate Discipline: Challenging Zero Tolerance Policies as Violating State Constitution Education Clauses*, 35 N.Y.U. REV. L. & SOC. CHANGE 303, 311, 342–44 (2011) (arguing that anecdotal and empirical evidence suggests that suspensions are not merely correlated with high dropout rates; rather, they “set students on a trajectory towards dropping out”).

18. Janel A. George, *Stereotype and School Pushout: Race, Gender, and Discipline Disparities*, 68 ARK. L. REV. 101, 119 (2015) (observing that consequences of “exclusionary discipline” include “impaired relationships with authority figures” and “disengagement from the learning environment”).

19. *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (holding that students facing suspension “must be given some kind of notice and afforded some kind of hearing” (emphasis omitted)); see *infra* Part II.B.

20. See *Goss*, 419 U.S. at 583 (rejecting the idea that students facing suspension should have the right to obtain counsel, call supporting witnesses, or cross-examine witnesses).

system. Schools also refer students directly to law enforcement, either by having them arrested at school or requesting that officers issue citations that will require students to appear in court.<sup>21</sup> Schools have used this authority to refer students to law enforcement for a wide range of behavior, from fighting to doodling on desks.<sup>22</sup> Like students who are suspended or expelled, students referred directly from schools to the justice system are virtually guaranteed to miss class time, and they may face sanctions that create permanent criminal records or increase their chances of being arrested in the future. But unlike students who are suspended or expelled, students who are arrested or referred to law enforcement are not provided with procedural due process at the point of referral.<sup>23</sup> Schools may refer students for virtually any reason, without telling students what they have been accused of or giving them an opportunity to explain their actions.

This Note argues that the lack of due process protections for students who are arrested or referred to the justice system while at school is incompatible with the Supreme Court's procedural due process jurisprudence in general and its decision in *Goss v. Lopez*<sup>24</sup> in particular. The same property and liberty interests that the Court identified as worthy of protection in *Goss* are implicated by in-school arrests and referrals. Therefore, schools should provide the same due process protections when referring students to law enforcement that they are required to provide when suspending them.

This Note proceeds in three parts. Part I provides background on the development, operation, and effects of the school-to-prison pipeline. Part II explains the due process jurisprudence that has developed to protect the rights of students facing suspension or expulsion proceedings. Part III describes the direct-referral process, which lacks such protections. It argues that schools seeking to refer

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21. See Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 880–81 (2012) (noting that students can be “arrested at school or for school-related conduct” or “processed through the juvenile or criminal justice systems” in the absence of an arrest by, for example, being issued citations).

22. Aaron J. Curtis, Note, *Tracing the School-to-Prison Pipeline from Zero-Tolerance Policies to Juvenile Justice Dispositions*, 102 GEO. L.J. 1251, 1258–59 (2014).

23. Heather Cobb, *Separate and Unequal: The Disparate Impact of School-Based Referrals to Juvenile Court*, 44 HARV. C.R.-C.L. L. REV. 581, 594 (observing that, in spite of the *Goss* Court's requirement that students facing suspension receive notice and a hearing, “[g]enerally, school officials remain free to refer a child [to the juvenile court system] without an in-school pre-adjudication hearing to determine whether the violation is serious enough to warrant the referral”).

24. *Goss v. Lopez*, 419 U.S. 565 (1975).

students directly to law enforcement should be required to give students an opportunity to hear the charges against them and respond before an arrest is made or a citation is issued, and they should provide students and their parents or guardians with written notice of a referral and the rationale for that referral. These measures will not unduly burden administrators or schools, but they will provide meaningful protections for students. Moreover, they will encourage police officers and school administrators to reserve referrals to the justice system for truly dangerous behavior, thereby reducing the number of children who find themselves swept up in the school-to-prison pipeline.

## I. THE DEVELOPMENT, OPERATION, AND EFFECTS OF THE SCHOOL-TO-PRISON PIPELINE

### A. *Development*

The 1990s were marked by rising anxiety about violence in schools. In the first four years of the decade, shootings on middle school and high school campuses killed or injured sixteen people.<sup>25</sup> In 1994, Congress passed the Gun-Free Schools Act,<sup>26</sup> which required states receiving federal education funds to enact laws mandating that any student who brought a gun to school be expelled for at least a year and referred to law enforcement officials.<sup>27</sup> But the shootings continued: between January 1994 and mid-April 1999, there were another seventeen shootings on school campuses.<sup>28</sup> By the time two high school students killed thirteen classmates and a teacher at Columbine High School on April 20, 1999, school shootings were seen as so commonplace that the *New York Times* began its editorial about the shooting, “Once again, a routine school day was interrupted by blasts of gunfire . . . .”<sup>29</sup> In reality, these crimes remained statistically rare.<sup>30</sup> But nationwide news coverage of the tragedies created a sense

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25. *United States School Shootings, 1990–Present*, BALLOTPEdia, [https://ballotpedia.org/United\\_States\\_school\\_shootings,\\_1990-present](https://ballotpedia.org/United_States_school_shootings,_1990-present) [https://perma.cc/ZYW8-QZ27].

26. Gun-Free Schools Act of 1994, Pub. L. No. 103–382, titl. I, § 101, 108 Stat. 3518, 3907 (codified at 20 U.S.C. § 8921 (1994)) (repealed 2002).

27. 20 U.S.C. § 7151 (2012) (replacing 20 U.S.C. § 8921).

28. *United States School Shootings, 1990–Present*, *supra* note 25.

29. Editorial, *Gun Spree at Columbine High*, N.Y. TIMES (Apr. 21, 1999), <http://www.nytimes.com/1999/04/21/opinion/gun-spree-at-columbine-high.html> [https://perma.cc/L5XY-ZEWR].

30. Am. Psychological Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 853 (2008) (“Incidents of critical and deadly violence remain a relatively small proportion of

that American teenagers were out of control and that schools had become dangerous places for both teachers and students.<sup>31</sup>

Schools, understandably horrified by the specter of violence within their walls, responded by implementing a variety of policies designed to enhance security and prevent violence.<sup>32</sup> One of the most common was the zero-tolerance policy.<sup>33</sup> The precise contours of zero-tolerance policies differ from district to district, but generally they require schools to suspend or expel any student caught with drugs or weapons.<sup>34</sup> These policies are not limited to illegal drugs or dangerous weapons; students have been suspended and expelled for arriving at school with over-the-counter headache medication<sup>35</sup> and small knives placed in lunchboxes by well-intentioned parents.<sup>36</sup> Zero-tolerance policies, in accordance with their name, are enforced rigidly, without regard for the circumstances surrounding a particular infraction.<sup>37</sup>

This rigid enforcement has led to absurd results. Taylor Hess, a high school student in Texas, was expelled after a security guard discovered a bread knife in the bed of his pickup truck.<sup>38</sup> Taylor, who

school disruptions . . . and the data have consistently indicated that school violence and disruption have remained stable, or even decreased somewhat, since approximately 1985.” (citations omitted)).

31. See, e.g., Robert C. Cloud, *Federal, State, and Local Responses to Public School Violence*, 120 EDUC. L. REP. 877, 877 (1997) (“[E]veryone in violent schools lives with the threat as well as the reality of physical harm and loss of property. . . . Violence and abusive behavior disrupt the instructional process and foster a survival mentality among students, faculty, and staff. Left untreated, violence paralyzes the school. Everyone loses.”).

32. *Id.* at 882–85.

33. *Id.* at 883–84.

34. See, e.g., S. David Mitchell, *Zero Tolerance Policies: Criminalizing Childhood and Disenfranchising the Next Generation of Citizens*, 92 WASH. U. L. REV. 271, 278–80 (2014) (noting that after the Gun-Free Schools Act was passed, many school districts imposed their own zero-tolerance policies that prohibited a wide range of actions including the possession of illegal drugs); Russell J. Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, 92 NEW DIRECTIONS FOR YOUTH DEV. 17, 19–23 (2001) (describing the history of zero-tolerance policies and observing that “[a]lthough there is no federal mandate of suspension or expulsion for drug-related offenses, the application of zero tolerance to drugs or alcohol has become quite common”).

35. Hays, *supra* note 3.

36. Am. Psychological Ass’n Zero Tolerance Task Force, *supra* note 30, at 852 (describing a ten-year-old girl who was expelled after giving her teacher a small knife that her mother had put in her lunchbox for cutting an apple).

37. See Cloud, *supra* note 31, at 883–84 (“Zero tolerance means exactly what it says. Rules for student conduct are strict and inflexible.”).

