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# ONE STRIKE AND YOU'RE OUT? CONSTITUTIONAL CONSTRAINTS ON ZERO TOLERANCE IN PUBLIC EDUCATION

ERIC BLUMENSON\*  
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During the 1990s a spate of shootings befell some of America's high schools, culminating in the methodical killings at Columbine High School in April 1999. Involving both child snipers and child victims, each case was as disturbing as it was tragic. Taken together, these shootings appeared to constitute a rapidly rising tide of school violence. John DiIulio of Princeton, James Alan Fox of Northeastern, and other academics confirmed and heightened public anxiety by predicting even more to come.<sup>1</sup> In graphic pronouncements, DiIulio described a juvenile "crime bomb [that] cannot be defused"<sup>2</sup>—"40 million kids 10 years old and under . . . [growing up] fatherless, godless and jobless."<sup>3</sup> Many of these children, he claimed, would soon become what he labeled "superpredators."<sup>4</sup>

To stanch this perceived epidemic, school districts throughout the

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1. Richard Zoglin, *Now for the Bad News: A Teenage Time Bomb*, TIME, Jan. 15, 1996, at 52.

2. John J. DiIulio, Jr., *Why Violent Crime Rates Have Dropped*, WALL ST. J., Sept. 6, 1995, at A19 (warning that "in five years we can expect at least 30,000 more young murderers, rapists and muggers on the streets . . . a new and more vicious army of predatory street criminals").

3. Fox Butterfield, *Crime Continues to Decline, but Experts Warn of Coming 'Storm' of Juvenile Violence*, N.Y. TIMES, Nov. 19, 1995, at A18 (quoting DiIulio and also citing F.B.I. statistics showing a decline of 2% overall in the crime rate from 1992 to 1994 and an 4% decline during this same period for violent crime); DiIulio, Jr., *Why Violent Crime Rates Have Dropped*, *supra* note 2.

4. John J. DiIulio, Jr., *The Coming of the Superpredators*, THE WEEKLY STANDARD, Nov. 27, 1995, at 23 (predicting the advent of tens of thousands of "severely morally impoverished juvenile super-predators" who "fear neither the stigma of arrest nor the pain of imprisonment. They live by the meanest code of the meanest streets, a code that reinforces rather than restrains their violent, hair-trigger mentality. . . . [T]hey will do what comes 'naturally': murder, rape, rob, assault, burglarize, deal deadly drugs, and get high"); David Westphal, *Youth Crime Decline Defies Predictions*, CHATTANOOGA TIMES, Dec. 13, 1999, at A7 (quoting DiIulio's description of the "frightening variant of young criminal": "They are remorseless, radically present-oriented and radically self regarding. . . . They lack empathic impulses; they kill or maim or get involved in other forms of serious crime without much consideration of future penalties or risks to themselves or others").

country adopted what is commonly known as a “zero tolerance” policy. Reversing long-standing campaigns aimed at keeping children at risk *in* school, the new policy seeks to identify troublesome students and get them out of school. Zero tolerance imposes expulsion or suspension for a wide range of misconduct that previously would have been dealt with through lesser sanctions such as detention, or through remedial efforts such as counseling. Since the mid-’90s, the number of infractions punished has skyrocketed, and the sanctions applied have been much more severe. In Chicago, for example, expulsions rose from eighty-one to approximately 1000 during the first three years of zero tolerance;<sup>5</sup> Massachusetts saw a sixteen-fold increase.<sup>6</sup> The most recent available national totals show that in 1998, more than 3.1 million children were suspended from school.<sup>7</sup> Suspension periods vary, but it is estimated that annually approximately 1.5 million students are excluded from a substantial part of the school year.<sup>8</sup> The consequence is a denial of *any* public education in the many states that do not offer alternative schooling to expelled or suspended students.<sup>9</sup>

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5. See Applied Research Center, *Facing the Consequences: An Examination of Racial Discrimination in U.S. Public Schools*, (Mar. 2000), at 6, available at <http://www.arc.org/erase/FTC2zero.html>. See also K. Fornek, *The Safe Schools Challenge: Program Loses Seats As Expulsions Soar* (Feb. 1999), available at <http://catalyst-chicago.org/02-99/029main.htm> (reporting an eight-fold increase in expulsions since the 1995-96 school year, and noting that Chicago public schools punish the possession of alcohol, drugs, or weapons on school grounds with expulsion); GENERATION Y, A PROJECT OF THE SOUTHWEST YOUTH COLLABORATIVE, *SUSPENDED EDUCATION: A PRELIMINARY REPORT ON THE IMPACT OF ZERO TOLERANCE ON CHICAGO PUBLIC SCHOOLS* (citing CHICAGO PUBLIC SCHOOLS, *END OF THE YEAR REPORTS TO ILLINOIS STATE BOARD OF EDUCATION, 1992-93 THROUGH 1998-99*, at 12).

6. See MASS. DEP’T OF EDUC., *STUDENT EXCLUSIONS IN MASSACHUSETTS PUBLIC SCHOOLS (1997-1998)* 1 (Apr. 1999), available at [http://www.doc.mass.edu/infoservices/reports/9798/exclu98\\_1.html](http://www.doc.mass.edu/infoservices/reports/9798/exclu98_1.html) (last visited Jan. 30, 2003). The number of expulsions rose in Massachusetts from ninety students in 1992-93 to 900 students in 1993-94, reaching approximately 1500 students each year from 1994 to 1998. *Id.* In Milwaukee, zero tolerance brought a three-fold increase in suspensions in one year (from twenty-five students during a three-month period in the 1996-97 school year to seventy-nine for the same period the next year). Caroline Hendrie, *Student Expulsions Soar under Milwaukee’s New Discipline Policy*, *THE BOOKSHELF*, Dec. 10, 1997. See also Carl Campanile, *Suspension Disbelief—School Kids Are Getting Sent Home in Doves*, *NEW YORK POST*, Nov. 12, 2001; Paul H.B. Shin, *Suspensions Go through the Roof; Schools Tossed Out Record 26,820 Kids*, *NEW YORK DAILY NEWS*, Nov. 5, 2000, at 6.

7. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, *ELEMENTARY AND SECONDARY SCHOOL SURVEY: 1998* (June 2000). Statistics on student discipline are available and searchable at [http://205.207.175.80/ocrpublic/wds\\_list98P.asp](http://205.207.175.80/ocrpublic/wds_list98P.asp) (reporting national school discipline levels by projecting data reported from sampling of school districts and schools, including 3,185,721 out-of-school suspensions and 87,298 expulsions).

8. Philip T.K. Daniel & Karen Bond Coriell, *Suspension and Expulsion in America’s Public Schools: Has Unfairness Resulted from a Narrowing of Due Process?*, 13 *HAMLIN J. PUB. L. & POL’Y* 1, 15 (1992).

9. See *infra* note 34.

With hindsight, we know that the sensational school shootings were in fact unconnected events, aberrant in the affected schools and unreflective of the substantial downward trend of juvenile crime. Various studies reported that juvenile crimes of violence fell in the 1990s by as much as 30%.<sup>10</sup> In high schools specifically, the incidence of threatening behavior in 1996 changed little from two decades earlier,<sup>11</sup> with the chances of being killed in school far less than being struck by lightning.<sup>12</sup> The “juvenile crime bomb” proved illusory (as DeLulio himself eventually acknowledged<sup>13</sup>), but the severe measures designed to deal with it remain entrenched. Zero tolerance has taken on a life of its own, partly because public misperception remains high,<sup>14</sup> and partly because in our hardheaded times isolation seems a safer bet than rehabilitation. Moreover, public school personnel have a number of powerful incentives to keep zero tolerance policies in place: federal aid is contingent on mandatory expulsions for weapons offenses; teachers are loathe to abandon a policy

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10. See *The Juvenile Crime Control and Delinquency Prevention Act of 2001: Hearing on H.R. 1900 Before the Subcomm. on Select Education of the House Comm. on Education and the Workforce*, 107th Cong. 147-49 (2001) (testimony of Rep. Pete Hoekstra) (citing FBI statistics showing that in “1999, for the fifth consecutive year, the rate of juvenile arrests for violent crime index offenses—murder, forcible rape, robbery, and aggravated assault—declined. As a result the juvenile violent crime arrest rate in 1999 was the lowest in a decade”); Westphal, *supra* note 4, at A7 (reporting the violent crime arrest rates for juveniles declined 30% between 1994 and 1999, and the juvenile murder rate declined by half).

11. THOMAS SNYDER ET AL., U.S. DEP’T OF EDUC., NATIONAL CENTER FOR EDUCATION STATISTICS PUB. N. 98-013, *THE CONDITION OF EDUCATION* (1998), available at <http://nces.ed.gov/pubs98/condition98/index.html>. Between 1993 and 1999, the percentage of high school students who were threatened or injured on school property remained roughly constant, at between 7% and 8% annually. NATIONAL CENTER FOR EDUCATION STATISTICS, *INDICATORS OF SCHOOL CRIME AND SAFETY* (2001), available at <http://nces.ed.gov/pubs2002/crime2001>. See also KIM BROOKS ET AL., JUSTICE POLICY INSTITUTE AND CHILDREN’S LAW CENTER, *SCHOOL HOUSE HYPE: TWO YEARS LATER* (Apr. 2000); Margaret Graham Tebo, *Zero Tolerance, Zero Sense*, 86 A.B.A. J. 40, 41 (2000) (“[N]ationwide, statistics gathered by the Justice Policy Institute and the U.S. Department of Education show that crime of all sorts is down at public schools since 1990—some studies say by as much as 30 percent.”).

12. Tebo, *supra* note 11, at 41.

13. Westphal, *supra* note 4, at A7. Dilulio admits that his predictions for an imminent crime wave proved unfounded, but he says that juvenile crime remains several times the rate of a half-century ago. *Id.* He further indicates that he regrets having used such a “dehumanizing” label as “super-predator”. Richard Morin, *Leading with His Right: John Dilulio, Ready to Go to the Mat with a Faith-Based Approach to Crime*, WASH. POST, Feb. 26, 2001, at C01.

14. According to an analysis of newspaper and television crime coverage undertaken by the Berkley Media Studies Group and the Justice Policy Institute, the media “unduly connects youth to crime and violence” and overrepresents youth of color as perpetrators. LORI DORFMAN & VINCENT SHIRALDI, *BUILDING BLOCKS FOR YOUTH, OFF BALANCE: YOUTH, RACE & CRIME IN THE NEWS* (Apr. 2001). See also James Forman, Jr., *Overkill on Schools*, WASH. POST, Apr. 23, 2001, at A15 (reporting an NBC/Wall St. Journal poll showing 71% feel a school shooting is likely in their community, and that 62% feel youth crime is rising).

that efficiently rids the classroom of troublemakers; and school administrators benefit because expelled students are often poor students who score poorly on the standardized tests that are increasingly used to evaluate their schools.<sup>15</sup>

Notwithstanding the popularity of zero tolerance policies, the resulting denial of public education to massive numbers of children threatens irreparable damage, not only to these individuals but to all of us.<sup>16</sup> This Article assesses the intended and unintended consequences of public school zero tolerance policies and details a number of constitutional infirmities of such policies that could provide an avenue for reform. We begin in Part I with a description of the multifaceted role that zero tolerance has come to play in public schools. Part II examines the rationale and actual impact of zero tolerance as school policy, and Part III explores what we argue are significant constitutional constraints on use of this policy to deny schoolchildren a public education. After assessing the as-yet-unresolved status of educational rights in the federal Constitution, we delineate a number of reasons why expulsions from the public school system may be constitutionally impermissible under both state education provisions and federal and state equal protection clauses.

## I. THE ELEMENTS OF ZERO TOLERANCE DISCIPLINE IN PUBLIC SCHOOLS

A zero tolerance school policy is generally understood to be one that applies a prescribed, mandatory sanction for an infraction—typically expulsion or suspension—with minimal, if any, consideration of the circumstances or consequences of the offense, or the intent, history, disabilities, or prospects of the offender.<sup>17</sup> But in most schools throughout the country, zero tolerance means more than “one strike and you’re out.” It also includes a raft of mutually reinforcing laws and policies designed to investigate, identify, remove, and punish troublesome students. A full zero

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15. Anthony DeMarco, *Suspension/Expulsion: Punitive Sanctions from the Jail Yard to the School Yard*, 34 NEW ENG. L. REV. 565, 571 (2000); Dirk Johnson, *Schools' New Watchword: Zero Tolerance*, N.Y. TIMES, Dec. 1, 1999, at A20.

16. In a previous article, we described the use of educational deprivation as a new and disturbing form of federally mandated punishments now being applied not only against high school students, but against college students and prisoners as well. See Eric Blumenson & Eva Nilsen, *How to Create an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61 (2002) (describing federal laws enacted over the past decade denying prisoners eligibility for Pell grants—which formerly financed college educations in prison—and either temporarily or permanently barring anyone ever convicted of a drug offense from federal college loans or aid; questioning the legality of the latter).

17. See *infra* notes 18-28.

tolerance regime is likely to include each of the following components.

*Mandatory suspensions and expulsions.* Expulsions and suspensions were once imposed only for either the most serious offenses or repeat offenders. The new zero tolerance policy imposes expulsion or suspension for a wide range of other conduct that previously would have been dealt with through after-school detentions, withdrawal of privileges, counseling, mediation, and other methods.<sup>18</sup> By making removal from school a mandatory sanction in all these cases, zero tolerance renders school personnel helpless to craft that response most suited to the situation, and it also narrows the disciplinary inquiry to the single issue of whether the student committed the infraction. Off the table are such significant factors as why the student committed the offense, whether it was intentional,<sup>19</sup> whether the student has a prior history of infractions or achievements, and the student's personal circumstances.<sup>20</sup>

The initial impetus for mandatory expulsions and suspensions came from Congress, which in 1994 enacted the Gun Free Schools Act.<sup>21</sup> This law conditions federal aid on a state's adoption of two zero tolerance regulations, one mandating a one-year expulsion for students who bring certain kinds of weapons to school<sup>22</sup> and another requiring referral of these

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18. For discussion on the variety of alternative disciplinary methods that have been pushed aside by zero tolerance, see Russell Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence*, in 72 NEW DIRECTIONS FOR YOUTH DEVELOPMENT 17, 36-37 (R. Skiba & G. Noam eds., Winter 2001).

19. For example, under some zero tolerance policies a student will be suspended or expelled even if she unintentionally possesses a weapon or contraband. *See, e.g., Seal v. Morgan*, 229 F.3d 567 (6th Cir. 2000) (overturning a student's expulsion for unwittingly bringing a knife to school in his mother's car and finding the school's zero tolerance policy for unknowing possession not rationally related to any legitimate state interest).

20. Testimony at a Massachusetts legislative hearing illustrates the severity of combining mandatory tolerance with strict liability. According to the witness, a lawyer for high school student "Marie B.," her client brought a butter knife to school after she had been harassed and threatened by other girls. Charges were filed and evidence adduced at a three-minute disciplinary hearing—limited, however, to the facts that Marie B. had brought the knife to school, that she had not brandished or used it, and that the knife was a weapon under the school rules. The witness testified that "this three-minute farcical hearing resulted in Marie's permanent expulsion . . . . That means forever. She has no right to a future review, or return to any Massachusetts public school." *Joint Committee on Education, Arts & Humanities in Support of HB 969, HB 990 and HB 1356 to create a system of alternative education in Massachusetts* (May 22, 2001) (testimony of Isabel Raskin).

21. 20 U.S.C. § 7151(b) (2002).

22. 20 U.S.C. § 7151(b)(1) ("Each State receiving Federal funds under any subchapter of this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school, under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis if such modification is in writing."). Prior to its revision and recodification in 2002, the Gun Free Schools Act mandated the sanction for all weapons offenses. 20 U.S.C.S. § 8921(b) (2001).

students to law enforcement.<sup>23</sup> Soon after passage, all fifty states enacted the required zero tolerance policies,<sup>24</sup> but a large majority of states chose to go further by requiring the expulsion of students who commit drug, alcohol, and other school infractions, as well.<sup>25</sup> According to one study, by 1998, 79% of public schools had zero tolerance policies for tobacco, 87% for alcohol, and 88% for drugs.<sup>26</sup> Such policies can produce highly disproportionate and destructive punishments, such as the two-year expulsion applied to a first offender caught with marijuana in a Milwaukee school.<sup>27</sup> Some states also require suspension or expulsion for infractions

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There are two qualifications to the mandatory expulsions. First, in a compelling case, the school district's chief administrator retains discretion to modify the sanction. 20 U.S.C. § 7151(b)(1) (stating that the required state expulsion law "shall allow the chief administering officer of such a local educational agency to modify such expulsion requirement for a student on a case-by-case basis if such modification is in writing"). Although the federal law thus allows some discretion in the imposition of punishment, some schools choose not to adopt discretionary policies, and some schools that do have such policies may fail to abide by them. *See, e.g.,* *Lyons v. Penn. Hills Sch. Dist.*, 723 A.2d 1073 (Pa. Commw. Ct. 1999). According to a 1998 Department of Education study, only 34% of weapons expulsions were shortened to less than one year, based on reports submitted by forty-three states. *See* BETH SINCLAIR ET AL., U.S. DEP'T OF EDUC., REPORT ON STATE IMPLEMENTATION OF THE GUN-FREE SCHOOLS ACT—SCHOOL YEAR 1996-1997 4 (1998), available at [www.ed.gov/pubs/gunfree](http://www.ed.gov/pubs/gunfree) (compilation of statistics for expulsions in American schools).

Second, the law permits, but does not require, states to provide educational services to expelled students in alternative settings. Section 7151(b)(2), formerly 8921(b)(2), provides that "[n]othing in this subpart shall be construed to prevent a State from allowing a local educational agency that has expelled a student from such a student's regular school setting from providing educational services to such student in an alternative setting." 20 U.S.C. § 7151(b)(2). The U.S. Department of Education has interpreted this law to require "removal from the student's regular school program at the location where the violation occurred," thus permitting the district to offer educational services that are distinguishable from the regular school placement. U.S. DEP'T OF EDUC., GUIDANCE CONCERNING STATE AND LOCAL RESPONSIBILITIES UNDER THE GUN-FREE SCHOOLS ACT OF 1994, 9 (1995).

23. 20 U.S.C. § 7151(h)(1) provides that "[n]o funds shall be made available under any subchapter of this chapter to any local educational agency unless such agency has a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to a school served by such agency." Additionally, forty-one states have laws requiring schools to report students to law enforcement for certain conduct committed in school. HARVARD UNIV. ADVANCEMENT PROJECTS & CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES, Executive Summary 3 (2000), available at [http://www.civilrightsproject.harvard.edu/research/discipline/call\\_opport.php](http://www.civilrightsproject.harvard.edu/research/discipline/call_opport.php) [hereinafter HARVARD REPORT].

24. *See* Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM U. L. REV. 1039, 1047 & n.46 (2001) (citing the laws of the fifty states and the District of Columbia).

25. *See* Chris Pipho, *Living with Zero Tolerance*, 79 PHI DELTA KAPPAN 725 (1998); Joan Wasser, *Zeroing in on Zero Tolerance*, 15 J.L. & POL. 747, 750 (1999) (noting that the American Federation of Teachers, the nation's largest teachers' union, lobbied senators for a policy mandating expulsion for possession of weapons or drugs in school).

26. *See* KATHRYN A. CHANDLER ET AL., U.S. DEPT. OF EDUC., NATIONAL CENTER FOR EDUCATION STATISTICS PUB. NO. 1999-057, Indicators of School Crime and Safety, Table A1 (1999), available at <http://www.nces.ed.gov/pubsearch/pubsinfo.asp?pubid=1999057>.

27. Anne Davis, *Zero Tolerance Is Too Severe, Father Says*, MILWAUKEE J. SENTINEL, Nov. 16,

committed off school grounds.<sup>28</sup>

The consequence of these mandatory sanctions is that, although school crime rates have remained roughly stable for the last two decades, the use of suspension has almost doubled.<sup>29</sup> More than 3.1 million students were suspended (about half for a substantial period) and 87,000 students expelled during the 1998 school year,<sup>30</sup> with expulsions rising significantly in such cities as Boston,<sup>31</sup> Chicago<sup>32</sup> and Milwaukee.<sup>33</sup> Whether these students continued to receive some form of education depended on geography: twenty-six states require school districts to provide alternative schools for these students, but eighteen states give individual school districts discretion to determine whether to provide alternative education, and many of these offer no educational program at all.<sup>34</sup>

*Expansion of disciplinary action to trivial infractions.* Zero tolerance regimes typically ignore the most basic of distinctions among offenses: how dangerous was it? Minor incidents that would have been handled quickly and informally by school officials are now the subject of disciplinary hearings and even reports to the district attorney for prosecution.<sup>35</sup> In many schools, zero tolerance sanctions are applied

1999, at 1 (critical of severity of zero tolerance penalties).

28. Chicago's school zero tolerance policies are in effect twenty-four hours a day, seven days a week. Johnson, *supra* note 15, at A20. Massachusetts adopted the so-called "Principal's Bill," which gave principals the power to suspend students convicted of felonies so long as the principal determines that the student's presence at school is detrimental to the general welfare of the school. See DeMarco, *supra* note 15, at 568.

29. VINCENT SCHIRALDI & JASON ZIEDENBERG, JUST. POL'Y INST. SCHOOLS AND SUSPENSIONS: SELF-REPORTED CRIME AND THE GROWING USE OF SUSPENSIONS 3 (2000), available at <http://www.cjic.org/sss/sss.html>. This report finds the current suspension rate as 6.8% of students. *Id.*

30. See *supra* note 7 and accompanying text.

31. See *supra* note 6 and accompanying text.

32. See *supra* note 5 and accompanying text.

33. See *supra* note 6 and accompanying text.

34. Some states offer or require alternative schooling for an expelled student, while others have no alternative programs at all even though state constitutions generally guarantee students a right to free public education. See HARVARD REPORT, *supra* note 23, Executive Summary 3 (stating that only twenty-six states require alternative education assignments for students suspended or expelled). The Report's Appendix III details the availability of alternative education programs in each state. *Id.* Appendix III. According to one commentator's review of the Department of Education's statistics, more than 40% of students expelled from 1996-99 were not offered alternative education. Wasser, *supra* note 25, at 762. See also BROOKS ET AL., *supra* note 11, at 24 ("Probably the most disturbing finding in the Massachusetts report is that 37% of youth expelled in 1997-98 did not receive alternative education in another school or special education program. In 75% of those cases, alternative education was not provided because the school district chose not to do so."); Jessica Portner, *Districts Scramble to Cope with Student Expulsions*, EDUC. WK., Oct. 9, 1996 (noting that even in states where alternative education is mandated, there is no funding for building the schools).

35. George F. Will sees zero tolerance school policies as an example of the ascendancy of "Bureaucratic Legalism" over "Hidden Law, on which privacy and civilized life generally depend . . . .

equally against weapons and alcohol offenses, drug sale and possession offenses, and assault and disorderly offenses. They also may apply against such infractions as tardiness, disrespect, and defiance, which, in addition to increasing the numbers, allow bias to creep into the decision to discipline.<sup>36</sup> It is estimated that the vast majority of expulsions and suspensions are imposed for noncriminal, nonviolent minor offenses, such as smoking cigarettes and truancy.<sup>37</sup> The rest range from minor to trivial, and according to media reports include such infractions as possession of such “weapons” as key chains,<sup>38</sup> staplers,<sup>39</sup> and geometry compasses;<sup>40</sup> and such “drugs” as lemon drops, asthma inhalers, Midol, and Advil.<sup>41</sup>

*Surveillance and searches.* To make zero tolerance sanctions effective, schools have increasingly relied on investigative searches, informants, and

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[C]ivilized life depends on informal rules and measures—social winks, . . . preventing such mundane conflicts from becoming legal extravaganzas or occasions for moral exhibitionism . . . . One sound of such a society is the ‘snap’ of handcuffs being placed on a 12-year-old subway snacker.” George F. Will, *Zero Tolerance Policies Are Getting Out of Hand*, BOSTON GLOBE, Dec. 25, 2000, at A23. *See also* Johnson, *supra* note 15, at A1 (“[T]he new school-conduct ethos has profoundly changed views about what was once deemed usual, if annoying, behavior by adolescents. No longer is the playground scrap or the kickball tussle deemed a rite of passage best settled by a teacher who orders the combatants to their corners, hears out the two sides and demands apologies and a handshake.”); Jessica Portner, *Zero-Tolerance Laws Getting a Second Look*, EDUC. WK., March 26, 1997 (quoting a Boston attorney’s view that “[e]xpulsion is the first measure of punishment that’s applied in many schools, and kids are put on the street for engaging in activities that five years ago might have warranted detention”); PAUL M. KINGERY, HAMILTON FISH INSTITUTE ON SCHOOL AND COMMUNITY VIOLENCE, ZERO TOLERANCE: THE ALTERNATIVE IS EDUCATION (2000), at <http://hamfish.org/pv/pub/susexp.html> (last visited Sept. 3, 2002) (describing suspensions or expulsions of various children for pointing a finger in anger at another child, writing an essay about blowing up the school, and bringing a one-inch long G.I. Joe accessory handgun to school).

36. RALPH C. MARTIN III, AM. BAR ASS’N, A.B.A. ZERO TOLERANCE POLICY REPORT 4 (2001), available at [www.ABA.net.org/crimjust/juvjus/zerotolreport.html](http://www.ABA.net.org/crimjust/juvjus/zerotolreport.html).

37. *See* Daniel & Coriell, *supra* note 8, at 15 n.103 (citing Gail Sorenson, *Focus on Punishment: The Worst Kinds of Discipline*, in UPDATE ON LAW-RELATED EDUCATION 27 (Fall 1982)).

38. *Georgia Pols Want ‘Common Sense’ to Trump ‘Zero Tolerance’* (Jan. 21, 2002), available at <http://www.foxnews.com/story/0,2933,43666,00.html> (“Georgia got its taste of zero tolerance-gone-wild as dozens of children were disciplined for what appeared to be minor infractions,” including a keychain deemed a weapon) [hereinafter Fox News].

39. *See* James M. Peden, *Through a Glass Darkly: Educating with Zero Tolerance*, 10 KAN. J.L. & PUB. POL’Y 369, 374 (2001) (citing *World News Tonight with Peter Jennings* (ABC television broadcast, Feb. 8, 2000)). The student was suspended for several months for holding a stapler as if it were a gun. *Id.*

40. Jordana Hart, *Creeping Violence Worries Suburban Schools; Stricter Rules Enforced to Seize ‘Weapons,’* BOSTON GLOBE, Apr. 18, 1994, at 15 (reporting a broadening of the definition of weapons to include a geometry compass).

41. Cara DeGette, *Busted for Lemon Drops, First-Grader Suspended*, DENVER POST, Nov. 19, 1997, at A01; Jessica Portner, *Suspensions Spur Debate Over Discipline Codes*, EDUC. WK., Oct. 23, 1996, at 10 (reporting that a fourteen-year-old student received a thirteen-day suspension for possession of Midol tablets in school and a seventh grader was suspended for a day for bringing Advil to school); Tebo, *supra* note 11, at 44 (citing “a middle schooler who shared her asthma inhaler on the school bus with a classmate experiencing a wheezing attack [being] suspended for drug trafficking”).

surveillance. The United States Supreme Court has facilitated this effort in a series of cases that have successively weakened the Fourth Amendment rights of students. In its 1985 opinion in *New Jersey v. TLO*, the Court found that although the Fourth Amendment applies to searches of students by public school officials, a standard less than probable cause was sufficient.<sup>42</sup> Ten years later, the Court approved random drug testing of high school athletes;<sup>43</sup> in 2002, the Court upheld drug testing of all students who engage in extracurricular activities as a way to deter drug use and promote safety.<sup>44</sup> Given the evisceration of any requirement of individualized suspicion and the virtual elimination of any expectation of privacy among public school students, the Court's incantation of Fourth Amendment protections to public schools is more ritual than substance. It is also clear that, whatever minimal doctrinal protections survive, random locker searches, video surveillance, records identifying potential troublemakers, and drug testing are increasingly commonplace in many schools around the country.<sup>45</sup>

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42. *New Jersey v. TLO*, 469 U.S. 325, 340 (1985) (balancing rights of students against a school's need for order; warrant and probable cause requirements would "unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed"). The Court articulated a standard akin to the "reasonable suspicion" standard adopted in *Terry v. Ohio*, 392 U.S. 1, 20 (1968), when it declared that in order to conduct a search, school officials must (1) have reasonable suspicion at the time the search is undertaken and (2) contain the search specifically to the area reasonably included in that suspicion. 469 U.S. at 341.

43. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 657 (1995) (allowing drug testing of athletes under rationale that public schools are a special environment because of duties owed to all students, and "the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children"). Individual students, however, may have a lower expectation of privacy. *Id.* at 663.

44. *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

45. *See, e.g.*, Paul Donsky, *Cameras Are Rolling in School*, ATLANTA J. & CONST., Jan. 31, 2002, at 1JN (reporting that Atlanta has installed video surveillance cameras in all of its ninety-seven school buildings and will be installing additional cameras in ball fields and parking lots); Tamar Lewin, *Schools Across U.S. Await Ruling on Drug Tests*, N.Y. TIMES, Mar. 20, 2002, at A26 (reporting that many districts will adopt drug testing if the Supreme Court upholds Oklahoma's suspicionless drug tests of extracurricular participants (which the Court subsequently did, *see supra* note 44)); Tom Verdin, *Student Violence Profiling Criticized*, BOSTON GLOBE, Dec. 16, 1999, at A27 (reporting that ten Los Angeles schools will circulate a questionnaire, Mosaic 2000, to teachers and administrators asking who, if any, of their students have made references to suicide or threats to others); NAT'L CENTER FOR EDUC. STAT., INDICATORS OF SCHOOL CRIME AND SAFETY, Table A3 (1998), available at <http://nces.ed.gov/pubs98/safety/> (reporting that "drug sweeps" were utilized in 19% of public schools during the 1996-97 school year); OFF. OF NAT'L DRUG CONTROL POL'Y, WHAT YOU NEED TO KNOW ABOUT DRUG TESTING IN SCHOOLS i (2002), available at [http://www.whitehousedrugpolicy.gov/pdf/drug\\_testing.pdf](http://www.whitehousedrugpolicy.gov/pdf/drug_testing.pdf) (noting that the Supreme Court has "greatly expanded the scope of school drug testing . . . [which can provide] enormous benefits"). *See also* Forman, Jr., *supra* note 14, at A15 (reporting a bill before the Texas legislature to allow school principals to carry weapons). A report prepared for the Justice Department lists a number of suggested public school security measures including student identification cards, surveillance cameras, drug dogs, hand-held metal detectors, random locker searches, and "crimestopper hotlines with rewards for

*Criminal referral and punishment.* Surveillance and security efforts have led to dramatic increases in the criminal punishment of high school students. So have new federal and state laws requiring school personnel to report certain categories of offenders to police or prosecutors.<sup>46</sup> Some states and school districts have instituted regular meetings of school officials, law enforcement officials, and social workers to identify and deal with present and potential troublemakers.<sup>47</sup>

In addition to mushrooming prosecutions, criminal punishment is more severe. Between 1991 to 1995, forty states changed their juvenile delinquency laws to make it easier for juveniles to be sentenced as adults.<sup>48</sup> These youthful offenders might now receive both a criminal

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information.” MARY W. GREEN, U.S. DEP’T OF JUST., NCJ NO. 178265, THE APPROPRIATE AND EFFECTIVE USE OF SECURITY TECHNOLOGIES IN U.S. SCHOOLS: A GUIDE FOR SCHOOLS AND LAW ENFORCEMENT AGENCIES, Ch. 1 (1999) at [http://www.ncjrs.org/school/ch1\\_6.html](http://www.ncjrs.org/school/ch1_6.html).

Regarding routine searches, a Florida journalist described a search technique utilized in Florida’s Pinellas County middle and high schools, each of which conducts searches several times a year:

[T]he door opens and a campus police officer with a dog enters the classroom. Students are told that a search for drugs, weapons and other contraband is about to begin, and they are urged to confess if they are carrying any illegal items. Then all students are ordered to file out of the room. While they wait in the hallway, their personal belongings and the classroom are searched by the officer and a specially trained drug-sniffing dog.

Diane Steinle, *Treading on Student Rights*, ST. PETERSBURG TIMES, Sept. 24, 2000, at C1 (reporting also the increasing use of card entry systems, panic alarms, surveillance cameras, and drug dogs in other schools). See also *Thompson v. Carthage Sch. Dist.*, 87 F.3d 979 (8th Cir. 1996) (holding that generalized search of all male students in grades six to twelve for weapons was constitutionally reasonable); *Isiah v. Wisconsin*, 500 N.W.2d 637 (Wis. 1993) (determining that student had no reasonable expectation of privacy in his locker); U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUST., ANNUAL REPORT ON SCHOOL SAFETY 1998, at 6-7 (1998).

46. Forty-one states require schools to report students to law enforcement for various conduct committed in school. HARVARD REPORT, *supra* note 23, at Executive Summary 3.

The federal Gun Free Schools Act requires referral to law enforcement when the student has brought a firearm to school. 20 U.S.C. § 7151(h)(1) (“No funds shall be made available under this Act to any local educational agency unless such agency has a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to a school served by such agency.”).

47. In Massachusetts, some communities hold periodic “juvenile justice roundtables” that include school officials, members of law enforcement, and social workers (but not the students or their parents or advocates). See Johanna Wald, *School Safety or Set-Up? The Legislature Considers Two Bills on Juvenile Justice Roundtables*, BOSTON LAW TRIB., July 23, 2001, at 1. See generally SUFFOLK UNIVERSITY LAW SCHOOL JUVENILE JUSTICE CENTER, JUVENILE JUSTICE ROUNDTABLES (2001), available at <http://www.law.suffolk.edu/cls/delt.cfm?cid=234>. Critics of these collaborative discussions explain that the real purpose of the meetings is to target students for punishment, both in school and with the police; that parents are not notified about the targeting of their children; and that much of the material discussed is confidential.

48. PATRICIA GRIFFIN ET AL., OFFICE OF JUV. JUST. & DELINQUENCY PREVENTION, U.S. DEP’T OF JUST., TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS, at Foreword (December 1998). Recently, the ABA issued a report that attempts to meet the challenge of the increasingly youthful prison population. The report states that at least two hundred thousand children under eighteen are now tried as adults each year, and that between 1985 and 1997

record and a prison sentence, producing the severe and long-lasting impact on life prospects that the juvenile system was designed to avoid.

## II. THE RATIONALE AND REALITY OF ZERO TOLERANCE REGIMES

Zero tolerance in public education constitutes a form of triage: it attempts to protect and better educate one group of children by identifying and excising another. The latter children may be viewed as “superpredators,” delinquents, or merely potential troublemakers, but in any event they are regarded as more dangerous, more hopeless, and more dispensable than their counterparts were a decade ago. The new disciplinary approach therefore largely eschews educational and rehabilitative measures for these students. They are instead to be handled and defused through the incapacitative and deterrent effects of suspensions, expulsions, and referrals to the criminal system.

We have noted that today’s students are in fact no more violent than in prior decades,<sup>49</sup> and there is good reason to doubt that they are any more incorrigible than their predecessors. Even so, weapons, drug abuse, and violence to *any* degree threaten both the safety and well-being of students, and disruptions in class undermine the learning process. The salient policy question about zero tolerance is whether it provides an effective method for dealing with these problems. This is also a difficult question, both because the claimed benefits of zero tolerance are hard to verify empirically and because some of these benefits are supposed to accrue in the long run. There is now enough data since the advent of zero tolerance, however, with which to make a preliminary assessment of its effectiveness in deterring and/or removing disruptions and violence from public schools.

### A. Deterrence

In an ideal world, zero tolerance policies would constitute so powerful and efficient a deterrent that almost all students would be well behaved,

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the number of juveniles in adult prisons had doubled, climbing to as high as 7,400. YOUTH IN THE CRIMINAL JUSTICE SYSTEM: GUIDELINES FOR POLICYMAKERS AND PRACTITIONERS 27 (2001), available at <http://www.abanet.org/crimjust/pubs/reports/index.html> [hereinafter YOUTH IN THE CRIMINAL JUSTICE SYSTEM]. For examples of the harsher approach prevailing in recent years, see California’s Gang Violence and Juvenile Crime Prevention Act of 1998, § (2)(k), Ballot Measure 4, 1999-2000 Legis. Sess. (Cal. 1999) (permitting the state to file criminal charges against children 14 and older, among many provisions that were approved by voters as Proposition 21); MASS. GEN. LAWS ch. 119, § 52 (mandating adult imprisonment of some children ages fourteen to seventeen based on their prior records and the seriousness of offenses).

49. See *supra* notes 10-12.

and very few would suffer sanctions or the destructive consequences of educational deprivation. Of course, this has not happened; as reported above, the number of suspensions and expulsions has skyrocketed.<sup>50</sup>

It is more difficult to say whether zero tolerance policies are serving as a deterrent to *some* degree by making rules violations too costly for some students. Government statistics report that juvenile violent crime did fall in the 1990s, but this reduction occurred both on and off school grounds.<sup>51</sup> In high schools, the number of students threatened or injured with a weapon on school property remained constant from 1993 to 1999, during which time zero tolerance policies were widely adopted in the wake of the 1994 federal zero tolerance weapons requirement.<sup>52</sup>

What these figures prove is unclear because of our inability to control for extraneous factors. Those experts who have attempted to isolate the impact of zero tolerance discipline have found little evidence that these sanctions are substantially influencing student behavior.<sup>53</sup> One reason may be that, although the expulsion sanction is severe, the likelihood of its application to any individual violator is quite low: except for highly visible infractions like fighting in class, few violators are caught.<sup>54</sup> Two scholars who have written widely on the issue report that schools substantially relying on zero tolerance policies “continue to be less safe than schools that implement fewer components of zero tolerance.”<sup>55</sup>

However, a conception of deterrence that encompasses only the “scare” factor associated with tough sanctions may be too crude to capture the full impact zero tolerance could have on student behavior over a longer period.

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50. See *supra* notes 5-8 and accompanying text.

51. See *supra* note 3.

52. PHILIP KAUFMAN ET AL., U.S. DEP'T OF EDUC. & JUST., NCJ NO. 190075, INDICATORS OF SCHOOL CRIME AND SAFETY: 2001, available at <http://nces.ed.gov/pubs2002/crime2001>.