38. *Grandma’s Knife Leads to Kid’s Expulsion*, CHI. TRIB. (Mar. 26, 2002), [http://articles.chicagotribune.com/2002-03-26/features/0203260026\\_1\\_zero-tolerance-expelled-knife](http://articles.chicagotribune.com/2002-03-26/features/0203260026_1_zero-tolerance-expelled-knife) [https://perma.cc/LPZ5-XMRG].

said he had no idea the knife was in the truck, explained that he had helped his grandmother move the day before and the knife had probably fallen out of a box of kitchen supplies.<sup>39</sup> Administrators said they had “no reason to believe” Taylor was lying, and there was no indication that the knife had been on his person while he was on school grounds, let alone that he had threatened anyone with it.<sup>40</sup> But they concluded that the school’s zero-tolerance policy required them to expel him anyway.<sup>41</sup>

Districts also sought to enhance security by expanding police presence in schools. Some districts established their own police forces.<sup>42</sup> Many contracted with local police departments to have one or more SROs assigned to schools full time. These officers spend their days on school campuses, whether an emergency is ongoing or not, and take on a variety of responsibilities, from leading antidrug programs to arresting students.<sup>43</sup> Sometimes, SROs become relatively integrated with schools—they build relationships with students, teach extracurricular classes, or attend after-school activities.<sup>44</sup> In other schools, SROs are seen purely as disciplinarians, and students report feeling intimidated by their presence.<sup>45</sup> Nationwide, there are more than 17,000 SROs installed in schools.<sup>46</sup> And even schools without SROs may call the police and request that officers arrest students for misbehavior.<sup>47</sup>

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39. *Id.*

40. *Id.*

41. *Id.*

42. In Texas alone, 163 school districts have their own police departments. But many of these “departments” are made up of just a single officer. John Burnett, *In Texas, A Police Officer for Everyone?*, NAT’L PUB. RADIO (Oct. 15, 2009), <http://www.npr.org/templates/story/story.php?storyId=113805196> [https://perma.cc/4CYP-6BHE].

43. NAT’L ASS’N OF SCH. RES. OFFICERS, *TO PROTECT AND EDUCATE: THE SCHOOL RESOURCE OFFICER AND THE PREVENTION OF VIOLENCE IN SCHOOLS* 22–23 (2012), <https://nasro.org/cms/wp-content/uploads/2013/11/NASRO-To-Protect-and-Educate-nosecurity.pdf> [https://perma.cc/VU74-UFFM].

44. *Id.* at 26–27.

45. See JASON LANGBERG, BARBARA FEDDERS & DREW KUKOROWSKI, *ADVOCATES FOR CHILDREN’S SERVS., LAW ENFORCEMENT OFFICERS IN WAKE COUNTY SCHOOLS: THE HUMAN, EDUCATIONAL, AND FINANCIAL COSTS* 8 (2011), <http://www.law.unc.edu/documents/faculty/sroreportv2.pdf> [https://perma.cc/Q8H2-2T8A] (“Studies suggest that a heavy police presence intimidates students, creates an adversarial environment, and pushes out the most vulnerable students.”).

46. Anderson, *supra* note 5.

47. Kim, *supra* note 21, at 878 (“Jurisdictions lacking the resources to hire full-time police personnel nonetheless may regularly summon the local police department through calls for service.”).



In conjunction with official policy changes, such as the implementation of zero-tolerance policies and the hiring of SROs, a cultural shift took place in schools as well. Many schools adopted a tough-on-crime mentality that has led them to apply harsh consequences in response to even minor offenses.<sup>48</sup> Infractions that might once have merited a trip to the principal's office or a call home have increasingly been treated as criminal acts. In other words, "pushing and shoving in the schoolyard is now a battery, and talking back is now disorderly conduct."<sup>49</sup>

## *B. Operation*

1. *Suspensions and Expulsions.* School-discipline policies push students from classrooms into courtrooms in two ways. The more traditional method consists of suspensions and expulsions. Although suspensions and expulsions do not directly force students to interact with the justice system, they often have that effect. Students who are suspended are frequently left unsupervised,<sup>50</sup> and being out and about during the day unsupervised presumably increases their chances of coming into contact with law enforcement. In some situations, police officers have detained suspended teenagers expressly because they were not in school.<sup>51</sup> For example, a Detroit high school freshman named Michael Reynolds was suspended in 2013 for not having his school ID badge.<sup>52</sup> Michael was ordered to leave school immediately

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48. See, e.g., Kaeanna Wood, *Restoring Our Children's Future: Ending Disparate School Discipline Through Restorative Justice Practices*, 2014 J. DISP. RESOL. 395, 399 (2014) ("Consistent with the 'get tough on crime' attitude that swept the country in the early 1990s, schools began to implement stricter disciplinary policies in an effort to increase school safety.").

49. Susan Ferriss, 'School to Prison Pipeline' Hit on Capitol Hill, CTR. FOR PUB. INTEGRITY (Dec. 13, 2012), <http://www.publicintegrity.org/2012/12/13/11921/school-prison-pipeline-hit-capitol-hill> [<https://perma.cc/S9j5-28ZS>] (quoting *Hearing on Ending the School-to-Prison Pipeline Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 2 (Dec. 13, 2012) (statement of Judith A. Browne Dianis, Co-Director, Advancement Project)).

50. See Letter from Better Education Support Team, *supra* note 13, at 6 (noting that high school students who were suspended often visited public libraries or parks instead of returning home).

51. See OFFICE OF CMTY. ORIENTED POLICING SERVS., DEP'T OF JUSTICE, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 47 (2015) [hereinafter 21ST CENTURY POLICING], [http://www.cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) [<https://perma.cc/D9L3-4WE4>] (describing the testimony of a student in this situation).

52. *Id.*; Kyla Calvert Mason, *Michigan Students March to End "Zero Tolerance" Approach to School Discipline*, THE RUNDOWN, PBS NEWS HOUR (Apr. 18, 2014, 2:53 PM),

and complied.<sup>53</sup> On his way home, Michael was stopped by a police officer who demanded to know why the teen was not in school.<sup>54</sup> The officer put Michael in a squad car and drove him back to school verify his story.<sup>55</sup> It took two hours for the officer to return to the car and announce to Michael that he was in fact suspended.<sup>56</sup> And because the school had not issued the appropriate suspension forms (which would have allowed Michael to demonstrate that he had permission to be out of school on a weekday), the officer issued truancy citations worth a total of six hundred dollars to Michael and his legal guardian.<sup>57</sup>

Students who are expelled from their schools permanently may be expelled to an alternative school<sup>58</sup> or “expelled to the street,” meaning no alternative education services are provided.<sup>59</sup> Like suspended students who are left unsupervised, students who are expelled to the street risk coming into contact with the police. This is particularly true for minority students, who are more likely to be suspended or expelled from their schools<sup>60</sup> and more likely to be stopped by the police than their white counterparts.<sup>61</sup> Even students who are expelled into an alternative education program may not avoid being expelled from school altogether. Some states have special expulsion rules for alternative schools: although students in traditional schools may only

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<http://www.pbs.org/newshour/rundown/michigan-students-march-end-zero-tolerance-approach-school-discipline> [<https://perma.cc/648N-2E87>].

53. 21ST CENTURY POLICING, *supra* note 51, at 47.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. The term “alternative school” can be used to describe any school that departs from the traditional K–12 curriculum, but it is most commonly used to describe schools for students with behavioral problems. ALLAN POROWSKI, ROSEMARIE O’CONNOR & JIA LISA LUO, ICF INT’L, HOW DO STATES DEFINE ALTERNATIVE EDUCATION? 4 (2014), <http://files.eric.ed.gov/fulltext/ED546775.pdf> [<https://perma.cc/576G-ZZDT>]. Among alternative schools, “there is a wide variance in school quality, and detailed information about their curricula is scarce.” Alexia Fernandez Campbell, *Can a Private Company Teach Troubled Kids?*, ATLANTIC (Aug. 27, 2016), <http://www.theatlantic.com/business/archive/2016/08/outsourcing-education/497708> [<https://perma.cc/EYQ9-678A>].

59. DEBORAH FOWLER, TEX. APPLESEED, TEXAS’ SCHOOL-TO-PRISON PIPELINE: SCHOOL EXPULSION: THE PATH FROM LOCKOUT TO DROPOUT 71 (2010), <https://www.texasappleseed.org/sites/default/files/02-STPP-SchoolExpulsion.pdf> [<https://perma.cc/HF77-ZAHH>].

60. *See infra* Part I.C.2.

61. *See* SARA LAPLANTE, CHRISTOPHER DUNN & JENNIFER CARNIG, N.Y. CIVIL LIBERTIES UNION, STOP AND FRISK 2012 NYCLU BRIEFING 2 (2013), [http://www.nyclu.org/files/publications/2012\\_Report\\_NYCLU\\_0.pdf](http://www.nyclu.org/files/publications/2012_Report_NYCLU_0.pdf) [<https://perma.cc/NT3T-BZPB>] (reporting that between 2003 and 2013, young black and Latino men accounted for 40.6 percent of “stop and frisk” stops in New York City, despite making up just 4.7 percent of the city’s population).

be expelled for certain criminal offenses, students in alternative schools may be expelled for persistently disruptive behavior.<sup>62</sup>

During the 2011–2012 school year, the last year for which there are comprehensive data, 3.2 million students were suspended in the United States and 111,000 were expelled.<sup>63</sup> Some of these suspensions and expulsions were mandated by zero-tolerance policies that left administrators with no choice but to suspend or expel a student guilty of a serious infraction, such as bringing drugs or weapons to school. However, many more of these suspensions and expulsions were issued at the discretion of administrators for behavior that is more accurately described as disruptive than dangerous.<sup>64</sup> Although there are no nationwide data available on this point, a comprehensive study of suspensions and expulsions in Texas during the 2008–2009 school year showed that only 29 percent of suspensions and expulsions were mandatory.<sup>65</sup> The remainder were issued at the discretion of school administrators for infractions ranging from fighting to verbally disrespecting school staff.<sup>66</sup>

2. *Direct Referrals to the Justice System.* Suspensions and expulsions can indirectly funnel students toward involvement with law enforcement, and schools can also directly refer students to the justice system. This can take the form of an on-campus arrest by an SRO or a traditional city police officer. Officers who are already in schools may decide to arrest students of their own volition.<sup>67</sup> Administrators may

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62. See TEX. EDUC. CODE ANN. § 37.007(c) (West 2015) (stating the conditions under which Texas students in disciplinary alternative education programs may be expelled); see also FOWLER, *supra* note 59, at 27 (noting that, in Texas, “[m]ore students are expelled for ‘serious or persistent misbehavior’” while attending an alternative school than for any other discretionary reason and that “[s]uch misbehavior would not trigger expulsion in any other educational setting”).

63. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., 2011–2012 CIVIL RIGHTS DATA COLLECTION: DISCIPLINE ESTIMATIONS, NATIONAL TOTALS (2014), [http://ocrdata.ed.gov/StateNationalEstimations/Estimations\\_2011\\_12](http://ocrdata.ed.gov/StateNationalEstimations/Estimations_2011_12) (follow “Discipline” hyperlink; then follow “National total” hyperlink) [<https://perma.cc/69B9-2VR8>].

64. For a discussion of the types of behavior that can lead to suspension and expulsion, see *infra* notes 86–91 and accompanying text.

65. FOWLER, *supra* note 59, at 5. Under Texas law, expulsions are mandatory for students who bring weapons to campus or engage in other criminal behavior, including “sexual assault, aggravated robbery, indecency with a child, and felony drug offenses.” *Id.* at 19.

66. *Id.*

67. See Kerrin C. Wolf, *Arrest Decision Making by School Resource Officers*, 12 YOUTH VIOLENCE & JUV. JUST. 137, 143–44 (2013), <http://www.ncjfcj.org/sites/default/files/Final%20Arrest%20Decision%20Making%20by%20School%20Resource%20Officers.pdf> [<https://perma.cc/LC2W-QXA4>] (analyzing data from a survey of SROs in Delaware and noting that the wishes of teachers and administrators are not the most important factors in an SRO’s arrest decision).

also request that officers (whether SROs or officers called to school to respond to specific incidents) arrest students.<sup>68</sup> During the 2011–2012 school year, 64,218 students were arrested in American schools.<sup>69</sup>

Officers can also refer students to the justice system by issuing citations that require students to appear in court without placing them under arrest. The precise procedures accompanying such referrals vary by jurisdiction. In Los Angeles, citations issued in schools can require students to appear before the Los Angeles County Probation Department or, in more serious cases, a juvenile court.<sup>70</sup> In Texas, officers can issue misdemeanor citations, which require students to appear in municipal court or before a justice of the peace.<sup>71</sup> During the 2011–2012 school year, schools referred 249,752 students to law enforcement.<sup>72</sup>

Citations can affect both students and their families. Students must miss class to appear in court. Parents or guardians may be required to appear along with their children, forcing them to miss work or arrange childcare for their other children.<sup>73</sup> There are often fines associated with citations,<sup>74</sup> and paying those fines imposes a burden on students, their guardians, or both. As a result of fines and parental-appearance requirements, many students simply do not tell their parents about their citations and do not go to court.<sup>75</sup> Failure to appear can result in another misdemeanor.<sup>76</sup> In some states, if a fine goes unpaid and the cited student never appears, a warrant can be issued for the student's arrest when she turns seventeen.<sup>77</sup>

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68. See Kim, *supra* note 21.

69. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., *supra* note 63.

70. Susan Ferriss, *Los Angeles School Police Still Ticketing Thousands of Young Students*, CTR. FOR PUB. INTEGRITY (Dec. 27, 2012), <http://www.publicintegrity.org/2012/12/27/11984/los-angeles-school-police-still-ticketing-thousands-young-students> [<https://perma.cc/HG7S-QGTH>].

71. Erik Eckholm, *With Police in Schools, More Children in Court*, N.Y. TIMES (Apr. 12, 2013), <http://www.nytimes.com/2013/04/12/education/with-police-in-schools-more-children-in-court.html> [<https://perma.cc/AYH8-UG7R>].

72. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., *supra* note 63.

73. See Ferriss, *supra* note 70 (noting that, when Los Angeles students who received tickets in schools were required to go to juvenile courts, they appeared with their parents).

74. See, e.g., OFFICE OF CMTY. ORIENTED POLICING SERVS., DEP'T OF JUSTICE, *supra* note 51 (describing truancy tickets worth a total of six hundred dollars issued to a suspended high school student and his legal guardian).

75. Ferriss, *supra* note 70.

76. *Id.*

77. DEBORAH FOWLER, TEX. APPLESEED, TICKETING, ARREST & USE OF FORCE IN SCHOOLS: HOW THE MYTH OF THE "BLACKBOARD JUNGLE" RESHAPED SCHOOL

In many jurisdictions, arrests and citations are not reserved for older students, who are likely to understand the importance of complying with citations and court orders. In Los Angeles, officers issue truancy citations to students as young as six.<sup>78</sup> Thirteen-year-olds there are cited more often than students in any other age group.<sup>79</sup> This is an age at which students are fully capable of hiding bad news from their parents but may not be capable of understanding that doing so could mean arrest four years later.

Referrals to the justice system happen for a litany of reasons. One is the prevalence of zero-tolerance policies: forty-three states require school officials to refer students to law enforcement for certain infractions,<sup>80</sup> and the federal Gun-Free Schools Act requires referrals when students bring firearms to school.<sup>81</sup> But zero-tolerance policies are not the only culprit. Drug and weapon offenses account for just a fraction of the school-based referrals to the juvenile justice system. Although zero-tolerance policies may contribute to the tough-on-crime atmosphere that pervades schools, the reality is that many referrals are made at the discretion of school administrators. And many administrators are referring students for behavior that is disruptive but not criminal.

There is general agreement among commentators and juvenile court judges that schools are having students arrested or sent to court for behavior that once would have been dealt with by teachers or principals.<sup>82</sup> Some states have made “disturbing a school” itself against the law, so schools can refer students to the justice system just for being

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DISCIPLINARY POLICY 71 (2010), [https://www.texasappleseed.org/sites/default/files/03-STPP TicketingandArrests.pdf](https://www.texasappleseed.org/sites/default/files/03-STPP%20TicketingandArrests.pdf) [<https://perma.cc/D8N6-ASM7>].

78. Ferriss, *supra* note 70.

79. *Id.*

80. Curtis, *supra* note 22, at 1258.

81. Gun-Free Schools Act of 1994, Pub. L. No. 103-382, titl. I, § 101, 108 Stat. 3518, 3907 (codified at 20 U.S.C. § 8921 (1994)) (repealed 2002).

82. *See, e.g.*, Am. Psychological Ass’n Zero Tolerance Task Force, *supra* note 30, at 856 (“The increased reliance on more severe consequences in response to student disruption has also resulted in an increase of referrals to the juvenile justice system for infractions that were once handled in school.”); Sara Rimer, *Unruly Students Facing Arrest, Not Detention*, N.Y. TIMES (Jan. 4, 2004), <http://www.nytimes.com/2004/01/04/us/unruly-students-facing-arrest-not-detention.html> [<https://perma.cc/KRJ8-BUAF>] (reporting that, in multiple states, “juvenile court judges are complaining that their courtrooms are at risk of being overwhelmed by student misconduct cases that should be handled in the schools”).

disruptive, even if their behavior would not otherwise constitute a crime.<sup>83</sup>

The national data on in-school arrests and citations do not disaggregate referrals by infraction or otherwise indicate why students were referred to the justice system,<sup>84</sup> so it is not possible to fully verify the claim that “schools are increasingly sending students into the juvenile justice system for the sort of adolescent misbehavior that used to be handled by school administrators.”<sup>85</sup> But as Professor Catherine Kim has shown, data from individual jurisdictions indicate that every year, thousands of children are referred to the justice system for misbehavior that could be addressed in schools.<sup>86</sup> In Texas, 24 percent of in-school arrests are made for disorderly conduct, a category that includes “profanity, offensive gesture[s], or fighting.”<sup>87</sup> More than 50 percent of citations issued to students there are issued for disorderly conduct or “disruption of class or transportation.”<sup>88</sup> In Clayton County, Georgia, the annual number of school-based referrals to juvenile court skyrocketed from 89 to 1400 in a matter of years. Officials reported that the vast majority of the increase was due to referrals for “minor incidents such as fights or disorderly conduct that ‘have traditionally been handled by the school and are not deemed the type of matters appropriate for juvenile court.’”<sup>89</sup> In Lucas County, Ohio, most school-based referrals to juvenile court are for disruptive conduct; just “a handful,” or about 2 percent, of referrals are for “serious incidents like assaulting a teacher or taking a gun to school.”<sup>90</sup> Kim concludes that, in some places, “school officials appear to have delegated their traditional authority to handle common forms of student misconduct—

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83. See Kim, *supra* note 21, at 879–80 nn.88–89 (noting that “[n]umerous states criminalize the offense of disrupting school activities or talking back to teachers” and collecting statutes). In October of 2015, an SRO in South Carolina was fired after cell phone video emerged of him dragging a teenager out of her seat and throwing her to the ground. The student, who had ignored instructions to put away her cell phone, was arrested on a charge of “disturbing the school.” Alan Blinder, *Ben Fields, South Carolina Deputy, Fired over Student Arrest*, N.Y. TIMES (Oct. 28, 2015), <http://www.nytimes.com/2015/10/29/us/south-carolina-deputy-ben-fields-fired.html> [<https://perma.cc/G7V2-HUEK>].