53. HARVARD REPORT, *supra* note 23, at 8; Troy Adam, *The Status of School Discipline and Violence*, 567 ANNALS AMER. ACAD. POL. & SOC. SCI. 140, 148 (2000) (noting lack of data showing effectiveness of zero tolerance in making schools safer); Russ Skiba & Reese Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 PHI DELTA KAPPAN 372, 376 (1999) (“[W]e lack solid evidence to support the effectiveness of harsh policies in improving school safety.”); Russ Skiba & Reese Peterson, *School Discipline at the Crossroads*, 66 EXCEPTIONAL CHILD. 335, 340 (2000) (“Disorder and violence in America’s schools do not appear to have been appreciably diminished, despite 4 years of national policy explicitly encouraging tougher responses.”). Skiba and Peterson also report on the negative consequences of relying on punishment-based approaches to teach new behavior. *Id.* at 342.

54. According to one study, “less than 1 percent of high school students who reported carrying a firearm to school were actually caught and considered for expulsion in 1997.” KINGERY, *supra* note 35. The report contrasts the high deterrent effect produced by zero tolerance when applied to in-school fighting, noting that the policy was well communicated to students and accompanied by alternative placements. *Id.*

55. See Skiba & Peterson, *School Discipline at the Crossroads*, *supra* note 53, at 337.

Arguably, zero tolerance might also exert a slower and more subtle influence by incrementally increasing the reputational and social costs (and not simply the punitive consequences) of troublemaking. This theory originally arose in the context of police strategy, and it might be thought to support a zero tolerance educational policy as well. According to one of its proponents, Professor Dan Kahan, a community's response to disorder helps determine the norms and behavior of its members:

Individuals decide to commit crimes . . . based in part on their perception of the values, beliefs, and behavior of other individuals; the law plays a role in shaping these perceptions . . . . [Disorder signals] not only that members of the community are inclined to engage in disorderly conduct, but also that the community is unable or unwilling to enforce basic norms. . . . The very openness of such behavior, moreover, suggests that violating basic norms carries little social sanction.<sup>56</sup>

Kahan believes that this dynamic suggests “the potential utility of policies aimed at suppressing public disorder and visible gang activity, forms of behavior that can generate social- influence pressure to engage in crime.”<sup>57</sup>

The theory that law enforcement (or its failure) influences social mores and *thereby* the incidence of crime is often referred to as the “broken windows” theory, after a seminal 1982 article by George Kelling and James Q. Wilson.<sup>58</sup> Kelling and Wilson asserted that police were paying insufficient attention to vandalism, prostitution, peddling, public drunkenness, and other misdemeanors.<sup>59</sup> Arguing that these crimes signaled and promoted urban disorder and decay, they urged a shift towards “order maintenance” policing.<sup>60</sup> Subsequently, so-called “norms theorists” urged such order-maintenance policies as misdemeanor arrests, curfews, snitch programs, antigang loitering laws, and even shaming punishments that they believed would stigmatize antisocial behavior and ultimately change cultural mores or their social meaning.<sup>61</sup> In the 1990s

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56. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 365, 370-71 (1997).

57. *Id.* at 365.

58. James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29. The point was that broken windows, when left unattended, send a message of societal carelessness that promotes further vandalism, more serious crime, and escalating urban deterioration. *Id.* at 31.

59. *Id.* at 33 (linking urban decay to the changing role of the police over time).

60. *Id.* at 32, 38.

61. See, e.g., Kahan, *Social Influence*, *supra* note 56, at 351, 371, 376, 385; Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Dan M. Kahan & Tracey L. Meares,

the idea of order-maintenance policing migrated from the academy to public housing and the precinct and became the conventional wisdom of police and public officials across urban America.<sup>62</sup> One high-profile proponent was the former mayor of New York City, Rudolph Guiliani, who instituted an aggressive zero tolerance policy against panhandlers, turnstile jumpers, squeegee men, and marijuana smokers (the latter resulting in an eighty-fold rise in marijuana arrests, from 720 in 1992 to 60,000 in 2000).<sup>63</sup> Whether such policies were responsible for the falling crime rates during this period,<sup>64</sup> and if so, whether this result would justify

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*Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805, 824 (1998); Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998) (describing scholarship that studies the law's indirect effect on behavior through its direct effect on other regulatory mechanisms—norms, markets, and the world as we find it); Tracey L. Meares, *It's a Question of Connections*, 31 VAL. U. L. REV. 579 (1997).

62. Although initially applied to such community-threatening activities as open-air drug dealing and prostitution, zero tolerance spread quickly, according to one critical study and “within months was being applied to issues as diverse as environmental pollution, trespassing, skateboarding, racial intolerance, homelessness, sexual harassment, and boom boxes.” See Skiba & Peterson, *School Discipline at the Crossroads*, *supra* note 53, at 373. In San Francisco, for example, the city brought “quality of life” charges against more than 16,000 people in 1998, most of them homeless. *Cities Seen ‘Criminalizing’ Homeless*, BOSTON GLOBE, Jan. 6, 1999, at A7. For extensive discussions of the nature and goals of zero tolerance policing by one of its earliest and most outspoken proponents, New York’s police commissioner during the Guiliani administration, see William J. Bratton, *Remarks at Harvard Law School for Police, Lawyers, and the Truth* (Nov. 14, 1995) (on file with authors); NYPD POLICE STRATEGY NO. 5: RECLAIMING THE PUBLIC SPACES OF NEW YORK (1994) (on file with authors). See also William J. Bratton, *Great Expectations: How Higher Expectations for Police Departments Can Lead to a Decrease in Crime*, in MEASURING WHAT MATTERS: NATIONAL INSTITUTE OF JUSTICE POLICING RESEARCH INSTITUTE CONFERENCE 4-7 (Nov. 28, 1995), available at <http://www.ncjrs.org/txtfiles1/170610-1.txt>.

63. John Marzulli, *Quality Crimefighting NYPD Crackdown on Minor Offenses Is Paying Off*, N.Y. DAILY NEWS, Dec. 20, 2000, at 7. According to the Lindesmith Center, a drug reform advocacy group, “Operation Condor” (the designation given the police operation against low-level drug dealers) during its first two months resulted in 18,000 arrests, many for possession of marijuana; cost New York City \$24 million in police overtime; and relied on profiles based on race, class, and physical appearance. The Lindesmith Center, NEWSFLASH, Mar. 23, 2000. See also Bratton, *supra* note 62.

64. John Dilulio attributed New York’s declining crime rate to its adoption of zero tolerance policing as well as tough sentencing laws. See Richard Lacayo, *Law and Order*, TIME, Jan. 15, 1996, at 51. In contrast, others trace it to a number of different factors, including sharp increases in police hiring during the 1990s (during which time the addition of 6,000 officers to its force yielded the highest ratio of police officers per civilian of the nation’s large cities); the waning of the crack cocaine epidemic; changing demographic patterns; an exploding prison population; and the strong economy of the 1990s. *Id.* at 50-51. Bernard Harcourt, a leading critic of order-maintenance policing, notes that crime rates dropped in most major cities, including cities such as San Diego that did not turn to zero tolerance policies. Bernard E. Harcourt, Editorial, *The Broken-Windows Myth*, N.Y. TIMES, Sept. 11, 2001, at A23. For discussions of the multiplicity of factors that must be considered when assessing the relationship between policing strategies and crime rates, see BERNARD HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 9 (2001) (noting a 1999 study by Robert Sampson and Stephen Raudenbush concluding that “the current fascination in policy circles on cleaning up disorder through law enforcement techniques appears simplistic and largely misplaced, at least in terms of directly fighting crime”); Bernard Harcourt, *After the Social Meaning Turn*:

its costs in terms of curtailed liberties<sup>65</sup> or disparate racial and class impact,<sup>66</sup> are questions that remain hotly contested.<sup>67</sup>

Similar “broken windows” reasoning may be at the heart of demands for zero tolerance in schools, especially by those who believe teenage disorder and violence have gotten out of control. The hope is that by

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*Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 LAW & SOC'Y REV. 179, 192 (2000) (noting that Chicago crime rates rose during enforcement of its antigang ordinance contrary to its proponents' claims); Ana Joanes, *New York City Policing Strategies*, 33 COL. J.L. SOC. PROB. 264 (2000).

Although he believes many additional factors were at work, Harcourt does not deny that New York's order-maintenance policing played a role in reducing crime. He argues, however, that the reduction in crime was not due to any change in social mores, as claimed by the “broken windows” theorists. Rather, Harcourt traces the connection to “the enhanced power of surveillance offered by a policy of aggressive misdemeanor arrests . . . . These mechanisms have little to do with fixing broken windows and much more to do with arresting window breakers—or persons who look like they might break windows, or who are strangers, or outsiders, or disorderly.” Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, The Broken Windows Theory, and Order-Maintenance Policing*, *New York Style*, 97 MICH. L. REV. 291, 342 (1998). By the 50% increase in misdemeanor arrests, police had much greater opportunities to perform searches, to run checks for outstanding warrants, and to turn arrestees into informants. *Id.* at 339-42.

65. At the theoretical level, viewing law as a set of norms-bearing messages blurs a distinction vital to the civil libertarian: the distinction between tolerating behavior and endorsing it. At the practical level, order-maintenance policing dramatically increased the number of encounters between police and citizens, resulting in more searches and arrests, both legal and illegal. For example, New York City recently agreed to pay \$50 million to tens of thousands of people who were illegally strip searched after being arrested for minor offenses such as loitering, disorderly conduct, and subway offenses. Benjamin Weiser, *New York Will Pay \$50 Million over Illegal Strip-Searches*, N.Y. TIMES, Jan. 10, 2001, at A1. *See also* HARCOURT, ILLUSION OF ORDER, *supra* note 64, at 43-45 (noting that misdemeanor arrests are being used to check identity, increase surveillance power, and remove undesirables from neighborhoods).

66. Order-maintenance policing intentionally blurs the line between the predatory and the unkempt or disorderly, *see* STUART A. SCHEINGOLD, THE POLITICS OF STREET CRIME: CRIMINAL PROCESS AND CULTURAL OBSESSION 190 (1991), which may be why two critics have described its essential character as “policing poor people in poor places.” Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 496 (2000). New York's “Operation Condor” against low-level drug dealers, for example, was condemned for relying on profiles based on race, class, and physical appearance. *See* NEWSFLASH, *supra* note 63. *See also* Harcourt, *After the Social Meaning Turn*, *supra* note 64, at 202 (arguing that increasing misdemeanor arrests has disproportionate impact on minorities, and noting that blacks comprised 46% of urban vagrancy arrests but only 13% of the urban population).

67. *See, e.g.*, Kahan & Meares, *supra* note 61, at 830; Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 COLUM. L. REV. 551 (1997) (urging courts to give the police leeway to bring order to communities, and criticizing aggressive interpretation and enforcement of the vagueness doctrine as applied to broad statutes because it ties the hands of police); William Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1894 (2000) (questioning the efficacy of aggressive search and seizure policies as potentially counterproductive). *See also* Harcourt, *After the Social Meaning Turn*, *supra* note 64 (exploring the social and economic harms of order maintenance policing); Toni M Massaro, *Show (Some) Emotions, in THE PASSIONS OF LAW* 91 (Susan Bandes ed., 1999) (questioning the shaming policies advocated by Kahan and Meares as overlooking the complexity of human emotions); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?* 107 YALE L. J. 1055 (1998) (critiquing shaming sanctions).

drawing a clear line, giving no quarter to disruption or disrespect, and setting high expectations, schools will instill the obedient and cooperative values of a former era. It is undoubtedly true that how a public school responds to infractions by its students conveys messages that influence student norms and culture. We believe, however, the messages are more varied and complicated than the “broken windows” theorists suggest. Consider mandatory expulsions for drug use as an example. We cannot assume, as these theorists do, that *official* intolerance of disorder necessarily engenders *peer* intolerance, so that using drugs becomes repugnant rather than “cool”—as thirty years of a zero tolerance drug policy at the national level, and before that prohibition, have demonstrated.<sup>68</sup> A zero tolerance policy for all drug violations is more likely to have disparate and varied effects: for some students, zero tolerance will help mitigate peer pressure by affording them an acceptable excuse to wield against classmates offering drugs, while others may be driven to identify with an “outlaw” culture. Some students may hear the literal, and potentially dangerous, message that hard and soft drugs are indistinguishable. Others who know they are not will learn to dismiss or ridicule authority. Most students *do* know that sharing a Tylenol is not as culpable as sharing a joint, which in turn is not as dangerous as selling cocaine. Should we really believe that these students will develop a newfound respect for teachers who treat all three with the same zero tolerance expulsion? Teenagers, after all, are exceptionally quick to discern and resent unfair treatment from adults, and research suggests that undifferentiated sanctions in public schools are promoting alienation and even disobedience among many students.<sup>69</sup>

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68. See, e.g., LLOYD D. JOHNSTON ET AL., DEP’T OF HEALTH & HUMAN SERVICES, MONITORING THE FUTURE: NATIONAL RESULTS ON ADOLESCENT DRUG USE, OVERVIEW OF KEY FINDINGS, 2000, at Table 1 (2001) (reporting that lifetime prevalence of drug use rose during the last decade, and that the percentage of twelfth graders using marijuana rose from 41.7% in 1995 to approximately 49% in 2001).

69. See, e.g., HARVARD REPORT, *supra* note 23, Executive Summary 3, 9 (stating that rigid zero tolerance policies “often further alienate students from school and exacerbate the behaviors they seek to remedy. This damage is particularly acute for children who are already considered ‘at risk’ for school failure and often has the effect of pushing them out of school completely”). See also Skiba & Peterson, *School Discipline at the Crossroads*, *supra* note 53, at 337 (“[R]esearch has suggested that misuse of school security measures such as locker or strip searches can create an emotional backlash in students.”); KINGERY, *supra* note 35 (“Students who are generally younger, less sophisticated in criminal endeavor, and first time offenders are more likely to be caught. Making examples of these youth, while letting the more serious offenders who escape detection escape prosecution under zero tolerance policies clearly sends the wrong message . . . [and could merely lead] the more hard core violent students to be more careful to avoid being caught.”); Calvin Morrill et al., *Telling Tales in School: Youth Culture and Conflict Narratives*, 34 LAW & SOC’Y REV. 521, 551-55 (2000) (warning against simplistic stereotypes that overlook the complexity of teenage responses to conflicts and

Finally, some students will hear a message about law and justice, one that corrodes rather than strengthens one of our essential cultural legacies. “One size fits all” punishments dispense with the elementary inquiries into blameworthiness or harm that are inseparable from our traditional understandings of fairness, liberty, and equality. Such sanctions teach a lesson that the Supreme Court famously warned against long ago: “That [schools] are educating the young for citizenship,” the Court explained, “is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”<sup>70</sup>

### *B. Incapacitation*

To the degree that deterrence fails, zero tolerance expulsions are supposed to provide schools with a second line of defense—a form of incapacitation. Removing troublesome students from the classroom should reduce disruptions and enhance safety in that school, assuming all other factors remain unchanged. Yet the statistics to date do not show significant success on this front, either. Were such a strategy working, the initial jump in zero tolerance removals would fall off as troublemakers were expelled. Instead, schools are expelling and suspending ever larger numbers of students.<sup>71</sup>

Whatever the prospects of identifying and removing disruptive students, it is important to understand how severely limited the incapacitation claim is: it considers short-term consequences in the classroom only, ignoring highly negative effects both outside school and in school over the longer term. But such costs must be counted in order to assess both the impact of zero tolerance removals and the relative merits of alternative disciplinary approaches that do not withdraw educational services.<sup>72</sup> Suspended or expelled students do not simply disappear, of

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discipline).

70. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). *See also* *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (describing schools as the primary vehicle for transmitting “the values on which our society rests”).

71. *See* KINGERY, *supra* note 35. *See also supra* notes 5-7 and accompanying text.

72. As one court succinctly observed, “what the state does not pay for now in quality education, it pays for later in welfare, lost jobs, and prison costs.” *Alabama Coalition for Equity, Inc. v. Hunt*, 624 So. 2d 107, 145 (Ala. 1993). In the Hamilton Fish Institute study, KINGERY, *supra* note 35, Kingery argues that the monetary impact of “expulsions-to-nowhere” are commonly misstated because only the immediate consequences within the school system are included in the calculation. *Id.*

When the cost appraisal [of the impact of zero tolerance] includes the broader community, the

course. They embark on an inauspicious trajectory that is more likely to endanger themselves and others when compared with students who continue to attend their schools. This trajectory begins by dissolving the bonds with the teachers and counselors who would be most able to provide help to troubled students.<sup>73</sup> It leads to greatly increased chances of permanently dropping out of school<sup>74</sup> and of joblessness.<sup>75</sup> Another correlation exists between the lack of secondary education and criminal behavior,<sup>76</sup> a correlation aggravated by expulsions that produce

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financial benefits of suspension and expulsion over alternative education may completely disappear. If students who are suspended or expelled do not reenter school right away, they are likely to fall farther behind academically and are at increased risk of falling into criminal activity in the community. Their likelihood of being incarcerated increases accordingly. The high costs of incarceration are not generally weighed against the relatively lower costs of alternative education, as would be recommended in a 'holistic' cost appraisal. . . . Thus the heavy use of suspension and expulsion can be seen as an expensive practice for the community even if it is cost-effective for the school.

*Id.*

73. William Ayers et al., *Introduction, in ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS* xi-xvi (W. Ayers et al. eds., 2001) (noting that such infractions as fighting or painting graffiti could be, and once were, "teachable moments," but such opportunities have been cast aside in favor of expulsion or prosecution). The bonds between teacher and student will be similarly corroded, even for students who are not disciplined, if the threat of zero tolerance expulsions deters parents from consulting with teachers about difficulties or risks facing their children. *See generally* NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, *MALIGNANT NEGLECT: SUBSTANCE ABUSE AND AMERICA'S SCHOOLS* 38 (Sept. 2001) [www.casacolumbia.org/usr\\_doc/malignant.pdf](http://www.casacolumbia.org/usr_doc/malignant.pdf).

74. Excluded students often have no opportunity to make up missed schoolwork, which both discourages many of them from returning even when the sanction is expired and reduces the ability of those who do return to pass their courses. *See* Skiba & Peterson, *The Dark Side of Zero Tolerance*, *supra* note 53, at 376. For other studies showing a strong correlation between suspension and expulsion and dropping out, see HARVARD REPORT, *supra* note 23, Executive Summary 3 (reporting that over 30% of high school sophomores who drop out have been suspended); Pedro Reyes, *Factors That Affect the Commitment of Children at Risk to Stay in School*, in *CHILDREN AT RISK* 18, 23 (Joan M. Lakebrink ed., 1989).

75. Not surprisingly, an ABA study found a positive correlation between dropping out of high school and unemployment. *YOUTH IN THE CRIMINAL JUSTICE SYSTEM*, *supra* note 48. Drop-outs have a higher incidence of unemployment, drug use, public assistance, and criminal conduct. Terence P. Thornberry et al., *The Effect of Dropping Out of High School on Subsequent Criminal Behavior*, 23 *CRIMINOLOGY* 3, 7-17 (1985). *See also* Plyler v. Doe, 457 U.S. 202, 221 (1982) ("[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all."); Lee v. Macon County Bd. of Educ., 490 F.2d 458, 460 (5th Cir., 1974) ("In our increasingly technological society getting at least a high school education is almost necessary for survival.").