84. See OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., *supra* note 63 (stating that 249,752 students were referred to law enforcement by their schools during the 2011–2012 school year, but without specifying the reason for referrals).

85. Rimer, *supra* note 82.

86. Kim, *supra* note 21, at 886–88.

87. *Id.* at 886.

88. *Id.*

89. *Id.* at 901.

90. Rimer, *supra* note 82.

such as those involving disruptive behavior or fights—to law enforcement.”<sup>91</sup>

### C. *Effects of the School-to-Prison Pipeline*

1. *Consequences for Students’ Academic Performance and Employment Prospects.* Suspensions, expulsions, and referrals to the criminal justice system can have consequences that long outlast the punishments themselves. One is simple disengagement from school.<sup>92</sup> Students who perceive themselves as having been unfairly excluded from the classroom report feeling disillusioned with school and with authority figures.<sup>93</sup> Perhaps in part because of this disengagement, and almost certainly in part because exclusionary discipline forces students to miss class, students who have been suspended, expelled, or referred to law enforcement are far more likely to drop out of school than classmates who have not been disciplined in such a manner.<sup>94</sup> Being arrested for the first time doubles the odds that a student will drop out of high school.<sup>95</sup> Being arrested and appearing in court for the first time quadruples the odds.<sup>96</sup>

Referrals to the justice system carry additional risks. Following referrals, students’ personal information will be included in the records of both the criminal justice system and the probation system.<sup>97</sup> Cases

91. Kim, *supra* note 21, at 887.

92. ADVANCEMENT PROJECT, ALL. FOR EDUC. JUSTICE, DIGNITY IN SCHS. CAMPAIGN & NAACP LEGAL DEF. AND EDUC. FUND, POLICE IN SCHOOLS ARE NOT THE ANSWER TO THE NEWTOWN SHOOTING 7 (2013), [http://b3cdn.net/advancement/df16da132af1903e5b\\_zlm6bkclv.pdf](http://b3cdn.net/advancement/df16da132af1903e5b_zlm6bkclv.pdf) [<https://perma.cc/9HDX-Z5WP>] (“[A]ggressive security measures produce alienation and mistrust among students, which in turn, can disrupt the learning environment.”).

93. See George, *supra* note 17, at 119 (observing that exclusionary policies may result in “feelings of stigmatization and inferiority” and can impair student relationships with “authority figures,” particularly for black girls).

94. For further discussion of why exclusionary discipline often leads to students dropping out, see *supra* note 17 and accompanying text. See also Skiba & Knesting, *supra* note 34, at 33 (noting, in the context of a discussion about the efficacy of suspensions and expulsions as punishment, that “the strength of the school social bond is an important predictor in explaining delinquency” and questioning “the wisdom of school disciplinary strategies that are expressly intended to break that bond with troublesome students”).

95. ADVANCEMENT PROJECT ET AL., *supra* note 92, at 10.

96. *Id.*

97. See Thurau & Wald, *supra* note 6, at 1011 (“Youth whose cases were referred or brought directly to the juvenile court resulted in their inclusion in both the criminal justice information system and the court activity record information system kept by the criminal history systems board and the department of probation.”); see also Susan Ferriss, *Los Angeles School Police Citations Draw Federal Scrutiny*, CTR. FOR PUB. INTEGRITY (June 16, 2015), <http://www.publicintegrity.org/2012/05/21/8906/los-angeles-school-police-citations-draw-federal->

may take as long as a year to resolve, during which time students must regularly miss class to attend hearings.<sup>98</sup> Schools can “refuse to accept students who are court-involved, leaving them without educational services for months at a time and increasing the likelihood that they will have further run-ins with the law.”<sup>99</sup> Referrals can also result in court-ordered oversight through juvenile probation, which creates an increased risk of future “incarceration for violations of conditions of probation or subsequent offenses.”<sup>100</sup>

For students who are arrested in school and adjudicated delinquent in juvenile court, the effects of discipline can linger even after a case is closed, affecting students’ chances of obtaining higher education or finding jobs. They may be required to disclose their arrests on college applications, and they may be ineligible for scholarships and federal grants.<sup>101</sup> When they apply for jobs, certain employers, including law enforcement agencies, health care providers, schools, and child-care facilities, will have access to their juvenile records if they have not been expunged.<sup>102</sup> And military employers will have access to applicants’ juvenile records even if they have been expunged.<sup>103</sup>

Some schools, and even some SROs, refer students to the juvenile justice system under the impression that, once they are in the system, courts will provide students with supportive services.<sup>104</sup> Unfortunately, this is almost never the case. Most juvenile justice systems are dramatically underfunded, and “except for probation, detention, and incarceration, courts have few or no services to offer.”<sup>105</sup> Furthermore,

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scrutiny [<https://perma.cc/HR5Z-T43T>] (discussing an instance in which a twelve-year-old boy was referred to juvenile court for fighting, and after his charges were dismissed his photograph and fingerprints were to remain on file with the police for at least five years).

98. JOANNA WALD & DANIEL LOSEN, THE CIVIL RIGHTS PROJECT, *DEFINING AND REDIRECTING A SCHOOL-TO-PRISON PIPELINE* 9 (2003), <http://youthjusticenc.org/download/education-justice/suspension-and-expulsion/Defining%20and%20Re-Directing%20the%20School-to-Prison%20Pipeline.pdf> [<https://perma.cc/QL2S-S6MR>] (“Once referred to the juvenile justice system, students often have to miss multiple days of school to make court appearances, even if their cases are ultimately dismissed.”).

99. *Id.*

100. Thureau & Wald, *supra* note 6, at 1011

101. *E.g.*, *Collateral Consequences of Juvenile Adjudications of Delinquency*, STATE OF DEL. OFFICE OF DEF. SERVS. 2, <http://publicdefender.delaware.gov/information/Consequences%20for%20Juvenile%20Adjudications.pdf> [<https://perma.cc/W92C-EQS3>].

102. *Id.* at 3.

103. *Id.* at 4.

104. Thureau & Wald, *supra* note 6, at 1011.

105. *Id.*



despite the promise of *In re Gault*,<sup>106</sup> “youth are regularly denied effective assistance of counsel in delinquency courts across the nation.”<sup>107</sup>

2. *Disparate Impact on Minority Students.* One of the most troubling aspects of the school-to-prison pipeline is that it appears to be funneling mostly minority children into the justice system. Minorities, particularly black students, are disproportionately represented among the ranks of students who have been suspended, expelled, arrested, or referred to the justice system. White students, meanwhile, are underrepresented. Black students are 3.8 times as likely to be suspended as their white peers.<sup>108</sup> In 2011–2012, black students made up just 16 percent of the nation’s student population, but they accounted for 32–42 percent of suspensions or expulsions; white students made up 51 percent of the student population and just 31–40 percent of students who were suspended or expelled.<sup>109</sup> Native American, Alaska Native, Latino, Native Hawaiian, and multiracial boys are also suspended disproportionately; those groups make up 15 percent of the student population but 19 percent of students who are suspended.<sup>110</sup> Asian and white students, meanwhile, are not suspended disproportionately.<sup>111</sup> Despite composing just 16 percent of the student population, black students represent 27 percent of students referred to law enforcement and 31 percent of those arrested in schools.<sup>112</sup> They are 2.3 times more likely to be arrested or referred to law enforcement at school than their white counterparts.<sup>113</sup>

Racial disparities in school discipline are not limited to middle and high schools. As early as preschool, black students are far more likely than white students to be suspended or expelled. Black children make

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106. *In re Gault*, 387 U.S. 1, 33–34, 41 (1967) (holding that juveniles have due process rights in delinquency proceedings, including the right to advance notice of charges and the right to counsel).

107. Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 374 (2011).

108. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., *supra* note 63, at 3.

109. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE 3 (2014) [hereinafter DATA SNAPSHOT], <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf> [<https://perma.cc/V9PK-62AT>].

110. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., *supra* note 63, at 3.

111. *Id.* at 4.

112. DATA SNAPSHOT, *supra* note 109, at 6.

113. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., *supra* note 63, at 4.

up just 19 percent of preschool enrollment, but 47 percent of preschoolers who are suspended more than once are black.<sup>114</sup>

These disparities cannot be explained by differences in the rates of misbehavior between minorities and white students.<sup>115</sup> Research into student behavior, discipline, and race has found “no evidence that African Americans misbehave at a significantly higher rate” than their white peers.<sup>116</sup> To the contrary, “available research suggests that black students tend to receive harsher punishments than white students and that those harsher consequences may be administered for less severe offenses.”<sup>117</sup> In some districts, white and minority students who commit substantively identical infractions receive remarkably different punishments. In one district, two students set off fire alarms during the same school year. One, a white freshman in high school, was suspended for a day. Another, a black kindergartener, was suspended for five days.<sup>118</sup> In another district, a white student got detention for using headphones without permission. At the same school, a black student with a similar disciplinary history was suspended for a day for using an iPod and a cellphone.<sup>119</sup> In a third district, a white student and a Native American student got into a shoving match at a middle school. The white student received a three-day in-school suspension. The Native American student was arrested and received a ten-day out-of-school suspension.<sup>120</sup>

Minority students are also far more likely to be removed from the classroom for behavior that does not require their removal but leaves

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114. *Id.* at 3.

115. *See, e.g.*, Am. Psychological Ass’n Zero Tolerance Task Force, *supra* note 30, at 854 (concluding that there are no “data supporting the assumption that African American students exhibit higher rates of disruption or violence that would warrant higher rates of discipline” and that “African American students may be disciplined more severely for less serious or more subjective reasons.”); Russell J. Skiba, Robert S. Michael, Abra Carroll Nardo & Reece L. Peterson, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 335 (2002) (analyzing school-discipline data from an urban school district’s middle schools and concluding that “the large and consistent black overrepresentation in office referral and school suspension was not explainable by either [socioeconomic status] or racial differences in behavior”).

116. Skiba & Knesting, *supra* note 34, at 31.

117. *Id.*

118. Stacy Teicher Khadaroo, *School Suspensions: Does Racial Bias Feed the School-to-Prison Pipeline?*, CHRISTIAN SCI. MONITOR (Mar. 31, 2013), <http://www.csmonitor.com/USA/Education/2013/0331/School-suspensions-Does-racial-bias-feed-the-school-to-prison-pipeline> [<https://perma.cc/7VUC-FMM6>].

119. *Id.*

120. *Id.*

disciplinary decisions to the discretion of teachers and administrators. A comprehensive study of school-discipline decisions in Texas found that, although white, Hispanic, and black students were removed from school for violations that required their removal (such as bringing a firearm to campus) “at comparable rates,” they “experienced discretionary actions at significantly different rates.”<sup>121</sup> After controlling for eighty-three variables to isolate “the effect of race alone on disciplinary actions,” researchers found that “African-American students had a 31 percent higher likelihood of a school discretionary action, compared to otherwise identical white and Hispanic students.”<sup>122</sup> Other researchers have found that white students are more likely to be disciplined for objective, observable infractions such as vandalism or smoking, whereas their black peers are more likely to be disciplined for subjective offenses like “disrespect” and “excessive noise.”<sup>123</sup>

Research indicates that these disparities are the result not of a conscious desire to punish minority students more harshly than white ones, but of racial stereotypes and unconscious biases that cause teachers and administrators to react differently to misbehavior by minorities, particularly black children.<sup>124</sup> Regardless of the reason for these disparities, they show that schools—which are supposed to be engines of equality—are actually perpetuating racial inequality.

Given the potentially grave consequences of school-discipline decisions, does making such decisions without any procedural

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121. TONY FABELO, MICHAEL D. THOMPSON, MARTHA PLOTKIN, DOTTIE CARMICHAEL, MINER P. MARCHBANKS III & ERIC A. BOOTH, COUNCIL OF STATE GOV'TS JUSTICE CTR., *BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT*, at x (2011), [https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking\\_Schools\\_Rules\\_Report\\_Final.pdf](https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf) [<https://perma.cc/BT46-26QC>].

122. *Id.*

123. Skiba et al., *supra* note 115, at 332.

124. *See* AM. PSYCHOLOGICAL ASS'N ZERO TOLERANCE TASK FORCE, *ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS* 59 (2006), <https://www.apa.org/pubs/info/reports/zero-tolerance-report.pdf> [<https://perma.cc/K45T-58P6>] (suggesting that stereotypes of black adolescents as “threatening or dangerous,” as well as “cultural discontinuities” regarding communication styles, can place black students at a disadvantage in schools because teachers “may react more quickly to relatively minor threats to authority” by black students); Am. Psychological Ass'n Zero Tolerance Task Force, *supra* note 30, at 854 (“Emerging professional opinion, qualitative research findings, and a substantive empirical literature from social psychology suggest that the disproportionate discipline of students of color may be due to lack of teacher preparation in classroom management, lack of training in culturally competent practices, or racial stereotypes.” (citations omitted)).

safeguards violate the Constitution's guarantee of procedural due process? Dozens of federal courts, including the Supreme Court, have held that in at least some circumstances the answer to that question is yes.<sup>125</sup>

## II. DUE PROCESS IN THE CONTEXT OF SUSPENSIONS AND EXPULSIONS

### A. *General Due Process Jurisprudence*

The Fifth and Fourteenth Amendments prohibit the federal government and the states, respectively, from depriving citizens of "life, liberty, or property, without due process of law."<sup>126</sup> The "essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'"<sup>127</sup>

The protection of property guaranteed by the Constitution "safeguard[s]" the "security of interests that a person has already acquired in specific benefits."<sup>128</sup> But these benefits are not created by the Constitution; "[r]ather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."<sup>129</sup> A legitimate claim of entitlement is a claim that is sufficiently determinate to generate reliance. Thus, the Supreme Court

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125. See, e.g., *Pervis v. LaMaque Indep. Sch. Dist.*, 466 F.2d 1054, 1058 (5th Cir. 1972) (holding that due process should be afforded to students facing long-term suspensions); *Mills v. Bd. of Educ.*, 348 F. Supp 866, 875 (D.D.C. 1972) (holding that a hearing is required prior to excluding a child from school or assigning him to an alternative program); *Vought v. Van Buren Pub. Sch.*, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969) (finding that a student at risk of expulsion "is entitled to the observance of procedural safeguards commensurate with the severity of the discipline"). For a discussion of the Supreme Court's decision in *Goss*, which recognized due process protections for students suspended or expelled, see *infra* Part II.B.

126. U.S. CONST., amends. V, XIV, § 1.

127. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring)).

128. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 576 (1972).

129. *Id.* at 577.

has found property interests in welfare benefits,<sup>130</sup> continued employment by tenured professors,<sup>131</sup> and even parole.<sup>132</sup>

The protection of liberty interests “denotes not merely freedom from bodily restraint” but the freedom “generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness,” including marriage, child-rearing, religious worship, and, crucially, education.<sup>133</sup> This freedom entails a liberty interest in one’s reputation, so “[w]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, [due process protections] are essential.”<sup>134</sup>

Procedural due process does not require that every governmental attempt to deprive an individual of a protected property or liberty interest be accompanied by a full-fledged trial. “The extent to which procedural due process must be afforded . . . depends upon whether the recipient’s interest in avoiding [a] loss outweighs the governmental interest in summary adjudication.”<sup>135</sup> Thus, determining what procedural protections are required in a given situation requires an analysis of both private and government interests. In *Mathews v. Eldridge*,<sup>136</sup> the Court established that such an analysis “requires consideration of three distinct factors”:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or

130. *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (“[D]ue process requires an adequate hearing before termination of welfare benefits.”).

131. *Roth*, 408 U.S. at 576–77 (“[T]he Court has held that a public college professor dismissed from an office held under tenure provisions . . . [has] interests in continued employment that are safeguarded by due process.” (citation omitted)); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

132. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (“[T]he liberty of a parolee . . . is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.”).

133. *Roth*, 408 U.S. at 572 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

134. *Id.* at 573 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)). A few years later, the Court clarified that one’s interest in his “reputation alone” is not the sort of liberty or property interest that is “by itself sufficient to invoke the procedural protection of the Due Process Clause.” *Paul v. Davis*, 424 U.S. 693, 701 (1976). Alleged reputational harms must be accompanied by the violation of “some more tangible interests such as employment.” *Id.* But the Court explicitly stated that the violation of a student’s right to an education was one such tangible interest. *Id.* at 710. Reaffirming its earlier holding in *Goss*, it noted that the suspension at issue there “could seriously damage the student’s reputation” and “resulted in a denial or deprivation of” the student’s state-law right to an education. *Id.*

135. *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970).

136. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>137</sup>

Regardless of the precise procedural protections that are appropriate in a given situation, "[t]he fundamental requisite of due process of law is the opportunity to be heard," so individuals should be provided with at least notice and some sort of hearing.<sup>138</sup> The format of the hearing may vary depending on the circumstances,<sup>139</sup> but it must take place "at a meaningful time and in a meaningful manner."<sup>140</sup>

### B. *Goss and Due Process for Students Facing Suspensions*

The Supreme Court has applied these principles in the school-discipline context and determined that schools are not required to provide the full panoply of due process protections when disciplining students. However, it has found that the imposition of certain punishments, such as suspension, does implicate students' property and liberty interests, and therefore must be accompanied by basic due process protections.

In *Goss v. Lopez*, the Court considered the case of Ohio students who were suspended for ten days after participating in school protests.<sup>141</sup> Their schools ordinarily held informal hearings in which students had an opportunity to hear the charges against them and respond before being suspended.<sup>142</sup> But following the protests, the schools simply removed the students from campus and told them not to come back for ten days.<sup>143</sup> The students filed suit under the Fourteenth Amendment, claiming the school's summary suspensions violated their due process rights by temporarily depriving them of their educations without a hearing.<sup>144</sup>

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137. *Id.* at 319, 334–35.