76. Young white men who lack a high school diploma are over five times as likely to be incarcerated than those who graduated. Anne Morrison Piehl, *Economic Issues in Crime Policy* 68 (1994) (unpublished Ph.D. dissertation, Princeton University) (on file with authors). Piehl examined the higher conviction rates of less-educated adolescents to determine whether they were committing more crimes or simply more likely to get caught. *Id.* She found that "more schooling is associated with lower probabilities of committing illegal activities . . . [as well as] lower conviction rates for those people involved in crime." *Id.* at 70.

unsupervised free time for many who can least handle it,<sup>77</sup> bleak future prospects,<sup>78</sup> and feelings of unjust treatment.<sup>79</sup> One study concludes that, absent alternative education for removed students, “school personnel may simply be dumping problem students out on the streets, only to find them later causing increased violence and disruption in the community. . . . [W]e face serious questions about the long-term negative effects of one of the cornerstones of zero tolerance, school exclusion.”<sup>80</sup>

### C. Racial Impact

The consequences we have just detailed help maintain an alienated, undereducated underclass that is getting larger, more despairing, and more entrenched. This underclass already includes five million young adults between the ages of sixteen and twenty-four who are both out of school

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It has not been shown that expelled students have a higher rate of criminal activity than voluntary high school drop-outs, but, as noted *supra*, it is clear that expulsions promote dropping out, and dropping out promotes criminal behavior, as an ABA study reported. See YOUTH IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 48, at 5, 27; Thornberry et al., *supra* note 75, at 7-17. The ABA study notes that drop-outs are at increased risk of arrest, and that “[i]n 1996, 46.5% of all jail inmates in the United States had less than a high school education.” YOUTH IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 48, at 5, 27 (citing BUREAU OF JUST. STAT. CORRECTIONAL POPULATIONS IN THE UNITED STATES (1996)). See also HARVARD REPORT, *supra* note 23, Executive Summary 3 (“More than 30% of sophomores who drop out have been suspended, and high school dropouts are more likely to be incarcerated.”); Reyes, *supra* note 74, at 15-17 (reporting a correlation between dropping out and later criminal activity).

Referrals for criminal prosecution have a similar criminogenic effect. See Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407, 418 (2000) (“[T]he long-term effects of invoking the criminal justice system for relatively minor behavior can be to increase rather than reduce crime through its effect on the life prospects or psychology of the arrested individual.”).

77. Some experts believe “suspensions may simply accelerate the course of delinquency by providing a troubled youth with little parental supervision and more opportunities to socialize with deviant peers.” See HARVARD REPORT, *supra* note 23, Executive Summary 1, 3. See also KINGERY *supra* note 35 (“Many students who exhibit violent and antisocial behavior need clearly defined and structured environments. . . . With the help of [highly structured classrooms], students learned self-control.”) (citing M. W. Lipsy & D. B. Wilson, *Effective Intervention for Serious Juvenile Offenders: A Synthesis of Research*, in SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS 313-45 (R. Loeber & D. P. Farrington eds., 1988)).

78. The correlation between lack of education and criminal behavior among men “is consistent with an economic model of crime in which education is associated with better legal sector opportunities.” Piehl, *supra* note 76, at 81. Up to 75% of imprisoned youths in the U.S. are functionally illiterate. Susan H. Bitensky, *Theoretical Foundations for a Right to Education under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 559 (1992) (citations omitted).

79. See *supra* note 69. It is possible that high school zero tolerance policies for minor infractions replicate the criminogenic effects that have been found to flow from “invoking the criminal justice system for relatively minor behavior [which may] increase rather than reduce crime through its effect on the life prospects or psychology of the arrested individual.” Heymann, *supra* note 76, at 418.

80. Skiba & Peterson, *The Dark Side of Zero Tolerance*, *supra* note 53, at 376.

and out of work, with few skills and fewer prospects.<sup>81</sup> Zero tolerance expulsions and suspensions are certain to add many more to their ranks, and they will include disproportionately high numbers of African Americans and other already disadvantaged teenagers<sup>82</sup>—the very people most damaged by the withdrawal of the primary means of advancement, education.

Studies have long reported the higher incidence of expulsions among minority students. African Americans, the hardest hit, are suspended or expelled at roughly twice the rate of students generally,<sup>83</sup> a disparity one federal district court has attributed to “institutional racism.”<sup>84</sup> This disparity predates zero tolerance,<sup>85</sup> but the large increase in suspensions

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81. Bob Herbert, *On the Way to Nowhere*, N.Y. TIMES, Sept. 3, 2001, at 15. Herbert cites Jack Wuest of the Alternative Schools Network: “[M]ost lack basic job skills as well as solid literacy and numbers proficiencies, and they are neither working nor looking for jobs. They are not in vocational training. They are not in manufacturing. They are not part of the information age. They are not included in the American conversation.” *Id.* See also John J. Lane, *Principal Perceptions of the At-Risk Child*, in CHILDREN AT RISK, 18, 45 (Joan M. Lakebrink ed., 1989) (reporting a Chicago drop out rate of almost 50%).

82. Black Americans, for example, have never remotely attained the standard of well-being common throughout the developed world. The United Nations Human Development Index combines longevity, education, and per capita income to formulate a rough scale of well-being. According to this index, the United States ranks sixth worldwide with white Americans alone ranking first and black Americans alone ranking thirty-first, next to Trinidad and Tobago. United Nations Dev. Programme, *Human Development Report* (1993), at 18 & figs. 1.12-13, cited in Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2430 (1994). See also Herbert, *supra* note 81, at 15 (noting that in 1999, 13% of white sixteen to twenty-four year olds were idle compared to 21% of blacks and Hispanics in same age group).

83. The Department of Education figures for 1997 report that 19.8% of all African American students were suspended at least once over a four-year period compared to 9.7% of their white student counterparts. THOMAS M. SMITH ET AL., U.S. DEPT. OF EDUC., NATIONAL CENTER FOR EDUCATION STATISTICS PUB. NO. 97-388, at 158, THE CONDITION OF EDUCATION, APP. A (1997), available at <http://nces.ed.gov/pubs/ce/97388.pdf>. See also Facing the Consequences, *supra* note 5, at 4 (reporting the disproportionate suspensions of African American students in twelve cities, and concluding that “it is African American and Latino students whose futures are wrecked by zero-tolerance”). See HARVARD REPORT, *supra* note 23; William Claiborne, *Disparity in School Discipline Found Blacks Disproportionately Penalized Under Get-Tough Policies, Study Says*, WASH. POST, Dec. 17, 1999, at A3 (reporting study’s findings that black students are so disproportionately disciplined under zero tolerance policies that blacks as a group are losing educational access). See also Scott S. Greenberger, *Expulsion, Suspension Rate Climbs 6 Percent, Study Says*, THE BOSTON GLOBE, Dec. 21, 2001, at B7 (reporting that during the 1999-2000 school year, of those students expelled or suspended for more than ten days “[m]inority students were expelled and suspended at a far higher rate than white students. . . . Ten percent of Massachusetts students are Hispanic and 9 percent are black, but 33 percent of the suspended and expelled students were Hispanic and 24 percent were black”).

84. *Hawkins v. Coleman*, 376 F. Supp. 1330, 1337 (N.D. Tex. 1974). After hearing expert witnesses, the court found black students were suspended more often, and for longer periods, than white students, and that the majority of suspensions were for minor, nonviolent offenses. *Id.* at 1335.

85. A 1984 accounting showed a similar 2:1 ratio, with black students comprising 16% of public school students but 31.3% of students suspended. Daniel & Coriell, *supra* note 8, at 32. See also Skiba & Peterson, *School Discipline at the Crossroads*, *supra* note 53, at 338 (citing statistics since 1974);

and expulsions under zero tolerance has made matters for minority students that much worse.<sup>86</sup>

Similarly, the laws requiring that certain offenses be reported to law enforcement will hit African Americans harder because they are far more likely to be adjudicated and sentenced as adults than other juveniles.<sup>87</sup> There are multiple reasons behind these statistics. First, many of these minority students start with a disadvantage due to financially pressed school systems and weak community after-school services. Second, as a recent report on public school racial discrimination points out, schools that retain some discretion to consider mitigating factors appear to confer leniency when they believe that the student has future prospects that would be destroyed by expulsion, and such calculations are easily influenced by racial stereotypes.<sup>88</sup> Finally, the new zero tolerance regulations exacerbate the disparity because they are more prevalent in predominantly black and Latino school districts than in others.<sup>89</sup> Whether or not the racial disparity in school expulsions is intentional, its contribution to racial stratification in schools and in society is significant.<sup>90</sup>

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HARVARD REPORT, *supra* note 23, at 7 (stating that “racial disparities in the application of school disciplinary policies have long been documented”).

86. A 1999 investigation of ten school districts reported that “black students, already suspended or expelled at higher rates than their peers, will suffer the most under new ‘zero tolerance’ attitudes . . . . [Z]ero tolerance means that black students will be pushed out of the door faster.” Bi-Partisan Working Group on Youth Violence, *Final Report*, A.B.A. 106th Congress, at n.6 (Feb. 2000), available at [http://www.jlc.org/home/updates/updates\\_links/report\\_youthviolence.htm](http://www.jlc.org/home/updates/updates_links/report_youthviolence.htm) (citing M. May, *Blacks Likely to Lose Out in School Crackdown*, S.F. CHRONICLE, Dec. 18, 1999).

87. For example, black juvenile drug offenders are two-and-a-half times more likely than their white classmates to be adjudicated as adults and end up with a drug conviction. E. Poe-Yamagata & M. Jones, *And Justice for Some: Differential Treatment of Minority Youth in the Justice System*, Building Blocks for Youth: Washington, DC (2000) (reporting that in 1997, 0.7% of white juveniles and 1.8% of African American juveniles charged with drug offenses were adjudicated as adults). An Illinois study found African Americans comprise 15.3% of the state’s juvenile population, but 88% of the juveniles in adult prisons for drug crimes. *Id.* (citing JUST. POL’Y INST., DRUGS AND DISPARITY: THE RACIAL IMPACT OF ILLINOIS’ PRACTICE OF TRANSFERRING YOUNG DRUG OFFENDERS TO ADULT COURT (2001), available at <http://www.buildingblocksforyouth.org/illinois/illinois.pdf>.) The transfers for adult prosecution were pursuant to an Illinois law that provides for automatic transfer of fifteen-and-sixteen year-old drug offenders. 705 ILL. COMP. STAT § 405/5-130(4)(a) (2002).

88. See Facing the Consequences, *supra* note 5, at 12.

89. HARVARD REPORT, *supra* note 23. (“Zero Tolerance policies are more likely to exist in predominantly black and Latino school districts. During the 1996-97 school year, these districts were more likely to have policies addressing violence (85%), firearms (97%), other weapons (94%), and drugs (92%) than white school districts (71%, 92%, 88%, and 83%, respectively). This disparity in the adoption of Zero Tolerance Policies may also account for some of the racial disparities, at least on a national level, in disciplinary actions taken.”).

90. Skiba & Peterson, *School Discipline at the Crossroads*, *supra* note 53, at 339. See also Ruth B. Ekstrom et al., *Who Drops Out of High School and Why? Findings from a National Study*, 87 TCHRS. COLL. RECORD, 356, 364 (1986) (reporting that one-third of students who drop out do so because of poor achievement and feelings of alienation, which are often the result of disciplinary

Although time may tell a different story, there is little evidence to date that zero tolerance discipline has worked as promised, and there is little support for it among the policy experts who have studied it. A research project undertaken by the Hamilton Fish Institute on School and Community Violence concluded that zero tolerance “represents a move toward strict discipline of a few scapegoats in a failed attempt to make schools safer.”<sup>91</sup> Another study by the American Bar Association’s (ABA) Criminal Justice Section found that zero tolerance “has redefined students as criminals, with unfortunate consequences.”<sup>92</sup> Subsequently, the ABA’s Board of Delegates voted to oppose school disciplinary policies that fail to take into account either the circumstances or nature of the offense or the accused’s history.<sup>93</sup> And a Harvard University study, among the most comprehensive examinations of the effects of zero tolerance on school children, concluded that the policy is unfair, breeds distrust and confrontations between students and teachers, and denies core educational and developmental needs of students.<sup>94</sup> According to the report, “policymakers, educators and parents should be very concerned with the long-term implications of denying educational opportunities to millions of children, particularly when the effectiveness of these policies in ensuring school safety is highly suspect.”<sup>95</sup>

Although the relatively sorry state of American public education has been near the top of the public agenda in recent years,<sup>96</sup> the massive turn toward expulsions and suspensions and the potentially dire consequences reported by researchers have generally eluded this focus. However, in the wake of news stories about particularly arbitrary and pointless expulsions, some politicians and educators have recently suggested that their states could devise more effective and humane sanctions than educational

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problems, suspension, or expulsion).

91. KINGERY, *supra* note 35, Summary. The report proposes a panoply of alternative methods of insuring school safety, including school safety plans, crisis management, incident reporting by youth, incident tracking by administrators, school security services, counseling and skills training in violence prevention, alternative education, and architectural designs incorporating additional safety considerations. *Id.*

92. A.B.A. CRIMINAL JUSTICE SYSTEM REPORT ON ZERO TOLERANCE 1 (Feb. 2000).

93. News Release, American Bar Association, ABA Votes to Oppose School “Zero Tolerance” Policies (Feb. 19, 2001), *available at* [www.abanet.org/media/feb01/zerotolerance.html](http://www.abanet.org/media/feb01/zerotolerance.html). The resolution urged school officials to develop alternatives to expulsion or referral for prosecution and “to exercise sound discretion [in determining discipline] that is consistent with principles of due process and considers the individual student and the particular circumstances of misconduct.” *Id.*

94. *See* HARVARD REPORT, *supra* note 23, Executive Summary 2.

95. *Id.* Executive Summary 3.

96. *See infra* notes 158-159, regarding American educational deficits and proposed remedies.

deprivation.<sup>97</sup> In Georgia, for example, after dozens of students were suspended for possessing innocuous items deemed weapons—among them a Tweety Bird wallet with a long keychain attached and a broken axe sitting in a student's car—the state legislature's Republican and Democratic leaders introduced a bill to make suspensions and expulsions discretionary. A January 2002 newspaper poll showed that 96% of Georgians agreed.<sup>98</sup> In Manalapan, New Jersey, the school board abandoned zero tolerance after a six-week period in which fifty *elementary school* children were suspended, many for using common expressions (such as, "I could kill her") that were deemed to be "threats."<sup>99</sup>

We now turn to another possible route to reverse zero tolerance expulsions and suspensions: legal challenges based on the denial of the right to a public education. This is a right guaranteed by many state constitutions, and it is one that could yet be recognized, at least to a limited degree, in the federal Constitution.

### III. CONSTITUTIONAL CONSTRAINTS ON ZERO TOLERANCE IN PUBLIC SCHOOLS

Consider the widespread practice of suspending or expelling students without providing equivalent, alternative schooling. Such students suffer an absolute deprivation of education. Is it also a deprivation of a federal or state *right* to an education?

In what follows, we delineate two legal theories that should be invoked to challenge public school expulsions and suspensions that are unaccompanied by equivalent alternative education: first, expulsion abridges the student's constitutional right to equal protection under both federal and state constitutions; and second, when an enumerated right to education exists under the state constitution, this right could in itself be

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97. See, e.g., KINGERY, *supra* note 35 (reporting on retreats from zero tolerance in Tustin, California, and Decatur, Illinois); Tim Walker, *Catch Them Before They Fall: A Kentucky School District Bucks the Trend Toward Exclusionary Discipline*, available at [http://www.tolerance.org/teach/printer.jsp?p=08.ar=1898\\_pi=ttt](http://www.tolerance.org/teach/printer.jsp?p=08.ar=1898_pi=ttt) (last visited Jan. 17, 2003) (reporting on a Louisville, Kentucky school district that rejects expulsion in favor of remedial education).

98. See Fox News, *supra* note 38. The poll also reported that only 4% wanted zero tolerance sanctions to remain mandatory or become stricter. *Id.* ("Georgia got its taste of zero tolerance-gone-wild as dozens of children were disciplined for what appeared to be minor infractions . . . [Cosponsor Senator Richard Marable said that Senate Bill 335] will go through the process as fast . . . as any can . . .").

99. Kate Zernike, *Crackdown on Threats in Schools Fails a Test*, N.Y. TIMES, May 17, 2001, at A1 (similarly reporting that the West Winsor, New Jersey, school board abandoned zero tolerance "after a furor over the suspension of a 9-year-old boy who had threatened to shoot a wad of paper with a rubber band").

grounds for relief from such an expulsion. (We bypass a potential third claim based on substantive due process because it is least likely to bear fruit.<sup>100</sup>) These theories challenge the constitutional permissibility of “expulsions-to-nowhere” generally. We do not address the many additional claims that may arise under the circumstances of particular cases, such as when notice or hearing are inadequate to comport with procedural due process;<sup>101</sup> when a covered student has been denied the alternative education guaranteed under the Individuals with Disabilities Act or a particular state’s statute;<sup>102</sup> or when the sanction was issued by an official unauthorized to do so under the relevant administrative law.

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100. The substantive due process theory has dimmer prospects than the equal protection theory because it demands more of the judiciary. The latter approach entails only that *if* a state provides a basic education to some, it must provide a basic education to all. It does not imply, as does the former theory, that a state is constitutionally obligated to provide its residents with an education. As noted above, to frame the issue in equal protection terms is to define a fundamental *equality* right rather than a positive individual right, in the same way that the Supreme Court has treated voting and criminal appeals.

101. In *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court held that because a student has protected liberty and property interests in a high school education, certain procedural due process protections attach to the decision whether to suspend or expel him from school, including notice of the alleged offense to the student and parents and a hearing. *Id.* at 572-84. The extent of the notice and hearing depend on the circumstances; there are greater protections for expulsions and long-term suspensions than for short term suspensions. *Id.* at 584. However, a recent Fifth Circuit decision found such protections inapplicable to a decision to *transfer* a student to an alternative school for disciplinary reasons, finding it involved no deprivation of a student’s interest in education despite evidence showing that the alternative school lacked effective teaching, sports, and extracurricular activities. *Nevaros v. San Marcos Consol. Indep. Sch. Dist.*, 954 F. Supp. 1162 (W.D. Tex. 1996), *rev’d* 111 F.3d 25 (5th Cir. 1997). *See infra* note 195.

102. The Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. §§ 1400-87 (1996), provides significant protection from expulsion to children with disabilities. Under this law, if the school intends to suspend a child for more than ten days, the child is entitled to notice of the charges and a hearing. If it is determined at the hearing that the child’s misbehavior is related to his disability, the student may not be expelled and is entitled to an individually tailored program of support and services. If the body hearing the case concludes that the conduct is not related to the student’s disability, the student may be suspended or expelled but is nevertheless entitled to educational services according to *S-1 v. Turlington*, 635 F.2d 342, 350 (5th Cir. 1981) and *Kaelin v. Grubbs*, 682 F.2d 595, 602 (6th Cir. 1982). *But see* *Virginia v. Riley*, 106 F.3d 559 (4th Cir. 1997) (finding no obligation to provide alternative educational services to students expelled for conduct unrelated to their disability). *See also* *Honig v. Doe*, 484 U.S. 305, 328-29 (1988) (holding under IDEA predecessor statute that schools may not suspend disabled students for more than ten days); *Magyar v. Tucson United Sch. Dist.*, 958 F. Supp. 1423, 1434-35 (D. Ariz. 1997) (holding that expulsion is permissible under IDEA only when offense unrelated to student’s handicap and, in such case must be accompanied by compensatory education; and *Gun Free Schools Act* does not authorize expulsions contravening IDEA); *Rehabilitation Act of 1973*, 29 U.S.C. § 701-97 (1998) (barring disciplinary practices with adverse impact on disabled students). Despite the broad substantive and procedural protections of the IDEA, it is often ignored by school officials, particularly regarding students who have borderline disabilities that have not been diagnosed or when parents are unaware of their student’s rights. *See* HARVARD REPORT, *supra* note 23, at 8, 9, 16, App. II & Executive Summary 2.