138. *Goldberg*, 397 U.S. at 267 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

139. See *Mathews*, 424 U.S. at 334 ("'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." (quoting *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961))); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

140. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

141. *Goss v. Lopez*, 419 U.S. 565, 569–70 (1975).

142. *Id.* at 583.

143. *Id.* at 569–71.

144. *Id.* at 567.

Ohio argued that because the right to an education is not guaranteed by the Constitution, “the Due Process Clause does not protect against expulsions from the public school system.”<sup>145</sup> But the Court held that Ohio “misconceive[d] the nature of the issue,” because protected property rights are derived from sources other than the Constitution.<sup>146</sup> Ohio state law had established that all children were entitled to an education; thus, “[h]aving chosen to extend the right to an education to people of [the students’] class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred.”<sup>147</sup>

The Court acknowledged that the state had “very broad” authority to “prescribe and enforce standards of conduct in its schools” but insisted that this authority “be exercised consistently with constitutional safeguards.”<sup>148</sup> It held that a student’s interest in his or her education constituted a “property interest which is protected by the Due Process Clause” and therefore “may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.”<sup>149</sup>

In addition to a property interest in education, the Court recognized that students have liberty interests in their reputations, which are threatened by long-term suspensions.<sup>150</sup> The Court noted that the students were suspended based on charges that “[i]f sustained and recorded . . . could seriously damage the students’ standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.”<sup>151</sup> Thus, “the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirement of the Constitution.”<sup>152</sup>

The Court acknowledged that “controversies have raged” about the proper application of the Due Process Clause, but “at a minimum” its protections “require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing

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145. *Id.* at 572.

146. *Id.*

147. *Id.* at 574.

148. *Id.*

149. *Id.*

150. *Id.* (citing *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).

151. *Id.* at 574–75.

152. *Id.*

appropriate to the nature of the case.”<sup>153</sup> The Court held that, in the school context, it was appropriate that “students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.”<sup>154</sup> The type of hearing described by the Court does not require a full-fledged adjudication with counsel, witnesses, and testimony,<sup>155</sup> but it does require that a student be provided with “oral or written notice of the charges against him” and “an explanation of the evidence the authorities have and an opportunity to present his side of the story.”<sup>156</sup> Ideally, this hearing should take place prior to the student’s removal from school, but a student whose presence at school “poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school.”<sup>157</sup> Such a situation does not obviate the need for due process protections; notice and a hearing “should follow as soon as practicable.”<sup>158</sup>

The due process requirements established by *Goss* for short-term suspensions can be met by a very informal, fast-moving process.<sup>159</sup> The notice requirement is satisfied by an administrator telling a student what she has been accused of, and the hearing requirement is satisfied by the administrator giving her an informal opportunity to respond.<sup>160</sup> In other words, an “oral conversation with the principal will suffice . . . .”<sup>161</sup>

But these requirements are not inconsequential. The *Goss* Court, which was concerned with the possibility that students would be

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153. *Id.* at 579 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950)).

154. *Id.* (emphasis omitted).

155. *Id.* at 583.

156. *Id.* at 581.

157. *Id.* at 582.

158. *Id.* at 582–83.

159. *See id.* at 582 (“There need be no delay between the time ‘notice’ is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred.”).

160. *See id.* (“We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is.”).

161. *Procedures for Short-Term Suspensions*, DUKE L. CHILDREN’S L. CLINIC, <https://law.duke.edu/childdedlaw/schooldiscipline/attorneys/shortterm> [<https://perma.cc/3RUV-76JN>]; *see also, e.g.*, *C.B. v. Driscoll*, 82 F.3d 383, 387 (11th Cir. 1996) (affirming that the notice-and-hearing requirement in *Goss* was satisfied by a principal’s telephone conversation with a student who had been removed from school for fighting, when the principal told the student what she was accused of and gave her an opportunity to tell her side of the story).



deprived of an education as a result of mistaken conclusions or “arbitrary” procedures, believed that requiring even oral notice and an informal hearing would “provide a meaningful hedge against erroneous action.”<sup>162</sup> The Court added that this notice-and-hearing requirement was the *minimum* the Constitution required for the imposition of a suspension lasting fewer than ten days: “Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.”<sup>163</sup>

### III. DUE PROCESS IN THE CONTEXT OF DIRECT REFERRALS TO THE JUSTICE SYSTEM

#### A. *Absence of Due Process Protections at the Point of Referral*

As outlined above, suspensions and expulsions are not the only paths from classrooms to courtrooms for young people.<sup>164</sup> Schools can send students directly into the justice system via in-school arrests or citations that require them to appear in court. And in spite of the potentially dire consequences of referrals to the juvenile justice system,<sup>165</sup> schools and SROs are not required to provide any due process protections to students at the point of arrest or referral. School officials can call the police to request an arrest or a citation-based referral without informing a student or her parents beforehand that such a request is being made or giving the student an opportunity to present her side of the story.<sup>166</sup> Similarly, SROs make arrests or issue citations without explaining the reasons for their actions or giving students an opportunity to respond.<sup>167</sup>

162. *Goss*, 419 U.S. at 583.

163. *Id.* at 584.

164. For a discussion of the different ways that school-discipline decisions contribute to juvenile court involvement, see *supra* Part I.B.2.

165. For a discussion of the effects of juvenile court involvement on students’ educational and career prospects, see *supra* Part I.C.

166. See *Cobb*, *supra* note 23, at 594 (noting that the guarantee in *Goss* of notice and a hearing for students facing suspension has not been “extended . . . to school-based referrals to the juvenile justice system”).

167. See, e.g., Letter from Assistant Attorney Gen. Thomas Perez to Miss. Educ. Officials Regarding Investigation of Lauderdale Cty. Youth Court, Meridian Police Dep’t, and Miss. Div. of Youth Servs. at 5 (Aug. 10, 2012) [hereinafter Letter from Thomas Perez to Miss. Educ. Officials], <http://www.justice.gov/iso/opa/resources/2642012810121733674791.pdf> [<https://perma.cc/8MCQ-VMX6>] (reporting that police officers arrested students “automatically” when school staff expressed a desire to press charges, without any indication that officers gave students any notice or opportunity to respond).

Of course, the same could be said of out-of-school arrests. Young people who are arrested on the street presumably do not have an opportunity to tell their side of the story to an arresting officer. But off-campus arrests do not implicate a student's property interest in her education or liberty interest in her reputation among peers and teachers, both of which are at stake when a student is arrested at school.<sup>168</sup>

Furthermore, out-of-school arrests are, or at least are supposed to be, made on the basis of probable cause that a crime has been committed.<sup>169</sup> The same should be true of in-school arrests. Warrantless arrests, whether of students or adults, should only be made when a police officer assesses a situation and has reason to believe that a suspect "has committed or is committing an offense."<sup>170</sup> But in some school settings, police officers routinely arrest students at the behest of school administrators without making any such assessments.<sup>171</sup> In Meridian, Mississippi, police officers characterized their department as a "taxi service" for the local public schools, because department policy "requires officers to automatically arrest a student whenever school staff indicate that they would like to press charges."<sup>172</sup> The Department of Justice found that officers in Meridian "do not assess the facts or circumstances of the alleged charge, or whether the alleged conduct actually qualifies as an arrestable offense."<sup>173</sup> Instead, they "routinely handcuff and arrest students without obtaining prior youth court custody orders or making necessary assessments of probable cause."<sup>174</sup>

Not only are schools and SROs not required to provide students with due process protections at the point of referral, they are also not required to notify students' parents of an arrest or provide parents with written notification of students' arrests or citations. Although many individual jurisdictions have policies that require administrators or

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168. For an explanation of why this is the case, see *supra* Part II.B.

169. Letter from Thomas Perez to Miss. Educ. Officials, *supra* note 167, at 4; *see also* Michigan v. DeFillippo, 443 U.S. 31, 36 (1979) ("It is not disputed that the Constitution permits an officer to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense.").

170. Letter from Thomas Perez to Miss. Educ. Officials, *supra* note 167, at 4.

171. *Id.* at 5; *see also* Wolf, *supra* note 67, at 6 (reporting that 68 percent of SROs surveyed in Delaware said they had arrested a student "to show students that actions had consequences," and 55 percent said "they had arrested students for minor offenses because teachers wanted the arrests to occur").

172. Letter from Thomas Perez to Miss. Educ. Officials, *supra* note 167, at 5.

173. *Id.*

174. *Id.*

officers to alert parents if their children are arrested,<sup>175</sup> when those notifications occur verbally, parents are left without records of the referral or its rationale. And some jurisdictions do not have such policies at all. In Texas, schools must notify parents when a child is suspended, expelled, transferred to an alternative school, or arrested for being truant.<sup>176</sup> There is no similar requirement that parents be notified when their children are issued citations that will require them to appear in court or arrested for infractions unrelated to truancy.<sup>177</sup> The absence of notification requirements leaves both students and parents without any record of the reason for the arrest or citation, and it may leave parents completely ignorant of their children's legal risks and responsibilities.<sup>178</sup>

*B. Students Should Receive Due Process Protections at the Point of Referral*

All of the considerations that led the Supreme Court to conclude that students who receive short-term suspensions are entitled to basic due process protections apply with equal, if not greater, force in the context of referrals to the justice system.