*A. Is There a Constitutional Right to Education?*

A court challenge is most likely to bear fruit if supported by a state or federal constitutional right to education. Before examining that issue, however, we should note why, doctrinally, this is so. As to a *federal* equal protection challenge, although unequal treatment may violate the Fourteenth Amendment whether or not another constitutional right is involved, the Supreme Court has famously enunciated wholly different standards for reviewing legislation in the two cases. A statute challenged as a violation of equal protection will be subject to “strict scrutiny” only if it impinges on a fundamental right (or discriminates against a “suspect class”<sup>103</sup>). If it does not, the court will uphold the statute if it has any rational basis.<sup>104</sup> Which test applies is often dispositive. Strict scrutiny means that the law will be found unconstitutional unless it both (1) serves, and was intended by the legislature to serve,<sup>105</sup> a *compelling* governmental interest and (2) is *narrowly tailored* to serve that interest—“with greater precision than any alternative means.”<sup>106</sup> By contrast, the rational basis standard affords the law a strong presumption of validity—any reasonably conceivable relation to a legitimate governmental purpose is enough, even if unsupported by evidence or empirical data.<sup>107</sup> A rational basis will be found unless the statute “rests on grounds wholly irrelevant to the achievement of the State’s objective.”<sup>108</sup> Justice Stevens has described this test as “tantamount to no review at all.”<sup>109</sup>

An enumerated *state* constitutional right to education could play a similar role in strengthening equal protection or due process challenges

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103. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223-27 (1995). The court will apply “strict scrutiny” when an equal protection challenge is mounted to a law classifying on the basis of race, national origin, or alienage, and “mid-level” scrutiny to a law classifying by gender or legitimacy. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982). Whether zero tolerance expulsions and suspensions could be challenged on the basis of racially discriminatory enforcement is beyond the scope of this article.

104. *Lyng v. Automobile Workers*, 485 U.S. 360, 370 (1988); *Plyler v. Doe*, 457 U.S. 202, 216-217 (1982); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

105. Additionally, the legislature must have enacted the law with the purpose to serve that compelling interest. *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996).

106. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986).

107. *See, e.g., Heller v. Doe*, 509 U.S. 312, 320-21 (1993); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 315 (1993).

108. *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981); *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978); *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

109. *Beach Communications, Inc.*, 508 U.S. at 323 n.3 (Stevens, J., concurring). Opposing the majority’s definition of rational review as too broad, Justice Stevens observed that “it is difficult to imagine a legislative classification that could *not* be supported by a “reasonably conceivable state of facts.” *Id.*

under the state's constitution. But perhaps most importantly, a state constitutional right to education could in itself be grounds for relief from the state's laws or actions denying education to students.

### 1. *Educational Rights in the United States Constitution*

Whether there is a right to education in the United States Constitution is a question that permits no single or simple answer.<sup>110</sup> *San Antonio Independent School District v. Rodriguez*,<sup>111</sup> the seminal but opaque Supreme Court case on the subject, is often cited for its statement that

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110. We limit our discussion to constitutional law under prevailing interpretations of the courts and the possibilities that remain open under those interpretations. There are some additional constitutional arguments for a federal right to education that may have interpretive integrity but appear to have little foundation in Supreme Court precedent. According to Philip Kurland, for example, the dormant Privileges and Immunities Clause of the Fourteenth Amendment should be read to include a right to education. Philip B. Kurland, *The Privileges Or Immunities Clause: "Its Hour Come Round At Last"?*, 1972 WASH. U. L.Q. 405, 419-20 (1972). Kurland and others have suggested that the Supreme Court would do well to reconsider the severely limiting interpretation it applied to the clause in the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872). *Id.* at 413-14. *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 498-500 (1999) (applying Privileges and Immunities Clause to protect a right to travel); *Id.* at 511, 527-28 (Thomas, J., dissenting) ("Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case."); MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 100-05 (1986); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 28 (1980); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988); MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? (1994); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 521-36 (1989); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

Susan Bitensky has argued that a federal right to education might be derived from more expansive and mutually reinforcing interpretations of the Fourteenth Amendment's Due Process Clause and Privileges or Immunities Clause, the First Amendment's Free Speech Clause, the right to vote, and the Ninth Amendment. Susan H. Bitensky, *Theoretical Foundations for a Right to Education under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 579-615 (1992). Another theoretical source of educational rights is international law and, in particular, United States the Buenos Aires Protocol that places obligations on the United States and other state parties to assure universal education of its citizens. Protocol of Amendment to the Charter of the Organization of American States ("Protocol of Buenos Aires"), Feb. 27, 1967, 21 U.S.T. 607 (1967). *Cf.* Universal Declaration of Human Rights (1948), art. 26, G.A. Res. 2/7, U.N. GAOR (3rd Sess. (1948)); United Nations Declaration of the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14th Sess. Supp. No. 16, at 19, Principle 7, U.N. Doc. A/4354 (1959); International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3, art. 13 (unratified by United States); Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93, art. 4 (unratified by United States); Convention on the Rights of the Child, G.A. Res. 44/25, 44 U.N. GAOR, Supp. No. 49, at 165, U.N. Doc. A/44/736, art. 28 (1989) (unratified by United States); American Declaration of the Rights and Duties of Man, Ninth Int'l Conference of American States Res. 1, art. 12. *See also* Roger J. R. Levesque, *Educating American Youth: Lessons from Children's Human Rights Law*, 27 J.L. & EDUC. 173 (1998).

111. 411 U.S. 1 (1973).

education “is not among the rights afforded explicit protection under our Federal Constitution.”<sup>112</sup> But the Court explicitly left open the question whether the Constitution provides a more limited educational guarantee.<sup>113</sup> Significantly, an expelled student’s challenge to the complete denial of public education could provide the Court with an opportunity to answer that question.

In *Rodriguez*, the Court addressed a Fourteenth Amendment equal protection challenge to Texas’ school financing method, which relied largely on local property taxes and thereby assured that poor school districts would have far less school funding available than wealthy districts.<sup>114</sup> In assessing this scheme, the Court applied rational basis review to the issue after finding that the financing scheme did not implicate any fundamental right.<sup>115</sup> “[T]he importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause . . . . [The question is rather] whether there is a right to education explicitly or implicitly guaranteed by the Constitution,” and according to the Court, there is not.<sup>116</sup> (The Court then found that financing a school system partly through local tax revenues rationally served a legitimate governmental interest by promoting meaningful local participation and control in school governance.<sup>117</sup>) Yet while declining to recognize a robust, positive constitutional right to a full public education,<sup>118</sup> the Court left open the question whether there might exist a more limited right—a fundamental right to a “*minimally adequate* education”:

Whatever merit appellees’ argument might have if a State’s financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the

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112. *Is.* at 35.

113. *Id.* at 36-37.

114. *Id.* at 9-16.

115. *Id.* at 28-35, 44. The Court also found that the law did not classify according to any suspect class. *Id.*

116. *Id.* at 30-33.

117. 111 U.S. at 51-53.

118. *Id.* at 36.

basic minimum skills necessary for the enjoyment of the rights of speech and of full participation in the political process.<sup>119</sup>

However, the Supreme Court did take one additional ambiguous step towards recognition of such a right nine years after *Rodriguez* in *Plyler v. Doe*.<sup>120</sup> There, the Court found a denial of equal protection in a Texas law excluding illegal aliens from public school.<sup>121</sup> Although the Court restated its view that education is not a fundamental constitutional right,<sup>122</sup> it explicitly declined to employ the deferential rational basis test in light of education's unique role:

Public education is not a "right" granted to individuals by the Constitution. But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. . . . By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 *can hardly be considered rational unless it furthers some substantial goal of the State*.<sup>123</sup>

Faced with this *total* deprivation of public education, the Court applied a heightened form of scrutiny to invalidate the Texas law. The Court's formula—that the law must further some substantial state goal or, in Powell's concurring rendition, must bear a "fair and substantial relation" to a substantial state interest<sup>124</sup>—is precisely the tougher "intermediate scrutiny" applied to quasi-suspect classifications like illegitimacy and gender.<sup>125</sup>

Does *Plyler's* more rigorous scrutiny also apply to the withdrawal of education for disciplinary reasons? Denying any alternative education to

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119. *Id.* at 37. *See also Plyler v. Doe*, 457 U.S. 202, 223 (1982) (holding that strict scrutiny is not triggered by "every variation in the manner in which education is provided").

120. 457 U.S. 202 (1982).

121. *Id.* at 210.

122. *Id.* at 221. The Court also found that the alternative trigger for strict scrutiny was not present because *undocumented* aliens are not a suspect class. *Id.* at 220.

123. *Id.* at 221, 223-24 (emphasis added) (citation omitted).

124. *Id.* at 239 (Powell, J., concurring).

125. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988) (illegitimacy); *Craig v. Boren*, 429 U.S. 190, 197-98 (1976) (gender); *Lalli v. Lalli*, 439 U.S. 259 (1978) (illegitimacy).

expelled children surely exacts the kind of severe costs identified in *Plyler* to both the affected children and to the country, costs which are difficult to justify as furthering a substantial state interest.<sup>126</sup> Nevertheless, it is also true that *Plyler's* application to disciplinary expulsions is uncertain, not least because the Court also stressed that the excluded children were innocents in no way accountable for their illegal status.<sup>127</sup>

In sum, the Supreme Court has yet to speak clearly on the constitutional status of educational access. It remains at the threshold, unwilling either to embrace or reject a constitutional right to a minimally adequate education. The Supreme Court itself has explicitly noted that it “has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.”<sup>128</sup>

What explains this extraordinarily persistent ambivalence to educational rights, evident in Supreme Court decisions stretching all the way back to *Brown v. Board of Education*?<sup>129</sup> One reason is that more than other government services, public education sits at the vortex of some of the Court's deepest constitutional commitments—specifically, its commitments (1) to federalism; (2) to equality of opportunity rather than of result; (3) to democratic rather than judicial policy making; and especially (4) to individual rights conceived as imposing limits rather than

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126. Even if *Plyler* is taken at its word as constructing a specific kind of rationality review in which the costs of educational deprivation must be considered, it leaves “expulsions-to-nowhere” constitutionally vulnerable.

127. See 457 U.S. at 223 (“Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status.”) In a subsequent case, *Kadrmas v. Dickenson Public Schools*, 487 U.S. 450, 459 (1988), the Supreme Court upheld a school bus user fee, finding that unlike *Plyler*, the fee neither “penalized [the plaintiff] for illegal conduct by her parents” nor threatened to “promot[e] the creation and perpetuation of a subclass of illiterates within our boundaries [and the consequent problems] of unemployment, welfare, and crime.” See also Brian B. v. Commonwealth of Pa. Dept. of Educ., 230 F.3d 582, 586 (3d Cir. 2000) (rejecting heightened scrutiny of expulsion and distinguishing *Plyler* because in that case, students were deprived as a result not of their own illegal conduct but that of their parents).

128. B. H. Papasan v. Allain, 478 U.S. 265, 285 (1986). See also *Kadrmas*, 487 U.S. at 467 n.1 (Marshall, J., dissenting) (“In prior cases, this Court explicitly has left open the question whether such a deprivation of access [to a minimally adequate education] would violate a fundamental constitutional right . . . . That question remains open today.”).

129. *Brown v. Bd. Of Educ.*, 347 U.S. 483 (1954). The best the *Brown* Court could agree on was that each child had a right to an *equal* opportunity for a free public education:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, *where the state has undertaken to provide it*, is a right which must be made available to all on equal terms.

*Id.* at 493 (emphasis added).

duties on government. While a constitutional right to other government services such as housing or welfare arguably runs afoul of all of these values, a right to education *straddles* them.

On one hand, to declare education a fundamental constitutional right would place state educational policies and funding under the “strict scrutiny” of federal judges, something the *Rodriguez* majority was obviously loath to do. In the *Rodriguez* Court’s view, federal courts are ill-suited to determine educational policy, both because public education has been conceived as a matter our federalist system leaves to state and local control (at least until recently), and because courts generally lack the competence and legitimacy of democratically elected legislators to resolve the exceedingly complex policy issues involved.<sup>130</sup> Moreover, the Supreme Court has construed the Constitution as affording individuals negative rather than positive rights—as primarily constraining governmental action rather than imposing affirmative governmental duties. On one interpretation finding a constitutional right to a certain level of educational services would contradict the Court’s view that there is no “affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the

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130. *Rodriguez*, 411 U.S. at 33-34. The Court seemed averse to federal oversight over either educational policy or state fiscal policy, both of which were involved in the *Rodriguez* case. In the majority’s view,

Questions of federalism are always inherent in the process of determining whether a State’s laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny . . . . It would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.

*Id.* at 44. *See also id.* at 40 (“We are asked to condemn the State’s judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures.”); *id.* at 42 (“In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court’s lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels.”); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“Providing public schools ranks at the very apex of the function of a State.”).

Federal court oversight of educational policy is also worrisome to those who believe that the appointed judicial branch possesses neither the democratic legitimacy to impose policy choices nor the competency to make them, at least as compared to legislatures that are elected and can draw on a bureaucracy of policy experts. Even some state courts unconcerned with federalism constraints have found the judicial branch unsuited to intervene in determinations of educational policies and standards. *See, e.g.*, *Coalition for Adequacy and Fairness in Sch. Funding v. Chiles*, 680 So. 2d 400, 406-08 (Fla. 1996); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996); *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d 1352, 1355 (N.Y. 1979). But see *infra* note 160 and accompany text for a discussion of a powerful and fruitful contrary trend.

government itself may not deprive the individual.”<sup>131</sup> While other countries might interpret a constitutional equality provision to imply a positive right to essential goods or a governmental obligation to redistribute wealth, the United States Supreme Court has construed equal protection as mandating equality of *opportunity*, not *result*: individuals must rely on their own efforts and merits rather than government assistance to achieve well-being. These values have coincided with and jointly fueled dismissal of any constitutional entitlement to government provision of welfare,<sup>132</sup> medical care,<sup>133</sup> housing,<sup>134</sup> or even physical safety<sup>135</sup> (assuming that the individual is not imprisoned or otherwise in state custody<sup>136</sup>).

Ambivalence arises in the context of public education, however, because *this* government benefit has less to do with equalizing results than

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131. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (holding that the Department's failure to remove battered child it knew to be at risk did not violate due process, which sets limits on state power rather than duties to assure safety and security). In *Rodriguez*, the Court expressed its reluctance to embrace a “positive right” when it distinguished “[t]he present case [from] any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases involved legislation which ‘deprived,’ ‘infringed,’ or ‘interfered’ with the free exercise of some such fundamental personal right or liberty.” *Rodriguez*, 411 U.S. at 37-38.

For arguments that a better interpretation of the constitution would recognize that its rights are not limited to negative liberties, see Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

132. *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970) (holding that welfare benefits are not a fundamental right).

133. *Harris v. McRae*, 448 U.S. 297, 315 (1980) (upholding denial of federal Medicaid funds for abortions because it “places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy”); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (upholding state denial of Medicaid payments for abortions because “the indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation”).

134. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (explaining that housing is not a fundamental right and that “[a]bsent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions”).

135. *DeShaney*, 489 U.S. at 195.

136. In such cases, the state may have affirmative duties of care stemming from its custodial responsibilities. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 316-19 (1982) (noting that involuntarily committed patients have right to treatment); *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (establishing that prisoners have a right to medical care).

A second exception to the *DeShaney* rule stems from state-created dangers to physical safety. See *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1264 (10th Cir. 1998) (determining that the state may have abridged substantive due process by suspending a student without notifying parents, who then committed suicide, where student was known to be a suicide risk). *But see* *Martin v. Shawano-Gresham Sch. Dist.*, 295 F.3d 701, 709-10 (7th Cir. 2002) (holding that the school did not create or increase risk to student who committed suicide following suspension, thus precluding substantive due process claim).

with equalizing opportunity, and less to do with guaranteeing well-being than assuring the chance to achieve well-being through one's own efforts. If the Court has left the door open to a limited right to education, it is not because education is a component of an individual's welfare, as are these other goods. Rather, it is because education is the key precondition of an individual's opportunity and autonomy—his opportunity to plan his own life, to pursue his own well-being, and to participate as a competent and responsible citizen. As *Plyler* observed, education is not “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation,” but the prerequisite to a society based on individual merit rather than aristocracy or caste.<sup>137</sup> It is also the prerequisite to an informed and unified citizenry capable of wisely exercising its democratic authority.

The most promising educational rights argument, then, would support a narrowly defined right to a “minimally adequate education,” distinguishing it from both (1) the unlimited educational equality right rejected in *Rodriguez* and (2) positive welfare rights to housing, food, or other goods.<sup>138</sup> As to the former distinction, the serious difficulties and imponderables that must have worried the Court in *Rodriguez* either do not apply, or apply with far less force, to the more limited “minimal” right. First, there is no risk that a limited right would compel a state to “level up” most school districts to the best educational services offered to a fortunate few. There is also little risk that a state would have to “level down” excellent school systems to deliver so minimal a guarantee. Second, the right to a minimally adequate education leaves educational policy to the legislature except when that policy so disserves a student as to deprive her of the most rudimentary, least contestable educational needs. No one doubts that literacy or arithmetic competence are part of a minimally adequate education, and standardized tests are given in all schools to assess student mastery of these skills. By contrast, the unqualified right to an education rejected in *Rodriguez* would have compelled courts to define fully the roles and goals of education, a highly controversial enterprise that is arguably beyond the expertise and legitimacy of the judiciary. Moreover, a court interpreting that right expansively—for example, as guaranteeing all students an equal ability to fulfill their learning potential—would have little choice but to judicially review a panoply of educational policy choices and budgetary tradeoffs for compliance. The

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137. *Plyler*, 457 U.S. at 221.

138. For a wide variety of speculative, theoretical grounds for reading a more extensive, positive right to education into the Constitution, see Bitensky, *supra* note 110.

threat such intrusiveness poses to federalist and democratic values is absent from the limited “fail-safe” assessment courts would undertake under the “minimally adequate” standard.

Regarding the second distinction, consider three approaches utilized by the Justices in other contexts, any of which could be invoked to embrace a right to basic education without opening the door to the panoply of positive rights that are anathema to the Court:

*a. Distinguishing Equality Rights from Positive Rights*

The difference between a contingent equality right and a substantive positive right is well known: there is no substantive constitutional right to appeal a conviction, for example, but there is a contingent equality right to do so *if* appeals are afforded to others.<sup>139</sup> The Supreme Court has been willing to invoke strict scrutiny on the basis of a fundamental *equality* right while stressing that no *substantive* constitutional right was involved. One example is the franchise: there is no substantive constitutional right to vote in state elections, but to afford a citizen inferior voting power violates his fundamental right to equality by consigning him to second class citizenship and permanent political disadvantage.<sup>140</sup> Several Justices have construed basic education as having a parallel constitutional status,<sup>141</sup> sometimes by explicit analogy to the voting cases.<sup>142</sup> Indeed, *Brown v. Board of Education* seemed to embrace education as a contingent but

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139. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (although states are not constitutionally required to provide appellate review, if it chooses to do so, it must not discriminate on the basis of wealth); *cf.* *Douglas v. California*, 372 U.S. 353, 357-58 (1963) (explaining that equal protection requires that indigents be provided counsel for appeals of right).

140. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Rodriguez* 411 U.S. at 34 n.74 and 35 n.78 (1973); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 625-30 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665, 667 (1966).

141. *See Plyler*, 457 U.S. at 221-22 (“[D]enial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”); *Id.* at 234 (Blackmun, J., concurring) (“[W]hen the State provides an education to some and denies it to others, it immediately and inevitably creates class distinctions of a type fundamentally inconsistent with those purposes, mentioned above, of the Equal Protection Clause. Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve.”).

142. *Id.* at 234 (Blackmun, J., concurring) (“[A]ccepting the principle of the voting cases—the idea that state classifications bearing on certain interests pose the risk of allocating rights in a fashion inherently contrary to any notion of ‘equality’—dictates the outcome here.”); *Rodriguez*, 411 U.S., at 115 n.74 (Marshall, J., dissenting) (“Education, in terms of constitutional values, is much more analogous . . . to the right to vote in state elections than to public welfare or public housing. Indeed, it is not without significance that we have long recognized education as an essential step in providing the disadvantaged with the tools necessary to achieve economic self-sufficiency.”).

fundamental equality right when, after noting how important education is to one's success in life, it decreed that "an opportunity [for an education], *where the state has undertaken to provide it*, is a right which must be made available to all on equal terms."<sup>143</sup>

Like the denial or evisceration of one's vote, depriving children of a basic education denies them both equal status and an equal chance in life. From their teenage years onward, the uneducated suffer multiple disadvantages and systematic barriers that are likely to permanently consign them to the underclass. Some will remain illiterate, which, as *Plyler* observed, "will handicap the individual . . . each and every day of his life," exacting an "inestimable toll . . . on [his] social, economic, intellectual, and psychological well-being . . ."<sup>144</sup> The uneducated are also those most likely to be ensnared in a mutually reinforcing web of poverty, homelessness, unemployment, crime, drug addiction, lack of self-esteem, disease, low life expectancy, and political powerlessness.<sup>145</sup> While the Equal Protection Clause would not bar the state from abolishing its schools outright, on this theory it does bar the state from denying a minimally adequate education to some of its citizens because of the devastating competitive disadvantages such deprivation would inflict.

*b. Basic Education as a Component of Other Acknowledged Constitutional Rights*

Consider the affirmative governmental duty to provide voting booths, counsel to indigent defendants, or police forces. Such duties are not viewed as threatening a positive rights regime, even though the government is required to provide these services, because they are necessary components of the underlying democratic and liberty rights they protect.<sup>146</sup> Might it be argued that educational access is similarly required

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143. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (emphasis added). The Court also recognized affirmative government duties to guarantee an educational equality right in the desegregation case of *Missouri v. Jenkins*, 495 U.S. 33, 57 (1990) (upholding the Court's authority to order local authorities to tax beyond the state statutory limit "in order to compel the discharge of an obligation imposed . . . by the Fourteenth Amendment").

144. *Plyler*, 457 U.S. at 222.

145. *See supra* notes 73-82.

146. The state voting right itself has been derived in this way, among others. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1885) (noting that the right to vote is "a fundamental political right, because preservative of all rights"); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (same). This view conceives of voting as a *prerequisite to*, and therefore a component of, settled and enumerated rights. This derivation of an implicit right is distinguishable from that used in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), which derived a right to privacy from the "penumbras emanating" from the First, Third, Fourth, and Ninth Amendments.

by certain substantive constitutional rights? This was Justice Brennan's position in his opinion—a dissent to be sure—in *Rodriguez*: “[T]here can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment. This being so, any classification affecting education must be subjected to strict judicial scrutiny . . . .”<sup>147</sup> In a similar fashion, public education could be conceived as a necessary component of the constitutional right to petition the government or serve on a jury.<sup>148</sup> As Justice Blackmun argued in his concurrence in *Plyler*, education has a constitutional dimension because it is a precondition to one's political rights and responsibilities.<sup>149</sup>

As noted, this very argument was lodged by the losing side in *Rodriguez*. The majority rejected it,<sup>150</sup> but again explicitly reserved judgment on the claim were it applied to the denial of even a rudimentary education:

Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, . . . [here] no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.<sup>151</sup>

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147. *Rodriguez*, 411 U.S. at 63 (Brennan, J., dissenting) (citation omitted). See also *id.* at 113-14 (Marshall, J., dissenting).

148. At a more theoretical and speculative level, one commentator has argued that an unenumerated, robust right to education is also potentially implicit in the Due Process and Privileges and Immunities Clauses, as well as free speech and voting rights guarantees. Bitensky, *supra* note 110, at 553.

149. *Plyler*, 457 U.S. at 233-34 (Blackmun, J., concurring). See also *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (“[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”); *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 876 (1982) (“[T]he Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs. . . .”).

150. 411 U.S. at 35.

It is appellees' contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to . . . the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote . . . . Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice.”

*Id.* at 35-36.

151. *Id.* at 37.

The Court has since reaffirmed that the validity of this line of argument remains an open question.<sup>152</sup>

*c. A Negative Right against State Interference with the Right to Learn*

To concede that there is no positive right to an education—that a state is free to abolish its public school system entirely—does not foreclose a negative rights argument that expulsion constitutes state interference with the constitutional right to learn. The Supreme Court has found such a fundamental right in educational access—a liberty right, protecting against state barriers to learning—in *Meyer v. Nebraska*.<sup>153</sup> *Meyer's* constitutional prohibition would arguably extend to unjustified state interference with an individual's access to whatever educational services it has chosen to offer its citizens generally. Thus, it would violate a child's right to pursue an education were she expelled simply because the principal disliked her, or expelled for any other reason that did not serve a compelling state interest. On this argument, the state is unencumbered by any positive right, retaining full discretion whether to fund education at all—but having done so, it may not then impose so severe a barrier upon any individual's educational access without a very good reason. It is interesting that *Plyler* supports this argument as well, because there the Supreme Court described educational deprivation as a form of state interference: “[D]enial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”<sup>154</sup>

Each of the above theories would provide a plausible and practical ground for the Court to recognize a constitutional right to some degree of

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152. *Papasan*, 478 U.S. at 284 (“The Court did not, however, foreclose the possibility ‘that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote].’”) (citing *Rodriguez*, 411 U.S. at 36).

153. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court ruled that a law criminalizing the teaching of German to students who had not yet passed the eighth grade was unconstitutional on substantive due process grounds. The Court found that the law violated the teacher's right to teach, the parents' right to employ the teacher to instruct their children, and, of most relevance here, the right of the student to learn. *Id.* at 399. “Without doubt, [the liberty guaranteed by the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual . . . to acquire useful knowledge . . .” *Id.* at 399-400. See also *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (recognizing that *Meyer* establishes a right to education).

154. *Plyler*, 457 U.S. at 221-22. See also *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (holding the removal of books from school libraries unconstitutional under the First Amendment because it interfered with a negative right “to receive information and ideas.”).

education. Beyond doctrinal arguments, the end result—the application of the strict scrutiny/compelling state interest analysis to denials of basic educational access—is entirely appropriate. The obvious problem with “expulsions-to-nowhere” based on any infraction, even possession of one “joint,” is the inequitable, potentially permanent disability inflicted for relatively trivial activity. After having left the issue open for so long, the Supreme Court may yet recognize a constitutional constraint reflecting that draconian equation: when the state chooses to wholly exclude some children from the essential, basic education it offers all others, it had better have a *compelling* justification for doing so.

This is a relatively auspicious period for the Supreme Court to resolve the issue. Educating American children is high on the public and political agenda, in part because of a consensus that our present public school systems have put the nation and its children at risk. Large numbers of children leave American schools without basic skills, and even larger numbers are ill-equipped for the highly technological job market that awaits them.<sup>155</sup> Many states have felt compelled to institute massive reform efforts, adopting measures such as teacher testing, statewide yearly student examinations as a prerequisite to a diploma, single sex education, alternative schools, a twelve-month school year, and school vouchers.<sup>156</sup> Simultaneously, federalism concerns about overbearing national governmental control over a state function have waned. For example, Republicans who fought to abolish the U.S. Department of Education twenty years ago last year passed a law providing for the most expansive federal role in educational policy yet, mandating national annual testing, tutoring and transfer rights for students in failing schools, and reporting

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155. See, e.g., U. S. DEP'T OF EDUC., NAT'L CENTER FOR EDUC. STATS., THE CONDITION OF EDUCATION 2000: READING PERFORMANCE OF STUDENTS IN GRADES 4, 8, AND 12, available at [http://nces.ed.gov/pubs2000/coe2000/section2/s\\_table13\\_2.html](http://nces.ed.gov/pubs2000/coe2000/section2/s_table13_2.html) (reporting that 23% of high school seniors are unable to read at a basic level); THE CENTER FOR EDUC. REFORM, A NATION STILL AT RISK: AN EDUCATION MANIFESTO (April, 1998), available at <http://edreform.com/pubs/manifest.htm>; Rene Sanchez, *U.S. High School Seniors Rank Near Bottom*, WASH. POST, Feb. 25, 1998, at A1.

156. See, e.g., Larry Cuban, *Two Decades of School Reforms Take US Back to the 1950s*, L.A. TIMES, Feb. 18, 2001, at 2 (standards-based curricula and testing have “become a state-driven formula for urban, suburban, and rural schools”); Stefanie Weiss, *Sex and Scholarship*, WASH. POST MAGAZINE, July 21, 2002, at W20 (“In May, the Bush administration made clear its intention to encourage the creation of more single-sex public schools.”); Jodi Wilgoren, *Young Blacks Turn to School Vouchers as Civil Rights Issue*, N.Y. TIMES, Oct. 9, 2000, at A1 (reporting a school voucher trend); Kate Zernike, *Union Is Urging A National Test for New Teachers*, N.Y. TIMES, Apr. 14, 2000, A1 (teacher testing); Kate Zernike, *Why Johnny Can't Read, Write, Multiply or Divide*, N.Y. TIMES, Apr. 15, 2001, at D5 (reporting that twenty-eight states now require passing a statewide examination to graduate); In June 2002, the Supreme Court upheld school vouchers against a challenge under the First Amendment's establishment bar. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S. Ct. 2460 (2002).

requirements.<sup>157</sup> It is also worth noting that in the context of a challenge to a weapons expulsion, any federalism argument is blunted by the fact that this zero tolerance policy is itself imposed upon state systems by federal law.

## 2. *Educational Rights in State Constitutions*

Whether or not a fundamental right to a basic education exists in the federal constitution, most public school students can rely on well-established educational rights afforded by their state constitution and statutes. These state guarantees are largely impervious to the Supreme Court's parsimonious holdings on educational rights for two reasons. Most obviously, the object of interpretation is a different constitution; it is an unquestioned axiom of our federal system that state constitutional provisions may afford greater protection than their federal counterparts.<sup>158</sup> Second, the principles at play in state constitutional adjudication are significantly different. Unlike Supreme Court justices, state justices need not be concerned with federalism constraints on central government powers, nor need they be concerned with opening the door to affirmative governmental duties.<sup>159</sup> Such duties are already mandated in many state

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157. Education was a signature campaign issue for President Bush, and on January 8, 2002, the President signed into law the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 113 Stat. 1423 (2002) (codified at 5 U.S.C. § 570) [hereinafter No Children Left Behind Act] reauthorizing and amending the Elementary and Secondary Act of 1965, 20 U.S.C.A. § 6301 (2000). The bill had been passed initially by lopsided majorities in both houses of Congress, *see* 147 Cong. Rec. H2645, May 23, 2001 (reporting a 385 to 45 vote in the House of Representatives), *and* 147 Cong. Rec. S6305, June 14, 2001 (reporting a 91 to 8 vote in the Senate). This Act makes federal aid conditional on state adoption of a nationwide educational program including the following: annual testing of students from grades three through eight, utilizing a federally prescribed test; a twelve-year schedule for increased performance levels of discrete student populations; reports to the federal government on educational progress by school, race, and economic status; and various rights for students in failing schools to receive tutoring or transfer to another district. *See* No Children Left Behind Act, *supra*. The Act also substantially increased federal aid to education. *See id.* Ironically, it was Democratic Senator Paul Wellstone who objected to the bill as "a stunning federal mandate" that strikes at the heart of local control. *See* Diana Jean Schemo, *Senate Approves a Bill to Expand the Federal Role in Public Education*, N.Y. TIMES, Dec. 19, 2001, at A27.

158. *Cooper v. California*, 386 U.S. 58, 62 (1967); *Union School Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir.) *cert denied* 513 U.S. 965 (1994). *See generally* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONS IN THE FEDERAL SYSTEM 12, 49 (1989); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

159. For an extensive argument that state constitutions typically provide extensive positive rights that require courts to ensure the realization of these rights rather than mimic federal doctrine, see Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999). According to Hershkoff, when a state constitution includes a right to a government-provided social service, "the relevant judicial question should be whether a challenged

constitutional clauses, including the duty to educate its population.<sup>160</sup> Indeed, *Rodriguez*'s holding that education is not a fundamental right is immediately distinguishable because there the Supreme Court was reading a constitution that nowhere mentions education, whereas every state constitution guarantees its citizens a free public education.<sup>161</sup>

How useful a particular state's guarantee will be to a plaintiff removed from public school depends on both its words and what they mean to the state court. In many states, the contours of these provisions have emerged only recently, often in response to lawsuits challenging school funding mechanisms or distributions. Of particular significance in the zero

law achieves, or is at least likely to achieve, the constitutionally prescribed end, and not, as federal rationality review would have it, whether the law is within the bounds of state legislative power." *Id.* at 1137. "[This test] should not be conflated with some form of heightened scrutiny that asks, 'How does this policy burden a constitutional right?' The question is instead, 'How does this policy further a constitutional right?'" *Id.* at 1184.

160. In the words of the Supreme Court, "[p]roviding public schools ranks at the very apex of the function of a State." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). The state education provisions are discussed *infra*, note 48.

Although states have affirmative duties with regard to education, there remains a wide variation in the role state judiciaries see for themselves in policing these duties. Language in some state constitutions placing the duty to educate with "the legislature" may be interpreted to raise a separation of powers objection to judicial involvement. More generally, a few state courts have been loath to delve into educational policy decisions that they believe should be left to the democratically elected branches. *See, e.g.*, *Coalition for Adequacy and Fairness in Sch. Funding v. Chiles*, 680 So. 2d 400, 406-08 (Fla. 1996) (*per curiam*) (noting that education is a legislative responsibility); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 57 (R.I. 1995) (declaring that legislative decisions on education are virtually unreviewable); *Lujan v. Colorado State Bd. Of Educ.*, 649 P.2d 1005, 1018 (Colo. 1982) (funding disparities "are considerations and goals which properly lie within the legislative domain," and noting that "[j]udicial intrusion to weigh such considerations and achieve such goals must be avoided"). On the other hand, many courts show no such reluctance where constitutional educational rights are at stake, as indicated by the fact that "over twenty states have had at least some segment of their public education systems overturned as a result of state court litigation." Hershkoff, *supra* note 159, at 1186 n.329. For example, declaring that it would be "literally unthinkable" for the legislature to have unreviewable discretion to determine educational rights, the Kentucky Supreme Court found the state's school system violated a fundamental right to an adequate education and proceeded to set forth the components of this right. *Rose v. Council for Better Educ. Inc.*, 790 S.W.2d 186 (Ky. 1989).

161. *See* ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 2; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2nd § 3; KAN. CONST., art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. Pt. 2, ch. V, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1, cl. A; MONT. CONST. art. X, § 1; NEB. CONST. art. VII § 1; NEV. CONST. art. XI, § 2; N.H. CONST. Pt. 2, art. 83; N.J. CONST. art. VIII, § 4, para. 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; WASH. CONST. art. IX, § 2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. Const. art. VII, § 1.

tolerance context are the state's constitutional holdings on the following issues:

First, does the constitutional provision afford individual students a judicially enforceable right to education? Some states have interpreted their constitutions to impose educational duties on the state but no correlative right to an education for individuals.<sup>162</sup> Most states, however, regard their educational guarantee as including a constitutional right that individuals have standing to enforce.<sup>163</sup>

Second, Assuming the court has interpreted the constitutional mandate to include an individual right to education, is it a fundamental right? Whether it is construed as such will influence the prospects of an equal protection challenge in those states that utilize differential levels of scrutiny akin to federal constitutional doctrine. (The issue will have less impact in other states that do not invoke that framework, and even a "nonfundamental" right may be sufficient to prevail on a claim seeking enforcement of the substantive educational right itself.) At this point, many state courts have held education to be a fundamental right,<sup>164</sup> and

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162. See, e.g., *Doe v. Superintendent of Schs. of Worcester*, 421 Mass. 117, 129-30 (1995) (holding that although the state has a constitutionally mandated duty to educate its children, individual students do not have a right to education, but only a right of "equal opportunity to an adequate education").

163. See, e.g., *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1263-64 (Wyo. 1995) (holding that the constitutional right to a quality education is judicially enforceable); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993) ("Having identified that a duty exists . . . we emphasize the corresponding right of the citizens to its enforcement."); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978) (interpreting the constitutional clause imposing a paramount duty to educate all children as affording a right of equal stature flowing from that duty); *Pauley v. Kelly*, 255 S.E. 2d 859, 878 (W. Va. 1979) (holding that a constitutional provision requiring the state to provide "thorough and efficient school systems" creates a fundamental constitutional right); and cases cited *infra* at notes 164-165.

164. *Claremont Sch. Dist.*, 703 A.2d at 1358 (applying strict scrutiny to infringements on the fundamental right to educational adequacy); *Leandro v. State*, 488 S.E. 3d 249, 255 (N.C. 1997) (applying strict scrutiny standard to fundamental rights); (1997) (fundamental right requiring strict scrutiny); *Sch. Dist. Of Wilksburg v. Wilksburg Educ. Ass'n.*, 667 A.2d 5, 9 (Pa. 1995) (education is a fundamental right); *Bismarck Pub. Sch. Dist. 1 v. State*, 511 N.W.2d 247, 256 (N.D. 1994) (noting that the right to education has equal standing with guarantees of freedoms of speech and religion); *Roosevelt Elementary Sch. Dist. v. Bishop*, 877 P.2d 806, 811 (Ariz. 1994) (applying strict scrutiny standard to fundamental right); *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994) (finding that education is a fundamental right requiring strict scrutiny); *Alabama Coalition for Equity, Inc., v. Hunt*, 624 So. 2d 107, 110, 159 (Ala. 1993) (finding that education is a fundamental right requiring strict scrutiny); *Skeen v. State*, 505 N.W.2d 299, 302 (Minn. 1993) (determining that strict scrutiny must be applied when education offered falls below level of "adequacy of education"); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 205-06 (Ky. 1989) (essential right); *Kukor v. Grover*, 436 N.W.2d 568, 579 (Wis. 1989) ("'[E]qual opportunity for education' is a fundamental right."); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 333, 335 (Wyo. 1980) (declaring education a "fundamental interest" and holding school funding system a violation of equal protection); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) (holding that a constitutional provision requiring the state to

many have also held to the contrary.<sup>165</sup>

Finally, how is the educational right defined? Is it an unqualified right to an education or a more limited right—for example, limited to a minimally adequate education or to equality in educational access?<sup>166</sup> Some constitutions require a “uniform” educational system, which courts may view as a right to equality in educational access. Other constitutions mandate a “thorough,” “efficient,” or “adequate” education, which some courts have read as affording a noncomparative right to a certain quantum or quality of education, to be assessed in terms of “inputs” (resources provided) and/or “outputs” (competencies achieved).<sup>167</sup> A particular

provide “a thorough and efficient system of free schools” creates a fundamental constitutional right to a “high quality education”); *Horton v. Meskill*, 576 A.2d 359, 374 (holding that the right to education is fundamental and striking down the state funding system under strict scrutiny); *Serrano v. Priest*, 557 P.2d 929, 951 (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977) (finding in an equal protection challenge to school funding that education is a fundamental right and invoking strict scrutiny).