Referrals, like suspensions, impinge on a student's property interest in her education by forcing her out of class temporarily and immediately. They also threaten a student's liberty interest in her "good name, reputation, honor, or integrity."<sup>179</sup> Arrests and citations can "damage the students' standing with their fellow pupils and their teachers" and "interfere with later opportunities for higher education and employment" as much as short-term suspensions, if not more so.<sup>180</sup> And just as suspending and expelling students without procedural protections can lead to "unfair or mistaken findings of misconduct and

175. See, e.g., *MMSD Policies and Procedures: 4400*, MADISON METROPOLITAN SCH. DIST., <https://board.madison.k12.wi.us/mmsd-policies-and-procedures-4400> [<https://perma.cc/K2YD-834B>] (requiring principals to "immediately" notify a parent or guardian when a student is arrested at school but not specifying what form that notice should take).

176. TEX. EDUC. CODE ANN. § 37.001(a)(6) (West 2013); OFFICE OF THE ATTORNEY GEN. OF TEX., *SCHOOL CRIME AND DISCIPLINE HANDBOOK 2013*, at 1, 15 (2013), [https://www.texasattorneygeneral.gov/files/cj/schoolcrime\\_2014.pdf](https://www.texasattorneygeneral.gov/files/cj/schoolcrime_2014.pdf) [<https://perma.cc/3FFR-EMZP>].

177. See generally OFFICE OF THE ATTORNEY GEN. OF TEX., *supra* note 176 (listing instances in which parents must be notified).

178. For further discussion of direct referrals to the justice system, see *supra* Part I.B.2.

179. *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).

180. *Id.* at 575; *supra* Part I.C.1.

arbitrary exclusion from school,” so too can referring students to law enforcement without first telling them what they are accused of and giving them an opportunity to respond.<sup>181</sup>

If a school may not ordinarily issue a suspension without notice and a hearing, it should not be able to decide “unilaterally and without process” that a student should be arrested or otherwise referred to the justice system.<sup>182</sup> “At the very minimum,” students facing referral should be given “some kind of notice and afforded some kind of hearing.”<sup>183</sup>

*C. What Sort of Process Should Be Afforded When Students Are Referred?*

Of course, “[o]nce it is determined that due process applies, the question remains what process is due.”<sup>184</sup> If due process protections granted in the context of referrals from schools to the justice system are to be effective, they must take a form that provides meaningful procedural protections but does not unduly burden educators as they do the admittedly difficult work of providing quality instruction and maintaining order in schools.

Some familiar components of due process in the criminal-prosecution context are not appropriate in the school context. Representation, the confrontation of witnesses, and the presentation of evidence were all considered and rejected by the Court in *Goss*,<sup>185</sup> and for good reason. In-depth proceedings of this nature would impose an unacceptable burden on school administrators, who may be responsible for hundreds or even thousands of students.<sup>186</sup>

But notice and an opportunity to respond, the two aspects of due process that the *Goss* Court determined were appropriate in the suspension context, are also appropriate in the referral context. It is not excessively burdensome for a student to “be told what he is accused of doing and what the basis of the accusation is” and then be “given an opportunity to explain his version of the facts.”<sup>187</sup> Such a conversation

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181. *Goss*, 419 U.S. at 581.

182. *Id.* at 575.

183. *Id.* at 579 (emphasis omitted).

184. *Id.* at 577 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

185. *Id.* at 583.

186. *See id.* (finding that allowing students facing suspension to secure counsel, confront witnesses, and bring their own witnesses “might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness”).

187. *Id.* at 582.

would only require a few minutes of an administrator's or a police officer's time, but it would give a student an important opportunity to correct any misconceptions and explain her side of the story.

What would this look like in practice? Suppose a twelve-year-old boy arrived in the principal's office with an office referral, written by his homeroom teacher, stating that he had shoved another student on the playground. Under current law, the principal could call the local police and ask them to arrest the child for assault without asking him for his side of the story, telling him what she was doing and why, or notifying his parents that he was going to be arrested. Under the standards proposed here, before she called the police to request an arrest, the principal would be required to at least tell the child, "I intend to call the police and have you arrested, because it says here that you shoved someone during recess," and give him a chance to respond. This would give him an opportunity to explain any mitigating circumstances—maybe the other student shoved him first, but the teacher turned around just in time to see him; maybe the other student threatened him on the bus that morning. Those circumstances would not justify the student's behavior, but the information might cause the principal to reconsider whether an arrest was the appropriate punishment. Even if the principal ultimately did choose to have the student arrested, the student would at least know what was happening and the rationale for the principal's decision.

In addition to verbal notice and an opportunity to respond prior to a referral, after a referral, students *and their parents* should be provided with written notice explaining that a referral has been made and detailing the reasons for the referral. This written notice need not be an exhaustive narrative; it could consist of a form with the student's name and information from the relevant incident filled in by an administrator.<sup>188</sup> But it should detail the charges against the student with some specificity. Too often, students have been referred to the justice system on the basis of charges that sound criminal, when the offense is in fact typical behavior for children. Playground scuffles have

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188. States or school districts that are concerned by the school-to-prison pipeline's disproportionate impact on minority students, *see supra* Part I.C.2, could consider requiring administrators to record the student's race as well. This practice would allow for better data collection regarding racial disparities in school discipline. It would also give individual administrators an opportunity to consider whether a disciplinary decision was influenced by a student's race.

been called “assault,”<sup>189</sup> passing gas has been described as “disrupt[ing the] classroom environment,”<sup>190</sup> and refusing to get out of one’s seat has been called “disturbing a school.”<sup>191</sup> Schools should not be permitted to baldly state that a student was arrested for “vandalism,” but they should instead be required to explain that a student was arrested for vandalism “for writing her name on a desk.”

The knowledge that she will be required to specify the events that led to a referral may provide a useful check to an administrator’s impulse to refer frustrating students for minor infractions. And this level of specificity will allow parents to respond appropriately to the referral, whether that means addressing an unfair referral with school administrators or addressing unacceptable behavior with their children.

As in the suspension context, if a student is a danger to other students or staff, or is disrupting the educational environment to such an extent that her immediate removal is necessary, notice and a hearing need not precede an arrest.<sup>192</sup> But written notice of the arrest should be issued to the student and her parents “as soon as practicable.”<sup>193</sup> Even if the arrest is a *fait accompli*, postreferral notice still serves important informational and accountability purposes.

*D. This Level of Process Is Consistent with the Court’s Decisions in Goss and Mathews*

A requirement that schools provide informal notice and hearing and written parental notice when students are arrested or referred squarely fits within the Supreme Court’s due process jurisprudence. These protections are a logical extension of the Court’s decision in *Goss*, and they satisfy the *Mathews* test for procedural protections, which directs courts to consider the private interests at stake, the “risk of an erroneous deprivation” of those interests under the current

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189. See Ferriss, *supra* note 97 (describing a twelve-year-old boy who was charged with assault after getting into a fight with a friend over a basketball game).

190. *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](http://www.nbcnews.com/id/27898395/ns/us_news-weird_news/t/student-arrested-passing-gas-fla-school) [<https://perma.cc/PEH9-L58R>].

191. *The Crime of Disturbing the Classroom*, DAILY KOS (Oct. 29, 2015, 7:53 AM), <http://www.dailykos.com/story/2015/10/29/1442058/-The-Crime-of-Disturbing-the-Classroom-Yes-in-S-C-it-s-a-CRIME> [<https://perma.cc/9KFF-GAQL>].

192. *Goss v. Lopez*, 419 U.S. 565, 582 (1975) (“Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school.”).

193. *Id.* at 582–83.

procedures, the value of the proposed additional procedures, and the government's interests.<sup>194</sup> There are several rationales for the absence of due process protections for students who are referred to the justice system, but none outweigh the student interests at stake.

Profound property interests and liberty interests are at risk when students are referred from school to the justice system.<sup>195</sup> An in-school arrest necessarily entails removing a student from an educational environment, and therefore at least temporarily deprives her of her property interest in an education. If the arrest is followed by formal charges, the student will be forced to miss school for court appearances.<sup>196</sup> And in some schools, students who are arrested and charged are not permitted to return to school until charges have been resolved, turning an arrest into a *de facto* long-term suspension.<sup>197</sup>

A student's reputation is at stake during an in-school arrest as well. Although any arrest can result in public humiliation, a school-based arrest is particularly dangerous to a student's reputation. It may involve a student being led, in handcuffs, past not just peers but also teachers and administrators—individuals whose views of a student can shape the rest of her school years<sup>198</sup> and her prospects of finding a job or being admitted to college.<sup>199</sup>

The “risk of an erroneous deprivation” of those interests through the existing procedures is quite high. As detailed above, the data indicate that with the current lack of due process protections, every year thousands of students are deprived of their interests in their educations and reputations without so much as an opportunity to tell an administrator or arresting officer their side of the story.<sup>200</sup>

The procedures proposed here would protect students in three ways. First, requiring officials to give students verbal notice of the charges against them and an opportunity to respond prior to arrest or

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194. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

195. For a discussion of the consequences of arrests and referrals on students' education and reputations, see *supra* Part II.B.