165. See *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 733 (Idaho 1993) (rejecting strict scrutiny analysis because education is not a fundamental right); *Fair Sch. Fin. Council of Okla., Inc. v. State*, 746 P.2d 1135, 1150 (Okla. 1987) (applying rational basis test); *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983) (striking down school funding system, but under a rational basis test); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1018 (Colo. 1982) ([R]ecognition . . . of the importance of an education does not elevate a public education to a fundamental interest warranting strict scrutiny”); *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 365-66 (N.Y. 1982) (rejecting strict scrutiny under equal protection because education is not a fundamental right); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981) (finding that “adequate education” is not a fundamental right); *Bd. of Educ. of City Sch. Dist. v. Walter*, 390 N.E.2d 813, 819-20 (Ohio 1979) (applying rational basis test).

166. See, e.g., *Doe v. Superintendent of Sch. of Worcester*, 653 N.E.2d 1088, 1095 (Mass. 1995) (holding that individual students are constitutionally guaranteed “equal opportunity to an adequate education” but not a noncomparative right to education); *Kukor v. Grover*, 436 N.W.2d 568, 579 (Wis. 1989) (“[E]qual ‘opportunity for education’ is a fundamental right”).

167. For example, in *Rose v. Council for Better Education*, the court interpreted the state constitutional right to an “efficient” system of education as requiring Kentucky schools to aim

to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

*Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989). See also *Pauley v. Kelly*, 255 S.E.2d at 877 (holding that the West Virginia constitution guarantees an education sufficient to ensure “development in every child to his or her capacity” of the following: literacy; arithmetic competency; knowledge of the government; self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life-work; work training and advanced academic training; recreational

state's terrain on these issues will guide a litigant toward the most promising state constitutional claims.

*B. Challenges Based on Federal and State Equal Protection Guarantees*

The federal and almost all state constitutions guarantee equal protection of the laws.<sup>168</sup> Here, we consider whether removal of some

pursuits; interests in all creative arts; and social ethics); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999) (finding a constitutional right to a "minimally adequate education" that includes adequate facilities and an opportunity to learn reading, writing, mathematics, physical science, history, government, economics, and academic and vocational skills); *DeRolph v. State*, 677 N.E.2d 733, 745 (Ohio 1997), *vacated by* 780 N.E. 2d 529 (Ohio 2002) (holding school funding system unconstitutional for depriving schools of resources necessary to provide a minimally adequate education); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 815-16 (Ariz. 1994) (holding school funding unconstitutional because poor condition of school buildings denied students educational opportunity); *Ala. Coalition for Equity v. Hunt*, 624 So. 2d 107 app. at 110 (Ala. 1993) (finding public school system unconstitutional and assessing its educational adequacy according to nine capabilities the system must provide); *Robinson v. Cahill*, 69 N.J. 449, 457, 355 A.2d 129, 132-133 (N.J. 1976) (defining the components of the constitutionally required "thorough and efficient" system as including, *inter alia*, instruction aimed at reasonable proficiency in communications and computational skills, program offerings designed to develop the individual talents and abilities, programs and supportive services for all pupils including the educationally disadvantaged, and adequately equipped, sanitary, and secure physical facilities).

168. U.S. CONST. amend. XIV. Among state constitutions, only Mississippi and Delaware lack a state equal protection guarantee; all others either contain an explicit equal protection guarantee or have been interpreted by the state's judiciary, in cases cited, to include an equal protection guarantee. ALA. CONST. art. I, § 1, *see* *Dillon v. Hamilton*, 160 So. 708 (Ala. 1935); ALASKA CONST. art. I, § 1, *see* *Leege v. Martin*, 379 P.2d 447, 451 (Alaska 1963); ARK. CONST. art. 2, § 3, *see* *Poe v. State*, 470 S.W.2d 818, 819-20 (Ark. 1971); ARIZ. CONST. art. 2, § 13, *see* *Valley Nat'l Bank of Phoenix v. Glover*, 159 P.2d 292, 299 (Ariz. 1945); CAL. CONST. art. I, § 7(a), *see* *San Bernardino County v. Way*, 117 P.2d 354 (Cal. 1941); COLO. CONST. art. II, § 25, *see* *Colorado Auto & Truck Wreckers Ass'n v. Dep't of Revenue*, 618 P.2d 646, 655 n.7 (Colo. 1980); CONN. CONST. art. 1, § 20, *see* *Brunswick Corp. v. Liquor Control Comm'n*, 440 A.2d 792 (Conn. 1981); FLA. CONST. art. I, § 2, *see* *Caldwell v. Mann*, 26 So.2d 788 (Fla. 1946); GA. CONST. art. I, § 2, *see* *Georgia R.R. & Banking Co. v. Wright*, 54 S.E. 52 (Ga. 1906); HAW. CONST. art. I, § 5, *see* *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); IDAHO CONST. art. I, § 2, *see* *Fisher v. Masters*, 83 P.2d 212 (Idaho 1938); ILL. CONST. art. I, § 2, *see* *People v. Nicholson*, 82 N.E. 2d 656 (Ill. 1948); IND. CONST. art. I, § 23, *see* *Fountain Park Co. v. Hensler*, 155 N.E. 465, 467 (Ind. 1927); IOWA CONST. art. 1, § 6, *see* *Beeler v. Van Cannon*, 376 N.W.2d 628 (Iowa 1985); KAN. BILL OF RIGHTS § 2, *see* *Harris v. Shanahan*, 390 P.2d 772, 776 (Kan. 1964); KY CONST. § 59, *see* *Tabler v. Wallace*, 704 S.W.2d 179, 183 (Ky. 1985); LA. CONST. art. I, § 3, *see* *Whitnell v. Silverman*, 686 So.2d 23 (La. 1996); ME. CONST. art. I, § 6-A, *see* *Lamert v. Wentworth*, 423 A.2d 527 (Me. 1980); MASS. CONST. pt. 1, art. I, *see* *Murphy v. Commissioner of the Dep't of Indus. Accidents*, 612 N.E.2d 1149, 1154 (Mass. 1993); MD. CONST. DECLARATION OF RIGHTS, art. 24, *see* *Murphy v. Edmonds*, 601 A.2d 102, 107 (Md. 1992); MICH. CONST. art. I, § 2, *see* *Fox v. Michigan Employment Sec. Comm'n*, 153 N.W.2d 644 (Mich. 1967); MINN. CONST. art. I, § 2, *see* *Thomas Oil, Inc. v. Onsgaard*, 215 N.W.2d 793, 796 (Minn. 1974); MO. CONST. art. I, § 2, *see* *State v. Stokely*, 842 S.W.2d 77 (Mo. 1992); MONT. CONST. art. II, § 4, *see* *Godfrey v. State*, 631 P.2d 1265 (Mont. 1981); NEB. CONST. art. III, § 18, *see* *Haman v. Marsh*, 467 N.W.2d 836, 846 (Neb. 1991); NEV. CONST. art. 4, § 21; N.H. CONST. pt. 1, art. 1, *see* *State v. Amyot*, 407 A.2d 812 (N.H. 1979); N.J. CONST. art. 1, § 1, *see* *Washington Nat'l Ins. Co. v. Board of Review of N.J. Unemployment*

students from the public school system constitutes a violation of that equality right. As a threshold matter, we note that a plaintiff might identify the burdened and unaffected classes in a number of ways. For example, she might argue that the state irrationally distinguishes among classes of weapons offenders by excluding her from public education pursuant to a zero tolerance weapons policy, but providing a disabled offender with alternative education whether or not his offense resulted from his disability, as federal law requires.<sup>169</sup> Or she might identify the other class as more dangerous offenders who are committed to juvenile institutions, thereby receiving an education in that setting. In the following discussion, however, we contrast offenders “expelled-to-nowhere” with *all* other students, a comparison that questions the justification for the exclusionary sanction at the most general level. If a fundamental right to some degree of education can be established under either state or federal constitutional law, litigation is a promising route to terminate “expulsions-to-nowhere”. Such discipline amounts to a *total* denial of education and should trigger strict scrutiny because it deprives the plaintiff of a “minimally adequate education.”<sup>170</sup> (Conversely, when genuine alternative schooling is

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Compensation Comm’n, 64 A.2d 443, 445 (N.J. 1949); N.M. CONST. art. II, § 18, *see* Bd. of Trustees of Las Vegas v. Montano, 481 P.2d 702 (N.M. 1971); N.Y. CONST. art. I, § 11, *see* Medical Bus. Assoc., Inc. v. Steiner, 183 A.2d 86 (N.Y. 1992); N.C. CONST. art. I, § 19, *see* S.S. Kresge Co. v. Davis, 178 S.E.2d 383 (N.C. 1971); N.D. CONST. art. I, § 21, *see* Hamich, Inc. v. State ex rel. Clayburgh, 564 N.S.2d 640, 647-48 (N.D. 1997); OHIO CONST. art. I, § 2, *see* State ex rel. Bateman v. Bode, 45 N.E. 195 (Ohio 1896); OKLA. CONST. art. II, § 2, *see* Wilson v. Foster 595 P.2d 1329, 1332-33 (Okla. 1979); OR. CONST. art. I, § 20, *see* Plummer v. Donald M. Drake Co., 320 P.2d 245, 248 (Or. 1958); PA. CONST. art. I, § 1, *see* Dansby v. Thomas Jefferson Univ. Hosp., 623 A.2d 816, 820 (Pa. 1993); R.I. CONST. art. I, § 2, *see* City of Warwick v. Almac’s, Inc., 442 A.2d 1265 (R.I. 1982); S.C. CONST. art. I, § 3, *see* Harrison v. Caudle, 139 S.E. 842 (S.C. 1927); S.D. CONST. art. 6, § 18, *see* Standard Oil Co. v. Jones, 205 N.W. 72 (S.D. 1925); TENN. CONST. ART. XI, § 8, *see* Tennessee Small Sch. Sys. V. McWherter, 851 S.W.2d 139, 152 (Tenn. 1993); Tex. Const. art. I, § 3, *see* Burroughs v. Lyles, 181 S.W.2d 570, 574 (Tex. 1944); UTAH CONST. art. I, § 2, *see* Purdie v. Univ. of Utah, 584 P.2d 831 (Utah 1978); VA. CONST. Art. 1, § 11, *see* Wilkins v. West, 571 S.E.2d 100 (Va. 2002); VT. CONST. ch. 1, art. 9, *see* Clark v. City of Burlington, 143 A. 677, 685-86 (Vt. 1928); WASH. CONST. art. I, § 12, *see* DeFunis v. Odegaard, 507 P.2d 1169, 1184-85 (Wash. 1973); W. VA. CONST. art. 3, § 10, *see* Thorne V. Roush, 261 S.E.2d 72, 74 (W. Va. 1979); WIS. CONST. art. I, § 1, *see* Kallas Millwork Corp. v. Square D Co., 225 N.W.2d 454, 458 (Wis. 1975); WYO. CONST. art. I, § 3, *see* Johnson v. State, 838 P.2d 158 (Wyo. 1992).

169. However, such a claim was rejected in *Escatel v. Atherton*, No. 96 C 8589, 2001 U.S. Dist. LEXIS 9212 (N.D. Ill. 2001) (finding that the difference in treatment between the plaintiff and another student was justified because the latter qualified as a handicapped student under IDEA). *See also* *Hamrick v. Affton School Dist. Bd. of Educ.*, 13 S.W.3d 678, 682-83 (Mo. 2000) (Russell, J., concurring) (concurring on the different ground that to “allow one student continued enrollment while denying enrollment to another student, when both students were cohorts in the same conduct, is arbitrary”); Sue G. Simon, *Discipline in the Public Schools: A Dual Standard for Handicapped and Nonhandicapped Students?*, 13 J.L. & EDUC. 209 (1984). *See supra* note 102 for a further discussion of the IDEA.

170. It is possible to argue that so long as the expulsion or suspension is not permanent, any right

provided, unless racial discrimination is involved, a court is almost certain not to utilize strict scrutiny to assess compliance with the Fourteenth Amendment—and even if it does, the court is likely to find the state’s action constitutional because it is “precisely tailored” to the state’s interest.) We begin with such an analysis, followed by an alternative analysis under the rational basis standard, should the jurisdiction find that no educational right whatever exists under its constitution.<sup>171</sup>

Consider the two-pronged test under the “strict scrutiny” standard, as applied to suspensions or expulsions for drug possession. In most situations, the state will almost certainly be able to satisfy its first burden, which is to demonstrate that the sanction serves a compelling state interest (or “substantial” state interest under intermediate scrutiny). The state’s interest surely includes protecting the learning environment; in particular, removal of students who bring drugs to school may be necessary to prevent schools from becoming drug markets and classmates from losing learning abilities to the effects of drugs. The continued presence of illicit drugs in schools may also encourage classroom disruptions or violence among students or portray school administrators and rules as toothless. The state surely has a compelling interest in using disciplinary sanctions to deter offenses and minimize these risks, all of which threaten to deprive schoolchildren of their education.<sup>172</sup>

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to an education has not been denied but merely postponed. But the teenage months or years of lost educational opportunity are in a very real sense unrecoverable, and it appears that of the many commentators and judges who have addressed suspensions, only one has adopted this view, albeit in dissent. See *Cathe A. v. Doddridge County Bd. of Educ.*, 490 S.E.2d 340, 355 (W. Va. 1997) (Davis, J., dissenting) (a one-year expulsion does not deny the right to a public education because it exists until a child reaches the age of twenty-one).

171. Although intermediate-level scrutiny seems inappropriate where the classification burdens a fundamental right, we note that it was utilized in *Plyler*, which stopped short of declaring a minimally adequate education to be a fundamental right. 457 U.S. 202, *reh’g denied*, 458 U.S. 1131 (1982). We do not assess the prospects of a challenge under this level of review, except to note that plaintiffs challenging their expulsion would likely benefit were education ultimately deemed only a “quasifundamental right” requiring this level of scrutiny. Although intermediate scrutiny differs from strict scrutiny in requiring only an “important governmental objective” and means that “substantially further” that objective, in recent equal protection cases involving gender classifications, intermediate scrutiny has become so exacting as to verge on strict scrutiny. For example, in *United States v. Virginia*, 518 U.S. 515, 531 (1996), a case holding Virginia Military Institute’s (VMI) exclusion of women unconstitutional, the Court subjected the government to a heavy burden of demonstrating an “exceedingly persuasive justification” for the classification. It found that the existence of even a small number of women either inclined or able to undergo VMI adverse training techniques was enough to render such exclusion unconstitutional. *Id.* at 542, 550. In dissent, Justice Scalia complained that the majority had effectively replaced the “substantial relation” test with a requirement that the means be narrowly tailored, thus rendering intermediate scrutiny indistinguishable from the stricter test. *Id.* at 566, 573-75 (Scalia, J., dissenting).

172. See *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring) (“Without first

In contrast, the state's second burden will be much harder to bear: the means chosen must be necessary and narrowly tailored to achieve the objective. A state may not constitutionally utilize certain methods when "there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity."<sup>173</sup> This will usually be the case when students are suspended or "expelled-to-nowhere." Those states that do require an alternative educational program for expelled students have been able to provide both an education to the expelled student *and* a safe educational environment through a variety of substitute settings; *all* states have been able to do so for disabled expelled students, as required by the Individuals with Disabilities in Education Act.<sup>174</sup> Indeed, even juvenile institutions housing the most dangerous delinquents are able to provide them with educational services. Those states that fail to provide alternative education to those expelled for less hazardous behavior shoulder a difficult burden in showing that there were no more precisely tailored means than expulsion available.

This precise issue has begun to surface in states where some degree of education is recognized as a fundamental right, with mixed results. Some state courts view education as a right that may be forfeited by a student's misconduct, a position that blocks further inquiry into whether a disciplinary sanction was precisely tailored so as to avoid infringing on the right.<sup>175</sup> At the opposite pole, the West Virginia Supreme Court first found the failure to provide alternative education to expelled students

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establishing discipline and maintaining order, teachers cannot begin to educate their students; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (upholding sanctions necessary to promote discipline in the school). And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern.").

173. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

174. *See supra* note 102.

175. *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 92 (Wash. 1978) ("Since the children residing within the State's borders possess this 'right,' the State may discharge its 'duty' only by performance unless that performance is prevented by the holder of the 'right.'"). Massachusetts and North Carolina also construe misconduct to constitute a "waiver," although unlike Washington neither state construes its constitution's educational guarantee to afford a fundamental right to students. *See Doe v. Superintendent of Sch. of Worcester*, 653 N.E. 2d 1088 (Mass. 1995) (finding expulsion for weapons possession does not deny the right to education because "a student's interest in a public education can be forfeited by violating school rules"); *In re Jackson, Jr, Juvenile*, 352 S.E.2d 449, 455 (N.C. App. 1987) (finding no duty to provide any educational services to a special needs student expelled for misconduct because "a child may lose his right to benefit from *any* public school program"). *See also C. L. S. v. Hoover Bd. of Educ.*, 594 So. 2d 138, 139 (Ala. Civ. App. 1991) (finding that statutory entitlement to education "does not allow the child to escape the consequences of misconduct in a public school").

unconstitutional *per se*,<sup>176</sup> later modifying its ruling to allow a case-by-case determination in which the state could attempt to meet its burden by a strong showing that particular, extreme circumstances made no alternative setting feasible.<sup>177</sup> One can envision rare cases in which the student would pose a safety risk in every setting short of a jail, including home tutoring.<sup>178</sup> Nevertheless, under the West Virginia rule, the state must shoulder the burden of showing that an “expulsion-to-nowhere” was necessary for such reasons, which will be present in most cases. Even such case-by-case consideration leaves expelled students with powerful constitutional tools, tools that are not yet being deployed in educational deprivation cases.

In closing our equal protection analysis, we note that even if federal or state law does not recognize a fundamental right to basic education, a challenge under the rational basis test might still be asserted. The rational basis route is very steep, but not hopeless. Despite its deference, the rational basis test does not confer immunity on imprecise governmental action no matter how extreme. The constitutionality of an under- or over-inclusive statute is necessarily a matter of degree. As the mismatch becomes increasingly pronounced, the legal instrument becomes increasingly unfair and futile—and by what indicator are we to judge instrumental rationality *if not* by the effectiveness of the means chosen?

Up to now, courts that do not recognize education as a fundamental right have largely rejected equal protection and due process challenges to “expulsions-to-nowhere,”<sup>179</sup> often because the rational basis test does not

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176. Phillip Leon M. v. Greenbrier County Bd. of Educ., 484 S.E.2d 909, 916 (W. Va. 1996), *overruled by* *Cathe A. v. Doddridge County Bd. of Educ.*, 490 S.E. 2d 340 (1997).