196. See WARD & LOSEN, *supra* note 98, at 9.

197. See *id.* (“[S]chools often refuse to accept students who are court-involved, leaving them without educational services for months at a time . . .”).

198. A teacher's perception of a student may affect not only how the teacher treats the student but also how the student herself behaves. See Bloomenthal, *supra* note 17, at 344 (“Studies reveal that a teacher can evoke behavior from a student that confirms the teacher's expectations of how the student will behave, creating what is known as a ‘self-fulfilling prophecy.’”).

199. For a discussion of the effects arrests and referrals can have on students' future prospects, see *supra* Part I.C.1.

200. For a discussion of the current lack of due process protections, see *supra* Part III.A.

referral would allow students to correct misperceptions an official may have or explain any extenuating circumstances. Second, requiring officials to provide written notice of referrals to parents will ensure that parents have the information they need to protect their children's legal interests.<sup>201</sup> Finally, requiring officials to record and specify the reason for every referral may provide a useful "nudge" that encourages administrators and officers to reserve arrests and citations for serious misbehavior.<sup>202</sup> Although this requirement would not affect the number of referrals that are required by zero-tolerance policies,<sup>203</sup> it could reduce the significant number of discretionary referrals that are made for offenses like "disturbing a school."<sup>204</sup>

As for the government's interests, schools assert that they must have absolute discretion over discipline decisions and that they must be able to implement those decisions efficiently. Although these are legitimate interests, according to the Court's analysis in *Goss*, neither is unduly burdened by a requirement that schools provide notice and a hearing to students referred to the justice system.

Schools argue that administrators should have the discretion to impose the discipline they see fit when students misbehave.<sup>205</sup> Indeed, courts have generally recognized that schools have wide latitude when making disciplinary decisions. But, while the *Goss* Court acknowledged that "public education . . . is committed to the control of

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201. For a discussion of the potential consequences for children when their parents are unaware of referrals, see *supra* Part I.B.2.

202. A "nudge" is an action by a governmental or other entity that is intended to encourage better decisionmaking. Arguments in favor of "nudges" are premised on the idea that individuals are prone to cognitive biases that impede rational decisionmaking but that small changes in their environments can override those biases. See generally CASS SUNSTEIN & RICHARD THALER, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2009) (arguing that "choice architecture" can successfully nudge people toward the best decision without restricting their freedom of choice).

203. For a discussion of the circumstances in which zero-tolerance policies require referrals to law enforcement, see *supra* Part I.B.1.

204. For a discussion of the frequency of referrals for discretionary reasons, see *supra* Part I.B.2.

205. See *Goss v. Lopez*, 419 U.S. 565, 583 (1975) (noting that "many school authorities may well prefer the untrammelled power to act unilaterally, unhampered by rules about notice and hearing"); see also Erik Eckholm, *School Suspensions Lead to Legal Challenge*, N.Y. TIMES (Mar. 18, 2010), <http://www.nytimes.com/2010/03/19/education/19suspend.html> [<https://perma.cc/A96P-CEGH>] (noting that a North Carolina school district argued that "it must retain discretion over punishments" after it was criticized for responding to a fight among high school students by suspending several of them for the remainder of the semester and barring them from attending the county's alternative school).



state and local authorities,”<sup>206</sup> it held that, because of the significance of the interests at stake, suspensions may not “be imposed by any procedure the school chooses.”<sup>207</sup>

The same interests implicated by short-term suspensions are implicated by referrals to the justice system. Thus, the need to exercise discretion over discipline decisions should not permit schools to have their students arrested or referred arbitrarily. The due process protections recommended here do not interfere with school officials’ legitimate exercise of discretion with regard to discipline; they simply require that administrators follow basic procedures to avoid unnecessary or unfair referrals to law enforcement.

School administrators may argue that, in the interest of efficiency, they must deal with discipline problems quickly and decisively, and providing notice and a hearing to every student who is referred would waste time and prevent them from doing their jobs effectively.<sup>208</sup> The Court acknowledged these concerns in *Goss*, but it held that requiring schools to give students notice of the charges against them and an opportunity to tell their side of the story did not “impose[] procedures on school disciplinarians which are inappropriate in a classroom setting.”<sup>209</sup> The Court acknowledged that requiring administrators to establish “truncated trial-type procedures”<sup>210</sup> for every short-term suspension would be inefficient and “overwhelm[ing]” to schools.<sup>211</sup> But it squarely distinguished such unreasonable measures from a notice-and-hearing requirement, which it described as “if anything, less than a fair-minded school principal would impose upon himself to avoid unfair suspensions.”<sup>212</sup>

The informal notice-and-hearing procedures proposed here are identical to the ones established for students facing suspension in *Goss*, so they do not impose a heavier burden on schools than the procedures expressly approved there. The proposed written-notice procedure,

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206. *Goss*, 419 U.S. at 578 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968)).

207. *Id.* at 576.

208. *See id.* at 580 (“Events calling for discipline are frequent occurrences and sometimes require immediate, effective action . . . . The prospect of imposing elaborate hearing requirements in every suspension case is viewed with great concern, and many school authorities may well prefer the untrammled power to act unilaterally, unhampered by rules about notice and hearing.”).

209. *Id.* at 583.

210. *Id.*

211. *Id.*

212. *Id.*

although not required by the *Goss* decision, is certainly not inconsistent with it. As described above, providing written notice of referrals to parents will not require a great deal of administrators' time, but it will provide significant protection to students by alerting their parents to referrals. Given that arrests and referrals may have more profound long-term consequences for disciplined students than short-term suspensions,<sup>213</sup> such a requirement is consistent with *Goss's* observation that "[l]onger suspensions or expulsions . . . may require more formal procedures."<sup>214</sup>

Thus, under the test the Court established in *Mathews* and the Court's analysis in *Goss* of due process in the school-discipline context, students referred from schools to the justice system should be afforded the basic protections of notice and an informal hearing prior to referrals and written parental notice following referrals.

#### *E. Due Process in the Juvenile Justice System Is Inadequate*

One objection to the provision of due process protections to students who are referred to law enforcement is that students will receive due process once they are in the juvenile justice system, so there is no reason to provide it at the point of referral.<sup>215</sup> This argument is flawed for several reasons. First, students may not be getting as much protection as the adults who refer them believe they are. Due process protections are not as robust in the juvenile justice system as they are in the adult criminal justice system.<sup>216</sup> Juveniles in delinquency proceedings do not have a federal right to a jury trial, and most states do not permit jury trials in juvenile cases.<sup>217</sup> The Supreme Court has held that the Constitution permits the "preventive detention" of young people who are awaiting trial but have not been convicted of a crime.<sup>218</sup> But the consequences that may be meted out to students in the juvenile justice system—fines, probation, and incarceration—are the same as the consequences delivered in the criminal system.

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213. For a discussion of the consequences of arrests and referrals, see *supra* Part I.C.

214. *Goss*, 419 U.S. at 584.

215. Cobb, *supra* note 23, at 594.

216. See Mark R. Fondacaro, Christopher Slobogin & Tricia Cross, *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science*, 57 HASTINGS L.J. 955, 956 (2006) ("[F]or more than half a century, the juvenile justice system functioned largely in the absence of the procedural rules found in adult court and beyond the oversight and review of the regular judicial system.").

217. Majd, *supra* note 107, at 374.

218. *Schall v. Martin*, 467 U.S. 253, 255–57 (1984).

Furthermore, the property and liberty interests protected by due process in the juvenile justice system *after* a referral has been made are not the same property and liberty interests the *Goss* Court identified as salient in the school-discipline context.<sup>219</sup> Due process in the justice system is intended to protect individuals against unjust deprivations of monetary property (via fines) or physical liberty (via incarceration). This process, although important, does not sufficiently protect a student's property interest in her education or liberty interest in her reputation, both of which are implicated at the moment she is arrested in school or issued a citation that will require her to appear in court.

### CONCLUSION

Given the significance of the property and liberty interests at stake, students who are referred from their schools to the juvenile justice system should be provided with written notice of the charges against them and an informal opportunity to respond to those charges. Their parents should be provided with written notice of those referrals and their rationales. This level of protection is consistent with the Supreme Court's due process jurisprudence generally and its decision in *Goss* in particular. From a legal point of view, it is the correct thing to do.

It is also, both morally and practically, the right thing to do. To most observers, the school-to-prison pipeline does not appear to be the result of a conscious desire to move thousands of children from schoolyards to prison yards. Rather, it is the result of the unintended consequences of well-intentioned policies and of unconscious bias against the minority students who are disproportionately represented among the ranks of the suspended, expelled, and arrested. Requiring school administrators and police officers to justify their referral decisions in writing, to specify the offenses that prompted referrals, and to notify students' parents every time referrals are made will provide a "meaningful hedge against erroneous action,"<sup>220</sup> and, one hopes, reduce the number of children in the school-to-prison pipeline.

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219. For a discussion of the property and liberty interests the Court recognized in *Goss*, see *supra* Part III.D.

220. *Goss v. Lopez*, 419 U.S. 565, 583 (1975).