177. *Cathe A.*, 490 S.E.2d at 350 (“[I]n extreme circumstances and under a strong showing of necessity in a particular case, strict scrutiny and narrow tailoring could permit the effective temporary denial of all State-funded educational opportunities . . .”). In dissent, Justice Davis argued that “[i]t may have been the Legislature’s conclusion that any funds diverted to alternative education for kids bringing weaponry to school would be funds taken away from the education of kids who come to school and follow the rules.” *Id.* at 356-57 (Davis, J., dissenting). Of course, this view is tantamount to rejecting the West Virginia precedent holding that each individual student has a right to education—a precedent that means individual students have an interest in education that is to at least some degree protected against ordinary legislative tradeoffs.

178. The state might also try to show empirically that when expulsions are coupled with alternative education, the deterrent value is so diminished that the state’s interest in a drug-free learning environment would remain at risk.

179. *Remer v. Burlington Area Sch. Dist.*, 149 F. Supp. 2d 665, 676 (2001) (finding rational relationship between multiple-year suspension and legitimate in security and discipline goals); *Brian B. v. Pa. Dep’t of Educ.*, 51 F. Supp. 2d 611 (E.D. Pa. 1999), *aff’d* 230 F.3d 582 (3d Cir. 2000) (finding that under rational basis test, plaintiffs were not likely to prevail in an equal protection challenge to the denial of education to incarcerated juveniles, and therefore denying preliminary injunction); *Enter. City Bd. of Educ. v. C.P. ex rel. J.P.*, 698 So. 2d 131 (Ala. Civ. App. 1996)

require the state to choose the least intrusive alternative.<sup>180</sup> On some occasions, however, statutes or official actions affecting educational access, including school expulsions, have been found so irrational as to violate the Fourteenth Amendment.<sup>181</sup>

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(upholding that an eight-week expulsion of a high school senior who unwittingly brought a gun to school in her mother's car as not arbitrary or capricious); *Doe v. Superintendent of Schs. of Worcester*, 653 N.E. 2d 1088, 1097 (Mass. 1995) (“[S]ince her expulsion was rationally related to the maintenance of order in the school, the defendants’ decision not to provide the plaintiff with an alternate education does not render her expulsion unconstitutional.”); *Clinton Mun. Separate Sch. Dist. v. Byrd*, 477 So. 2d 237 (Miss. 1985) (semester’s suspension not arbitrary or capricious); *Mitchell v. Bd. of Trs. of Oxford, Mun. Separate Sch. Dist.*, 625 F.2d 660, 665 (5th Cir. 1980) (holding that a mandatory expulsion for weapons infraction was rationally related to the goal of providing a safe learning environment).

180. Unlike strict scrutiny, rational basis review does not demand that a law utilize the most precise means to its end. *See, e.g.*, *Weinberger v. Salfi*, 422 U.S. 749, 769 (1975) (citing *Dandridge v. Williams*, 397 U.S. 471 (1970)); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)). At one point, the Supreme Court did apply an “irrebuttable presumption” doctrine, requiring that when criteria presume a fact that is not universally true (for example, physical incompetence due to pregnancy, or in this case, unsuitability in the classroom for all rule violators), affected individuals must have an opportunity to disprove that presumption in their case. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (striking down a compelled leave of absence for pregnant public school teachers as a violation of substantive due process). *See also Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972). But the Court has virtually gutted that doctrine so that such overbroad laws must either be struck down as unconstitutional or upheld as reasonable in light of the effectiveness of the classification and the costs of precision. [CITE] [CITE] In *Weinberger v. Salfi*, the court stated that

the question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute . . . . The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule.

422 U.S. 749, 777 (1975).

181. *Seal v. Morgan*, 229 F.3d 567 (6th Cir. 2000) (holding the expulsion of a student who unwittingly brought a knife in his father’s car to school grounds was not rationally related to any legitimate state interest); *Donnell C. v. Ill. State Bd. of Educ.*, 829 F. Supp. 1016 (N.D. Ill. 1993) (denying motion to dismiss an equal protection complaint against denial of educational services to juvenile detainees because such denial may bear no rational relationship to the stated goal of prison security); *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983) (invalidating school funding system as failing the rational relation test). In *Tate v. Racine Unified School District*, No. 96-C-0524, 1996 U.S. Dist. Lexis 22723 (E.D. Wis. 1996), the Court granted a preliminary injunction to a student permanently expelled for seriously wounding another student with a knife, finding *inter alia* a likely violation of the plaintiff’s substantive due process rights. “Because the expulsion has lasted over two years and because the District can educate R.T. without posing a threat to other students through homebound education, permanently depriving R.T. of an education is arbitrary and capricious.” *Id.* at 20. *See also Hamrick v. Affton Sch. Dist. Bd. of Educ.*, 13 S.W.3d 678, 682 (Mo. 2000) (Russell, J., concurring) (concurring on the different ground that to “allow one student continued enrollment while denying enrollment to another student, when both students were cohorts in the same conduct, is arbitrary”); *Cook v. Edwards*, 341 F. Supp. 307, 311 (D. N.H. 1972) (ordering student’s reinstatement pending further hearing and stating that “the punishment of indefinite expulsion raises a serious question as to substantive due process . . . . I perceive no valid reason for making the expulsion

Is denying education to at-risk children a rational way to create a safe, conducive learning environment? In *Plyler*, Justice Powell stated in his concurrence that “it hardly can be argued rationally that anyone benefits from the creation within our borders of a subclass of illiterate persons many of whom will remain in the State, adding to the problems and costs of both State and National Governments attendant upon unemployment, welfare, and crime.”<sup>182</sup> Although the majority in *Plyler* utilized intermediate scrutiny, it too predicted only negative effects resulting from Texas’ deprivation of education to aliens within its borders.<sup>183</sup> The very

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indefinite”). It is also worth noting that in *Papasan v. Allain*, 478 U.S. 265, 286-88, the Supreme Court stated that its *Rodriguez* decision upholding the rationality of Texas’ school funding differentials must not be taken to mean other states’ funding formula’s can pass rational scrutiny.

This case is therefore very different from *Rodriguez*, where the differential financing available to school districts was traceable to school district funds available from local real estate taxation, not to a state decision to divide state resources unequally among school districts. The rationality of the disparity in *Rodriguez* . . . does not settle the constitutionality of disparities alleged in this case.”

*Id.* at 288 (emphasis in original).

Laws limiting the employment opportunities of offenders raise somewhat analogous constitutional concerns, and many courts have struck down such bans as lacking a rational relationship to any legitimate state goal. *See, e.g.*, *Lewis v. Ala. Dep’t of Pub. Safety*, 831 F. Supp. 824, 827 (M.D. Ala. 1993) (holding that Alabama’s exclusion from towing contracts of persons convicted of a crime of force, violence, or moral turpitude struck down on equal protection grounds as “totally irrational” because it neither allowed consideration of the nature, circumstances, age, or seriousness of the crime in relation to the job sought, nor the degree of the offender’s rehabilitation); *Kindem v. City of Alameda*, 502 F. Supp. 1108, 1112 (D.C. Cal. 1980) (holding unconstitutional a ban on hiring ex-felons for city jobs; “it has not been demonstrated that the sole fact of a single prior felony conviction renders an individual unfit for public employment, regardless of the type of crime committed or the type of job sought”); *Davis v. Bucher*, 451 F. Supp. 791, 799 (D.C. Pa. 1978) (“[A] regulation which bars former users and addicts from city employment, without any consideration of the merits of each individual case, [is] overbroad and irrational” and therefore in violation of the Equal Protection Clause.”); *Smith v. Fussenich*, 440 F. Supp. 1077, 1080 (D. Conn. 1977) (striking down a state law excluding ex-felons from private detective or security guard work as lacking a rational basis because the “across-the-board disqualification fails to consider probable and realistic circumstances in a felon’s life, including the likelihood of rehabilitation, age at the time of conviction, and other mitigating circumstances related to the nature of the crime and degree of participation”); *Butts v. Nichols*, 381 F. Supp. 573, 580 (S.D. Iowa 1974) (holding an exclusion of exfelons from most civil service jobs unconstitutional on equal protection grounds and noting “the punitive effects across-the-board ‘felon bans’ can have on individuals seeking to rehabilitate themselves”). When the New York City Transit Authority dismissed an employee convicted of manslaughter pursuant to a policy requiring the dismissal of anyone convicted of a felony, a federal court found the policy unconstitutionally overbroad: “Before excluding ex-felons as a class from employment, a municipal employer must demonstrate some relationship between the commission of a particular felony and the inability to adequately perform a particular job.” *Furst v. N.Y. City Transit Auth.*, 631 F. Supp. 1331, 1338 (E.D.N.Y. 1986). *Cf. Craigmiles v. Giles*, 110 F. Supp. 2d 658, 665 (E.D. Tenn. 2000) (striking down the requirement that caskets be sold only by funeral director’s licensed by the state and describing the rational basis test as deferential, but “not ‘toothless’”) (citation omitted).

182. *Plyler v. Doe*, 457 U.S. 202, 241 (1982) (Powell, J., concurring).

183. *Id.* at 230 (1982). (“It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely

flawed relation between zero tolerance and the goals it is designed to serve, as examined *supra* in Part II, could lead a court to the same conclusion.

*C. Challenges Based on a State Constitutional Right to an Adequate Education*

Expulsions or suspensions may also be challenged as abridging a state's constitutional guarantee of an adequate education—a claim that escapes some difficulties attached to the equal protection approach. Courts concerned about an equality right's potential to extend beyond education to a panoply of other government services will be more comfortable relying on a right explicitly limited to education.<sup>184</sup> Moreover, although an equal protection claim may effectively turn on whether the burdened right is deemed *fundamental* and thus triggers heightened scrutiny, a claim that one's state constitutional right to an adequate education was denied may provide remedies whether or not it has been so classified.<sup>185</sup> The change in strategies utilized by plaintiffs challenging school district funding disparities over three decades—the shift from federal and then state equal protection claims to a “third wave” of litigation based on state constitutional guarantees of educational adequacy<sup>186</sup>—are partly due to the

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adding to the problems and costs of unemployment, welfare, and crime.”)

184. This was one worry expressed by the United States Supreme Court in *Rodriguez*, 411 U.S. at 37 (“[T]he logical limitations on appellees’ nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter?”), and in *Robinson v. Cahill*, 303 A.2d 273, 283 (N.J. 1973) (“the equal protection clause may be unmanageable if it is called upon to supply categorical answers in the vast area of human needs”) [hereinafter *Robinson I*]. Such a concern is also implied in numerous state decisions declaring that equal protection challenges to disparities in school district funding will not be sustained absent evidence that the disparity resulted in a substandard or inadequate education. *See, e.g.*, *Gould v. Orr*, 506 N.W.2d 349, 353 (Neb. 1993); *Skeen v. Minnesota*, 505 N.W.2d 299, 311 (1993); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 776 (Md. 1983); *Thompson v. Engelking*, 537 P.2d 635, 651 (Idaho 1975).

185. *See Plyler*, 457 U.S. at 231 (Blackmun, J., concurring) (“Others have noted that strict scrutiny under the Equal Protection Clause is unnecessary when classifications infringing enumerated constitutional rights are involved, for ‘a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid.’”).

186. *Compare Rodriguez*, 411 U.S. at 1, *Robinson I*, 303 A.2d 273, and *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (assessing whether the states’ educational financing formula complied with federal and/or state equal protection requirements) with *DeRolph v. State*, 678 N.E.2d 886 (Ohio 1997) vacated by 780 N.E. 2d 529 (Ohio 2002), *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997), *McDuffy v. Sec’y of the Executive Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993), and *Ala. Coalition for Equity, Inc.*, 624 So.2d 107, 165-66 (Ala. 1993) (each addressing whether the funds allotted to particular schools abridged state constitutional guarantees to an adequate or sufficient education). *See also* Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”*: *From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995) (each describing the shift from

greater willingness of courts to find violations and fashion remedies under specific, substantive education clauses in their state constitutions.<sup>187</sup>

Given the dearth of litigation challenging expulsion under state educational adequacy provisions, it is too soon to say whether courts will be as willing to utilize such provisions to protect a student against expulsion as they have been to protect students against inadequate educational resources. To some degree, the prospects of such a claim depend on geography. As noted earlier, some state courts have found that their states' constitutional provisions do not afford citizens any judicially enforceable educational rights, or that whatever educational rights exist can be forfeited by misconduct.<sup>188</sup> Nevertheless, most state courts have found an individual constitutional right to education, whether "fundamental" or not,<sup>189</sup> and a few state courts have found this right abridged by "expulsions-to-nowhere."<sup>190</sup> Perhaps the particular strength of such a claim is that it allows the plaintiff to litigate the cardinal defect of "expulsions-to-nowhere." Educational deprivation is a terrible denial of equality, but it is also much more: it is a deliberate and devastating roadblock to self-reliance, self-esteem, and a place in society. As the Supreme Court recognized in *Brown v. Board of Education*, no child "may

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equal protection to educational sufficiency); Betsy Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, 1977 DUKE L.J. 1099 (1977).

187. See, e.g., *Abbott v. Burke*, 748 A.2d 82 (N.J. 2000) (holding that funding system does not meet constitutional adequate educational guarantee) [hereinafter *Abbot IV*]; *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997) (holding that an adequate public education is a fundamental right); *DeRolph*, 677 N.E.2d at 745 (holding school funding system unconstitutional for depriving schools of resources necessary to provide a minimally adequate education); *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 667-68 (N.Y. 1995) (reinstating a claim alleging New York abridged its constitutional duty to provide adequate education); *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993) (declaring school finance system unconstitutional on educational adequacy grounds); *Idaho Schs. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724 (1993); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Pauley v. Kelly*, 255 S.E.2d 859, 863-64 n.5, 871 n.25 (W. Va. 1979) (local tax funding violates state constitutional guarantee); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 71 (Wash. 1978) (declaring school financing system unconstitutional under constitutional provision making education a "paramount duty" of the state). According to one scholar surveying the results of two decades of school reform litigation, equal protection arguments have been far less successful than arguments relying on state educational adequacy clauses. See Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1, 2 (1997).

188. See *supra* Part III.A.2.

189. See *supra* note 163 and accompanying text.

190. *Cathe A v. Doddridge County Bd. of Educ.*, 490 S.E.2d 340, 350-51 (1997) (holding that, absent extreme circumstances and a strong showing of necessity, the state's fundamental constitutional right to an education is violated by failure to provide alternative education to an expelled student).

reasonably be expected to succeed in life if he is denied the opportunity of an education.”<sup>191</sup>

#### CONCLUSION

Not long ago, a fundamental national priority was to keep children *in* school. Now, however, our government and school systems are engaged in an effort to deny many students the high school educations they wish to pursue. As a result of the zero tolerance laws and policies that have swept school districts across the country, each year thousands of children are removed from their public schools, whether or not they pose any danger—and most do not.<sup>192</sup> The current administration proclaims it wants to “leave no child behind,”<sup>193</sup> yet these exclusionary measures are doing exactly that by design.

In this Article, we have argued that it is counterproductive to deny education to anyone, and that it is especially bad policy when applied against those at risk. The educational deprivation sanctions now in place in most high schools can only reinforce and exacerbate the class divide that long ago made the United States the least egalitarian of the Western democracies, and only in a way that specifically denigrates the hopes and even humanity of its student targets. For their sake and ours, what is needed are educational and counseling programs, not zero tolerance policies that close the door to economic and social achievement. We have also suggested that federal and state constitutions, and the courts, may provide significant constraints on the indiscriminate use of zero tolerance “expulsions-to-nowhere.”

We recognize that even if one of these arguments were successful, much additional work would remain to be done to realize the promise of education in practice. Alternative education might exist, but in name only, as is often the case, in those states that already mandate such programs. Although some schools are innovative and permit students to keep up with their grade level, many are little more than holding facilities where students complete rote exercises that are a far cry from their regular curriculum, and some are more like jails than schools.<sup>194</sup> As extensive

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191. 347 U.S. 483, 493 (1954).

192. See *supra* notes 35-41 and accompanying text.

193. See *supra* note 157.

194. See, e.g., Jonathan C. Wren, Note, “*Alternative Schools for Disruptive Youths*”—*A Cure for What Ails School Districts Plagued by Violence?* 2 VA. J. SOC. POL’Y & L. 307, 349 (1995) (discussing the court-ordered dismantling of a New York alternative education program that was criticized for ‘dumping’ minority and ‘problem’ students in inadequate alternative schools). See also

litigation over one sad alternative school in West Texas demonstrates, the arguments advanced here will not prevent some courts from upholding transfers to such schools on the ground that those transferred are continuing to receive a minimally adequate education, however formalistic and inaccurate that finding may be in particular circumstances.<sup>195</sup> (It is also true, however, that court decisions invalidating “expulsions-to-nowhere” will clear a new path for students to show that specific alternative placements effectively amount to the same denial of education.) Although we have focused on law reform litigation, it is important to recognize that litigation is only one imperfect instrument for reclaiming educational opportunity for all Americans. In order for our young people to fully realize their potential, society will have to overcome its propensity for branding and banishing troublesome students and instead see them as children with whom we share an intertwined and interdependent future.

In the mid-1800s, America awoke to what now seems an obvious fact—that the physical health of its most prosperous citizens was inextricably connected to the health of the poorest, sometimes despised communities. The concept of public health was born, and with it the provision of plumbing, sanitation, and vaccinations to people whose welfare had never mattered politically. Now, as then, public health prevention measures save far more Americans from the ravages of disease than medical treatment.

What we in America have yet to grasp is that our civic health is similarly indivisible. We have embarked on a path of triage, lost in the

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HARVARD REPORT, *supra*, note 23, Executive Summary 3 (“Anecdotal evidence illustrates that many of these schools fail to provide an adequate education. There is little data revealing the quality of the instruction that occurs in these centers if any is given at all.”).

195. *Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 954 F. Supp. 1162 (W.D. Tex. 1996), *rev'd* 111 F.3d 25 (5th Cir. 1997). *Nevares*, a tenth grader who threw rocks at a moving car and injured a passenger, was removed from his school and placed into the system’s alternative school, called Rebound. *Id.* at 1163. Rebound had no library, and students were not permitted to bring books home, *id.* at 1166; its curriculum lacked elective- and honors-level courses, or even core high school courses like biology and physics (which were replaced with a general “science” course), and extra curricular activities. *Id.* Thus, students in class worked independently from a text, with the teacher going from student to student; students easily could fall behind in credit hours and lose a grade level. Finally, students were stigmatized as “troublemakers”, and were compelled to under drug counseling, even if the precipitating infraction was not drug related. *Id.*

The lower court found that “removal of a student from regular high school classes for placement in alternative education [was] a form of punishment . . . [and] that education at Rebound [was] not comparable to that received at San Marcos High School.” *Id.* The court invalidated the transfer as a violation of due process, but its ruling was reversed on appeal. According to the court of appeals, there was no denial of public education involved in the “mere transfer” of a student to a different school for disciplinary reasons. *Nevares*, 111 F.3d at 26. *See also* Audrey Knight, *Redefining Punishment for Students: Nevares v. San Marcos I.S.D.*, 20 REV. LITIG. 777, 791 (2001).

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fantasy that by banishing children at risk from our schools, we are delivering law, order, and morals. On the contrary: there is no morality in depriving any child of the most basic tools she needs to succeed in life, and there is no order in constructing what threatens to be a large, enduring, and hopeless underclass.